

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

Higher Education Support Act 2003

Higher Education Provider Amendment (Support for Students Policy) Guidelines 2023

AUTHORITY

Section 238-10 of the *Higher Education Support Act 2003* (the Act) provides that the Minister may make Higher Education Provider Guidelines to, amongst other things, provide for matters necessary or convenient to be provided in order to carry out, or give effect to, certain provisions in 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. The amendments to the *Higher Education Provider Guidelines 2023* (the Principal Instrument) made by the *Higher Education Provider Amendment (Support for Students Policy) Guidelines 2023* (the Amendment Instrument) rely on this provision.

PURPOSE AND OPERATION

Section 19-43 of the Act prescribes new requirements for higher education providers to have a support for student policy that deals with the support provided to the provider's students to assist them to successfully complete the units of study in which they are enrolled.

The Australian Universities Accord is an Australian Government commitment to drive lasting and transformative reform in Australia's higher education system. The Government has invested \$2.7 million over two years from 2022–23 to deliver the Accord through a 12-month review of Australia's higher education system, led by a panel of eminent Australians.

The Australian Universities Accord Panel's Interim Report recommended that the Government cease the 50 per cent pass rule, given its poor equity impacts, and require increased reporting on student progress. The Government has amended the Act to remove the pass rule and introduce the requirement to have a support for students policy. The legislation received the Royal Assent on 6 November 2023.

The Amendment Instrument amends the Principal Instrument to prescribe the requirements in relation to providers' support for student policies. In particular, the Amendment Instrument details the requirements on a provider's support for students policy (including requirements on what that policy must include, how often the policy must be reviewed and

be made available), and requirements in relation to a provider's report to the Minister on its compliance with its support for students policy. The Amendment Instrument also requires that providers comply with the Australian Privacy Principles set out in the *Privacy Act 1988* in respect of student personal information obtained for the purposes of complying with the requirements related to the provider's support for students policy.

The new requirements will further strengthen the accountability for higher education providers to ensure they have supports in place to assist their students to succeed, while still recognising student agency: ultimately students have the primary responsibility for accepting support and for their own success.

The requirements will also prescribe further reporting requirements for higher education providers approved under the Act, by requiring providers to give specific information in their support for students policy, and report on their compliance with that policy. Providers will be required to set out in their support for students policy how they will identify students at risk of failing their courses and ensure that students have access to support to assist them to successfully complete their studies. A provider's support for students policy will also be required to set out providers' crisis and critical harm response arrangements, which should also include the provider's response arrangements in relation to harassment and sexual harm. These requirements will provide clarity around available support at each provider.

Providers will also be required to provide annual reports for the previous calendar year to the Minister for Education on the implementation and success of their policies, with the first report to be provided on or before 1 March 2025. This will include information about how the provider assesses which kinds of support are required to meet the needs of its student cohorts, assessment and assurance activities in relation to its support for students policy, and how the provider identifies opportunities for improvement, including its response to student complaints.

These requirements build on the *Higher Education Standards Framework (Threshold Standards) 2021*, which represent the minimum threshold requirements for the provision of higher education by Australian higher education providers registered under the *Tertiary Education Quality and Standards Agency Act 2011*. The new support for students policy requirements set additional, complementary requirements on providers to support their students.

IMPACT ANALYSIS

The Office of Impact Analysis has advised that the impacts of the Amendment Instrument will be minor and an Impact Analysis is not required (OIA23-05671).

COMMENCEMENT

The Amendment Instrument commences on 1 April 2024.

CONSULTATION

The Australian Universities Accord Panel's Interim Report recommendation to remove the pass rate requirement and increase reporting on student progress was following a lengthy and in-depth consultation process with the sector. This included two formal submission processes in relation to Terms of Reference and a Discussion Paper, targeted meetings, direct and one-on-one engagements, roundtables and a survey.

On 16 August 2023 a Consultation Paper was released on the Department of Education (the department) website (<https://www.education.gov.au/new-requirements-support-students/consultations/consultation-paper?page=0>) on the proposed support for students policy requirements. The consultation received 56 submissions from across the sector, and the wider community including from student advocacy groups and private individuals as well as higher education providers and provider advocacy groups. The department published 55 out of the 56 submissions received, at the same location on the department's website. One submission was not published at the request of the author as it contained identifiable personal information.

Initial feedback on the support for student policy requirements was mixed. Many submissions noting their in-principle support for the policy, while expressing concern that the proposed requirements did not reflect the diversity of the higher education sector. There were concerns relating to the regulatory burden associated with the proposed reporting requirements. Where providers would have had to upgrade their student management systems to meet these requirements, it would come at a cost.

Following this process, the department held an online seminar open to the higher education sector to provide further information and respond to questions. The department undertook further consultation with the sector on the draft Amendment Instrument and met with sector representatives and peak bodies to discuss the clauses in detail and refine the Amendment Instrument.

The department also held a series of focused workshops with a small group of experts from across the higher education sector to work through technical aspects of the proposed changes.

The department's response to this feedback was to amend the language used throughout the Amendment Instrument to better reflect the diversity of the higher education sector. Primarily, this was addressed by ensuring that references to particular activities and organisational structures in the Amendment Instrument were applicable to all higher education providers. The department also inserted a note clarifying that providers could meet the new support for students policy requirements by creating a single overarching 'support for students policy' that referenced existing policies, rather than duplicating or recreating those existing policies within a new policy.

The requirements under the Act to have, comply with and report on a support for student policy commence from 1 January 2024. Acting on feedback received from the representative

group that the timeframes for implementation were challenging for the sector to comply with, given the level of detail that was being provided in the Amendment Instrument, the support for students policy requirements will be implemented through a phased approach. The requirements in the Amendment Instrument will commence from 1 April 2024 to provide time for the sector to prepare their policy in accordance with the requirements. Reporting will be required on or before 1 March 2025, providing more than a year before the first annual report is due.

In the first year, the Amendment Instrument allows providers to report to the Minister in a narrative format containing qualitative metrics on how they met the requirements in the support for study policy. Providers will only need to provide de-identified quantitative information if that information is available, and accessible.

The department will establish a new working group in January 2024, drawing on a range of sector representatives, to investigate additional data that could be available to provide a deeper understanding of student need for supports. The department, with the assistance of the working group, will also continue to inform the sector throughout 2024 and into 2025 to help preparations for the first report on the support for students policy due by 1 March 2025.

While the department has an existing data collection system through the Tertiary Collection of Student Information system, the qualitative information requested will give the department assurance that providers have support for students policies in place and are implementing them effectively, as well as to improve the Government's understanding of student support needs across the sector.

Through the consultation process stakeholders raised concerns that the draft Amendment Instrument removes a student's responsibility for their success or otherwise in their chosen course of study. This Amendment Instrument clarifies that providers are required to establish a framework to help students succeed in their studies, while still recognising student agency: ultimately students have the primary responsibility for accepting support and for their own success.

Feedback on the final tranche of changes has been positive.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Higher Education Provider Amendment (Support for Students Policy) Guidelines 2023

The *Higher Education Provider Amendment (Support for Students Policy) Guidelines 2023* (the 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

Section 19-43 of the *Higher Education Support Act 2003* (the Act) prescribes new requirements for higher education providers to have a support for student policy that deals with the support provided to the provider's students to assist them to successfully complete the units of study in which they are enrolled.

The Australian Universities Accord is an Australian Government commitment to drive lasting and transformative reform in Australia's higher education system. The Government has invested \$2.7 million over two years from 2022–23 to deliver the Accord through a 12-month review of Australia's higher education system, led by a panel of eminent Australians.

The Australian Universities Accord Panel's Interim Report recommended that the Government cease the 50 per cent pass rule, given its poor equity impacts, and require increased reporting on student progress. The Government has amended the Act to remove the pass rule and introduce the requirement to have a support for students policy. The legislation received the Royal Assent on 6 November 2023.

The Amendment Instrument amends the *Higher Education Provider Guidelines 2023* (the Principal Instrument) to prescribe the requirements in relation to providers' support for student policies. In particular, the Amendment Instrument details the requirements on a provider's support for students policy (including requirements on what that policy must include, how often the policy must be reviewed and be made available), and requirements in relation to a provider's report to the Minister on its compliance with its support for students policy. The Amendment Instrument also requires that providers comply with the Australian Privacy Principles set out in the *Privacy Act 1988* in respect of student personal information obtained for the purposes of complying with the requirements related to the provider's support for students policy.

The new requirements will further strengthen the accountability for higher education providers to ensure they have supports in place to assist their students to succeed, while still recognising student agency: ultimately students have the primary responsibility for accepting support and for their own success.

The requirements will also prescribe further reporting requirements for higher education providers approved under the Act, by requiring providers to give specific information in their support for students policy, and report on their compliance with that policy. Providers will be required to set out in their support for students policy how they will identify students at risk of failing their courses and ensure that students have access to support to assist them to successfully complete their studies. A provider's support for students policy will also be required to set out providers' crisis and critical harm response arrangements, which should also include the provider's response arrangements in relation to harassment and sexual harm. These requirements will provide clarity around available support at each provider.

Providers will also be required to provide annual reports for the previous calendar year to the Minister for Education on the implementation and success of their policies, with the first report to be provided on or before 1 March 2025. This will include information about how the provider assesses which kinds of support are required to meet the needs of its student cohorts, assessment and assurance activities in relation to its support for students policy, and how the provider identifies opportunities for improvement, including its response to student complaints.

These requirements build on the *Higher Education Standards Framework (Threshold Standards) 2021*, which represent the minimum threshold requirements for the provision of higher education by Australian higher education providers registered under the *Tertiary Education Quality and Standards Agency Act 2011*. The new support for students policy requirements set additional, complementary requirements on providers to support their students.

Human rights implications

The Amendment Instrument engages the following rights:

- the right to education in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Right to 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'.

The Amendment Instrument amends the Principal Instrument to prescribe requirements in relation to a provider's support for student policy, and requires that the policy include certain information regarding the supports that are available for students. These amendments support the right to education, as the amendments will require providers to include in their policy specific information that will assist the provider's students with successfully completing the units of study in which they are enrolled, and will ensure that

providers have specific processes and procedures in their support for students policy that will ensure students receive the support they need to complete their studies.

The new requirements prescribed by the Amendment Instrument also specifically require that providers include in their support for students policy information in relation to how the provider will identify students in need of academic support, how the provider will proactively make arrangements to connect students in certain circumstances to support services, and what specific arrangements the provider has for First Nations students, students with disability, students who have experienced family and domestic violence or harassment or sexual harm or other traumatic events. These new requirements will ensure that providers are taking steps to proactively support students who may be disadvantaged or at risk, which supports those students' educational outcomes.

Right to privacy

The Amendment Instrument engages the right to privacy set out in Article 17 of the ICCPR. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, home or correspondence, nor to unlawful attacks on their honour or reputation.

The right to privacy under Article 17 can be permissibly limited in order to achieve a legitimate objective and where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances.

The Amendment Instrument is consistent with, and protects, the right to privacy

The Amendment Instrument amends the Principal Instrument to require that providers comply with the Australian Privacy Principles (the APPs) in the Privacy Act in respect of student personal information obtained for the purposes of complying with the requirements related to a provider's support for students policy.

The APPs impose a range of privacy obligations on organisations. Specifically the APPs:

- require that organisations only collect personal information that is reasonably necessary for the organisation's functions or activities;
- impose further restrictions on how organisations can collect sensitive information (for example health information) by requiring that sensitive information can only be collected with consent from the individual; and
- require that organisations only use or disclose personal information for a purpose for which it was collected or for a secondary purpose only where an exception applies.

A provider's failure to comply with the APPs will mean that the provider fails to comply with paragraph 19-60(3)(a) of the Act. The Minister can take compliance action against the provider for such non-compliance, for example, by issuing a compliance notice under section 19-82 of the Act, imposing conditions on the provider's approval under section

16-60 of the Act, or suspending or revoking the provider's approval under Division 22 of the Act.

As such, the Amendment Instrument requiring that providers comply with the APPs is consistent with, and protects, the right to privacy as it imposes a requirement on providers to comply with the APPs in relation to student personal information obtained for the purposes of complying with the requirements related to a provider's support for students policy, which creates additional protections for students by limiting how providers can collect, use, handle or disclose student personal information.

Further, any information collected by providers for the purposes of complying with the requirements related to a provider's support for students policy, is also subject to the information management provisions in Part 5-4 of the Act. Specifically, Division 179 restricts how personal information obtained and created under Chapter 2 of the Act (which is relevant to the requirements related to the support for students policy) can be used or disclosed. Subsection 179-10(1) of the Act provides that an officer (which includes a person who is or was an officer of a provider) commits an offence if the officer uses personal information and that use was not done in the course of the officer's official employment. The offence in subsection 179-10(1) carries a penalty of imprisonment for 2 years. Division 179 provides further protections for student privacy by limiting how providers can use personal information collected for the purposes of complying with the requirements related to a provider's support for students policy.

The Amendment Instrument also requires that providers, in giving a report to the Minister on its compliance with its support for students policy, must only provide de-identified information. De-identified information has the same meaning as in the Privacy Act, and personal information is de-identified if the information is no longer about an identifiable individual or an individual who is reasonably identifiable. This means that providers, in giving the report to the Minister, will only be able to provide aggregated data that does not identify individuals or include details that would allow an individual to be identified. This protects the right to privacy as it limits the disclosure of student personal information, by requiring that providers only provide de-identified information in their report to the Minister.

Conclusion

The Amendment Instrument is compatible with human rights because it supports the right to education, and is consistent with, and protects, the right to privacy. If there are any limitations imposed on the right to privacy by the requirements in the Amendment Instrument, these limitations achieve a legitimate objective (of ensuring providers are complying with their requirements to support students under the Act) and are lawful and not arbitrary (noting information must only be collected by providers consistent with the APPs and Part 5-4 of the Act, and only de-identified information must be given by providers to the Minister).

Minister for Education, The Hon Jason Clare MP

HIGHER EDUCATION PROVIDER AMENDMENT (SUPPORT FOR STUDENTS POLICY) GUIDELINES 2023

EXPLANATION OF PROVISIONS

Part 1 – Introduction

Section 1: Name

1. This section specifies the name of the instrument as the *Higher Education Provider Amendment (Support for Students Policy) Guidelines 2023* (the Amendment Instrument).

Section 2: Commencement

2. This section provides that the Amendment Instrument commences on 1 April 2024.

Section 3: Authority

3. This section provides that the Amendment Instrument is made under section 238-10 of the *Higher Education Support Act 2003* (the Act).

Section 4: Schedules

4. This is a technical provision that explains that each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned.

Schedule 1 – Amendments to the *Higher Education Provider Guidelines 2023*

Higher Education Provider Guidelines 2023

Item 1

1. Item 1 amends section 4 of the *Higher Education Provider Guidelines 2023* (the Principal Instrument) to define ‘de-identified’ as having the same meaning as in the *Privacy Act 1988* (the Privacy Act).
2. Item 1 also inserts a note under the new definition of ‘de-identified’ that provides that, for the purposes of the Privacy Act, personal information is de-identified if the information is no longer about an identifiable individual or an individual who is reasonably identifiable.

Item 2

3. Item 2 inserts a new Chapter 4A and a new section 21A in the Principal Instrument.
4. New Chapter 4A and section 21A impose new requirements on higher education providers for the purposes of paragraph 19-60(3)(a) of the Act. New section 21A requires that higher education providers must comply with the Australian Privacy Principles set out in Schedule 1 to the Privacy Act, in respect of student personal information obtained for the purposes of section 19-43 of the Act (i.e., for the purposes of complying with the support for students policy requirements in section 19-43 of the Act).

Item 3

5. Item 3 inserts a new Chapter 10A in the Principal Instrument that sets out requirements in relation to providers’ support for students policies.
6. New section 49A sets out the requirements in relation to providers’ support for students policies.
7. New subsection 49A(1) sets out the requirements on what information the support for students policy must include.
8. New paragraph 49A(1)(k) requires that a provider’s support for students policy must include information describing the provider’s crisis and critical harm response arrangements for students and instructions to students on how to report such incidents. A provider’s crisis and critical harm response arrangements should include the provider’s response arrangements in relation to sexual harm and sexual assault.
9. New subsection 49A(2) requires that providers’ support for students policies must be reviewed annually, and must be made publicly available. This subsection also provides that, if the provider references any of its other policies or provides information about

its support services or where to access those services in its support for students policy, those other policies and that information must also be made publicly available and communicated to each individual student.

10. New subsection 49A(2) also has a note that a higher education provider must have one support for students policy that satisfies the requirements in section 19-43 of the Act and this section 49A. The note clarifies that the support for students policy may be an overarching policy which attaches or refers to other policies or information about support services that meet the requirements in section 49A (provided that those other policies or any other information provided be made publicly available and is communicated to each individual student).
11. New section 49B sets out the requirements in relation to the reports given by providers to the Minister on providers' compliance with their support for students policies.
12. New subsection 49B(1) requires that the reports include certain quantitative (if available) and qualitative de-identified information in relation to the calendar year before the report is provided.
13. New paragraph 49B(1)(g) requires that the report include examples of how the provider's available support services, as detailed in the provider's support for students policy, assisted students in undertaking the units of study in which they are enrolled. The examples provided in the report could take the form of case studies that describe how the provider's available support services assisted students in undertaking the units of study in which they were enrolled.
14. New subsection 49B(2) requires that the reports must be provided annually on or before 1 March. The note under this subsection explains that, in the first year the report is due, a higher education provider is only required to provide the information in the report provided under subsection 19-43(5) of the Act that relates to its compliance with the requirements in Chapter 10A from 1 April 2024 to 31 December 2024. This is because, while subsection 49B(1) requires that the provider report on specific information in relation to the calendar year before the report is provided, in the first year that the report must be provided (i.e., 2025), Chapter 10A will not have applied for the entire calendar year (since Chapter 10A only commenced on 1 April 2024).
15. The note further clarifies that, if the information required by subsection 49B(1) does not relate to the provider's compliance with the requirements in Chapter 10A (e.g. where that information relates to the provider's compliance with the requirements found in paragraph 19-43(2)(a) of the Act), the provider will be required to report on that information in relation to the entire calendar year before the report is provided (i.e. from 1 January 2024 to 31 December 2024).