

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Migration Act 1958

Migration Amendment (Suspending Education Providers) Regulations 2024

The Migration Act 1958 (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act. Paragraph 504(1)(l) of the Migration Act provides that the Governor-General may make provisions prescribing matters that, under the *Education Services for Overseas Students Act 2000* (ESOS Act), are required or permitted to be prescribed in regulations made under the Migration Act.

The ESOS Act establishes a regulatory framework for the registration of providers of education services to overseas students. Section 97 of the ESOS Act provides that the Immigration Minister may give a suspension certificate to a registered provider or an associate of a registered provider if, in their opinion, a significant number of overseas students or intending overseas students are entering or remaining in Australia for purposes not contemplated by their visa.

In considering whether to issue a certificate under subsection 97(1) of the ESOS Act, the Minister may have regard to any of the matters in subsection 97(2) of the ESOS Act, including any other matter set out in regulations made for the purposes of paragraph 97(2)(d) of the ESOS Act. Subsection 97(3) of the ESOS Act provides, that subsection 97(2) does not limit the matters to which the Immigration Minister may have regard in considering whether to give a suspension certificate.

Currently, the *Migration Regulations 1994* (the Migration Regulations) do not prescribe any other matters under paragraph 97(2)(d) of the ESOS Act.

The *Migration Amendment (Suspending Education Providers) Regulations 2024* (the Regulations) supports implementation of the Government's Migration Strategy announced on 11 December 2023. The Regulations amend Division 1.6 in Part 1 of the *Migration Regulations 1994* to prescribe the 'relevant score' as a matter that the Minister may have regard to when considering whether to issue a suspension certificate under section 97 of the ESOS Act.

The Regulations provide that a 'relevant score' is a score that is worked out for a registered provider using the method specified by the Minister in a legislative instrument made under proposed subregulation 1.29(3) of the Regulations.

The legislative instrument made for the purpose of subregulation 1.29(3) would also specify when, and how often a 'relevant score' for a registered provider is to be worked out and the period for which a 'relevant score' would have effect for a registered provider. The method

specified in the legislative instrument may take into account matters relating to overseas students, or intending overseas students, matters that occurred during a particular period, whether that period ends before or after the commencement of the Regulations. There would be no statutory right of review in relation to a determination of the relevant score, however judicial review rights may apply.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa settings in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provision. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment A](#).

The Office of Impact Analysis (OIA) has been consulted in relation to the amendments. The OIA considers that the Regulations are unlikely to have more than a minor regulatory impact. No Impact Analysis is required. The OIA consultation reference number is OIA23-06072.

Section 17 of the Legislation Act provides that the rule maker must be satisfied that consultation has been undertaken that is appropriate and reasonably practicable before making a legislative instrument. The department consulted with education sector stakeholders and the Department of Education and the Department of Employment and Workplace Relations on the development of the Migration Strategy, which includes the International Student Integrity reforms agreed by the Government. Further consultation occurred in relation to the Regulations with these stakeholders, in addition to the Tertiary Education Quality and Standards Agency (TEQSA), Australian Skills Quality Authority (ASQA), the Attorney-General's Department, the Tuition Protection Service, and the Overseas Students Ombudsman.

The amendments commence on the day after registration on the Federal Register of Legislation.

Further details of the Regulations are set out in [Attachment B](#).

The Regulations amend the Migration Regulations which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and

similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and

- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

The Department follows standard practices to notify clients about the Regulations, including updating its website.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Suspending Education Providers) Regulations 2024

This Disallowable 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 Disallowable Legislative Instrument

Since the Australian border re-opened to visa holders, including student visa holders, following the COVID 19 pandemic, the Department of Home Affairs (the Department) has seen increasing levels of integrity concerns across the student visa program, including higher levels of fraudulent documents, fraud related to English language testing and non-genuine claims being presented in student visa applications. These integrity concerns impact visa processing times and allow for exploitation of the international education sector, the student visa program and student visa applicants themselves. This undermines Australia's reputation as a provider of international education for genuine applicants.

On 26 August 2023, the Hon Clare O'Neil MP, Minister for Home Affairs, issued a joint [media release](#) with the Hon Jason Clare MP, Minister for Education, announcing a package of measures to support integrity in the international education system and to support genuine overseas students, including closing a loophole allowing the misuse of concurrent enrolments, increasing the financial capacity requirement for international students, and consideration of the use of power under section 97 of the *Education Services for Overseas Students Act 2000 (ESOS Act)*.

The ESOS Act establishes a regulatory framework for the registration of providers of education services to overseas students. Subsection 97(1) of the ESOS Act provides that the Immigration Minister may give a suspension certificate to a registered provider or an associate of a registered provider if, in their opinion, a significant number of overseas students or intending overseas students are entering or remaining in Australia for purposes not contemplated by their visa.

Under subsection 97(2) of the ESOS Act, in considering whether to give such a certificate, the Immigration Minister may have regard to any of the following:

- (a) the number of applications for student visas made by overseas students and intending overseas students, in respect of the registered provider or associate, that have been refused, where there were fraudulent statements made or fraudulent documents given in connection with the application;
- (b) the number of the registered provider's or associate's accepted students and former accepted students who have breached conditions of their visas;
- (c) the number of accepted students and former accepted students of the registered provider or associate who remain in Australia unlawfully after finishing their courses;

(d) any other matter set out in regulations made for the purposes of this paragraph under the *Migration Act 1958*.

The *Migration Amendment (Suspending Education Providers) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to prescribe the ‘relevant score’ as a matter that the Minister may have regard to when considering whether to issue a suspension certificate under section 97 of the ESOS Act. The Amendment Regulations also amend the Migration Regulations to provide that a ‘relevant score’ is a score that is worked out for a registered provider using the method specified by the Minister in a legislative instrument made under the Migration Regulations.

The Amendment Regulations amend the Migration Regulations to provide the Minister with the ability to specify by instrument the method for working out a score, when and how often a relevant score is to be worked out and the period in which a relevant score has effect for a registered provider in a legislative instrument. The amendments further provide that the method for working out a score of a registered provider may take into account matters relating to overseas students, or intending overseas students in respect of the registered provider or an associate of the registered provider; and matters that occurred during a particular period, whether that period ends before or after the commencement of the regulation.

It is expected that the instrument will specify the method for working out the relevant score based on the (existing) evidence level framework. The evidence level framework was established as part of the Simplified Student Visa Framework (SSVF) and is used to determine what evidence, for example evidence of funds, that visa applicants need to provide as part of their student visa application.

Under the SSVF, each country and each Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS)-registered education provider is allocated an evidence level on a scale of 1 – 3 which is visible to the provider through the Provider Registration and International Student Management System (PRISMS).

The methodology behind the evidence levels of the SSVF was developed in consultation with the education sector at the time that SSVF was established. Evidence levels are calculated using a weighted average based on the total number of international students (applicants and holders of student visas) that have a confirmation of enrolment based on their principal course of study from the education provider. The evidence level indicators that are used to calculate the evidence level include the rates of visa cancellations and visa refusals, including due to fraud. Further information about the indicators and weightings is available on the Department’s website¹.

Under section 98 of the ESOS Act, before issuing a suspension certificate, the Immigration Minister must give the registered provider a written notice stating that they intend to give the provider a suspension certificate and why. This function may be delegated to the Secretary of the Department or to an SES employee.

- The notice must provide at least 7 days for the provider to give written submissions about the matter to the Immigration Minister.
- After considering any submission received within that period, the Immigration Minister may give the provider the suspension certificate if they still consider that they should do so.

¹ <https://immi.homeaffairs.gov.au/what-we-do/education-program/what-we-do/evidence-levels>

- Once issued, the certificate must be tabled in both Houses of Parliament within 15 sitting days of giving it to the provider.

If the Immigration Minister gives a suspension certificate to a registered provider under section 97 of the ESOS Act:

- The effect of a suspension certificate is that the provider would not be able to recruit new international students for the period that the suspension certificate remains in force. However, existing students may continue their studies with the provider.
- The suspension certificate would have effect for six months unless revoked early by the Minister.
- Breach of a suspension certificate by an individual is an offence under section 101 of the ESOS Act.
- The Minister may give further certificates for a period longer than six months, unless by the end of the period in which the certificate is in effect the provider satisfies the Minister that they should not be given a further certificate.
- A decision to give a suspension certificate is not merits reviewable through the Administrative Appeals Tribunal. A provider may be able to apply for judicial review of the decision.

The integrity of the student visa program is a responsibility of all relevant parties in the international education sector, including registered education providers and other government agencies. The Department shares regulatory responsibility of the student visa program with the Department of Education and the regulatory bodies for education providers; the Tertiary Education Quality and Standards Agency (TEQSA); and the Australian Skills Quality Authority (ASQA). TEQSA and ASQA are responsible for regulating and assuring the quality of all providers of Higher Education and Vocational Education and Training providers, and accrediting their courses of study.

The amendments made by the Amendment Regulations support the exercise of the Immigration Minister's existing power under the ESOS Act and provide for a further matter, the education provider's 'relevant score', to be considered by the Minister when deciding whether to issue a suspension certificate. This will enhance integrity in both the international education sector and the student visa program.

These amendments are part of the measures to support genuine overseas students, and the integrity in the international education sector more broadly, and are part Government's Migration Strategy that was announced on 11 December 2023.

The Amendment Regulations are also consistent with the Government's intention to prevent the exploitation of overseas students in the international education sector in Australia and prevent vulnerable temporary migrants from being targeted by unscrupulous migration or education agents and employers who stand to gain financial benefit from bringing overseas students to Australia for purposes other than study.

Human rights implications

This Disallowable Legislative Instrument may engage:

- The right to education in Article 13 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR)
- The right to work in Article 6 of the ICESCR
- Rights relating to children under the *Convention on the Rights of the Child* (CRC).

Right to education

The objective of the amendments made by the Amendment Regulations is to improve integrity in the international education sector in Australia, with the ultimate aim of ensuring that genuine overseas students are able to have receive a quality education and student experience in Australia, and therefore broadly supports the right to education of those students. If a suspension certificate is issued to an education provider, including where the ‘relevant score’ was considered in that decision, this limits the ability of the education provider to recruit new students, but does not limit those students’ ability to choose a different provider for their studies in Australia. In addition, the measure is not intended adversely to affect existing students of that provider, as those students are permitted to continue their studies with that provider during the suspension.

As part of developing and implementing the regulations, consultation was undertaken with TEQSA, ASQA, Department of Education, Department of Employment and Workplace Relations and the Tuition Protection Service² in order to co-ordinate a cross government approach. While issue of a suspension certificate does not automatically trigger a provider to default, Tuition Protection Service indicated readiness to implement a support system for students that may be adversely affected by their education provider being issued with a suspension certificate. This includes a communication strategy informing students if their education provider is issued with a suspension certificate and support to continue studies with another provider should they choose to do so. The amendments therefore support the right to education, and any consequential impact on future or existing students would not limit their rights in relation to commencing or continuing their studies.

Right to work

In most cases education providers are educational institutions and corporate entities rather than individuals. Further, education providers who receive a suspension certificate are not prevented from owning or operating the business whilst a suspension certificate is in effect, as existing students are permitted to continue their studies during the suspension. However, a possible consequence of a suspension certificate being issued, including following the consideration of the relevant score provided for by the Amendment Regulations, to a natural person, is that this may affect their ability to continue working as an education provider. Similarly, employees of an education provider may be affected if the education provider ceases operations following the issue of a suspension certificate.

However, the person and/or employees would not be limited in pursuing other employment opportunities. Further, any consequential impact on their right to work would occur after a natural justice process in relation to the issuing of the suspension certificate, and be for the legitimate purpose of protecting overseas students, and the integrity of the student visa program, from unscrupulous education providers.

Rights relating to children

While the measure is expected to primarily impact providers of higher and vocational education, the ESOS framework also applies to schools. Therefore in some cases the rights of children under 18 may be engaged. As the amendments are intended to benefit students by helping to ensure they receive a quality education and student experience in Australia, they

² The Tuition Protection Service is a Government initiative which supports international students on student visas and eligible domestic students whose education providers are unable to fully deliver their course of study. It was established in 2012 as an international student tuition protection scheme under the ESOS Act. More information is available at: <https://www.education.gov.au/tps/about-us>

would also broadly support the rights of students aged under 18, including their rights to education under both the ICESCR and the CRC.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights, and any limitation on human rights would be necessary, reasonable and proportionate to legitimate aims.

The Hon Clare O’Neil MP
Minister for Home Affairs

Details of the Migration Amendment (Suspending Education Providers) Regulations 2024

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (Suspending Education Providers) Regulations 2024*.

Section 2 – Commencement

This section provides that the proposed Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958*.

Section 4 – Schedules

This section provides for how the amendments made by the Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Before Regulation 1.30

This item inserts new regulation 1.29 in the Migration Regulations.

New regulation 1.29 provides that, in considering whether to give an Immigration Minister's certificate to a registered provider under section 97 of the ESOS Act, the Minister may have regard to the relevant score for the provider at that time. Regulation 1.29 establishes a power for the Minister to make a legislative instrument to specify the method for working out a relevant score for a registered provider, as well as the score's period of effect and the frequency with which the score is to be calculated.

New subregulation 1.29(1) of the Migration Regulations provides that regulation 1.29 is made for the purposes of paragraph 97(2)(d) of the ESOS Act. Paragraph 97(2)(d) of the ESOS Act provides that the Minister, when deciding whether to give a suspension certificate to a registered provider, may have regard to any matter set out in regulations made under the Migration Act, in addition to those listed under paragraphs 97(2)(a) to (c). Subsection 97(3) of the ESOS Act, provides that the matters to which the Immigration Minister may have regard in considering whether to give a certificate are not limited by Subsection 97(2) of the ESOS Act.

New subregulation 1.29(2) provides that when considering whether to issue an Immigration Minister's suspension certificate to a registered provider at particular time, the Minister may have regard to the relevant score that has effect for the registered provider at that time.

New subregulation 1.29(3) provides that the Minister may specify the method for working out a score, when and how often a relevant score is to be worked out and the period in which a relevant score has effect for a registered provider in a legislative instrument. A legislative instrument made under this provision would be covered by the disallowance exemption provided by table item 20 in regulation 10 of the *Legislation (Exemption and Other Matters) Regulation 2015*.

New subregulation 1.29(4) prescribes a non-exhaustive list of matters that may be taken into account in the method to be specified under paragraph (3)(a). The method for working out a score of a registered provider may take into account matters relating to overseas students, or intending overseas students in respect of the registered provider or an associate of the registered provider; and matters that occurred during a particular period, whether that period ends before or after the commencement of the regulation.

New subregulation 1.29(5) provides the definitions for a number of terms used in new regulation 1.29. For instance, the term ***relevant score*** means a score that is worked out for a registered provider using the method specified in the instrument made under paragraph 1.29(3)(a).