

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019

EXPLANATORY STATEMENT

Higher Education Support Act 2003

Higher Education Provider Guidelines 2012

PURPOSE AND AUTHORITY

The *Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019* (the Amendment Guidelines) amend the *Higher Education Provider Guidelines 2012* (F2013C00787) (the Guidelines) to include new chapters that provide administrative and operational detail supporting:

- the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019*;
- the *Higher Education Support (HELP Tuition Protection Levy) Act 2020* (upon commencement);
- *Higher Education Support Amendment (Cost Recovery) Act 2019*; and
- *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*.

The Amendment Guidelines amend Chapter 1 of the Guidelines, repeal and replace Chapters 2 and 3, and insert a new Chapter 8 and Chapter 9 of the Guidelines.

The Amendment Guidelines are made under section 238-10 of the *Higher Education Support Act 2003* (the *Act*). The Amendment Guidelines amend the Guidelines that were made for the purposes of Part 2-1 of the *Act*.

Section 238-10 of the *Act* provides that the Minister may make guidelines providing for matters required or permitted by the *Act* or necessary or convenient to be provided in order to carry out or give effect to the *Act*. Item 6 of the table in subsection 238-10(1) of the *Act* provides that the Minister may make Commonwealth Scholarships Guidelines permitted under Part 2-1, section 104-1 and section 169-17 of the *Act*.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

OVERVIEW

The amendments made to the Guidelines by this instrument repeal the current Chapters 2 and 3 of the Guidelines, concerning the Tuition Assurance Requirements and Particular Obligations on Certain Providers, and inserts the following new chapters into the Guidelines:

- Chapter 2 that outlines the administration requirements of the new tuition protection arrangements introduced by the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* and upon the commencement of the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*.
- Chapter 3 that sets out the amount of the higher education provider application fee charged to bodies corporate that apply for approval as higher education providers.
- Chapter 8 that sets out additional quality, accountability and other administrative requirements that apply to higher education providers approved under section 16-25 of the *Act*.

- Chapter 9 that specifies matters to be taken into account in determining whether students undertaking units of study provided by higher education providers approved under section 16-25 of the *Act* are genuine students for the purposes of their eligibility for FEE-HELP assistance.

Consequential amendments are also made to Chapter 1 to update the Purpose and Interpretation of the Guidelines.

PURPOSE AND OPERATION

Higher education provider application fee

The *Higher Education Support Amendment (Cost Recovery) Act 2019* introduced cost recovery measures for the Higher Education Loan Program (HELP) in the higher education sector. These measures include a higher education provider application fee payable by prospective higher education providers submitting an application for approval as a higher education provider under the *Act*. The higher education provider application fee amount is set at a level that recovers the Australian Government's full costs of administering and assessing applications from prospective higher education providers. The higher education provider application fee is also consistent with the Australian Government Charging framework.

The new Chapter 3 inserted into the Guidelines by this instrument sets the application fee for bodies corporate applying to be approved as a higher education provider from 1 January 2020.

Provider integrity

Under subsection 16-25(1) of the *Act*, the Minister may approve a body corporate as a higher education provider subject to various requirements as set out in Subdivision 16-C of the *Act*.

The *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017* introduced measures to make important changes to key legislation governing higher and international education to strengthen regulatory controls and student protections in these sectors. These measures are intended to proactively address instances of unscrupulous providers transitioning operations into the FEE-HELP scheme and international education sector in the wake of reforms to vocational education and training (VET) student loan arrangements.

The *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017* introduced a measure requiring the financial statements of a higher education provider to comply with any requirements prescribed by the Guidelines. This measure, intended to strengthen regulatory controls, requires higher education providers to present financial information as prescribed by the new Chapter 8 of the Guidelines. Additional requirements include the need to prepare general purpose financial statements where revenue for the financial reporting period exceeds \$10 million, and to prepare and provide consolidated statements for consolidated entities. Chapter 8 also introduces matters regarding financial viability that the Minister must have regard to when finding a higher education provider financially viable and likely to remain so. These matters include profitability and liquidity indicators as well as the diversification of revenue sources.

The *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017* amended the *Act*, the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) and the *Education Services for Overseas Student Act 2000* (ESOS Act) to protect students from unscrupulous providers. The amendments will bolster enforcement powers and oversight capabilities of relevant regulators, enabling them to intervene as necessary to prevent malicious practices across the higher and international education sectors.

The new Chapters 8 and 9 inserted into the Guidelines by this instrument supplement provisions in the *Act* concerning financial statement requirements, financial viability requirements, specified benefits that may be offered to students enrolling in a FEE-HELP approved unit of study, the acceptable use of third-party contact lists, record keeping requirements, publishing requirements, requirements relating to withdrawal processes, the basis for determining whether a student is a genuine student for the purposes of being entitled to FEE-HELP assistance, and clarification of student academic progression requirements.

Tuition protection

The *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* introduced new tuition protection arrangements, commencing on 1 January 2020, by amending the *Act*. The tuition protection arrangements are funded by providers through a levy model set out in the Higher Education Support (HELP Tuition Protection Levy) Bill 2019, currently under consideration by the Parliament. The new tuition protection arrangements are modelled on the successful Tuition Protection Service (TPS) for international students under the ESOS Act.

The tuition protection requirements introduced by this instrument inform higher education providers to whom Part 5-1A of the *Act* applies of the procedures that the HELP Tuition Protection Director will follow when administering the HELP tuition protection scheme. The new provisions include requirements for the collection and recovery of levies, detail around the notices that higher education providers that default must give to students and the HELP Tuition Protection Director, student placement service requirements additional to section 166-25 of the *Act*, and the circumstances in which payments can be made from the HELP Tuition Protection Fund.

Detailed explanation

An explanation of the provisions of the Amendment Guidelines is set out at [Attachment A](#).

CONSULTATION

The amendments made by the Amendment Guidelines provide procedural detail to support the new tuition protection arrangements set out in the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* and on the commencement of the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*. Peak industry bodies and higher education providers were consulted in relation to this enabling legislation, and they also had the opportunity to comment on the bills through an inquiry conducted by the Senate Education and Employment Legislation Committee in October and November 2019.

The peak body representing independent higher education providers in Australia, Independent Higher Education Australia (formerly Council of Private Higher Education), was also consulted on the provider integrity arrangements introduced by the *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*.

In addition, the Government has consulted with higher education stakeholders on the higher education cost recovery charging arrangements introduced by the *Higher Education Support Amendment (Cost Recovery) Act 2019*.

REGULATORY IMPACT STATEMENT

The amendments made by the Amendment Guidelines provide procedural detail to operationalise the new tuition protection arrangements set out in the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* and on the commencement of the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*. The regulatory impacts of the amendments are minor and the Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement will not be required (OBPR ID No. 23228).

The regulatory impacts of the amendments made by schedule 1 of the Amendment Guidelines for the higher education provider application fee and the provider integrity measures are minor and the OBPR has advised that a Regulation Impact Statement is not required (higher education provider application fee: OBPR ID Nos. 23161 and 23162; provider integrity measures: OBPR ID No. 23144).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Statement of Compatibility with Human Rights is set out in Attachment B. It has been prepared in accordance with section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

FINANCIAL IMPACT STATEMENT

The explanatory memorandum accompanying the Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019 calculated the expected revenue of the new tuition protection arrangements for VSL students, FEE-HELP or HECS-HELP students studying at a private education provider or TAFE as being \$3 million over the forward estimates as a result of the revenue projected to be collected through the levy system.

The proposed exemption of the TAFEs and government providers from the new tuition protection arrangements will reduce the projected amount of levies (revenue) to be collected under the measure by \$0.6 million per year (reflecting \$0.55 million for VSL and \$0.05 million for FEE-HELP/HECS-HELP).

The measure to introduce new tuition protection arrangements to cover VET Student Loans (VSL) students, FEE-HELP or HECS-HELP students studying at a private education provider will now generate expected revenue of \$0.6 million over the forward estimates.

Impact on underlying cash (\$ millions)					
Amendments to cover private providers only					
	2019–20	2020–21	2021–22	2022–23	Total
New tuition protection measures – removal of TAFEs and government providers	-1.1	-0.4	+1.0	+1.1	+0.6

EXPLANATION OF PROVISIONS

Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 (Amendment Guidelines)*.

Section 2 – Commencement

The table in this section sets out when the provisions of the Amendment Guidelines commence.

Section 3 – Authority

This section provides that the Amendment Guidelines are made under the authority of the *Higher Education Support Act 2003* (the *Act*). Section 238-10 of the *Act* provides that the Minister may, by legislative instrument, make Guidelines providing for matters, including the Higher Education Provider Guidelines.

Section 4 – Schedules

This section provides that the Guidelines are amended as set out in the Schedules to the Amendment Guidelines.

Schedule 1—Provider integrity and application fee

Item 1 – After paragraph 1.1.1(a)

Item 1 adds to paragraph 1.1.1 of the Guidelines that a purpose of the Guidelines is to set out the application fee for a body corporate’s application to be approved as a higher education provider.

Item 1A – After paragraph 1.1.1(n)

Item 1A adds that a further purpose of the Guidelines is to specify certain matters in relation to the quality and accountability requirements and other administrative requirements that apply to higher education providers approved under section 16-25 of the *Act*.

It also adds that a further purpose of the Guidelines is to specify matters to be taken into account in determining whether students undertaking units of study provided by higher education providers approved under section 16-25 of the *Act* are genuine students.

Item 2 – Paragraph 1.5.5

Item 2 substitutes the words “paragraph 1.5.10” in place of “paragraph 1.5.5”. This corrects an incorrect reference.

Item 3 – Paragraph 1.5.10

Item 3 provides that “accounting standards” has the same meaning as in the *Corporations Act 2001*.

Item 4 – Higher education provider application fee

Item 4 provides that Chapter 3 of the Guidelines is repealed, and is substituted with a new Chapter 3.

Section 3.1.1 provides that the purpose of Chapter 3 is to set out the application fee for a body corporate’s application to be approved as a higher education provider.

Section 3.2.1 provides that, for the purposes of paragraph 16-40(2)(c) of the *Act*, the fee is set out in the table below:

Year	Fee
2020	\$12,818
2021	\$13,010
2022	\$13,231
2023	\$13,456
2024	\$13,698

Item 5 – At the end of the instrument

Item 5 adds a new chapter 8 at the end of the instrument, titled “Quality, accountability and other administrative requirements in relation to certain higher education providers”.

Section 8.1.1 provides that the purpose of the chapter is to set out additional quality, accountability and other administrative requirements that apply to higher education providers approved under section 16-25 of the *Act*.

Section 8.2.1 provides that section 8.2 is made for the purpose of paragraph 19-10(2)(ab) of the *Act*.

Paragraph 8.2.5 provides that, if the higher education provider had total revenue of \$10 million or more for the previous annual financial reporting period, the financial statement for the annual financial reporting period must: (a) be a general purpose financial statement that complies with the applicable accounting standards, (b) be prepared by a qualified accountant in accordance with the applicable accounting standards, and (c) include a declaration by the qualified accountant that the provider has, as at the date of the declaration, complied with all statutory obligations relating to the payment of Commonwealth, State and Territory taxes and the superannuation guarantee charge in relation to employees of the provider.

Paragraph 8.2.10 provides that, if the higher education provider had total revenue of less than \$10 million for the previous annual financial reporting period, the financial statement for the annual financial reporting period must be a special purpose financial statement that complies with the following accounting standards:

- (a) AASB 101, Presentation of Financial Statements;
- (b) AASB 107, Statement of Cash Flows;
- (c) AASB 108, Accounting Policies, Changes in Accounting Estimates and Errors;
- (d) AASB 1048, Interpretation of Standards;
- (e) AASB 1054, Australian Additional Disclosures.

For the purposes of paragraph 8.2.10, the version of the accounting standards that apply are those in force on 1 January 2020. They are readily and freely publicly available from the website of the Australian Accounting Standards Board:

<https://www.aasb.gov.au/Pronouncements/Current-standards.aspx>.

Paragraph 8.2.15 provides that, if the higher education provider is part of a consolidated entity, the financial statement for the annual financial reporting period must be accompanied by: (a) a copy of the most recent consolidated financial statements for the entity prepared in accordance with applicable accounting standards; and (b) such additional information related to the consolidated entity as is determined, in writing, by the Minister.

Paragraph 8.2.20 provides that, in section 8.2, the following terms have the following definitions:

consolidated entity has the same meaning as in the *Corporations Act 2001*.

general purpose financial statement has the meaning given by the *accounting standards*.

qualified accountant has the same meaning as in the *Corporations Act 2001*.

special purpose financial statement means a financial statement that is not a general purpose financial statement.

Paragraph 8.3.1 provides that, for the purposes of paragraph 19-12(b) of the *Act*, the Minister must have regard to the following matters when determining whether a higher education provider is financially viable, and likely to remain so:

- (a) the provider generates sufficient income to meet operating payments, debt commitments and, where applicable, to allow growth while delivering quality higher education;
- (b) the provider's total assets exceed the provider's total liabilities (the provider has a positive equity position), and there is no evidence to suggest that this might change;

- (c) if the provider is not a charitable or not-for-profit organisation registered with the Australian Charities and Not-for-profits Commission, and has been operating for 3 years or more—the provider has operated at a profit for at least 2 of the 3 most recent financial years for the provider;
- (d) if the provider has at least 100 enrolments in courses of study that lead to higher education awards—at least 20% of the provider’s revenue for the previous financial year came from sources other than payments that gave rise to FEE-HELP debts;
- (e) the provider has a net positive cash position from operating activities (determined in accordance with the accounting standards);
- (f) the provider is not providing guarantees or loans that could have a material effect on the provider’s finances;
- (g) the provider is not providing its assets as security other than under a commercial loan arrangement with an authorised deposit-taking institution (within the meaning of the *Banking Act 1959*).

Paragraph 8.4.1 provides that the following benefits are specified for the purposes of subsection 19-36A(2) of the *Act*:

- (a) the content and quality of the unit of study;
- (b) the amount of the tuition fees for the unit of study;
- (c) the availability of FEE-HELP assistance for the unit of study;
- (d) marketing merchandise up to the total value of \$30 per person;
- (e) the offering of money in the form of scholarships or bursaries.

Paragraph 8.5.1 provides that section 8.5 is made for the purposes of subsection 19-36C(3) of the *Act*.

Paragraph 8.5.5 provides that subsection 19-36C(2) of the *Act* does not apply if the student has given express consent to being contacted by the higher education provider.

Paragraph 8.5.10 provides that the student is taken to have provided express consent if:

- (a) information in the request for consent was presented clearly, and set out the specific purpose for which the student’s personal information would be used if consent were given; and
- (b) the request was prominent; and
- (c) the student was able to give consent in a separate optional tick box from other consents; and
- (d) the request was not a required field to be answered in order for a person to submit other information; and
- (e) the request did not include a default tick for consent; and
- (f) the request named the provider; and
- (g) the request detailed any referral fee or other fee that would be paid to the person who made the request and any other benefit that would be provided to the person who made the request.

Paragraph 8.5.15 provides that the student is taken to have provided express consent if the student initiates contact with a third party for the purpose of:

- (a) giving information relating to education and training to the provider; or
- (b) getting information relating to higher education from the provider.

Paragraph 8.6.1 provides that section 8.6 is made for the purposes of section 19-72 of the *Act*.

Paragraph 8.6.5 provides that a higher education provider must keep records relating to: (a) how the provider assessed a student as academically suited to undertake a unit of study before enrolling the student in the unit of study being undertaken as part of a course of study, and (b) if the provider is satisfied that special circumstances apply to a student for the purposes of section 104-1A of the *Act*—the grounds on which the provider is so satisfied.

Paragraph 8.6.10 provides that the records must be kept in a manner so that they can be readily provided upon request to the student concerned, the Minister or the Secretary.

Paragraph 8.6.15 provides that a record required to be kept by a provider under this section must be kept by the provider for the period of 7 years, starting from when the record was made by the provider.

Paragraph 8.7.1 provides that section 8.7 is made for the purposes of section 19-73 of the *Act*.

Paragraph 8.7.5 provides that a higher education provider must publish the following information in relation to each unit of study offered by the provider:

- (a) the mode of delivery of the unit of study;
- (b) whether the unit of study will be delivered by the provider or by a third party;
- (c) whether FEE-HELP assistance is available for the unit of study;
- (d) whether there are any limits or conditions on the FEE-HELP assistance available for the unit of study imposed on the provider's approval as a higher education provider.

Paragraph 8.7.10 provides that the information must be published by the provider prominently on its website, and in a manner that is easily accessible without provision of login or contact information.

Paragraph 8.7.15 provides that the information must be published before the earliest day for enrolment in the unit of study, and must remain published at least until the end of the period in which the unit can be undertaken.

Paragraph 8.8.1 provides that section 8.8 is made for the purposes of section 169-17 of the *Act*.

Paragraph 8.8.5 provides that a higher education provider must have processes and procedures that include procedures for a student to withdraw from a unit of study or a course of study, and a procedure for a student to enrol in a unit of study that was part of a course of study with the provider in circumstances where the student had earlier withdrawn from a unit of study of that course undertaken with the provider.

Paragraph 8.8.10 provides that the procedures for a student to withdraw from a unit of study or a course of study, before a census date for the unit or course, must not involve financial, administrative or other barriers to the withdrawal.

Paragraph 8.8.15 provides that if a student withdraws from a unit of study or a course of study, the provider must not, after the withdrawal, enrol the student in a unit of study or course of study without the written permission of the student (which must be given after the withdrawal).

Item 5 also adds a new chapter 9 at the end of the instrument, titled "Determining whether students are genuine students".

Paragraph 9.1.1 provides that the purpose of this chapter is to specify matters to be taken into account in determining whether students undertaking units of study provided by higher education providers approved under section 16-25 of the *Act* are genuine students.

Paragraph 9.2.1 provides that, for the purposes of subsection 104-1(1A) of the *Act*, in determining whether a student is a genuine student in relation to a unit of study being undertaken as part of a course of study, regard may be had to the following matters:

- (a) whether the student is reasonably engaged in the course;
- (b) whether the student has been provided with information about the requirements for the course, and the cost and duration of the course;
- (c) whether the student has satisfied course requirements for the course or participated in assessment activities for the course;
- (d) if the course is an online course—the number of occasions on which the student has logged in to the course is not insignificant;
- (e) whether the student has provided up-to-date contact details that enable the Department to contact the student to verify the student's enrolment in the course;
- (f) if the student is enrolled in another course—the number of the enrolments and associated course loads would not make successful completion of a course by the student impossible or highly improbable.

Schedule 2—Tuition protection

Item 1 – Paragraph 1.1.1(a)

Item 1 provides that paragraph 1.1.1(a) is repealed, and is substituted with a new paragraph 1.1.1(a) that explains that a purpose of the Guidelines is to set out the tuition protection requirements which a body corporate must fulfil to be approved by the Minister as a higher education provider under sections 16-30, 19-66A, subsections 166-5(1), 166-10(3), 166-20(3), 166-15(5), 167-10(2), and paragraphs 166-25(2)(f) and (3)(g), 166-15(3)(b) of the *Act* and with which higher education providers other than Table A providers must comply in order to maintain their approval as higher education providers under the *Act*.

Item 1A – Paragraph 1.1.1(m)

Item 1A provides that paragraph 1.1.1(m) is repealed, and is substituted with a new paragraph 1.1.1(m) that explains that a purpose of the Guidelines is to specify the following tuition protection matters:

- (i) matters relating to the collection of levies payable for tuition protection, including notices for payments, when payments become due and payable, extensions to the due date, penalties, refund of a levy or penalties, review of decisions for collection or recovery of a levy
- (ii) circumstances to which the HELP Tuition Protection Director may have regard to in the placement of an affected student
- (iii) information the HELP Tuition Protection Director may request from a provider in relation to students affected by the provider default
- (iv) requirements for a provider notice to affected students upon provider default
- (v) tuition protection payments from the HELP Tuition Protection Fund
- (vi) the classes of providers who are exempt from the requirement to pay one or more of the components of the tuition protection levies.

Item 2 – Section 1.5.10

Item 2 provides that definitions of the following terms are repealed:

- *course assurance option*
- *Course Assurance TAS Operator*
- *Exempt Provider*
- *First Provider*
- *Repayment Guarantor*
- *Repayment TAS Operator*
- *replaced unit*
- *replacement unit*
- *Second Provider*
- *student contribution / tuition fee repayment option*
- *tuition assurance administrator*
- *tuition assurance scheme, and*
- *transfer payment.*

Item 2A – Section 1.5.10

Item 2A adds the following definition:

Affected Student means a student who is enrolled with a higher education provider to whom Part 5-1A of the *Act* applies and is unable to complete a course as described at subsection 166-10 of the *Act*, because a higher education provider *defaults*.

Item 3 – Chapter 2

Item 3 provides that Chapter 2 of the Guidelines is repealed and substituted.

Paragraph 2.1.1 provides that the Chapter sets out the requirements for tuition protection for the purposes of section 16-30 of the *Act*. The tuition protection requirements are the requirements set out in Part 5-1A of the *Act*, including the Guidelines.

Paragraph 2.1.5 provides that the tuition protection requirements have five parts:

- Part 1: Providers of a kind
- Part 2: Requirements for the determination and collection of levies
- Part 3: Notices of provider default
- Part 4: Other student placement service requirements; and
- Part 5: Payments to a provider of replacement course.

Paragraph 2.1.10 provides that a higher education provider, other than a Table A provider or provider at Part 1 of the Guidelines, must satisfy the Secretary that it complies with Part 2, Part 3 and Part 5 of the tuition protection requirements.

Paragraph 2.5.1 provides that Part 1 prescribes a kind of provider to whom Part 5-1A of the *Act* does not apply. Paragraph 2.5.1 is made under paragraph 166-5(1)(b) of the *Act*. Providers of a kind to whom Part 5-1A of the *Act* does not apply, with the exception of sections 166-27 and 166-30, which continue to apply to these providers, are:

- (a) owned by the Commonwealth, a State or a Territory; or
- (b) established under one of the following:
 - (i) the *Technical and Further Education Commission Act 1990* (NSW);
 - (ii) the *Education and Training Reform Act 2006* (Vic.);
 - (iii) the *TAFE Queensland Act 2013* (Qld);
 - (iv) the *Vocational Education and Training Act 1996* (WA);
 - (v) the *TAFE SA Act 2012* (SA);
 - (vi) the *Training and Workforce Development Act 2013* (Tas.);
 - (vii) the *Canberra Institute of Technology Act 1987* (ACT).

Paragraph 2.10.1 provides that Part 2 of the Guidelines sets out the requirements for the purposes of section 19-66A of the *Act* for the determination and collection of levy amounts.

Paragraph 2.10.5 provides that the HELP Tuition Protection Director must give a written notice to each provider liable to pay a HELP tuition protection levy that sets out for the provider:

- (a) the amount of the levy;
- (b) the calculation for each levy component that applies to the provider; and
- (c) the day by which the provider must pay the levy, which must be at least 30 days after the written notice is given to the provider.

Paragraph 2.10.10 provides that, where a provider becomes a leviable provider after 30 June in a calendar year, and continues to be a leviable provider in the following calendar year, the HELP Tuition Protection Director must give the provider a written notice of the levy for the first year in the next calendar year ('the levy notice').

Paragraph 2.10.15 provides that the levy notice must set out the amounts for the administrative fee component of the HELP tuition protection levy imposed under subsection 8(1) of the *Higher Education Support (HELP Tuition Protection Levy) Act 2020* for:

- (a) the first year the higher education provider became a leviable provider; and
- (b) the year in which the notice is issued.

Paragraph 2.10.20 provides that the HELP Tuition Protection Director may give a written overdue notice to comply with a levy notice by the end or within 7 days of the due day. The overdue notice must specify:

- (a) the amount that is still owing; and
- (b) state the day the amount must be paid by the higher education provider.

Paragraph 2.10.25 provides that a leviable provider may make a request for review in writing to the HELP Tuition Protection Director within 7 days of a levy notice in relation to a determination of a levy component or components.

Paragraph 2.10.30 provides that, if a request for review is made by a leviable provider, the HELP Tuition Protection Director must review the decision and may:

- (a) affirm, vary or set aside the levy determined in the levy notice; and
- (b) if the decision is set aside – make such other decision as is appropriate.

Paragraph 2.10.35 provides that the HELP Tuition Protection Director must give notice of the review decision to the higher education provider within 7 days of the decision. The notice of the review decision must:

- (a) set out the reasons for the decision; and
- (b) where the review decision causes the calculation, total amount or due date of the levy to be varied or set aside, issue a new levy notice with a due date at least 30 days after the date the provider is notified of the review decision.

Paragraph 2.10.40 provides that, if an amount paid by a leviable provider exceeds the amount determined in the levy notice, or the HELP Tuition Director otherwise determines that a refund is payable, the HELP Tuition Protection Director must pay the refund from the HELP Tuition Protection Fund.

Paragraph 2.15.1 provides that Part 3 sets out the requirements under sections 166-10 and 166-15 of the *Act* where the higher education provider must give the information specified to the HELP Tuition Protection Director and to an affected student within the specified timeframes.

Paragraph 2.15.5 provides that a notice given under subsection 166-15(2) of the *Act* must be given in writing and include the following information:

- (a) the circumstances of the default;
- (b) the number of students in relation to whom the higher education provider has defaulted;
- (c) advice about:

- (i) whether the higher education provider intends to teach units of study so that students are able to complete the units, and/or provide a refund to those students; and
- (ii) if so, how the higher education provider intends to teach the units and/or refund students.

Paragraph 2.15.10 provides that a notice given under subsection 166-15(3) of the *Act* must also include the following information in a form requested by the Director:

- (a) student contact hours
- (b) mode of study and/or location of study, where the unit(s) of study are delivered face-to-face, for each unit of study affected by the default;
- (c) unit hours
- (d) work integrated learning and/or internship requirements for each course of study affected by the default.

Paragraph 2.15.15 provides that a written notice given under subsection 166-20(2) of the *Act* must include:

- (a) the name of the course of study affected by the default; and
- (b) the day the course of study ceased to be provided; and
- (c) a copy of the affected student's transcript for units of study already completed; and
- (d) details of where to get information from the Australian Government Department of Education about tuition protection.

Paragraph 2.20.1 provides that, where an affected student had deferred their study at the time a higher education provider defaults and the student did not receive tuition protection assistance at that time, the HELP Tuition Protection Director must assist the student if the student later seeks tuition protection assistance.

Paragraph 2.20.5 provides that, in providing tuition protection assistance to an affected student who deferred their study, the HELP Tuition Protection Director must have regard to whether a replacement course determined to be a suitable replacement course under section 166-25 of the *Act* immediately following the higher education provider default, continues to be a suitable replacement course.

Paragraph 2.20.10 provides that, in providing student placement services to an affected student who had deferred their study, the HELP Tuition Protection Director must comply with all of the requirements under section 166-25 of the *Act*.

Paragraph 2.25.1 provides that Part 5 provides for payments in connection with tuition protection under paragraph 167-10(1)(a) of the *Act*.

Paragraph 2.25.5 provides that the HELP Tuition Protection Director may make a payment from the HELP Tuition Protection Fund to the higher education provider of a replacement course where the HELP Tuition Protection Director is satisfied that the higher education provider of the replacement course has met its obligations to the student under section 166-30 of the *Act*, and one of the following requirements is met:

- (a) the student is enrolled and the course census date has passed; or
- (b) the student is enrolled and 6 weeks has passed since the student commenced the course.

Paragraph 2.25.10 provides that an amount paid under Part 5 must be paid by the HELP Tuition Protection Director to the higher education provider of the replacement course.

Paragraph 2.25.15 provides that the HELP Tuition Protection Director may make a payment up to a maximum amount of \$2000 for each affected student.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019

The Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 (the Amendment Guidelines) are compatible with 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 instrument

The purpose of the Amendment Guidelines is to amend the *Higher Education Provider Guidelines 2012* (the Guidelines) to repeal the current Chapters 2 and 3 of the Guidelines concerning Tuition Assurance Requirements and Particular Obligations on Certain Providers, and insert new chapters into the Guidelines:

- Chapter 2 that outlines the administration requirements of the new tuition protection arrangements introduced by the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* and the Higher Education Support (HELP Tuition Protection Levy) Bill 2019 (at such time it is enacted and receives Royal Assent).
- Chapter 3 that sets out the amount of the higher education provider application fee charged to bodies corporate that apply for approval as higher education providers.
- Chapter 8 that sets out additional quality, accountability and other administrative requirements that apply to higher education providers approved under section 16-25 of the *Act*.
- Chapter 9 that specifies matters to be taken into account in determining whether students undertaking units of study provided by higher education providers approved under section 16-25 of the *Act* are genuine students for the purposes of their eligibility for FEE-HELP assistance.

Consequential amendments are also made to Chapter 1 to update the Purpose and Interpretation of the Guidelines.

The Guidelines are made by the Minister under section 238- 10 of the *Higher Education Support Act 2003* (the *Act*).

The Guidelines set out the requirements for higher education providers in regards to tuition protection arrangements, grievance and review procedures, publication and other requirements for tuition fees and student contribution amounts, fees for overseas students and fees for goods and services that are incidental to studies.

Tuition protection aims to ensure students are protected and supported in the event that their course provider defaults – that is, where the student has not withdrawn from the course and either:

- the provider fails to start to provide a course or a part of a course to the student on the day on which the course or part was scheduled to start; or
- the provider ceases to provide a course or a part of a course to the student on a day after the course or part starts but before it is completed.

The proposed tuition protection arrangements are modelled on the successful Tuition Protection Scheme (TPS) for international students under the *Education Services for Overseas Students Act 2000* (ESOS Act). The tuition protection arrangements will apply to higher education students studying at private providers who access FEE-HELP or HECS-HELP.

The new tuition protection provisions include requirements for the collection and recovery of levies, detail around the notices that higher education providers that default must give to students and the HELP Tuition Protection Director, student placement service requirements additional to section 166-25 of the *Act*, and the circumstances in which payments can be made from the HELP Tuition Protection Fund.

Human rights implications

Schedule 1 of the Amendment Guidelines provides the administrative and operational detail to support the provider integrity measures introduced by the *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*; and provides the amount for the higher education provider application fee that was introduced by the *Higher Education Support Amendment (Cost Recovery) Act 2019*. Therefore, Schedule 1 of the Amendment Guidelines does not directly engage any human rights additional to those engaged by the enabling legislation.

Schedule 2 of the Amendment Guidelines operationalises the changes in tuition protection for students accessing FEE-HELP or HECS-HELP at a private higher education provider which are set out in the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* and the Higher Education Support (HELP Tuition Protection Levy) Bill 2019 (at such time that it is enacted and receives Royal Assent). Accordingly, the Amendment Guidelines provides administrative detail to those legislative changes, and does not directly engage any human rights additional to those engaged by the enabling legislation.

Right to education

The Amendment Guidelines indirectly engages the right to education, under Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which recognises the important personal, societal, economic and intellectual benefits of education. Article 13(2)(c) of the ICESCR provides that higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education’.

Schedule 1 of the Amendment Guidelines may indirectly promote the right to education by improving accessibility to education by refining provisions relating to quality, accountability

and other administrative procedures in the Guidelines. These measures, in turn, bolster the integrity and accountability of the higher education sector.

Schedule 2 of the Amendment Guidelines indirectly promotes this right by providing mechanisms enabling the HELP Tuition Protection Director to place a student affected by a provider default in a suitable replacement course to complete their academic qualification, wherever possible. This means that students are protected and supported in the event that their course provider defaults – that is, where the student has not withdrawn from the course and either:

- the provider fails to start to provide a course or a part of a course to the student on the day on which the course or part was scheduled to start; or
- the provider ceases to provide a course or a part of a course to the student on *a day* after the course or part starts but before it is completed.

Students who instead elect to have their HELP balance re-credited for the affected unit or units of study may choose to obtain a qualification by recommencing their studies at another provider which they independently approach.

This instrument is compatible with the right to education.

Right to privacy

This legislative instrument also engages the right to privacy outlined in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 17 of the ICCPR provides that no one shall be subject to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation.

Section 19-36C of the *Act* concerns the use of third party contact lists by higher education providers approved under section 16-25 to market, advertise or promote a unit of study or a course of study, or enrol a student in a unit of study or course of study. A provider is prohibited from mentioning the possible availability of FEE-HELP assistance for the students undertaking the unit of study or course other than in circumstances that are specified in the Higher Education Provider Guidelines.

Schedule 1 of the Amendment Guidelines engages the right to privacy in that it amends the Guidelines so as to specify that a student may be so contacted by the provider when the student has given express consent. New provisions also specify when a student should be taken to have provided such consent. Schedule 1 of the Amendment Guidelines provides necessary qualifications to provisions in the *Act*, which further protect the individual from unsolicited correspondence.

Schedule 2 of the Amendment Guidelines engages the right to privacy as a higher education provider which defaults must provide to the HELP Tuition Protection Director, in a written notice, information about the mode, delivery, location and other requirements of a student's units of study. This is additional to a provider's obligations to provide student information when notifying the HELP Tuition Protection Director of the details of a default at subsection 166-15(3) of the *Act*. The sharing of this information enables the HELP Tuition Protection Director to identify suitable replacement courses and to offer affected students the option of continuing their studies at another higher education provider. The HELP Tuition Protection Director is a Commonwealth officer, thus the scope of the existing provisions at Division 179

of the *Act* that deal with the use and disclosure of personal information collected under the *Act* apply.

These measures augment the right to privacy for students as they place important further protective limitations around the authorised use and dissemination of their contact information under the *Act* and the Guidelines, namely by imposing the strict requirement that there be express consent for contact to occur as well including specifications around the provision of express consent. The management of students' personal information also remains subject to existing safeguards under the privacy legislation and the *Act* which continue to ensure the lawful collection, storage, record keeping, access, use and disclosure of personal information.

The Amendment Guidelines are compatible with, and promote, the right to privacy.

Conclusion

The Amendment Guidelines are compatible with human rights.