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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

HIGHER EDUCATION LEGISLATION AMENDMENT (PROVIDER CATEGORY STANDARDS AND OTHER MEASURES) BILL 2020

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education, the Honourable Dan Tehan MP)

HIGHER EDUCATION LEGISLATION AMENDMENT (PROVIDER CATEGORY STANDARDS AND OTHER MEASURES) BILL 2020

OUTLINE

The Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020 (**the Bill**) proposes to amend the *Tertiary Education Quality and Standards Agency Act 2011* (**TEQSA Act**) to:

- give effect to the Commonwealth Government's decision to implement the recommendations arising from the *Review of the Higher Education Provider Category Standards* (**PCS Review**);

- give effect to an outstanding recommendation from the *Review of the impact of the TEQSA Act on the higher education sector* (**Impact Review**), to refer to the Threshold Standards as a single unified framework; and

- improve regulation of Australia's higher education sector through a small number of other measures, including to ensure student records can be appropriately handled following a provider ceasing to operate and to protect the term 'university' as it appears in Australian internet domain names.

The Bill also proposes to amend the *Higher Education Support Act 2003* (**HESA**) to:

- replace references to 'Indigenous students' with 'Indigenous persons' to provide clarity around the scope of 'Indigenous Student Assistance Grants'.

The 2017–18 Budget included a measure to undertake a review of the Higher Education Provider Category Standards, which are part of a legislative instrument, the *Higher Education Standards Framework (Threshold Standards) 2015* (**the Threshold Standards**). The PCS Review, undertaken by Emeritus Professor Peter Coaldrake AO in 2018-19, recommended amendments to the Provider Category Standards to ensure they support the Government's goals for a diverse and high-quality higher education sector that meets the needs of students, employers, higher education providers and the wider community, with category standards that are fit for purpose for the future.

At the Minister's request, and as required by Section 58 of the TEQSA Act, the Higher Education Standards Panel (**the Panel**), which advises the Commonwealth Minister for Education on changes to the Higher Education Standards Framework and on higher education quality and regulatory matters, proposed amendments to the Threshold Standards to give effect to the PCS Review recommendations. To accommodate these proposed amendments to the Threshold Standards, complementary amendments are also proposed to be made to the TEQSA Act by this Bill to ensure that the Threshold Standards can be made as proposed. Should this Bill be enacted, new Threshold Standards, in the form proposed by the Panel, will therefore be made by legislative instrument, with both the legislative instrument

and relevant provisions of the Bill to come into effect on the same date, to be fixed by proclamation..

In particular, the measures in Schedule 1 of the Bill will:

- amend a small number of references to provider category types, to reflect the new provider category names. References to ''a provider category that permits the use of the word "university"' will be replaced with references to either the 'Australian University' or 'Overseas University' provider category, to account for the introduction of the new 'University College' category for high quality, high-performing non-university providers (which will be permitted to use the term 'university' in their name);

- enable TEQSA to make a determination setting out factors it will take into consideration when assessing the quality of research under new university research benchmarks; and

- clarify references to the type of self-accrediting authority for 'Australian University' category providers (as required to give effect to the introduction in the Threshold Standards of a subset of the 'Australian University' category of universities that have a 'specialised focus', and which do not have full self-accrediting authority).

The Impact Review was conducted by Deloitte Access Economics in 2016-17, in accordance with section 203 of the TEQSA Act, which required that, before 1 January 2016, the Minister commence a review of the impact of the TEQSA Act on the higher education sector. The majority of amendments required to respond to this review were made through the *Tertiary Education Quality and Standards Agency Amendment Act 2019*. The outstanding recommendation, which was deferred until after completion of the PCS Review, proposed reframing references to the Threshold Standards in the TEQSA Act as a single unified framework, instead of four distinct types of Threshold Standards. This amendment will enable the structure of the Threshold Standards instrument to be simplified, making it clearer to read and use.

Other measures to improve higher education regulation given effect by the Bill will:

- include reference to the Australian Qualifications Framework qualification type 'undergraduate certificate' in the definition of 'higher education award';

- allow TEQSA to extend the period of a provider's registration or course accreditation more than once, which will help TEQSA manage its regulatory workload better and provide low-risk providers with additional flexibility;

- allow merits review of a decision by TEQSA not to change a provider's category;

- provide TEQSA with the legislative authority to assume control of higher education student records from a registered higher education provider in the

event the provider ceases operations (and to allow students and providers to request access):

    - This measure is part of the Government’s Job-ready Graduates package, and will help current and former higher education students obtain access to their academic records in the event that a registered higher education provider ceases to operate;

    - The measure will provide TEQSA with similar legislative powers to those conferred on the Australian Skills Quality Authority (ASQA) in sections 211 to 214 of the *National Vocational Education and Training Regulator Act 2011*, which require registered training organisations to provide ASQA with a copy of their student records within 30 days of ceasing operation.

- protect use of the word ‘university’ in Australian internet domain names, by requiring consent of the Minister to issue a domain name containing the word ‘university’ or words or expressions that have the same or similar meaning.

The amendments in Schedule 2 of the Bill will replace references to ‘Indigenous student’ with ‘Indigenous person’ in Part 2-2A of HESA to ensure that providers can use Indigenous student assistance grants to assist prospective Indigenous students as well as existing students.

Overall, the amendments are intended to help clarify and streamline the regulatory framework for the benefit of higher education providers, students and potential students.

FINANCIAL IMPACT STATEMENT

The student records management provisions in the Bill are expected to cost $2 million over four years from 2020–21. The other measures in the Bill have no financial implications.

REGULATION IMPACT STATEMENT

The Regulation Impact Statement for the Bill titled "*What's in a Name? Review of the Higher Education Provider Category Standards*" is at the end of this Explanatory Memorandum (Attachment A).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

HIGHER EDUCATION LEGISLATION AMENDMENT (PROVIDER CATEGORY STANDARDS AND OTHER MEASURES) BILL 2020

The Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020 (**the Bill**) 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 Bill

The Bill proposes to amend the *Tertiary Education Quality and Standards Agency Act 2011* (**TEQSA Act**) to:

- give effect to the Commonwealth Government's decision to implement the recommendations arising from the *Review of the Higher Education Provider Category Standards* (**PCS Review**);
- give effect to an outstanding recommendation from the *Review of the impact of the TEQSA Act on the higher education sector* (**Impact Review**), to refer to the Threshold Standards as a single unified framework; and
- improve regulation of Australia's higher education sector through a small number of other measures, including to ensure student records can be appropriately handled following a provider ceasing to operate and to protect the term 'university' as it appears in Australian internet domain names.

The Bill also proposes to amend the *Higher Education Support Act 2003* (**HESA**) to:

- replace references to 'Indigenous students' with 'Indigenous persons' to provide clarity around the scope of 'Indigenous Student Assistance Grants'.

The 2017–18 Budget included a measure to undertake a review of the Higher Education Provider Category Standards, which are part of a legislative instrument, the *Higher Education Standards Framework (Threshold Standards) 2015* (**the Threshold Standards**). The PCS Review, undertaken by Emeritus Professor Peter Coaldrake AO in 2018-19, recommended amendments to the Provider Category Standards to ensure they support the Government's goals for a diverse and high-quality higher education sector that meets the needs of students, employers, higher education providers and the wider community, with category standards that are fit for purpose for the future.

The Higher Education Standards Panel (**the Panel**), which advises the Commonwealth Minister for Education on changes to the Higher Education Standards Framework and on higher education quality and regulatory matters, drafted amendments to the Threshold Standards to give effect to the PCS Review recommendations. To accommodate these proposed amendments to the Threshold Standards, complementary amendments are also proposed to be made to the TEQSA Act by this Bill to ensure that the Threshold Standards can be made as proposed.

The Bill provides capacity for TEQSA to make a determination, by legislative instrument, setting out factors it will take into consideration when assessing the quality and quantity of research under new university research benchmarks. It also clarifies references to the type of self-accrediting authority for 'Australian University' category providers under the new Threshold Standards.

In response to an outstanding recommendation from the Impact Review, references to the Threshold Standards will be reframed as a single unified framework, instead of four distinct types of Threshold standards as originally specified in the TEQSA Act.

Other measures to improve higher education regulation given effect by the Bill will:

- include reference to the Australian Qualifications Framework qualification type 'undergraduate certificate' in the definition of 'higher education award';

- allow TEQSA to extend the period of a provider's registration or course accreditation more than once, which will help TEQSA manage its regulatory workload better and provide low-risk providers with additional flexibility;

- allow merits review of a decision by TEQSA not to change a provider's category;

- provide TEQSA with the legislative authority to assume control of higher education student records from a registered higher education provider in the event the provider ceases operations:

  - This measure is part of the Government's Job-ready Graduates package, and will help current and former higher education students obtain access to their academic records in the event that a registered higher education provider ceases to operate;

  - The measure will provide TEQSA with similar legislative powers to those conferred on the Australian Skills Quality Authority (**ASQA**) in sections 211 to 214 of the *National Vocational Education and Training Regulator Act 2011*, which require registered training organisations to provide ASQA with a copy of their student records within 30 days of ceasing operation.

- protect use of the word ‘university’ in Australian internet domain names, by requiring consent of the Minister to issue a domain name containing the word ‘university’ or its derivatives.

Analysis of human rights implications

The Bill engages the following human rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**);
- the right to privacy – Article 17 of the *International Covenant on Civil and Political Rights* (**ICCPR**); and
- the right to freedom of expression – Article 19 of the ICCPR.

Right to education

The Bill engages the right to education, which is set out in Article 13 of the ICESCR. The right to education recognises the important personal, societal, economic and intellectual benefits of education.

The measures contained in the Bill amend the Threshold Standards to simplify and streamline provider categories, and clearly articulate the requirements to be categorised as a particular type of higher education provider. This will help to ensure a diverse and high-quality higher education sector that meets the needs of students, employers, higher education providers and the wider community.

The Bill also makes a number of amendments that are technical in nature, and are designed to provide TEQSA with greater flexibility in conducting its regulatory functions, consistent with its risk-based and proportionate approach to regulation. These will, in turn, improve higher education providers' ability to deliver high-quality teaching, learning and research, optimising educational outcomes for students.

Provisions in the Bill allowing TEQSA to collect some student records will help current and former higher education students to obtain access to their academic records in the event that a registered higher education provider ceases to operate. In the past, students of providers that have ceased operation have had difficulty in obtaining their student records, as current arrangements for accessing these records are unclear. These amendments are intended to address this.

TEQSA currently has no legislative authority to take custody of such records. In the past, when former students of closed providers have sought TEQSA's assistance to gain access to their academic records it has had to rely solely on the goodwill of, and professional relationships forged with, the relevant providers, liquidators and the like, to facilitate access to records. This measure promotes the right to education by ensuring students can access their records and transition without impediment to new educational opportunities with other tertiary education providers and, more broadly, supports student access to and participation in higher education in Australia.

The Bill is compatible with the right to education because the amendments, separately and in combination, will clarify and streamline the regulatory framework

associated with the provision of education to the benefit of higher education providers, students and potential students.

The amendments in Schedule 2 confirm the arrangements provided in Part 2-2A of HESA. For detailed discussion of the human rights implications of Part 2-2A, see the statement of compatibility with human rights in the explanatory memorandum to the Higher Education Support Legislation Amendment (2016 Measures No. 1) Bill 2016.

Right to privacy

The Bill engages Article 17(1) and 17(2) of ICCPR, which states that "no one shall be subject to arbitrary or unlawful interference with his privacy…nor to unlawful attacks on his honour and reputation" and that "everyone has the right to the protection of the law against such interference or attacks".

The right to privacy under Article 17 allows, impliedly, for the right to be limited provided that limitation or purported interference is not 'arbitrary' or 'unlawful'. In order for an interference with the right to privacy to be permissible, the interference must be prescribed or authorised by law, be for a reason consistent with the ICCPR and be reasonable, necessary and proportionate means for pursuit of a legitimate objective. The UN Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The Bill engages the right to privacy because it authorises TEQSA to collect student records that may include personal information (within the meaning of the *Privacy Act 1988*) from a registered higher education provider in the event the provider ceases operations. As a result, this measure would necessarily involve the access, transfer and storage of student personal information, including sensitive information.

This measure is reasonable, necessary and proportionate means for pursuit of a legitimate objective because it is designed to help current and former higher education students to obtain access to their academic records in the event that a registered higher education provider ceases to operate. Currently a student may have to approach a number of different entities such as liquidators, parent companies, new owners, former managers or academics in order to access their academic records, which in some cases may be incomplete or unusable. Information about students can only be obtained, used and disclosed under these provisions in the furtherance of this legitimate policy objective.

The proposed amendments are also targeted, measured and subject to existing privacy protections. They specify clearly the circumstances in which the transfer of personal information from a provider to TEQSA is permitted or required. Notably, as a Commonwealth agency, TEQSA and its staff are subject to the terms of the Privacy Act and the Australian Privacy Principles (**APPs**) established under that Act.

Personal information held by TEQSA as a result of this measure will only be able to be accessed and disclosed by TEQSA in circumstances consistent with the purpose for which the information was collected (APP 6). TEQSA may disclose the

information to the student to whom it relates (APP12), or under certain circumstances to a second higher education provider, to facilitate the movement of a student's academic records to another higher education provider where the student enrolls with that provider and has consented to the information being passed to the new provider.

TEQSA will undertake a privacy impact assessment (**PIA**) as part of its implementation of this measure to ensure that its handling of personal information under the new provisions in the Bill complies with the *Privacy Act 1988*.
To the extent that these measures limit the right to privacy, such limitations are consistent with the prohibition on arbitrary interference with privacy as they are directed at a legitimate objective and are reasonable and proportionate to that objective. Further, in streamlining the access route to private information that is held by providers which have ceased operation, the measure aims to improve the protection of the privacy of students affected by provider closures. Students of closed higher education providers will have a single point for access for their academic transcripts, assessment results, grades, and qualifications, without having to approach a range of individuals and entities to which the records may have passed in the absence of TEQSA's role (as is currently the case).

Right to freedom of expression

The Bill engages the right to freedom of opinion and expression as contained in Article 19 of the ICCPR. Amongst other things, Article 19 states that individuals must have the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers'. Under Article 19(3), the right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.

The Bill will require approval of the Minister before a licence can be issued to use an Australian internet domain name containing the word 'university' (or expressions of similar meaning). This measure will, in effect, limit the capacity of individuals to choose domain names in some circumstances where those domain names include the word 'university' or expressions of similar meaning – for example 'uni' or, in some cases, 'U'. This restriction mirrors similar requirements on the issuing of company and business names containing the word 'university' or derivatives of that term.

The policy intent underpinning this measure is to protect the reputation of Australian higher education institutions by preventing misleading, or deceptive use of the word 'university' in company names, business names and domain names in ways that could undermine the standing or reputation of individual institutions or the higher education sector as a whole. Protecting the use of the word 'university' is one element of Australia's higher education quality arrangements. Restricting the use of the word 'university' in company names, business names and domain names ensures that employers and students can be confident that any institution with the word 'university' in its title meets the relevant quality requirements. It also acts as a consumer protection measure to limit the opportunity for individuals to be misled

about the nature and standing of a business or service that claims to have a connection to one or more universities.

In today's online world, internet domain names are effectively the trading names of many businesses and services, many of which are unincorporated and do not seek formal approval of a business or company name.

Under guidelines approved by the Minister, approval may be granted, for example, where the applicant:

- is a university itself or has the approval of a university to use its name – for example in a campus-based club or business; or

- is not a university or a university-related entity with approval to use the university's name, and:

    - does not propose to provide education services or information about education services;
    - does not purport to operate as a university;
    - the proposed name reflects the purpose for which the business is being formed.

A policy to limit the allocation of domain names containing the word 'university' was previously in operation through inclusion of the word 'university' on the reserved list of .auDA, the Government-endorsed industry self-regulatory body for the .au Country Code internet Top Level Domain space. The Bill will provide specific authority to reinstate the policy as a matter of law.

The requirement to seek approval for use of the word 'university' in a domain name is a reasonable, necessary and proportionate response to the need to maintain the integrity and reputation of Australia's higher education system. This is because an authorisation process is the least restrictive means to minimize the likelihood of domain names being misused. The authorisation process is limited and proportionate to the reasonable policy objective of curtailing the misuse of 'university' or analogous words in domain names.

There is no restriction on the use of a domain name once it has been licensed. As is the case in relation to company and business names, the restriction effectively applies to those responsible for issuing domain name licences, rather than on individuals who have been issued a licence.

The Bill is compatible with the right to freedom of expression as the limitation will be prescribed by law, pursue a legitimate objective that is rationally connected to the limitation and is a proportionate means of doing so.

Conclusion

Measures in the Bill, which bolster TEQSA's regulatory capabilities, enable amended Threshold Standards, allow TEQSA to specify matters in relation to new research

quality benchmarks for providers in the ‘Australian University’ category, simplify and consolidate tertiary provider categories and assist students to access their records in the event a provider ceases to operate, support and enhance the right to education by improving both the governance arrangements and the functional experience of students entering, and navigating through, the tertiary education system. To the extent that measures contained in the Bill may limit human rights, these limitations are reasonable, necessary, and proportionate to the legitimate policy aims to which those measures are directed.

The Bill is compatible with human rights.

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NOTES ON CLAUSES

Clause 1 - Short title

This clause provides for the Act to be the *Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Act 2020.*

Clause 2 - Commencement

The table in subclause 2(1) sets out when the Act's provisions will commence. The table provides that:

- sections 1 to 3 and anything in the Act not covered elsewhere in the table commence on the day the Act receives the Royal Assent;
- Part 1 of Schedule 1 – containing the Provider Category Standards-related amendments – commences on a date to be fixed by Proclamation or, if the provisions do not commence within 12 months from the day the Act receives the Royal Assent, the provisions commence the day after the end of that 12 month period;
- Part 2 of Schedule 1 – containing the other regulatory measures in the Bill – commences the day after the Act receives the Royal Assent;
- Items 1 to 4 of Schedule 2 - commences the day after the Act receives the Royal Assent
- Item 5 of Schedule 2 commences immediately after the commencement of Items 1 to 4 of Schedule 2. However, the Item does not commence at all if Schedule 1 to the *Higher Education Support Amendment (Job-ready Graduates and Supporting Regional and Remote Students) Act 2020* commences on or before the day on which Items 1 to 4 of Schedule 2 commence.

Subclause 2(2) provides that information in column 3 of the table at subclause 2(1) is not part of the Act and information may be inserted into column 3 or information in it may be edited in any published version of the Act.

Clause 3 - Schedules

This clause provides that any legislation that is specified in a schedule is amended or repealed as set out in the applicable items in the schedule and that any other item in a schedule has effect according to its terms.

LIST OF ABBREVIATIONS

COAG	Council of Australian Governments
HESA	*Higher Education Support Act 2003*
Impact Review	Review of the Impact of the TEQSA Act on the higher education sector undertaken by Deloitte Access Economics and published in 2018
Panel	Higher Education Standards Panel
PCS Review	Review of the higher education Provider Category Standards conducted by Emeritus Professor Peter Coaldrake AO and released in 2019.
TEQSA Act	*Tertiary Education Quality and Standards Agency Act 2011*

Schedule 1 – Higher Education standards and other amendments

Summary

The amendments in Part 1 of Schedule 1 give effect to:

- recommendations arising from the PCS Review that require a legislative response; and
- an outstanding recommendation from the Impact Review – this is done by removing references to different types of Threshold Standards.

The amendments in Part 2 of Schedule 1 enact a number of other measures intended to strengthen the way the TEQSA Act is administered and TEQSA's regulatory role to:

- include reference to the new Australian Qualifications Framework qualification type 'undergraduate certificate' in the definition of 'higher education award';
- allow TEQSA to extend the period of a provider's registration or course accreditation more than once;
- introduce external merits review of a decision by TEQSA not to change the category in which a provider is registered;
- provide TEQSA with the legislative authority to assume collect and disclose higher education student records from a registered higher education provider in the event the provider ceases operations; and
- require domain name licensors to obtain ministerial consent to use the term 'university' or its derivatives in Australian internet domain names.

Detailed explanation

Part 1 – Higher education standards

Tertiary Education Quality and Standards Agency Act 2011

Item 1

Section 4 of the TEQSA Act is a simplified outline of the TEQSA Act.

Item 1 omits and substitutes that part of the outline which relates to the need for registered higher education providers to have their courses of study accredited before they can provide those courses in connection with regulated higher education awards.

The new wording is similar to the current wording, except that it makes some minor drafting changes and clarifies that some providers (including those registered in the 'Australian University' category) are authorised to self-accredit some or all of their courses of study.

Items 2 to 5

These items amend the definitions contained in section 5 of the TEQSA Act to remove references to different types of Threshold Standards, in line with the outstanding recommendation of the Impact Review, as follows:

- Item 2 repeals and substitutes the definition of ***Higher Education Standards Framework*** – the new definition being the Threshold Standards and any other standards made under paragraph 58(1)(b). The capacity for the Minister to make standards in addition to the Threshold Standards, should the need ever arise, is retained.
- Item 3 amends the definition of ***provider category*** so that it now means a provider category listed in the Threshold Standards (instead of a provider category listed in the Provider Category Standards). Once the new Threshold Standards come into effect, the provider categories will be described in a separate part of the Threshold Standards, rather than a separately constituted and separately named set of 'Provider Category Standards'.
- Item 4 repeals the following definitions, which are no longer required because the relevant standards will no longer be used, and instead their content will be captured in the Threshold Standards:
    - ***Provider Category Standards***
    - ***Provider Course Accreditation Standards***
    - ***Provider Registration Standards***
- Item 5 repeals and substitutes the definition of ***Threshold Standards*** – the new definition being the Threshold Standards made under paragraph 58(1)(a), The new singular set of Threshold Standards will replace the current four separate types of Threshold Standards – see also amendments to subsection 58(1) made by (**Item 14**).

Items 6 to 9

Items 6 to 9 make minor changes to the language used in various provisions of the TEQSA Act to reflect the introduction of the new 'Australian University' and 'Overseas University' provider categories.

Item 6 amends paragraphs 19(2)(b) and 20(2)(b) to omit "permits the use of the word 'university'" and, substitutes it with: "is either the 'Australian University' or 'Overseas University' provider category, to reflect the change in provider categories under the Threshold Standards.

Section 33 of the TEQSA Act concerns decisions that TEQSA proposes to make about the ability of a registered higher education provider, that is registered in a provider category that permits the use of the word ‘university’, to self-accredit its courses. Item 7 amends paragraph 33(1)(a) to omit reference to “permits the use of the word ‘university’:” and substitutes it with: “either the ‘Australian University’ or ‘Overseas University’ provider category”, to reflect the change in provider categories under the Threshold Standards.

Section 36 of the TEQSA Act concerns decisions by TEQSA on whether to renew the registration of a registered higher education provider. Under subsections 36(5) and 36(6), if TEQSA proposes to reject an application for renewal of registration made by a provider that is registered in a provider category that permits the use of the word ‘university’, then TEQSA must give the provider and the relevant state or territory minister for higher education notice of the proposed decision and allow them the opportunity to provide representations about the matter. Item 8 amends paragraph 36(6)(b) to omit reference to permitting the use of the word ‘university’ and, instead, substitutes reference to either the ‘Australian University’ or ‘Overseas University’ provider category to reflect the change in provider categories under the Threshold Standards.

Section 39 of the TEQSA Act concerns consultations that TEQSA must undertake when considering whether to make a decision under subsection 38(1) to change the category in which a provider is registered. Under paragraph 39(1)(b), if TEQSA proposes to make a decision under subsection 38(1) to change a provider’s category of registration and the provider is registered in a provider category that permits the use of the word ‘university’ – then TEQSA must give the provider and the relevant state or territory minister for higher education notice of the proposed decision and allow them the opportunity to provide representations about the matter.

Item 9 amends paragraph 39(1)(b) to omit reference to permitting the use of the word ‘university’ and, instead, substitutes reference to either the ‘Australian University’ or ‘Overseas University’ provider category.

Items 10 and 11

Section 45 of the TEQSA Act concerns who can accredit courses of study. Subsection 45(1) provides that registered higher education providers in the Australian university provider category that are established by or under, or recognised by, a Commonwealth, state or territory law, or are registered as companies under Part 2A.2 of the *Corporations Act 2001*, are authorised to self-accredit their courses that lead to a higher education award they offer or confer.

Item 10 replaces the words “Australian university provider category” in paragraph 45(1)(a) with the words “‘Australian University’ provider category”, to better reflect the way the new provider category is expressed in the Threshold Standards.

Item 11 inserts a new subsection 45(2A) which provides that subsection 45(1) does not apply to registered higher education providers in the ‘Australian University’

category if they have a specialised focus in accordance with the Threshold Standards. This is necessary as, in future, the 'Australian University' category will encompass providers that offer courses across a broad curriculum in several fields of education, as well as providers that offer a more limited offering in just one or two fields of education. The latter will not have automatic authority to self-accredit courses outside of their recognised specialised fields of education. They would either need to seek accreditation by TEQSA under section 46 for any courses they wished to offer in other fields of education or, alternatively, seek authority to self-accredit courses in those additional fields of education under section 41.

Items 12, 13, 16 and 17

Items 12, 13, 16 and 17 make minor amendments to paragraph 49(1)(b), subsection 56(1), section 61 and paragraph 98(d) of the TEQSA Act to omit 'Provider Course Accreditation Standards' and substitute 'Threshold Standards', as the Provider Course Accreditation Standards are being replaced with the Threshold Standards.

Item 14

Subsection 58(1) of the TEQSA Act provides that the Minister may, by legislative instrument, make a number of standards that together comprise the Higher Education Standards Framework. These are: the Provider Registration Standards; the Provider Category Standards; the Provider Course Accreditation Standards; the Qualification Standards (all four of which Note 1 explains make up the Threshold Standards); as well as other standards against which the quality of higher education can be assessed.

Item 14 repeals and substitutes subsection 58(1). New subsection 58(1) provides that the Minister may, by legislative instrument, make standards that together comprise the Higher Education Standards Framework. These are the Threshold Standards and other standards against which the quality of higher education can be assessed. This change streamlines the standards providers are expected to satisfy, in line with an outstanding recommendation of the Impact Review. A Note draws attention to subsection 33(3) of the *Acts Interpretation Act 1901* which clarifies that the power to make the standards includes the power to vary or revoke them.

Item 15

Item 15 inserts new section 59A. New subsection 59A(1) provides that, if TEQSA is considering the Threshold Standards, to the extent they relate to research, either in relation to:

- a regulated entity that has applied to TEQSA for registration within the "Australian University" provider category;
- a registered higher education provider that has applied under section 38 to change to the "Australian University" provider category; or
- a registered higher education provider that is in the "Australian University" provider category (for example, in relation to deciding whether to renew the registration of a registered higher education provider as an "Australian

University” under section 36 of the TEQSA Act, or in relation to compliance assessments undertaken under section 59 of the TEQSA Act);

then TEQSA must have regard to the quality of the research undertaken by the entity or provider.

This reflects the PCS Review’s recommendation that new research quality benchmarks be included in the Threshold Standards for providers in the ‘Australian University’ category. While the current Provider Category Standards require universities to undertake “research that leads to the creation of new knowledge and original creative endeavour”, they do not specify how this is to be measured or assessed.

New subsection 59A(2) provides that, in having regard to the research undertaken by the entity or provider under new subsection 59A(1), TEQSA must have regard to the matters determined in an instrument made under new subsection 59A(7) (if such an instrument is in force).

New subsection 59A(3) specifies that new subsection 59A(2) does not limit the matters to which TEQSA may have regard (in considering the quality of research undertaken by an entity or provider under subsection (1)).

New subsection 59A(4) provides that TEQSA may, in writing, determine matters relating to the quality of research for the purposes of new section 59A.

New subsection 59A(5) provides that a determination made under new subsection 59A(4) has no effect unless the Minister approves it in writing.

New subsection 59A(6) specifies that TEQSA must give the Minister such information as the Minister reasonably requires for the purposes of approving the determination.

New subsection 59A(7) provides that a determination under subsection 59A(4) made by TEQSA and approved by the Minister is a legislative instrument made by the Minister on the day on which the determination is approved.

Item 18

Section 108 provides for an offence and a civil penalty for a regulated entity that uses the word ‘university’ in representations about itself or its operations concerning courses of study and higher education awards – when the entity is not registered in a ‘university’ category.

Item 18 amends paragraphs 108(1)(b) and 108(2)(b) to omit the words “a provider category that permits the use of the word ‘university’” and substitutes “the ‘Australian University’ or ‘Overseas University’ provider category”, to better reflect the way the new provider category is expressed.

Neither the offence nor civil penalty will apply to providers in the new ‘University College’ category as long as they represent themselves as a University College, rather than a University. A requirement within the new Threshold Standards will mandate that, while a University College category provider is welcome to use the word ‘university’ in its institutional branding, it must only do so by using the full category name ‘university college’ and not just the word ‘university’ in isolation.

Item 19 is an application provision which provides as follows:

- the amendments made to paragraphs 19(2)(b) and 20(2)(b) of the TEQSA Act (see **Item 6**) apply to applications made on or after the commencement of Item 19;
- the amendments made to paragraphs 33(1)(a), 36(6)(b) and 39(1)(b) of the TEQSA Act (see **Items 7, 8 and 9**) apply to decisions made on or after the commencement of Item 19;
- the amendment that inserts subsection 45(2A) of the TEQSA Act (see **Item 11**) applies in relation to working out whether a registered higher education provider is authorised to self-accredit a course of study on or after the commencement of Item 19;
- the amendment made to paragraph 49(1)(b) of the TEQSA Act (see **Item 12**) applies to applications for accreditation of courses of study made on or after the commencement of Item 19, or that were pending immediately before that commencement;
- the amendment made to subsection 56(1) of the TEQSA Act (see **Item 13**) applies to applications for renewal made on or after the commencement of Item 19, or that were pending immediately before that commencement;
- the amendment made to insert subsection 59A(1) (see **Item 15**) of the TEQSA Act applies in relation to the consideration of the Threshold Standards on or after the commencement of Item 19, whether the research was undertaken before, on or after that commencement;
- the amendment made to paragraph 98(d) of the TEQSA Act (see **Item 17**) applies in relation to a failure to ensure that an accredited course in relation to a provider meets the Threshold Standards that occurred on or after the commencement of Item 19;
- Subdivision A of Division 1 of Part 7 of the TEQSA Act (Administrative sanctions), as in force immediately before the commencement of Item 19, continues to apply on or after that commencement in relation to a failure referred to in paragraph 98(d) (i.e. a failure to ensure that an accredited course in relation to a provider meets the Provider Course Accreditation Standards) that occurred before the commencement of Item 19; and
- the amendments made to section 108 of the TEQSA Act (see **Item 18**) apply to uses of the word ‘university’ on or after the commencement of Item 19.

Part 2 – Other amendments

Tertiary Education Quality and Standards Agency Act 2011

Item 20

Item 20 expands the definition of ***higher education award*** in section 5 of the TEQSA Act by adding in the words 'undergraduate certificate' after 'bachelor degree'. This reflects COAG Education and Skills Councils' agreement to add 'Undergraduate Certificate' to the Australian Qualifications Framework as a new higher education qualification type from May 2020 to December 2021, unless this period is extended by the Councils.

Item 21

Item 21 inserts a definition of ***higher education student records*** into section 5 of the TEQSA Act, as it is used in new Subdivision C of Division 2 of Part 10 (see **Item 28**). This definition covers documents or objects in any form (including any electronic form):

- held by an entity that is a registered higher education provider, because of the document's or object's connection with a person who is or was enrolled in an accredited course provided by the entity
- held by an entity that is a former registered higher education provider at a time when it was a registered higher education provider, because of the document's or object's connection with a person who was enrolled in an accredited course provided by the entity.

Item 22

Subsection 37A(1) of the TEQSA Act currently provides that TEQSA may extend the period of a registered higher education provider's registration, so long as the period has not been previously extended by TEQSA. Item 22 removes the words 'so long as the period has not been previously extended by TEQSA'. This will enable TEQSA to extend the period of registration more than once. Having this ability may be necessary to manage regulatory activity during the COVID-19 pandemic. It will also offer TEQSA greater flexibility to manage provider registrations into the future, particularly for low risk high quality providers that may have had a previous period of extension – including a relatively short extension period that might have been granted in response to the pandemic.

Items 23 and 24

Under paragraph 38(1)(b) of the TEQSA Act, TEQSA may change the provider category in which a registered higher education provider is registered on application by the provider (under paragraph 38(1)(a), TEQSA may also change the provider category on its own initiative).

Item 23 inserts a new subsection 38(1A) into the TEQSA Act which makes it clear that, where a provider has made an application under paragraph 38(1)(b) application to change its category of registration, TEQSA may decide not to change that category. This addition will enable decisions not to change a provider category to be included in the list of decisions that may be reviewed by the Administrative Appeals Tribunal – see **Item 27**.

Subsection 38(2) provides that, before it makes a decision under subsection 38(1), it must have regard to the Threshold Standards. Item 24 makes a consequential amendment to subsection 38(2) to provide that this requirement to have regard to the Threshold Standards also applies to a decision under the new subsection 38(1A).

Item 25

Section 40 of the TEQSA Act provides that TEQSA must, within 40 days of making a subsection 38(1) decision, give the registered higher education provider written notice of its decision and reasons for the decision. Item 25 amends section 40 to extend this requirement to decisions made under new subsection 38(1A) (see **Item 23**).

Item 26

Subsection 57A(1) of the TEQSA Act currently provides that TEQSA may extend the period of accreditation of a course of study, so long as the period has not been previously extended by TEQSA. Item 26 removes the words 'so long as the period has not been previously extended by TEQSA'. This will enable TEQSA to extend the period of accreditation more than once, just as **Item 22** provides this capacity in relation to extensions of provider registration and for the same reasons.

Item 27

Section 183 of the TEQSA Act contains a table setting out those decisions of TEQSA that are reviewable decisions that may be reviewed by the Administrative Appeals Tribunal following a process of internal review by TEQSA. Item 27 adds a new reviewable decision category to that table – that is, decisions under section 38 not to change the category in which a registered higher education provider is registered (see **Item 23**).

Item 28

Division 2 of Part 10 of the TEQSA Act concerns information management and consists of the following subdivisions:

- Subdivision A (restrictions on the disclosure or use of information)
- Subdivision B (information sharing).

Item 28 adds a new Subdivision C (student records), consisting of the following new sections:

- section 197AA (higher education student records to be provided to TEQSA)
- section 197AB (TEQSA may request higher education student records)
- section 197AC (provision of higher education student records to another registered higher education provider)
- section 197AD (TEQSA's management of higher education student records)
- section 197AE (compensation)

These provisions will enable TEQSA to take custody of the academic records of a higher education provider that closes, ensuring that past students of the provider will have guaranteed and simpler access to their records into the future. Such records are often needed by a student to facilitate their enrolment in a course with another provider, or to verify the units undertaken or qualifications awarded for an employer. The provisions in sections 197AA to 197AE are modelled on similar authority provided to the Australian Skills Quality Authority to assist vocational education and training students in sections 211 to 214 of the *National Vocational Education and Training Regulator Act 2011* (**NVETR Act**).

While not explicitly stated in the provisions, students will have access to their own personal information held by TEQSA by virtue of their rights under the *Privacy Act 1988* and the APPs under that act, to which TEQSA, as an APP entity, is subject. APP 12 (access to personal information) requires an APP entity that holds personal information about an individual to give the individual access to that information on request. APP 12 also sets out minimum access requirements, including the time period for responding to an access request, how access is to be given, and that a written notice, including the reasons for the refusal, must be given to the individual if access is refused.

<u>Section 197AA (higher education student records to be provided to TEQSA)</u>

Subsection 197AA(1) provides that if:

- an entity is a registered higher education provider has effectively ceased to operate; or
- an entity's registration as a registered higher education provider is cancelled.

then TEQSA may, by written notice given to a person who is, or was, an executive officer of the entity, require the person to provide to TEQSA with a copy of the higher education student records (see **Item 21**) relating to an entity as are specified in the notice, within the period specified in the notice.

Subsection 197AA(2) provides that the period specified in the notice must be at least 14 days after the notice is given.

Subsection 197AA(3) provides that a person commits an offence (subject to a penalty of 150 penalty units), where that person possesses or controls higher education student records specified in a notice issued to them under subsection

197AA(1), and fails to comply with that notice (the value of a penalty unit is currently $222).

Subsection 197AA(4) is a civil penalty (of up to 300 penalty units) provision, which is contravened where a person who possesses or controls higher education student records specified in a notice issued to them under subsection 197AA(1), fails to comply with that notice.

These penalties are consistent with 'A guide to framing Commonwealth offences, infringement notices and enforcement powers', published by the Attorney-General's Department, as they are consistent with existing similar offences. In particular, these penalties are consistent with subsections 211(3) and 211(4) of the *National Vocational Education and Training Regulator Act 2011*.

These penalties are necessary to ensure compliance with the notices provided by TEQSA, so that students are able to access their student records and continue their education or gain employment. The size of the penalties is reasonable and proportionate, and reflect the potential harm to students and the reputation of the Australian higher education system of non-compliance. The penalties are also consistent with comparable offences. For example, the penalties created by this section are the same as those applicable to an executive officer or high managerial agent of a vocational education and training provider for a comparable offence under section 211 of the NVETR Act.

Section 197AB (TEQSA may request higher education student records)

Section 197AB entitles TEQSA to issue a notice in writing to a person (where that person is not, and was not, an executive officer of the entity) it considers may hold higher education student records relating to an entity, requesting the person provide a copy of those records specified in the notice to TEQSA where:

- an entity that is a registered higher education provider has effectively ceased to operate; or
- an entity's registration as a registered higher education provider is cancelled

This section will enable TEQSA to request copies of student records that may be held by someone other than an executive officer or former executive officer of a provider that has ceased operating. This is necessary as, once a provider closes, custody of the former provider's assets, including historical student records and data may pass to a range of other individuals or entities, including liquidators or relatives.

Section 197AC (transfer of higher education student records to another registered higher education provider)

Section 197AC facilitates the transfer of higher education student records held by one registered higher education provider to be transferred to another registered higher education provider, where a student transfers providers.

Section 197AC provides that if a person (i.e. student) is enrolled in an accredited course provided by an entity that is a (first) registered higher education provider and then that person transfers their enrolment to a different (second) registered higher education provider, then:

- the person may request the first registered higher education provider provide a copy of the higher education student records the first provider holds about the person to the second registered higher education provider; or
- the second registered higher education provider may, in writing, request the first registered higher education provider provide a copy of the higher education student records the first provider holds about the person to the second registered higher education provider.

Section 197AD (TEQSA's management of higher education student records)

Section 197AD facilitates TEQSA providing a copy of relevant higher education student records to a registered higher education provider where a student requests this to occur if:

- the person to whom the record relates has enrolled, or is seeking to enrol, in an accredited course with the provider and gives TEQSA a written request asking it to provide the record to the provider; or
- with the consent of the person to whom the record relates, the provider gives TEQSA a written request asking it to provide a copy of the record to the provider because the person has enrolled, or is seeking to enrol, in one of the accredited courses it provides.

Section 197AE (compensation)

Subsection 197AE(1) provides that, if the operation of section 197AA would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person, within the meaning of section 51(xxxi) of the Constitution. This is included to remove any doubt about the validity of new section 197AA.

Subsection 197AE(2) specifies that, if the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Item 29

Item 29 inserts a new section 204A into the TEQSA Act.

Subsection 204A(1) specifies that a licence must not be issued for the use of a domain name with either:

- the word "university" in the domain name; or

- a word or expression that has the same or similar name to the word “university” in the domain name

and where the domain name includes an Australian top level domain (such as “.au”) unless there is an approval in force under subsection 204A(2).

Subsection 204A(2) specifies that the Minister may, in writing, give an approval for the purposes of subsection 204A(1).

Subsection 204A(3) specifies that the Minister may delegate the power under subsection 204A(2) to an SES employee, or acting SES employee, in the Department.

Subsection 204A(4) specifies that the Minister’s approval is not a legislative instrument.

Subsection 204A(5) specifies that section 204A relies on the Commonwealth’s legislative power under paragraph 51(v) of the Constitution (the power to make laws with respect to postal, telegraphic, telephonic, and other like services).

Item 30

Item 30 is an application provision which provides as follows:

- the amendment made to section 37A of the TEQSA Act (see **Item 22**) applies to an extension of a higher education provider’s registration given on or after the commencement of Item 30, whether the registration occurred before, on or after that commencement;
- the amendments made to sections 38, 40 and 183 of the TEQSA Act (see **Items 23, 24, 25 and 27**) apply to decisions about not changing provider registration category made on or after the commencement of Item 30, whether an application to change provider registration category was made before, on or after that commencement;
- the amendment made to section 57A of the TEQSA Act (see **Item 26**) applies to an extension of a period of accreditation of a course of study given on or after the commencement of Item 30, whether the accreditation occurred before, on or after that commencement;
- new section 197AA of the TEQSA Act (see **Item 28**) concerning providing copies of higher education student records to TEQSA applies in relation to:
    - a registered higher education provider that effectively ceases to operate on or after the commencement of Item 30
    - the cancellation of a registered higher education provider’s registration on or after the commencement of Item 30;
- new section 197AB of the TEQSA Act (see **Item 28**) concerning TEQSA requesting copies of higher education student records applies in relation to:
    - a registered higher education provider that effectively ceases to operate on or after the commencement of Item 30
    - the cancellation of a registered higher education provider’s registration before, on or after the commencement of Item 30;

- new paragraph 197AC(b) of the TEQSA Act (see **Item 28**) concerning the provision of copies of higher education student records to another registered higher education provider, applies where the person to whom the records relate transfers to the new (second) provider on or after the commencement of Item 30, irrespective of whether the person’s enrolment with the original (first) provider occurred before, on or after that commencement; and

New section 204A of the TEQSA Act (see **Item 29**) concerning issuing licences for the use of a domain name with the words ‘university’ and ‘.au’, applies in relation to the issue of licences on or after the commencement of Item 30.

Schedule 2 – Indigenous student assistance grants

Summary

Schedule 2 to the Bill amends certain sections in Part 2-2A (Indigenous student assistance grants) and other parts of HESA to replace references to 'Indigenous students' with 'Indigenous persons', and to clarify the purpose for which grants under Part 2-2A may be made to higher education providers. These amendments confirm the existing arrangements provided for by Part 2-2A of HESA that providers can use Indigenous student assistance grants to assist prospective Indigenous students as well as existing Indigenous students.

Detailed explanation

Higher Education Support Act 2003

Items 1 and 2 – Paragraph 3-5(1)(aa), Sections 8-1 and 38-1

Items 1 and 2 amend paragraph 3-5(1)(aa) and sections 8-1 and 38-1 of HESA to replace references to 'Indigenous students' with references to 'Indigenous persons.'

These are consequential amendments due to **items 3 and 4**.

Item 3 – Paragraph 38-10(1)(a)

Item 3 amends paragraph 38-10(1)(a) of HESA to replace the reference to 'Indigenous students' with the words 'Indigenous persons (who may or may not be students)'. This amendment confirms that Table A and Table B providers are eligible for Indigenous student assistance grants for the purpose of assisting prospective Indigenous students as well as existing Indigenous students undertaking higher education.

Item 4 – Paragraph 38-10(1)(b)

Item 4 replaces paragraph 38-10(1)(b) of HESA to confirm that Table A and Table B providers are eligible for Indigenous student assistance grants for the purposes of increasing the number of:

- Indigenous persons enrolling in courses leading to higher education awards; and
- students who are Indigenous persons progressing in and completing courses leading to higher education awards.

Examples of activities that are consistent with this purpose can be found in the explanatory memorandum to the Higher Education Support Legislation Amendment (2016 Measures No. 1) Bill 2016.

Item 5 – Subclause 1(1) of Schedule 1

Item 5 inserts a new definition for Indigenous person into Schedule 1 of HESA, being the same definition as in the *Indigenous Education (Targeted Assistance) Act 2000*. Under that Act, 'Indigenous person' means:

(a) a member of the Aboriginal race of Australia; or
(b) a descendant of the Indigenous inhabitants of the Torres Strait Islands.

ATTACHMENT A

Regulation Impact Statement

What's in a Name? Review of the Higher Education Provider Category Standards