THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

EDUCATION SERVICES FOR OVERSEAS STUDENTS
LEGISLATION AMENDMENT BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Honourable Chris Evans)
The purpose of the Bill is to make amendments to the Education Services for Overseas Students Act 2000 (the ESOS Act) and the Ombudsman Act 1976 to provide for recommendations from the review of the Education Services for Overseas Students legislative framework, dated February 2010, titled Stronger, simpler, smarter ESOS: supporting international students (the ESOS Review) conducted by the Hon Bruce Baird AM.

The Bill will introduce provisions to strengthen the registration process for approved providers. As part of proving their demonstrated capacity to provide education of a satisfactory standard, providers will have to demonstrate access to the financial resources to meet the objectives of the ESOS Act, have a sustainable business model, and the capability, governance structures and management to deliver education of a satisfactory standard. The purpose of this measure is to build on the previous amendment which introduced two new registration criteria and to further raise the bar of entry into the international education sector.

Building on the risk managed approach to the re-registration process introduced by the previous amendment to the ESOS Act, this measure will extend a risk management approach to all registrations and throughout the registration period. The purpose is to better identify risk and ensure a consistent assessment of risk by all state designated authorities to reduce the number of high risk providers entering the international education sector, or set appropriate conditions on that registration, including for ongoing monitoring to better manage risk. This measure will mean that when assessing a provider for registration, the registering body will set a period of review, and any conditions that should apply arising from an assessment of the provider’s risk profile. In addition to registration, a risk management approach will target regulatory activity to reduce duplication of effort and unnecessary regulatory burden.

The risk management approach will be supported by limiting a provider’s registration period to no more than five years. This will also introduce consistency into the registration regime to allow ESOS to formally recognise and align with limited periods of registration for each provider set by the states and domestic quality assurance frameworks.

Risk management will be further supported by enabling conditions to be placed on a provider’s registration when the provider is first registered or anytime throughout the registration period related to risk. This measure allows the Commonwealth/Secretary to impose a condition on a provider’s registration on its own initiative, rather than on a recommendation by a state designated authority and for reasons other than non-compliance. Imposing a condition on a provider’s registration will arise from a
provider’s risk assessment conducted by the state designated authority or where risk is identified separately by the Commonwealth as part of ongoing compliance monitoring.

This measure will also extend existing sanctions and strengthen the ability to take effective enforcement action by introducing financial penalties for a broader range of non-compliant behaviour to better address emerging issues confronting the international education sector, such as unethical recruitment activity and maintaining student records.

To make ESOS stronger, the ESOS Review recommended that targets and regular reporting on all regulatory activities undertaken be published. This measure will allow the Secretary to publish any actions taken by the Commonwealth under Parts 6 and 7 of the ESOS Act (which deal with enforcement action, and monitoring and searching activities respectively). The appeals of providers against the enforcement action taken will be no bar to the publication of this information, with the publication corrected if the appeal is upheld.

To improve access to a statutorily independent external complaints body the jurisdiction of the Commonwealth Ombudsman will be extended to included overseas students of private registered providers.

Registered providers are currently required to have arrangements in place for a person or body independent of, and external to, the registered provider to hear complaints or appeals arising from the registered provider’s internal complaint and appeals process or refer students to an existing body where that body is appropriate for the complaint or appeal.

Currently many of the public registered providers are constituted as statutory authorities or similar bodies under State or Territory legislation. Accordingly these types of bodies are captured by the jurisdiction of the relevant State or Territory Ombudsman or bodies under State or Territory legislation or bodies such as the South Australian Training Advocate. This available jurisdiction enables the students of these registered providers to direct their complaint to the particular State Ombudsman for review of investigation.

However, students of private registered providers, while they must be provided access to an external complaints body, do not have recourse to a statutorily independent external body, such as an ombudsman, competent to hear and investigate student complaints in a consistent and quality-assured manner. The extension of the jurisdiction of the Commonwealth Ombudsman will address this gap in access to a statutorily independent external complaints body.

In addition to investigating complaints, the Commonwealth Ombudsman will provide advice and training to private registered providers to facilitate best practice complaint handling. The Commonwealth Ombudsman will also review and investigate complaint handling and may report on broader systemic issues across the international education sector.
FINANCIAL IMPACT STATEMENT

The financial impact on providers in meeting requirements relating to financial viability and business capability are not expected to be different to that required under the demonstrated capacity requirement introduced earlier this year. With the risk managed approach to registration, not all providers will be required to undergo the same level of scrutiny, only those that haven’t already met the strengthened requirements through a complementary regulatory regime and this will enable better targeting of existing resources rather than additional resources. There may be a financial impact for some providers associated with conditions imposed on their registration based on their risk profile, for example, extra monitoring requirements or restrictions on the number of overseas students they are able to enrol (although this would not be a restriction on the number of domestic students enrolled within the overall capacity approved under domestic quality assurance). Consistent with proposed changes to the Australian Quality Training Framework (AQTF) 2010 announced by the Council of Australian Government in December 2009, the use of conditions would target those providers assessed as high risk and be aimed at protecting student interests.

Introducing a broader range of financial penalties will have a financial impact on providers not complying with their obligations under ESOS, which is anticipated to be a small proportion of providers.

There will be no financial impact on providers or students for accessing external complaints handling through the Commonwealth Ombudsman. The cost of extending the jurisdiction of the Commonwealth Ombudsman to hear complaints from providers who do not currently have access to a statutorily independent complaints authority is being funded by the Department of Education, Employment and Workplace Relations in the first instance.

REGULATION IMPACT STATEMENT

Background

This regulatory Impact Statement (RIS) has been prepared by the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) which is responsible for the administration of the Education Services for Overseas students Act 2000 (the ESOS Act) and associated legislation governing the delivery of education services to overseas students in Australia on a student visa.

The principal objects of ESOS are to:

- Provide financial and tuition assurance to overseas students for courses for which they have paid
- Protect and enhance Australia’s reputation for quality education and training services
- Complement Australia’s migration laws by ensuring providers collect and report information relevant to the administration of the law relating to student visas.
Whilst ESOS is administered by the Australian Government there is a significant role for state and territory governments, including making a recommendation to the Commonwealth for registration under ESOS once a provider has satisfied domestic quality assurance requirements of relevant quality frameworks, such as the Australian Quality Training Framework (AQTF), and ongoing audit activity.

The purpose of the RIS is to assist the Australian Government to make decisions regarding some of the proposed regulatory changes arising out of recommendations from the recent Review of the ESOS Act conducted by the Hon Bruce Baird AM (the Baird Review). The review was originally planned for 2012 but was brought forward by the Deputy Prime Minister, the Hon Julia Gillard MP, in August 2009 in response to a number of emerging issues impacting on the international education sector following a period of rapid growth and change. These included concerns about quality, student welfare, and reports of unethical behaviour by some education providers and education agents.

Education is now Australia’s fourth biggest export industry, generating more than $17 billion annually and supporting around 125,000 jobs across Australia. In 1990, Australia welcomed 47,000 international students. By 2000, this number had grown to 188,000, and in 2009 it is estimated that almost half a million overseas students studied in Australia. In 1990, 31 per cent of students came to Australia to study in higher education and a further 15 per cent studied in VET. By 2009, higher education and VET were roughly equal contributors at over 30 per cent each. The growth in the student population has led to significant growth in the number of education providers offering services to international students (now over 1300 providers). As with the student population, providers have become much more diverse, ranging from large universities and TAFEs, public and private schools, to small private VET and English language providers.

The Terms of Reference for the Baird Review were:
- Supporting the interests of students
- Delivering quality as the cornerstone of Australian Education
- Effective regulation
- Sustainability of the international Education Sector.

The Baird Review report, *Stronger, simpler, smarter ESOS: supporting international students*, was publicly released on 9 March 2010 following an extensive consultation period with a wide range of stakeholders. The report makes 19 recommendations predominantly related to:
- more support for international students and improved information
- stronger consumer protection mechanisms to ensure students are protected from unscrupulous operators
- improved regulation of Australia’s international education sector
- improved support for those who study and live in Australia including having somewhere to go when problems arise.

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In releasing the report, the Deputy Prime Minister indicated her in-principle support for a small number of recommendations for immediate implementation through a first tranche of legislation to be introduced in the winter sitting of Parliament (which are the subject of this RIS). The Government’s response to the remainder of the recommendations will be progressed through further consultation with relevant stakeholders and second tranche legislation expected to be introduced in the Spring sitting of Parliament.

It is important to note too, that the Baird review, and in particular the first group of recommendations for implementation, builds on recent amendments to the ESOS Act 2000 enacted on 3 March 2010. These amendments included for the re-registration of all providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) by 31 December 2010 using a risk management approach as recently agreed between the Commonwealth and States and Territories through the Joint Committee on International Education (JCIE). The Amendment Act introduces two strengthened registration criteria – that the provider must have a principal purpose to provide education and the demonstrated capacity to deliver education to a satisfactory standard. The range of evidence that would support a claim against these new criteria has also been agreed through the JCIE to ensure a nationally consistent approach to registration decisions. The Amendment Act also allows the Commonwealth to recognise any conditions on registration imposed by the states and for regulatory changes related to education agents to be made - both of which relate directly to first tranche Baird recommendations.

At the same time, the Government is working with states and territories on broader but related reforms to the education sector including: changes to the AQTF in mid-2010 (to also strengthen initial registration as a Registered Training Organisation and risk management approaches) and the establishment of the Tertiary Education Quality Standards Agency (TEQSA) and a National VET Regulator in January 2011. It will be important therefore to align ESOS, which cuts across all education sectors, with these changes to ensure consistency and reduce duplication for a smooth transition for regulators, providers and students to a more national regulatory environment from 2011 onwards.

During the debate on the ESOS Amendment Bill in February 2010 a number of Senators signalled expectations of further amendments to be brought back to Parliament as soon as possible after the Baird Review was completed. Timely changes to the Education Services for Overseas Students Act 2000 are seen as critical for restoring stability and confidence in Australia’s international education industry. A spate of provider closures, continued adverse media coverage on student safety concerns, the re-registration measure and recent announcements regarding changes to skilled migration policy and student visa integrity measures are all impacting on enrolments and creating uncertainty for students and providers in 2010.

The key element from the Baird review that this RIS addresses is the need for a stronger gateway into the international education sector and effective regulation throughout the registration period. While ESOS regulators currently and routinely look at risk both at point of registration and in targeting audit activity, these recommendations would overlay a more nationally consistent, comprehensive risk
management approach that is developed and maintained in consultation with stakeholders and experts to profile providers at entry to determine the level of scrutiny, evidence, tests and costs that apply at registration and through the period of registration. The recommendations would also allow ESOS to formally recognise and align with limited periods of registration for each provider set by the states and TEQSA (under domestic quality assurance requirements) to support this risk management approach.

Assessing the problem
Statement of the Problem

Given reports of unscrupulous providers, poor quality and a spate of provider closures due to financial and business issues, a key question for the review has been whether the gateway to international education through CRICOS registration – the entry requirements, their application and ongoing monitoring arrangements – is appropriately set. Feedback from a wide range of stakeholders through consultation during the Baird review suggested the gateway should be strengthened through consistent consideration of matters such as financial viability, sustainability of business operations and the bona fides of key personnel. Greater scrutiny upfront to identify high risk providers and denying them CRICOS registration or imposing conditions on their registration, as well as ongoing monitoring of risk should prevent or at least reduce the more serious compliance issues and number of provider closures the sector is currently experiencing. Only those providers that are able to make a genuine claim to quality and capacity to deliver that quality should be allowed to register on CRICOS.

The international education sector is diverse and, following a period of rapid growth, is now poorly served by a one size fits all approach to regulation, both by the underlying education quality assurance frameworks and under ESOS. While the self-accreditation of public universities has in the main been effective in ensuring high quality in the higher education sector, a greater level of scrutiny is warranted in other sectors, particularly the growth areas. The AQTF, for example, has had a quality improvement and outcomes focus which has assumed that all providers aspire to quality when in fact a relatively small number of VET providers have had a principal purpose more related to maximising business outcomes. It is noted that proposed changes to the AQTF in mid-2010 aim to address this gap by strengthening entry to the VET sector.

The presence of providers of concern on the CRICOS register has been primarily due to:
- legislative requirements at both the domestic quality assurance and ESOS level that are considered insufficient to allow regulators to refuse registration or always take effective compliance action
- a lack of consistent, formalised risk management processes and frameworks focused on the risks peculiar to the international education sector (e.g. additional consumer protection considerations and visa integrity) and
• inadequate compliance resources (or more accurately a failure of resourcing to keep pace with the growth in the number of providers and overseas students) to undertake thorough registration and monitoring processes.

What has resulted is regulatory action that has tended to jump from one crisis to the next, rather than taking a proactive, planned approach that relies on indicators of risk grounded in evidence and the collective experience and knowledge of regulators. Furthermore, the regulatory frameworks sometimes over-burden well-established providers with a good compliance history without addressing the underlying issues that poor quality providers exploit.

Currently, CRICOS registration relies heavily on state recommendations based on domestic quality assurance regimes. The matters which DEEWR must take into consideration when deciding to register a provider on CRICOS are limited and largely administrative in nature. This process does not make it sufficiently clear what matters have been considered by the designated authority and what evidence was accepted as meeting the registration requirement.

The entry requirements need to be strengthened for providers wanting to enter the sector with attention to ensuring providers have the financial resources to operate and a sustainable business model. They need to have the right capacity, capability and intent to operate successfully. Risk needs to be better identified at entry into the sector and regularly throughout registration as part of an audit cycle that reflects the initial risk rating, using a range of indicators that go to the heart of the purpose of ESOS (over and above the needs of domestic students) and whether the provider will be able to operate successfully now and in the future. This will mean less requirement for compliance measures downstream, better targeting of available compliance resources (noting increasing compliance resourcing is a second tranche Baird recommendation), as well as building rewards (in the form of less regulatory burden) for providers who actively reduce their risk.

The Baird review recommendations to allow conditions on initial registration and throughout the registration period and limiting the period of registration for each provider are seeking to address a relatively minor problem and in large part will simply formalise current practice.

**Need for Government action**

These measures, as recommended by the Baird Review are designed to address shortcomings in the existing ESOS regulatory framework, in turn to protect and enhance Australia’s reputation for quality education.

The ESOS framework has provided a sound regulatory structure and consumer protection framework for international students which, until recently, has served Australia’s international education sector well. Following a period of rapid growth and change however, the seriousness of emerging issues related to quality and student wellbeing have shown decisively that adjustments need to be made to ESOS to strengthened entry requirements and ensure enforcement is applied by regulators in a more consistent and rigorous manner. Greater transparency about the outcomes of regulatory activity should also be available to students, potential students and
providers, so all groups can feel assured by the system and providers are held accountable.

The risk managed approach to re-registration and the two new registration criteria introduced under the ESOS Amendment Act 2010 on 3 March 2010 go some way towards addressing these issues and there is agreement with state regulators that assessment against the new criteria will include a greater focus on financial viability, business model and governance as per the relevant Baird recommendation.

Subsequent amendments to implement the first tranche Baird recommendations will simply expand on and strengthen these recent amendments by making the risk assessment and evidential requirements more explicit and linked to monitoring beyond initial registration.

The additional measures proposed will aim to ensure that only genuine providers with a long-term commitment to the international education sector are able to deliver courses to international students supported by a stronger and more transparent regulatory regime.

A key principle underlying the development of these measures is that it aims not to add an additional layer of rules and red tape to the existing regulatory framework but rather make it work more efficiently and effectively by simplifying, streamlining and strengthening areas identified as problematic. It is expected the VET regulator and TEQSA will take on the regulatory responsibilities for ESOS in their sectors, including registration. This will further streamline risk-management practices and registration with domestic quality assurance requirements.

**Objectives**

The objectives of the proposed measures to introduce a risk-based approach to the regulatory framework are to:

- make that framework more effective and efficient by better targeting resources towards higher risk providers;
- ensure a lower regulatory burden for low risk providers which doesn’t duplicate existing processes and also rewards providers that seek to reduce their risk; and
- ensure greater consistency in risk assessment and risk management approaches already in place in most states and territories.

The measures to strengthen entry requirements for provider registration aim to:

- further enhance the recent amendments to the ESOS Act to strengthen registration requirements;
- ensure appropriate scrutiny is given to those areas of risk specific to international education recently highlighted in college closures (e.g. financial viability to meet refund obligations); and
ensure that only genuine providers with a long-term commitment to deliver quality education outcomes for international students by ensuring they are financially viable, have sustainable business models and the capacity, capability and business structures and management.

The objectives of the entire suite of recommendations are to

- ensure the effectiveness and efficiency of the existing regulatory framework by simplifying, streamlining and strengthening areas identified as problematic.
- to support Australia’s international education reputation with a stronger and more transparent regulatory regime.

**Options**

**Status quo**

The emerging issues confronting the international education sector as outlined in previous sections, adverse media attention, declining student enrolments, reputational damage raised by diplomatic partners (especially India and China) associated with college closures and consistent feedback from a wide range of stakeholders during consultations has clearly signaled that the option to retain the status quo is not a sustainable one. This is further evidenced by the Minister’s decision to require re-registration of all providers in 2010, introduce a range of immediate amendments to the ESOS Act in August 2009 and bring forward the Review of the ESOS Act at the same time.

The Baird review recommendations are consistent with regulatory changes introduced with the recent ESOS Amendment Act 2010 to strengthen the regulatory presence and will better position ESOS for the transition to national regulation of the VET and Higher education sectors.

**Increased scrutiny and regulation for all CRICOS providers**

The option for an ‘across the board’ increase in regulatory function was not considered to be an option. Investigations show that a significant percentage of currently registered providers fall into a low risk category. Consultation with key stakeholders during the Baird review, and feedback from stakeholders when the re-registration measure was first announced, raised concerns about the possibility of a ‘knee-jerk’ reaction to increase regulatory burden on the ‘good’ providers for the sake of a few. Additionally, there was concern raised about the capacity of an already stretched regulator workforce to enforce additional regulatory requirements on all providers.

Rather, the prevailing view was that resources targeted at high risk providers would be more effectively utilised in identifying and regulating those providers who are not delivering a quality education. More tightly regulating entry to the industry was also seen as key to ensuring the future of the sector.

These changes seek to avoid an increase in the regulatory burden for compliant providers and an overall decrease in regulatory burden and duplication across complementary regimes.
Risk managed regulation of CRICOS providers

More effective regulation has been identified as essential to address emerging challenges and reputational issues for the international sector. A risk managed approach has been identified as the best option for creating a more effective regulatory regime.

Risk management is a measure proposed to:

- better identify risk at entry into the sector
- reduce the number of high risk providers in the sector
- scrutinise providers already registered on CRICOS
- better manage compliance resources by reducing compliance issues overall (by not registering highest risk providers), setting appropriate review cycles and levels of scrutiny, and by generally targeting resources to areas of the highest risk.

These ‘lifting the bar’ measures seek to complement rather than duplicate the risk-based regulatory approach being adopted by the national regulators and enhance recent amendments to ESOS.

Concerns

Possible disadvantages using a risk based approach include low risk providers taking advantage of a lower level of monitoring and the incorrect identification and weighting of key risk factors that would be critical to informing the basis of an effective risk management regulatory approach. These possible risks however will be mitigated by ensuring that low risk providers are scrutinised on a regular basis, as appropriate, contracting independent and expert advice to develop risk factors and ongoing evaluation and review of the risk assessment model.

Impacts

Recommendation 3: That ESOS regulators adopt a consistent, comprehensive risk management approach developed and maintained in consultation with stakeholders and experts to

a) profile providers at entry to determine the level of scrutiny, evidence, tests and costs that apply to registration and throughout the period of registration

b) update every provider’s profile on a regular basis to reassess the level of scrutiny and tests that should apply.

This recommendation will impact on all providers currently registered or wishing to register on CRICOS albeit in different ways. In summary, the impact is expected to be either no increase or reduced regulatory burden for providers assessed as low risk; no increase or small increase in regulatory burden for providers assessed as medium risk; and an increase in regulatory burden for providers assessed as high risk.
A key objective of developing and adopting a consistent, comprehensive risk management approach to registration will be to target activity where it is most needed. The range of documentation required and the intervals at which it is to be provided will be determined by the risk profile of the provider.

In estimating the likely impact of these recommendations on providers this RIS is based on the risk management approach recently developed for implementing the re-registration measure between the Commonwealth and all state and territory designated authorities under ESOS (endorsed by the Joint Committee on International Education in January 2010). Analysis was done to estimate the number of providers that would fall into low, medium and high risk categories. KPMG was commissioned during the Baird Review to explore risk management options and this report, which is not inconsistent with the re-registration model, will form the basis of ongoing consultations with a wide range of stakeholders in coming months to refine the risk indicators.

In implementing this recommendation it is anticipated that the ESOS Act 2000 will be amended to enable the application of a risk management approach to registration and ongoing monitoring throughout the registration period. The details underpinning the risk model will then be developed in consultation with a wide range of stakeholders. In the first instance it is likely to be proposed that consultation with states and territories be undertaken through the Joint Committee on International Education under the Ministerial Council for Tertiary Education and Employment (MCTEE) to build on the framework recently agreed for the re-registration measure and the KPMG analysis. A comprehensive impact analysis would be undertaken at that time as part of preparation of a consultation Regulation Impact Statement, consistent with Council of Australian Governments (COAG) best practice regulation requirements. Through this process a more refined risk matrix would be developed for consultation workshops with key industry stakeholders (providers, peak bodies and Tuition Assurance Providers) and experts in risk management and regulation. This may also include a submissions process. Taking into account consultation feedback, MCTEE would then be asked to endorse a final risk management model. Subject to consultation, this may be incorporated into the ESOS legislative framework in some way to ensure a transparent and consistent application of the model, for example, a list of core risk indicators and continuum of conditions that could be imposed according to risk prescribed in the regulations or as an appendix to the National Code.

Noting the above and not pre-empting the final model, details around the risk management approach might include consideration of the following:

- The categories of risk
- The core indicators of risk that would determine which category of risk a provider is allocated and any weighting of indicators, e.g.
  
  - proportion of overseas to domestic student (<50% low risk, 50-70% medium risk, >70% high risk)
  
  - proven track record delivering quality education (yes = low risk, no = med/high risk),
  
  - compliance history (good = low risk, minor concerns addressed = medium risk, major compliance issues not adequately addressed = high risk)
- governance arrangements (manager/CEO/owner has education qualifications = low risk, education expert representation on board = medium risk, no access to education expertise = high risk).

- Minimum financial viability tests would apply to all providers on registration versus what additional financial viability tests might apply to medium and high risk providers on registration and at prescribed intervals during registration on top of any financial tests under related regulatory purposes (e.g. under HESA or RTO registration requirements) – this might be an agreed procedures audit by a certified accountant approved by Government for this purpose looking at capacity to pay student refunds etc. There may be a cost associated with a special audit that could be incurred by the provider directly or incorporated in regulator fees.

- The range of other information that all providers be required to provide on registration compared to any additional information by medium and high risk providers at registration and at prescribed intervals during registration (and what the different intervals should be for different tiers of risk).

For example:
- all providers: establishment documentation, strategic plans, governance structures, experience of management and teaching staff, details about course delivery arrangements and assessment regimes, administrative systems, student support services

- higher risk providers might be required to undertake and report on student surveys, provide details about the background of the owners, copies of student attendance/course progress, copies of recruitment activity and agreements with students and agents.

- The cycle of auditing that low, medium and high risk providers should be put on e.g. low risk = a minimum of one audit every 3 years, medium risk = a minimum of one audit every 18 months, high risk = minimum of one audit every year with unannounced spot visits at any time.

- How regularly should risk be reviewed e.g. this could be linked to the registration period where low risk are given a 5 year registration, medium risk a 3 year registration and high risk a 1 year provisional registration.

- The range of other conditions that might be appropriate on registration according to medium and high risk e.g. an appropriate cap on enrolments, requirements for bank guarantees or limiting prepaid fees that may be taken, requiring the provider to establish particular governance arrangements, prescribing student agreements and certain policies and procedures to be followed, providing the department with student academic records quarterly etc.
Low risk providers
There was agreement that in the main providers who have had their principal purpose, financial viability, business model, governance and quality thoroughly scrutinised through another process (such as for recurrent government funding or for VET fee help purposes) could be considered low risk and need only apply in order to be re-registered. Initial investigations into the risk management data provided by the Provider Registration and International Students Management System (PRISMS) have shown that of a total of 1327 CRICOS providers between 600-700 providers would fall into the low risk category. Extrapolating this model for implementing Baird recommendation 3a and b, it is estimated that these same providers, recently reregistered in 2010, would be given the maximum period of time between risk reviews and audit cycles and the minimum level of scrutiny deemed necessary to satisfy ESOS compliance (unless of course there were complaints or other indicators that there may be compliance issues to investigate). This review period would most likely align with existing domestic quality assurance cycles. For these providers the impact of the changes to regulation would be minimal or even a reduction in current requirements.

High risk providers
A broad risk matrix was then agreed, based on a model developed and recently tested in the Victorian (VRQA) rapid audits of CRICOS providers in 2009, to assist in the differentiation of medium and high risk providers. According to this matrix, those in the highest risk include providers with a particular profile, for example:
- are newly established and have little or no track record in providing education;
- have a narrow course scope primarily linked to skilled migration policy;
- recruit mainly or only overseas students and from only one or a small number of source countries/regions;
- have a large share of foreign ownership and/or education agent ownership;
- have a history of compliance issues etc.

Again, based on PRISMS data, it was estimated 10-20 per cent or between 150 – 250 providers might be considered high risk. In the re-registration process, these providers might be required to undergo a full desk audit and site visit. Some may not be re-registered – a general worst case scenario would be 50 per cent which would reduce the number for Baird implementation purposes down to between 75-125 providers. If the same risk assessment then applies, these providers would be on the maximum cycle for risk review and auditing. This could mean spot visits, a full site audit every year or every two years, annual financial viability statements, conditions on their registration (such as a cap on enrolments), and a minimum period of registration. More frequent registration periods would mean a more frequent re-registration charge which currently varies considerably from state to state. Currently CRICOS charges are:
- all states have an initial registration charge ranging from $127 (ACT) up to $10,730 (NSW) – average around $800
- an annual CRICOS fee in QLD ($245), NSW (up to $8110), and VIC (up to 1064)
- reregistration fee in QLD ($245), WA ($240), VIC (up to $1800), NT ($350), and SA ($1260)
- a non-routine compliance visit charge applies in NSW ($145/hr if a complaint otherwise free) and VIC ($125/hr)
NSW is the only state to charge reinstatement after suspension ($7020) and
DEEWR has a $396 initial registration charge, a base annual fee of $351 = $30 per student), a reinstatement fee of $135.

It is important to note that many of these providers are already facing tougher regulatory requirements through intensified auditing activities instigated by state and territory regulatory authorities to manage emerging quality issues in the industry. For example, in January 2010 the VRQA introduced new tougher guidelines that will apply to all new applications for registration and all existing CRICOS providers and NSW has instigated ‘flying squad’ audits of all VET CRICOS providers in 2010. The proposed changes to the AQTF in mid-2010 will also require all new and lapsing registrations to meet tougher new regulatory requirements, including financial viability tests.

Medium risk providers
A further 30 - 40 percent of providers (between 400 -500 providers) therefore could be considered to be in a medium risk category depending on further consultation with the relevant state and territory regulatory bodies. The requirement for a consistent, comprehensive risk management approach would mean that that these providers may come under more in depth scrutiny but in keeping with the risk management approach, providers meeting all registration criteria would not be significantly affected by this new approach to regulation. Furthermore under the regulatory systems already in place in states and territories many of these providers would already be facing the appropriate level of scrutiny. The aim of the regulatory changes is to provide consistency across all jurisdictions.

Recommendation 4 That ESOS be amended to support better risk management by:

a) allowing conditions on initial registration and throughout the registration period so a provider can be subject to additional scrutiny and tests as their risk profile demands

b) limiting the period of registration for each provider.

The recommendation to ‘allow conditions on initial registration and throughout the registration period so a provider can be subject to additional scrutiny and tests as their risk profile demands’ essentially supports the previous recommendations around risk management and would impact most significantly on those providers identified as high risk. As previously indicated, from the data obtained through the re-registration process this would be a relatively small group of providers. In the re-registration process, all the medium and high risk providers are required to complete a self-assessment against the two new criteria looking at principal purpose and capacity to deliver quality. This assessment, agreed between the Commonwealth and the states, provides a list of the range of evidence a provider might be required to produce to support a claim against these new criteria – evidence around financial viability, business planning, infrastructure and workforce capacity, student profile and recruitment activity and student support services etc. This would likely form the basis of whatever additional tests might apply for Baird recommendation 4a. In terms of financial viability, one suggestion from the KPMG consultancy was the requirement
for an agreed procedures audit conducted by an approved accountant and this could be a cost added to the registration charge. It should be noted that in some states, e.g. WA, all ESOS providers are already subject to rigorous financial viability tests.

States and territories routinely place conditions on providers under their own regulatory powers. These conditions include caps on enrolments, and targeting auditing activity according to risk. Although the ESOS Act does not provide a similar authority, the most recent amendments to the ESOS Act now provides the Commonwealth the ability to recognise any conditions on registration imposed by the states, in part or in whole. This proposed new amendment would further close this gap in the authority exercised by the states and the Commonwealth by enabling the Commonwealth to also impose any conditions on provider registration to better manage risk. The imposition of sanctions and the increased scrutiny would be resource efficient in targeting those providers who may potentially cause problems in the industry. At the same time the regulatory action would send a signal to all stakeholders that the Government is determined to ensure that Australia maintains its reputation for quality education and training.

The recommendation to limit the period of registration for each provider aims to introduce consistency into the registration regime. Currently, the activity surrounding the end date of a provider’s period of registration depends on the processes of the state or territory regulatory body. This measure will provide transparency around the period of registration and formalise existing practice to a large extent. As mentioned in previous sections, currently ESOS does not allow the Commonwealth to place an end date on the CRICOS registration of providers. However, the legislation places an indirect end date on CRICOS registrations as the registration period is linked to the domestic quality assurance registration periods for providers, for e.g. for registered training organisations (and by course for CRICOS registration) set by the state designated authorities. The majority of providers are required to re-register under domestic quality assurance requirements every 3 to 5 years. The exception has been some self-accrediting universities but it is understood that TEQSA will introduce a maximum registration period of 5 years for all tertiary education institutions. In practice, therefore CRICOS registration in most cases is already limited because under the ESOS Act, CRICOS registration is dependent on a provider first meeting all domestic quality assurance requirements (i.e. if a provider is not re-registered under the AQTF or equivalent for schools, ELICOS and Higher Education then that provider’s CRICOS registration will be cancelled). Providers should not officially be registered on CRICOS without an end date specified and, subject to a risk assessment appropriate for international education purposes, this should be aligned to the underlying education quality framework assessed by a single regulator (where possible) to minimise the regulatory burden on providers.

It may be that new applications for registration regarded high risk are given a minimum or probationary period of registration of only one to two years in which to demonstrate capacity and deliver quality outcomes. Risk would then be reassessed and for many would mean they are then put on a more routine cycle of re-registration and audit. It is anticipated that this would only be a small percentage of new applicants (as the very high risk would not be granted registration at all).
A key principle underlying the development of these measures is that it aims not to add an additional layer of rules and red tape to the existing regulatory framework but rather make it work more efficiently and effectively by simplifying, streamlining and strengthening areas identified as problematic.

It is expected the VET regulator and TEQSA will take on the regulatory responsibilities for ESOS in their sectors, including registration. This will further streamline risk-management practices and registration with domestic quality assurance requirements.

Consultation

Throughout the course of the Baird Review there was extensive consultation with international students, international education providers and peak bodies and state and territory governments on the proposed changes. Further consultations will take place with key stakeholders during development of the implementation of recommendations and through the provision of education and training on changes and their implications.

In preparing the final report Mr Baird spoke to nearly 200 students and education providers from the tertiary, school and English language sectors at consultation forums held in major capital cities. He also met with provider and student peak bodies, regulators, state and territory government officials, diplomatic missions, education industry bodies and Members of Parliament. The review received approximately 150 formal submissions and more than 300 people registered with the online discussion forum. Mr Baird also considered suggestions from the International Student Roundtable held in September 2009.

The large majority of stakeholders in the international education industry will be touched in some way by the proposed legislative amendments. However, as outlined in the Impact Analysis it is estimated these changes will directly impact on a relatively small portion of education providers specifically those whom have been assessed as a risk to the market.

Responses to the final report from providers, peak bodies and regulatory authorities have been resoundingly positive. Examples of support for the proposed measures in raising the bar for a risk management approach include:

Feedback from providers:

Many of the failed providers closed their doors within 5 years of operation because they could start a business with relatively small working capital and insufficient assets to protect the students’ interests. Current entry requirements are dangerously undemanding in terms of the financial backing needed to operate successfully in this industry. Student fees in advance are used as a start up capital and we have all seen the risks to the wider education community in this approach.

It is very important to regulate newcomers to the industry so that the failure of a new provider is not at the expense of long established good providers.2

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2 Sydney College of English, Submission 107
Low quality providers are damaging the international education sector in Australia. More stringent mechanisms are needed to screen providers seeking CRICOS accreditation.  

Feedback from industry bodies:

Barriers to entry and risk management practices for new institutions have not been adequately enforced, leading to the emergence of training businesses with unsound business models and in need of more support than regulatory authorities are able to provide.

Feedback from regulatory authorities:

RTOs and Institutions must be in good financial health to be able to deliver quality education and training services to students.

Poor financial health is very likely to significantly and negatively affect the management or operation of an RTO or Institution. This was evident in the financial collapse of a number of RTOs in November 2009.

...the notion of ‘probationary or provisional’ registration until a track record can be established...Monitor providers more closely in their initial registration period. A full follow up audit post initial registration should be conducted within a six to nine month period.

The Baird’s review extensive consultation with stakeholders across Australia found ESOS is considered a sound legislative framework which has served Australia’s international education sector well. However, the lack of consistent and rigorous enforcement of the legislation generated significant concern. There have been reports of ineffective monitoring activities, complex and duplicative procedures and limited information sharing between government, providers and students. In addition, its tuition protection arrangements were considered in need of substantial revision to provide support to international students.

The implementation of the proposed legislative amendments subject to this RIS, as written in recommendation 3 (i.e ‘risk management approach developed and maintained in consultation with stakeholders and experts) and as per the Minister’s announcement, will involve extensive further consultation. This will be with state and territory representatives through the Joint Committee on International Education (JCIE), state and territory ministers through the Ministerial Council of Tertiary Education and Employment (MCTEE), other key stakeholders including providers, students, industry peak bodies and other government agencies. The department of the Prime Minister and Cabinet will be key to the consultation around the expansion of

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3 TAFE NSW Sydney Institute, Submission 113
4 Australian Council for Private Education and Training, Submission 10
6 Department of Education Services WA, Submission 40
the Ombudsman’s powers. DIAC and DFAT will also be significantly involved in the consultation process.

Of particular relevance to the consultation regarding these proposed measures to raising the bar, is the consultation with both the Australian Government and states and territories in finalizing a nationally consistent risk managed approach to re-registration through JCIE.

There was also targeted consultation with key stakeholders before the measure was introduced as an amendment to the ESOS Act, consideration by a Senate Committee Inquiry in September 2009 which received a number of submissions and recommended that the Amendment Bill be passed, and the re-registration and risk management amendments received good bipartisan support during Parliamentary debate.

In the weeks following Royal Assent, DEEWR has consulted with all major peak bodies to explain the risk-management approach to the re-registration measure, including ACPET, English Australia, TAFE Directors Australian, Universities Australia, and all other TAS operators.

Information sessions were also held with groups of providers in SA, the ACT and NSW in March (approximately 500 people attended).

There was a good level of support for the process, especially:

- IT system enhancements to enable automated online processes and regular communication with providers, careful monitoring and support to the regulators to assist with timely information sharing and consistency;
- Standardised reporting of key risk information for each provider drawn from PRISMS data;
- Simplicity and transparency of the self-assessment form and the fact that providers do not have to submit documentation until requested so as not to duplicate that already held by regulators.

These are all processes that can be built on for the expanded risk-management of registrations.

Apart from general concern about timing and what proportion of providers might not be re-registered, concerns raised were around the transparency of the risk assessment and how consistently this will be applied by each state, whether risk information will be confidential and that diversity in international education means that risk in one sector may not be risk in another sector.

The re-registration measure and further consultation in implementing the Baird review offers an opportunity to refine risk indicators but it is noted that there will always be a need for some flexibility for regulators to draw from a range of information and experience in making risk assessments.

Conclusion and recommendations
Overall, it is argued that while the Baird recommendations to raise the bar for entry into the international education sector through a risk management approach to re-registration and throughout the registration period will have an impact on all CRICOS providers, this impact will mainly be on a small number of high risk providers. Further, that the proposed changes build on current risk management practices, intensified auditing by most states and territories and the re-registration measure in response to serious concerns about the quality and practices of some CRICOS providers. A national approach to risk management should help to formalise much of current practice and ensure a more consistent application of risk assessment. Together with the establishment of national regulators for the VET and Higher Education sectors, this may result in reduced regulatory burden for some medium and all low risk providers.
NOTES ON CLAUSES

Clause 1 - Short title

Provides for the Act to be cited as the Education Services for Overseas Students Legislation Amendment Act 2010.

Clause 2 - Commencement

Subclause 2(1) inserts a three column table setting out commencement information for various provisions in the Act. Each provision of the Act specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table has the effect of providing for sections 1 to 3 and anything in this Act not elsewhere covered by this table to commence on Royal Assent; Schedules 1 and 2 to commence on the later of the day after this Act receives the Royal Assent or 1 January 2011.

Subclause 2(2) provides that column 3 of the table is for additional information which may be added to or edited in any published version of the Act but that information is not part of the Act.

Clause 3 - Schedule(s)

Provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule and that any other item in a Schedule has effect according to its terms.
For ease of description, this explanatory memorandum uses the following abbreviations:

‘ESOS Review’ means the review of the Education Services for Overseas Students legislative framework (ESOS) conducted by the Hon Bruce Baird AM, dated February 2010, titled Stronger, simpler, smarter ESOS: supporting international students

‘CO’ means the Commonwealth Ombudsman

‘CRICOS’ means the Commonwealth Register of Institutions and Courses for Overseas Students

‘ESOS Act’ means the Education Services for Overseas Students Act 2000

‘Ombudsman Act’ means the Ombudsman Act 1976

‘OSO’ means the Overseas Students Ombudsman

‘Privacy Act’ means the Privacy Act 1988
Schedule 1—Amendment of the Education Services for Overseas Students Act 2000

Part 1—Amendments

Item 1 - Section 5 (definition of condition)

Item 1 amends the existing definition of the term condition. Currently the term condition is defined to mean a condition imposed on the registration of a provider under section 14A or subsection 83(3) of the ESOS Act. This amendment will expand the meaning of condition to also include a condition imposed under section 14B of the ESOS Act.

Item 2 - Section 5

Item 2 inserts the new term risk assessment and defines risk assessment of a provider to mean an assessment of the risk of a provider being unable to satisfy the obligations of a provider under the ESOS Act.

Item 3 - After subsection 9(1)

Item 3 inserts new section 9(1A). Section 9 provides for the registration of providers on CRICOS. Proposed subsection 9(1A) will require all designated authorities for a State to adopt a risk-management approach in their assessment of whether to recommend to the Secretary that a provider should be registered.

Item 4 - Subparagraph 9(2)(c)(iii)

Item 4 repeals and substitutes subparagraph 9(2)(c)(iii).

Subsection 9(2) provides that the Secretary must register a provider if the requirements of paragraphs 9(2)(a) to (e) are satisfied. Paragraph 9(2)(c) requires the designated authority to give the Secretary a certificate verifying certain matters for the purpose of recommending that an approved provider be registered on CRICOS.

This amendment expands on the current requirement that the provider has clearly demonstrated capacity to provide education of a satisfactory standard. The purpose of this amendment is to further strengthen the current registration requirements by specifying additional matters to be addressed by a designated authority when considering whether a provider has evidenced the criteria of “demonstrated capacity”. The additional matters to be addressed by a designated authority include, but is not limited to, having an appropriate business model and access to adequate financial resources.
Item 4 also inserts proposed subparagraphs 9(2)(c)(iv), (v) and (vi). These proposed subparagraphs require a designated authority to also certify the following matters for the purpose of recommending that an approved provider should be registered on CRICOS:

- the results of the designated authority’s risk assessment of the provider; and
- the conditions (if any) that should apply to a provider’s registration for the specified course in the State in view of the results of the provider’s risk assessment; and
- the period (of not more than 5 years) which the designated authority recommends the provider should be registered for the specified course in the State.

Item 5 - At the end of section 9

Item 5 inserts proposed subsections 9(10) and (11).

The purpose of proposed subsection 9(10) is to limit the maximum period the Secretary may register an approved provider (in respect of each specified course for that State) to 5 years. Proposed subsection 9(11) ensures that, in spite of the impending expiration of a provider’s registration for a course, the provider will be able to complete the teaching of a given course to its currently enrolled students beyond the end date of its registration. This amendment will ensure students of such a provider are not disadvantaged as a result of the provider’s imminent re-registration process. However the provider will be prevented from enrolling new students until such time as the provider has been re-registered.

Item 6 - Subsection 9A(1)

Item 6 is a technical amendment to remove a redundant provision from subsection 9A(1).

Item 7 - Subsection 14A(2)

Item 7 amends subsection 14A(2) to include the Secretary as an authorised person also able to impose a condition on a provider’s registration.

Currently, if a designated authority for a State has imposed a condition on a provider relating to its provision of courses for a State, subsection 14A(1) enables the Secretary to impose that condition on the provider’s registration when the provider is first registered on CRICOS; or, if the provider has already been registered on CRICOS, subsection 14A(2) enables the Minister to impose that condition on the provider’s existing registration.
To ensure consistency between these two provisions, the amendment made by Item 6 includes the Secretary as an authorised person also able to impose a condition on a provider’s existing registration. This amendment will ensure that the Secretary is authorised to undertake either of these two roles.

**Item 8 - After section 14A**

Item 8 inserts proposed section 14B. Proposed section 14B enables the Secretary to impose a condition on a provider’s registration on the Secretary’s own initiative (rather than on recommendation by a designated authority under section 14A). Under this amendment, the Secretary may impose a condition on a provider’s registration when the provider is registered, or at any time throughout the registration period, arising from either, the provider’s risk profiling advice provided by the designated authority (under the amendment made to paragraph 9(2)(c) by Item 4), or where the Secretary has identified risk as a result of a risk assessment made the Secretary.

**Items 9, 10, 11, 12, 13, 14 and 21 - Subsection 19(3) (note 1), at the end of section 19, subsection 20(1) (note 1), at the end of section 20, subsection 21(3) (note), at the end of section 21 and sections 104 and 105**

The amendments made by Items 9 to 14, inclusive, reorganise existing offence provisions in respect of sections 19, 20 and 21 to reflect modern drafting practice by locating the operative offence provisions within their corresponding, substantive provisions. Items 10, 12 and 14 specify the following provisions as strict liability offences.

- Section 19 which deals with the obligations of registered providers to give certain information to the Secretary after the happening of specified events;
- Section 20 which obliges a registered provider to send to its student a written notice if the student has breached a prescribed condition of a student visa;
- Section 21 which requires a registered provider to keep appropriate records for each of its students who are enrolled with the provider and who have paid any course money to the provider.

These proposed offences will provide that a registered provider (or in the case of a registered provider who is an unincorporated body, the principal executive officer of a registered provider) commits an offence for failure to comply with any of these sections. The penalty for committing an offence against any of these proposed provisions is 60 penalty units.

Items 10 and 12 have the effect of increasing the penalty for a breach of sections 19 and 20 respectively. The purpose of the increase is create further disincentive for breach of these important obligations on registered providers and, to bring consistency to the penalties for breach of the proposed strict liability offences able to be dealt with by the infringement notice scheme under section 106 of the ESOS Act (see Items 22 and 23). Items 9, 11, 13 and 22 are consequential to the amendments made by Items 10, 12 and 14.
Item 15 and 16 - After subsection 21A(1) and At the end of section 28

*Items 15 and 16* create strict liability offence provisions for failure by a registered provider to comply with subsection 21A(1) or section 28 respectively.

Subsection 21A(1) obliges a registered provider to maintain and publish a list of all the provider’s agents and to comply with any other requirements set out in regulations (made under subsection 21A(2). Section 28 sets out the provider obligations in relation to entering into written agreement and refunding of course monies for student default.

These amendments will provide that a registered provider (or if the registered provider is an unincorporated body, the principal executive officer of a registered provider) commits an offence for failure to comply with either of these provisions. The penalty for committing an offence against any of these proposed provisions is 60 penalty units.

Item 17 - At the end of section 29

*Item 17* creates a strict liability offence for failure by a registered provider to comply with section 29.

Section 29 sets out the provider obligations in relation to refunding of course monies for provider default.

The effect of this amendment is to provide that a registered provider who fails to comply with section 29 commits an offence. A registered provider commits the *primary offence* on the first day on which the provider fails to comply with section 29. The penalty in respect of the *primary offence* is 60 penalty units.

The registered provider will commit a *subsequent offence* for each successive day during which the provider continues to remain in breach of section 29 (including a day on which the provider may be convicted for the offence or any later day). The penalty in respect of each day on which the provider commits a *subsequent offence* is 6 penalty units. The maximum penalty for each day that the offence continues is ten percent of the maximum penalty that could be imposed in respect of the *primary offence*.

Items 18 and 19 - After subsection 93(1) and subsection 93(2)

The amendments made by *Items 18 and 19* will provide that procedural fairness requirements apply in respect of the Secretary’s proposed powers under sections 14A and 14B (see *Items 7 and 8*).

Subsection 93(1) sets out procedural fairness requirements the Minister must comply with before making a decision which may adversely affect a registered provider. These amendments will ensure that observe procedural fairness requirements also
apply to any decision made by the Secretary to impose a condition on a registered provider’s registration under the Secretary’s proposed powers under sections 14A and 14B (see Items 7 and 8).

**Item 20 - At the end of subsection 96(1)**

**Item 20** inserts proposed paragraph (d) into subsection 96(1). Subsection 96(1) obliges the Secretary to update the Register on the happening of specified events. Proposed paragraph 96(1)(d) requires the Secretary to update the Register if a registered provider applies to the Administrative Appeals Tribunal for review of a decision to suspend, cancel or impose a condition on the provider’s registration.

**Items 22 and 23 - Before subsection 106(1) and subsection 106(1)**

The amendments made by **Items 22** and **23** itemise the offence provisions under the ESOS Act which the Minister may deal with by way of an infringement notice in lieu of prosecution for the offence.

Section 106 sets out an infringement notice scheme which enables the Minister to give a registered provider an infringement notice requiring payment of a penalty as an alternative action to prosecution of the offence. The offence provisions specified by **Item 22** are offences of strict liability. Subsection 106(1) will authorise the Minister to issue an infringement notice in respect of a breach of any of the following offence provisions.

- Subsection 19(5) which obliges registered providers to give certain information to the Secretary after the happening of specified events.
- Subsection 20(6) which obliges a registered provider to send to its student a written notice if the student has breached a prescribed condition of a student visa.
- Subsection 21(5) which requires a registered provider to keep appropriate records for each of its students who are enrolled with the provider and who have paid any course money to the provider.
- Subsection 21A(1A) which obliges a registered provider to maintain and publish a list of all the provider’s agents and to comply with any other requirements set out in regulations.
- Subsection 28(5) which requires registered providers to enter into compliant written agreements with every overseas student (or intending overseas student) and to refund course monies for student default.
- Subsection 29(5) which requires registered providers to comply with obligations in relation to refunding of course monies for provider default.

The maximum amount of the penalty to be paid by a registered provider under an infringement notice issued by the Minister under subsection 106(1) is 4 penalty units for an individual or 20 penalty units for a body corporate. **Item 23** is consequential to the amendment made by **Item 22**.
Item 24 - Section 119

Item 24 repeals section 119. Section 119 of the ESOS Act provides that a person is to be paid compensation for complying with a notice to provide copies of documents issued under paragraph 113(2)(c). Given current efforts to better manage risk and to strengthen enforcement within the international education sector, it is expected that the ability to issue production notices will be increasingly utilised. The provisions of section 119 which allows providers or administrators to seek financial compensation to comply with production notice requests would seem to be at odds with the ESOS Review recommendations around risk management and improved enforcement.

Item 25 - Before section 170

Item 25 inserts proposed section 170A.

Proposed section 170A is introduced as a result of a recommendation of the ESOS Review urging the ESOS Act be amended to require the publishing of targets and the regular reporting of regulatory activities undertaken.

Under this amendment, the Secretary may publish information if a the Minister, the Immigration Minister or the Secretary take action in relation to a provider under:

- Part 6 which deals with the range of enforcement action permitted under the ESOS Act; or
- Part 7 which sets out the types of monitoring and searching activities permitted under the ESOS Act.

Specifically, the Secretary may publish information about the action taken and the results of that action taken, including any recommendations for improvements that are given to a provider and/or any action subsequently taken by the provider to implement those recommendations.

Where the Secretary has published information about an action taken against a provider, and the relevant provider has applied for review of the decision to take that action, the Secretary must also publish the fact that the provider has sought review of the decision, and must also publish the results of that review. The Secretary must also ensure that all information published is accurate and kept up-to-date.

The Secretary may decide the medium in which to publish the information, including for example, publishing on the website of the Secretary’s Department.
Item 26 - Paragraph 176(1)(aa)

Item 26 amends paragraph 176(1)(aa) and has the effect of ensuring that a decision made by the Secretary to impose a condition on a provider’s existing registration under, either section 14A (as amended by Item 7), or proposed section 14B (as inserted by Item 8) is reviewable by the Administrative Appeals Tribunal.

Part 2—Transitional provision

Item 27 - Transitional provision—existing unlimited registrations

Item 27 is a transitional provision intended to ensure that the registration of all registered providers who do not have an end to their registration period specified are re-registered with an end date specified no later than 5 years after limited registrations are introduced. This provision provides that the registration of any provider who (immediately before this Schedule commences) is registered for an unlimited period shall expire 5 years after commencement of Schedule 1, unless the provider has already been re-registered.
Schedule 2—The Overseas Students Ombudsman

Part 1—Amendment of the Ombudsman Act 1976

Item 1 - Title

Item 1 amends the long title of the Ombudsman Act to include a reference to the OSO so that the title reflects all the subject matter of the Ombudsman Act.

Item 2 - After Part IIB

Item 2 inserts proposed Part IIC, which establishes the Office of the OSO into the Ombudsman Act after Part IIB and sets out the powers and functions of the OSO.

Part IIC—Establishment, functions, powers and duties of the Overseas Students Ombudsman

Division 1—Preliminary

Proposed section 19ZF - Definitions

Section 19ZF inserts definitions of officer, Overseas Students Act, principal executive officer and private registered provider which are to apply for the purposes of Part IIC.

The definition of officer explains who is an officer in relation to a private registered provider. An officer of a private registered provider means a person who is employed in the service of a private registered provider, or members of staff of a private registered provider whether or not employed by a private registered provider, or persons authorised by a private registered provider to exercise any powers or functions of the private registered provider on its behalf.

The term Overseas Students Act is defined to mean the Education Services for Overseas Students Act 2000.

The term principal executive officer has the same meaning given in the ESOS Act. Section 5 of the ESOS Act provides that the principal executive officer of a provider (that is not an individual) means the person who has executive responsibility for the operation of the provider.

The term private registered provider is defined to mean a registered provider, as defined by the ESOS Act, which is not owned or administered by the Commonwealth Government or a State or Territory government.
Proposed section 19ZG – Continued application of Part to former registered providers

This provision applies where a private registered provider takes action, the OSO receives a complaint in relation to that action within 12 months of the action being taken, and after that time, the private registered provider ceases to be a private registered provider.

In these circumstances, Part IIC continues to operate as though the private registered provider continues to be a private registered provider. This provision ensures that the OSO may continue to handle a complaint, even if the private registered provider ceases to be registered under the ESOS Act.

Proposed section 19ZH - Part not to affect operation of other provisions of this Act

This provision explains that, in interpreting the Act, Part IIC is not to be implied to affect the operation of other provisions in the Ombudsman Act. It is necessary to include this provision because of differences in drafting style between the amendments made to the Ombudsman Act by the *Education Services for Overseas Students Legislation Amendment Act 2010* and earlier provisions of the Act. This provision is intended to override the general principle of statutory interpretation that, when interpreting an Act, no part can be considered in isolation from its context - the Ombudsman Act must be read as a whole.

For example, specific provisions are included in the Ombudsman Act (for example subsection 8(5)) which set out the particular procedures to be followed by the CO to ensure procedural fairness in the investigation of complaints. While these provisions will also apply to the OSO, Part IIC inserts a new provision which provides that the common law rules of procedural fairness are to apply generally to the OSO in the exercise of his or her powers.

Division 2—Establishment and functions of the Overseas Students Ombudsman

Proposed section 19ZI - Establishment of office of Overseas Students Ombudsman

Proposed section 19ZI establishes the office of the OSO and provides that the office of the OSO is to be held by the same person who holds the office of the CO. (This includes a person who is the CO because he or she has been appointed to act in the position under section 29 of the Ombudsman Act.) The establishment of the OSO will involve creating a dedicated and nominated office within the CO's office consistent with the approach taken for the establishment of the Postal Industry Ombudsman.
Proposed section 19ZJ - Functions of Overseas Students Ombudsman

Proposed section 19ZJ provides that the functions of the OSO are to investigate complaints or to initiate investigations about actions taken by a private registered provider in connection with an overseas student, an intending overseas student, or an accepted student, within the meaning of the ESOS Act.

The OSO’s power to initiate investigations may result in the investigation of broader systemic issues that have come to his or her attention. The OSO may also use this power to initiate an investigation of the internal complaint handling processes of private registered providers.

The OSO will provide advice and training to private registered providers about the best practice for handling complaints made by overseas students.

Proposed section 19ZK – Transfer of complaints

This proposed section provides for the transfer of complaints by the OSO.

Proposed subsection (2) states the OSO must transfer a complaint where the OSO forms the view that a statutory complaint handler has the function of investigating, reviewing or enquiring into the action complained about. An example of the kind of statutory complaint handler to which it is envisaged a complaint must be transferred is the South Australian Training Advocate. The South Australian Training Advocate already provides a statutorily independent external complaints body for overseas students and as such would be able to deal with a complaint about a private registered provider in South Australia. Subject to its inclusion in the regulations, a complaint that could be investigated by the South Australian Training Advocate would not be investigated by the OSO, but transferred.

Proposed subsection (3) gives the OSO discretion to transfer a complaint to another statutory office-holder if the OSO forms the view that the complaint could be more conveniently or effectively be dealt with by the other statutory office-holder. The discretion can be exercised before or after the OSO has started investigating the complaint. Two examples of a statutory office-holder to which is it envisaged a complaint may be transferred is the Office of the Privacy Commissioner and the Fair Work Ombudsman.

Proposed subsection (4) provides that if the OSO has decided to transfer a complaint under subsections (2) or (3), the OSO must give the statutory office-holder or statutory complaint handler any relevant documents or information he or she has about the complaint and notify the complainant that the complaint has been transferred.

Proposed subsection (5) defines statutory complaint handler and statutory officer-holder.

A statutory complaint handler is a person, prescribed under the regulations, who has a function of investigating action taken by a private registered provider in connection
with an overseas student, an intending overseas student, or an accepted student, within the meaning of the Overseas Student Act.

A **statutory officer-holder** is a person who holds any office or appointment under a law of the Commonwealth, or under a law of a State or Territory.

**Proposed section 19ZL - Discretion not to investigate certain complaints**

This proposed section gives the OSO discretion not to investigate a complaint or, if an investigation has begun, not to investigate it further. The discretion can be exercised where the OSO is of the opinion that:

- the complaint is frivolous or vexatious or not made in good faith;
- the complainant does not have a sufficient interest in the complaint;
- an investigation or, further investigation, is not warranted, having regard to all the circumstances;
- the complainant has not yet raised the complaint with the private registered provider:
- the action came to the complainant’s knowledge more than 12 months before the complaint was made; or
- the complainant has or had a right to cause the action to which the complaint relates to be reviewed by a court or tribunal but has not exercised that right.

There are also discretions about whether or not to investigate a complaint which are applied by the application of parts of section 6A and 6B of the Ombudsman Act to the OSO. These applications are detailed in relation to proposed section 19ZM(3).

**Division 3—Powers and duties of the Overseas Students Ombudsman**

**Proposed section 19ZM - Application of other provisions of this Act to the Overseas Students Ombudsman**

This section sets out which of the provisions that existed in the Ombudsman Act before its amendment by the *Education Services for Overseas Legislation Amendment Act 2010* will apply in relation to the OSO and how they will apply. Subject to any contrary intention, the provisions set out in proposed subsection (3) apply, being:

- subsection 3(1) and (8);
- sections 3C and 3D;
- sections 6A to 7A;
- section 8, except paragraph (7A)(b) and subsections (8) to (12);
- section 8A, other than subsections (1B) to (1D);
- section 9, except paragraphs (1AA)(ab) and (ac) and paragraph (4)(ab);
- section 11A other than subsections (1) and (5);
- sections 12 to 14;
- section 18;
- section 19, except subsection (8);
- subsection 31(1);
section 33;
section 34, except subsections 34(1) to (2A);
section 35, except subparagraphs (1)(e) and (3)(b)(ia);
section 35AA
section 35A, except paragraph (3A);
sections 35B to 38.

The provisions will apply, unless the contrary intention appears, as if any reference in those provisions to the CO were a reference to the OSO and any reference to “a Department”, “a prescribed authority” or “a Department or a prescribed authority” were a reference to a private registered provider. They will apply as if a reference in any of those provisions to an officer were a reference to an officer within the meaning of officer in proposed Part IIC and a reference in any of those provisions to a principal executive officer were a reference to a principal executive officer within the meaning of Part IIC. (“Officer” and “principal executive officer” for the purposes of proposed Part IIC are defined in proposed section 19ZF.)

Proposed subsection (4) contains a table which explains how certain provisions in the Ombudsman Act will apply in relation to the OSO. By operation of the table:

- subsection 7A(1) will apply as though the reference to paragraph 5(1)(b) were a reference to proposed paragraph 19ZJ(2)(b);
- subsection 11A(4) will apply and the reference to the Minister will be a reference to the Minister and the Minister administering the ESOS Act;
- subsections 12(4) and (5) will apply as if a reference to section 15 is a reference to proposed section 19ZQ;
- section 18 will apply as though a reference to section 17 were a reference to proposed section 19ZR;
- subsection 19(2) applies as if a reference to sections 15, 16 and 17 is a reference to proposed section 19ZQ or 19ZR.
- subsection 35(6A) will apply as though a reference to paragraph 6(4A)(e), (4D)(e) or (18)(d) were a reference to proposed paragraph 19ZK(4)(b);
- paragraph 35AA(1)(a) will apply as though a reference to paragraph 5(1)(b) were a reference to proposed paragraph 19ZJ(2)(b);
- subsection 35B(2) (paragraph (a) of the definition of listed disclosure method) will apply as if a reference to Division 2 of Part II were a reference to proposed section 19ZQ, 19ZR or 19ZS; and
- subsection 35B(2) (paragraph (b) of the definition of listed disclosure method) will apply as if a reference to section 6A were a reference to proposed section 19ZK.

The application and effect of each provision set out in proposed subsections 19ZM(3) and (4) are explained separately in Appendix A at the end of this Explanatory Memorandum.
Proposed section 19ZN - Powers of the Overseas Students Ombudsman under section 9

Proposed section 19ZN enables the OSO to exercise his or her powers under section 9 to obtain information before and after the investigation of a complaint as well as during the investigation. The OSO will, for example, be able to use the powers to decide whether or not to investigate, to start or continue an investigation or report in relation to an investigation.

The proposed section sets out the purposes for which the OSO may exercise his or her powers under section 9. These purposes are:

- to determine whether he or she may investigate action under Part IIC – this involves a determination of whether or not the OSO has jurisdiction;
- to decide whether or not to investigate action, or to investigate action further, under Part IIC – this involves a decision about whether or not to take action to investigate an action or to investigate it further;
- to start or further the conduct of an investigation – this involves taking the action to start or further an investigation;
- to prepare a report in relation to an investigation – this involves deciding whether or not a report is warranted; and
- to find out what action has been taken by a private registered provider after the OSO has exercised a power under section 9. The OSO can only exercise a power to do this if the OSO has already exercised a power for any of the purposes mentioned above.

Despite the fact that section 8 is headed “Investigations” and deals with the manner and process of conducting investigations, there is nothing in the text of section 8 which would support an interpretation that the powers in section 9 cannot also be used for the purposes set out in section 8. (Section 8, other than paragraph (7A)(b), is applied by proposed section 19ZM. Appendix A contains further information on the application of section 8.)

Proposed section 19ZO - Duty to accord procedural fairness

Proposed section 19ZO provides that the common law rules of procedural fairness are to apply generally to the OSO in the exercise of any of his or her powers under the Ombudsman Act. The proposed provision notes examples of how procedural fairness should be applied. The first of these notes that if the OSO sets out a critical opinion in a report under proposed section 19ZQ, he or she must provide that person with an opportunity to respond to the criticism (subsection 8(5)). The second notes that if the OSO sets out a critical opinion of a person in disclosing information under subsection 35A(1) or referring to an investigation in a report under proposed section 19ZS, he or she must accord the person procedural fairness.

Proposed section 19ZP - Disclosure of identifying information

Proposed section 19ZP is intended to protect the confidentiality of complainants. Section 19ZP provides that, in making a report under proposed sections 19ZQ and
19ZS, the OSO must not disclose the name of a complainant or any information which would enable the identification of a complainant, unless it is fair and reasonable to do so.

**Proposed section 19ZQ - Overseas Students Ombudsman may report to private registered provider**

Proposed section 19ZQ requires the OSO to report to the private registered provider after the completion of an investigation if:

- the OSO forms the view that the action taken by the private registered provider seems to have been contrary to law, was unreasonable, unjust, oppressive or improperly discriminatory or otherwise wrong in all the circumstances; and
- the OSO is of the opinion that something could have been done in relation to an action taken (for example, some action could have been taken by the private registered provider to mitigate or alter the effects of an action, or a policy or practice on which the action was based should be altered, or that reasons should have been given for the action taken, or that any other thing should be done.)

The OSO must include in the report his or her reasons for the opinions expressed in the report and may also include in the report any recommendations he or she thinks fit to make.

The OSO may ask the private registered provider to provide, within a specified time, particulars of any action proposed to be taken in response to the matters set out in the OSO’s report. The private registered provider may give the OSO comments on the report. The OSO must give a copy of the report and any comments the private registered provider has made to the OSO about the report to the Minister administering the ESOS Act.

**Proposed section 19ZR - Minister to table certain reports in Parliament**

Proposed section 19ZR provides the means for ensuring that consequences attach to the failure of a private registered provider to take action within a reasonable time in relation to matters and recommendations included in the OSO’s report made under proposed section 19ZQ.

If the private registered provider does not take action that the OSO considers adequate and appropriate in the circumstances within a reasonable time period, the OSO may ask the Minister administering the ESOS Act to table copies of the report before each House of Parliament. If so requested, the Minister must, within 15 sittings day after receipt of request, table copies of the report, along with any comments made by the private registered provider under subsection 19ZQ(5).

**Proposed section 19ZS - Annual reports**

Proposed section 19ZS reiterates that the OSO, in relation to the provision of annual reports, has the same functions and duties as the CO has under section 19 except that
those powers and duties do not include the powers and duties of the CO relating to the
Australian Capital Territory.

In accordance with Item 9 of Schedule 2 of the Bill, the first annual report to be
provided by the OSO under this section must relate to the period beginning on the
date of commencement of Part IIC and ending on the following 30 June.

The CO is required by section 19 to produce an annual report. The OSO’s report
about his or her operations during a year may be included in the CO’s report under
section 19.

Proposed subsection 19ZS(4) sets out the matters the OSO must include in his or her
report. These are:

- the number of complaints received by the OSO under Part IIC during the year;
- the number of investigations about complaints started and ended during the
  year;
- the number of investigations initiated by the OSO which were started and
  completed during the year; and
- details of the circumstances and number of occasions the OSO has required
  information or documents to be provided under section 9 during the year.

Proposed subsection 19ZS(5) sets out the matters the OSO may include in his or her
report. These are:

- details of the circumstances and number of occasions during the year where the
  OSO has decided under subsection 19ZK to transfer a complaint to a statutory
  complaint handler or statutory office holder;
- details of recommendations made during the year in reports under section 19ZQ
  about particular actions that should be taken, about policies or practices that
  should be altered, or anything that should be done in relation to an action that has
  been investigated, and statistical information about such actions;
- details of action that the OSO took during the year to promote best practice in
  dealing with complaints; and
- details of the OSO’s observations regarding any trends in complaints or any
  broader issues arising from investigations.

**Proposed section 19ZT - Overseas Students Ombudsman may notify of
misconduct**

Proposed section 19ZT applies in circumstances where the investigation of an action
by the OSO identifies misconduct on the part of an officer of a private registered
provider. In these circumstances, the proposed section provides that if the evidence of
misconduct is sufficiently compelling to justify his or her doing so, the OSO may
bring the misconduct to the attention of the principal executive officer of the private
registered provider. Proposed section 19ZT does not apply to the action of an officer
who is the principal executive officer of the private registered provider.
Proposed section 19ZU - Limitation on liability where information or documents provided in good faith or when required to do so

Proposed subsection 19ZU(1) provides statutory protection to a person who has, in good faith, given information, a document or other record to the OSO in relation to the OSO’s functions or powers.

Proposed subsection 19ZU(2) is an avoidance of doubt provision which clarifies that subsection 19ZU(1) does not prevent a person from being liable to a proceeding or being subject to a liability for conduct of the person that is revealed by the information, document or record given to the OSO. In combination, these subsections are intended to encourage people to provide information on a voluntary basis while at the same time ensuring that this provision is not used to avoid liability for any conduct revealed by the information.

Proposed section 19ZU does not limit the immunity from civil suit provided by section 37. Section 37 protects a person from actions for loss, damage or injury of any kind suffered by another person as a result of the making of a complaint to the OSO under the Ombudsman Act or making a statement, giving information or a document to a person, whether or not the statement was made or the information given because it was required to be given by the operation of section 9 or section 11A. The immunity only applies if the complaint was made or the statement, information or document was given, in good faith.

Item 3 – After subsection 34(2A)

Item 3 inserts a new subsection into the delegations provisions. Proposed subsection 34(2B) gives the OSO the power to delegate to a person generally, or as described in an instrument of delegation, all his or her powers or any of his or her powers under the Act, except that the OSO must not delegate his or her powers under proposed sections 19ZQ (power to report to a private registered provider following an investigation) and 19ZR (power to request the Minister to table reports about a private registered provider where provider has not taken adequate and appropriate action) and the powers referred to in proposed section 19ZS (powers relating to annual reports).

Item 4 - Subsection 34(3) and (4)

The amendment made by Item 4 has the effect repealing subsection 34(3) and (4) as the effect of these provisions is now covered by paragraphs 34AB(c) and (d) of the Acts Interpretation Act 1901.
Part 2—Amendment of the Privacy Act 1988

Section 50 of the Privacy Act allows the Privacy Commissioner to transfer complaints to other agencies.

From 1 November 2010 the functions and powers conferred on the Privacy Commissioner under the Privacy Act will be principally performed and exercised by the Australian Information Commissioner—see section 10 of the *Australian Information Commissioner Act 2010* and Item 52, Schedule 5 to the *Freedom of Information Amendment (Reform) Act 2010*.

**Items 5, 6 and 7** amend the Privacy Act to include a reference to the OSO. The amendments to the Privacy Act will allow the Australian Information Commissioner to transfer complaints to the OSO if the Commissioner considers that the OSO could more conveniently or more effectively deal with the complaint and deem a complaint so transferred to be a complaint made to the OSO.

Part 3—Transitional provisions

**Item 8 - Application of Part 1**

This provision explains that the proposed amendments made by Part 1 of this Schedule apply in relation to action taken by a private registered provider before or after the commencement of Schedule 2.

**Item 9 - Transitional provision—reports under section 19ZS**

Proposed section 19ZS requires the OSO to produce annual reports about his or her activities. This provision explains what happens during the first year of the OSO’s operations. The OSO’s first annual report will relate to the period from the date of commencement of Part 3 of Schedule 2 to the period ending on the day on which 30 June first occurs after commencement.
Appendix A

This appendix is included to explain the operation of proposed subsections 19ZM(3) and (4). Proposed subsections 19ZM(3) and (4) set out a list of the existing provisions in the Ombudsman Act and specify the manner in which these provisions will apply in relation to the OSO.

The application and effect of each of the following provisions are explained below:

- subsection 3(1) and (8);
- sections 3C and 3D;
- sections 6A to 7A;
- section 8, except paragraph (7A)(b) and subsections (8) to (12);
- section 8A, other than subsections (1B) to (1D);
- section 9, except paragraphs (1AA)(ab) and (ac) and paragraph (4)(ab);
- section 11A other than subsections (1) and (5);
- sections 12 to 14;
- section 18;
- section 19, except subsection (8);
- subsection 31(1);
- section 33;
- section 34, except subsections 34(1) to (2A);
- section 35, except paragraph (1)(e) and paragraph (3)(b)(ia);
- section 35AA;
- section 35A, except paragraph (3A); and
- sections 35B to 38.

Subsection 3(1)

Proposed section 19ZM applies subsection 3(1).

This subsection contains definitions. The definitions apply to the OSO subject to any contrary intention set out in Part IIC. So, for example, the definitions of “officer” contained in subsection 3(1) will not apply for the purposes of Part IIC. This term is defined separately in proposed section 19ZF. Nor will the definition of “Ombudsman” apply. For the purposes of Part IIC, a reference to “Ombudsman” is to be taken to be a reference to the OSO (see proposed paragraph 19ZM(2)(a)).

Similarly, the definitions of a “Department” or “prescribed authority” will not apply and, instead, any reference to a “Department” or “prescribed authority” is to be taken to be a reference to a private registered provider (see proposed paragraph 19ZM(2)(b)).

Subsection 3(8)

Proposed section 19ZM applies subsection 3(8).
This subsection explains that the expression, “international relations of the Commonwealth”, where it occurs in the Ombudsman Act is a reference to the Commonwealth’s relations with any other country or an international organisation.

Section 3C - Application of Act

Proposed section 19ZM applies section 3C. Section 3C provides that the OSO scheme will apply within and outside Australia and in every external Territory.

Section 3D - Application of the Criminal Code

Proposed section 19ZM applies section 3D. Section 3D provides that chapter 2 of the Criminal Code applies to all offences against the Ombudsman Act and will therefore apply to the offences set out in section 36.

Section 6A - Transfer of complaints about Australian Crime Commission

Proposed section 19ZM applies section 6A. Section 6A enables the Ombudsman to transfer, in certain circumstances, a complaint about the Australian Crime Commission to another authority.

If the Ombudsman is of the opinion that the complaint could have been made to another authority established under a law of the Commonwealth, a State or a Territory, and the complaint could be more conveniently or effectively dealt with by that other authority, then the Ombudsman may transfer the complaint to that other authority. If the Ombudsman does decide to transfer the complaint, the Ombudsman must advise the complainant and do so as soon as is reasonably practicable, and, subject to section 35B, provide that other authority with the information that the Ombudsman has in relation to the complaint.

Section 6B - Transfer of complaints about Integrity Commissioner

Proposed section 19ZM applies section 6B.

Section 6B enables the Ombudsman to transfer a complaint in relation to the Integrity Commissioner to another authority to deal with. Where the Ombudsman decides to transfer the complaint to another agency, he or she must do so as soon as practicable and, subject to section 35C, the Ombudsman must provide the agency with all relevant documents and information and notify the complainant that the matter has been referred to that agency.

Section 7 - Complaints

Proposed section 19ZM applies section 7.

This section sets out how to make a complaint to the OSO. Although a complaint may be made to the OSO either orally or in writing, the OSO may at any time reduce a complaint to writing or require the complainant to do so. If the OSO asks the complainant to reduce the complaint to writing and he or she refuses to do so, the
OSO may refuse to investigate the complaint, or investigate it further, until the complainant complies with the request.

Subsections (3) and (4) explain the rights of a person in custody to make a complaint and receive correspondence from the OSO. A person in custody (a detainee) has the right to ask for facilities to complain in writing to the OSO, have any subsequent information about the complaint sent to the OSO and have the complaint or any further information sent to the OSO in a sealed envelope. A detainee also has the right to receive, without undue delay, any sealed envelope addressed to him or her by the OSO that comes into the possession of the person holding him or her in custody or performing duties for the person who is holding the other in custody. Persons holding another in custody do not have the right to open a sealed letter from the OSO to the detainee or from the detainee to the OSO.

For the purposes of identifying and delivering sealed correspondence to detainees the OSO may make special arrangements with the appropriate authority of a State or Territory.

Section 7A - Preliminary inquiries

Proposed section 19ZM applies section 7A.

Where a complaint is made to the OSO, this section allows the OSO to make inquiries of the principal executive officer of a private registered provider to determine whether he or she is authorised to investigate the action or, if authorised, to decide not to investigate the complaint. Similarly, if the OSO thinks he or she is authorised to investigate action taken by a private registered provider under proposed paragraph 19ZJ(2)(b) he or she may make inquiries of the principal executive officer of a private registered provider to decide whether to exercise his or her discretion not to investigate.

The OSO may make an arrangement with the principal executive officer of a private registered provider setting out the officers of whom the OSO may make all inquiries, or inquiries included in a class or classes of inquiries.

Subsections 7A(1A), (1B), (1C), (1D) and (1E) provide for disclosure of information. The purpose of these subsections is to enable a private registered provider to provide information to the OSO notwithstanding any law that would otherwise preclude, inhibit or provide conditions on doing so, where requested by the OSO or where the private registered provider reasonably considers the information would be relevant to the OSO’s inquiries.

The provisions enable private registered providers to provide information to the OSO without breaching privacy legislation or other legislation and without the need for the OSO to issue a formal notice (under section 9 of the Ombudsman Act) requiring the information.

The disclosure of information under these provisions would be entirely discretionary. If a private registered provider does not wish to provide the information for any reason, it will be entitled not to do so. In those circumstances, the OSO might
consider issuing a notice under section 9 of the Ombudsman Act requiring the information.

Subsection (1A) provides that subsections (1B), (1C), (1D) and (1E) apply if the OSO requests the principal executive officer of the private registered provider or an officer (where an arrangement has been made between the OSO and the private registered provider that an officer may answer inquiries) to give information or produce a document or record, or if the principal executive officer or officer (referred to in the arrangement) reasonably believes that information or a document or record would assist the OSO to make a determination whether to investigate a matter.

Subsection (1B) provides that if the officer gives information to the OSO or produces a document or record to the OSO and by doing so, contravenes another enactment, might tend to incriminate the officer or make the officer liable to a penalty, discloses a legal advice given to a private registered provider, discloses a communication between an officer of private registered provider and another person or body that would be protected by legal professional privilege, or otherwise acts contrary to the public interest, then the information or production of the document or record is not admissible in evidence against the officer in proceedings, other than proceedings for an offence under section 137.1 (providing false or misleading information), 137.2 (providing false or misleading documents), or 149.1 (obstructions of Commonwealth officials) of the Criminal Code.

Subsection (1C) provides that an officer is not liable to any penalty under the provisions of any other enactment by reason of his or her giving the information to the OSO or producing the document or record to the OSO.

Subsection (1D) provides that the giving of information or the production of a document or record to the OSO is, for the purposes of the Privacy Act 1988, taken to be authorised by law, which is one of the exceptions to the use or disclosure provisions in the Information Privacy Principles and National Privacy Principles in the Privacy Act.

Subsection (1E) provides that despite subsection (1B), which provides that an officer may provide material to the OSO which may be subject to legal professional privilege, a claim for legal professional privilege in relation to the information, document or record is not affected.

Section 8 - Investigations

Proposed section 19ZM applies section 8, other than paragraph (7A)(b) and subsections (8) to (12).

Section 8 sets out the manner and process of conducting investigations. The powers set out in section 8 may be exercised by the OSO at any time during an investigation, including before the commencement of an investigation or after completion.

Subsection 8(1) requires the OSO to inform the principal executive officer of a private registered provider that an action is to be investigated, prior to commencing the investigation.
Subsection (1A) provides that the OSO may make an arrangement with the principal executive officer of a private registered provider to provide for the manner in which, and the period within which, the OSO is to inform the principal executive officer that he or she proposes to investigate action that is included in a class or classes of actions specified in the arrangement.

Subsections (2) and (3) provide that subject to the Ombudsman Act, investigations can be conducted in any way the OSO thinks fit but must be conducted in private. Subject to the Ombudsman Act the OSO has a wide discretion to obtain information from such persons and make such inquiries as he or she thinks fit.

Subsections 8(2A), (2B), (2C), (2D) and (2E) provide that a private registered provider or any person may provide information to the OSO notwithstanding any law that would otherwise preclude, inhibit or provide conditions on doing so, where requested by the OSO or where the private registered provider or person reasonably considers the information would be relevant to the Ombudsman's investigation.

Subsection (2A) provides that (2B), (2C), (2D) and (2E) apply if either the OSO requests a person to give information to the OSO or to produce a document or other record, or if a person reasonably believes that information or a document or other record is relevant to an investigation. However, the person must have either obtained the information, document or record:

- in the course of their duties as the principal executive officer and is still the principal executive officer; or
- in the course of their duties as the principal executive officer but they are no longer the principal executive officer and the principal executive officer has authorised the person to give the information; or
- in the course of their duties as an officer and the principal executive officer has authorised the person to give the information; or
- lawfully but not in the course of the person's duties as an officer. This subparagraph would cover all persons; they would not necessarily be an officer or former officer of a private registered provider.

Subsection (2B) provides that if the person gives information to the OSO or produces a document or record to the OSO, and by so doing contravenes another enactment, might tend to incriminate the officer or make the officer liable to a penalty, discloses a legal advice given to a private registered provider, discloses a communication between an officer of a private registered provider and another person or body that would be protected by legal professional privilege, or otherwise acts contrary to the public interest, then the information or production of the document or record is not admissible in evidence against the officer in proceedings, other than proceedings for an offence under section 137.1 (providing false or misleading information), 137.2 (providing false or misleading documents), or 149.1 (obstructions of Commonwealth officials) of the Criminal Code.

Subsection (2C) provides that a person is not liable to any penalty under the provisions of any other enactment by reason of his or her giving the information to the OSO or producing the document or record to the OSO.
Subsection (2D) provides that the giving of information or the production of a
document or record to the OSO is, for the purposes of the Privacy Act 1988, taken to
be authorised by law, which is one of the exceptions to the use or disclosure
provisions in the Information Privacy Principles and National Privacy Principles in
the Privacy Act.

Subsection (2E) provides that despite subsection (2B), which provides that an officer
may provide material to the OSO which may be subject to legal professional
privilege, a claim for legal professional privilege in relation to the information,
document or material is not affected.

Subsection (4) provides that the OSO does not have to allow a complainant or any
other person to appear before him or her in connection with an investigation.

Subsection (5) provides that the OSO is subject to special obligations if he or she
expressly or impliedly criticises a private registered provider in a report in respect of
an investigation. In such cases, before completing the investigation the OSO must
afford the principal executive officer of the private registered provider and the officer
principally concerned in the investigation opportunities to appear before him or her,
or before an authorised person, to make submissions, either orally or in writing about
the action and, if the opinions are about a person, allow the person to do the same.

Subsection (6) provides that if the principal executive officer of a private registered
provider is afforded the opportunity of an appearance, the principal executive officer
may appear in person or authorise someone else to appear on his or her behalf. A
person other than a principal executive officer who is afforded a right of appearance
may, with the approval of the OSO or the person authorised by the OSO, be
represented by another person at the appearance.

Subsection (7) provides that where, in relation to an investigation, the OSO proposes
to give a person the opportunity to appear before him or her, or before an authorised
person, and to make submissions under subsection 8(5), or proposes to require the
person to produce information or documents under section 9, the complaint must be
reduced to writing, if it was made orally.

Section 8A

Proposed section 19ZM applies section 8A, other than subsections (1B) to (1D).

Section 8A enables the OSO to make an arrangement with the Ombudsman of a State
(or the Ombudsmen of two or more States) to jointly investigate action that relates to
a matter of administration in taken by a private registered provider.

If the OSO does enter into such an arrangement, the arrangement must be in writing
and may be varied or revoked. In addition, the arrangement may relate to particular
actions or classes of actions.

Subsection 8A(6) enables the making of regulations that relate to the participation of
the OSO in the proposed joint investigations.
Subsection 8A(7) clarifies that nothing in the provisions of section 8A affect the powers and duties of the OSO under any other provision of the Ombudsman Act. Subsection 8A(8) further clarifies that the OSO is not empowered to exercise any of the powers of the Ombudsman of a State other than in accordance with subsection 34(7) of the Ombudsman Act, nor to enter into an arrangement for the exercise of a power of the OSO by the Ombudsman of a State other than in accordance with an instrument of delegation made under subsection 34(1).

Section 9 - Power to obtain information and documents

Proposed section 19ZM applies section 9, other than paragraphs (1AA)(ab) and (ac); and paragraph (4)(ab).

Subsection 9(1) gives the OSO the power to require a person, whom he or she believes capable of providing information or producing documents or other records relevant to an investigation under the Ombudsman Act, to provide the information or produce the documents or other records at a place and within a time, or on a date and at a time, specified by notice in writing, served on the person. The information must be provided in writing to the OSO, signed by the person if the notice was served on an individual and signed by an officer of the body corporate, if the notice was served on a body corporate.

Subsection 9(1AA) addresses the situation where the OSO believes that an officer of a private registered provider has information, documents or records relevant to an investigation but the OSO does not know the identity of that officer. In such cases, the OSO may serve a notice on the principal executive officer of a private registered provider requiring that principal executive officer, or a person nominated by the principal executive officer, to attend at the place and within the period or on the specified date and at the time specified in the notice. The person on whom the notice is served must appear before the person specified in the notice to answer questions relevant to the investigation or to produce to the person specified in the notice such documents or other record as are specified.

Subsection 9(1A) gives the OSO the right to take possession of documents and records produced to him or her under subsection 9(1) or 9(1AA), or an order under subsection 11A(2), and to copy them, take extracts from them and to retain them as long as necessary for the purposes of the investigation. However, the OSO must allow a person who would be entitled to inspect the documents or records, if they were not in his or her possession, to inspect them at all reasonable times.

Subsection 9(2) allows the OSO to serve a notice on a person whom he or she believes is able to give information relevant to an investigation under the Ombudsman Act, requiring them to attend before a person specified in the notice at a specified date, time and place, to answer questions relevant to the investigation.

Subsection 9(3) imposes limits on the OSO’s powers to require a person to provide information, answer questions or produce documents or records where the Attorney-General gives the OSO a certificate certifying that the disclosure of the information or documents would be contrary to the public interest. The provision has effect where
the Attorney-General certifies that the disclosure would be contrary to the public interest because it would:

- prejudice the security, defence or international relations of the Commonwealth;
- involve disclosure of confidential communications between a Minister and a Minister of a State that would prejudice relations between the Commonwealth Government and the Government of a State;
- involve disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
- involve disclosure of deliberations or advice of the Executive Council; or
- if the documents were in the possession or under the control of the Australian Crime Commission or Board of the Australian Crime Commission, endanger the life of a person or create a risk of serious injury to a person.

Subsection (4) sets out situations where provisions of other enactments will not excuse a person from providing information or producing a document or record or answering questions when required to do so under the Ombudsman Act on any of the following grounds that:

- it would contravene the provisions of any other enactment (whether it was enacted before or after the commencement of the *Prime Minister and Cabinet Legislation Amendment Act 1991*);
- it might tend to incriminate the person or make him or her liable to a penalty; or
- disclosing the information or providing the document would be otherwise contrary to the public interest.

The information or document or record or answer to a question is not admissible in evidence against the person in proceedings except in the following situations:

- in an application under subsection 11A(2) to the Federal Court for an order directing a person to comply with a requirement made by the OSO to provide information, produce documents or records and answer questions in relation to an investigation; or
- in proceedings for an offence against section 36 of the Ombudsman Act (i.e. refusing or failing to attend before the OSO, or be sworn or make an affirmation or furnish information or answer a question or produce a document or record) or offences against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to the Act.

The fact that a person is not excused from doing these things does not affect a claim of legal professional privilege that anyone may make in relation to the information, documents or records (subsection (5A)). Subsection (5) provides that a person is not liable to a penalty under any other enactment for refusing to provide information, produce a document, or record or answer questions when required to so under the Act.
The effect of subsection (6) is that the reference in subsection (1) to an officer in relation to a private registered provider that is a body corporate includes a reference to a director, secretary, executive officer or employee of the body corporate.

For the purposes of section 9 “State” includes the Australian Capital Territory and the Northern Territory.

Section 11A – Powers of the Federal Court of Australia

Proposed section 19ZM provides that subsections 11A(2)-(4) apply.

These provisions strengthen the OSO’s ability to obtain information or documents necessary to the conduct of an investigation where a person fails to respond to a request from the OSO.

The OSO can make an application to the Federal Court of Australia (upon which jurisdiction is conferred for the purposes of 11A by operation of subsection 11A(3) of the Act) but only if he or she first informs the Minister administering the Ombudsman Act and the Minister administering the ESOS Act in writing of his or her reasons for doing so.

An application may be made for an order directing a person who has failed to respond to a notice served on him or her under section 9 to provide information, produce documents or other records to attend before the OSO to answer questions, as he or she was required to do by the notice.

Section 12 – Complainant and Department etc. to be informed

Proposed section 19ZM provides that section 12 applies.

This section imposes obligations on the OSO to inform parties about the outcome of an investigation.

If the OSO does not investigate, or continue to investigate, an action taken by a private registered provider which is the subject of a complaint, the OSO must inform the complainant as soon as practicable, and in any manner the OSO thinks fit, that he or she has decided not to investigate, or not to continue investigating the action and the reasons for his or her decision.

An exception to the requirement to inform a private registered provider is provided in subsection 12(2). The exception applies where the OSO has made an arrangement with a private registered provider about actions in relation to which complaints have been made to the OSO, where the actions were actions taken by a private registered provider that are included in a class or classes of actions specified in the arrangement. Such arrangements may set out the manner in which, and the period within which, the OSO has to inform a private registered provider of his or her decision not to investigate or continue to investigate actions and the reasons for his or her decision. An arrangement may also provide that the OSO is not required to inform a private registered provider of his or her decision not to investigate or continue to investigate actions or the reasons for his or her decision.
Subsections 12(3) and (4) explain that the OSO must give a private registered provider the details of the investigation of an action, which was the subject of a complaint, when the investigation is completed. The OSO can provide this information in a way, and at the times, he or she thinks fit. The OSO also has discretion to give suggestions or comments relating to, or arising from, an investigation that he or she has carried out, to a private registered provider, or to another body or person.

Subsection (5) provides that, if the OSO gives a report containing recommendations about action which has been the subject of a complaint to a private registered provider under proposed section 19ZQ, and the OSO considers that action that is adequate and appropriate is not taken in relation to the recommendations within a reasonable time, the OSO must give the complainant a copy of the recommendations and any comments he or she thinks appropriate. In any other case, the OSO may give the complainant a copy of the recommendations and any comments he or she thinks fit.

**Section 13 - Power to examine witnesses**

Proposed section 19ZM provides that section 13 applies.

Where the OSO requires a person to attend before him or her in the exercise of his or her powers under section 9 of the Ombudsman Act, the OSO may administer an oath or affirmation to the person and examine the person on oath or affirmation.

Where the OSO serves a notice on a person (the respondent) under subsection 9(2) of the Ombudsman Act, requiring the respondent to attend before the person specified in the notice, the person before whom the respondent is required to attend may also administer an oath or affirmation to the respondent and examine him or her on oath or affirmation.

**Section 14 - Power to enter premises**

Proposed section 19ZM provides that section 14 applies.

This section provides that for the purposes of an investigation an authorised person may at any reasonable time of the day enter a place that is occupied by a private registered provider and carry on the investigation at that place.

Subsection 14(2) that a person is not authorised to enter or carry on an investigation at a place referred to in paragraph 80(c) of the *Crimes Act 1914*, a place that is a prohibited place by the virtue of section 7 of the *Defence (Special Undertakings) Act 1952*, an area of land or water that is declared as restricted under section 14 of the *Defence (Special Undertakings) Act 1952* unless the Minister administering that Act has approved the person entering the place. The Minister may place conditions for entry and the manner in which his or her investigation is to be conducted at that place.

Subsection (3) provides that if the Attorney-General is satisfied that the carrying on of an investigation at a place might prejudice the security or defence of the Commonwealth, he or she may declare that subsection (1) does not authorise a person to enter or carry on an investigation in relation to that place. That is unless the
Minister approves the person entering the place and that person complies with any conditions imposed by the Minister.

Subsection (6) provides that for the purposes of this section an authorised person includes a reference to the Ombudsman and Deputy Ombudsman.

**Section 18 - Ombudsman may have further discussion with principal officer**

Proposed section 19ZM provides that section 18 applies.

After presentation to the Parliament of a report under section 19ZR in relation to action taken by a private registered provider, the OSO may discuss any matter to which the report relates with the principal executive officer of the private registered provider for the purpose of resolving the matter.

**Section 19 - Annual report and additional reports to Parliament**

Proposed section 19ZM provides that section 19 applies, other than subsection 19(8). The OSO is also subject to obligations in section 19ZS.

The OSO is subject to mandatory annual reporting requirements. The OSO also has discretion to submit reports to the Minister administering the Ombudsman Act (currently the Prime Minister) for tabling in Parliament. This discretionary power allows the OSO to bring attention to the OSO’s activities, and thereby discourage actions considered undesirable.

The OSO must submit to the Minister administering the Ombudsman Act as soon as practicable, but at least within 6 months after 30 June each year, a report on the OSO’s activities for the year ending on 30 June. The OSO also has discretion to submit reports to that Minister, from time to time, for tabling in Parliament. The reports may cover the OSO’s operations for part of a year or matters related to, or arising out of the OSO’s performance of functions or exercise of powers under the Ombudsman Act.

If the OSO gives the Minister a report under subsections (1) or (2), the Minister must have the report tabled in both Houses of Parliament within 15 sitting days of receiving it.

If the OSO believes he or she cannot submit a report under subsection (1) within 6 months after 30 June of that year, the OSO may, within that 6 month period ask the Minister for an extension of time. If the OSO asks for an extension of time, the OSO must provide a statement of reasons to the Minister explaining why he or she will not be able to submit the report. The Minister may grant any extension he or she considers reasonable.

However, if the Minister grants the OSO an extension, within three sitting days of granting the extension the Minister must table before each House of Parliament a copy of the OSO’s statement of reasons, a statement specifying the extension granted and the reasons for granting the extension.
The OSO must then submit the report within the extended period and the Minister must table it before both Houses of Parliament within 15 sitting days of receiving it.

If the OSO fails to submit a report within 6 months after 30 June in a particular year or fails to submit a report within a period extended by the Minister under subsection 19(7), the OSO must explain to the Minister in writing why the report was not submitted and the Minister must table a copy of the statement before each House of Parliament within 3 sitting days of receiving it.

Section 31 – Staff

Proposed section 19ZM provides that subsection 31(1) applies. This subsection provides that the staff required for the purposes of the Ombudsman Act shall be persons engaged under the *Public Service Act 1999*.

Section 33 – Ombudsman not to be sued

Proposed section 19ZM provides that section 33 applies. Subject only to the obligations imposed on the OSO under section 35 of the Ombudsman Act to observe confidentiality, section 33 provides statutory immunity from an action, suit or proceeding for the OSO (including a delegate of the OSO and persons acting under the direction or authority of the OSO) in relation to anything done or omitted to be done in good faith in the service of, or purported exercise of, any powers or authority conferred by the Ombudsman Act.

Section 34 – Delegation

Proposed section 19ZM provides that section 34 applies, other than subsections 34(1) to (2A). Item 3 inserts a new subsection 34(2B), as discussed above.

Subsection 34(5) provides that a delegate shall produce, upon request, the instrument of delegation (or a copy) for inspection by any person affected by the exercise of delegated powers.

Subsection 34(7) provides that where in accordance with a law of a State, the Ombudsman of a State delegates to the OSO, either generally or as otherwise provided by the instrument of delegation, any of his or her powers and the Minister consents to the exercise of the power or powers, the OSO is authorised to exercise that power accordingly.

Section 35 – Officers to observe confidentiality

Proposed section 19ZM provides that section 35 applies, other than subparagraph 35(3)(b)(ia).

Section 35 imposes obligations on “officers” to keep certain information confidential. For the purposes of section 35, an “officer” may include a person who is a member of the OSO’s staff or a member of the OSO’s staff to whom the OSO has delegated his or her powers under section 34 or a person who is an authorised person.
Subsection 35(2) is an offence provision for the breach of which a penalty of $500 applies. Subject to section 35, it is an offence to make a record of, reveal or pass on to anyone, either directly or indirectly, information acquired as an officer which was obtained under the provisions of the Ombudsman Act. The offence applies while a person is an officer and after a person ceases to be an officer.

Despite subsection 35(2), under paragraph 35(3)(b)(i) an officer may divulge, or communicate to another person, information provided by an officer of a private registered provider with the consent of the principal executive officer of the private registered provider. Under paragraph 35(3)(b)(ii), an officer may also disclose information provided by a person other than a person who is an officer of a private registered provider with the consent of that person.

The OSO may give information to another statutory office holder when transferring a complaint (see subsection 19ZK).

Under subsection 35(4), the offence provision in subsection 35(2) does not prevent the OSO from disclosing matters he or she thinks should be disclosed in a report under the Ombudsman Act, when setting out grounds for conclusions and recommendations made in the report. However, such disclosure is prohibited if the Attorney-General provides a certificate to the OSO stating in writing that the disclosure of information or documents about a specified matter or matters included in a class of specified matters or the disclosure of a specified document or documents included in a specified class of documents would, for a reason specified in the certificate, be contrary to the public interest (see subsection 35(5)). The reason specified in the certificate must be one of those set out in paragraphs 9(3)(a), (b), (c), (d) or (e). The maximum penalty for disclosing information or documents in contravention of subsection 35(5) of the Ombudsman Act is 2 years imprisonment.

Subsection 35(2) also applies to prevent an officer from disclosing information acquired under the provisions of the Ombudsman Act concerning any of the matters set out in paragraphs 9(3)(a), (b), (c), (d) or (e).

Subsection 35(6) provides that subsection 35(5) does not prevent an officer, in the performance of duties, from disclosing the information to another officer, or the contents, copy or extract of such documents to another officer or, if returning the document, to the person lawfully entitled to it.

Before the OSO may provide any information or document to the Ombudsman of a State, subsection 35(7) obliges the OSO to be satisfied that a law of the State makes similar provisions with respect to the confidentiality of information to be acquired by the Ombudsman of the State. However, subsection (7) does not apply in relation to any information or document obtained by the OSO as a result of the exercise of a power delegated by the Ombudsman of the State to the OSO under subsection 34(7) of the Ombudsman Act.

Subsection 35(8) makes it clear that a person who is, or has been, an officer cannot be compelled to disclose information acquired through being, or having been, an officer. The provision applies to any proceedings before a court (whether or not the court
exercises federal jurisdiction). It also applies to any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory or by consent of the parties to hear, receive or examine evidence.

Section 35AA - Disclosure of information and documents to Integrity Commissioner

Proposed section 19ZM provides that section 35AA applies.

This section applies where the OSO has investigated action on his or her own motion (proposed paragraph 19ZJ(2)(b)) and during the course of the investigation obtains information or a document that is or may be relevant to a corruption issue.

In these circumstances, the OSO is not prevented from disclosing the information, making a statement or giving the document to the Integrity Commissioner.

In this section, corruption issue has the same meaning as in the Law Enforcement Integrity Commissioner Act 2006 and Integrity Commissioner has the same meaning as in the Law Enforcement Integrity Commissioner Act 2006.

Section 35A – Disclosure of information by OSO

Proposed section 19ZM provides that section 35A applies, other than subsection (3A).

Section 35A sets out when the OSO may disclose information. In particular, it clarifies that nothing in the Ombudsman Act precludes the OSO from disclosing information or making a statement to a person, the public or a section of the public, about the performance of the functions of, or an investigation by, the OSO under the Ombudsman Act about those matters, if the OSO considers that it is in the interests of a private registered provider or it is in the public interest to disclose the information or make the statement. Proposed section 35A is intended to permit the OSO to disclose relevant information to any person, including the Department administering the ESOS Act.

However, the OSO must not disclose information or make a statement if doing so is likely to interfere with carrying out an investigation or making a report under the Ombudsman Act. Further, in disclosing information or making a statement under subsection 35A(1) of the Ombudsman Act about a particular investigation, the OSO must not disclose the name of a complainant or any other matter that would allow the complainant to be identified, unless it is reasonable in the circumstances to do so. The OSO must not disclose information or make a statement that is critical of a private registered provider, unless the OSO has complied with subsection 8(5).

Subsection 35A(4) provides that section 35A has effect despite the requirement in subsection 8(2) to conduct investigations in private and the requirement in section 35 to observe confidentiality. However, it does not override the requirement in subsection 35(5) to keep confidential matters of public interest in respect of which the Attorney-General has issued a certificate.

Section 35B - Disclosure of Australian Crime Commission (ACC) information
Proposed section 19ZM provides that section 35B applies.

The purpose of section 35B is to restrict disclosure by the OSO of certain ACC information. If the Attorney-General gives the OSO a certificate stating that the disclosure of certain ACC information by one or more of the specified disclosure methods would be contrary to the public interest by reason that it would prejudice the safety of a person, the fair trial of a person who has been or may be charged with an offence, the proper performance of the functions of the ACC or the operations of a law enforcement agency, then the OSO must not so disclose that ACC information.

Section 35C - Disclosure of Australian Commission for Law Enforcement Integrity (ACLEI) information

Proposed section 19ZM provides that section 35C applies.

Section 35C is in large part identical to section 35B which prevents the disclosure by the OSO of certain ACC information. If the Attorney-General gives the OSO a certificate stating that the disclosure of certain ACLEI information by one or more of the specified disclosure methods would be contrary to the public interest by reason that it would prejudice the safety of a person, the fair trial of a person who has been or may be charged with an offence, the proper performance of the functions of the Integrity Commissioner or the operations of a law enforcement agency, then the OSO must not so disclose that ACLEI information.

Section 36 – Offences

Proposed section 19ZM provides that section 36 applies.

This section lends force to the OSO’s powers by making it an offence punishable on conviction by a fine of up to $1,000 or imprisonment for up to 3 months to refuse to appear or fail to appear before the OSO to be sworn or to make an affirmation or answer questions or produce a document or record when required to do so under the Ombudsman Act, unless the person has a reasonable excuse for not doing so. If a defendant mounts the latter defence, the defendant bears the evidential onus of proving the defence.

Section 37 – Protection from civil actions

Proposed section 19ZM provides that section 37 applies.

This section facilitates the operation of the Ombudsman Act by providing immunity from civil suit for persons who, in good faith, complain to the OSO or make a statement or give a document or information to a person who is an officer within the meaning of section 35 of the Ombudsman Act, if the information or document is given for the purposes of the Ombudsman Act. The protection applies even if the statement was not made or the document or information was not given in response to a requirement made under section 9 or an order under section 11A of the Ombudsman Act.
Section 38 – Regulations

Proposed section 19ZM provides that section 38 applies.

Section 38 provides that the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Ombudsman Act and in particular, prescribing matters in connection with fees and expenses of witnesses appearing before the OSO.

For example, section 19ZK(4) provides that a person may be prescribed under the regulations as a statutory complaint handler.