

# CHAPTER 10

## STUDENT VISAS

10.1 This chapter will consider specific issues raised during the committee's inquiry about the operation and administration of the Migration Act in relation to overseas students, including:

- key legislation relating to overseas students;
- the importance of overseas students to Australia;
- student awareness of migration law and policy;
- the cancellation of student visas;
- student visa administration and enforcement issues; and
- detention of students.

### Relevant legislation

10.2 Under the Migration Act and Regulations, people who are not Australian citizens or Australian permanent residents can be granted a visa to study in Australia. There are currently seven student visa subclasses for overseas students enrolled in registered courses. The subclasses generally relate to specific education sectors, such as 'schools' (subclass 571) or 'higher education' (subclass 573).<sup>1</sup> A range of conditions can be imposed on student visas under the Migration Regulations, such as work limits, and performance and attendance requirements. Some of these conditions will be considered further where relevant below.

10.3 The Department of Education, Science and Training (DEST) also regulates education and training services to overseas students in Australia through the *Education Services for Overseas Students Act 2000* (ESOS Act) and associated legislation. According to the DEST website:

The purpose of the [ESOS Act and associated] legislation is to protect the interests of people coming to Australia on student visas, by providing tuition and financial assurance and by ensuring a nationally consistent approach to provider registration. The legislation also seeks to ensure the integrity of the industry through visa-related reporting requirements.<sup>2</sup>

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1 See further: [http://www.immi.gov.au/study/visas/subclasses\\_assessment.htm](http://www.immi.gov.au/study/visas/subclasses_assessment.htm) (accessed 3 November 2005).

2 [http://www.dest.gov.au/sectors/international\\_education/policy\\_issues\\_reviews/key\\_issues/esos/](http://www.dest.gov.au/sectors/international_education/policy_issues_reviews/key_issues/esos/) (accessed 3 November 2005).

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## ***Review of the ESOS Act***

10.4 The ESOS Act was recently reviewed, and the report, *Evaluation of the Education Services for Overseas Students Act 2000* (ESOS Evaluation Report), was published in June 2005.<sup>3</sup> The ESOS Evaluation Report made a number of recommendations, mostly relating to amendments to the ESOS Act and the associated *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students* (the National Code). However, some recommendations were also made in relation to migration legislation and policy, including:

- that the National Code, Migration Regulations and student visa conditions be amended to reflect basic principles in relation to issues such as full-time study, completion of course requirements, and student attendance and performance; and to remove 'outmoded assumptions about educational practice that inhibit providers' ability to support visa integrity';<sup>4</sup>
- that restrictions on students changing their education provider be transferred from the Migration Regulations to the Regulations under the ESOS Act;<sup>5</sup> and
- that DIMIA consult with DEST with a view to amending the Migration Regulations to enable the three-year exclusion period (against a student whose visa has been cancelled for not meeting course requirements) to be waived under certain circumstances.<sup>6</sup>

10.5 In response to the Committee's Questions on Notice, DIMIA noted that it was currently considering the implications of the recommendations made in the ESOS Evaluation Report. DIMIA observed that, if implemented, the recommendations may require amendments to the Migration Regulations and DIMIA systems, policies and procedures. DIMIA noted that it was consulting closely with DEST on progressing the recommendations relating to the ESOS Act, Regulations and National Code. DIMIA advised:

When the DEST response is more fully articulated, DIMIA will need to take the necessary steps to implement the required changes in our Regulations.<sup>7</sup>

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3 PhillipsKPA and LifeLong Learning Associates, *Evaluation of the Education Services for Overseas Students Act 2000*, June 2005 (ESOS Evaluation Report), Available at: [http://www.dest.gov.au/sectors/international\\_education/policy\\_issues\\_reviews/reviews/evaluation\\_of\\_the\\_esos\\_act\\_2000/esos\\_reforms\\_default.htm](http://www.dest.gov.au/sectors/international_education/policy_issues_reviews/reviews/evaluation_of_the_esos_act_2000/esos_reforms_default.htm) (accessed 3 November 2005).

4 See ESOS Evaluation Report, recommendation 28.

5 See ESOS Evaluation Report, recommendation 35; see also DIMIA answers to Questions on Notice received 5 December 2005, p. 103. Under Schedule 8 of the Migration Regulation, Condition 8206 generally precludes students from transferring from the education provider of initial enrolment to another provider during the first 12 months of their course.

6 See ESOS Evaluation Report, recommendation 35.

7 DIMIA answers to Questions on Notice, received 11 October 2005, p. 69.

10.6 Other findings and recommendations of the ESOS Evaluation Report are considered where relevant throughout this chapter.

### **Importance of overseas students to Australia**

10.7 Some submissions pointed out the importance of overseas students and the 'education export industry' to Australia.<sup>8</sup> Similarly, the ESOS Evaluation Report declared that education is now Australia's third largest service export industry, and pointed to recent studies which:

...estimate that incoming international students spent \$5.2 billion in 2002 on tuition fees, goods and services, and that the economic activity this generated had an employment impact of about 42,650 jobs.<sup>9</sup>

10.8 DIMIA provided statistics indicating that, in the last three years, around 170,000 student visas have been granted each year. The majority of these student visas grants were for the higher education sector.<sup>10</sup> Indeed, the Law Institute of Victoria (LIV) suggested:

...Australian tertiary education providers have also become substantially reliant upon income generated through full fee paying overseas students.<sup>11</sup>

10.9 Ms Jockel of the Law Council of Australia (LCA) observed that Australia is competing globally for students, and as a result, we need to consider how our immigration law and policies may affect our international reputation:

We are competing with the US, Canada and England for the same international students, and we are competing with the offshore campuses which are now being developed in Asia. If we lose this source of revenue, we are going to suffer as a nation.<sup>12</sup>

10.10 Ms Michaela Rost, whose submission focussed on the issue of student visas and detention of international students, expressed concern that, under Australia's migration system:

...despite students' significant payment for education services and their economic contribution to Australia's sixth largest export industry, as trading partners, they seem to receive little understanding, assistance or compassion in exchange, and have instead been subject to harsh, uncompromising and unjust treatment.<sup>13</sup>

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8 See, for example, Ms Michaela Rost, *Submission 220*, p. 1 and *Committee Hansard*, 27 September 2005, p. 3; LIV, *Submission 206*, p. 12; Dr Anthony Pun, *Submission 94*, p. 2.

9 ESOS Evaluation Report, p. 8; see also Ms Michaela Rost, *Submission 220*, pp 1 and 12.

10 See DIMIA answers to Questions on Notice, received 11 October 2005, p. 64.

11 Law Institute of Victoria, *Submission 206*, p. 12.

12 *Committee Hansard*, 27 September 2005, p. 84.

13 Ms Michaela Rost, *Submission 220*, pp 1 and 12.

## Student awareness of migration law and policy

10.11 The committee heard evidence of the need to ensure international students are made sufficiently aware of Australia's immigration system, and that education agents need to be better regulated in this context. For example, Ms Michaela Rost argued that education agents:

...may not be adequately and correctly informing prospective students about the complexities and implications of Australian immigration laws pertaining to visas and extensions. Students may also be lured to study in Australia under misleading information about education providers. These agents, well paid by Australian universities (up to \$900 per student they enrol), are not accountable to any Australian regulatory body.<sup>14</sup>

10.12 The Migration Institute of Australia (MIA) expressed similar concerns about the lack of regulation of education agents operating overseas:

Unregistered agents including education agents soliciting students from overseas for universities continue to provide visa assistance ... and continue to have unfettered access to DIMIA at all levels.<sup>15</sup>

10.13 The MIA told the committee that it has:

...repeatedly sought with DIMIA and successive Ministers to enforce the provisions of the Act where such practices are occurring. Some of the unethical behaviour and exploitation of clients by such unregistered people has been well documented across a wide range of the media.<sup>16</sup>

10.14 The MIA reported to the committee its understanding that:

Current DIMIA plans are to give these people [education agents] a new ID number which will be similar to that given to Registered Migration Agents, so that they may access DIMIA for their clients. Yet there is still no regulation of unregistered agents, no legally enforceable code of conduct for them, and no fees to pay DIMIA. An Australian Registered Migration Agent spends up to \$6000 per year in direct costs including statutory fees to MARA [Migration Agents Registration Authority], insurance and compulsory continuing education costs, just to remain registered. An Australian registered agent is subject to a well developed and serious complaints handling system where serious misbehaviour may cause them to have their registration (practicing license) cancelled.<sup>17</sup>

10.15 The MIA continued:

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14 Ms Michaela Rost, *Submission 220*, p. 8; see also Debra Jopson, 'Migration agents risk universities' future', *Sydney Morning Herald*, 9 May 2005, p. 4.

15 Migration Institute of Australia, *Submission 144*, p. 7.

16 Migration Institute of Australia, *Submission 144*, p. 7.

17 Migration Institute of Australia, *Submission 144*, p. 7.

Unregistered overseas agents and domestic education agents face none of these requirements, yet DIMIA intends to allow them to continue to operate alongside Australian registered agents. We put the obvious questions to this inquiry: Where is the justice and equity in allowing this situation to continue? And in doing so, how can DIMIA be said to be acting in the interests of all Australians?<sup>18</sup>

10.16 Ms Rost was further concerned that:

...in the huge marketing campaigns and expos by universities prior to arriving here, prospective students are never told by education recruitment agents that students may be 'detained' on cancellation of visa, and what 'detained' really means...It is unlikely that they even know about detention. Such information would not enhance a university's marketing strategy.<sup>19</sup>

10.17 Ms Rost concluded that the Australian Government has a:

...duty of care to ensure that prior to arrival, overseas students are thoroughly informed about all details of immigration and visa laws through its embassies, as well as by its universities and education providers.<sup>20</sup>

10.18 The committee questioned DIMIA as to the measures it has put in place to ensure that overseas students are aware of the requirements of their visa and the consequences of not meeting such requirements. DIMIA replied that it has a range of measures in place, including:

- the visa approval letter sent to students which provides information about their visa, and the conditions that have been imposed on the visa;
- regular outreach activities by DIMIA's state and territory offices, including information sessions for international students at universities and other institutions during student orientation periods. Visa conditions, particularly those relating to study and work, are a central focus of these sessions;
- training for education agents, conducted by DIMIA migration officers based in Australian missions overseas, to assist agents in advising clients about student visa requirements; and
- information about visa conditions on DIMIA's website.<sup>21</sup>

10.19 In relation to the regulation of education agents, a representative of DIMIA explained that, where they are playing an immigration advisory role, education agents are required to be registered if they are within Australia. However, the representative also acknowledged that offshore education agents are not required to be registered.<sup>22</sup>

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18 Migration Institute of Australia, *Submission 144*, pp 7-8.

19 Ms Michaela Rost, *Submission 220*, p. 8.

20 Ms Michaela Rost, *Submission 220*, p. 8; see also *Submission 220A*, p. 3.

21 Answers to Questions on Notice, received 11 November 2005, p. 67.

22 *Committee Hansard*, 11 October 2005, p. 10.

10.20 The representative further told the committee that this issue was being examined, and that DIMIA would:

... work with the education industry onshore to encourage more education agents to become MARA [Migration Agents Registration Authority] registered ... Offshore, we are consulting with the industry on the possibility of a legislative change that will remove the requirement for a migration agent to be either an Australian citizen or a permanent resident. That would enable overseas education agents to at least have the option of becoming MARA registered, and thereby to come within that framework.<sup>23</sup>

10.21 The representative explained that DIMIA was also trying to train and encourage education agents to enter into administrative contracts with DIMIA. The representative told the committee that this would mean the agents are:

...committed to abiding, at least administratively, by a code of conduct and a code of behaviour associated with the lodgment of electronic student visa applications...we believe it is the most practical way of going forward in the interests of Australia's education industry, the interests of the overseas students and the interests of the agents themselves.<sup>24</sup>

10.22 The committee notes that the ESOS Evaluation Report recommended that the National Code and the Migration Regulations be revised to require DIMIA and education providers to inform each other of concerns with an education agent in relation to immigration and visa-related matters.<sup>25</sup>

### **Student visa cancellations**

10.23 A key concern raised during the committee's inquiry was the problem of the cancellation of student visas, and in particular, the inflexible provisions of the migration legislation in this area.

10.24 A number of conditions can be imposed on student visas under the migration legislation.<sup>26</sup> One of the key conditions raised during the committee's inquiry related to the work limits imposed on student visas.<sup>27</sup> First-time grants of student visas initially have a condition that the visa holder is not permitted to work.<sup>28</sup> However, once in Australia, a student can apply for permission to work. If granted permission, that student must not work for more than 20 hours a week during any week when their

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23 *Committee Hansard*, 11 October 2005, p. 11.

24 *Committee Hansard*, 11 October 2005, p. 11.

25 See ESOS Evaluation Report, recommendation 16.

26 See further DIMIA, "Student Visa Conditions", <http://www.immi.gov.au/study/visas/conditions.htm> (accessed 4 November 2005).

27 See Ms Michaela Rost, *Submission 206*, p. 12.

28 See Migration Regulations, Schedule 8, condition 8101.

course is in session (under 'Condition 8105').<sup>29</sup> Importantly, a breach of this condition is grounds for mandatory cancellation of a student's visa. That is, where the grounds for cancellation are established, the visa *must* be cancelled.<sup>30</sup>

10.25 Another key condition raised during the committee's inquiry was 'Condition 8202', which requires the visa holder to satisfy certain enrolment, attendance and course requirements (such as academic results).<sup>31</sup> Again, breach of this condition is grounds for mandatory cancellation of a student's visa.<sup>32</sup> However, DIMIA informed the committee that the Migration Regulations were amended on 8 October 2005 to allow for 'exceptional circumstances beyond the student's control to be taken into consideration prior to cancelling a student visa for a breach of condition 8202'.<sup>33</sup>

10.26 Ms Michaela Rost was highly critical of these mandatory cancellation provisions. Ms Rost recognised that the relevant provisions were 'designed to guard against a minority of non-genuine students from abusing Australia's immigration laws',<sup>34</sup> but still considered the migration legislation to be 'unforgiving'.<sup>35</sup> For example, Ms Rost described the work limits in condition 8105 as 'draconian' because:

A student can have worked two hours more and then have the entire visa cancelled and be sent back, even if they are one subject off a master's degree.<sup>36</sup>

10.27 Ms Rost further argued that:

The conditions of the visa are just totally unrealistic for the needs of students because a lot of them need to work here to pay for living costs ... They should be allowed to work for longer. There should not be blanket cancellation of the visa and then possible detention.<sup>37</sup>

10.28 The LIV recognised that visa conditions, such as the work limits and attendance requirements, are based on genuine concerns that student visas should not be misused for other purposes, such as obtaining work in Australia. At the same time,

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29 See Migration Regulations, Schedule 8, condition 8105.

30 Migration Regulation 2.43(2)(b)(i). Note also that section 137J of the Migration Act provides for automatic cancellation of student visas in certain circumstances.

31 See also Ms Michaela Rost, *Submission 220*, p. 13.

32 Migration Regulation 2.43(2)(b)(ii).

33 DIMIA answers to Questions on Notice received 5 December 2005, p. 101; and Migration Regulation 2.34(2)(b).

34 Ms Michaela Rost, *Submission 220*, p. 6.

35 *Submission 220*, p. 8; see also pp 12-14 and *Committee Hansard*, 27 September 2005, p. 3.

36 *Committee Hansard*, 27 September 2005, p. 6.

37 *Committee Hansard*, 27 September 2005, p. 6.

the LIV expressed concern about DIMIA's enforcement of those conditions.<sup>38</sup> This is discussed further later in this chapter.

10.29 A representative of DIMIA acknowledged that the work limit conditions under the Migration Regulations 'do not provide a significant degree of flexibility', and that this is something that the DIMIA was 'looking at'.<sup>39</sup> However, the representative maintained that the work limit itself of 20 hours was quite generous.<sup>40</sup>

10.30 More generally, Ms Rost pointed out the high financial and personal impact of a student visa cancellations on those students:

... because they now do not have a student visa, they are no longer considered to be a student, despite having paid fees in advance, having study materials in their possession, and their parents owing vast sums of money for their Australian education.<sup>41</sup>

10.31 Indeed, Ms Rost gave the committee a number of unfortunate and distressing examples of students who had found themselves in this situation.<sup>42</sup> Ms Rost argued that automatic cancellation for breach of a student visa is too harsh a penalty:

... for the seemingly minor offences that constitute a breach of the student visa, a draconian punishment is meted out – the visa is cancelled, the student is immediately relegated to “unlawful non-citizen” status must leave the country within 28 days – unless he/she appeals against the decision, a process taking up to 6 months and [which] prohibits study.<sup>43</sup>

10.32 Ms Rost suggested that a system of fines for breaching visa conditions may be more appropriate.<sup>44</sup>

10.33 The ESOS Evaluation Report also expressed concern about the lack of flexibility in relation to non-compliance with student visas:

The 'all or nothing' nature of present requirements for providers to report students for breach of their visa conditions has brought the full weight of DIMIA's compliance processes into play too early and the provider has insufficient flexibility to make educational judgements.<sup>45</sup>

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38 Law Institute of Victoria, *Submission 206*, p. 12; referring to [2005] FCAFC 132 (23 July 2005); and see also Ms Michaela Rost, *Submission 220*, pp 17-19.

39 *Committee Hansard*, 11 October 2005, p. 9.

40 *Committee Hansard*, 11 October 2005, p. 9.

41 Ms Michaela Rost, *Submission 220*, p. 12.

42 Ms Michaela Rost, *Submission 220*, pp 27-34 and also *Committee Hansard*, 27 September 2005, pp 4 and 7-9.

43 Ms Michaela Rost, *Submission 220*, p. 12.

44 *Committee Hansard*, 27 September 2005, p. 6.

45 ESOS Evaluation Report Executive Summary, p. xxv.

10.34 The ESOS Evaluation Report concluded that this inflexibility was part of the reason for the high number of student visa cancellations.<sup>46</sup> Indeed, the figures provided by DIMIA indicated that, for the last three years, around 8,000 student visas have been cancelled each year.<sup>47</sup> Although the ESOS Evaluation Report noted that in 2003 the actual number of student visa cancellations (8,243) represented a small proportion of the total number of international students in Australia (303,324), it considered that the overall level of student visa cancellation was 'too high'.<sup>48</sup> Ms Rost pointed out that student visa cancellations represented around one-third of total visa cancellations.<sup>49</sup>

10.35 Nevertheless, DIMIA's 2004-05 Annual Report noted that 'since the student visa reforms of 2001 there has been a steady improvement in compliance levels against all key indicators'.<sup>50</sup> In particular, DIMIA reported that 'the number of student visa holders who became unlawful in 2004-05 was 1,514, a 33 per cent decrease on the 2003-04'.<sup>51</sup>

10.36 A representative of DIMIA explained to the committee that DIMIA was working to ensure that it got the 'balance right' in relation to student visa cancellations. The representative noted that DIMIA was consulting with industry, DEST and other government agencies (particularly state government agencies) with a view to making improvements in this area. The representative was hopeful that:

...as a result of those consultations, a set of arrangements will emerge which is both suitable to the industry and also suitable to ensuring immigration integrity.<sup>52</sup>

### ***Appeals of student visa cancellations***

99.1 The committee heard that a related problem is the high, and growing, levels of appeals of student visas. For example, Ms Rost estimated that 12% of all students with visa cancellations appeal to the MRT.<sup>53</sup> The ESOS Evaluation Report noted that there has been a growth in the number of appeals to the MRT in relation to cancellations of

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46 ESOS Evaluation Report, p. 153.

47 DIMIA answers to Questions on Notice, received 11 October 2005, p. 2. Note that as a result of the case of *Uddin V MIMIA* [2005] FMCA 841 (7 June 2005), some of these visa cancellations may have been ineffective and subsequently reversed. See DIMIA, answers to Questions on Notice, received 11 October 2005, p. 65.

48 ESOS Evaluation Report, p. 153.

49 Ms Michaela Rost, *Submission 220*, p. 11. DIMIA confirmed this statistic in answers to Questions on Notice, received 11 October 2005, pp 2-3.

50 DIMIA *Annual Report 2004-05*, p. 66; see also DIMIA, *Committee Hansard*, 11 October 2005, p. 12.

51 DIMIA *Annual Report 2004-05*, p. 66.

52 *Committee Hansard*, 11 October 2005, p. 10.

53 Ms Michaela Rost, *Submission 220*, p. 11.

student visas.<sup>54</sup> The ESOS Evaluation Report commented on the high proportion of visa cancellations set aside by the MRT — 'averaging 39 per cent over the last three years.'<sup>55</sup> The committee notes that this effectively means that over one in three cancellation decisions by DIMIA which are appealed in the MRT are overturned. The committee considers that this rate is unacceptably high, particularly given the consequences suffered by students whose visas are wrongly cancelled. These consequences include personal and financial hardship for both the student and their family, not to mention the possibility of ending up in immigration detention.

10.37 These problems are exacerbated by the delays in finalising appeals in relation to those cancellations. For example, the ESOS Evaluation Report found that:

This high rate [of visa cancellations being set aside] is compounded by the lengthy time taken to finalise appeals, which in 2003–04 averaged five and a half months.<sup>56</sup>

10.38 DIMIA responded to these concerns by telling the committee that:

All student visa cancellation cases are allocated Priority 1 (highest priority) status, and the Tribunal aims to finalise student visa cancellation cases within 90 calendar days... In 2004-05, the average processing time for all student visa cancellation cases was 152 calendar days. For applicants in detention, the average processing time was 91 calendar days.<sup>57</sup>

10.39 DIMIA also noted that applicants can contribute to delays:

In individual cases, there may be requests from applicants for hearings to be rescheduled or for applicants to be given more time to present submissions or further evidence.<sup>58</sup>

10.40 Nevertheless, the ESOS Evaluation Report found that the rates and timeliness of appeals:

... imposes financial and emotional burdens on students, costs on DIMIA and providers dealing with visa cancellation issues, and unnecessary administrative complexities for those managing international student programmes.<sup>59</sup>

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54 ESOS Evaluation Report, p. 153; see also Ms Michaela Rost, answers to Questions on Notice, 28 October 2005, p. 9.

55 ESOS Evaluation Report, p. 153; see also DIMIA answers to Questions on Notice, 11 October 2005, p. 66 and DIMIA answers to Questions on Notice received 5 December 2005, p. 105. This compares with the evidence of Ms Michaela Rost, *Committee Hansard*, 27 September 2005, p. 3 – Ms Rost estimated that only 5-10% of students who appeal their visa cancellations are successful.

56 ESOS Evaluation Report, p. 153.

57 DIMIA answers to Questions on Notice received 5 December 2005, p. 105.

58 DIMIA answers to Questions on Notice received 5 December 2005, p. 105.

59 ESOS Evaluation Report, p. 153.

10.41 Ms Rost also told the Committee that students with cancelled visas can end up resorting to other avenues, such as applications for refugee status, which are unlikely to be successful, and merely result in further appeals and time in detention.<sup>60</sup>

### **Administration and enforcement issues – recent cases**

10.42 The committee was also told of two recent Federal Court cases which have highlighted concerns about DIMIA's approach to administration and enforcement of student visas.

10.43 The first case, *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>61</sup> related to notices given to student visa holders. According to DIMIA, the court in this case found that:

... a defective form was used to advise some students that they had breached their conditions. The court found the form did not meet mandatory legislative requirements setting out to whom and where students need to report to DIMIA after being notified that they had breached their conditions (the form indicated students should report to a compliance officer when it should have said to any DIMIA officer and it also indicated the nearest specific DIMIA office when it should have said any DIMIA office).<sup>62</sup>

10.44 DIMIA explained that the relevant form was revised in July 2005, but that the case affected all cancellations of student visas under section 137J of the Migration Act between May 2001 and 16 August 2005. DIMIA told the committee that it had:

...decided that the best way to deal with this situation was to reverse on DIMIA systems all section 137J cancellations recorded in this period.<sup>63</sup>

10.45 DIMIA continued:

Some 8,450 section 137J cancellations were reversed. Most such visas would have in any case expired and some people have other visas. As at 4 October 2005, there are 625 people in Australia with a current resurrected student visa.<sup>64</sup>

10.46 DIMIA also told the committee that DIMIA would be seeking a single blanket debt waiver for students found to be affected by the *Uddin* decision.<sup>65</sup> Finally, DIMIA

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60 Ms Michaela Rost, *Submission 220*, pp 24-25.

61 [2005] FMCA 841 (7 June 2005).

62 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65.

63 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65.

64 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65.

65 DIMIA answers to Questions on Notice, received 31 October 2005, p. 2.

noted that it had developed a 'comprehensive information campaign to advise students who may be affected by the decision' and its consequences.<sup>66</sup>

10.47 However, the committee understands that most of the 8,450 students affected by DIMIA's actions have left Australia and returned home, presumably after some considerable cost to themselves and their families. The Committee also understands that those affected students located by DIMIA would be advised that they could return to study if their institutions would have them. If not, or if their visas had expired, they would be offered bridging visas, while they applied for a regular visa.<sup>67</sup>

10.48 More troubling to the committee was the recent case of *Minister for Immigration & Multicultural & Indigenous Affairs v Alam*,<sup>68</sup> where the Federal Court considered the work limits condition on student visas. This case highlighted considerable concerns in relation to DIMIA's approach to compliance and enforcement of student visa conditions. For example, the LIV suggested that the case:

... identified alarming concerns about DIMIA's 'manner of its enforcement' of student visa conditions which 'go beyond the terms of the regulation'.<sup>69</sup>

10.49 The case concerned Mr Alam, whose student visa was cancelled after DIMIA officers came to his home, looking for someone else, and subsequently searched Mr Alam's room and belongings.<sup>70</sup> During that search, the officers found payslips and then cancelled Mr Alam's student visa on the basis of their interpretation that he had breached condition 8105 of his visa by working 22¼ hours in a week, rather than the permitted 20 hours.<sup>71</sup>

10.50 The main issue in question in this case related to the definition of a 'week'. However, in coming to its decision (to dismiss the Minister's appeal), the Federal Court was very critical of the treatment of Mr Alam and the conduct of DIMIA officers. In particular, Justice Wilcox felt the case raised 'disturbing questions'.<sup>72</sup> He

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66 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65; also DIMIA answers to Questions on Notice received 5 December 2005, p. 108; and DIMIA website 'Important Information for students who have had their student visas automatically cancelled between May 2001 and 16 August 2005', at <http://www.immi.gov.au/study/overview/student visa cancel.htm> (accessed 31 October 2005).

67 See Joseph Kerr, 'Another bad mark for Immigration', *Sydney Morning Herald*, 16 September 2005, p. 1; also Jewel Topsfield, 'Immigration bungle sends 8000 students home', *The Age*, 16 September 2005, p. 1.

68 [2005] FCAFC 132 (23 July 2005).

69 Law Institute of Victoria, *Submission 206*, p. 12; referring to [2005] FCAFC 132 (23 July 2005); see also Ms Michaela Rost, *Submission 220*, pp 17-19.

70 For further information on DIMIA's 'compliance field operations' in relation to students, see DIMIA, answers to Questions on Notice, received 11 October 2005, pp 67-68.

71 [2005] FCAFC 132 (23 July 2005), see discussion by Wilcox J at para 7.

72 [2005] FCAFC 132 (23 July 2005), para 11.

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described the relevant migration regulation as providing a 'drastic, non-discretionary penalty'.<sup>73</sup> However, Justice Wilcox further commented that:

Concerns about this case go beyond the terms of the regulation. They extend to the manner of its enforcement. By what right did the DIMIA officers enter and search Mr Alam's home and take away his payslips? They had no search warrant. Nothing in the *Migration Act 1958* (Cth) confers on DIMIA officers such extraordinary powers. Counsel for the Minister was unable to point us to any legislative provision authorising such conduct.<sup>74</sup>

10.51 Justice Wilcox continued:

Even if the DIMIA officers had power to do what they did, why did they act in such a heavy handed fashion? Mr Alam's request to be allowed to put on a shirt before he was taken to Lee Street was entirely reasonable. Unless it was to humiliate him, what reason could the DIMIA officers have had to refuse this request? After his interrogation, Mr Alam was informed he would be detained unless he could put up a \$10,000 bond. It was unlikely in the extreme that he was carrying that amount of money on his person, yet he was refused the opportunity of telephoning his sister for assistance. What reason could there have been for that refusal?<sup>75</sup>

10.52 Finally, Justice Wilcox observed:

[Visa] control should be firm, but it should be exercised in a fair and courteous manner. Inappropriate regulatory provisions and heavy-handed enforcement are likely adversely to affect our international reputation and ultimately to undermine the overseas student program itself.<sup>76</sup>

10.53 DIMIA acknowledged that the Full Federal Court in this case was 'highly critical of alleged conduct by departmental officers', and told the committee that the allegations 'are taken seriously by the Department', as detailed in Chapter 2.<sup>77</sup> DIMIA told the Committee that as a response to criticisms about its compliance actions, \$50.3 million would be spent to establish a College of Immigration Border Security and Compliance in 2006. DIMIA explained:

This college will provide new compliance and detention staff with a 15 week induction program and existing staff in border security and compliance areas will complete regular refresher training each year.<sup>78</sup>

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73 [2005] FCAFC 132 (23 July 2005), para 13.

74 [2005] FCAFC 132 (23 July 2005), para 16.

75 [2005] FCAFC 132 (23 July 2005), para 17; see also Ms Michaela Rost, *Submission 220*, pp 17-19 and *Committee Hansard*, 27 September 2005, p. 7 and Ms Jockel, Law Council of Australia, *Committee Hansard*, 27 September 2005, p. 81.

76 [2005] FCAFC 132 (23 July 2005), para 18.

77 DIMIA answers to Questions on Notice received 5 December 2005, p. 34.

78 DIMIA answers to Questions on Notice received 5 December 2005, p. 34.

10.54 DIMIA further explained that 'there will also be enhanced training for compliance and detention staff in the period leading up to the establishment of the college,' and that 'DIMIA is also reviewing its procedures and policy to enhance openness and accountability, and improve its service to clients.'<sup>79</sup>

### **Detention of students**

10.55 Another concern raised with the committee was that some international students, whose visas are cancelled, end up in immigration detention. Ms Michaela Rost was concerned the consequences can be quite severe for a student whose visa is cancelled:

...they become unlawful citizens and may be detained before being required to leave the country. If they then decide to contest the alternative of deportation but cannot afford a bond of up to \$10,000 for the granting of a bridging visa, some overseas students have continued a nightmarish journey in detention rather than returning home to face disgrace for their family, huge education debts incurred, a totally ruined reputation and great mental stress.<sup>80</sup>

10.56 Ms Rost acknowledged that only a minority of students end up in longer-term detention – usually those who decide to contest their visa cancellation and deportation.<sup>81</sup> Nevertheless, Ms Rost suggested that very few Australians, including those in educational institutions, are aware that international students have been, and are being, detained under Australia's immigration detention system.<sup>82</sup> Mr Rost claimed that: 'Australia's unique mandatory detention policy makes this the only country in the world to incarcerate some of its full fee paying international students'<sup>83</sup> and that:

Students detained for both short and long terms have been severely punished for the relatively very minor offences constituting a breach and are held strictly accountable.<sup>84</sup>

10.57 However, Ms Rost noted that it has been difficult to establish how many students with cancelled visas have been detained in immigration detention facilities, and the length of the detention of those students.<sup>85</sup>

10.58 The committee notes that DIMIA has previously advised that:

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79 DIMIA answers to Questions on Notice received 5 December 2005, p. 35.

80 *Committee Hansard*, 27 September 2005, p. 3.

81 Ms Michaela Rost, *Submission 220*, p. 11.

82 Ms Michaela Rost, *Submission 220*, p. 1 and *Committee Hansard*, 27 September 2005, p. 3.

83 Ms Michaela Rost, *Submission 220*, p. 11.

84 *Committee Hansard*, 27 September 2005, p. 3.

85 Ms Michaela Rost, *Submission 220*, p. 11 and *Submission 220A*, p. 1; also *Committee Hansard*, 27 September 2005, p. 3.

Generally overseas students are only detained for short periods and are often granted bridging visas or if appropriate they are removed within a short time of becoming lawful. If a former student visa holder is detained for anything more than a matter of days, it is usually because of issues which are not directly relevant to their stay as a student.<sup>86</sup>

10.59 Further, DIMIA also informed the committee that 'most persons who have had a student visa cancelled are granted a bridging visa pending the outcome of the MRT's review'.<sup>87</sup>

10.60 In terms of the time spent in detention, DIMIA reported to the committee that between September 2002 and 21 October 2005, 1,375 people were detained 'as a direct result of overstaying their student visa or having their student visa cancelled'.<sup>88</sup>

10.61 DIMIA provided information on the length of time spent in detention by these 1,375 people (see Table 10.1 below). The committee notes that other evidence provided by DIMIA indicated that one former student visa holder (who was subsequently released on a Bridging Visa E) spent 2 years and 4 months in detention.<sup>89</sup>

**Table 10.1: Periods of detention – former student visa holders**

Period of detention	Number of People Detained
Less than a day	34
1 to 7 days	596
1 to 4 weeks	514
1 – 3 months	168
3 – 6 months	32
6 – 12 months	24
1 year or more	7

Source: DIMIA answers to Questions on Notice, 5 December 2005, p. 104.

86 Budget Estimates May 2005, answer to question on notice No. 28.

87 DIMIA answers to Questions on Notice received 5 December 2005, p. 105.

88 DIMIA answers to Questions on Notice received 5 December 2005, p. 104. DIMIA noted that, of these people, 17 remained in immigration detention as at 21 October 2005. Note that DIMIA has also previously advised that around 2,310 former student visa holders were detained between 1 January 2001 and 22 July 2005: Budget Estimates May 2005, answer to question on notice No. 28.

89 Answers to Questions on Notice, received 31 October 2005, p. 4; see also Ms Michaela Rost, *Submission 220*, pp 27-33.

10.62 As both Ms Rost and DIMIA pointed out, there have been a wide range of outcomes in the cases of former student visa holders held in detention, including: the grant of a bridging visa; the cancellation being overturned; a criminal justice visa grant; departure from Australia; or the grant of a temporary or permanent substantive visa. For example, according to DIMIA, during 2004-05:

- 155 former student visa holders who had been detained subsequently departed at their own expense;
- 244 former student visa holders were recorded as having been removed (some of these may have departed voluntarily); and
- 153 former student visa holders were released from detention on a Bridging Visa E.<sup>90</sup>

10.63 However, Ms Rost argued that former student visas holders who are released on a Bridging Visa E will still have considerable problems completing their studies, because this visa 'prohibits work, study or Medicare'.<sup>91</sup>

10.64 Further, the committee also heard that many students who have been held in immigration detention have accrued detention debts. For example, Ms Rost gave the example of a former student visa holder who was detained for two years, and who accrued a detention debt of \$97,000.<sup>92</sup> In answers to Questions on Notice, DIMIA reported that, as at 7 October 2005, there were 17 students in detention who had accrued a debt. The total amount of debt accrued by these students was \$394,447. However, DIMIA declined to provide the details of the individual amounts accrued by each student 'because it would enable the identification of individuals'.<sup>93</sup>

### **Committee view**

10.65 The committee acknowledges concerns raised in evidence in relation to the treatment of overseas students under the Migration Act and Regulations.

10.66 In particular, the committee is concerned by the levels of student visa cancellations, and the fact that a number of students are finding themselves in immigration detention. The committee considers that this has negative consequences both in terms of the personal impacts on overseas students, as well as the negative impacts on the wider 'education export industry'.

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90 DIMIA answers to Questions on Notice, received 31 October 2005, pp 3-4; see also Ms Michaela Rost, *Submission 220*, p. 1.

91 Ms Michaela Rost, *Submission 220*, p. 20. Bridging visas are also discussed in Chapter 8.

92 Ms Michaela Rost, *Submission 220*, pp 25 and 28.

93 DIMIA answers to Questions on Notice, received 31 October 2005, p. 3; see also pp 2-3 for further evidence in relation to the process for the waiver of detention debts.

10.67 The committee recognises the importance of compliance with student visa conditions – particularly academic performance and attendance requirements. However, the committee believes that there are considerable problems with the restrictive and inflexible nature of the legislative provisions relating to student visas. In particular, the committee is concerned that the mandatory visa cancellation provisions under the Migration Regulations allow for no discretion and little consideration of the circumstances surrounding an alleged breach of a student visa.

10.68 The committee is pleased to note that the Migration Regulations were amended on 8 October 2005 to allow for 'exceptional circumstances beyond the student's control to be taken into consideration prior to cancelling a student visa for a breach of condition 8202' (which relates to academic and performance requirements). However, the Committee considers that such changes could have gone further.

10.69 For example, in relation to the work limits conditions (Conditions 8104 and 8105), the Committee is satisfied that the policy of imposing work limits on students is appropriate. However, the Committee agrees with the evidence that the mandatory cancellation provisions for an alleged breach of such work limits are draconian and heavy-handed. The Committee notes that DIMIA acknowledged that the lack of flexibility in the regulations in this area could be addressed.<sup>94</sup>

10.70 The committee considers that a more flexible and compassionate approach should be taken in relation to the cancellation of student visas. The committee also believes that this may help to reduce the high levels of student visa cancellations and, in turn, reduce the number of appeals of such cancellations and the rates of detention of international students. In particular, the committee recommends that the Migration Act and Regulations be amended to allow for greater flexibility and discretion in dealing with breaches of conditions of student visas.

10.71 Specifically, the committee recommends that consideration be given to replacing the current provisions requiring mandatory cancellation, with a rebuttable presumption in favour of cancellation. This would satisfy the legitimate policy objectives of creating an incentive for compliance and thereby help to prevent abuse of the student visa system. It would however, introduce an element of flexibility in cases where a student can show, in all the circumstances, that the visa should not be cancelled.

### **Recommendation 61**

**10.72 The committee recommends that the Migration Act and Regulations be amended to allow for greater flexibility and discretion in dealing with breaches of the conditions of student visas.**

10.73 In the committee's opinion, another key problem with the student visa regime relates to the inappropriate administration and enforcement of the Migration Act and

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94 *Committee Hansard*, 11 October 2005, p. 9.

Regulations. Indeed, the committee considers that the issues raised in relation to the treatment of student visa holders are a good example of the wider cultural problems within DIMIA. The committee notes DIMIA's evidence that it is working to address these issues and encourages DIMIA to continue its efforts in this area.

10.74 Finally, the committee notes that the recommendations of the ESOS Evaluation Report may also assist in addressing many of the issues and concerns raised in relation to student visas. The committee therefore recommends that the recommendations of the ESOS Evaluation Report continue to be implemented as a high priority.

### **Recommendation 62**

**10.75 The committee recommends that the recommendations of the *Evaluation of the Education Services for Overseas Students Act 2000* continue to be implemented as a high priority.**

**Senator Patricia Crossin**

**Chair**