

# CHAPTER 1

## Background

### Reference

1.1 On 15 October 2015, the Senate referred the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 (the bill) and the Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015 (the Registration Charges bill; collectively, the bills) to the Senate Education and Employment Legislation Committee for inquiry and report.

### Conduct of inquiry

1.2 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 27 organisations, as detailed in Appendix 1.

### Background

1.3 The bills amend respectively the *Education Services for Overseas Students Act 2000* (ESOS Act) and the *Education Services for Overseas Students (Registration Charges) Act 1997* (Registration Charges Act), with the aim of introducing efficiency measures which will reduce the regulatory burden and cost on education institutions.

1.4 In May 2013, Professor Kwong Lee Dow AO (former Vice Chancellor of the University of Melbourne) and Professor Valerie Braithwaite (of the Regulatory Institutions Network at the Australian National University) were commissioned to undertake a review of higher education regulation. Their review was released on 5 August 2013.<sup>1</sup>

1.5 The Department of Education and Training (the department) undertook a consultation process to respond to concerns raised about the Education Services for Overseas Students (ESOS) sector. The department released a discussion paper in October 2014, *Reform of the ESOS Framework*, and received seventy submissions in response. On the basis of those submissions, the department organised five theme-based stakeholder workshops in February 2015; these informed the exposure drafts of the bills, which were released in July and August 2015. A further 32 submissions were received in response to these.<sup>2</sup>

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1 Department of Education and Training, *Review of Higher Education Regulation*, <https://www.education.gov.au/review-higher-education-regulation-1>, accessed 20 November 2015.

2 Department of Education and Training, *Submission 17*, p. 3.

1.6 Two key areas of reform were identified during the department's consultation period:

- streamlining the ESOS Act to better reflect changes to the regulatory architecture since 2012—in particular the introduction of the national regulators ASQA and TEQSA—consistent with key recommendations of the 2013 Review of Higher Education Regulation; and
- reducing the administration associated with the Tuition Protection Service (TPS) to remove duplicative and unnecessary reporting requirements and to more fairly support competition in the sector and student choice.<sup>3</sup>

1.7 These bills respond to those areas of reform. The department notes that the provisions of the bills:

focus on ways to improve the alignment between the ESOS Act and the two domestic frameworks that support quality and integrity in the education system: the Tertiary Education Quality and Standards Agency Act 2011 (TEQSA Act), which regulates the higher education sector, and the National Vocational Education and Training Regulator Act 2011 (NVETR Act), which regulates the vocational education and training (VET) sector and registered training organisations (RTOs).<sup>4</sup>

## **Overview of the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015**

1.8 The bill is comprised of six schedules.

### ***Schedule 1 – Streamlining registration***

1.9 Schedule 1 contains measures designed to improve consistency and flexibility across existing education quality assurance frameworks by reducing the administrative burden on education providers and quality assurance agencies.<sup>5</sup>

1.10 The bill creates the role of the 'ESOS agency', which serves as the body responsible for decision making around the registration and compliance monitoring for all providers. This amendment removes the concept of designated authority and therefore reduces the duplication of roles currently performed by the Tertiary Education Quality and Standards Agency (TEQSA) and the Australian Skills Quality Agency (ASQA) as both delegates of the Secretary and as designated authorities under the ESOS Act. The regulatory powers will be vested in those agencies directly.<sup>6</sup>

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3 Department of Education and Training, *Submission 17*, p. 3.

4 Department of Education and Training, *Submission 17*, p. 5.

5 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 18.

6 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 18.

1.11 State and territory agencies will continue to serve as the ESOS agency for relevant schools, but will be referred to as 'designated State authorities'; the Secretary of the Department of Education and Training will serve as the ESOS agency for school providers.<sup>7</sup>

### ***Schedule 2 – Review of decisions***

1.12 Schedule 2 provides for internal review processes for decisions made by delegates of ESOS agencies. A provider affected by a reviewable decision made by a delegate of an ESOS agency will be able to choose between an internal review (by the ESOS agency) and a review conducted by the Administrative Appeals Tribunal (AAT).<sup>8</sup>

1.13 The rationale for this change is that it can result in 'considerable savings in time and resources for education providers', which may in turn allow for the resolution of matters which the provider may not have otherwise been willing to appeal as a consequence of the cost of AAT processes.<sup>9</sup>

1.14 Providers unhappy with the internal review can subsequently seek to have that decision reviewed by the AAT.<sup>10</sup>

1.15 A new section of the bill includes a table listing reviewable decisions and the providers able to seek review of those decisions. Decisions made by an ESOS agency itself – such as ASQA, TEQSA or the Secretary personally – are not subject to internal review, but can be reviewed by the AAT.<sup>11</sup>

1.16 These new review provisions were requested by ASQA and TEQSA, so that providers under the ESOS Act would have similar processes as those under the National Vocational Education and Training Regulator (NVETR) and TEQSA Acts.<sup>12</sup>

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7 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 18.

8 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 69.

9 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 69.

10 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 69.

11 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 69.

12 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 70.

**Schedule 3 – Ministerial directions**

1.17 Schedule 3 amends the ESOS Act to include a power for the Minister to make a legislative instrument issuing a direction to an ESOS agency about the performance of its functions under the ESOS Act. This will align the ESOS Act with the TEQSA Act and the NVETR Act, each of which allows the Minister to make such directions<sup>13</sup>

1.18 This power does not extend to the Minister being able to give a direction about a particular provider or registered provider.<sup>14</sup>

1.19 Any direction given under this power is subject to disallowance.<sup>15</sup>

**Schedule 4 – Tuition Protection Service Director**

1.20 Schedule 4 aims to provide for the Tuition Protection Service Director (TPS Director) to effectively manage the tuition protection framework and support the work of ESOS agencies by making recommendations in relation to enforcement action.<sup>16</sup>

1.21 The new measures will expand the functions of the TPS Director to enable them to make recommendations to the ESOS agencies about taking enforcement action against a provider. The ESOS agency must consider the TPS Director's recommendation when deciding whether to take particular enforcement action against a registered provider.<sup>17</sup>

1.22 Another measure allows the TPS Director to issue a production notice to an education provider in their own right. This replaces the existing system whereby the TPS Director can only access information consequent upon a notice issued by a delegate of the Secretary. Failure to comply with an order is an offence.<sup>18</sup>

**Schedule 5 – Other amendments**

1.23 Schedule 5 consists of other amendments which seek to increase flexibility for students and decrease regulatory costs for providers.

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13 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 74.

14 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 74.

15 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 74.

16 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 76.

17 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 76.

18 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 76.

1.24 The first of these removes the restriction on registered providers receiving more than 50 per cent of the tuition fees before the course begins for a course that is longer than 24 weeks. The amendment will allow providers to receive more than 50 per cent of the fees if either the student chooses to pay more, or if the course is no more than 25 weeks long.<sup>19</sup>

1.25 The amendment also removes the requirement that further tuition fees must not be required by the provider until two weeks before the second study period begins. This change will increase flexibility for students and providers.<sup>20</sup>

1.26 The amendments further remove the concept of a 'study period' from the ESOS Act, on the basis that it imposes an arbitrary and limiting requirement of a study period being a maximum of 24 weeks in length.<sup>21</sup>

1.27 A further amendment introduced in Schedule 5 is to remove the requirement that providers must maintain an account into which all tuition fees paid by students prior to the course's commencement and in which these fees must be kept until the student starts the course. The removal of this requirement will create, according to the explanatory memorandum, 'a more level playing field between public and private providers' and will encourage 'competition and innovation in the sector'.<sup>22</sup>

1.28 The bill also removes reporting obligations for registered providers in cases of student defaults. Under the amendments, providers will only need to report the outcome of student defaults where the provider has paid a refund to the student under a legislative instrument made by the Minister (primarily covering cases of visa refusal).<sup>23</sup>

1.29 The deadline for other information about students reportable by providers to the Secretary – as set out in section 19 of the ESOS Act – will be extended from 14 to 31 days, with the exception of cases where a student who is under the age of 18 years has failed to start their study, or has had that study terminated.<sup>24</sup>

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19 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 80.

20 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 80.

21 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 80.

22 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 80.

23 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 80.

24 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 80.

### ***Schedule 6 – Application, transitional and savings provisions***

1.30 This schedule sets out the application, transitional and savings provisions for the purposes of the bill.

### **Overview of the Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015**

1.31 This bill consists of one schedule.

### ***Schedule 1 – Entry to market charges***

1.32 This schedule removes the minimum two-year period of registration which previously applied to new providers. Consequently the bill clarifies the application to entry charges to ensure that a provider registered under the ESOS Act pays all entry to market charges but is not charged more than once in cases where the provider's registration period is less than two years and it seeks a renewal of that registration.<sup>25</sup>

### **Human rights implications**

1.33 The bills engage the following human rights:

- The right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*;
- The right to privacy – Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*; and
- The rights of the child – Article 3 of the *Convention of the Rights of the Child (CRC)*.

1.34 The bills' explanatory memorandum states that the bills engage the right of overseas students to quality education by enabling regulatory agencies to more effectively and efficiently monitor the quality of education providers.<sup>26</sup>

1.35 The right to privacy is affected by the proposed amendments, since students' information will be entered into the Department of Education and Training's computer system (known as PRISMS) when specified events occur. However, the explanatory memorandum notes that this information is necessary for the effective regulation of the sector, and therefore the bill is compatible with the right to privacy.<sup>27</sup>

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25 Explanatory memorandum, *Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015*, p. 3.

26 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, pp 14 - 5.

27 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 15.

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1.36 The rights of the child are also engaged by the bill, which maintains protections for students under the age of 18 years. Providers are required to report within 14 days – via the PRISMS system – when students under 18 years enrol in but do not begin, or begin but cease, a course. Thus the bill maintains the rights of the child.<sup>28</sup>

### **Financial impact statement**

1.37 The implementation of the bill will require system changes estimated at \$0.4m. These changes relate to the Provider Registration and International Student Management System (PRISMS), the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) and the TPS IT system.<sup>29</sup>

1.38 The explanatory memorandum states that the long-term financial impact is expected to be budget neutral, since the initial costs will be compensated for by 'the streamlining measures and the significantly reduced data reporting requirements for providers'.<sup>30</sup>

1.39 The Registration Charges bill has no related financial impact.<sup>31</sup>

### **Acknowledgement**

1.40 The committee thanks those organisations and individuals who contributed to the inquiry by preparing written submissions.

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28 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 15.

29 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 7.

30 Explanatory memorandum, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*, p. 7.

31 Explanatory memorandum, *Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015*, p. 2.

