Law Council
OF AUSTRALIA

Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024

Senate Standing Committee on Education and Employment

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Acknowledgements

The Law Council would like to thank the Migration Law Committee of its Federal Dispute Resolution Section for its valuable input into this submission.

Introduction

1. The Law Council supports the intention of the Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024 (Cth)[1] (the **Bill**), which will amend the *Education Services for Overseas Students Act 2000* (Cth) (**ESOS Act**) to support the quality, integrity and sustainable growth of the international education sector.

2. The Bill seeks to address issues identified in the *Rapid Review into the Exploitation of Australia's Visa System*[2] (the **Nixon Review**) and the Government's *Migration Strategy*[3] by introducing:

   - further mandatory considerations in assessing whether an education provider is fit and proper to be registered;
   - a requirement for the provision of information about education agents and education agent commissions to the Department of Education;
   - further eligibility requirements to be satisfied prior to registration for conducting a course for international students;
   - circumstances in which a provider's registration can be automatically suspended or cancelled;
   - Ministerial discretionary power to limit enrolments, and to either suspend or cancel a provider's registration for a fixed period in relation to specific courses; and
   - automatic suspension or cancellation of courses, either specified or of a class identified by the Minister in a legislative instrument.[4]

3. The Law Council, with particular thanks to its Migration Law Committee, provides its submission with emphasis on observing principles of procedural fairness, and with regard for the impact on international students and their migration status when studying in Australia on a visa.

Overarching comments on how changes to the ESOS Act may affect international students

4. International students make up a large cohort of Australia's migration program and, as detailed in the Nixon Review, are liable to be taken advantage of by education agents.[5] The Nixon Review reports that '[a]pproximately 75 percent of international students obtain the assistance of an education agent (many of whom are based overseas) for research, enrolling and applying for a visa in Australia'.[6]

[1] Parliament of Australia, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024. <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7191>.
[2] Christine Nixon AO, APM, *Rapid Review into the Exploitation of Australia's Visa System* (Report, 31 March 2023) <https://www.homeaffairs.gov.au/reports-and-pubs/files/nixon-review/nixon-review-exploitation-australia-visa-system.pdf>.
[3] Commonwealth of Australia, *Migration Strategy* (Report, December 2023) <https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf>.
[4] Explanatory Memorandum, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024.
[5] Nixon (n 2) 15.
[6] Ibid.

5. International students can apply for a visa to permit them to stay in Australia while they study. Student visa applications take, on average, 86 days to be determined by a primary decision-maker of the Department of Home Affairs (the **Department**).[7]

6. To be granted a student visa, the applicant must satisfy criteria including that they are a genuine applicant for entry and stay as a student.[8] To satisfy the criteria, the student visa applicant needs to be enrolled in a course at the time of consideration.[9]

7. For applications made before 23 March 2024, but not finally determined by that date, Ministerial Direction No. 108[10] (**MD108**) provides guidance to decision-makers, including merits review bodies, on assessing whether a student is a genuine temporary entrant (which criterion has been amended to a 'genuine entry and stay requirement' under the Migration Regulations).

8. Ministerial Direction No. 106[11] (**MD106**) provides guidance to decision-makers under the *Migration Act 1958* (Cth), including merits review bodies, for assessing the genuine entry and stay requirements for student visa and student guardian visa applications lodged after its commencement on 23 March 2024.

9. A decision-maker also must have regard to the value of the course to the primary applicant's future, including whether it will assist the primary applicant to obtain employment in their home country or another country, including in relation to remuneration.[12]

10. If an international student is enrolled in a course but is refused the visa for another reason by the primary decision-maker, they are able to seek merits review of the decision in the Administrative Appeals Tribunal (**AAT**) (soon to be Administrative Review Tribunal) if they are onshore. Average processing times for student visa cancellations (50% finalised within 432 days; 95% finalised within 532 days) and refusals (50% finalised within 302 days; 95% finalised within 687 days)[13] in the AAT are up to two years, in which time any changes to a student visa applicant's enrolment status can affect the success of that application.

11. The changes introduced by the Bill are capable of affecting the success of student visa applications assessed against either MD106 or MD108. This is because a student's enrolment in a course is subject to cancellation, due to any suspensions or cancellations introduced by the Bill to courses or registrations of the provider with whom they are seeking to study.

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[7] Visa processing times (homeaffairs.gov.au).
[8] *Migration Regulations 1994* (Cth), Schedule 2, r 500.212, Schedule 3, cr 8202.
[9] *Migration Regulations 1994* (Cth), Schedule 3, cr 8202.
[10] Direction Number 108 – Assessing the Genuine Temporary Entrant Criterion for Student Visa and Student Guardian Visa Applicants (21 March 2024) <https://immi.homeaffairs.gov.au/Visa-subsite/files/direction-no-108.pdf>.
[11] Direction Number 106 – Assessing the Genuine Entry and Stay Requirements for Student Visa and Student Guardian Visa Applicants (21 March 2024) cl 8(5) <https://immi.homeaffairs.gov.au/Visa-subsite/files/direction-no-106.pdf> ('**MD106**').
[12] E.g. MD106 (n 12) cl 8(5).
[13] Administrative Appeals Tribunal, 'Migration and Refugee Division processing times' (online) <https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times>.

12. Further changes came into effect on 1 July 2024, where some temporary visa holders, including holders of Visitor (600) visas and Temporary Graduate (Subclass 485) visas, can no longer apply for a Student (Subclass 500) visa while they are in Australia.[14]

13. While we commend the Government's intention to tighten regulation of the international education sector, we make a general observation that it may not be appropriate for the Government to dictate what courses should be provided for international students when held against the contribution of those courses to Australia's skilled workforce needs. This is particularly so given students may have an interest in studying courses that also benefit them on return to their home country.

Provisions of the Bill

Item 4, Part 1

14. The Law Council is supportive of the inclusion of onshore and offshore education agents in the changes at item 4 of the Bill to the definition of 'education agent' via an activity-based formulation. To ensure an effective system for the regulation of education agents, the Government should support these legislative amendments with resources to introduce a system of registration for onshore and offshore agents.

Education agents should be regulated through a register system

15. The Nixon Review recommended that the Government consider regulating onshore and offshore education agents used by Australian education providers.[15] This recommendation reflects the reality that many education agents are based overseas, and that the costs associated with establishing a system of registration are outweighed by the benefits of addressing the known integrity risks with education agents.[16] The Nixon Review cites the United States as an example jurisdiction that has successfully introduced a regulation framework for education agents.[17]

16. It is unclear whether similar regulation is intended through the proposed amendments to the ESOS Act. This would be useful to clarify in the Explanatory Memorandum to the Bill. The Law Council strongly recommends that, to support the expanded definition in section 6BA, resources be allocated towards implementing a government-led system for ongoing regulation of onshore and offshore agents—instead of the current system in which providers are expected to self-regulate regarding the agents with which they work.

17. Creating a registration system for onshore and offshore education agents would also present an opportunity to implement a more comprehensive redress system for international students to make complaints about particular education agents. Presently, if an international student uses an education agent and has a problem with them, they are advised to first speak with their education provider and its internal complaints and appeals processes.[18] In the event the student is not satisfied with the outcome of the internal appeal process, the student can either complain to the

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[14] See the Hon Clare O-Neil MP, 'Ending 'visa hopping' in the migration system' (Media Release, 12 June 2024) <https://minister.homeaffairs.gov.au/ClareONeil/Pages/ending-visa-hopping-migration-system.aspx>; Department of Home Affairs, 'Changes to the Temporary Graduate visa program – from 1 July 2024' (online) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-graduate-485/changes>;
[15] Nixon (n 2) 16 (Recommendation 13).
[16] Nixon (n 2) 15.
[17] Ibid.
[18] Commonwealth Ombudsman, 'International Students – education agents' (Factsheet) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0033/79683/Factsheet_student_education-agents-links-fixed-A1576258.pdf>.

Commonwealth Ombudsman for private education providers, or to the state or territory ombudsman for public (government) education providers.[19]

18. A single point of complaint in the first instance, via a registration body for education agents, would allow that body to better keep track of the types of complaints and repeat offenders, and to implement bans to prevent future exploitative conduct.

Recommendations

- **That the overview section of the Explanatory Memorandum detail the model of regulation that the Government intends to pursue for education agents.**
- **That the Government implement a system of registration for onshore and offshore education agents.**

Fit and proper test

Item 5, Part 1

19. Section 7A of the ESOS Act sets out the relevant criteria to be assessed by an Education Services for Overseas Students agency (**ESOS agency**) in deciding whether a provider or registered provider is fit and proper to be registered.

20. Item 5 in Part 1 of Schedule 1 to the Bill proposes to insert the following additional mandatory considerations into section 7A(2)(g) in assessing whether a provider or registered provider is fit and proper:

    (a) Whether the provider, or an associate of the provider, has any ownership or control (whether direct or indirect) of an education agent, and if so, the value or extent of the ownership or control; and

    (b) Whether an education agent, or an associate of the education agent, has any ownership or control (whether direct or indirect) of the provider, and if so, the value or extent of the ownership or control; and

21. The Explanatory Memorandum (**EM**) notes that the 'amendments to the fit and proper provider test in Part 1 of Schedule 1 to the Bill aim to limit collusive and unscrupulous business practices occurring between providers and agents, where student enrolments are facilitated for maximum profit rather than in the student's best interest'.[20]

Comment

22. On its face, the amendments are likely to enable better transparency in the sector and enable international students to have more confidence in the education provider they choose. The amendments also address the concerns raised in the Nixon Review about non-genuine providers colluding with disreputable agents to facilitate student visas.[21]

[19] Commonwealth Ombudsman, 'International Students – education agents' (Factsheet) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0033/79683/Factsheet_student_education-agents-links-fixed-A1576258.pdf>.
[20] Explanatory Memorandum, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024.
[21] Nixon (n 2) 16.

23. The Law Council is generally supportive of the intention of this amendment, although we recommend that comprehensive guidance be drafted on the nature of 'direct' or 'indirect' ownership or control in the context of education providers and agents, and the impact that will have on whether a provider is 'fit and proper'. There may be unintended consequences if the provisions are interpreted broadly by decision-makers—legitimate providers may otherwise be found not to be fit and proper, thus having their registration cancelled or not granted.

Recommendations

- **The Explanatory Memorandum should provide further guidance on the application of the 'direct' or 'indirect' ownership or control test contained in proposed paragraph 7A(2)(g).**
- **The Government should provide comprehensive policy guidance for decision-makers assessing providers under the fit and proper test contained in proposed paragraph 7A(2)(g), including context and case studies of what may constitute 'direct' or 'indirect' ownership or control.**

Items 42, 43 and 44, Part 6

24. Item 42 proposes to insert paragraph 7A(2)(aa), which includes a further mandatory consideration under the fit and proper test:

> (aa) Whether the provider or a related person of the provider is being investigated for an offence covered by subsection (2AA)

25. This is accompanied by the introduction of a new subsection 7A(2AA), which details offences for the purposes of the new paragraph 7A(2)(aa). Notably, these offences range in severity from low-level fraud,[22] to offences under the ESOS Act, through to serious fraud[23] and offences under the *Criminal Code Act 1995* (Cth) that relate to slavery and slavery-like conditions, trafficking in persons and debt bondage.[24]

26. We note that Item 44 provides that the amendments to section 7A introduced by Item 43 apply regardless of whether the conduct constituting the alleged offence occurred before, on, or after the commencement of the amendment in relation to:

(a) applications for registration made on or after the commencement of the amendment; and

(b) applications for registration made before the commencement of the amendment but not yet decided as at that commencement; and

(c) providers registered before, on or after the commencement of the amendments.

Comment

27. The cumulative effect of these amendments is that any provider that is currently registered, in the process of being registered, or will commence the process for registration would become liable to a finding that they are not fit and proper if they become subject to investigation for any past, present or future alleged conduct related to an offence under new subsection 7A(2AA). If an ESOS agency were to find that a

[22] *Corporations Act 2001* (Cth), s 590.
[23] Ibid.
[24] *Criminal Code Act 1995* (Cth), Divisions 270 and 271.

particular provider is not fit and proper because there are investigations on foot for the offences outlined in proposed subsection 7A(2AA), this would result in the automatic suspension of the provider's registration under section 89 of the ESOS Act for all courses for all locations.

28. If a provider is suspended under section 89 of the ESOS Act, the provider would not be able to operate generally for the duration of the suspension, as it would be required to cease any activities towards recruiting, enrolling, or receiving matriculation fees from overseas students. The envisioned effect of this amendment would mean that a provider could have their registration suspended by an ESOS agency if any investigations of the manner stipulated are on foot at the time of assessment by the ESOS agency, even where that investigation later does not find that any of the offences are substantiated.

29. While the Law Council is broadly supportive of measures to ensure the quality and integrity of education providers in Australia, the inclusion of proposed paragraph 7A(2)(aa) creates a disproportionate emphasis on the mere existence of an allegation of misconduct by a provider, particularly when weighed against some of the lower-level offences that can trigger a provider's suspension (for example, the concealment of company property to the value of $100 by a related person of the provider can trigger this).[25]

30. We recommend that the Committee consider revisions to proposed subsection 7A(2AA) to ensure a proportionate application of that paragraph in assessing providers against the fit and proper test under paragraph 7A(2)(aa). For example, investigations involving human trafficking may sensibly justify suspension, whereas low-level offences may not. In our view, the provision should be narrowed to the investigation of serious offences given the gravity of the consequences proposed for a provider. This can be achieved by qualifying the offence with a term such as 'serious' or 'relevant'.[26]

31. Furthermore, the broad application of the fit and proper test may have significant consequences for international students. Paragraph 95(1)(c) provides that, if an accepted student of the provider has not begun a course subject to a registration suspension, then the provider must not permit the student to begin the course.

32. If a student visa applicant or holder is enrolled to study with a provider whose registration becomes suspended, and the enrolment is then cancelled, this would become a ground for refusal of the visa.

33. We recommend that the Government introduce a complementary amendment to the *Migration Regulations 1994* (Cth) to provide a waiver or grace period for student visa applicants or student visa holders affected by a provider's registration suspension, to allow time for the student to enrol in a different course in satisfaction of the visa grant criteria under the Migration Regulations.

[25] *Corporations Act 2001* (Cth), s 590(1)(c)(i).
[26] Example definitions include *Telecommunications (Interception and Access) Act 1979* (Cth), s 5D.('serious offence'); *Surveillance Devices Act 2004* (Cth), s 6 ('relevant offence'); and *Criminal Code Act 1995* (Cth) (ss 71.9(3) ('serious offence'), 105A.2 ('serious Part 5.3 offence'), 117.1 ('serious offence') and 473.1 ('serious offence against a law of the Commonwealth, a State or a Territory').

Recommendations

- **Revise proposed subsection 7A(2AA) to qualify the offences under investigation for which a provider may be found not to meet the fit and proper test. This could be achieved by inserting the word 'serious' or 'relevant' to narrow the application of the subsection to more serious offences.**
- **Introduce complementary amendments to the Migration Regulations to provide a grace period for student visa applicants and student visa holders to enrol in another course if their extant enrolment is cancelled due to the suspension of their provider's registration.**

Giving of information to the Secretary of the Department of Education about education agent commissions

Item 10, Part 1

34. Proposed section 21B would require providers to give information to the Secretary of the Department of Education (the **Secretary**) about education agents, including commissions given to education agents.

Comment

35. We acknowledge that the intention of this amendment is to increase transparency around the operation of education agents and to strengthen the ability of the relevant regulator to give information to registered providers about education agents.[27] However, this may be a cumbersome approach to data collection and transparency in the sector.

36. We recommend that the Department of Education investigate options for a system of education agent registration to complement the National Code of Practice for Providers of Education and Training to Overseas Students 2018 (the **National Code**). If a system of registration were created, the National Code could include a reporting or professional obligation of education agents to ensure that education agents confirm commission rates with their clients. The rationale for registering education agents is to provide a basis for confidence and legitimacy in the use of education agents by students, who rely on advice from education agents to make significant decisions about studying and living in Australia.

Recommendation

- **To better achieve the policy objective underlying proposed section 21B, the Government should create a registration system for education agents that implements professional or reporting obligations requiring education agents to disclose commission rates with clients.**

[27] Explanatory Memorandum, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024, [24].

Comment on the proposed ban to onshore student transfer commissions

37. The Law Council notes that there will be complementary amendments introduced to the National Code to ban commissions from being paid by providers to education agents for onshore student transfers.[28]

38. Although education agents do not have the same professional obligations as a migration agent, for example, there is the possibility of a real and clear conflict of interest arising for an education agent taking a commission to refer international students to specific study institutions (universities, TAFEs and/or Registered Training Organisations) or for specific courses. We also acknowledge that commission payments could be the primary reason for education agents to refer an international student to particular institutions and into specific courses. This undermines the best interests of the international student.

39. However, a blanket ban on commissions may stifle the international student sector in Australia by making it unsustainable for legitimate education agents to operate, making it more difficult for international students to obtain meaningful advice and assistance.

40. Instead of banning commissions, a fee for service could be charged by education agents, with limits set by Government. The Department of Education should consider whether it is appropriate to have a commission payment or a payment based on continuing enrolment and/or course progression.

41. The Law Council considers increased transparency over commission payments are beneficial to international students and mitigates concerns about the reason why an education agent refers students to specific institutions or to specific courses.

Recommendation

- **The proposed ban on education agent commissions through amendments to the National Code should be revised and, instead, limits should be placed on the commission fees that can be charged by education agents.**
- **The Government should also consider pursuing increased transparency by implementing an obligation to disclose commission payments to international student clients.**

Giving information to registered providers

Item 22, Part 2

42. The Law Council supports the proposed amendment to section 175 of the ESOS Act to include the categories of information that may be given to providers about education agents to better inform providers.

[28] Explanatory Memorandum, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024, 9.

Management of provider applications

Item 33, Part 3

43. Item 33 would introduce powers exercisable by the Minister for Education to suspend initial applications for the registration of providers, and for the registration of courses by registered providers.

Comment

44. The Law Council is not in a position to comment extensively on how this would operate. However, we raise preliminary concerns about the broad nature of the power conferred upon the Minister by this item, particularly given that it is intended to be exercised in "limited circumstances".[29] The Law Council has long maintained the position that executive power should be carefully defined by law, such that it is not left to the Executive to determine for itself when and how its powers may be used.[30]

45. The text of the proposed legislation should at the very least clearly articulate the circumstances in which the Minister can exercise the power. The Explanatory Memorandum refers to maintaining the integrity and sustainability of the sector—this should also be articulated in the text of the legislation. The proposed legislation should also clarify the circumstances in which a Minister may not invoke this power. In particular, these powers should not be used to suspend consideration of applications for registration as a means of easing the administrative burden on ESOS agencies.

Recommendation

- **Amend the proposed provisions in item 33 to articulate the circumstances in which the Minister for Education may suspend initial applications for the registration of providers to ensure that suspensions are used for legitimate purposes.**

Registration requirements

Item 38, Part 4

46. The Bill proposes to amend section 11 of the ESOS Act to include a requirement for a provider to have delivered one or more courses for consecutive study periods totalling at least 2 years at a location or locations to students in Australia other than overseas students.

Comment

47. The Law Council supports this requirement as it will ensure that providers are established in the domestic market before they can offer places to international students. We consider that this would be a protective measure for future international students seeking to undertake studies on a genuine basis in Australia, and to limit situations in which international students are vulnerable to being taken advantage of by non-genuine education agents and providers.

[29] Explanatory Memorandum, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024, [79].
[30] Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011).

48. We also support an exemption from the new requirement for providers seeking registration as standalone English Language Intensive Courses for Overseas Students providers or standalone Foundation Program providers, listed in Table A of the *Higher Education Support Act 2003* (Cth).

49. However, the provision of a course (with no requirement for those to be completed or successfully completed) to domestic students should not be the only indicator taken into account when determining whether to register a provider to enrol international students. Additional metrics could include information covered in subsection 96B(2) of the ESOS Act, i.e. completion rates, and the transfer of students to other providers.

Recommendation

- **Revise the proposed section 38 to include further considerations for determining whether to register a provider to enrol international students: e.g. completion rates and the transfer of students to other providers.**

Automatic cancellation of registration

Item 40, Part 5

50. Item 40 of the Bill proposes to introduce section 92A, which subjects providers to automatic cancellation of their registration if they do not provide a course in a continuous 12-month period (the measurement period).

51. Section 92A would apply to any registered provider that is not an approved school provider that does not provide a course at a location to an overseas student during the measurement period from or following 1 January 2024.

Comment

52. The Law Council does not support the automatic cancellation of a provider's registration under proposed section 92A. As presently drafted, a provider would be denied procedural fairness where their registration is cancelled under that section.

53. The Law Council believes that provisions for the cancellation of registration should be underpinned by the principle of procedural fairness.[31] This should include an obligation on decision-makers to provide an opportunity for a provider to comment on adverse information relied upon to reach a conclusion that they have not delivered a course for 12 consecutive months, before a decision is made to cancel the registration.

54. Including an opportunity for procedural fairness would still enable the cancellation of registrations for providers that are not serving the market, and would likely alleviate any need for, or administrative burden associated with, ESOS agencies to respond to requests for extensions by providers.

[31] *Kioa v West* (1985) 159 CLR 550, 585; *Saeed v Minister for Immigration and Citizenship* (2010 241 CLR 252.

55. This would limit unfair applications of an automatic cancellation where the exercise of such a power is premised on incorrect information about the education provider. This would also limit the economic impacts on providers that are unable to conduct business while their registration is suspended, if investigations are ongoing.

56. This approach would also be consistent with other areas of the Government's migration program: for example, the monitoring of employer sponsorship and visa holders to ensure that both sponsors and visa holders comply with the sponsorship obligations under the Migration Act and its regulations.[32] In the event that the Department finds that a sponsor has breached a condition of its sponsorship, the Department is able to take actions to sanction the sponsor including: barring sponsorship for a period of time; not approving existing applications for sponsorship; or cancelling all existing sponsorship approvals.[33] This process allows for less disruption to the industry while still ensuring the integrity and quality of the system.

57. Furthermore, if the underlying circumstances causing a provider not to deliver a course over the measurement period are particularly serious, we would expect that resources are provided to investigate the conduct in an expedient manner, during which process an opportunity for procedural fairness should be given to the education provider under investigation.

Recommendations

- **Revise the proposed section 92A to include an opportunity for a provider to comment on adverse information prior to a decision being made to cancel the registration of a provider.**
- **Adequately resource ESOS agencies to monitor providers.**

Item 41, Part 5

58. Item 41 would amend section 169AB to include 'a decision by the ESOS agency for a registered provider to extend, or not to extend, the measurement period in relation to the provider under section 92B' as a 'reviewable decision'.

59. A registered provider would be able to seek merits review in the AAT (or, once established, the Administrative Review Tribunal) of a decision not to extend the measurement period after which it could be subject to automatic cancellation—but not of the automatic cancellation itself.

Comment

60. In addition to our recommendation that procedural fairness be provided for under the proposed section 92A, we also recommend that any decision to cancel registration under that provision be subject to merits review.

Recommendation

- **Include an amendment that defines a cancellation decision under the proposed section 92A as a 'reviewable decision' under section 169AB.**

[32] Department of Home Affairs, 'Sponsorship obligations for standard business' (online) <https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/existing-sponsors/standard-business-accredited-obligations>.
[33] Ibid (Sanctions).

Enrolment limits

Items 47, 48 and 49, Part 7

61. Item 47 would insert proposed sections 26B and 26C under new Division 1AA, which would empower the Minister to impose total enrolment limits by legislative instrument or by notice to a provider.

62. In particular, proposed subsection 26B(6) would allow the Minister to specify a class of providers by reference to any matter, including, but not limited to, any of the following:

    (a) the kind of provider;

    (b) the kind of courses provided by the provider;

    (c) the location of courses provided by the provider;

    (d) other circumstances applying in relation to the provider.

63. Additionally, subsections 26E and 26F would empower the Minister to impose course enrolment limits by legislative instrument or by notice to a provider as to the number of international students enrolling in specific courses.

64. Item 48 would amend section 83A to note that Division 1AA would provide for:

    (a) automatic suspension of a provider's registration for all courses in relation to a year if the provider exceeds its total enrolment limit for the year, and

    (b) automatic suspension of a provider's registration for a course in relation to a year if the provider exceeds its course enrolment limit for the course and the year.

65. Section 96 would provide for an automatic period of suspension for exceeding total enrolment limits under any provision of Division 1AA, with the consequence that the provider would not be able to enrol any overseas student for the course in respect of the year until the earlier of either 31 December of that year or if given a notice by the Secretary in respect of that year.

66. Section 96A would similarly provide for an automatic period of suspension for exceeding a specific course enrolment for the year.

Comment

67. The Law Council is concerned that the above proposed provisions under Part 7 of the Bill are over-extensive in their reach in dictating a cap on enrolments and that this is likely to impede the ability of providers to meet market demands, to freely conduct its business, and to make appropriate commercial decisions.

68. By creating obligations under proposed sections 26D and 26G to comply with instruments or notices that dictate the number of enrolments, genuine registered providers would be restricted in their capacity to meet the demand of international students.

69. The Law Council recommends that sections 26B, 26C, 26E and 26F each be revised to insert a provision allowing for providers to seek an exemption from restrictions to which they become subject under any of those provisions. This would give providers an opportunity to temper obligations under the Act with market demands where there is a special need or where specific caps would place undue burden on the capacity of a provider to conduct its business.

Recommendation

- **Revise the proposed sections 26B, 26C, 26E and 26F to include an ability for providers to seek an exemption from caps imposed by instrument or notice.**

Automatic suspension and cancellation of specified courses

Item 55, Part 8

70. Under Division 1AB, proposed subsection 96B(1) provides that the Minister may, by legislative instrument, specify one or more classes of courses for the purposes of subsection 96B(1) if the Minister is satisfied that:

    (a) there are or have been systemic issues in relation to the standard of deliver of the courses included in the class; or

    (b) the courses included in the class provide limited value to Australia's current, emerging and future skills and training needs and priorities; or

    (c) it is in the public interest to do so.

71. Proposed section 96C provides for the automatic suspension of specified courses where:

    (a) a registered provider (other than an exempt provider) is registered to provide a course at a location or locations; and

    (b) the course is included in a class of courses specified in an instrument under subsection 96B(1); and

    (c) 30 days after that instrument comments, one or more students are enrolled in and have commenced, but not completed or withdrawn from, the course.

72. Proposed section 96D provides for the automatic cancellation of specified courses where:

    (a) a registered provider (other than an exempt provider) is registered to provide a course at a location or locations; and

    (b) the course is included in a class of courses specified in an instrument under subsection 96B(1); and

    (c) 30 days after that instrument comments, there are no students that are enrolled in and have commenced, but not completed or withdrawn from, the course.

Comment

73. The Law Council notes that section 96B is silent as to whether there is an obligation to provide notification of the inclusion of courses in an instrument, which is similarly absent from sections 96C and 96D. We also note that, while an automatic suspension or cancellation would only come into effect 30 days after the instrument commences, we do not consider this gives providers an adequate opportunity to either dispute or prepare for the cancellation of such a course.

74. Given the severe effect of an automatic suspension or cancellation on providers, we recommend that provisions in each of sections 96B, 96C and 96D include clauses requiring that written notice be given to providers of an instrument coming into effect and any review rights available.

75. We also recommend that proposed section 96B be made clearer to articulate the circumstances in which the Minister can make a legislative instrument for the automatic suspension or cancellation of courses.

76. As to the scope of circumstances under subsection 96B(1) in which the Minister can make an instrument, there must be a robust process prior to any suspension or cancellation given the high stakes for the course provider and those that have paid for the service. The Minister should implement comprehensive guidance for the referral of classes of courses that may become subject to suspension or cancellation:

    - With respect to paragraph 96B(1)(a), we consider that this should be subject to findings by way of investigation into the class of courses, and any instrument should include reasons for specifying that class of courses for suspension or cancellation.
    - With respect to paragraph 96B(1)(b), we are concerned that the ability to suspend or cancel courses on the basis that they 'provide limited value to Australia's current, emerging and future skills and training needs and priorities' may disproportionately affect the ability of international students to undertake courses that may be useful to them in their home country, with the result that the international student market could be stifled by the unavailability of particular courses.[34]
    - With respect to paragraph 96B(1)(c), guidance on what may constitute the public interest should consider the interests of international students as a cohort vulnerable to the system.

Recommendation

- **Revise proposed section 96B to include an obligation on either the Minister or the relevant ESOS agency to provide written notice to a provider of a 96B instrument, including any review rights.**

Impact on international students

77. We note that there is a difference in the application of sections 96C and 96D in that suspension can occur in circumstances where a student is enrolled in and has commenced (but not completed or withdrawn from) the course, and cancellation will occur in circumstances where there are no students enrolled.

78. On our reading, we take this to mean that there is unlikely to be an adverse impact on international students because the intention is for the legislation to only capture courses that do not have legitimate students presently enrolled.

79. We recommend that the Department of Education work with the Department of Home Affairs to ensure there is appropriate guidance in place to support international students to transition to new course providers without having their visas considered for cancellation or cancelled in these circumstances.

[34] See clause 8(5) of MD106.