

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

Tertiary Education Quality and Standards Agency Act 2011

Tuition Protection (Up-front Payments Guidelines) 2020

Purpose

The purpose of the *Tuition Protection (Up-front Payments Guidelines) 2020* (the **Guidelines**) is to put in place administrative and operational provisions to support amendments to the *Tertiary Education Quality and Standards Agency Act 2011* (**TEQSA Act**) made by the *Education Legislation Amendment (Up-front Payments Tuition Protection) Act 2020* (the **Tuition Protection Act**), and the *Higher Education (Up-front Payments Tuition Protection Levy) Act 2020* (the **Levy Act**).

A registered higher education provider (**provider**) must comply with conditions imposed on the provider's registration under section 24 of the TEQSA Act. Section 26A of the TEQSA Act, as introduced through the Tuition Protection Act, includes a new condition – compliance with the tuition protection requirements. The tuition protection requirements include requirements set out in these Guidelines (subsection 26A(3) of the TEQSA Act).

Authority

The Guidelines are made under section 26B of the TEQSA Act, as enabled by section 4 of the *Acts Interpretation Act 1901* (**Acts Interpretation Act**). Amongst other things, section 4 of the Acts Interpretation Act provides that a power in an Act to make an instrument of legislative character (such as the Guidelines) may be exercised prior to the commencement of that power, as if it had commenced. Section 4 of the Acts Interpretation Act allows for the Guidelines to be made prior to the commencement of the Tuition Protection Act so that they can be effective for commencement on 1 January 2021.

Overview

The tuition protection requirements introduced by the Guidelines specify requirements on higher education providers to whom Part 5A of the TEQSA Act applies, of:

- determining tuition fees that are included and excluded for the purposes of paragraph (c) of the definition of 'tuition fees' in section 5 of the TEQSA Act;
- requirements for the collection and recovery of the up-front tuition protection levy (**Levy**), including the issuing of Levy notices by the Higher Education Tuition Protection Director (the **Director**);
- detail on the internal and external review processes in relation to a Levy decision;
- requirements for providers to keep records of certain information and documents related to tuition protection for each domestic student enrolled in a unit of study or Australian course of study with the provider or who has paid up-front payments to the provider;

- requirements for providers to disclose certain information and documents related to tuition protection to the Secretary about each domestic student enrolled in a unit of study or Australian course of study with the provider;
- other circumstances when a provider defaults in relation to a student that is in addition to section 62C of the TEQSA Act;
- detail around the written notices that providers that default must give to students and the Director;
- requirements for providers to give evidence within their written notice to the Director of the outcome of discharge of obligations that is in addition to subsection 62H(2) of the TEQSA Act;
- other tuition protection requirements for providers to notify students of certain matters.

Background

The Tuition Protection Act extends the Government managed Tuition Protection Service (TPS) to domestic up-front fee paying higher education students, commencing on 1 January 2021, by amending the TEQSA Act and the *Higher Education Support Act 2003 (HESA)*. The expansion ensures domestic higher education students that take out a HELP loan and/or pay up-front for their study costs at a private higher education provider, are assisted by either a recredit, refund or suitable replacement unit and course in the event that their provider defaults in failing to commence or ceasing to provide their unit of study and/or course.

The new up-front payments tuition protection arrangements are funded by providers through a levy model set out in the Levy Act. Also these new tuition protection arrangements are modelled on the successful TPS for international students under the *Education Services for Overseas Students Act 2000*.

Consultation

The Guidelines provide procedural detail to support the extension of higher education tuition protection arrangements to domestic up-front paying students under the TEQSA Act. Peak industry bodies and higher education providers were consulted in November 2020 by email in relation to the Guidelines. The feedback received was positive and supportive of the procedural and administrative requirements contained in the Guidelines.

Regulatory Impact Statement

The Office of Best Practice Regulation (OBPR) has been consulted. Based on their advice that the proposal does not appear to have a more than minor regulatory impact on business, community organisations or individuals, no Regulation Impact Statement was required (OBPR ID No. 42730).

Tuition Protection (Up-front Payments Guidelines) 2020

Explanation of Provisions

Part 1—Preliminary

Section 1: Name

1. Section 1 is a formal provision specifying the name of the instrument as the *Tuition Protection (Up-front Payments Guidelines) 2020* (the **Guidelines**).

Section 2: Commencement

2. Section 2 provides that the Guidelines commence on 1 January 2021.

Section 3: Authority

3. Section 3 sets out the Minister's authority to make the Guidelines under section 26B of the *Tertiary Education Quality and Standards Agency Act 2011* (**TEQSA Act**).

Section 4: Definitions

4. Section 4 of the Guidelines sets out definitions for the purposes of the Guidelines.

Part 2—Tuition Protection

Division 1—Tuition fees

Section 5: Meaning of tuition fees

5. Section 5 prescribes the types of payments that are included as tuition fees for the purposes of paragraph (c) of the definition of tuition fees in section 5 of the TEQSA Act. Subsection 5(2) provides that certain fees payable by domestic students enrolled with, or applying for enrolment with, a provider in a unit of study are prescribed amounts. For example, fees payable in relation to tuition, examination, an enabling course and the granting of an Australian higher education award will be considered tuition fees for the purposes of tuition protection.
6. Paragraphs (a) and (b) of the definition of tuition fees in section 5 of the TEQSA Act defines tuition fees in respect to domestic students that are liable to pay a student contribution amount or tuition fee within the meaning of the *Higher Education Support Act 2003* (**HESA**) at an approved higher education provider. The purpose of section 5 of the Guidelines is to prescribe the amounts that are tuition fees where paragraphs (a) and (b) of the definition of tuition fees in the TEQSA Act does not apply, which would include amounts charged by registered higher education providers (under the TEQSA Act) that are not approved higher education providers under HESA.
7. Subsection 5(3) of the Guidelines sets out the kind of fees that do not amount to tuition fees for the purposes of paragraph (c) of the definition of tuition fees in the

TEQSA Act. To avoid doubt, section 5 does not prescribe the actual tuition fees charged by providers. Tuition fees charged by providers are set by providers.

Division 2—Up-front payments tuition protection levy

Section 6 – Notice of amount of up-front payments tuition protection levy

8. Subsection 6(1) sets out the matters which the Higher Education Tuition Protection Director (the **Director**) must include in a written notice to each provider who is liable to pay the up-front tuition protection levy (**Levy**).
9. Subsection 6(2) clarifies that even if the Director does not give a provider a notice in accordance with subsection 6(1), the provider is still liable to pay the Levy. The notes under subsection 6(2) outline that the Levy is imposed under the *Higher Education (Up-front Payments Tuition Protection Levy) Act 2020 (Levy Act)* and the TEQSA Act requires a provider to pay the Levy when it is due and payable.
10. Subsection 6(3) explains that a notice under subsection 6(1) does not need to be given to a provider if the provider's liability to pay the Levy is waived under section 8 of the Guidelines.

Section 7 – Overdue notice

11. Section 7 provides that the Director may give a written overdue notice to a provider to comply with a notice issued under section 6 after the date the Levy is due and payable. The overdue notice must specify the matters at subsection 7(2).

Section 8 – Waiver

12. Section 8 provides that liability to pay the Levy for a year is waived if prior to the time the Director issues a notice under section 6, the provider's registration is cancelled under the TEQSA Act or the provider is no longer in operation.

Section 9 – Internal review of notice issued under section 6

13. Section 9 sets out the internal review processes in relation to a notice issued under section 6. A provider may seek a reconsideration (i.e. internal review) from the Director of the notice issued under section 6 in relation to the determination of any components of the Levy.
14. Subsection 9(2) requires that the request is made in writing and given to the Director within 14 days after the day on which the provider received the notice.
15. Subsection 9(3) provides that the Director must reconsider the decision and confirm, vary or set the decision aside and substitute a new decision. The Director must give the provider written notice of the Director's internal review decision within 7 days after the decision is made, including a statement of reasons and a new notice under section 6 where the Director varies or substitutes the original notice (subsections 9(4)-(5)).

Section 10 – Administrative Appeals Tribunal review

16. Section 10 provides that a provider may make an application to the Administrative Appeals Tribunal for the review of a decision that has been confirmed, varied or set aside under section 9. Section 10 allows a provider to apply for an independent merits review at the Administrative Appeals Tribunal of the Director's internal review decision.

Division 3—Information and documents related to tuition protection

Section 11 – Record keeping

17. Section 11 provides a list of matters that a provider must keep records of in relation to each domestic student who is enrolled in a unit of study or Australian course of study or who has paid any up-front payments to the provider.
18. Subsection 26A(7) of the TEQSA Act provides that the Guidelines may set out specified information and documents that a provider must keep records of for the purposes of the tuition protection requirements and give to the Secretary in accordance with subsection 26A(8) of the TEQSA Act.
19. It is important that providers keep these records for the purposes of the administration of the new tuition protection arrangements under the TEQSA Act. It also ensures providers are able to meet their requirements under Part 5A of the TEQSA Act including being able to assist affected students to continue their studies or receive a refund of any up-front payments made for affected units in the event of a default. These records would also assist the Director to assist students where a provider fails to discharge its obligations to a student following a default.

Section 12 – Giving information and documents to the Secretary

20. Section 12 sets out the information and documents a provider must give to the Secretary about each domestic student enrolled in a unit of study or Australian course of study or who has paid any up-front payments to the provider. Under subsection 26A(8) of the TEQSA Act, the information and documents must be given to the Secretary within a period specified by the Secretary and in the manner and form approved by the Secretary. The Secretary will take into account operational requirements when determining the period and manner and form for the provision of the information and documents set out in this section.
21. Section 12 includes personal information (e.g. student's name and contact information), information about the student's studies, course and unit information and information about up-front payments and other fees.
22. Many of the terms used in sections 11 and 12 refer to terms used in the Tertiary Collection of Student Information Data Element Dictionary (**Dictionary**) available online: <https://www.tcsisupport.gov.au/elements>. Many providers are already familiar with these terms given other existing reporting requirements. For example,

the terms ‘course code’, ‘course outcome date’ and ‘unit of study status’ are defined in the Dictionary.

23. It is reasonably necessary for the Secretary to collect this information from providers as the information will assist the Director in performing functions and powers under the TEQSA Act to quickly and effectively assist students in the case of a provider default.
24. The Secretary may disclose personal information collected under section 12 to the Director for the purposes of administering the tuition protection arrangements in the case of a provider default. Paragraph 179-20(a) of HESA provides the legislative authorisation for this disclosure of personal information by a Commonwealth officer to another Commonwealth officer to assist that other officer in the other officer’s official employment.

Division 4—When a provider defaults in relation to a student

Section 13 – Other default circumstances

25. Section 13 sets out additional circumstances where a provider defaults in relation to a domestic student. A provider defaults where a student is enrolled in an Australian course of study with the provider and is not enrolled in any units of study within that course and the provider fails to commence the course on the day the course was scheduled to start or ceases to provide the course on a day after the course starts but before it is completed.
26. For example, if a student is enrolled in a course of study but deferred a semester (therefore not enrolled in any units) and the provider ceases to provide the course during that semester, the student would still be offered tuition protection under the TEQSA Act in the form of a suitable replacement course to assist the student to complete their course of study.
27. Similarly, if a student is enrolled in a course of study, and it is a semester break but the student has not yet enrolled in any units, and the provider defaults in delivering the student’s course, then the student would also be provided with tuition protection under the TEQSA Act in the form of a suitable replacement course to enable the student to continue their course of study.

Division 5—Notifying the Higher Education Tuition Protection Director of the details of a default

Section 14 – Additional details of default

28. Section 14 sets out the additional requirements that a provider must notify the Director about in the written notice given under subsection 62D(3) of the TEQSA Act. The additional information is necessary for the Director to promptly assist a student if a provider fails to discharge its obligations under the TEQSA Act.

Section 15 – Requirements of notice

29. Subsection 15(1) specifies that the provider's notice given to the Director under subsection 62D(2) of the TEQSA Act must include information about the number of domestic students in relation to whom the provider has defaulted. This information will give the Director an indication of how many students are impacted by the provider default.
30. Subsection 15(2) provides that the information required under subsection 62D(3) of the TEQSA Act (notification within 3 business days of default) must be given to the Director in a manner and form approved by the Director.

Division 6—Requirements of notice to student

Section 16 – Requirements of notice

31. Section 16 specifies the matters a provider must include in a written notice of default to domestic students under subsection 62E(2) of the TEQSA Act. Subsection 16(2) provides the manner the provider must send the notice.

Division 7—Providers to notify of outcome of discharge of obligations

Section 17 – Requirements of notice

32. Section 17 sets out additional matters a provider must include in its written notice to the Director under section 62H of the TEQSA Act.

Division 8—Other tuition protection requirements

Section 18 – Notification about the collection of personal information and tuition protection

33. Section 18 sets out other tuition protection requirements for the purposes of paragraph 26A(3)(b) of the TEQSA Act. A provider must provide a domestic student with the information outlined in subsection 18(1) at or before the time or, if that is not practicable, as soon as practicable after, a provider collects personal information about the student for the purposes of enrolment in an Australian course of study or unit of study.
34. In addition to general information about the operation of tuition protection under Part 5A of the TEQSA Act, the provider must provide a notification of the collection of personal information for the purposes of tuition protection under paragraph 18(1)(b).
35. Subsection 18(2) sets out the matters a provider must inform the student about for the purposes of paragraph 18(1)(b). Including that the provider must disclose certain personal information to the Secretary under the TEQSA Act, the Secretary may disclose personal information to the Director, the Secretary and Director may disclose personal information to the Australian Government Actuary and further

details about how the Secretary and the Director handle personal information under relevant policies.

36. The note under subsection 18(2) clarifies that providers may have other privacy obligations under other laws, including the *Privacy Act 1988*. For example, a provider may have other obligations under Australian Privacy Principle 5 contained in the *Privacy Act 1988* regarding the notification of the collection of personal information.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Tuition Protection (Up-front Payments Guidelines) 2020

This legislative 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

The purpose of the *Tuition Protection (Up-front Payments Guidelines) 2020* (the **Guidelines**) is to put in place administrative and operational provisions to support amendments to the *Tertiary Education Quality and Standards Agency Act 2011* (**TEQSA Act**) made by the *Education Legislation Amendment (Up-front Payments Tuition Protection) Act 2020* (the **Tuition Protection Act**), and the *Higher Education (Up-front Payments Tuition Protection Levy) Act 2020* (the **Levy Act**).

A registered higher education provider (**provider**) must comply with conditions imposed on the provider's registration under section 24 of the TEQSA Act. Section 26A of the TEQSA Act, as introduced through the Tuition Protection Act, includes a new condition – compliance with the tuition protection requirements. The tuition protection requirements include requirements set out in these Guidelines (subsection 26A(3) of the TEQSA Act).

The tuition protection requirements introduced by the Guidelines specify requirements on higher education providers to whom Part 5A of the TEQSA Act applies, of:

- determining tuition fees that are included and excluded for the purposes of paragraph (c) of the definition of 'tuition fees' in section 5 of the TEQSA Act;
- requirements for the collection and recovery of the up-front tuition protection levy (**Levy**), including the issuing of Levy notices by the Higher Education Tuition Protection Director (the **Director**);
- detail on the internal and external review processes in relation to a Levy decision;
- requirements for providers to keep records of certain information and documents related to tuition protection for each domestic student enrolled in a unit of study or Australian course of study with the provider or who has paid up-front payments to the provider;
- requirements for providers to disclose certain information and documents related to tuition protection to the Secretary about each domestic student enrolled in a unit of study or Australian course of study with the provider;
- other circumstances when a provider defaults in relation to a student that is in addition to section 62C of the TEQSA Act;
- detail around the written notices that providers that default must give to students and the Director;
- requirements for providers to give evidence within their written notice to the Director of the outcome of discharge of obligations that is in addition to subsection 62H(2) of the TEQSA Act;

- other tuition protection requirements for providers to notify students of certain matters.

The Tuition Protection Act extends the Government managed Tuition Protection Service (TPS) to domestic up-front fee paying higher education students, commencing on 1 January 2021, by amending the TEQSA Act and the *Higher Education Support Act 2003 (HESA)*. The expansion ensures domestic higher education students that take out a HELP loan and/or pay up-front for their study costs at a private higher education provider, are assisted by either a recredit, refund or suitable replacement unit and course in the event that their provider defaults in failing to commence or ceasing to provide their unit of study and/or course.

The new up-front payments tuition protection arrangements are funded by providers through a levy model set out in the Levy Act. Also these new tuition protection arrangements are modelled on the successful TPS for international students under the *Education Services for Overseas Students Act 2000*.

Human rights implications

Right to Education

The Guidelines engage the right to education, which is set out in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 13 recognises the important personal, societal, economic and intellectual benefits of education. Article 13 provides that secondary education in its different forms, including higher education, shall be made generally available and accessible to all by every appropriate means.

The Guidelines sets out the administrative and operational details to support the changes made to the TEQSA Act made through the Tuition Protection Act. As a result, the Guidelines also promote the right to education as it is designed to support domestic students in the event of a provider default (through tuition protection requirements).

Right to Privacy

The Guidelines indirectly engage the right to privacy, under Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*, which provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation and that everyone has the right to the protection of the law against such interference or attacks.

The right to privacy can be permissibly limited in order to achieve a legitimate objective and where the limitations are lawful and not arbitrary. Authorised disclosure of personal information also invokes the exception in Australian Privacy Principle (APP) 6.2(b) in Schedule 1 to the *Privacy Act 1988 (Privacy Act)*, which permits the disclosure of an individual's personal information for a secondary purpose where the disclosure is authorised by law.

In this case, the legitimate objective is the protection and support of domestic up-front fee paying students in the event that their private higher education provider defaults, through the Australian Government's TPS arrangements, which the Guidelines set out the

procedural and administrative requirements supporting the tuition protection arrangements under Part 5A of the TEQSA Act.

Registered higher education providers under the TEQSA Act will have obligations to keep records and provide personal information to the Department about their students (including in relation to contact details, information about enrolled units and tuition fees) in accordance with requirements set out in sections 11 and 12 of the Guidelines.

This information will be collected by the Secretary and provided to the Director for the purposes of assisting students when a provider defaults. The Secretary's collection, use and disclosure of personal information from providers about domestic up-front fee paying students under this requirement is reasonable, proportionate and necessary to support the effective administration of tuition protection to quickly and effectively assist students when a provider defaults. The Secretary and Director are also required to comply with the relevant APPs regarding the collection, use and disclosure of this personal information under the Privacy Act.

In addition, access to quality higher education student data on an ongoing basis is reasonable, necessary and proportionate to achieve the policy objective, which is to protect higher education students when their provider defaults through the TPS, in order for the students to continue their higher education studies.

The Department has also undertaken a Privacy Impact Assessment to inform the drafting of the Guidelines.

Section 18 of the Guidelines also indirectly promotes the right to privacy, by ensuring students are aware of how their personal information will be used by providers for the purposes of tuition protection, including the intended disclosures of their personal information, and is consistent with the APPs for collection, use and disclosure of personal information.

Overall, the Guidelines is compatible with and promotes the right to privacy by ensuring that appropriate safeguards and limitations apply to persons who use and disclose personal information specified in the Guidelines.

The Guidelines do not otherwise engage any human rights noting that the Guidelines impose obligations on providers, but do not impose obligations on, or otherwise affect the rights of, individuals (subject to the discussion above).

A detailed explanation of the human rights engaged by the enabling legislation is set out in the *Statement of Compatibility with Humans Rights* for the Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020 and appended to the Explanatory Memorandum for that Bill. The Explanatory Memorandum can be found at:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r6576

Conclusion

The Guidelines are compatible with human rights because it promotes the protection of human rights.

**Minister for Education
The Hon Dan Tehan MP**