

EXPLANATORY STATEMENT

Guidelines issued under section 238-10 of the Higher Education Support Act 2003

Other Grants Guidelines (Education) Amendment (No. 2) 2019

Authority

Section 238-10 of the *Higher Education Support Act 2003* (the Act) provides that the Minister may make guidelines providing for matters required or permitted by the Act or is necessary or convenient to be provided in order to carry out or give effect to the Act. In particular item 8 of the table in subsection 238-10(1) specifies that the Minister may make Other Grants Guidelines to give effect to matters under Part 2-3 of the Act. Section 41-15 of the Act provides that the Other Grants Guidelines may specify one or more programs under which grants for particular purposes specified in the table in subsection 41-10(1) are to be paid.

Purpose

The purpose of the *Other Grants Guidelines (Education) Amendment (No. 2) 2019* (Amendment Instrument) instrument is to amend the *Other Grants Guidelines (Education) 2012* (the Guidelines) which were registered on the Federal Register of Legislative Instruments on 13 February 2012 (see F2012L00281).

The main purpose of this instrument is to delete and substitute the Higher Education Disability Support Program (DSP) provisions of Chapter 1 of the Guidelines with new Higher Education DSP provisions. These amendments will give effect to the Australian Government's response to the Higher Education Disability Support Program 2015 evaluation.

The amendments also make some technical amendments to the Introduction (Chapter i), including updating definitions.

Collection and storage of health information relating to students with disability

For the purposes of paragraph 1.135.1(2) of the Amendment Instrument, in order to provide effectively tailored educational support and equipment to students with disability, providers must obtain evidence of that student's particular disability and support needs. Further, in accordance with paragraph 1.135.10, providers are required to maintain records of the evidence collected and assessment process undertaken, including details of the medical, specialist or other advice obtained in verifying disability and support needs of a student, for a period of no less than 7 years.

The objective of the DSP, which is underpinned by the requirements set out in paragraph 1.135.1(2) of the Amendment Instrument, is to provide funding to eligible higher education providers to assist them with the high costs incurred in providing educational support and/or equipment to students with disability. The overarching aim of the DSP, and the measures contained in the Amendment Instrument which institutionally support it, is to bolster the ability of students with disability to inclusively participate in higher education. In order to administer the DSP, to properly undertake the assessment process, including verifying the disability and

support needs of students and ensure the targeted allocation of funding to providers for this purpose, it is necessary for providers to collect, use, analyse and store sensitive health information.

The information required may vary across higher education providers, however, the documentation will generally include information on:

- the student's condition (including whether the condition is permanent, temporary or ongoing); and
- how the student's study is affected by the condition

If the student has a learning disability, they will generally be required to provide a report from a psychologist or other qualified professional trained in assessing learning disabilities.

The only higher education providers that are eligible to receive funding under the DSP are those listed as Table A providers in subsection 16-15(1) of the Act.

Division 179 of the Act provides for the protection of personal information obtained or created by an officer of a higher education provider for the purpose of Chapter 2 of the Act (the chapter under which the DSP is established (specifically Part 2-3 of the Act)). A person is an officer of a higher education provider if the person is an officer or employee of the provider, or a person who, although not an officer or employee of the provider, performs services for or on behalf of the provider (subsection 179-15(3A)). The personal information collected by Table A providers under paragraph 1.135.5 of the Amendment Instrument is specifically protected under the secrecy provisions set out in Division 179 of the Act.

Under Division 179, an officer who discloses, copies or records personal information otherwise than in the course of official employment, or causes unauthorised access to, or modification of, personal information, commits an offence. Sections 179-10 and 179-35 of the Act provide for a penalty of 2 years imprisonment for improper use of personal information.

Further, a Table A provider may be sanctioned by the Tertiary Education Quality and Standards Agency if it does not comply with the *Higher Education Standards Framework (Threshold Standards) 2015* (the Threshold Standards).

Paragraph 7.3(3)(b) of the Threshold Standards requires Table A providers to “*prevent unauthorised or fraudulent access to private or sensitive information, including information where unauthorised access may compromise academic or research integrity*”. The sanction for failure to comply with the Threshold Standards may include cancellation of registration as a higher education provider.

Commencement

This legislative instrument takes effect on 1 January 2020.

Consultation

In June 2014, the Department of Education (the Department) engaged KPMG to conduct an evaluation of the DSP.

The evaluation identified a number of options for improving the program's efficiency and appropriateness. The program evaluation report and executive summary were published on the department's website in 2015.

In October 2016, the Department published a consultation paper on its website outlining the Government's proposed response to the issues raised in the program evaluation report. The Department also wrote to universities and stakeholders inviting feedback on the ideas presented in the consultation paper, or any other proposals to improve the DSP and outcomes for students with disability. The Department received 24 submissions through this process, and feedback received was used to inform these amendments to the Guidelines.

Transitional arrangements

A decision or payment made under the Guidelines as in effect immediately before this instrument commences will continue to have effect as if the amendments had not occurred.

Regulatory impact statement

The Office of Best Practice Regulation was consulted in the preparation of the Amendment Instrument. The Office concluded that a Regulation Impact Statement was not required (OBPR ID: 20990).

Explanation of provisions

Item 1 – Chapter 1 Paragraphs 1.90 to 1.150.15 - Higher Education Disability Support Program (DSP)

This item repeals paragraphs 1.90 to 1.110.10.10 of Chapter 1 relating to the DSP and substitutes new paragraphs 1.90 to 1.150.15. The substituted provisions give effect to the Government's response to the 2015 DSP evaluation.

- 1.90.1 Sets out the objective of the DSP, which is to promote equality of opportunity in higher education, by providing support to students with disability to access, participate and succeed in higher education.
- 1.90.5 Sets out the two components of the DSP. These are the Disability Support Fund (DSF), and the Australian Disability Clearinghouse on Education and Training (ADCET).
- 1.90.10 Specifies that Table A providers only are eligible to receive grant payments under the DSP.
- 1.95.1 Specifies the total amount of funding available to providers under the DSP in 2020. This amount will be indexed for subsequent years in accordance with the method specified in part 5-6 of the Act.
- 1.95.5 Specifies that grants made under the DSP are grants made in respect of a calendar year.
- 1.100.1 Specifies the objectives of the DSF, which is to promote equality of opportunity in higher education. The DSF achieves this by granting supplementary funding to providers to assist them to attract domestic students with disability to participate in higher education and to assist providers to deliver appropriate support for them to succeed.
- 1.105.1 Specifies that the amount payable to a provider for a year under the DSF is calculated by adding the enrolments-based grant amount and the amount for students with disability with high cost needs.
- 1.105.5 Specifies that the amount payable to a provider under the DSF will be calculated based on disability data available to the Commonwealth in the Higher Education Information Management System during the second half of each calendar year.

- 1.110.1 Specifies that the total annual grant amount available for the DSF is calculated by subtracting the amount allocated to ADCET at 1.160.15 from the total annual grants amount available for the DSP set out at 1.95.1.
- 1.110.5 Stipulates that the Minister may determine what proportion of the total annual amount available for the DSF in a calendar year will be available for each of the enrolments-based grant amount and the amount for students with disability with high cost needs.
- 1.110.10 Specifies that unless the Minister makes a determination in accordance with 1.110.5, the total annual enrolments-based amount is 55 per cent of the total annual grant amount for the DSF and the total annual amount for students with disability with high cost needs is 45 per cent of the total annual grant amount for the DSF.
- 1.115.1 Sets out the formula used to calculate the enrolments-based grant amount for a provider.
- 1.120.1 Describes that a student with disability with high cost needs means a student enrolled with a provider, who has been assessed by the provider as having disability, and has received from the provider educational support and equipment related to that disability in a calendar year for an amount that exceeds the threshold specified at 1.120.5.
- 1.120.5 Specifies the student with disability with high cost needs threshold in 2020. This amount will be indexed for subsequent years in accordance with the method specified in Part 5-6 of the Act.
- 1.120.10 Sets out the formula used to calculate the students with disability with high cost needs amount payable to a provider.
- 1.120.15 Specifies that if the sum total of claims from all providers for students with disability with high cost needs is less than the annual amount available for students with disability with high cost needs the balance will be distributed according to the formula at 1.115.1.
- 1.125.1 Specifies that providers will receive their allocation of DSF enrolments-based funds for each calendar year prior to the end of that calendar year.
- 1.125.5 Specifies that providers may claim for educational support provided to students with disability with high cost needs in the preceding calendar year. Claims for funding must be in a form specified by the department.

- 1.130.1 Stipulates that if a provider earns interest on DSF funds, that interest must be spent on eligible DSF activities.
- 1.135.1 Stipulates eligible activities that may be undertaken with DSF funding, which are:
- activities aimed at attracting and supporting students with disability to participate in higher education;
 - providing educational support and equipment for students with disability;
 - modifications to course content, teaching materials and delivery methods to better meet the needs of students with disability; or
 - training of provider staff to support students with disability.
- 1.135.5 Sets out the obligations that providers must satisfy when using DSP funding for the purposes of providing educational support and equipment for students with disability.
- 1.135.10 Stipulates that providers must maintain records of evidence and assessment processes in verifying disability and support needs for a period of no less than 7 years.
- 1.135.15 Stipulates that providers must publish their needs assessment procedure on their website in a format that is readily available and accessible to the public.
- 1.140.1 Sets out ineligible activities that must not be undertaken with DSF funding.
- 1.145.1 Stipulates that if a provider does not spend any part of DSF funds by the end of the grant period, the provider must return the unspent grant amount to the Commonwealth in accordance with instructions given by the Department.
- 1.150.1 Stipulates that a provider must report annually to the Department on the progress and outcomes of any DSF activities in the form specified by the Department.
- 1.155.1 Specifies that the objective of the ADCET is to provide information, advice, and online resources through a website to disability practitioners, teachers and students to promote inclusive teaching and learning practices for students with disability.
- 1.160.5 Specifies the provider to host the ADCET is appointed by the Minister.
- 1.160.10 Specifies that conditions of the grant to the provider hosting the ADCET will be determined by the Minister under paragraph 41-25(b) of the Act.
- 1.160.15 Specifies that funds to be provided to the provider hosting the ADCET will be determined by the Minister under paragraph 41-30(b) of the Act.

Statement of Compatibility with Human Rights

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

Other Grants Guidelines (Education) Amendment (No. 2) 2019

The Other Grants Guidelines (Education) Amendment (No. 2) 2019 (Amendment Instrument) 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 Legislative Instrument

The *Other Grants Guidelines (Education) 2012* (Principal Instrument) sets out a number of programs under which grants may be provided in accordance with Part 2-3 of the *Higher Education Support Act 2003* (Act). The Principal Instrument also sets out some conditions on grants made under the programs specified in the instrument.

The Amendment Instrument amends an existing program in the Principal Instrument, the Disability Support Program (DSP). The DSP will provide grants to Table A providers to assist Table A providers to meet their obligations under the *Disability Discrimination Act 1992* and the Disability Standards for Education (2005) to ensure that all students with disability have the same or similar choices and opportunities regarding enrolment, participation, curriculum and support services as students without disability. The Amendment Instrument gives effect to the Australian Government's response to the then Department of Education and Training's evaluation of the Disability Support Program published in June 2015.

Human rights implications

Right to education

People with disability are recognised under international law as rights-holders, with a right to education without discrimination and on the basis of equal opportunities. This right is guaranteed by the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR). The Amendment Instrument engages the right to education, contained in Article 13 of ICESCR in that it supports access to education of particular classes of persons who may face barriers to it, namely people with disability.

The Amendment Instrument forms part of the DSP framework objective of addressing the specific barriers students with disability face in enjoyment of their right to education, through systematic supports and accommodations, and by ensuring their effective access to education and fulfilment of their individual potential on equal terms to other students within a participatory learning environment.

The measures in the Amendment Instrument collectively promote the right to education by strengthening the capacity of the education system to accommodate all learners to maximise full and effective participation, accessibility, attendance and achievement of all students and overcome barriers to learning and participation for all by focusing on well-being and success of students with disability. The measures underpin and support the broader right to inclusive

education to accommodate the differing requirements and identities of individual students, together with a commitment to remove the barriers that impede that possibility.

In particular, the Amendment Instrument promotes the right to education in that it supports and underpins equality of opportunity in education, by providing grants to eligible higher education providers to provide educational support to people with disability. By removing barriers to education for students with disability, the Amendment Instrument will improve access to, and increase participation in, higher education, by ensuring comparable access, services and facilities, and improving the ability for students with disability to participate in education and training without discrimination. This is achieved by providing funding to foster inclusion of students with disability to support and enhance their equality throughout their education.

Rights of people with disabilities

The rights of people with disabilities are contained in the *Convention on the Rights of Persons with Disabilities 2006 (CRPD)*. CRPD sets out the right to education as applied to people with disabilities in Article 24.

Article 24(1) of CRPD provides States Parties must ensure the realisation of the right of persons with disabilities to education through an inclusive education system at all levels, including tertiary education, for all students, including persons with disabilities, without discrimination and on equal terms with others.

Article 24(1) also sets out the aims of an inclusive education system as being to promote the full development of human potential and sense of dignity and self-worth, by strengthening respect for human rights, fundamental freedoms, and diversity, to foster the personality, talents and creativity of people with disabilities, as well as their mental and physical abilities, to their fullest potential and to enable persons with disabilities to participate effectively in society.

The Amendment Instrument engages and promotes the rights of students with disability by providing funding support to eligible higher education providers to assist with high costs incurred in providing educational support and/or equipment to domestic students with a disability with high cost needs, and encouraging efficient and effective use of equipment and resources to support students with disability. The DSP, as bolstered by the measures in the Amendment Instrument, promotes the rights of people with disabilities consistent with the CRPD by providing funding to providers to support students with disability.

Right to protection of privacy and reputation

Article 17 of the ICCPR prohibits the unlawful or arbitrary interference with a person's privacy and unlawful attacks on a person's reputation. This right is also reflected in Article 22 of CPRD and Article 16 of the *Convention on the Rights of the Child (CRC)*.

Collecting, using, storing, and/or disclosing personal information amounts to an interference with privacy. In order for the interference with privacy not to be 'arbitrary', any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity.

The right to privacy includes respect for informational privacy including the right to respect the storing, use and sharing of private information and right to control the dissemination of private information. The Amendment Instrument engages the right to privacy by authorising a provider to obtain evidence, through the collection and storage of personal health information, including details of the medical, specialist or other advice relating to a student's disability, in order in order to assess and evaluate the educational support and equipment which will be required by that student.

For the DSP to operate effectively and ensure the best outcomes for students with disability, health information which provides an accurate clinical picture of the students' needs must be prescribed and collection, use and disclosure of that information is therefore authorised for the defined and limited purpose of conducting the assessment process to evaluate the educational support and equipment that will be required to meet their specific needs. While the Amendment Instrument would authorise the collection, use and disclosure of personal information about students with disability, any effect on privacy is proportionate, necessary and reasonable in order to achieve the policy objective of improved educational outcomes for students with disability and to properly support them in the pursuit of their educational goals. The measures are directly aligned with the broader aims and objectives of the Performance-based Disability Support Funding component of the DSP to encourage higher education providers to implement strategies to attract and support students with disability.

Safeguards and accountability mechanisms for the collection, use and disclosure of personal information are in place under the Act, including penalties of up to 2 years imprisonment for improper use or disclosure of personal information under Division 179. Further, it is a condition of registration as a higher education provider under the *Tertiary Education Quality and Standards Agency Act 2011* that providers prevent unauthorised or fraudulent access to private or sensitive information. Failure to do so may result in the provider's registration as a higher education provider being cancelled.

These safeguards indicate that the measures are reasonable, necessary and proportionate having regard to the legitimate policy aim of the DSP.

Conclusion

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

Hon Dan Tehan MP, Minister for Education