

EXPLANATORY STATEMENT

Education Services for Overseas Students Act 2000

Education Services for Overseas Students Regulations 2019

Authority

Section 177 of the *Education Services for Overseas Students Act 2000* (the Act) provides that the Governor-General may make regulations prescribing matters that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Subsection 50(2) of the *Legislation Act 2003* provides that a legislative instrument made in the year 2001 sunsets on 1 October 2019. This instrument is made to repeal and replace the *Education Services for Overseas Students Regulations 2001* ('the old regulations') which sunsets on 1 October 2019.

A reference in the *Education Services for Overseas Students Regulations 2019* (the Regulations) to an Act, the *National Code of Practice for Providers of Education and Training for Overseas Students 2018* (the National Code), the *Migration Regulations 1994* or any other disallowable legislative instrument is a reference to it as in force from time to time.

Legislative background

The Act came into force on 21 December 2000 and is the principal legislation for the delivery of education and training services to overseas students in Australia on a student visa.

The Act's objectives include to provide tuition assurance and refunds for overseas students for which they have paid, to protect and enhance Australia's reputation for quality education and training services, and to complement Australia's migration laws by ensuring education providers collect and report information relevant to the administration of the law relating to student visas.

The old regulations support implementation of the objects of the Act by establishing obligations on registered providers to keep and give student information, and establishing requirements for issuing penalties and infringement notices. The old regulations sunset on 1 October 2019.

Purpose and operation

The Regulations are made in substantively the same form as the old regulations. A small number of additional provisions have been inserted into the Regulations to give effect to the implementation of the revised National Code and the commencement of the *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*.

These additions to the Regulations include prescribing certain information that must be reported for the registration of providers and additional information that registered providers must provide about accepted students, including details of education agents who facilitated or are facilitating the student's enrolment with a provider.

Requiring information about education agents to be entered in the Provider Registration and International Student Management System (PRISMS) supports providers to comply with Standard 4 (Education Agents) of the National Code and assist Education Services for Overseas Students (ESOS) agencies (as defined in section 6C of the Act) in determining whether providers are complying with their obligations under Standard 4 of the National Code, which deals with providers' engagement of education agents. Information collected about education agents may be published pursuant to subsection 175(4) of the Act.

Part 4 ('Infringement Notices') of the Regulations substantially replicates Part 6 of the old regulations. Part 4 provides a procedure whereby the ESOS agency for a registered provider may serve a provider with an infringement notice requiring the payment of a penalty as an alternative to prosecution for an offence to which section 106 of the Act applies.

A number of minor amendments have also been made to update the language of the Regulations in accordance with current administrative practice, and to improve clarity of intent.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) has agreed a RIS is not required for the Regulations (OBPR reference number 24022).

Commencement

The Regulations commence on 1 October 2019.

Consultation

As part of the process of remaking the Regulations, the following key stakeholders were consulted:

- the Australian Government Department of Home Affairs to ensure the Regulations complement Australia's migration laws relating to student visas;
- the Australian Skills Quality Authority (ASQA) as the National Vocational Education and Training (VET) Regulator and ESOS agency for registered VET providers for the purposes of the Act, to ensure the Regulations support ASQA to fulfil its role as an ESOS agency;
- the Tertiary Education Quality Standards Agency (TEQSA) as the ESOS agency for registered higher education providers for the purposes of the Act, to ensure the Regulations support TEQSA to fulfil its role as an ESOS agency;
- the Tuition Protection Service (TPS) Director appointed under the Act responsible for assisting students to find suitable alternative courses, and providing refunds, in the case of defaults, to ensure the Regulations support the TPS Director to fulfil his or her role;
- the Australian Government Attorney-General's Department, to ensure the Regulations conform with requirements regarding administrative law, criminal law, human rights and information law; and
- the Australian Bureau of Statistics, to ensure the Australian Standard Classification of Education 2001 was appropriately referenced.

The above stakeholders have indicated their support for the Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*
Education Services for Overseas Students Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Education Services for Overseas Students Regulations 2019* (the Regulations) is to support the administration of the *Education Services for Overseas Students Act 2000* (the Act) by establishing prescribed information for the registration of providers, obligations on registered providers to keep and give student information and education agent information, and requirements for issuing penalties and infringement notices.

Human rights implications

The Regulations engages the following human rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and Article 28 of the *Convention on the Rights of the Child* (UNCRC); and
- the right to work – Article 6 of the ICESCR.

Right to Education

The Regulations engage the right to education, contained in Article 13 of the ICESCR, insofar as it relates to the provision of education and training services to overseas students in Australia on a student visa. Article 13(1) of the ICESCR recognises each person's right to education, and that education is important to "*the full development of the human personality*", and enables "*all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*". The protections afforded by the Act and the Regulations to overseas students, demonstrate Australia's commitment to upholding the right to education for overseas students in Australia.

Similarly, Article 28(1) of the UNCRC is relevant to children who are overseas students studying in primary and secondary schools in Australia, and recognises the "*right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity*". The Act and Regulations, in conjunction with state and territory laws on school registration, child protection and welfare ensure that there is a regulatory framework to protect overseas students in primary and secondary school.

The objectives of the Act include providing tuition assurance and refunds for overseas students for which they have paid, as well as protecting and enhancing Australia's reputation for quality education and training services. This framework supports and complements Australia's migration laws by ensuring education providers collect and report information relevant to the administration of the law relating to student visas, thereby protecting the quality of the education and training in Australia. The Regulations also support enforcement of the infringement provisions under the Act,

which provide additional protections for students by penalising providers who fail to comply with the record-keeping and student refund provisions of the Act. A strong international education system, which includes appropriate protections for overseas students, allows Australia to promote the right to education, especially to overseas students.

To the extent that the right to education is engaged, the measures contained in the Regulations are compatible with the right to education.

Right to Work

The Commonwealth's commitment to the delivery of quality education and training services to overseas students provides a solid foundation and opportunity for people to engage with and pursue quality work objectives after completing their studies. The promotion of the right to education inherently leads into the promotion of the right to work, as education is one of the pathways to employment.

The Regulations engage the right to work, contained in Article 6 of the ICESCR. Article 6(1) of the ICESCR discusses "*the right to work, which includes the right of everyone to the opportunity to gain [their]... living by work which [they] freely [choose] or [accept]*". A high quality international education system provides a foundation on which overseas students may then pursue broader employment opportunities.

Similarly, the vocational education and training (VET) sector promotes the objects of Article 6(2) of the ICESCR, which include access to "*technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment...*". Australia's VET sector (including VET courses) partners with the industry and employment sectors to ensure training and education delivered is relevant and assists in people, including overseas students, accessing and gaining skilled employment.

The pathway from the right to education to the right to work is supported by the international education system provided for by the Act and Regulations.

To the extent that the right to work is engaged, the measures contained in the Regulations are compatible with the right to work.

Conclusion

The Regulations are compatible with human rights because they advance the protection of human rights.

Dan Tehan
Minister for Education

Detailed explanation of the *Education Services for Overseas Students Regulations 2019*

Part 1 – Preliminary

Section 1 – Name of Regulations

Section 1 provides that the title of the Regulations is the *Education Services for Overseas Students Regulations 2019* (Regulations).

Section 2 – Commencement

Section 2 provides that the Regulations commence on 1 October 2019.

Section 3 – Authority

Section 3 provides that the Regulations are made under the *Education Services for Overseas Students Act 2000* (the Act), as provided for in section 177 of the Act.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms. Schedule 1 to the Regulations repeals the *Education Services for Overseas Students Regulations 2001*.

Section 5 – Definitions

Section 5 provides definitions for terms used in the Regulations that are not already provided for under the Act.

Section 6 – Meaning of *student visa*

Section 6 provides a definition for the meaning of *student visa* for the purposes of section 5 of the Act. This definition refers to the definition of student visa set out in regulation 1.03 of the *Migration Regulations 1994*.

Section 7 – Meaning of *tuition fees*

Section 7 provides a definition of *tuition fees* for the purposes of section 7 of the Act. Subsection 7(2) prescribes the classes and types of fees that are *tuition fees* for the purposes of paragraph 7(b) of the Act. Subsection 7(3) prescribes the classes and types of fees that are not *tuition fees* for the purposes of paragraph 7(c) of the Act. The *tuition fees* prescribed in section 7 of the Regulations are not exhaustive and other classes and types of fees may fall within the definition of *tuition fees* specified in paragraph 7(a) of the Act.

Part 2 – Registration of providers

Section 8 – Information to be entered on the Register

Section 8 prescribes certain types of information to be entered on the Register, for the purposes of paragraph 14A(4)(i) of the Act. The Register is called the Commonwealth Register of Institutions

and Courses for Overseas Students (CRICOS). The information relates to a provider's registration to provide a course or courses at a location or locations and includes information about:

- the provider's business information;
- the maximum number of overseas students to whom a course may be provided;
- details about each course (including about duration, tuition and non-tuition fees payable and how the course will be provided);
- location details for each course (including information about the individual responsible for the day-to-day operation of the provider at the location); and
- levels and fields of study of courses provided.

For the purposes of paragraph 8(2)(a), subsection 8(3) provides the levels of study and requirements for fields of study for a course. Subparagraph 8(3)(a)(i) refers to the Australian Qualifications Framework (AQF). The AQF is incorporated by reference as existing at the commencement of this section. The AQF is the national policy for regulated qualifications in Australian education and training. It incorporates the qualifications from each education and training sector into a single comprehensive national qualifications framework. The AQF is publicly available on the AQF website at www.aqf.edu.au. Subparagraph 8(3)(b)(i) refers to the Australian Standard Classification of Education (ASCED). The ASCED, published by the Australian Statistician in 2001, is incorporated by reference as existing on 1 October 2019. The ASCED is a statistical classification for use in the collection and analysis of data on educational activity and attainment. The ASCED is publicly available on the Australian Bureau of Statistics website at www.abs.gov.au.

Part 3 – Obligations on registered providers

Division 1 – Giving information about accepted students

Section 9 – Students who become accepted

Section 9 provides that a registered provider must give certain types of information about each person who becomes an accepted student of that provider for the purposes of paragraph 19(1)(a) of the Act. The registered provider is required to enter this information in the Provider Registration and International Student Management System (PRISMS).

This includes:

- information about the student;
- details about the course;
- agreed starting day and expected completion date of the course;
- tuition and non-tuition fees paid for the student to the provider for the course;
- total amount of tuition fees the student is required to pay to undertake the course; and
- student visa information.

Paragraph 9(q) requires the provider to enter information about a student's completion of an English language proficiency test under the *Migration Regulations 1994*. If undertaking a particular English language proficiency test is a requirement specified under paragraph 500.213(3)(a) of Schedule 2 to the *Migration Regulations 1994*, and the student has undertaken that test (whether or not for the purposes of a Subclass 500 (Student) visa), the provider must record the name of the test, the date the student undertook the test and score the student received.

Paragraph 9(r) provides that if the student holds, or has applied for, a Subclass 500 (Student) visa and the student was within a class of applicants specified under paragraph 500.213(3)(b) of Schedule 2 to the *Migration Regulations 1994*, which refers to the classes of applicants who are exempt from subclause 500.213(1) and is not required to undertake that particular test, the provider is required to provide details of the class of exemption which applies to that student.

Section 10 – Students who do not begin courses when expected

Section 10 provides that the registered provider must give certain types of information about an accepted student for the purposes of paragraph 19(1)(c) of the Act. If the student does not begin his or her course when expected, the provider must give the student's current residential address, phone number and email address.

Under subsection 10(2) of the Regulations, the provider is not required to give the prescribed information under subsection 10(1) if, before the student's expected starting day:

- the student asks the provider for a later starting day; and
- the request is made on the basis of compassionate or compelling circumstances; and
- the provider agrees to a later starting day for the student.

Section 11 – Other prescribed matters

Section 11 applies in relation to an accepted student who is accepted for enrolment, or enrolled, in a course provided by a registered provider. The section is made for the purposes of paragraph 19(1)(f) of the Act, and set out a table at subsection 11(2) which prescribes the types of information to be given about an accepted student. The information must be given within the applicable number of days after the occurrence of the event set out in the table. Subsection 19(1A) of the Act defines 'applicable numbers of days'. Generally, a provider must provide the information prescribed under paragraph 19(1)(f) of the Act within 31 days of the event occurring.

Column 1 of the table sets out the events that cause a registered provider to be required to give certain information.

Column 2 of the table sets out any conditions that apply for a particular event to cause a registered provider to be required to give the information.

Column 3 sets out the types of information to be given by a registered provider upon the event occurring.

Information collected under this section may be used by the Department of Home Affairs if relevant enforcement action against the student is required. The information specified in Column 3 may also be used by the Department of Education and Training when recording information about a student's enrolment and for broader policy development.

Section 12 – Prescribed condition of student visa

Section 12 specifies that visa condition 8202, set out in Schedule 8 to the *Migration Regulations 1994*, is prescribed for the purposes of subsections 19(2) and 20(1) of the Act.

Division 2 – Record keeping

Section 13 – Details of which a registered provider must keep records

A registered provider must keep records about accepted students.

Section 13 prescribes the information a registered provider must record for each accepted student for the purposes of paragraph 21(2)(d) of the Act. This includes:

- the total amounts of tuition and non-tuition fees paid for the student to the provider for the particular course, including the total of any tuition and non-tuition fees that have become payable and have not been paid;
- copies of any written agreements entered into between the provider and student;
- amounts a student will be charged to access the student's records; and
- if an agent (also known as an education agent) of the provider facilitated, or is facilitating an accepted student's enrolment, details about that agent. This includes information about individual employees of the agent who were or are involved in the facilitation of the enrolment (including name, email address and Migration Agents Registration Number if applicable).

Section 14 – Fees for accessing records

Section 14 sets out that the fee a provider may charge for a student to access a record set out in section 13 of the Regulations must not exceed the actual cost incurred by the provider in providing access to that record. This provision is made under the necessary and convenient power for carrying out or giving effect to the Act under paragraph 177(b) of the Act.

Part 4 – Infringement notices

Section 15 – Purpose of this Part

Part 4 of the Regulations relate to infringement notices, and is made for the purposes of section 106 of the Act. Part 4 provides for a procedure for dealing with offences specified at subsection 106(1A) of the Act through infringement notices. An ESOS agency for a registered provider may serve the provider an infringement notice requiring payment of a penalty as an alternative to prosecution for the offence.

Section 16 – Infringement notices

Section 16 provides that an ESOS agency for a provider may serve an infringement notice (or cause one to be served) on the provider if the ESOS agency has reasonable grounds to believe that the registered provider has committed an offence covered by section 106 of the Act.

The infringement notice must include the information specified at subsection 16(2). This includes:

- name and address of the provider;
- details of the alleged offence and the relevant provision of the Act;
- the maximum penalty a court could impose for the offence;
- the amount payable as the infringement notice penalty;
- a statement that if the provider prefers that the matter not be dealt with by a court, the provider may signify that preference by paying the infringement notice penalty within a particular period;
- details of how and where the provider may pay the infringement notice penalty;
- a statement that if before the end of 28 days after service of the notice, the provider notifies the ESOS agency of any facts or matters that the provider believes ought to be

taken into account in relation to the alleged offence, the time for payment will be extended and the ESOS agency must consider matters mentioned in subsection 20(5);

- matters the ESOS agency must consider under subsection 20(5);
- statement that if the infringement notice penalty is paid in time, the provider's liability for the offence is discharged and further proceedings cannot be taken against the provider for the offence and the provider is not taken to have been convicted of the offence;
- that the provider may be prosecuted for the alleged offence if the provider does not meet certain timeframes; and
- the name of the person who serves the notice.

Subsection 16(3) explains that the infringement notice may also contain any other information that the ESOS agency considers necessary.

Subsection 16(4) specifies the infringement notice must be served on the provider not more than 12 months after the alleged commission of the offence.

Section 17 – Service of infringement notices

Section 17 sets out the requirements for how an infringement notice may be validly served on an individual person or a body corporate.

Section 18 – Extension of time to pay

Section 18 sets out the process by which a provider may apply to the ESOS agency for a further period of time within which to pay the infringement notice penalty. The ESOS agency must be satisfied that any such extension is reasonable taking into account all of the relevant circumstances.

This section also provides for the relevant processes and consequences that follow should an extension of time to pay be granted or refused.

Section 19 – Payment by instalments

Section 19 provides that an ESOS agency may, if it is satisfied that it is proper in the circumstances to do so, make arrangements for a provider who has been served with an infringement notice to pay the amount set in the infringement notice by instalments.

This section also provides for the relevant processes that follow should a payment by instalments arrangement be granted or refused.

Section 20 – If infringement notice disputed

Section 20 provides that an ESOS agency for a provider may withdraw an infringement notice served on a provider, if it is satisfied that it is proper in the circumstances to do so.

Subsections 20(2) to 20(5) set out what an ESOS agency must consider when a provider disputes an infringement notice, and the relevant processes and consequences that follow should an ESOS agency decide to withdraw, or refuse to withdraw, an infringement notice.

Section 21 – Payment of penalty if infringement notice not withdrawn

Section 21 provides that if an infringement notice has been served on a provider and the ESOS agency who served the notice decides to refuse to withdraw the infringement notice, then the provider must pay the infringement notice penalty before the end of 28 days after receiving the ESOS agency's notice of its refusal to withdraw the infringement notice.

Section 22 – Effect of payment of infringement notice penalty

Section 22 provides that if a provider pays the infringement notice penalty in accordance with Part 4 of the Regulations, then the provider's liability in respect of the offence set out in the infringement notice is discharged, no further action can be taken against the provider for the offence, and the provider is not convicted of the offence. Subsection 22(2) provides that subsection 22(1) also applies to a provider who has arranged to pay the infringement notice penalty in instalments once the provider makes payments in accordance with that arrangement.

Section 23 – Admissions under paragraph 16(2)(h)

Section 23 provides that an admission made by a provider in any notice given to an ESOS agency under paragraph 16(2)(h) of the Regulations, is inadmissible in proceedings against the provider for the alleged offence.

Section 24 – Matter not to be taken into account in determining sentence

Section 24 provides that if a provider is served with an infringement notice, elects not to pay the infringement notice penalty, and is prosecuted for and convicted of the alleged offence mentioned in the infringement notice, then the court must not take into account the provider's decision not to pay the infringement notice penalty in determining any penalty.

Section 25 – Evidence for hearing

At the hearing of a prosecution for an offence mentioned in an infringement notice, the certificates described at subsection 25(1) are *prima facie* evidence of the facts stated in the certificate.

Subsection 25(2) provides that a certificate that purports to have been signed by an authorised officer of the ESOS agency for the alleged offender is considered authentic unless proven otherwise.

Section 26 – Payment of penalty by cheque

Section 26 provides that if all or part of the infringement notice penalty is paid to the Commonwealth by cheque, then the payment is not taken to have been made until and unless the cheque is honoured on relevant presentation.

Section 27 – Infringement notice not compulsory, etc

The purpose of section 27 is to clarify that nothing in Part 4 of the Regulations is to be taken as:

- requiring an ESOS agency to serve an infringement notice on a provider suspected of having committed an offence to which section 106 of the Act applies;
- affecting the liability of a provider to be prosecuted for an alleged offence if:
 - the provider is not served with an infringement notice for the offence; or
 - the provider is served with an infringement notice, but the notice is then withdrawn; or

- limiting the penalty a court may impose on a provider convicted of an offence.

Part 5 – Application and transitional provisions

Division 1 – Provisions for this instrument as originally made

Section 28 – Definitions

Section 28 defines “old regulations” as being the *Education Services for Overseas Students Regulations 2001*.

Section 29 – Things done under the old regulations

Section 29 clarifies that anything done for the purposes of the old regulations continues to have effect for the purposes of these Regulations, as if the thing had been done for the purposes of the Regulations. The reference to a thing being done under subsection 29(2) includes a reference to a notice, application or other instrument being given or made.

Schedule 1 – Repeals

Item 1 repeals the *Education Services for Overseas Students Regulations 2001* on commencement of the Regulations.