
Review of the Education Services for Overseas Students (ESOS) Act 2000

Submission to the Hon Bruce Baird

6 November 2009

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Introduction

The Law Institute of Victoria (LIV) is pleased to provide this submission to the *Review of the Education Services for Overseas Students (ESOS) Act 2000* (Review of ESOS).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 13,500 members. The LIV's Administrative Law and Human Rights Section Migration Law Committee is made up of legal practitioners experienced in immigration law. Many Committee members are accredited specialists in immigration law and many have experience representing international students on visas allowing them to study in Australia.

The LIV is concerned about the welfare of international students in Australia and seeks policy and legislative reforms to better protect the interests of international students. Recently, the LIV made a submission to the Senate Education, Employment and Workplace Relations Committee's *Inquiry into the Welfare of International Students*.¹ Many of our comments and recommendations to the Senate Inquiry are also relevant to the Review of ESOS and we include these where relevant below.

The Terms of Reference indicate that the Review of ESOS will consider the need for enhancements to the ESOS legal framework in the following four key areas:

- 1) Supporting the interests of students
- 2) Delivering quality as the cornerstone of Australian education
- 3) Effective regulation
- 4) Sustainability of the international education sector.

On 23 September 2009 an Issues Paper was released.² In the following we provide comments and recommendations in response to select discussion questions under terms of reference 1-3, as set out on p5 of the Issues Paper.

Supporting the interests of students

- i. **How can the quality and accessibility of reliable information be improved? What role can ESOS have in ensuring providers and their agents are held to account for supplying prospective and current international students with accurate and timely information?**

Comments and Recommendation/s

Availability of Information

Much of the information available for prospective students, particularly overseas, comes from education providers themselves or education agents who are paid commission to enrol students into courses. There is very little independent information available to students to fully analyse what a provider offers and our members report that many students arrive in Australia disappointed by what may have been promised to them.

Many education providers also fail to provide up-to-date websites which include information on procedural requirements for complaints handling issues. Our members report instances where education providers have sent letters to clients without attaching relevant information relating to

¹ LIV submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Welfare of International Students* (21 August 2009), available at www.liv.asn.au/submissions.

² See <http://www.aei.gov.au/AEI/GovernmentActivities/InternationalStudentsTaskforce/ReviewESOSAct.htm>.

their internal complaints or appeal procedures and which also fail to fully explain to students how attendance records and academic requirements are met.

Recommendation 1

Consideration should be given to setting up an independent website for prospective students to review information about education providers and courses offered, which includes information about student class/teacher ratios, size of the provider, domestic/international student ratio, international tertiary rankings, fee payment options and amounts and any other relevant information which would benefit a student's educational experience in Australia.

Recommendation 2

Clear and consistent detailed guidelines relating to complaints handling procedures, change of address procedures and internal and external appeals procedures so that providers follow the same procedures and use the same type of forms and that it be compulsory for all education providers to have these guidelines and forms available on their website. All new students should be provided with information on where these forms can be accessed, including where hard copies of the forms may be available, if required.

Student exclusion procedures – s20 Notices

The *Education Services for Overseas Students Act 2000* (Cth) and its *Regulations* (ESOS Act and Regulations) and the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (National Code of Practice 2007) currently govern providers of education and training to overseas students in relation to the exclusion – or expulsion – of students from courses. Education and training providers may 'exclude' students due to unsatisfactory course progress or unsatisfactory course attendance in breach of Condition 8202 of the *Migration Regulations 1994* (Cth) (the Migration Regulations).

When an education or training provider intends to 'exclude' on this basis, they must issue a s20 Notice under the ESOS Act that sets out the particular details of the breach of condition 8202. Prior to the issuing of such a notice, the ESOS Act and the National Code of Practice 2007 set out various internal procedural standards that must be complied with.³

Under s 137J(2)(b) of the Migration Act the student must report to DIAC within 28 days of a s20 Notice being issued, after which the matter is passed from the Department of Immigration and Citizenship (DIAC) to the Department of Education, Employment and Workplace Relations (DEEWR) to consider whether the education provider has fairly complied with the requirements relating to the issue of the notice, in accordance with *Direction No 38 – Cancellation of Student Visas* dated 19 September 2007 (Direction No 38).

Reforms to the ESOS Act, Regulations and the National Code of Practice 2007 in 2007 were intended to strengthen the rights of students,⁴ but in many instances, rights and avenues of appeal were removed. For example, only political upheaval or natural disaster in a particular country can be taken into account as factors affecting a student's studies. The procedure in relation to cancellation notices has also become more complex and time consuming. For example, students must attempt to prove that the Educational Provider has not followed the correct procedure as outlined in the National Code of Practice 2007 as required by Direction No 38. Many students also seek legal advice only after the visa is cancelled, not realising the complexities of the law surrounding cancellations. Further, they are not encouraged by DIAC to seek legal advice in relation to student visa cancellation issues.

The LIV considers a review of the cancellation procedure to be necessary. The procedure needs to be more equitable and accessible for international students and should allow for a warning system for first-time offenders.

³ Standards 10 – 13, *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*.

⁴ See Preamble of *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*.

In particular, the LIV considers it necessary to address the hurdles and difficulties students might face trying to obtain from their education provider all the relevant documentation pertaining to their exclusion. As no guidelines or timeframes exist for such requests, a student's ability to challenge the validity of the s20 Notice can be greatly prejudiced in circumstances where he or she is unable to access the pertinent documentation in a timely manner.

Recommendation 3

The LIV recommends that a simplified and codified procedure be introduced to enable students to obtain a copy of their documents from their education providers when issued with a s20 Notice under the ESOS Act and *National Code of Practice 2007*. Importantly, strict time limits within which documents are to be provided to students must be established in light of the limited time available for students to respond to cancellation issues under the Migration Regulations.

Recommendation 4

The LIV recommends a review of whether the referral of matters under Direction No 38 to DEEWR by DIAC is effective and whether instead DIAC should determine whether the ESOS Act and Regulations and the National Code of Practice 2007 has been complied with.

ii. How should the Australian Government and the international education sector protect international students if a provider closes? How should this be resourced?

No comment

iii. Are different mechanisms needed to support international students to resolve complaints effectively? Are additional complaint mechanisms needed?

Comments and Recommendation/s

Independent Complaints Body

Currently there are a myriad of state, territory and federal government bodies that have a degree of responsibility in overseeing international students and addressing complaints. Depending on the nature of a complaint, a student may be directed to DIAC, DEEWR, a state accrediting authority or a state, territory or federal consumer affairs authority.

With the current regime, there is no clear avenue for international students to raise concerns related to the quality of their studies. Only limited student services and advocacy support – such as dedicated career advisers and student advocates – are made available to students, including international students. For example, in July 2007, DEEWR commissioned an independent review of career development services provided by Australian tertiary education providers.⁵ The DEEWR review noted that career development services have experienced increasing pressure from a more diverse student profile in recent years, particularly from large numbers of international students. Recommendation 12 of the DEEWR report stated that:

Institutions should provide special funding for the provision of career development services for international students as a fixed proportion of income received from student fees.

⁵ Department of Education, Employment and Workplace Relations, *Review of Career Development Services in Australian Tertiary Institutions*, May 2008. See http://www.dest.gov.au/sectors/career_development/programs_funding/programme_categories/key_career_priorities/career_development/tertiary_development.htm#Review_of_Career_Development_Services_in_Australian_Tertiary_Institutions_Final_Report.

In response, the National Association of Graduate Careers Advisory Services proposed a figure of 0.0025 % to fund such services.⁶

Recommendation 5

The LIV recommends that an International Student Ombudsman be established to deal with all international student complaints, whether at the federal, state or territory levels. An International Student Ombudsman could handle the serious concerns of international students from wrongful exclusion from courses to employer exploitation. Alternatively, the consumer affairs authority or an equivalent body in each state or territory should be empowered to deal with international student issues on a centralised basis.

Recommendation 6

The LIV recommends that education providers be required to provide relevant support services, such as career services, which are needed by overseas students. A proportion of the income received from international students should be required to be set aside for international student support services. An alternative means of funding could be imposing an additional fee or levy when an educational provider seeks to register a course for international students of each education provider with the relevant Commonwealth Authority.

iv. Should an international student's ability to change their education provider be limited, if so in what way?

Comments and Recommendation/s

Reintroduction of visa condition 8206

On 1 July 2007, the Migration Regulations were amended to remove student visa condition 8206 from Schedule 8 and the related provisions in Schedules 1 and 2 to student visa subclasses. Condition 8206 limited the ability of student visa holders to change education providers during their course of study on the first 12 months of the course. As a result of this change, it is no longer necessary for students to apply for a new student visa in order to change education provider or seek to obtain a release from the provider.

The reason for the change was that the obligations set out in condition 8206 have been transferred from the Migration Regulations to the National Code of Practice 2007. We understand that the rationale for change was argued to be essentially educational, not an immigration matter. Under Standard 7 of the National Code of Practice 2007, an education provider is restricted from enrolling a new student if he or she has not completed 6 months of the principal course of study for which the student visa was granted, unless it meets the requirements outlined in Standard 7.

LIV members report that the removal of visa condition 8206 has led to regular transfer between education providers so that many providers do not appear to meet the requirements set out in Standard 7. We understand that there is no monitoring by either DIAC or DEEWR as to whether Standard 7 is complied with. Where students change courses regularly issues arise including delay in completion, issues with exemptions and students completing a course and being awarded a qualification from a provider where they may actually have completed very little of the course.

The LIV supports flexibility for students to change courses, particularly if on arrival, the course or provider does not meet their expectations. However, we submit that this flexibility should be monitored to prevent abuse and that the current system is lacking in this area.

⁶ See <http://nagcas.org.au/uploads/NAGCAS%20response%20to%20Phillips%20KPA%20Review.pdf>.

Recommendation 7

Visa condition 8206 should be reintroduced to a student visa holder, but enable a student to apply for a change of provider if legitimate reasons can be provided. This should not be interpreted as “exceptional circumstances” but rather a more practical and flexible approach to be able to change courses.

Delivering quality as the cornerstone of Australian education

v. How can the intersection between ESOS and the underpinning education quality assurance frameworks be improved?

No comment

vi. Where do international students’ needs differ to other students, such that additional or different regulation is required?

Comments and Recommendation/s

There are many factors which make international students’ needs different to domestic students, which include:

- Living in a different country for the first time (often for many students this may be the first time they have travelled outside of their country of residence);
- The need to find accommodation, part time employment and orientating themselves with the place they are living and cost of living in Australia;
- Domestic students are not influenced by education agents, who receive commission to attract students into various types of courses;
- English invariably is not the first language of most overseas student visa holders; and
- Whether the student has the financial capacity to study and live in Australia.

Financial Capacity

Schedule 5A of the Migration Regulations specifies the test to determine whether an applicant for any of the seven student visa subclasses has financial capacity to live and study in Australia. Student visa applicants are categorised into Assessment Levels (from 1 – 5) according to their country of origin, which purportedly reflects the perceived “risk level” of that country. Currently, only Assessment Levels 3 and 4 (there are currently no Assessment Level 5 countries) are required to provide documentary proof of sufficient funds that will be used to cover course fees, living expenses and airfares to and from Australia.

Central to the purpose of this requirement is that while students are granted work rights in Australia, income generated from such work is intended only to supplement finances while studying in Australia, and not to be the main source of income.

There are various components to the calculation of financial capacity under Schedule 5A. In particular, the amount required to cover living expenses in Australia is \$12,000 per annum. This

figure has not been indexed, changed or updated since the introduction of Schedule 5A on 1 July 2001.⁷

The LIV submits that \$12,000 per annum is an inadequate indication of the cost of living in Australia. The income level above which a person would be considered to be living in poverty was assessed by the Melbourne Institute in March 2009 to be a weekly income of \$391.85 a week or \$20,376.2 a year.⁸ Based on this figure, \$12,000 appears to be a poor indication of the yearly cost of living for an overseas student in Australia.

The danger of having an unrealistic figure for living expenses is self evident. After arriving in Australia, students might discover that they do not have sufficient funds to support themselves and, as a result, breach their 20 hour a week restriction, possibly working in the “black market” cash economy for substandard pay and poor working conditions.

The permissible sources of income allowed by the Migration Regulations to prove financial capacity should also be reviewed. For instance, applicants for a student visa can demonstrate that a loan has been taken out to fund their educational expenses but there is no requirement that these loan funds actually be remitted to Australia to pay for tuition fees or living costs. The concern is that students who find themselves unable to access such loan funds are forced to work while studying in Australia to pay for their tuition fees.

There is currently no regulation of how an education provider can require payment of tuition fees. The National Code of Practice 2007 requires education providers to provide only an itemised list of course money payable by the student and to provide information in relation to refunds of course money.⁹ The fact that education providers can allow fees to be paid by way of monthly payment plans allows students to travel to Australia without sufficient funds and might encourage work in excess of visa conditions while in Australia in order to meet payments. If loan arrangements are to be allowed to support studies in Australia, evidence that funds have been transferred should also be considered.

Recommendation 8

The LIV recommends that the figure of \$12,000 for living expenses under Schedule 5A of the *Migration Regulations* be re-evaluated by the DIAC to more accurately reflect the true cost of living in Australia. The figure should also be indexed annually to reflect increasing cost of living.

Recommendation 9

The LIV recommends that all students, not just students who fall within Assessment Levels 3 and 4 under Schedule 5A of the Migration Regulations, be required to provide documentary evidence that they have the requisite funds to live and study in Australia.

The LIV considers that any student that comes to Australia without having to verify his or her financial capacity is at risk of being forced to work more than the permitted hours.

Recommendation 10

The LIV recommends that tuition fees to education providers be required to be paid in advance by term or semester, and the practice of payment plans such as monthly instalments be stopped. Regulation of payment of tuition fees should be considered under the ESOS Act.

Recommendation 11

The LIV recommends that more information should be made available to prospective international students about the cost of living in Australia – as well as information about their employment rights

⁷ Schedule 5A was inserted in the *Migration Regulations* and became effective on 1 July 2001 by the *Migration Legislation Amendment (Overseas Students) Act 2000* (Cth).

⁸ See <http://www.melbourneinstitute.com/labour/inequality/poverty/default.html>.

⁹ Standard 3 – Formalisation of enrolment in the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*

and entitlements, safety in Australia and access to financial resources to assist international students during their stay in Australia. This should be available prior to students arriving in Australia through reading material. Consideration should be given to providing compulsory workshops on an ongoing basis upon and after the arrival of international students, offered by education providers under the guidance of the federal government as to information and workshop structure.

20 hour work condition

A limit of 20 hours per week might be an appropriate restriction on work rights when a visa holder's course of study or training is in session. However, the inflexibility of this condition by calculating this on a 7 day week (from Monday to Sunday) is problematic.

It provides for no flexibility to enable students to work more hours at certain times of the month, allowing for other times during the month to focus on their studies, assignments and examinations. The 20 hour limitation also encourages "cash in hand" employment in order to allow the students to work in excess of 20 hours per week without a record being kept, which is detrimental to students because no income tax is withheld and superannuation is paid by the employer and they are more likely to be subject to exploitation through low wages or poor work conditions.

Recommendation 12

The LIV recommends that the Conditions 8104 and 8105 in the Migration Regulations be amended to enable the 20 hours work a week requirement to be calculated as an average over one calendar month or four weeks.

Mandatory cancellation for breach of work conditions

Unlike many other visa conditions which allow for discretion to cancel where a breach occurs, cancellation for a breach under conditions 8104 and 8105 is one of a only few circumstances in which cancellation of a visa is mandatory under s116 of the Migration Act (read together with reg 2.43(2) of the Migration Regulations). The other circumstances in which cancellation of a visa is mandatory under s116 concern, for example, having an association with the proliferation of weapons of mass destruction or where the Australian Security Intelligence Organisation assesses the visa holder as a risk to national security.

The LIV considers that it is disproportionate that the breach of a student visa work condition attracts the same level of response as someone associated with the proliferation of weapons of mass destruction or suspected of terrorism. It is inappropriate that there is no scope to allow for mitigating circumstances to be considered by a decision-maker prior to making a decision to cancel a student's visa.

Recommendation 13

The LIV recommends that the Migration Act and Migration Regulations be amended to allow for discretion in considering whether to cancel a visa as a result of a breach of either Condition 8104 or 8105.

Effective regulation

vii. Is ESOS compliance and enforcement adequate?

Comments and Recommendation/s

Education agents

The LIV understands that there has been an increase in the number of private education providers in the VET Sector in recent years, with a corresponding increase in the number of education agents whose core business is to locate potential international students to study at an Australian education provider. We also understand that education agents are paid a commission for each student referral, which invariably is a percentage of the tuition fee paid by the international student. LIV members understand that Australian universities and TAFE colleges pay significantly lower commissions than some private VET colleges. There is, we understand, no prerequisite licensing or training required to become an education agent (except where imposed by education providers or by state government bodies).

The increase in education agents might be attributed to the availability of lucrative commissions and to the low barriers to entry.

Some countries have registers of education agents and some education providers impose their own standards. For example, the Victorian Department of Education and Early Childhood Development accredits education agents to be its representative to recruit students for Victorian Government Schools. The Victorian government requires education agents to have completed the Education Agent Training Course.¹⁰ However, education agents are not currently regulated by the Australian Government or any other independent regulatory authority in Australia.

The LIV is concerned that, in the absence of a regulatory authority, there is little incentive for education agents to act in the best interest of students. There is a clear conflict of interest in advising students about available courses and at the same time receiving commissions from the education provider. The recommendation of a student to a particular educational provider could be driven more by the commission to be received than the standard of education or services available to the student at that education provider. Moreover, as there is no authority or regulating body providing oversight of education agents, an aggrieved student has no means or avenue to lodge a complaint.

The LIV recognises that the regulation of education agents is problematic. As many education agents are not located in Australia, an Australian regulatory authority would have difficulty enforcing any penalty on an offending education agent.

There are education agents who are also migration agents, who would then come under the jurisdiction of the Office of the Migration Agents Registration Authority (OMARA) and be governed by the Migration Agents' Code of Conduct. However, problems arise where an education agent also acts as an international student's migration agent. There is an inherent conflict of interest between the student's interest, the interest of the education provider and the agent's own pecuniary interest. On the one hand, the agent will receive a commission from an education provider and, on the other hand, the agent will receive professional fees for any immigration work done for the student.

Possible conflicts are exacerbated when an education provider has a financial relationship with an education agent/migration agent, whereby they receive a recurring income stream from the education provider for student placements. In contrast, they receive a single payment from the student for the visa work done and, as a result, the ability to give independent migration advice could be compromised.

In addition to issues concerning the regulation of education agents, there is a real need for an overhaul of education provider scrutiny and regulation of the industry. We support the recent announcement of the Honourable Julia Gillard MP, Minister for Education, that an International Students Review is to be undertaken, which will include a review of the ESOS Act and report on changes designed to ensure Australia continues to offer world class quality international education.¹¹

In particular, the LIV supports Recommendation 20 of *DEEWR's Review of Australian Higher Education of 2008*, that the Australian Government establish a national regulatory body to be

¹⁰ See <http://www.study.vic.gov.au/Agents/BecAgent.htm>.

¹¹ Review of Australian Higher Education, Final Report, December 2008 available at http://www.deewr.gov.au/HigherEducation/Review/Documents/PDF/Higher%20Education%20Review_one%20document_02.pdf

responsible for accrediting and reaccrediting all providers of higher education, including providers under the ESOS Act.¹²

Recommendation 14

The LIV recommends that the federal government investigate the operation of education agents with a view to ensuring consumer protection for students.

Recommendation 15

The LIV recommends that education agents located overseas should be prohibited from providing migration advice relating to visa applications and acting on any visa matter. International students should be encouraged by the government to use independent registered migration agents for their visa applications. In our view, international students should be encouraged to seek advice from registered migration agents with legal qualifications.

Recommendation 16

The LIV recommends that migration agents and any related parties (such as the business where the migration agent is employed or operates) should be precluded from receiving any commission from education providers.

This could be achieved by either introducing a prohibition in the Migration Agents' Code of Conduct or by amending the ESOS Act to prohibit education providers from paying commissions to education agents who are also migration agents.

Recommendation 17

The LIV recommends that the ESOS Act be amended to impose a maximum commission rate that can be paid by education providers to anyone referring a student to an education provider.

viii. Can risk be better addressed through strengthening registration requirements and/or better targeting of compliance and enforcement action? How else can risk be managed?

See comments above in relation to education agents.

ix. What should be the balance between a focus on inputs and prescription versus outcomes?

No comment.

x. How can ESOS better support Australia's student visa program?

Comments and Recommendation/s

"Genuine Student" requirement

The Migration Regulation requires applicants for student visas to demonstrate that they are a "genuine applicant for entry and stay as a student" (e.g. reg 572.223(1)) and that there is no evidence that they are not a "genuine student" (reg 572.221(2)(b)(i)(A)).

In deciding whether to grant a student visa for the purposes of the Migration Regulations, consideration should be given by decision-makers as to whether the proposed study is in line with a prospective student's educational and employment background. Where, for example, an engineer, marketing professional, banker or physicist, applies to complete a hairdressing or cookery course, questions may arise about whether the person is applying solely with the aim of securing permanent residency. The LIV therefore considers a prospective student's educational

¹² Review of Australian Higher Education, Final Report, December 2008 available at http://www.deewr.gov.au/HigherEducation/Review/Documents/PDF/Higher%20Education%20Review_one%20document_02.pdf.

and employment background is a relevant consideration for decision-makers in relation to whether an applicant is a 'genuine student'.

Student visa options should be focused on providing *education* to international students. The LIV accepts that an international student may have a dual and legitimate purpose of obtaining a sound education and obtaining permanent residency in Australia. There is also an important need to maintain an onshore pathway to the General Skilled Migration program for international students due to Australia's ageing population and labour market needs.

However, the apparently increasing number of incidents of students who are studying courses for the predominant purpose of obtaining their permanent residency devalues the education industry and the purpose of the General Skilled Migration program. For example, the number of overseas students commencing studies in Hospitality Management and who meet the eligibility requirements for General Skilled Migration has increased dramatically in the past 5 years, with over 10,000 students enrolled in Hospitality Management courses in 2007 who were eligible for General Skilled Migration, increasing from less than 2,000 in 2004.¹³

Recommendation 18

The LIV recommends that greater focus be placed on the assessment of whether a person is a 'genuine student' in the *Migration Regulations*. For example, a prospective student's educational and employment background should be a relevant consideration for decision-makers.

¹³ *General Skilled Migration Reforms: Impacts and Prospect*, presented at MIA Vic/TAS Conference 29 August 2008 – Hobart by Pater Speldewinde, Director, Skilled Migration DIAC.