

## **REPLACEMENT EXPLANATORY STATEMENT**

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

*Commonwealth Grant Schemes Guidelines 2020*

### **Authority**

Section 238-10 of the *Higher Education Support Act 2003* (the Act) provides that the Minister may make guidelines for the purposes of the Act. In particular, item 2 of the table in subsection 238-10(1) specifies the Minister may make Commonwealth Grant Scheme Guidelines to give effect to matters set out in Part 2-2 (Commonwealth Grant Scheme) of the Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* also provides that 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 the power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. The repeal of the *Commonwealth Grant Scheme Guidelines 2012* by the Schedule to this instrument relies on that provision.

### **Purpose**

The purpose of this instrument is to repeal the *Commonwealth Grant Scheme Guidelines 2012* made on 27 November 2012 and registered on 13 December 2012 (the Former Guidelines), and all subsequent amendments, and make the *Commonwealth Grant Scheme Guidelines 2020* (the Guidelines).

The changes made in repealing and remaking the Guidelines are primarily intended to give effect to the amendments to the Act made by the *Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Act 2020* (the Job-Ready Graduates Act). The Guidelines, as compared to the Former Guidelines, also reflect changes in terminology and use simpler language.

Key changes in remaking the Guidelines include:

- removing the ‘enabling loading’ and ‘regional loading’ chapters as these loadings will no longer be provided under Part 2-2 of the Act. Instead, they will now be provided as grants until 2023 under the Government’s Indigenous, Regional and Low Socio-Economic Status Attainment Fund (IRLSAF) which is a program established under Part 2-3 (Other grants) of the Act and is set out in the *Other Grants Guidelines (Education) 2012*. The IRLSAF for 2024 and later years will be co-designed with the higher education sector;
- updating the description of the units included in each funding cluster to reflect the changes made by the Job-Ready Graduates Act;
- providing the method for working out the Transition Fund Loading, which will provide funding to support eligible providers following the commencement of the Job-Ready Graduates Act for the grant years 2021, 2022 and 2023;
- removing the chapter relating to the ‘Performance Funding Grant Amount – Facilitation Funding’ as this funding ceased after 2013; and

- specifying the amounts for the purposes of subsection 30-27(2) and paragraph 30-27(3)(a) of the Act, which provide that the maximum basic grant amount for a Table A provider for higher education courses for the grant years 2021, 2022, 2023 and 2024 must not be less than the amount specified in the Guidelines.

## **Commencement**

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

## **Availability of merits review**

The Commonwealth makes grants to eligible providers under Part 2-2 (Commonwealth Grant Scheme) of the Act. These decisions are not made under the Guidelines, but are made consistently with the matters set out in the Guidelines.

Section 206-1 of the Act specifies the types of decisions made under the Act that are reviewable decisions. This is an exhaustive list. Funding decisions made under Part 2-2 of the Act are not specified at section 206-1 as decisions that are reviewable. The Guidelines do not create new decision making powers, or provide the Minister with the power to establish a new review mechanism in addition to the review process available under the Act.

## **Consultation**

A discussion paper outlining the measures in the Government's Job-ready Graduates Package (the Package) was released on the Department of Education, Skills and Employment (Department) website (see: <https://www.dese.gov.au/document/job-ready-graduates-discussion-paper>) alongside the announcement by the Minister for Education, the Hon Dan Tehan MP, of the Package at the National Press Club on 19 June 2020.

In developing the Guidelines, the Department had ongoing conversations in relation to the Package with individual universities and peak bodies, including through the Regional Universities Roundtables convened by the Minister for Decentralisation and Regional Education, the Hon Andrew Gee MP. A draft of the Guidelines was also published on the Department's website (see: <https://www.dese.gov.au/job-ready>) for consultation on 30 September 2020. The Guidelines have been updated to reflect feedback from the higher education sector.

The Department engaged a working group of university vice-chancellors to consult with peak bodies in the areas of psychology and social work to finalise the details of the Professional Pathways policy. The peak bodies consulted were the Australian Psychological Society (APS), the Australian Clinical Psychology Association (ACPA), the Australian Association of Psychologists (AAP), the Psychology Board of Australia, Heads of Departments and Schools on Psychology Association (HODSPA), the Australian Psychology Accreditation Council (APAC), the Australian Association of Social Workers (AASW), the Australian Council of Heads of Schools of Social Work (ACHSSW), the Australian Services Union (ASU), the Commonwealth Alliance of Youth Workers Associations (CAYWA), the Youth Workers' Association (YWA), the Australian Counselling Association (ACA), the Psychotherapy and Counselling Federation of Australia (PACFA), and the Australian

Community Workers Association. The consultations informed the working group's advice to Government on the Professional Pathways policy.

### **Regulatory impact statement**

The measures in the Job-Ready Graduates Act and the Package, including the changes made in revoking and remaking the Guidelines, have minimal regulatory impact. The Office of Best Practice Regulation has determined that a regulation impact statement is not required.

## **Explanation of provisions**

### *Chapter 1 – Preliminary*

**Section 1** provides the name of the Guidelines.

**Section 2** provides for the commencement of the Guidelines the day after they are registered on the Federal Register of Legislation. This commencement date will allow the Department to finalise funding agreements with providers in 2020 for the period 2021 to 2023.

**Section 3** states that the Guidelines are made under section 238-10 of the Act.

**Section 4** provides definitions for certain expressions used in the Guidelines, and notes that a number of expressions used in the Guidelines are already defined in Schedule 1 to the Act.

**Section 5** provides that the instrument specified in the Schedule to the Guidelines is repealed.

**Section 6** provides that, despite the repeal of the Former Guidelines made by Schedule 1 of the Guidelines, the Former Guidelines, as in force immediately before the commencement of the Guidelines, continue to apply on and after that commencement in relation to a grant made under Part 2-2 of the Act for the 2020 grant year. This means that the Former Guidelines will continue to apply to any Commonwealth Grant Scheme payments made to providers for the 2020 grant year.

### *Chapter 2 – Higher Education Providers*

**Section 7** provides that the purpose of Chapter 2 is to specify, for the purposes of subparagraph 30-1(1)(b)(i) of the Act, providers, other than Table A providers, that can be paid grants under Part 2-2 of the Act.

**Section 8** lists the higher education providers that can be paid grants under Part 2-2 of the Act. Providers that do not have a funding agreement with the Commonwealth for the years 2021 to 2023 have been removed from this list. This includes some private higher education providers that received funding under Part 2-2 of the Act in 2020 for the purposes of providing ‘short courses’ (for example, undergraduate certificates as now described under the Australian Qualifications Framework) in 2020.

### *Chapter 3 – National Priorities*

**Section 9** provides that the purpose of Chapter 3 is to specify, for the purposes of paragraph 30-20(b) of the Act, outcomes in the provision of higher education as national priorities.

**Section 10** lists the outcomes considered to be national priorities which include increasing the number of persons undertaking Education and Nursing courses of study, and supporting persons proposing to undertake certain courses of study at the University of Notre Dame Australia. Under the Act, non-Table A providers can only receive Commonwealth Grant Scheme funding in relation to the national priorities set out in the Guidelines and this is a key mechanism used to ensure that limited Commonwealth funding is appropriately targeted to improving education outcomes in areas of national priority, such as nursing and education. National priorities may change as Australia’s workforce evolves over time, and therefore, it is

vital that there is flexibility to specify new and different national priorities through the Guidelines. This flexibility will ensure the rapid implementation of Government funding decisions. It is therefore appropriate for the national priorities to be specified in delegated legislation, noting that paragraph 30-20(b) of the Act expressly allows for the Minister to specify national priorities in the Guidelines.

#### *Chapter 4 – Medical Student Loading*

**Section 11** provides that the purpose of Chapter 4 is to specify how the amount of medical student loading is to be worked out for the purposes of subparagraph 33-1(1)(b)(ii) of the Act.

**Subsection 12(1)** states that the medical student loading for a provider for Commonwealth supported ‘medical student EFTSL’ for the allocated number of medical student places in 2021 and later years is the medical student loading in 2020 (of \$1,465 per place) indexed in accordance with Part 5-6 of the Act.

**Subsection 12(2)** provides that, for the purposes of determining a provider’s medical student EFTSL, only students undertaking certain medical units of study in a course of study in medicine are taken into account. The subsection also incorporates by reference the Australian Bureau of Statistics (ABS) *Australian Standard Classification of Education 2001* (ABS document), as in force or existing from time to time, in accordance with section 14 of the *Legislation Act 2003*. The ABS document is freely available to the public (see: <https://www.abs.gov.au/ausstats/abs@.nsf/0/E7779A9FD5C8D846CA256AAF001FCA5C>).

**Subsection 12(3)** provides that medical student places are allocated for a year based on the most recent full year student load data reported by the provider through the Higher Education Student Data Collection (HESDC) and cleared as final by the Department, plus any subsequent approved variations for a course of study in medicine not yet reported in the HESDC and specifically allocated to the provider by the Minister.

#### *Chapter 5 – Determining the Funding Clusters*

**Subsection 13(1)** provides that the purpose of Chapter 5 is to specify, for the purposes of section 33-35 of the Act, how to determine the funding cluster—or part of a funding cluster—in which units of study are included.

**Subsection 13(2)** states that funding clusters are defined by reference to the field of education (FOE) code contained in the ABS document (which is incorporated by reference as in force or existing from time to time, in accordance with section 14 of the *Legislation Act 2003*), and as set out in the table at section 14. The Department of Education, Skills and Employment’s website also includes information about the allocation of units to funding clusters (see: <http://www.dese.gov.au/higher-education-loan-program/resources/2021-allocation-units-study-funding-clusters>).

**Section 14** sets out parts or subparts of the funding clusters, and the unit descriptions and FOE codes for each part of subpart of each funding cluster. This table is different to the table that was included in Chapter 7 of the Former Guidelines. The key changes are:

- there are now only four funding clusters – previously there were eight funding clusters;

- the former ‘Humanities’ part of funding cluster two in the Former Guidelines will now be included in the ‘Society and Culture’ part of funding cluster one;
- the former ‘Social Studies’ and ‘Behavioural Science’ parts of funding cluster three in the Former Guidelines will now be included as subparts of the Society and Culture part of funding cluster one – the Society and Culture part of funding cluster one has been described in this way to ensure that the correct Commonwealth contribution amount is paid to providers in respect of grandfathered students undertaking units of study in the fields of Social Studies and Behavioural Science;
- ‘Human movement’ units with FOE code 069903 are now in the Society and Culture part of funding cluster one;
- ‘Indigenous and Foreign Languages’ is included as part of funding cluster 3. The Act refers to ‘Foreign Languages’ as being the relevant part of this funding cluster in error. The Act will be amended at the earliest opportunity to change references to ‘Foreign Languages’ to ‘Indigenous and Foreign Languages’ consistent with the terminology used in the Guidelines;
- two new parts have been created in funding cluster two: ‘Professional Pathway Psychology’ and ‘Professional Pathway Social Work’;
- Behavioural Science units with FOE codes starting with 0907 that are included in the Society and Culture part of funding cluster one do not include ‘Postgraduate Clinical Psychology’ units, which are in funding cluster two, and Professional Pathway Psychology units with FOE codes starting with 0907 which are in cluster two;
- ‘Human Welfare Studies and Services’ units with FOE codes starting with 0905 that are included in the Society and Culture part of funding cluster one do not include Professional Pathway Social Work units with FOE codes starting with 0905 which are in cluster two;
- Professional Pathway Psychology units of study are Behavioural Science units (with FOE codes starting with 0907) that contribute to a course of study that leads to a bachelor degree or honours degree in psychology with a course structure that makes it compulsory to study units relevant to professional registration as a psychologist by the Psychology Board or Australia, and the course of study represents a pathway to professional registration as a psychologist; and
- Professional Pathway Social Work units of study are ‘Human Welfare Studies and Services’ units (with FOE codes starting with 0905) that contribute to courses of study that lead to a bachelor degree, honours degree or master’s degree in social work accredited by the Australian Association of Social Workers.

The funding clusters have been redesigned to better align Commonwealth funding to emerging labour market priority areas and align funding per student place to the cost of delivering university education, and to rebalance contributions across fields of study to address a number of growing economic imperatives because:

- the relative costs of delivering different courses have changed over recent years; and
- the economy is changing and there is a need to increase the level of support going to fields of study that will contribute to national priorities and future prosperity.

Funding reform is needed to create room for further growth in places, which is critical if Australia is to maintain attainment rates and growth in productivity to support a globally competitive economy into the future.

### *Chapter 6 – Advances for Certain Purposes*

**Section 15** provides that the purpose of the chapter is to specify, for the purposes of subsection 33-40(5) of the Act, how advances are to be determined by the Minister under subsection 33-40(1) of the Act, and how amounts of grant payable to providers under section 33-1 of the Act in the three years following the making of the advance are to be reduced.

**Section 16** sets out some of the purposes for which the Minister may approve advances to providers under subsection 33-40(1) of the Act. This is not an exhaustive list.

**Subsection 17(1)** provides that a reduction, for the purposes of subsection 33-40(4) of the Act, in the amount of a grant payable to a provider under section 33-1 of the Act for each of the years (up to a maximum of 3 years) following the year an advance was made to the provider, will be decided by the Minister.

**Subsection 17(2)** provides a formula for reducing the amount of grant payable to the provider for a year under section 33-1 of the Act, in the three years following the year in which the advance is made to the provider under subsection 33-40(1).

#### *Chapter 7 – Transition Fund Loading*

**Section 18** provides that the purpose of Chapter 7 is to specify how the Transition Fund Loading (TFL) will be worked out for the purposes of subparagraph 33-1(b)(iv) of the Act.

**Subsection 19(1)** provides that the TFL is payable to Table A providers and the University of Notre Dame Australia for the 2021, 2022 and 2023 grant years, and sets out the formula for calculating the TFL payable to a provider. The purpose of the TFL is to ensure that eligible providers can maintain their revenue over the grant years 2021 to 2023, whilst the Job-Ready Graduates Act is being implemented.

**Subsection 19(2)** states that, if the TFL for a provider is calculated to be less than zero, the provider will not be paid any TFL.

#### *Chapter 8 – Maximum basic grant amount for higher education courses*

**Section 20** provides that the purpose of Chapter 8 is to specify amounts for the purposes of subsection 30-27(2) and paragraph 30-27(3)(a) of the Act, which provide that the maximum basic grant amount (MBGA) for a Table A provider for higher education courses for the grant years 2021, 2022, 2023 and 2024 must not be less than the amount specified in these Guidelines.

**Section 21** states that a provider's MBGA for higher education courses for a grant year must not be less than the amount specified in the table. The amounts specified for each provider in the table represent the MBGA 'floor' for higher education courses for each provider (i.e. a guaranteed baseline for MBGAs for those courses). This means that the MBGA for a provider for higher education courses for the relevant grant years, which will be specified in the provider's funding agreement, must not be less than the amount specified in the table.

The table only includes the amounts for the years 2021 to 2023. The table will be updated to include an amount for 2024, once the indexation factor for 2024 is known.

*Schedule 1*

**Section 1** repeals the *Commonwealth Grant Scheme Guidelines 2012*.



## Statement of Compatibility with Human Rights

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

### Commonwealth Grant Scheme Guidelines 2020

The *Commonwealth Grant Scheme Guidelines 2020* (the 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 of the Guidelines

The purpose of the Guidelines is to repeal the *Commonwealth Grant Scheme Guidelines 2012* made on 27 November 2012 and registered on 13 December 2012 (the Former Guidelines), and all subsequent amendments, and make the Guidelines.

The changes made in repealing and remaking the Guidelines are primarily intended to give effect to the amendments to the Act made by the *Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Act 2020* (the Job-Ready Graduates Act). The Guidelines, as compared to the Former Guidelines, also reflect changes in terminology and use simpler language.

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- updating the description of the units included in each funding cluster to reflect the changes made by the Job-Ready Graduates Act;
- providing the method for working out the Transition Fund Loading, which will provide funding to support eligible providers following the commencement of the Job-Ready Graduates Act for the grant years 2021, 2022 and 2023;
- removing the chapter relating to the ‘Performance Funding Grant Amount – Facilitation Funding’ as this funding ceased after 2013; and
- specifying the amounts for the purposes of subsection 30-27(2) and paragraph 30-27(3)(a) of the Act, which provide that the maximum basic grant amount for a Table A provider for higher education courses for the grant years 2021, 2022, 2023 and 2024 must not be less than the amount specified in the Guidelines.

#### Human rights implications

##### Right to education

The Guidelines engage the right to education contained in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). 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.’

The Guidelines improve access to higher education by listing non-Table A providers that can receive grants under Part 2-2 of the Act for the purposes of supporting Commonwealth supported students. This gives students more choice when considering undertaking higher education, by ensuring that more providers are able to offer students subsidised places in a range of different locations.

The Guidelines also allow the Minister to advance a higher education provider their grant under Part 2-2 of the Act in particular circumstances, such as to assist a provider with the cash flow implications of restructuring, thereby ensuring support and access is maintained for higher education students.

Further, the insertion of the TFL in the Guidelines also has a positive impact on the right to education. The TFL is aimed at ensuring eligible providers do not receive less funding for Commonwealth supported places as a result of the measures contained in the Job-Ready Graduates Act for the 2021, 2022 and 2023 grant years. This funding will ensure that providers can continue to provide quality higher education services to students during a period in which major reforms are being made to higher education funding.

Chapter 5 of the Guidelines implements changes being made to the funding clusters by the Job-Ready Graduates Act. These changes better align Commonwealth funding for Commonwealth supported places to the cost of course delivery, which is aimed at improving efficiency in Commonwealth spending in higher education in order to maximise the number of available places. As a result of these changes, the Commonwealth will be able to support more university places, thus providing better, and more affordable, access to higher education to a greater number of students.

However, the changes made by Chapter 5 of the Guidelines may—or may appear to—limit the right to education. These changes reflect increases in student contribution amounts for students studying in certain fields, for example law and history. This means that courses of study that consist of units with these higher student contribution amounts will cost students more overall. Whilst these changes may be perceived as restricting access to higher education, this is not the case as the students affected by these changes are able to defer their student contribution amounts through the Higher Education Loan Program (HELP) scheme. That is, students will still be able to access higher education, regardless of the cost of their degree, and will only be required to pay back their HELP debt once they earn over the repayment threshold (for the 2020-21 income year, the threshold is \$46,620). Existing students will not have to pay the increased student contribution amounts, and will continue to pay current rates. Further, this measure is intended to maximise efficiency in Commonwealth spending for higher education and support a significant expansion in the number of Commonwealth supported places. This will not only improve access to university education but also enable more people to benefit from the opportunities it creates.

To the extent it could be argued that the changes made by Chapter 5 limit the right to education, these limits are justifiable as they are reasonable, necessary and proportionate to achieving the legitimate objectives of the Job-Ready Graduates Act that are described above.

## **Conclusion**

The Guidelines are compatible with human rights because the instrument advances the protection of human rights in the delivery of higher education in Australia, including the right to education. To the extent that it may limit human rights, these limitations are reasonable, necessary, and proportionate

**Hon Alan Tudge MP, Minister for Education and Youth**