Migration Legislation Amendment (Student Visas) Bill 2012

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Contents

Purpose .......................................................................................................................... 2
Background .................................................................................................................... 2
Committee consideration .............................................................................................. 6
Financial implications .................................................................................................. 6
Key provisions ............................................................................................................. 6
Migration Legislation Amendment (Student Visas) Bill 2012

**Date introduced:** 22 March 2012  
**House:** House of Representatives  
**Portfolio:** Immigration and Citizenship

**Commencement:** Sections 1 to 3 commence on the day the Act receives Royal Assent. Schedule 1 commences on a day to be fixed by Proclamation, or six months after the day of Royal Assent, whichever is first.

**Links:** The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through [http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation). When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/).

**Purpose**

The purpose of this Bill is to amend the *Education Services for Overseas Students Act 2000* (ESOS Act) and the *Migration Act 1958* (Migration Act) to abolish the current system of automatic visa cancellation for student visa holders who are in breach of the academic progress or attendance requirements of their student visa. The decision to cancel a student visa on these grounds will become discretionary, rather than automatic.

The Bill also amends the ESOS Act to provide that a registered provider of education to overseas students must advise the Government of any change in a student’s contact details within 14 days after becoming aware of the change.

**Background**

All overseas students in Australia are subject to visa condition 8202, which requires them to maintain a certain standard of course attendance and academic progress. Currently, if satisfactory attendance and progress is not maintained by a student, the course provider is required to report the student to the Secretary of the Department of Industry, Innovation, Science, Research and Tertiary Education (Department of Innovation), and notify the student that he or she is in breach of visa condition 8202. The visa then becomes subject to automatic cancellation (unless the student can demonstrate exceptional circumstances, which they must do within a strict 28 day time period).

Automatic cancellation for breaches of condition 8202 is, at first glance, a straightforward compliance issue—if a visa condition is not met, the visa is cancelled. However, the process has attracted criticism from several quarters, most recently the 2011 Strategic Review of the Student Visa Program (the Knight Review).

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The Knight Review was announced in December 2010, by the Minister for Immigration and Citizenship, Chris Bowen, and the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Chris Evans, in response to concerns about the competitiveness of Australia’s international education sector and the integrity of the student visa system.¹ The international education sector is a significant contributor to the Australian economy, and an important source of revenue for many higher education providers. Numbers of overseas students in Australia grew at an unprecedented rate under the Howard Government, largely due to policy measures designed specifically to attract students. While this growth was welcomed by many, it also led to concerns around the integrity of the program, and its utilisation as a pathway to permanent residency, as well as exploitation of students by unscrupulous education providers.²

In response to these concerns, and also to address the impacts of the Global Financial Crisis (GFC), which contributed to a decline in demand for overseas workers, the Rudd and Gillard Governments introduced reforms to the student visa program and the skilled migration program, which were aimed at improving the integrity of the system and better meeting the needs of the Australian labour market.³

The higher education sector has been alarmed by the fall in international student numbers that has been experienced in the wake of both the Rudd/Gillard reforms and the GFC—student visa grants declined by almost 16 per cent from 2008–09 to 2009–10.⁴ Through the Knight Review, the Government invited stakeholders in the sector to air concerns and contribute to the discussion around ways to enhance Australia’s overseas student sector, while at the same time strengthening the integrity of the student visa system.

The report of the Review was provided to the Government in June 2011. It contains 41 recommendations aimed at making Australia a more attractive destination for students (university students in particular) from overseas, and at improving the integrity of the student visa system as a whole.⁵ The Government responded positively to the Knight Review, giving in-principle support to all

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2. For detail on these policy changes, and consequences for the integrity of the program, see E Koleth, Overseas students: immigration policy changes 1997—May 2010, Background note, 2009–10, Parliamentary Library, Canberra, 2010, viewed 30 March 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F1P1X6%22
3. Ibid.

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41 recommendations. The majority of recommendations do not require legislative change, and have already been implemented, or are in progress.

A key area of reform recommended by the Knight Review concerns the integrity of the student visa program across all sectors. Included in this category was the recommendation to abolish automatic visa cancellation for unsatisfactory academic progress or attendance:

**Recommendation 24**

Automatic cancellation of student visas should be abolished and replaced by a system in which information conveyed by SCVs [Student Course Variations] is used as an input into a more targeted and strategic analysis of non-compliance.

The Knight Review criticises the automatic cancellation regime as being inequitable, inefficient and inflexible. In particular, it points out the demands the system places on the Department of Immigration and Citizenship’s (DIAC) compliance resources. The current process by which a student visa is automatically cancelled is as follows:

1. The course provider determines that a student has not met attendance requirements or made satisfactory academic progress. Attendance and academic progress requirements are set by each individual course provider, and vary between institutions and courses.

2. The course provider, under section 19 of the ESOS Act, notifies the Department of Innovation that the student has not met these requirements, via a Student Course Variation (SCV).

3. As required under section 20 of the ESOS Act, the course provider notifies the student that they are in breach of their visa conditions and they must report to a DIAC office within 28 days to demonstrate exceptional circumstances.

4. If the student does not report to DIAC, or cannot demonstrate exceptional circumstances, then the visa is automatically cancelled at the end of the 28 day period, under section 137J of the Migration Act.

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9. SCV’s can cover a range of matters, including the student changing to a different course. Not all SCVs will lead to a student being issued with a Non Compliance Notice.

10. Section 137J of the Migration Act provides that a student who has been sent a notice under s20 of the ESOS Act may have their visa automatically cancelled.
There are other reasons, besides unsatisfactory attendance and progress, why a student may be issued with a Non Compliance Notice (NCN), and education providers are required under section 19 of the ESOS Act to notify the Department of Innovation of other possible breaches, such as students failing to commence their course. However unsatisfactory attendance and academic progress are the only two compliance issues that lead to automatic cancellation, as prescribed by section 137J of the Migration Act. In every other case visa cancellation is at DIAC’s discretion, under the general visa cancellation framework contained in the Migration Act. The Knight Review points out that this places enormous pressure on DIAC’s compliance resources. Virtually every student issued with an NCN on these grounds reports to DIAC requesting to have their circumstances considered, and as they are subject to automatic cancellation they are dealt with as a priority. This means that a large proportion of student compliance officer time (up to 80 per cent) is spent investigating these cases.11 Limited time is therefore available for officers to investigate other compliance issues, such as failure to commence studies, which are potentially more serious, but not subject to automatic cancellation. As the review notes, ‘the current system obliges DIAC to concentrate its student integrity and compliance staff resources in areas which do not constitute the greatest risk.’12

A further concern expressed in the Knight Review is the potential for education providers to use the automatic cancellation provisions ‘carelessly, or even maliciously’.13 At best, education providers have been found to be unreliable in the issuing of SCVs, with some being found to have a 100 per cent error rate.14

Similar concerns have also been expressed by the Australian National Audit Office (ANAO), in its recent report on the management of student visas. It found that ‘there are systemic flaws and vulnerabilities in the regime for automatic and mandatory cancellation of student visas for breaches of condition 8202 relating to course progress and attendance’.15 In particular, the ANAO was concerned that the regime was extremely vulnerable to legal challenge. A series of successful legal challenges to various procedural aspects of the automatic cancellation regime meant that the regime was found to be valid for only five months in the period from May 2001 to December 2009. While these procedural errors have been rectified, the ANAO noted that concern had been expressed by the judiciary that the regime was ‘draconian’ and not ‘reasonably proportionate’.16 The ANAO recommended a review of the student visa cancellation regime be undertaken in order to examine whether it was effectively achieving DIAC’s integrity and compliance objectives. This became one of the areas of inquiry for the Knight Review, which ultimately came to similar conclusions as the ANAO.

12. Ibid., p. 96.
14. Ibid.
16. Ibid., p. 110.

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Under the amendment proposed in this Bill, registered education providers will no longer be able to issue a notice to students under section 20 of the ESOS Act. This will have the effect of ending the automatic cancellation regime, as it is the section 20 notice which triggers the automatic cancellation process. However, education providers will still be required to notify the Government of any breaches of the attendance and progress requirements. The decision to cancel a visa on the basis of the reported breach will then be made by a DIAC officer under the existing discretionary cancellation framework. This will bring breaches of the attendance and academic progress requirement into line with all other visa breaches, and allow officers to make more targeted decisions about where best to focus compliance resources.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 18 June 2012. Details of the inquiry are at:

Financial implications

The Explanatory Memorandum to the Bill states that there is no financial impact.\(^\text{18}\)

Key provisions

**Item 3** of Schedule 1 of the Bill amends subsection 19(1) of the ESOS Act to insert **proposed paragraph 1A**, which states that a registered education provider must advise the Secretary of the Department of Innovation of any change in a student’s contact details or other prescribed details, within 14 days of becoming aware of the change. This is to ensure that relevant government agencies maintain up-to-date contact details for overseas students in order to effectively target compliance activity, and engage with students who may be reported for non-compliance.

**Items 4 and 5** of Schedule 1 of the Bill amend section 20 of the ESOS Act to provide that a registered education provider **must not** send a student a written notice advising the student that they are in breach of a prescribed condition of their student visa on or after the day on which **proposed subsection 20(4A)** commences. It is these amendments to section 20 that will have the effect of

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removing automatic visa cancellation, as in the current regime it is the notice of the breach sent to the student by the education provider under section 20 provider that triggers the automatic cancellation process.

**Items 6 and 7** of Schedule 1 of the Bill make consequential amendments to the Migration Act, cross-referencing the amendments to the ESOS Act. In particular, item 7 adds an additional note to section 137J(1) of the Migration Act, providing that a breach notice must not be sent after new subsection 20(4A) of the ESOS Act commences. Section 137J of the Migration Act governs the automatic visa cancellation regime.

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