



Education Services for Overseas Students Legislation Amendment Bill 2010

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Education Services for Overseas Students Legislation Amendment Bill 2010

Date introduced: 27 October 2010

House: Senate

Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

Commencement: Sections 1–3 on the day of Royal Assent and Schedules 1 and 2 the later of the day after Royal Assent or 1 January 2011.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill would amend the *Education Services for Overseas Students Act 2000* (ESOS Act) to strengthen the registration criteria for providers of education services to overseas students and to introduce a risk managed approach for the regulation of these providers. The Bill would also amend the *Ombudsman Act 1976* to establish an Overseas Students Ombudsman within the office of the Commonwealth Ombudsman. This Bill is identical to the Bill of the same title that lapsed with the proroguing of the 42nd Parliament.

Background

The Education Services for Overseas Students Act 2000

The regulation of education and training services to overseas students who come to Australia on a student visa is a responsibility shared by the Commonwealth and the state and territory governments. The model of shared responsibility is one that not only involves the administrative effort of the Commonwealth Departments of Education, Employment and Workplace Relations (DEEWR) and Immigration and Citizenship (DIAC), but also that of the state/territory education and training authorities operating under state/territory legislation.

The principal objects of the Commonwealth regulatory framework that governs these arrangements, the ESOS Act, are:

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

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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 where providers take on students displaced by college closures
- contributions by providers to an assurance fund for reimbursing students in cases of provider collapse
- reporting obligations on providers—for example the disclosure of previous breaches, or breaches by their associates, or student breaches of their visa obligations
- a compulsory National Code which sets standards and benchmarks for providers and their courses in order to qualify for registration on CRICOS and which serves to guide states and territories in their approval, registration and monitoring activities
- compulsory compliance with the National Code
- 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.¹

Government responses to problems in the international education sector

In 2009 problems that had been building for some years in the international education sector came to a head with media exposés of unethical behaviour within the sector, college closures and protests by Indian students following some assaults on individuals in their community. The Government has adopted a multi-part strategy for addressing a complex set on inter-related problems.²

Students have been provided with opportunities to have their grievances heard and under the National International Student Strategy governments will work with students and the sector to establish an international student consultative committee whose activities will include annual roundtable discussions with government representatives and senior officials.³ These grievances have proven to be broad ranging—from personal welfare concerns in relation to personal safety, housing, employment and transport, to complaints about the quality of the education provided and about the administrative practices of education providers, the ethical standards of immigration and education

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1. For more information on the ESOS framework including complementary legislation see Department of Education, Employment and Workplace Relations (DEEWR), 'Easy guide to ESOS', DEEWR website, viewed 20 July 2010, http://aei.gov.au/AEI/ESOS/EasyGuide_ESOS.htm
 2. Elements of the strategy include the development through COAG of the recently released [National International Student Strategy](#) to improve the quality of education for international students and their well-being, the holding of an [International Student Roundtable](#) (14–15 September 2009), the creation of a [hotline](#) for students. In addition, the Australian Senate's Education, Employment and Workplace Relations References Committee conducted an [Inquiry into the Welfare of International Students](#), The Senate, Canberra, 2009, viewed on 8 September 2009, http://www.aph.gov.au/Senate/committee/eet_ctte/international_students/index.htm
 3. Council of Australian Governments (COAG), [International Student Strategy for Australia 2010–2014](#), COAG, 2010, p. 14, viewed 9 November 2010, <http://www.coag.gov.au/>

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agents, the incidence of, and response to college closures and finally frustration with how complaints about all these matters are handled.

The Government has also reviewed and refined the immigration policy settings of the Howard Government that linked education pathways directly to migration outcomes.⁴ The level of exploitation of Australia's immigration and education system (including by providers, agents and students) has in part been attributed to the incentives created by these policy settings. Together with inadequate state and territory government regulatory oversight of the education providers that set up to take advantage of these opportunities, these policies have attracted into the market a number of education businesses that have proven unviable.⁵ The subsequent closure of a number of these has meant that the burden for tuition and fee assurance provided by ESOS has fallen disproportionately on the remaining reputable and viable providers. The effect of the closure of a significant number of businesses that have proven unviable or that have not met the required standards has been to damage Australia's reputation as a high quality, reliable provider of international education services.

The Government has therefore taken action to restore confidence in the sector by amending the very regulatory framework which was established to simultaneously protect the reputation of this significant Australian export industry (currently valued at \$18.5 billion annually), maintain the integrity of the migration program and protect the interests of overseas students as consumers.⁶ In 2009 the Rudd Government introduced amendments to the ESOS Act pending a review of the Act. The review which had been scheduled for 2010–2011 was brought forward and former Member of Parliament Bruce Baird was appointed to chair it. The 2009 amendments required the re-registration of all institutions registered on CRICOS by 31 December 2010, introduced two new registration requirements to strengthen the education credentials of education providers, and required providers to list the names of their agents and comply with any regulations relating to them.⁷

These measures however are only the latest in a decade of fine tuning and strengthening of the regulatory framework to deal with what have proven to be ongoing risks to our reputation as a

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4. For more details on these issues see E Koleth, *Overseas students: immigration policy changes 1997–May 2010*, Background note, 18 June 2010, 2009–10, Parliamentary Library, Canberra, 2010, viewed 6 November 2010, http://parlinfo.parlInfo/download/library/prsub/1P1X6/upload_binary/1p1x61.pdf;fileType=application/pdf#search=%22koleth%22
 5. Criticisms of inadequate regulatory oversight were documented in C Kempner, *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009*, Bills digest, no. 28, 2009–10, Parliamentary Library, Canberra, 2009, viewed 6 November 2010, http://parlinfo.parlInfo/download/legislation/billsdgs/ROMU6/upload_binary/romu60.pdf;fileType=application/pdf#search=%22esos%22
 6. Australian Bureau of Statistics (ABS), [International Trade in Goods and Services, Australia \(Cat no 5368.0\): Table 11, Credits \(Exports\)](#), ABS, Canberra, 2010, viewed 6 November 2010, [http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/45EDB9CBD1570AA0CA2577D000104345/\\$File/53680_sep%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/45EDB9CBD1570AA0CA2577D000104345/$File/53680_sep%202010.pdf)
 7. For an outline of these see C Kempner, *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009*, Bills digest, no. 28, 2009–10, op. cit.

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quality education destination and to our immigration programme. The current ESOS Act has its origins in the substantial strengthening that occurred in 2000 amidst allegations, similar to those that emerged in 2009, of immigration ‘rorts’, ‘shonky’ providers, poor quality education services, college closures and exploited students.⁸ The framework was later generally endorsed as sound by an independent evaluation in 2004–05 and 41 recommendations to improve its effectiveness were implemented in amendments to the Act in 2006.⁹

Further amendments to the ESOS Act in 2007 included implementation of some of the remaining recommendations of the 2004–2005 evaluation, some amendments to reflect changes to the National Code that came into effect in July 2007, and changes designed, in the words of the Explanatory Memorandum to ‘provide flexibility in the allocation of the roles and responsibilities between the Australian Government and the states and territories governments under the Act’.¹⁰

While governments have turned readily to regulatory strengthening when problems have arisen, the ongoing challenge for governments has been in recognising that in changing their immigration and/or education policy priorities, for example in favour of growing education exports or in addressing skill shortages through education pathways to migration, this flexibility can lead to new immigration and/or education industry risks.

Baird Review amendments take a new regulatory approach

The provisions in this Bill mark the first stage in the implementation of the recommendations of the report of the Review of the *Education Services for Overseas Students Act 2000* conducted by Bruce Baird.¹¹ The challenge for the Baird Review was how to improve on a framework that has widespread industry support, has been independently assessed to be essentially sound, has been further strengthened on various occasions and yet has recently appeared to have failed.

The proposed changes for this first stage do involve a degree of more regulatory strengthening by adding to the registration criteria introduced in the 2009 amendments that require that the principal purpose of providers should be to provide education, and that they should have a demonstrated capacity to provide education of a satisfactory standard. They will now also be required to demonstrate access to financial resources, have a sustainable business model and the capability, governance and management structures to support the delivery of education of a satisfactory standard.

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8. For details on the background to these changes see C Kempner and N Hancock, *Education Services for Overseas Students Bill 2000* (and other related Bills), Bills digests, Nos. 62–66, 2000–01, Parliamentary Library, Canberra, 2000
 9. *Education Services for Overseas Students Legislation Amendment (2006 Measures No.1) Act 2006* and *Education Services for Overseas Students Legislation Amendment (2006 Measures No.2) Act 2006*.
 10. ‘Outline’ in the Explanatory Memorandum, Education Services for Overseas Students Legislation Amendment Bill 2007. Note that the pages of Explanatory Memorandum are not numbered.
 11. B Baird, *Stronger, simpler, smarter ESOS; supporting international students: Final report Review of the Education Services for Overseas Students Act 2000*, Australian Government, Canberra, 2010, viewed 13 July 2010, http://www.aei.gov.au/AEI/GovernmentActivities/InternationalStudentsTaskforce/ESOS_REview_Final_Report_Feb_2010_pdf.pdf

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However, the proposed changes also introduce a new approach to regulation by extending the risk managed approach that has been used in the re-registration process to the ongoing management of regulating providers. The changes will introduce a consistent approach to risk management at the time of registration and for ongoing monitoring throughout registration. This entails a consistent process for assessing risk to be applied by all state authorities and a consistent risk related management strategy which enables:

- setting of a period of review
- conditions to be placed on a provider's registration and
- limiting the period of registration to a period of no more than five years.

By formalising a national, standardised risk management approach to managing the regulation of providers these reforms respond to recent criticisms that the failure was one of enforcement rather than inadequate regulation.¹² At the same time it recognises that there are limited resources for enforcement particularly at a time when the number of private, and arguably more risky, providers in the market has expanded. Student demand generated by the migration incentives of Howard Government policies and contestable funding in the domestic education market had led to growth in the number of private vocational education and training (VET) providers.

Therefore noting not only the growth in the number, but also the diversity of providers now in the international education sector, the Explanatory Memorandum rejects 'an 'across the board' increase in regulatory function' and proposes doing away with a 'one size fits all approach to regulation' to enable regulatory authorities to focus on high risk areas.¹³ It also takes on board views expressed during the Baird consultations that 'the gateway' or entry to the industry should be strengthened. The aim is therefore not to add to the burden of the state regulatory authorities but to deliver 'better targeting of available compliance resources' and at the same time 'ensure enforcement is applied by regulators in a more consistent and rigorous manner'. The stated underlying principle behind the measures is 'not to add an additional layer of rules and red tape to the existing regulatory framework but rather make it work more effectively by simplifying, streamlining and strengthening areas identified as being problematic'.¹⁴

Other changes include:

- Introducing financial penalties for a broader range of non-compliant behaviour such as 'unethical recruitment activity' and 'maintaining student records'
- Publishing targets and regularly reporting on all regulatory activities undertaken. This includes the reporting of regulatory action even when it is being appealed.¹⁵

12. For details see C Kempner, Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009, Bills digest, no. 28, 2009–10, op. cit.

13. Explanatory Memorandum, Education Services for Overseas Students Legislation Amendment Bill 2010, pp. 7, 10.

14. Ibid., pp. 8, 9.

15. Ibid., p. 3.

In addition, responding to student dissatisfaction with complaints handling that was so strongly expressed during the various consultations, the changes in this Bill include expanding the role of the Commonwealth Ombudsman to cover complaints from international students that relate to private providers. The proposed new Overseas Students Ombudsman within the office of the Commonwealth Ombudsman will also provide advice to private providers on complaints handling processes and possibly report on 'broader systemic issues across the international education sector'.¹⁶

Committee consideration

The Bill has been referred to the Senate Education, Employment and Workplace Relations Legislation Committee for inquiry and report by 22 November 2010. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/index.htm

Financial implications

According to the Explanatory Memorandum the financial implications for education providers are estimated to be:

- none associated with meeting the financial viability and business capability requirements as they are not different to those already introduced
- there may be a financial impact associated with extra conditions and monitoring of higher risk groups. One example given is that shorter and more frequent registration periods would mean that higher risk providers would face re-registration charges
- there will be a financial impact on those facing penalties for non-compliance and
- initially there will be none for use of the Overseas Students Ombudsman as the cost will be fully offset from the Department of Education, Employment and Workplace Relations (DEEWR), though cost recovery may be considered in the second stage of reforms.¹⁷

Concerns about the costs of compliance particularly for high risk providers, and early positioning by some providers to be categorised as low risk can be seen in submissions to the Senate on the earlier Bill from the Independent Schools Council of Australia, English Australia, the Australian Council of Private Education Providers (ACPET) and Universities Australia.¹⁸

The Explanatory Memorandum does not consider the financial impact on the state regulators but language such as 'better targeting of available compliance resources' suggests an expectation of cost neutrality.

16. Ibid., and DEEWR, 'Implementation of Baird Review recommendations', viewed 16 July 2010, <http://www.aei.gov.au/AEI/GovernmentActivities/InternationalStudentsTaskforce/ReviewESOSAct.htm>

17. Explanatory Memorandum, Education Services for Overseas Students Legislation Amendment Bill 2010, p. 4.

18. See 'Senate Education, Employment and Workplace Relations Committee: Education Services for Overseas Students Amendment Bill 2010 (Provisions): Submissions received by the Committee', viewed 8 November 2010, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm

As mentioned above DEEWR is meeting the initial costs for the Overseas Students Ombudsman though cost recovery may be considered down the track. In the 2010–11 Budget the Government has provided \$ 4.8 million (including capital of \$25 000) over four years.¹⁹

Main issues

The proposed Risk Management Model

The Explanatory Memorandum provides some idea about what is envisaged for the risk management model and the possible scope of its reach. Analysis conducted for the process for re-registering providers estimated that out of 1327 providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) 150–250 would fall into the high risk category before the re-registration process and some 75–125 after, 400–500 would fall into the medium risk category and 600–700 the low risk category.²⁰

While the details of the standard risk model to be adopted by state regulatory authorities are yet to be developed through a consultative process, the Regulatory Impact Statement outlines what this might entail. Consultations will be conducted on the basis of a KPMG risk management options paper commissioned by Baird and which is consistent with the model used for the re-registration process. A risk matrix would be developed which would form the basis of the risk model to be approved by the Ministerial Council for Tertiary Education and Employment and ‘may be incorporated in to the ESOS legislative framework’.²¹ Such a matrix was developed and tested during the Victorian rapid audits of CRICOS providers that were conducted in 2009. According to this matrix those in highest risk may have the following characteristics:

- newly established with little or no track record
- narrow course scope primarily linked to migration policy
- high reliance on overseas students and from one or only a small number of source countries
- large foreign ownership or education agent ownership share
- a history of compliance issues.

The risk management model might include categories of risk, core indicators of risk (for example the proportion of overseas to domestic students), minimum financial viability tests, information required from providers for registration, regularity of auditing and review of risk for various risk categories, and the range of suitable conditions.

19. Australian Government, *Budget measures: budget paper, no. 2: 2010–11*, Commonwealth of Australia, Canberra, 2010, p. 285.

20. Explanatory Memorandum, Education Services for Overseas Students Legislation Amendment Bill 2010, op. cit., pp. 14–15.

21. *Ibid.*, p. 12.

Issues

The Explanatory Memorandum acknowledges that there are possible risks associated with the risk management approach. One of these is the potential for incorrectly identifying the level of risk. However, it suggests that this can be minimised by the use of expert advice in the development of the risk factors and through ongoing review. As the main representative body for private training providers, the group most likely to come under some scrutiny in this risk managed approach, ACPET has expressed ‘concerns about the capacity of current regulatory agencies to develop and implement a robust and meaningful risk framework for the sector’. ACPET calls for the introduction of this risk managed approach to be ‘informed by both appropriate risk assessment expertise and input from the education and training sector’.²²

The Explanatory Memorandum also acknowledges that low risk providers may take advantage of lower levels of scrutiny. Provider rigour in monitoring student progress or attendance for visa compliance purposes may be one of the risks of lower levels of scrutiny. However, many low risk providers have already been made exempt from attendance reporting following opposition, particularly from the universities, when it was first introduced, on the grounds that it would come at considerable cost.²³

Another risk of lower scrutiny might concern the meeting of education standards. Higher education institutions, likely to be assessed as ‘low risk’ under this model, have not been immune from allegations of relaxing standards for international students. Concerns have been aired that academic staff in some higher education institutions have been pressured to mark international students ‘softly’.²⁴

The Explanatory Memorandum proposes that this risk of lower level scrutiny will be mitigated by ensuring that ‘low risk providers are scrutinised on a regular basis, as appropriate’.²⁵ How this would be accommodated by the risk based model is unclear.

The proposed Overseas Students Ombudsman

This proposal responds to strong calls from students, during recent consultations, for a student ombudsman to handle student complaints. There was however no unanimity of view about what

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22. Australian Council for Private Education providers (ACPET), Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Education Services for Overseas Students Amendment Bill 2010 (Provisions), viewed 8 November 2010, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm
 23. See for example J Elson-Green, ‘Bishop slams AVCC’s arrogance’, *Campus review*, Vol. 16, no. 22, 7 June 2006, pp. 1, 5, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%22Firnart%2F72YJ6%22;the%20amendments%20were%20provided%20for%20in%20the%20Education%20Services%20for%20Overseas%20Students%20Legislation%20Amendment%20\(2006%20Measures%20No.%202\)%20Act%202006](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%22Firnart%2F72YJ6%22;the%20amendments%20were%20provided%20for%20in%20the%20Education%20Services%20for%20Overseas%20Students%20Legislation%20Amendment%20(2006%20Measures%20No.%202)%20Act%202006).
 24. See for example A Morton, ‘English skills row over foreign students’, *Age*, 29 January 2007, p. 3, [earch=%22soft%20international%20students%20marking%20universities%22](http://www.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%22Firnart%2F72YJ6%22;the%20amendments%20were%20provided%20for%20in%20the%20Education%20Services%20for%20Overseas%20Students%20Legislation%20Amendment%20(2006%20Measures%20No.%202)%20Act%202006)
 25. Explanatory Memorandum, Education Services for Overseas Students Legislation Amendment Bill 2010, op. cit., p. 11

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should be the scope of such an ombudsman and the expectations appeared to be quite broad ranging extending well beyond education concerns. The Senate Inquiry into the Welfare of International Students summed up the need for access to an independent complaints body in these terms:

Students could contact an independent body such as an ombudsman on issues such as study, safety, accommodation or employment after exhausting other complaint and assistance mechanisms available to them. This body would also be able to investigate complaints in relation to providers and regulatory bodies.²⁶

The ombudsman proposal in this Bill is however limited to the handling of complaints against education providers. Even though there are existing requirements under ESOS for providers to have an internal complaints process, and to provide access to an external complaints body, the recent reviews have placed high value on the need for an external body with statutory independence.²⁷ While currently both domestic and overseas students with publicly run providers have access to a statutorily independent complaints body—the relevant State or Territory Ombudsman—students of private providers in most states do not have recourse to a statutory body. The exceptions are South Australia where ‘all providers already fall within the jurisdiction of the South Australian Training Advocate’, and Victoria where some complaints by overseas students are dealt with by the Victorian Registration and Quality Authority.²⁸

The recommendation to extend the jurisdiction of the Commonwealth Ombudsman to provide access to such a statutorily independent body for the ‘international education sector’ was made by the Senate Inquiry into the Welfare of International Students.²⁹ The Australian Greens followed this in March 2010 with a proposal to set up an ‘Education Ombudsman’ within the office of the Commonwealth Ombudsman that would cover all higher education and ESOS registered providers. This was presented in a non-government Bill, the Ombudsman Amendment (Education Ombudsman) Bill 2010 (this lapsed with the proroguing of the 42nd Parliament and was re-introduced on 29 September 2010).

The Commonwealth Ombudsman has supported the proposal for a statutorily independent body and that his office might play a role. Like the Greens, he had originally proposed the establishment of a national body, one that would cover the whole tertiary education sector, a ‘Tertiary Education Ombudsman’, either by ‘creating a specialist education Ombudsman, or by conferring jurisdiction

26. Senate Education, Employment and Workplace Relations References Committee, *Inquiry into the Welfare of International Students*, op. cit., p. 63.

27. Standard 8 in the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 does include features of both the internal and external complaints processing arrangements.

28. B Baird, op. cit., p. 28 and Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman: Education Services for Overseas Students Amendment Bill 2010 (Provisions)*, Commonwealth Ombudsman, Canberra, 2010, p. 3, viewed 8 November 2010, p. 5, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm.

29. Senate Education, Employment and Workplace Relations References Committee, *Inquiry into the Welfare of International Students*, op. cit., p. 2.

upon an existing office such as the Commonwealth Ombudsman'.³⁰ One of the advantages he proposed for establishing a national body would be to reduce confusion and uncertainty about regulatory roles and responsibilities and therefore make it easier for students to access these services. The Commonwealth Ombudsman also viewed a national body of this kind as being consistent with other current government initiatives such as the establishment of a national VET regulator.³¹

The Baird Review supported a role for the Commonwealth Ombudsman but did not however take up the idea of a national 'Education' or 'Tertiary Education' body. Baird recommended a model that would complement existing arrangements—that 'all providers, not already within the remit of other statutorily independent complaints bodies' could be covered by the Commonwealth Ombudsman, that is, those private providers not currently covered by statutorily independent state bodies.³² Baird envisaged that:

By utilising the current structures domestic and international students of public providers will access the same complaints bodies minimising confusion. Parliaments will retain their oversight over public providers via the statutory bodies they have created for that purpose. In practice this would result in government providers using their state and territory Ombudsman. Non-government providers would come within the remit of the Commonwealth Ombudsman.³³

The Council of Australian Governments (COAG) agreed with Baird's recommendation to put in place arrangements that complement existing state arrangements.³⁴

The establishment of the Overseas Students Ombudsman within the office of the Commonwealth Ombudsman proposed in this Bill gives effect to this decision. However, its coverage is further pared back to cover only ESOS registered private education providers not covered by existing arrangements, and only their overseas students. The **private registered providers** covered by the amendments are those registered within the meaning of the ESOS Act, therefore only those private providers registered to deliver education services to overseas students. Access to this complaints mechanism for students of these ESOS providers is limited only to their overseas students in that the Overseas Students Ombudsman is authorised:

30. Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman: Inquiry into the Welfare of International Students*, Commonwealth Ombudsman, Canberra, 2009, p. 3, viewed 8 November 2010, http://www.aph.gov.au/Senate/committee/eet_ctte/international_students/submissions.htm; Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman: Review of the Education Services for Overseas Students Act 2000*, viewed 8 November 2010, <http://www.deewr.gov.au/HigherEducation/Documents/ESOSsubmissions/CommonwealthOmbudsman.pdf>

31. Ibid., Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman: Inquiry into the Welfare of International Students*, p. 2.

32. Ibid.

33. B Baird, op. cit., p. 28.

34. Council of Australian Governments (COAG), *COAG Communiqué: Council of Australian Governments Meeting 19–20 April 2010*, 'National International Student Strategy', viewed 19 July 2010, http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/index.cfm?CFID=607588&CFTOKEN=66751165

... to investigate action taken by a private registered provider in connection with an overseas student, an intending overseas student, or an accepted student, within the meaning of the Overseas Students Act.³⁵

Comment

This measure responds to the demands for a more effective and independent complaints handling process for overseas students but only insofar as it relates to complaints about education providers. There may however be legitimate policy questions about whether students might not have been better served by a single national agency, and whether that agency might have been a specialist education ombudsman?

The model that has been chosen is a complementary model—where there are state based statutorily independent arrangements in place that cover overseas students they will continue to apply. Where these do not cover private sector, overseas students their complaints will be handled by the ‘Overseas Students Ombudsman’ within the Office of the Commonwealth Ombudsman. Given the recent growth in the number of private providers and overseas students, cost considerations may well have been a factor in eschewing proposals for a national agency with broad sectoral and student coverage. The choice of a complementary model also means that the changes can be achieved by the Commonwealth on its own. However, an opportunity to streamline and simplify the process for the benefit of students may well have been missed. While the changes go some way to simplification, the ongoing involvement of state and federal bodies may not fully address the issue of student confusion and uncertainty about who is responsible for what. The difficulties students face in understanding these processes and accessing these services is again restated in the International Education Association’s submission on this Bill.³⁶

Furthermore, perhaps an unintended consequence of the proposed arrangements will be that domestic students studying with private providers (ESOS registered and others) will be the only students without access to a statutorily independent external complaints body.³⁷ In its recent submission on this Bill DEEWR has explained this as being because the ESOS Legislation Amendment Bill specifically responds to the Baird recommendation to improve access by overseas students ‘given the particular vulnerabilities of overseas students’.³⁸ Nevertheless it is legitimate to ask why the broader policy issues arising from the decision to implement the Baird recommendation in this

35. See proposed section 19ZJ, subsection (3) in this Bill.

36. International Education Association, *ESOS Legislation Amendment Bill : submission from ISANA: International Education Association*, viewed 8 November 2010, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm

37. This point is also noted in a personal submission on this Bill by John Blahusiak, an academic from Edith Cowan University, J Blahusiak, *Personal submission to Education Services for Overseas Students Amendment Bill 2010 (Provisions) Inquiry*, viewed 8 November 2010, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm

38. Department of Education, Employment and Workplace Relations, *Submission to the Inquiry into the Education Services for Overseas Students Legislation Amendment Bill 2010*, DEEWR, Canberra, 2010, p. 8, viewed 11 November 2010, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm

particular, and arguably narrower way, should not be considered. Is not the principle of equal access by all students of a provider, to the same statutory complaints body, at the very least, worth pursuing? The administrative efficiencies for the provider might also be significant.

All the reviews supported extending the jurisdiction of the Commonwealth Ombudsman, to some extent or another, to take on the role of the proposed statutory complaints body. However, it is unclear whether other possible alternatives were considered. For example could the state and territory ombudsmen have taken on this role in relation to private providers in their jurisdictions and in this way have achieved coverage of domestic and overseas students? Would an industry specific national body or even state bodies like the South Australian Training Advocate have been more inclusive of all students and provided greater industry focus?

The attraction of using the office of the Commonwealth Ombudsman is understandable as it falls within the Commonwealth's own jurisdiction. The case is also strongly made in the Commonwealth Ombudsman's submissions to the recent inquiries. The office of the Commonwealth Ombudsman has strong credentials for complaints handling, it is well established and well placed with a network of state based offices. It has also confirmed that 'the proposed powers of the Overseas Students Ombudsman are consistent with the powers of the Commonwealth Ombudsman'.³⁹ Furthermore it has some prior experience in the education field. In its submission on this Bill it notes that it has jurisdiction over complaints from overseas students about the Department of Education, Employment and Workplace Relations' administration of the ESOS Act and that as the Australian Capital Territory Ombudsman it also deals with complaints about Australian Capital Territory public education providers.⁴⁰ This jurisdiction over government administrative action does however sit comfortably with its traditional 'primary function' as described in its annual report and its submission on this Bill—the handling of complaints and enquiries from members of the public about 'government administrative action'.⁴¹ In its new Overseas Students Ombudsman role however, it will deal with complaints about the actions of a large number of private providers which, although government registered and regulated, are essentially privately run businesses within a primarily, privately funded sector of the education industry.

While the Commonwealth Ombudsman has noted that 'the jurisdiction of the Ombudsman has been extended to cover a range of non-government entities, including service providers contracted to government, and a number of private sector postal providers' it is unclear whether these are comparable in size and scope to the private, overseas education sector.⁴² This new role may

39. Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman: Education Services for Overseas Students Amendment Bill 2010 (Provisions)*, Commonwealth Ombudsman, Canberra, 2010, viewed 8 November 2010, p. 5, http://www.aph.gov.au/Senate/committee/eet_ctte/esos_43/submissions.htm

40. *Ibid.*, p. 1.

41. Commonwealth Ombudsman, *Annual Report 2009-10*, Commonwealth Ombudsman, Canberra, p. 2, http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2009-10/download/PDF/ombudsman_anrep_2009_2010_full.pdf

42. Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman: Inquiry into the Welfare of International Students*, Commonwealth Ombudsman, op. cit., p. 3.

therefore well mark a significant change in the scope of Commonwealth Ombudsman's responsibilities.

A final observation that might have some bearing on the workloads of the new Overseas Student Ombudsman—as noted earlier there were wide ranging views about what should be the scope of an overseas student ombudsman's responsibilities. These not only included a body to handle complaints related to education providers but also to handle other complaints such as employment and tenancy complaints and to provide advocacy and advice on the whole gamut of issues that face international students.⁴³ While not charged with responsibility for these additional functions, nor even for the whole of the international student body, the so named 'Overseas Students Ombudsman' may well find that it is at the receiving end of some of these expectations and may well have a significant referral task on its hands.

Key provisions

The following is only a brief overview of the main provisions as the Explanatory Memorandum provides a very detailed description of them.

Schedule 1 provides for the amendments to the Education Services for Overseas Students Act 2000.

Item 4 repeals and replaces **subparagraph 9(2)(c)(iii)** and adds **subparagraphs 9(2)(c)(iv)–(vi)**.

Section 9 deals with the registration of providers and paragraph 9(2)(c) addresses what information needs to be in the certificate provided by the designated regulatory authority to the Secretary for the purposes of registration. The new **subparagraph 9(2)(c)(iii)** builds on the existing requirement that the certificate should state that the provider has demonstrated the capacity to provide education of a satisfactory standard by including the examples of having an appropriate business model and access to adequate financial resources. New **subparagraphs 9(2)(c)(iv)–(vi)** respectively require that the certificate states the results of the designated authority's risk assessment of the provider, any risk associated conditions that should apply to the provider's registration in the state and the period for which the provider should be registered.

Item 8 adds a new **section 14B** which enables the Secretary to impose registration conditions on the Secretary's own initiative in view of a risk assessment made by the Secretary or another designated authority. The conditions may be imposed at the time of registration or throughout the registration period and there is a requirement that the Secretary must send written notification to the provider.

Items 9–14 provide for drafting changes to existing offences under sections 19–21 which are linked to the repeal of sections 104 and 105 provided for in **item 21**. **Items 10, 12** and **14** also provide for a penalty of 60 penalty points and specify as strict liability offences:

- the failure of a registered provider to give information about students to the Secretary as provided for in section 19 which includes information about student breaches of visa conditions

43. See footnote 21.

- the failure of a registered provider to send to a student written notice of a breach of visa conditions as required under section 20
- the failure of a registered provider to keep records of each student as provided for under section 21.⁴⁴

Items 10 and 12 have the effect of increasing the penalty for breach of sections 19 and 20 respectively, increasing the disincentive and affording consistency to the penalties for the proposed strict liability offences.

Items 15–17 also specify as strict liability offences:

- the failure of a registered provider to meet its obligations with respect to its agents as provided for under subsection 21A(1)
- the failure of a registered provider to meet the student refund obligations as provided for under sections 28 and 29.

Item 22 inserts a new **subsection 106(1A)** to specify the new offence provisions provided for under **items 10 to 17** so that they may be included in the infringement notice scheme provided for under section 106.

Item 25 inserts a new **section 170A** that enables the Secretary to publish information about enforcement and monitoring action taken and the results of that action. It also imposes obligations on the Secretary to also ensure that if that information has been published and the provider applies for a review, the fact and results of the review are also published and the information is kept up to date.

Schedule 2, item 2 provides for the amendments to the *Ombudsman Act 1976* to establish the Overseas Students Ombudsman within the office of the Commonwealth Ombudsman (**proposed section 19ZI**).

Proposed section 19ZF defines private registered provider covered by this schedule as a provider registered under the ESOS Act that is not owned or administered by the Commonwealth or a state or territory.

Proposed section 19ZJ outlines the functions of the Overseas Students Ombudsman as being to investigate complaints, give providers advice about best practice in the handling of complaints and perform other functions as conferred. He or she may investigate actions in relation to complaints or may initiate his or her own investigative action in accordance with the Act. **Proposed subsection (3)** only authorises that such action be taken in connection with an overseas student, an intending overseas student or an accepted student within the meaning of the ESOS Act.

Proposed section 19ZK enables the Overseas Students Ombudsman to transfer complaints to any statutory complaints handler or office-holder who may already have the function of investigating

44. Explanatory Memorandum, Education Services for Overseas Students Legislation Amendment Bill 2010, p. 25.

such complaints. It also includes the requirement to inform the complainant of such a transfer and to hand any information over to the relevant statutory authority.

Proposed section 19ZL gives the Overseas Students Ombudsman discretion not to investigate certain complaints.

Proposed Division 3 details the powers and duties of the Overseas Students Ombudsman. **Proposed section 19ZM** identifies the other sections of the *Ombudsman Act 1976* that apply to the Overseas Students Ombudsman. **Proposed section 19ZQ** details the obligations that the Overseas Students Ombudsman has to report the findings of his or her investigation to the provider that has been investigated. This includes allowing the private provider to make comments on the report. **Proposed section 19ZR** enables the tabling of such reports and any comments from the provider if inadequate action is taken in relation to the recommendations in the report. **Proposed section 19ZS** provides for the annual reporting requirements of the Overseas Students Ombudsman which must include the number of complaints, the number of investigations started and completed and the number of requirements made of a person. **Proposed section 19ZT** enables the Overseas Students Ombudsman to bring evidence, uncovered during an investigation, of misconduct of an officer of a private provider to the attention of the principal executive officer.

Concluding comments

The Government has taken various measures to address the complex range of problems that have recently surfaced in the international education industry. These include consulting with overseas students, changing immigration policy settings, re-registering providers and bringing forward the Review of the *Education Services for Overseas Students Act 2000* which was conducted by Bruce Baird. The provisions in this Bill are the first stage in the implementation of the recommendations of this review. They are part of a continuum of fine tuning of a regulatory framework that is generally considered sound. While they include some regulatory strengthening, the main thrust is to incorporate some new approaches to enforcement. The risk management approach that will be applied to the regulation of education providers recognises that with the limited resources available state and territory regulators need to focus their efforts on high risk providers. The challenge is likely to be in establishing a credible risk based model that does not impose excessive costs on bona fide providers.

The provisions for an Overseas Students Ombudsman respond to strong calls from overseas students for better handling of their complaints, many of which extend well beyond problems with education providers. Its role however will be limited to complaints about education providers, and to this extent some expectations will not be met. The Overseas Students Ombudsman will also only cover the overseas students of private providers that are currently not covered by a statutory state body. The domestic students of private providers will not be covered by these arrangements. However, students (domestic and overseas) in public institutions will continue to be covered by the state based statutorily independent bodies that handle their complaints now. This complementary approach has obvious cost benefits and meets the call for statutory coverage for all overseas students. However, an alternative proposal for a single, national, specialist education body might

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have provided more of an industry focus and have simplified student access by providing coverage for all students of all providers.

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