

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Indigenous Affairs

Higher Education Support Act 2003

Indigenous Student Assistance Grants Amendment Guidelines 2018

Purpose

1. The Indigenous Student Assistance Grants Amendment Guidelines 2018 (Amendment Guidelines) amend the *Indigenous Student Assistance Grants Guidelines 2017* (the Guidelines) to make a number of mostly minor and technical changes.
2. The Guidelines provide a framework to deal with grants for the Indigenous Student Success Programme (ISSP) under Part 2-2A of the Act. The Guidelines are made under subsection 238-10(1) of the *Higher Education Support Act 2003* (the Act) for the purposes of Part 2-2A of the Act (see Item 6A of the table in subsection 238-10(1) of the Act).

Background

3. The ISSP is designed to address the additional barriers Indigenous students face to succeed in higher education by providing higher education providers with increased flexibility to tailor their support to meet the specific needs of Indigenous students. The ISSP commenced in 2017.
4. The Department of the Prime Minister and Cabinet (the Department) undertook a post-implementation review of the ISSP during 2018 to explore whether changes should be made to improve the ease of implementation or mitigate unintended consequences. The Amendment Guidelines implement the outcomes of the review.

Regulatory Impact Statement

5. The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required for these Guidelines.

Statement of Compatibility with Human Rights

6. The Statement of Compatibility with Human Rights appears at the end of this Explanatory Statement.

Commencement

7. The Amendment Guidelines commence the day after they are registered on the Federal Register of Legislation.

Consultation

8. The Department released a discussion paper on the post-implementation review of the ISSP on 11 July 2018. Thirty-eight responses were received from higher education providers, peak bodies and students (including 8 private submissions). The Department also held five teleconferences with stakeholders and met with the National Aboriginal and Torres Strait Islander Higher Education Consortium (NATSIHEC) in relation to the review.
9. The Department of Finance was consulted on the preparation of the Amendment Guidelines.

Explanation of provisions

Clause 1 – Name

10. **Clause 1** sets out the name of the instrument, being the *Indigenous Student Assistance Grants Amendment Guidelines 2018* (referred to in this Explanatory Statement as ‘the Amendment Guidelines’).

Clause 2 – Commencement

11. **Clause 2** provides that the Amendment Guidelines commence on the day after the Amendment Guidelines are registered.

Clause 3 – Authority

12. **Clause 3** specifies that the Amendment Guidelines are made under the authority of subsection 238-10(1) of the Act.

13. The note alerts the reader that subsection 33(3) of the *Acts Interpretation Act 1901* has the effect that Guidelines made under subsection 238-10(1) of the Act may be varied. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that if an Act confers a power to make an instrument, the power includes power to vary or revoke the instrument.

Clause 4 – Schedules

14. **Clause 4** provides that each instrument specified in a Schedule to the Amendment Guidelines is amended or repealed as set out in the Schedule.

Schedule 1 – Amendments

15. **Item 1** is a technical amendment to replace the words “previous grant year” in column 3 of item 1 of the table in subsection 7(2) of the Guidelines with the words “year before the grant year.”
16. Subsection 7(2) of the Guidelines deals with notification of ISSP grant amounts. *Grant year* is defined in section 4 of the Guidelines.
17. This change is made because there may not always be a previous grant year for a higher education provider.
18. **Item 2** repeals subsection 7(3) of the Guidelines. Subsection 7(3) of the Guidelines deals with ISSP grant amounts for the 2017 grant year. This provision is now redundant.
19. **Item 3** deletes the words “can demonstrate it” in paragraph 10(1)(b) of the Guidelines. This is done for drafting consistency with paragraphs 10(1)(a) and (c) of the Guidelines.
20. **Item 4** replaces paragraph 11(a)(i) of the Guidelines, and **Item 5** repeals paragraph 11(a)(ii) of the Guidelines. The effect is to require the Indigenous Governance Mechanism of a higher education provider to consist of:
 - a. at least two Indigenous persons, at least one of whom is an appropriately qualified senior academic employee, or appropriately qualified senior executive employee of the provider; or
 - b. a committee constituted by a majority of Indigenous persons, each of whom has skills and experience relevant to the role.
21. The purpose of these amendments is to require that the Indigenous Governance Mechanism of a higher education provider consists of at least two Indigenous persons.
22. **Item 6** replaces paragraph 12(a) of the Guidelines to require the Indigenous Workforce Strategy of a higher education provider to include a key performance indicator that the number of employees engaged by the provider who are Indigenous persons is at least 3 per cent of all employees of the provider. The Minister and a provider may also agree a higher percentage (as a stretch target) before 24 November of the year before the grant.
23. The Indigenous Workforce Strategy of a higher education provider must also include one or more additional key performance indicators relating to employment of the Indigenous persons by the provider.
24. **Item 7** inserts new subparagraph 12(b)(iii) in section 12 of the Guidelines to require the Indigenous Workforce Strategy of a higher education provider to prioritise the employment of at least one Indigenous person as a senior executive employee at the level of Pro Vice-Chancellor, Deputy Vice-Chancellor or Vice-Chancellor, or equivalent level.

25. **Item 8** repeals paragraph 12(c) of the Guidelines. Paragraph 12(c) of the Guidelines provides for a higher education to prepare a plan regarding employment of Indigenous persons.
26. Paragraph 12(c) of the Guidelines is no longer necessary following amendments to paragraph 12(a) (see item 6) and paragraph 12(b) (see item 7). Amendments to paragraphs 12(a) and (b) of the Guidelines set specific requirements of higher education providers regarding employment of Indigenous persons.
27. **Item 9** amends the heading to Part 4 of the Guidelines to refer to use, reporting and continuing eligibility. This is to accommodate new section 18A in this Part (see item 11).
28. **Item 10** replaces paragraph 15(a) of the Guidelines. Paragraph 15(a) of the Guidelines prevents a higher education provider using an ISSP grant to administer any aspect of the provider's business other than delivery of activities specified in the Guidelines.
29. The effect of this amendment is to remove a transitional exception to this rule where the higher education provider used a grant received under the Indigenous Support Program provided for in the *Other Grants Guidelines (Education) 2012* to deliver a unit of study about Indigenous societies and cultures. This exception is no longer necessary.
30. **Item 11** inserts new section 18A of the Guidelines.
31. New subsection 18A(1) imposes a condition on ISSP grants requiring higher education providers, in the grant year, to continue to satisfy the eligibility requirements of section 38-10 of the Act and the additional eligibility requirements specified in section 10 of the Guidelines. If a higher education provider breaches new subsection 18A(1), Part 2-5 of the Act authorises the Minister to reduce a grant to the provider under the Act, or require the provider to repay an amount of a grant to the Commonwealth.
32. New subsection 18A(2) requires a higher education provider to provide evidence that it complies with new subsection 18A(1) within 10 business days of a request by an administering officer.
33. The purpose of new section 18A of the Guidelines is to ensure a higher education provider that receives an ISSP grant continues to satisfy eligibility requirements for the grant during the grant year.
34. **Item 12** replaces subsection 21(3) of the Guidelines. Existing subsection 21(3) of the Guidelines stipulates the amount of an ISSP grant that a higher education provider is required to use to offer Indigenous Commonwealth Scholarships to Indigenous students from remote areas and regional areas in the 2017 and 2018 grant years. This amendment will retain these requirements for all grant years, with some modifications.
35. New subsection 21(3) stipulates that the amount of an ISSP grant that a higher education provider must use to:

- a. offer Indigenous Commonwealth Scholarships to Indigenous students from remote areas and regional areas for the grant year; and
 - b. meet payment obligations of the provider for the grant year, if any, in respect of Indigenous Commonwealth Scholarships that the provider awarded to Indigenous students from remote areas and regional areas in a previous grant year,

must be at least 95 per cent of the total value of Indigenous Commonwealth Scholarship payments that the provider made to Indigenous students from remote areas and regional areas for the previous grant year.
36. The exception to this rule is where the Minister agrees alternative arrangements in writing.
37. Paragraph 21(3)(a) requires higher education providers to count the value of scholarship offers for the grant year towards the 95 per cent value. It does not allow higher education providers to count the total value of a scholarship where the scholarship is for more than one year. Paragraph 21(3)(b) allows higher education providers to count existing Indigenous Commonwealth Scholarship commitments in a grant year towards the 95 per cent value.
38. The 95 per cent value is the amount that is 95 per cent of the total value of Indigenous Commonwealth Scholarship payments that the provider made to Indigenous students from remote areas and regional areas for the previous grant year. The total value of Indigenous Commonwealth Scholarship payments will not be the same, necessarily, as the total value of Indigenous Commonwealth Scholarships awarded in the previous grant year (that is, where a higher education provider awarded scholarships for the more than one year in the previous grant year).
39. **Items 13 and 14** make technical corrections to paragraph 27(1)(b) of the Guidelines.
40. **Item 15** amends paragraph 27(1)(b) to facilitate the insertion of new paragraph 27(1)(c) (see item 16).
41. **Item 16** inserts new 27(1)(c) to require a higher education provider to take steps to recover the amount of an Indigenous Commonwealth Scholarship that has not been exhausted if the scholarship is an Indigenous Commonwealth Accommodation Scholarship and the scholarship recipient has deferred his or her course of study.
42. It is not considered appropriate for a scholarship recipient to have the benefit of an accommodation scholarship where the recipient has deferred his or her course of study.
43. **Item 17** makes a technical alteration to column 3 of item 1 of the table in subsection 28(6) of the Guidelines. This is done for drafting consistency.
44. **Item 18** amends paragraph 30(c) of the Guidelines to facilitate the insertion of new paragraph 30(d).

45. **Item 19** inserts new paragraph 30(d) of the Guidelines expressly to enable a higher education provider to use an ISSP grant to provide guidance to Indigenous students about career options following completion of a *course of study*.
46. **Item 20** inserts new paragraph 32(aa) of the Guidelines to enable a higher education provider to use an ISSP grant for activities to maintain the engagement of Indigenous students undertaking a *course of study*.
47. **Item 21** amends paragraph 32(b) of the Guidelines to refer to activities to engage an Indigenous student who has deferred undertaking his or her course of study, in addition to activities to engage an Indigenous student who has withdrawn his or her enrolment in a course of study.
48. **Item 22** inserts new section 35A of the Guidelines dealing with working with vulnerable persons requirements. This provision implements Commonwealth policy that recipients of Commonwealth grants are required to comply with working with vulnerable persons requirements. New section 35A is consistent with the substance of clauses in the Commonwealth of Australia Head Agreement for Indigenous Grants.
49. New subsection 35A(1) requires a higher education provider to screen a person before engaging the person in relation to any part of administering or using an ISSP grant, if the person may have contact with a vulnerable person in that role.
50. New subsection 35A(2) requires a higher education provider to take certain steps if the provider becomes aware that a person engaged by the provider, in relation to the administration or use of an ISSP grant, is prohibited from having contact with a vulnerable person and that person has, or may have contact with, a vulnerable person.
51. Where a higher education provider and an administering officer agree that the provider must undertake additional requirements relating to contact with vulnerable persons, police checks, and criminal history, and the provider and the officer have agreed such requirements, new subsection 35A(3) requires the provider to comply with these requirements.
52. New subsection 35A(4) requires a higher education provider to include in its performance report under section 17 of the Guidelines a statement regarding the provider's compliance with the requirements under subsections 35A(1), (2) and (3) of the Guidelines for the grant year, where a provider was required to comply with these subsections.
53. New subsection 35A(7) inserts a definition of vulnerable person for the purposes of new section 35A of the Guidelines.
54. **Item 23** amends the definition of *normal previous year allocation* in item 1 of Schedule 1 to the Guidelines to ensure consistency with amendments to item 5 of Schedule 1 to the Guidelines.

55. **Items 24 and 26** renumber paragraphs a. and b. in column 3 of item 1 of the table in item 2 of Schedule 1 to the Guidelines as paragraphs (a) and (b). This is done for ease of reference and consistency with drafting convention.
56. **Items 25 and 27** correct cross-references in paragraphs a. and b. in column 3 of item 1 of the table in item 2 of Schedule 1 to the Guidelines.
57. **Item 28** deletes paragraph c. in column 3 of item 1 of the table in item 2 of Schedule 1 to the Guidelines. This paragraph relates to calculating ISSP grant amounts for the 2017 grant year and is no longer required.
58. **Items 29 and 31** renumber paragraphs a. and b. in column 3 of item 1 of the table in item 3 of Schedule 1 to the Guidelines as paragraphs (a) and (b). This is done for ease of reference and consistency with drafting convention.
59. **Items 30 and 32** correct cross-references in paragraphs a. and b. in column 3 of item 1 of the table in item 3 of Schedule 1 to the Guidelines.
60. **Item 33** deletes paragraph c. in column 3 of item 1 of the table in item 3 of Schedule 1 to the Guidelines. This paragraph relates to calculating ISSP grant amounts for the 2017 grant year and is no longer required.
61. **Item 34** replaces subitem 5(4) of Schedule 1 to the Guidelines. Existing subitem 5(4) specifies the normal previous year allocation for a higher education provider for the 2017 grant year. The normal previous year allocation of a higher education provider is used to calculate the provider's ISSP grant amount.
62. New subitem 5(4) specifies that the normal previous year allocation for a higher education provider that did not receive an ISSP grant in the year before the grant year, but received a grant approved under section 38-20 of the Act to use for activities specified in the Guidelines is to be calculated in accordance with new subitem 5(5) of Schedule 1 to the Guidelines.
63. **Item 35** inserts subitem 5(5) into Schedule 1 to the Guidelines. Subitem 5(5) provides that the amount of the normal previous year allocation for a provider identified in subitem 5(4) is either:
 - a. the amount of the grant approved under section 38-20 of Act in respect of the provider, where that grant was made at the beginning of the grant year and was to be used for the entire grant year; or
 - b. where that is not the case (for example, the grant approved under section 38-20 of Act in respect of the provider was approved part-way through the year), the amount agreed between an administering officer and the provider.
64. In agreeing an amount, the administering officer and the provider may consider any establishment costs provided by the Commonwealth to the provider to deliver the ISSP and

an agreed scaling of the grant approved under section 38-20 of Act in respect of the provider to account for the entire grant year.

65. **Item 36** is an application provision relating to changes to eligibility requirements to receive an ISSP grant. Item 36 provides that changes to eligibility requirements do not apply to ISSP grants that are payable in respect of the year 2019. This is done to avoid the possibility of eligibility requirements for 2019 ISSP grants changing after the Minister has formed a view under section 8 of the Guidelines, and to give higher education providers time to meet the new requirements. Changes to ISSP grant conditions will apply to 2019 ISSP grants.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

66. The *Indigenous Student Assistance Grants Amendment Guidelines 2018* (Amendment Guidelines) are 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

67. Section 238-10 of the *Higher Education Support Act 2003* (the Act) provides that the Minister may, by legislative instrument, make Guidelines for the purposes of Part 2-2A of the Act (Item 6A of the table in section 238-10).

68. The *Indigenous Student Assistance Grants Amendment Guidelines 2018* amend the *Indigenous Student Assistance Grants Guidelines 2017* (the Guidelines) to make a number of mostly minor and technical changes. The Guidelines provide a framework to deal with grants for the Indigenous Student Success Programme (ISSP) under Part 2-2A of the Act.

69. The ISSP is designed to address the additional barriers Indigenous students face to succeed in higher education by providing higher education providers with increased flexibility to tailor their support to meet the specific needs of Indigenous students. The ISSP commenced in 2017. The Amendment Guidelines implement the outcomes of a post-implementation review of the ISSP conducted in 2018.

Human rights implications

70. To the extent the Amendment Guidelines engage human rights, the Amendment Guidelines engage the right to education and the right to equality and non-discrimination.

Right to education

71. The right to education is contained in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognises the ‘right of everyone to education.’

72. Relevantly, Article 13(2)(c) of the ICESCR recognises that for the full realisation of the right to education, ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means ...’.

73. The United Nations Committee on Economic Social and Cultural Rights has stated that the right to education requires that functioning educational institutions and programmes must be available in sufficient quantity within a country.¹

¹ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education (Article 13), 21st sess, UN Doc E/C.12/1999/10 (8 December 1999), at paragraph [6].

74. The Amendment Guidelines are intended to improve the administration of the ISSP and enhance the capacity of higher education providers to assist Indigenous students. To the extent this better enables Indigenous students to access higher education and attain higher education awards, the Amendment Guidelines advance the right to education.

Right to equality and non-discrimination

75. The right to equality and non-discrimination is contained in Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the ICESCR and Article 5 of the Convention on the Elimination of all forms of Racial Discrimination (CERD). These rights recognise that all human beings have the right to be treated equally and to not be discriminated against.

76. Of particular relevance in the context of the Amendment Guidelines, CERD establishes a general prohibition on racial discrimination. The *Racial Discrimination Act 1975* implements this prohibition in Australian domestic law.

77. In improving the administration of the ISSP and enhancing the capacity of higher education providers to assist Indigenous students, the Amendment Guidelines make a clear distinction based on race. This means that Indigenous persons will continue to be provided with a different level of assistance to access higher education than other persons.

78. The Amendment Guidelines may be characterised as altering and continuing an existing ‘special measure’, being the ISSP as implemented under the Guidelines. ‘Special measures’ are provided for in article 1(4) of the CERD and subsection 8(1) of the *Racial Discrimination Act 1975*. They are an exception to the general prohibition on racial discrimination, and are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.’ For a measure to be characterised as a ‘special measure’ it must:

- be for a particular group or individuals;
- be taken for the sole purpose of securing the adequate advancement of those groups or individuals;
- be ‘necessary’; and
- not continue after its objectives have been achieved.

79. The Amendment Guidelines will make changes to the administration of the ISSP. The ISSP provides for grants to higher education providers specifically to assist Indigenous students.

80. The United Nations Committee on Economic Social and Cultural Rights has expressed concern about disparities in access to the educational system for Indigenous peoples, including those living in remote areas, compared with the rest of the population, as well as the deficient quality of education provided to persons living in remote areas, in particular

Indigenous peoples.² Current data indicates that in Australia Indigenous peoples do not access or complete higher education at a rate equivalent to non-Indigenous peoples.

81. The purpose of the Guidelines is to improve the provision of targeted assistance to Indigenous students. The Amendment Guidelines enhance the capacity of higher education providers to assist Indigenous students to better access, progress in and complete higher education awards. Therefore, the Amendment Guidelines provide further measures to address the disparity in access to, and completion of, higher education that exists between Indigenous persons and other persons.
82. These measures are reasonably necessary to secure the equal enjoyment of the right to education and the right to equality and non-discrimination by Indigenous persons. Although the number of Indigenous persons accessing higher education is increasing, the arrangements provided for in Part 2-2A of the Act and the Guidelines remain necessary to capitalise on improvements in Indigenous access to higher education and ensure students are not only enrolling in, but also progressing in and completing university awards, in greater numbers.
83. The arrangements for the ISSP and the improvements in the Amendment Guidelines are appropriate, adapted and proportionate, as they improve the administration of the ISSP and enhance the capacity of higher education providers to assist Indigenous students in recognition of an identified need and with minimal impact on other persons.
84. In administering the Guidelines, the Commonwealth will continually monitor how higher education providers engage with the measures in the Amendment Guidelines. This will ensure that there will be a continual evaluation of the new measures, and the level of assistance that needs to be provided until the objectives of the measures are achieved.
85. The Guidelines and the Amendment Guidelines may also be regarded as legitimate differential treatment. The principle of legitimate differential treatment allows countries to treat particular groups differently, provided particular criteria are met. The justification for differentiation must be reasonable and objective. There must also be a clear and reasonable relationship of proportionality between the aim sought and its effects.³
86. The rationale for the ISSP is to assist Indigenous students to access or complete higher education at a rate equivalent to non-Indigenous peoples. Implementation of arrangements for this purpose has minimal impact on other persons.
87. The Amendment Guidelines engage rights to equality and non-discrimination by altering and continuing an existing 'special measure', and arrangements that may be regarded as legitimate differential treatment.

² United Nations Committee on Economic Social and Cultural Rights, *Consideration of Reports submitted by State Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 42nd sess, UN Doc, E/C.12/AUS/CO/4 (22 May 2009), at paragraph [31].

³ United Nations Committee on Economic Social and Cultural Rights, General Comment No 20, *Non-discrimination in economic, social and cultural rights* (art 2, para 2), UN Doc E/C.12/GC/20, 2 July 2009, [13].

Conclusion

The Amendment Guidelines are compatible with human rights. This is because they advance the right to education; engage the right to equality and non-discrimination; continue a ‘special measure’; and may also be regarded as legitimate differential treatment.

Minister for Indigenous Affairs, Senator the Hon Nigel Scullion