



Australian Government

Department of Education and Training

Explanatory Overview:

**Education Services for Overseas Students
Amendment (Streamlining Regulation)
Bill 2015**

and

**Education Services for Overseas Students
(Registration Charges) Amendment
(Streamlining Regulation) Bill 2015**

ISBN

978-1-76028-226-4 [PDF]

978-1-76028-227-1 [DOCX]



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The document must be attributed as the *Explanatory Overview: Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 and Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015*.

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1 Purpose of the proposed legislative changes

The Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 (the Streamlining Regulation Bill) seeks to introduce measures that will reduce the regulatory burden on education institutions and simplify assessment and registration processes in the *Education Services for Overseas Students Act 2000* (ESOS Act).

The Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015 (the Charges Bill) makes minor consequential changes to *Education Services for Overseas Students (Registration Charges) Act 1997* (Registration Charges Act) arising from the Streamlining Regulation Bill.

The Bills are the culmination of extensive consultation with international education stakeholders over 2014 and early 2015 to identify the priority areas for reforming the Education Services for Overseas Students (ESOS) legislative framework to make it more contemporary and support the continued growth of international education, Australia's largest non-resource export, by reducing unnecessary red tape.

The following sections provide an overview of the Bills' measures to assist the ongoing public consultation process.

2 Streamlining the ESOS Act with other legislation

A number of the measures proposed in the Streamlining Regulation Bill are designed to improve the existing quality assurance frameworks across both domestic and international education. They reflect the changes to the education quality assurance system since the establishment of the Tertiary Education Quality and Standards Agency (TEQSA) and the Australian Skills Quality Authority (ASQA). The proposed measures also aim to increase flexibility for education institutions and reduce their administrative burden. The changes are outlined in more detail below.

2.1 Streamlining the roles of government agencies under the ESOS Act

Current arrangements

Many of the functions of the Minister and the Secretary under the ESOS Act have been delegated to TEQSA and ASQA. TEQSA and ASQA also have roles as the designated authority for higher education providers and vocational education and training (VET) organisations under the ESOS Act. The states and territories have a designated authority role under the ESOS Act in respect of providers of school courses to overseas students, although the states and territories are not delegated any powers. The arrangements in the ESOS Act reflect a time when the states and territories undertook the majority of quality assurance activity (as a designated authority) for providers of education and training to overseas students, in their respective jurisdictions. While the division of responsibilities between the Minister, the Secretary and the designated authorities suited those regulatory arrangements, this now creates complexity and duplication in work performed by TEQSA and ASQA.

Proposed amendments

The measures in the Streamlining Regulation Bill are designed to expressly recognise, in the ESOS Act, the roles performed by the Minister, the Secretary, TEQSA, ASQA, and the states and territories. They also aim to remove the heavy reliance on delegations made under the current ESOS Act, as well as remove the duplication in work performed by TEQSA and ASQA.

The Streamlining Regulation Bill proposes to introduce a new concept— the ‘ESOS agency’—which will be used to refer to the Secretary, TEQSA and ASQA as well as any other agency that is prescribed by legislative instrument as an ESOS agency.

To streamline the administrative functions in the ESOS Act, the proposed amendments will remove the concept of a designated authority. However, to ensure the ESOS Act maintains the key role currently undertaken by state and territory agencies in respect of providers of school courses to overseas students, they will be referred to as the 'designated State authority' for a provider. The Streamlining Regulation Bill will also include a provision to make it clear that nothing in the ESOS Act creates or places a duty on a designated State authority, to address any potential constitutional law issues associated with the Bill.

2.2 Registration and assessment of applications

Current arrangements

Currently the ESOS Act requires that the Secretary register a provider on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) after the Secretary has received a recommendation from the relevant designated authority, if the requirements in the Act have been met.

Proposed amendments

REGISTRATION PROCESS

The proposed measures in the Streamlining Regulation Bill amend the ESOS Act so that a provider must apply to their ESOS agency for registration or for the renewal of their registration. The Streamlining Regulation Bill sets out the requirements that a provider must satisfy in order to be registered or to have their registration renewed. These registration requirements are similar to the list of factors currently in the ESOS Act.

Under the provisions proposed in the Streamlining Regulation Bill, if a provider is a school provider, the designated State authority for the provider will give a certificate to the ESOS agency that sets out the authority’s view on matters relevant to the registration or renewal of registration. This is referred to as a ‘DSA assessment certificate’, issued by the designated State authority (DSA).

When assessing an application for registration or renewal of registration, the ESOS agency must use a risk management approach when making its decision, including whether to impose, vary or remove conditions on that provider’s registration.

ADDING COURSES AT LOCATIONS

The process in existing section 9AG of the ESOS Act will also be streamlined so that providers will apply directly to their ESOS agency to add courses and locations to their registration. The ESOS agency will have discretion in making these additions, but must use a risk management approach. If the application is from a school provider, the designated State authority for that provider will give a DSA recommendation certificate to the ESOS agency, making a recommendation that the course for the school should be added to CRICOS. The DSA recommendation certificate will also indicate any conditions that should be imposed on that provider's CRICOS registration.

ABILITY TO USE INFORMATION IN THE ESOS AGENCY'S POSSESSION

The Streamlining Regulation Bill also proposes to amend the ESOS Act so that all ESOS agencies can use any relevant information in the possession of that agency when considering an application for registration or renewal of registration or to add a course at a location to a registration. However, the ESOS agency will be able to request additional information to allow further consideration of an application. This amendment is intended to allow ESOS agencies to streamline their quality assurance processes and limit requests for information from education institutions when they are assessing a provider's application, particularly if the ESOS agency has recently obtained relevant information.

POWERS RETAINED BY MINISTER AND SECRETARY

While the creation of an ESOS agency removes the duplication in roles performed by the Secretary, TEQSA and ASQA, the amendments in the Bill ensure that the Minister and the Secretary retain powers necessary for the proper administration of the ESOS Act. These powers relate primarily to the appointment of the Tuition Protection Service (TPS) Director and TPS Advisory Board, the making of legislative instruments, and the establishment and maintenance of CRICOS and the Provider Registration and International Student Management System (PRISMS).

2.3 Aligning registration periods

Current provisions

Currently the ESOS Act requires a provider to be registered for a specified period of more than two years but no more than five years (section 9AC). Under the *Tertiary Education Quality and Standards Agency Act 2012* (TEQSA Act) and the *National Vocational Education and Training Regulator Act 2011* (NVETR Act), higher education providers and registered training organisations may be registered for up to seven years.

Proposed amendments

The Streamlining Regulation Bill proposes amendments to the ESOS Act to remove the minimum two-year registration period and allow for a maximum registration of seven years, consistent with the TEQSA Act and the NVETR Act. The ESOS agency for a provider (that is, TEQSA, ASQA, or the Secretary as the ESOS agency responsible for registering providers of school courses) will then be able to determine the most appropriate period of registration for an individual provider. This will give TEQSA and ASQA flexibility to align the registration periods under the ESOS Act with the

registrations under the TEQSA Act and the NVETR Act, where appropriate and agreed by the provider.

The removal of the minimum registration period requires consequential amendments to the arrangements for the entry to market charge. These will ensure that an education provider registering on CRICOS pays all entry to market charges but is not charged more than once if its registration period is less than two years and it seeks renewal. These amendments are in the Charges Bill.

2.4 Continuation provisions

Current provisions

If a provider's registration has expired, the ESOS Act currently allows the provider to continue to teach to students who were enrolled in a course before the registration expired (subsection 9AC(6)).

Similarly, where a provider has applied for their registration to be renewed, a recommendation has been made by the designated authority but the Secretary has not made a final decision about the renewal before the registration expires, the registration is taken to continue until a decision has been made (subsection 9AC(5)).

Proposed amendments

The proposed amendments in the Streamlining Regulation Bill maintain the arrangement that enables a provider to 'teach out' students where its registration has expired. However, the proposed amendments make it clear that a provider cannot recruit or enrol new students in a course after the provider's registration expires.

As noted above, the provider will now be required to apply to an ESOS agency to renew its registration. Once the provider has applied to the ESOS agency, the provider's registration will continue until the ESOS agency has made a decision on the provider's application.

2.5 Reminder notices for registration charges

Current provisions

Currently, the TPS Director must issue a reminder notice to a registered provider who has not paid an amount of the TPS levy by the end of the due day (section 53D). There is no similar reminder notice mechanism for payment of the annual registration charge or the entry to market charge. Currently a late payment results in an automatic suspension.

Proposed amendments

The Streamlining Regulation Bill proposes an amendment to address the discrepancy between the arrangements for the payment of the TPS levy and those for the annual registration and entry to market charge. This amendment, which will be consistent with the existing processes set out in section 53D of the ESOS Act for the payment of the TPS levy, will ensure providers receive a reminder notice if their payment is late.

2.6 Exempt providers

Current provisions

Currently, in various sections of the ESOS Act, certain providers are exempt from some provisions, such as the fit and proper requirement and related enforcement provisions.

Proposed amendments

The proposed amendments maintain the concept of exempt providers. However, for ease of reference, a new definition of ‘exempt provider’ will be included in the introductory sections of the ESOS Act.

2.7 Automatic suspension and cancellation of registration

Current provisions

Currently, where the designated authority or the Secretary is no longer satisfied that a provider (other than certain exempt providers) is fit and proper to be registered, the provider’s registration is automatically suspended for all courses at all locations (section 89A).

A registered provider is also automatically suspended if its approval from the designated authority to deliver courses to overseas students is suspended (section 89).

There are also arrangements in the ESOS Act relating to automatic cancellation where a provider’s approval is cancelled (section 91).

Proposed amendments

To ensure consistency, the amendments proposed in the Streamlining Regulation Bill will ensure that, if an ESOS agency is no longer satisfied that a provider is fit and proper to be registered or a designated State authority tells an ESOS agency that it is no longer satisfied that a registered provider is fit and proper to be registered, the registration of the provider will be automatically suspended for all courses at all locations. Following suspension, if the ESOS agency or the designated State authority for the provider becomes satisfied that the provider is fit and proper to be registered, the ESOS agency may give the provider a notice advising that the suspension will be removed upon the payment of a fee.

The automatic suspension for loss of approval from the designated authority to deliver to overseas students for whatever reason will no longer be available because the concept of designated authority is being removed from the ESOS Act

Where a provider’s approval is cancelled under another regulatory framework, the proposed amendments will ensure this is recognised under ESOS. For example, where a registered higher education or registered VET provider’s registration under their regulatory framework for domestic students has been cancelled or a course is no longer accredited, the new provisions ensure the automatic cancellation

of the registration of related courses on CRICOS. The amendments will also provide for the automatic cancellation of the registration of related courses on CRICOS where a school's approval by a designated State authority for a course or courses has ceased.

2.8 Authorised officer

Current provisions

During consultations on the *Reform of the ESOS framework* discussion paper, TEQSA and ASQA noted that the definition of 'authorised employee' in the ESOS Act does not align with their frameworks for monitoring and quality assurance activities under the TEQSA Act and NVETR Act.

Proposed provisions

The proposed amendments in the Streamlining Regulation Bill will align the three legislative frameworks in part by replacing the term 'authorised employee' in the ESOS Act with 'authorised officer', a term used in the TEQSA Act and NVETR Act. The 'authorised officer' will be defined to include all appropriate officer holders at TEQSA and ASQA, the Secretary's department and other ESOS agencies.

2.9 Breach of ELICOS and Foundation Program Standards

Current provisions

Currently the ESOS Act provides that the Minister may, by legislative instrument, make ELICOS Standards and Foundation Program Standards. The current ESOS Act does not explicitly state that action may be taken under Part 6 (Enforcement) against a registered provider if the provider is not complying with the requirements of the ELICOS Standards or the Foundation Program Standards.

Proposed provisions

The proposed amendment will clarify that enforcement action may be taken by an ESOS agency for a breach of either the ELICOS Standards or the Foundation Program Standards. Similarly, the monitoring and searching provisions in the ESOS Act will be extended to apply to determining compliance with the ELICOS Standards and Foundation Program Standards.

2.10 Publication of enforcement actions

Current provisions

Section 170A of the ESOS Act enables the Minister, Immigration Minister or Secretary to publish results of action taken under Part 6 (Enforcement) and Part 7 (Monitoring and searching providers) of the ESOS Act. The Secretary may decide the way in which the publication is made.

Proposed provisions

The proposed amendment in the Streamlining Regulation Bill will enable the ESOS agency, rather than the Minister, to publish information about action taken under Part 6 and Part 7 of the ESOS Act. The way in which the publication is made may now be specified by the Secretary in a legislative instrument.

2.11 Internal review

Current provisions

Section 176 of the ESOS Act currently allows for an application to be made to the Administrative Appeals Tribunal for the review of certain decisions made by the Minister, the Secretary or the TPS Director, including on the provider's registration. Both the TEQSA Act and the NVETR Act allow for an internal review process. ASQA and TEQSA have requested that the same process be included in the ESOS Act.

Proposed provisions

The proposed amendment will allow a provider to seek an internal review of certain decisions, as set out in the Streamlining Regulation Bill.

Providers will continue to be able to appeal a decision of the TPS Director in respect of the TPS Levy to the Administrative Appeals Tribunal.

2.12 Ministerial directions

To ensure appropriate oversight and consistency between the ESOS Act, the TEQSA Act and the NVETR Act, a new power will be given to the Minister to direct an ESOS agency in the performance of its functions under the ESOS Act. However, a direction is not permitted to be about or to relate to a particular provider or registered provider.

2.13 New TPS Director provisions

In discharging his or her functions, the TPS Director is privy to certain information on the activity of education providers and plays an important role in ensuring providers meet their obligations to students. The Streamlining Regulation Bill will allow the TPS Director to make a recommendation to an ESOS agency that the agency take enforcement action against a provider. The ESOS agency must consider the TPS Director's recommendation when deciding whether to take particular enforcement action.

A further measure to streamline administrative processes under the ESOS Act will allow the TPS Director to issue a production notice to an education provider in the TPS Director's own right. The process for the TPS Director will be consistent with the production notice powers given to ESOS agencies under the ESOS Act.

A further proposed provision will enable the TPS Director to be assisted by a 'TPS officer', who will have defined roles and responsibilities in that capacity. A 'TPS officer' is an APS employee in the department who assists the TPS Director in the performance of his or her functions or a consultant engaged by the TPS Director.

To remove any uncertainty the Streamlining Regulation Bill also contains an amendment to ensure the TPS Director is identified as an 'official' of the department within the meaning of the *Public Governance, Performance and Accountability Act 2013*.

2.14 National Code

The Streamlining Regulation Bill proposes minor amendments to sections 34 (purpose of the National Code) and 38 (contents of the National Code). The amendment to section 34 will more appropriately reflect the role of the National Code—that is, to provide nationally consistent standards and procedures for providers and persons delivering education and training services to overseas students. The amendment to section 38 will support future amendments to the National Code relating to agreements between providers and students, which will be designed to increase transparency and help students better understand their rights and obligations.

3 Reducing unnecessary red tape

3.1 Student default reporting

Current provisions

The ESOS Act sets out various requirements for education providers to report on incidents of a student default. Currently a registered education provider is required to report the default of an overseas student within five business days (section 47C) of the default occurring.

Education providers expressed a strong view during consultations and in written submissions to the *Reform of the ESOS framework* discussion paper that the requirement to report each instance of student default under section 47C within five business days is unnecessary because it frequently does not allow an accurate decision to be made on whether or not there has been a genuine student default. Under sections 47D and 47E the provider has four weeks to then meet its refund obligations to the student.

Proposed provisions

The proposal in the Streamlining Regulation Bill will repeal section 47C, removing the current requirement for providers to report student defaults. The potential risks associated with removing this requirement are low, particularly as there is already the ability to capture student movements under section 19.

To simplify the reporting process and minimise the reporting burden, the Streamlining Regulation Bill proposes that the current section 47H(1) be amended so that, where an education provider is required to pay a refund under existing section 47E, the provider will report on whether it has met those obligations to the Secretary and the TPS Director. However, if a written agreement is in place, the provider will not need to report to the Secretary and the TPS Director under section 47H.

3.2 Reporting changes to a student's study

Current provisions

Currently, section 19 of the ESOS Act requires each provider to report certain matters about accepted students (including student default) within 14 days of a specified event occurring.

Proposed provisions

The Streamlining Regulation Bill proposes to amend section 19 to extend the reporting period from 14 to 31 days, except for students under 18 years of age. Information about students under the age of 18 years will still need to be reported within 14 days given the importance of ensuring welfare arrangements are in place for students not residing with a parent or relative. This will ensure that changes in a student's course continue to be monitored for visa integrity purposes.

4 Improving risk management associated with the Tuition Protection Service

4.1 Collection of tuition fees

Current provisions

Currently all providers are prevented from receiving more than 50 per cent of a student's total tuition fees before the student commences the course unless the course has only one 'study period' (section 27). This limit on the collection of tuition fees prevents overseas students or their sponsor (such as in the case of a scholarship student) from paying more than 50 per cent of the tuition fees before a course commences, even if they wish to. This has been a cause of concern for the sector and was an issue raised during the department's consultations with stakeholders on potential reforms to ESOS. The current ESOS Act provisions also place a limit on when a provider can require further tuition fees before commencement of the student's second study period for the course.

The limits on the payment of tuition fees were introduced in the 2012 amendments to the ESOS Act and were associated with the introduction of the TPS. The purpose of these provisions was to limit financial risk to the TPS if an education provider defaulted or closed and could not meet its obligations to students, as well as to reduce the financial burden for students (section 27).

Proposed provisions

The Streamlining Regulation Bill proposes to amend section 27 to remove the restriction currently on students or third parties paying more than 50 per cent of tuition fees up front by allowing them to request to pay more. The current exception to the requirement in section 27 (for a course that has only one study period) has been amended so that the Bill now proposes an exemption for courses of 24 weeks or less duration. This is because the concept of study period, which was linked to this provision, will be removed (see below).

The restriction on the collection of any remaining tuition fees after the course commences will be removed from the ESOS Act.

4.2 Designated account

Current provisions

The limit on collecting more than 50 per cent of tuition fees prior to the student commencing the course was introduced in conjunction with a requirement under the ESOS Act that some providers hold those fees in a separate, designated account (sections 28 to 32). All providers administered by a state education authority as well as any other provider entitled to receive funds under a law of the Commonwealth for recurrent expenditure to provide education or training are exempt from the requirements in sections 28 to 32 of the ESOS Act.

The designated account requirement was a further risk management measure introduced at the same time as the TPS to ensure education providers did not overly rely on high levels of tuition fees collected before courses commenced. The measure was also designed to ensure that, if an education provider did default, there would be funds available for it to meet its refund (or alternative placement) obligations to students, or to pay the TPS to enable it to do so.

Proposed provisions

The amendment in the Streamlining Regulation Bill will remove the requirement for non-exempt providers to maintain and use a designated account. The amendment proposed is based on an assessment of the high regulatory burden on providers compared to the level of risk being managed through this measure.

Regulation impact assessment

The Office of Best Practice Regulation (OBPR) advised the department that a Regulation Impact Statement (RIS) would be required for the changes to these two TPS-related measures. The RIS has been submitted to OBPR for assessment.

The RIS notes that removing both the 50 per cent limit and designated account requirement at the same time could significantly increase risk. However, removing only the designated account requirement minimises the likely impact. Further, of the two requirements, the designated account imposes a far greater regulatory cost and applies to all private education providers, regardless of whether they are high, medium or low risk. Publicly funded providers are exempt. This requirement therefore has a significant market and competition impact.

The proposed amendments in the Streamlining Regulation Bill reflect the option that minimises risk and market impact by:

- allowing greater student choice with respect to the amount of tuition fees paid up front
- maintaining exemptions for shorter courses for all providers
- removing the highest regulatory (cost) burden (the designated account) for education institutions
- maintaining sufficient safeguards to support the sustainability of the TPS
- minimising administrative and implementation costs to government.

5 Removing the definition of study periods and associated reporting

Current provisions

Currently under the ESOS Act a study period can be no longer than 24 weeks. The concept of a study period is then linked to a number of requirements under the ESOS Act, including that registered providers make an agreement in writing with each overseas student for each course setting out the length of each study period and the amount of tuition fees payable for each study period in that course (section 22). This is more appropriately covered in standard 3 of the *National Code of Practice for Providers of Education and Training to Overseas Students 2007* (National Code), which requires education providers to have a written agreement with each student and to provide an itemised list of course fees payable by the student.

Proposed provisions

The Streamlining Regulation Bill proposes to repeal section 22, removing the requirement from the ESOS Act to make an agreement specifying the length of each study period and amount of tuition fees for each study period. The Bill also proposes to remove the definition of a study period entirely, as the specified period of up to 24 weeks is not consistent with other timeframes used in providers' business operations and has created administrative complexity.

While the National Code is currently under review, it is not proposed to remove the need for providers to indicate course (tuition and non-tuition) fees required from students, as well as the timeframes or dates to which those fees relate, in written agreements.

6 Transitional arrangements

The transition from the existing ESOS Act arrangements to those proposed in the Streamlining Regulation Bill and the Charges Bill will be finalised following consultation on the exposure draft of the Bills. It is expected that the transitional and implementation measures in the final Bill will reflect—as far as possible—the intent of the policy changes, as follows:

- all existing registrations on CRICOS as well as conditions on registration or suspensions of registration will continue from commencement of the amendments
- if a provider or registered provider has applied for registration or re-registration with a designated authority prior to commencement of the amendments and the application has not been dealt with by the relevant ESOS agency, providers will need to reapply. However, new provisions will enable the ESOS agency to take into consideration any relevant information in its possession when considering the application for registration
- any enforcement action underway prior to commencement of the amendments will continue
- the ability for an ESOS agency to undertake an internal review will apply to decisions made after the date of commencement of the amendments in the Streamlining Regulation Bill.