

EXPLANATORY STATEMENT

Issued by the authority of Minister for Education

Education Services for Overseas Students Act 2000

Education Services for Overseas Students (Notice Requirements) Instrument 2022

AUTHORITY

Subsections 46B(6) and 46F(5) of the *Education Services for Overseas Students Act 2000* (the Act) provide that the Minister may, by legislative instrument, specify requirements for a notice given under sections 46B and 46F of the Act, respectively.

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 repeal of the *Education Services for Overseas Students (Notifying provider default – requirements for a notice) Determination 2012 (No. 1)* and *Education Services for Overseas Students (Provider default – discharge of obligations – requirements for a notice) Determination 2012 (No. 1)* (the Former Instruments) by the Schedule to this instrument rely on that provision.

PURPOSE AND OPERATION

The purpose of the *Education Services for Overseas Students (Notice Requirements) Instrument 2022* (the Instrument) is to repeal and replace the Former Instruments, which were due to sunset (or automatically repeal) on 1 October 2022 in accordance with the *Legislation Act 2003*, with the Instrument which will specify requirements for notices given by a registered provider under sections 46B and 46F of the Act.

Subsection 46B(1) requires a registered provider to give notices in accordance with section 46B if the provider defaults in relation to one or more overseas students, or intending overseas students, and a course at a location. The provider is required to notify the ESOS Agency, the Tuition Protection Service (TPS) Director and the relevant students in the event of such a default. Section 6C of the Act sets out what the relevant ESOS agency is for a provider or registered provider.

The Instrument specifies additional information that a provider must give when notifying the relevant ESOS agency and the TPS Director that the provider is unable to deliver a course as agreed with a student.

Subsection 46F(1) requires a registered provider to give notices in accordance with section 46F, if the provider defaults in relation to one or more overseas students, or intending overseas students, and a course at a location. Under this section, a registered provider must notify the relevant ESOS agency and the TPS Director of whether, and if so how, they have discharged their obligations under section 46D of the Act after a provider default.

A provider discharges its obligations to a student under section 46D if the provider arranges for the student to be offered a place in a replacement course and the student accepts the offer in writing, or if the provider provides a refund in accordance with subsection 46D(6) of the Act.

Timely information about provider defaults forms part of an effective tuition protection service. The provision of information facilitates prompt and effective responses by providers and, if necessary, by the Tuition Protection Service, in placing students in an alternative course or providing a refund.

REGULATORY IMPACT

The Office of Best Practice Regulation has advised that no RIS is required as the Instrument is unlikely to have a more than minor regulatory impact (OBPR ID: 44167).

COMMENCEMENT

This instrument commences on the day after it is registered on the Federal Register of Legislation.

CONSULTATION

The TPS Director is a Commonwealth statutory officer established by the Act, and has functions that include overseeing the operation of student placements, making payments to providers for accepting students affected by a provider default, overseeing refunds to students, managing the operation of the Overseas Student Tuition Fund and determining the amount of the annual TPS levy. The TPS Operations Team is located within the Department of Education, and supports the TPS Director. The TPS Director and the TPS Operations Team were consulted in the preparation of this Instrument and are supportive of this Instrument.

As prescribed in legislation (section 176A of the Act, section 113A of the *Vet Student Loans Act 2016* (VSL Act), section 238-7 of the *Higher Education Support Act 2003* (HESA) and section 203A of the *Tertiary Education Quality and Standards Agency 2011* (TEQSA Act)), it is a requirement that the responsible Minister commence a review of the tuition protection arrangements. The Review must consider the operation of tuition protection arrangements and each Tuition Protection Fund and related matters. The Terms of Reference for this Review were issued on 14 September 2021. The Review was conducted by an independent consultant whose analysis was informed by comprehensive consultations with key

stakeholders across the International Education, Higher Education and VET sectors. The Terms of Reference were to assess the effectiveness and efficiency of the current legislative, operational, administrative and governance arrangements of the TPS, including:

- whether the current delivery arrangements best meet the tuition protection policy objectives as set out in the Act, VSL Act, HESA and the TEQSA Act, and
- the framework of the current legislative structure of the TPS as set out in the Act, VSL Act, HESA, the TEQSA Act, and multiple subordinate legislative instruments.

The Review consulted 38 tuition providers. The Review concluded in February 2022 and it made no recommendations regarding changing the contents of this legislative instrument.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Education Services for Overseas Students (Notice Requirements) Instrument 2022

The *Education Services for Overseas Students (Notice Requirements) Instrument 2022* (the Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Instrument is to repeal and replace the *Education Services for Overseas Students (Notifying provider default – requirements for a notice) Determination 2012 (No. 1)* and the *Education Services for Overseas Students (Provider default – discharge of obligations – requirements for a notice) Determination 2012 (No. 1)* and specify requirements for notices given by a registered provider under sections 46B and 46F of the *Education Services for Overseas Students Act 2000* (the Act).

Subsection 46B(1) of the Act requires a registered provider to give notices in accordance with section 46B if the provider defaults in relation to one or more overseas students, or intending overseas students, and a course at a location. The provider is required to notify the relevant ESOS agency, the Tuition Protection Service (TPS) Director and the relevant students in the event of such a default.

The Instrument specifies additional information that a provider must give when notifying the relevant ESOS agency and the TPS Director that they are unable to deliver a course as agreed with a student.

Subsection 46F(1) of the Act requires a registered provider to give notices in accordance with section 46F, if the provider defaults in relation to one or more overseas students, or intending overseas students, and a course at a location. Under this section, a registered provider must notify the relevant ESOS agency and the TPS Director of whether, and if so how, they have discharged their obligations under section 46D of the Act after a provider default.

A provider discharges its obligations to a student under section 46D if the provider arranges for the student to be offered a place in a replacement course and the student accepts the offer in writing, or if the provider provides a refund in accordance with subsection 46D(6) of the Act.

Human rights implications

The Instrument engages the following rights:

- the right to education; and
- the right to privacy.

Right to education

The Instrument promotes the right to education contained in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 13(2)(c) of the ICESCR provides that ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.’

Sections 6 and 7 of the Instrument helps safeguard the interests of overseas students, and intending overseas students, by facilitating the timely provision of information about provider defaults. Timely and comprehensive notifications of default, and notifications of how a provider has met their obligations after a default, form part of an effective tuition protection service. Such notices assist in facilitating prompt and effective responses by providers and, if necessary, by the Tuition Protection Service, in placing students in an alternative course or providing a refund.

Where students receive a refund or are placed in an equivalent course, they will be able to independently seek to continue to undertake further education or training. This protective safeguard supports the broader goals of the right to education by removing an impediment to continuing accessibility through the provision of an equivalent program or reimbursement. The notice requirements also impose an important accountability mechanism which promotes the integrity of the education system, and ensure a level of oversight that educational offerings remain functionally adaptable to the continuing needs of overseas students undertaking, or prospectively undertaking, a particular course of study.

Therefore, the Instrument promotes the right to education by assisting providers and the Tuition Protect Service, to ensure overseas students, and intending overseas students, receive the tuition they have paid for or, as a last resort, a refund.

Right to privacy

The Instrument engages the right to privacy which is set out in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 17 of the ICCPR 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.

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 right to privacy is engaged by the Instrument because it authorises the on-sharing of personal information by requiring a provider to enter a student's personal information into the computer system established by the Secretary, the Provider Registration and International Student Management System (PRISMS). PRISMS was developed by the Department of Education (the Department), in association with the Department of Home Affairs, for the purpose of receiving and storing information about accepted overseas students that is given to the Secretary under section 19 of the Act. It is a secure system accessible by Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) registered providers who have been granted access and provided with log-in credentials.

The Department is committed to the protection of privacy and must comply with the Australian Privacy Principles (the APPs) contained in the *Privacy Act 1988* (the Privacy Act) when handling any personal information and sensitive information.

Prior to recording overseas students' personal information into PRISMS, providers must ensure that overseas students have been made aware of the following matters involving the collection and use of personal information:

1. they are required under the Act to provide the Department with certain personal information about them including their name, date of birth, gender, address, email address, phone number, country of birth, nationality, passport number, and course details;
2. their personal information will be recorded in PRISMS;
3. their personal information is made available to the Department, the Department of Home Affairs and other State/Territory government agencies in relation to administering the Australian Government ESOS program, the Act and the *Migration Act 1958* (Migration Act);
4. their personal information may be used for any directly related purpose or any other purpose required or authorised by law;
5. if their personal information is not collected they will not be able to be enrolled in the providers' course; and
6. they can obtain further information about the Department's privacy policy at <http://education.gov.au/privacy>.

By enrolling in an Australian course, overseas students consent to all of the above.

To enable providers to use and record information in PRISMS, the Department advises them that it collects and records the following personal information from representatives of providers to authorise access to PRISMS: their name, date of birth; and business email address and phone number. That personal information is used for the purpose of managing PRISMS and may be made available to the Department of Home Affairs in relation to managing PRISMS and administering the Act and the Migration Act. This personal information may also be used for any directly related purpose or any other purpose required or authorised by law. Users are informed that an intentional breach of conditions of use of PRISMS is an offence. Conditions of use are on the Department's website at <https://prisms.education.gov.au/information/showinformation.aspx?doc=provider>.

Persons and providers in relation to whom personal information is collected are also referred to the Department's privacy policy on further information about how the Department handles personal information, how personal information can be accessed or corrected and how to make a complaint. The Department's privacy policy is accessible at <https://www.dese.gov.au/using-site/privacy>.

To the extent that the Instrument requires higher education providers to disclose students' personal information to the TPS Director, the right to privacy of students in terms of their personal information is limited.

In this case, the legitimate end is the protection of students, the efficacy of educational outcomes and the accountability of providers as a part of the broader policy to ensure a high level of performance and integrity across the higher education sector. Specifically, the limitation of the right is reasonable, proportionate and aligned with the legitimate policy objective of ensuring that the relevant ESOS agency and the TPS Director are able to contact students to ensure that they have been properly placed in an alternate course, or have been provided a refund, in the case of a provider default.

To the extent that the Instrument limits the right to privacy, the limitations are duly circumscribed to facilitate the legitimate policy objective and are justifiable in their terms, as the reporting of information by providers through PRISMS facilitates the effective regulation of the international education sector.

Conclusion

The Instrument is compatible with human rights because it promotes the right to education and to the extent that it may limit the right to privacy, those limitations are reasonable, necessary and proportionate.

The Hon Jason Clare MP, Minister for Education

**EDUCATION SERVICES FOR OVERSEAS STUDENTS (NOTICE REQUIREMENTS)
INSTRUMENT 2022**

EXPLANATION OF PROVISIONS

Section 1: Name

1. This section specifies the name of the instrument as the *Education Services for Overseas Students (Notice Requirements) Instrument 2022* (the Instrument).

Section 2: Commencement

2. This section specifies that the Instrument commences on the day after its registration on the Federal Register of Legislation.

Section 3: Authority

3. The Instrument is made by the Minister under subsections 46B(6) and 46F(5) of the *Education Services for Overseas Students Act 2000* (the Act).

Section 4: Definitions

4. Section 4 provides definitions for certain expressions used in the Instrument, and notes that a number of expressions used in the Instrument are already defined in section 5 of the Act.
5. This section defines the terms 'Act' and 'confirmation of enrolment' for the purposes of the Instrument.
6. 'Act' refers to the *Education Services for Overseas Students Act 2000*.
7. 'Confirmation of enrolment' has the same meaning as in the *Migration Regulations 1994*:

'Confirmation of enrolment, in relation to a student and a registered provider, means a confirmation by the registered provider that the student is enrolled in a registered course provided by the registered provider, as required by section 19 of the *Education Services for Overseas Students Act 2000*.'
8. For example, a confirmation of enrolment is a document issued by an education provider to verify an overseas student's, or intending overseas student's, enrolment in a specified course. The form of a confirmation of enrolment may differ between providers.

Section 5: Schedules

9. This section clarifies that Schedule 1 is effective on its terms. That is, to repeal the *Education Services for Overseas Students (Notifying provider default – requirements for a notice) Determination 2012 (No. 1)* and the *Education Services for Overseas Students (Provider default – discharge of obligations – requirements for a notice) Determination 2012 (No. 1)*.

Section 6: Requirements for a notice of provider default

10. This section specifies the additional requirements for a notice given under section 46B of the Act.
11. The section requires the provider to enter certain information in the computer system established by the Secretary, as mentioned in section 109 of the Act. The computer system is the Provider Registration and International Student Management System (PRISMS).
12. The specified information must be entered into PRISMS for each student to whom the provider has issued a confirmation of enrolment and in relation to whom the provider has defaulted.
13. Subsection (1) provides that the notice must include the default date and the reason for the default (e.g. insufficient enrolments). Subsection (2) requires the provider to enter specified contact details for the student, if known by the provider, into PRISMS, in case follow-up action is required by the TPS Director or the Immigration Secretary.

Section 7: Requirements for a notice of outcome of discharge of obligations

14. This section specifies the additional requirements for a notice given under section 46F of the Act.
15. Subsection (1) requires the provider to enter the information specified in this section in the computer system established by the Secretary, as mentioned in section 109 of the Act (i.e. PRISMS).
16. Where a provider has not met their obligations in case of a provider default, paragraph (1)(a) requires the notice to include the reasons that their obligations have not been met.
17. Where a provider has met their obligations, paragraph (1)(b) requires that the notice specify whether they met their obligations by arranging an alternative course for the student or by providing a refund.

18. Subsection (2) requires a provider, if the provider met their obligations by arranging an alternative course for a student, to include the following details in the notice:
- a. the date the provider met their obligations (i.e. the date the student accepted the offer);
 - b. if known, the new confirmation of enrolment code of the alternative course accepted by the student; and
 - c. confirmation that the provider has evidence of the student's acceptance of an offer of a place in an alternative course.
19. Subsection (3) requires a provider, if the provider met their obligations by paying a refund to the student, to include the refund amount and date of payment in the notice.

SCHEDULE 1—REPEALS

Item 1: The whole of the instrument

20. This item repeals the *Education Services for Overseas Students (Notifying provider default – requirements for a notice) Determination 2012 (No. 1)*.

Item 2: The whole of the instrument

21. This item repeals the *Education Services for Overseas Students (Provider default – discharge of obligations – requirements for a notice) Determination 2012 (No. 1)*.