

# SUBMISSION FROM THE AUSTRALIAN SKILLS QUALITY AUTHORITY

## **Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Regulatory Powers (Standardisation Reform) Bill 2020 [Provisions]**



**Australian Government**

**Australian Skills Quality Authority**

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## Executive Summary

This submission is presented to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) by the National VET Regulator (ASQA) in response to the inquiry into the *Regulatory Powers (Standardisation Reforms) Bill 2020* [Provisions] (the Bill).

ASQA welcomes the opportunity to make a submission to the Committee as part of the inquiry.

ASQA's purpose is to ensure quality vocational education and training (VET) so that students, employers, the community and governments can have confidence in the integrity of national qualifications issued by training providers.

ASQA does this by regulating VET providers, VET accredited courses, and providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS), including those delivering English Language Intensive Courses to Overseas Students (ELICOS).

Providers are regulated under the:

- *National Vocational Education and Training Regulator Act 2011* (the NVR Act), and/or
- *Education Services for Overseas Students Act 2000* (the ESOS Act).

ASQA regulates approximately 3,745 providers. Of these providers, around:

- 3,005 are regulated under the NVR Act only
- 85 are regulated under the ESOS Act only, and
- 655 are regulated under both the NVR Act and ESOS Act.

ASQA is the ESOS Agency for registered VET providers.

This submission reflects ASQA's intent to implement regulation that is integrated, risk-based and proportionate, underpinned by good decision-making and sound regulatory practice.

ASQA is currently implementing a significant reform agenda resulting from the Rapid Review of its regulatory practices, governance and culture, which was completed in early 2020.

ASQA supports the simplification and streamlining of regulatory powers across the Commonwealth Government, through the implementation of standardised monitoring, investigation and enforcement provisions. This is consistent with ASQA's intent to be efficient and effective, and continuously improve its regulatory capability and practices.

The proposed changes to the ESOS Act are supported by ASQA, as they will provide ASQA with greater flexibility and allow for a more consistent approach to regulation in a number of aspects, as set out in this submission.

ASQA notes the NVR Act has not been included in the Bill. However, ASQA would seek to maintain alignment with best practice standardised monitoring, investigation and enforcement provisions across the Commonwealth Government. Exclusion of the NVR Act from the Bill will result in the NVR Act not fully aligning with the *Regulatory Powers (Standard Provisions) Act 2014* (RPSP Act), and creates a risk that the NVR Act becomes further misaligned over time if a process is not established

to directly amend the NVR Act following these and any future changes to the RPSP Act. This may result in non-standard monitoring, investigation and enforcement provisions across the two Acts under which ASQA regulates.

## ASQA's Rapid Review

ASQA's Rapid Review [report](#) was released on 30 April 2020. The Rapid Review found that, while ASQA's overarching vision and purpose remain appropriate, adjustments to its practices are needed to improve engagement with the sector, and ensure its regulatory approach is guided by necessity, risk and proportionality. The review made 24 recommendations (all of which were accepted by government) for reforms to the way ASQA operates, and set out a long-term vision for best-practice regulation of the VET sector in Australia.

The recommendations of the Rapid Review confirmed ASQA's approach to:

- clarify its role and regulatory approach
- build a common understanding of self-assurance and excellence in training outcomes
- provide more considered and meaningful reporting on provider performance
- strengthen its engagement and educative approach
- undertake appropriate and proportionate regulatory action as required
- align its practices and governance accordingly.

With a national workforce which regulates a highly diverse sector under two Acts, an area of concern for stakeholders (noted in the Rapid Review report) relates to the consistency of practice across auditors and decisions-makers within ASQA.

Significant work is underway to engage with the sector and staff to clarify and modernise ASQA's regulatory approach. The proposed changes to the ESOS Act will support greater consistency in the application of ASQA's compliance framework, and in ASQA's engagement with regulated entities and stakeholders.

## Implementation considerations for proposed amendments to the ESOS Act

The Bill proposes to amend the ESOS Act to trigger Parts 2, 3, 5 and 6 of the RPSP Act in relation to monitoring and investigation, infringement notices, and enforceable undertakings.

### Monitoring and investigation

The Bill proposes to amend the ESOS Act to trigger Part 2 – Monitoring and Part 3 – Investigation, of the RPSP Act. These changes, including to the definition of 'evidential material' and investigation and monitoring powers, will more closely align the regulatory powers under the ESOS Act with those available in the NVR Act. This will enable greater consistency in the way in which ASQA monitors and investigates provider conduct under both Acts and, in particular, the way ASQA collects evidence.

One important amendment that will allow ASQA to exercise greater consistency and flexibility in the way it regulates under the ESOS Act is the introduction of provision for persons assisting authorised

officers when exercising monitoring and investigation powers. Currently, only authorised officers (as defined in the ESOS Act) may exercise these powers and, unlike the NVR Act, there is no provision in the ESOS Act for assistance to be provided by other (non-authorised) persons. This capability (under the NVR Act) is frequently used by ASQA, allowing for a more efficient use of its compliance and enforcement capacity.

In addition to triggering Parts 2 and 3 of the RPSP Act, the Bill proposes to retain the existing power in the ESOS Act for use of force in executing a monitoring (s130(14) of the Bill) or investigation (s131(12) of the Bill) warrant. It is important to note that, in both cases, the use of force is limited to “things” and not persons. To this extent, the proposed changes reflect the current position under both the NVR Act and ESOS Act.

Many VET providers – including those registered under the ESOS Act – operate from multiple premises across the country. Drawing on ASQA’s experience exercising similar powers under the NVR Act, this use of force provision allows the ESOS Agency to gain entry to search vacant premises under an applicable warrant, when the occupier refuses or is unable to attend the premises. It also permits use of the services of a locksmith when encountering a locked cabinet or room on the premises, in the instance the occupier refuses to open or does not otherwise have the means to access the cabinet or room. This power enables the ESOS Agency to urgently secure documents and things specified under a warrant in an efficient manner.

## Infringement notices

The Bill proposes to amend the ESOS Act to trigger Part 5 – Infringement notices of the RPSP Act. These changes, and in particular the matters to be included in an infringement notice and considered when deciding whether or not to withdraw an infringement notice, will more closely align the infringement notice scheme under the ESOS Act with that in place under the NVR Act. This will enable greater consistency in the way ASQA deals with infringement notices under both Acts.

## Enforceable undertakings

The Bill proposes to amend the ESOS Act to trigger Part 6 – Enforceable undertakings of the RPSP Act. The proposed changes preserve the power of an ESOS Agency to accept a written undertaking given by a provider that they will take, or refrain from taking, specified actions in order to comply with a provision of the ESOS Act, *National Code of Practice for Providers of Education and Training to Overseas Students 2018*, or ELICOS or foundation standards, or a condition of the provider’s registration.

Additionally, the Bill proposes to retain the power to accept an undertaking that a provider will take specified action directed towards ensuring that, in the future, the provider does not, or is unlikely to, contravene a condition of registration. The use of this provision will be important to ASQA as it increases its focus on managing providers’ return to sustained compliance, as recommended by the Rapid Review.

The Bill also reflects the wider availability of enforceable undertakings as a regulatory response, consistent with the effect of recent amendments to the NVR Act in relation to dealing with enforceable undertakings (s146(1A) of the NVR Act).

## Areas of misalignment with the NVR Act

The RPSP Act and NVR Act are currently misaligned in two key areas that impact on ASQA's practices. These are the:

- scope of monitoring powers – the RPSP Act includes a power to observe any activity conducted on the premises, which is not contained in the NVR Act (see s19 of the RPSP Act and s67 of the NVR Act)
- matters that must be listed on an investigation (enforcement) warrant (see s70 of the RPSP Act and s86 of the NVR Act) – the RPSP Act requires a number of actions relating to matters to be listed on an investigation warrant that are not required when executing an enforcement warrant issued under the NVR Act. These are:
  - (a) state the offence provisions or offences provisions, or civil penalty provision or civil penalty provisions, to which the warrant relates
  - (e) state that evidential material of the kind specified may be seized under the warrant
  - (f) state that the person executing the warrant may seize any other thing found in the course of executing the warrant if the person believes on reasonable grounds that:
    - (i) The thing is evidential material of a kind not specified in the warrant; or
    - (ii) A related provision has been contravened with respect to the thing; or
    - (iii) The thing is evidence of the contravention of a related provision; or
    - (iv) The thing is intended to be used for the purpose of contravention of a related provision.

It should also be noted that the provision for appointment of authorised officers contained in the NVR Act (see s89) does not currently align with the form of wording recommended by the Office of Parliamentary Counsel's [Drafting Direction 3.5A Regulatory Powers](#).

## Conclusion

The Bill will provide for greater flexibility for ASQA to apply a more consistent approach to regulation under the NVR Act and ESOS Act.

Whilst the NVR Act is not included in the Bill, the proposed changes to the ESOS Act will enable greater consistency of the application of ASQA's compliance framework. This is aligned with ASQA's intent to be clear in its engagement with regulated entities, efficient and effective, and to continuously improve its regulatory capability and practices.

To maintain alignment with standardised monitoring, investigation and enforcement provisions across Commonwealth Government regulators, ASQA notes the need for the Department of Education, Skills and Employment to establish a process that will ensure the NVR Act is amended to align with the RPSP Act following these and any future changes made to the RPSP Act.