**EXPLANATORY STATEMENT**

**Select Legislative Instrument No. 94, 2014**

*Education Services for Overseas Students Act 2000*

*Education Services for Overseas Students Amendment (Student Visas and Other Measures) Regulation 2014*

**Authority**

Section 177 of the *Education Services for Overseas Students Act 2000* (the ESOS Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the ESOS Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the ESOS Act. Section 33 of the *Acts Interpretation Act 1901* also provides authority for the making of the instrument.

**Legislative background**

The ESOS Act sets out the legal framework governing the delivery of education to overseas students studying in Australia on a student visa.

One of the objects of the ESOS Act is to complement Australia’s migration laws by ensuring registered providers collect and report information relevant to the administration of the laws relating to *‘student visas’*. Student visa subclasses are defined under the *Migration Regulations 1994* (Migration Regulations).

The *Education Services for Overseas Students Regulations 2001* (ESOS Regulations) contain a definition of *‘student visa’* which is intended to align with the definition in the Migration Regulations. The definition of *‘student visa’* was included as an amendment to the ESOS Regulations in 2007 to support consistency across the ESOS and Migration legislation and to ensure that providers and students would understand who was, and who was not, covered under the ESOS legislative framework.

The ESOS Regulations supplement provisions in the ESOS Act and *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students* (National Code). In particular, Part 4 of the Regulations relate to penalties for breaches of the National Code. These penalties are in addition to the sanctions in the ESOS Act, which also cover breaches of the National Code.

**Purpose and operation**

The purpose of the amendments to the ESOS Regulations is to ensure that the definition of *‘student visa’* is appropriate in the ESOS context and, to the extent that is appropriate, reflect the definition of *‘student visa’* in the Migration Regulations. In addition the amendment repeals redundant penalty provisions related to breaches of the National Code.

AusAID reference

The definition of *‘student visa’* in the ESOS Regulations currently includes a reference to an *‘AusAID student’*. *‘AusAID* *student*’ is a category of student visa subclass defined under the Migration Regulations where a student’s study or training under a scholarship scheme or program is approved by the Minister responsible for the Australian Agency for International Development (AusAID). Given the special nature of the AusAID student visa subclass, the Department of Immigration and Border Protection (DIBP) does not require these students to be monitored under the ESOS arrangements.

Proposed amendments to the Migration Regulations under the *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014* are designed to remove all relevant references to the term ‘Australian Agency for International Development’ and replace the term with the equivalent Department of Foreign Affairs and Trade (DFAT) term, as DFAT now has responsibility for these functions.

Accordingly, the ESOS Regulations require updating to remove references to *‘AusAID student’* to ensure consistency with the Migration Regulations. This will assist providers and students to understand which students are covered under the ESOS legislative framework.

Penalty provisions under the National Code

Part 4 of the ESOS Regulations prescribe penalties for breaching certain provisions of the National Code. Currently sub-regulation 4.01 (2) references Schedule 1, which was repealed in 2012. An oversight in drafting repealed Schedule 1 of the ESOS Regulations but did not delete the reference which has resulted in the regulators not being able to enforce these provisions. In addition, the provisions are duplicative in nature as the Minister’s delegate is already able to initiate enforcement action and impose sanctions under Part 6 of the ESOS Act for a breach of any standard of the National Code. Consultation feedback from ESOS regulators indicates that the penalty provisions in Part 4 of the ESOS Regulations have never been used. In that context, and in light of the Government’s agenda to eliminate unnecessary regulation, it is considered that maintaining these penalty provisions is no longer necessary.

In summary the Regulation repeals and substitutes the definition of *‘student visa’* by providing that a *‘student visa’* means a visa of a subclass mentioned in the definition of *‘student visa’* in the Migration Regulations, subject to certain exceptions. One of those exceptions is persons on a subclass 576 (Foreign Affairs and Defence Sector) visa. In addition, where the definition of *‘student visa’* refers to an *‘exchange student’*, the word *‘secondary’* has been inserted beforehand to clarify that an *‘exchange student’* is a *‘secondary exchange students’* as defined in the Migration Regulations. The Regulation will also repeal in its entirety, Part 4 of the ESOS Regulation – Penalties for the National Code.

**Commencement**

The Regulation commences on 1 July 2014.

**Consultation**

The Department of Education consulted with DIBP on the required changes to the definition of *‘student visa’* between March and May 2014. The amendment has no impact on students captured by the definition as it simply reflects changes to administrative arrangements within government.

The Department of Education consulted with the Australian Skills Quality Authority (ASQA) and the Tertiary Education Quality and Standards Agency (TEQSA) on changes to Part 4 of the ESOS Regulations in March 2014. TEQSA feedback included that the costs of enforcement action would be greater than the penalties to potentially be paid by registered providers and that it was unlikely that TEQSA’s focus would be on prosecuting providers who fail to comply with the prescriptive requirements of the National Code. ASQA advised that it supported the repeal of Part 4 of the ESOS Regulations. All agencies acknowledged that the provisions of Part 4 of the ESOS Regulations had never been used and were redundant.

**Detailed explanation of the Regulation’s provisions**

Regulation 1 – Name of regulation

This regulation provides that the title of the Regulation is the *Education Services for Overseas Students Amendment (Student Visas and Other Measures) Regulation 2014.*

Regulation 2 – Commencement

This regulation provides for the Regulation to commence on 1 July 2014.

Regulation 3 – Authority

This regulation provides that the Regulation is made under the *Education Services for Overseas Students Act 2000.*

Regulation 4 – Schedule(s)

Regulation 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 - Amendments

Item [1] repeals and substitutes the current definition of *student visa* in regulation 1.03 of the ESOS Regulations to provide that a *student visa* means a visa of a subclass mentioned in the definition of *student visa* in regulation 1.03 of the Migration Regulations, subject to certain exceptions.In particular, paragraph (a) of new regulation 1.03 excludes persons on visa subclass 576 (Foreign Affairs and Defence Sector) from the definition of *student visa* and new paragraph (c) inserts the word ‘secondary’ in front of ‘exchange student’ to clarify that the application of this provision is to *‘secondary exchange students’* as defined in the Migration Regulations.

Item [2] repeals Part 4 - Penalties for the National Code, in its entirety.

**Statement of Compatibility with Human Rights**

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

***Education Services for Overseas Students Amendment (Student Visas and Other Measures) Regulation 2014***

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

**Overview of the Regulation**

The Regulation is made under Section 177 of *Education Services for Overseas Students Act 2000* (the ESOS Act).

In parallel with amendments being made to the Migration Regulations under the *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014*, the *Education Services for Overseas Students Regulations 2001* (ESOS Regulations) will be amended by the *Education Services for Overseas Students Amendment (Student Visas and Other Measures) Regulation 2014* (the Regulation) to ensure that the definition of *‘student visa’* in the ESOS Regulations is aligned with the definition of *‘student visa’* in the Migration Regulations. The amendments will clarify for stakeholders which students are captured under the ESOS legislative framework.

In addition, the Regulation will repeal the redundant penalty provisions of Part 4 of the ESOS Regulations that may be imposed on registered providers for breaches of certain provisions of the National Code. The provisions are duplicative in nature as the Minister’s delegate is already able to instigate enforcement action and impose sanctions under the ESOS Act for a breach of any standard of the National Code.

**Human rights implications**

*Right to education*

The Regulation engages the right to education, contained in Article 13 of the International Covenant on Economic, Social, and Cultural Rights.

The proposed amendments engage the right to education, as the Regulation relates to the provision of education services to international students by registered providers. In particular, the Regulation amends the definition of *student visa* in the ESOS Regulations to align it with the definition of student visa in the Migration Regulations. As the amendments to the definition of *student visa* in the ESOS Regulations are not expected to have an impact on any individual, nor are they expected to impact on a student’s right to education in the future, the proposed amendments do not limit the right to education.

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

**Conclusion**

This Regulation is compatible with human rights because it advances the protection of human rights.