

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

Higher Education Support Act 2003

Higher Education (Disclosure of Information to Other Bodies) Determination 2023

AUTHORITY

Subsection 180-25(4) of the *Higher Education Support Act 2003* ('the Act') provides that the Minister for Education ('Minister') may, by legislative instrument, make a determination in relation to a body or association for the purposes of paragraph 180-25(3)(d) of the Act, which provides that the Secretary of the Department of Education ('Secretary') may disclose Higher Education Support Act information ('HESA information') to a person employed or engaged by a body or association determined by the Minister.

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 *Higher Education (Disclosure of Information to Other Bodies) Determination 2013* (the Former Instrument) by Schedule 1 to the *Higher Education (Disclosure of Information to Other Bodies) Determination 2023* (the Instrument) relies on that provision.

PURPOSE AND OPERATION

Division 180 of the Act authorises the disclosure and use of HESA information for certain purposes.

Section 180-5 of the Act defines HESA information to mean 'personal information' (as defined in section 179-5 of the Act), 'VET personal information' (as defined in section 72 of Schedule 1A to the Act), and information that is obtained or created by a Commonwealth officer as a result of a survey of the kind referred to in section 180-30 of the Act. It also includes any other information obtained or created by a Commonwealth officer for the purposes of the Act or for the purposes referred to in subsection 180-28(5).

Subsection 180-25(1) of the Act provides that the Secretary may disclose HESA information to a person referred to in subsection 180-25(3) for the purposes of:

- (a) improving the provision of higher education or vocational education and training;
- (b) research relating to the provision of higher education or vocational education and training, including research relating to:
 - (i) quality assurance; or

(ii) planning the provision of higher education or vocational education and training.

Paragraph 180-25(3)(d) provides that the Secretary may disclose HESA information for any of these purposes to a person (an 'officer') who is employed or engaged by a body or association determined by the Minister. The Instrument gives effect to paragraph 180-25(3)(d) by determining the relevant bodies and associations.

The Instrument will repeal and replace the Former Instrument, which was due to sunset on 1 October 2023. The bodies and associations specified in the Instrument are the same as the bodies and associations specified in the Former Instrument with some minor wording changes to reflect changes to the names of the relevant bodies and associations.

It is appropriate to continue to share higher education related data with the listed bodies or associations for the purposes stated in section 180-25 of the Act, as it is in the Commonwealth's interest to continue to provide data for the benefit of the Australian community. It would not be realistic for the listed bodies or associations to gather this data directly and would put significant additional cost on higher education providers.

IMPACT ANALYSIS

Based on the information provided, the Office of Impact Analysis (OIA) considers the Instrument is unlikely to have a more than minor impact, as the requirements on entities to request, use and store the data are reasonable. As such, the preparation of an Impact Analysis is not required (OIA reference number: OIA23-05255).

COMMENCEMENT

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

CONSULTATION

No consultation was undertaken in respect of the Instrument. The Department of Education engages with relevant bodies or associations regularly and no concerns have been raised in relation to the content of the Instrument.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Higher Education (Disclosure of Information to Other Bodies) Determination 2023

The *Higher Education (Disclosure of Information to Other Bodies) Determination 2023* (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

Subsection 180-25(4) of the *Higher Education Support Act 2003* ('the Act') provides that the Minister for Education ('Minister') may, by legislative instrument, make a determination in relation to a body or association for the purposes of paragraph 180-25(3)(d) of the Act, which provides that the Secretary of the Department of Education ('Secretary') may disclose Higher Education Support Act information ('HESA information') to a person employed or engaged by a body or association determined by the Minister.

Section 180-5 of the Act defines HESA information to mean 'personal information' (as defined in section 179-5 of the Act), 'VET personal information' (as defined in section 72 of Schedule 1A to the Act), and information that is obtained or created by a Commonwealth officer as a result of a survey of the kind referred to in section 180-30 of the Act. It also includes any other information obtained or created by a Commonwealth officer for the purposes of the Act or for the purposes referred to in subsection 180-28(5).

Subsection 180-25(1) of the Act provides that the Secretary may disclose HESA information to a person referred to in subsection 180-25(3) for the purposes of:

- (a) improving the provision of higher education or vocational education and training;
- (b) research relating to the provision of higher education or vocational education and training, including research relating to:

- (i) quality assurance; or

- (ii) planning the provision of higher education or vocational education and training.

Paragraph 180-25(3)(d) provides that the Secretary may disclose HESA information for any of these purposes to a person (an 'officer') who is employed or engaged by a body or association determined by the Minister. The Instrument gives effect to paragraph 180-25(3)(d) by determining the relevant bodies and associations.

The Instrument will repeal and replace the Former Instrument, which was due to sunset on 1 October 2023. The bodies and associations specified in the Instrument are the same as the bodies and associations specified in the Former Instrument with some minor wording changes to reflect changes to the names of the relevant bodies and associations.

It is appropriate to continue to share higher education related data with the listed bodies or associations for the purposes stated in section 180-25 of the Act, as it is in the Commonwealth's interest to continue to provide data for the benefit of the Australian community. It would not be realistic for the listed bodies or associations to gather this data directly and would put significant additional cost on higher education providers.

Human rights implications

The Instrument engages the right to privacy under Article 17 of the International Covenant on Civil and Political Rights ('ICCPR').

Privacy and reputation

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 is engaged by the Instrument because it authorises the on-sharing of HESA information, which may include personal information, to persons engaged or employed by the bodies and associations determined by the Minister in the Instrument.

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.

There are legitimate objectives for the Instrument as the disclosure of HESA information is for the purposes of improving the provision of higher education and for research relating to the provision of higher education.

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

The department must also comply with the information management provisions setting out protections for the sharing of HESA information provided in Part 5-4 of the Act. The Act provides substantial protections for individuals' privacy, including regulating the way in which the specified bodies can use and disclose personal information. The Act provides that a person commits an offence if that person uses personal information or VET personal information for a purpose that was not a permitted purpose. In particular, one of the protections set out in the Act is that, if the Secretary discloses HESA information to a person who is employed or engaged by a body or association determined by the Minister under the Instrument, and if the information was provided by a higher education provider or a VET

provider, then the Secretary may only disclose the information if the provider consents to that disclosure.

Conclusion

The Instrument is compatible with human rights as the limitations imposed on the right to privacy through the Instrument are reasonable, necessary and proportionate to achieving a legitimate objective, and there are appropriate safeguards and limitations to apply to the disclosure of HESA information.

Minister for Education, The Hon Jason Clare MP

HIGHER EDUCATION (DISCLOSURE OF INFORMATION TO OTHER BODIES) DETERMINATION 2023

EXPLANATION OF PROVISIONS

Section 1: Name

1. This is a formal provision specifying the name of the instrument.

Section 2: Commencement

2. This section provides that the *Higher Education (Disclosure of Information to Other Bodies) Determination 2023* (the Instrument) commences on the day after it is registered on the Federal Register of Legislation.

Section 3: Authority

3. This section provides that the Instrument is made under subsection 180-25(4) of the *Higher Education Support Act 2003* (the Act).

Section 4: Definitions

4. This section defines the term ‘Act’ to mean the *Higher Education Support Act 2003*.

Section 5: Schedules

5. This section provides that the Instrument that is specified in the Schedule (the *Higher Education (Disclosure of Information to Other Bodies) Determination 2012* (the Former Instrument)) is repealed.

Section 6: Bodies or associations determined for the purposes of paragraph 180-25(3)(d)

6. This section lists the bodies or associations which have been determined for the purposes of paragraph 180-25(3)(d) of the Act as:
 - (a) Universities Australia [ABN 53 008 502 930];
 - (b) the Independent Higher Education Australia Ltd [ABN 23 472 698 119];
 - (c) the Independent Tertiary Education Council Australia [ABN 63 054 953 758];
 - (d) The Group of Eight Limited [ABN 98 089 687 990];
 - (e) the following Tertiary Admissions Centres:

- (i) Queensland Tertiary Admissions Centre Limited [ABN 28 050 542 633];
- (ii) South Australian Tertiary Admissions Centre [ABN 55 682 725 032];
- (iii) Tertiary Institutions Service Centre Ltd [ABN 24 830 500 871];
- (iv) Universities Admissions Centre (NSW & ACT) Pty Limited [ABN 19 070 055 935];
- (v) Victorian Tertiary Admissions Centre [ABN 83 837 024 255];
- (f) the Australian Institute of Health and Welfare [ABN 16 515 245 497]; and
- (g) the Australian Institute for Teaching and School Leadership Limited [ABN 17 117 362 740].

7. It is in the Commonwealth's interests to continue to provide higher education related data to the listed bodies or associations for the benefit of the Australian community. It would not be realistic for the listed bodies or associations to gather this data directly and would put significant additional cost on higher education providers.

Schedule 1 – Repeals

Higher Education (Disclosure of Information to Other Bodies) Determination 2013

Item 1: The whole of the instrument

1. This item repeals the Former Instrument because it is replaced by the Instrument.