Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012

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Higher Education Support Amendment (Maximum Payment Amounts and Other Measures) Bill 2012

Date introduced: 12 September 2012
House: House of Representatives
Portfolio: Industry, Innovation, Science, Research and Tertiary Education
Commencement: On the day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill proposes amendments to the Higher Education Support Act 2003 (HESA) to update the maximum payment amounts for Other Grants and Commonwealth scholarships, to authorise wider use and disclosure of personal information collected for the purposes of the HESA. The Australian Research Council Act 2001 is also amended to update appropriations.

Committee consideration

The Bill was referred to the House of Representatives Standing Committee on Education and Employment for inquiry and report. The Committee report recommended the House of Representatives pass the Bill.1 Submissions to the inquiry are referred to below under the Main issues and key provision section of the Digest.

The Senate Standing Committee for the Scrutiny of Bills has commented on proposed section 180-25 of the HESA, at item 2 of Schedule 3 of the Bill. This provision will allow the Department to disclose information, which may include personal information, to certain persons for specified purposes. (The provision is explained in more detail in the Main issues and key provision section of the Digest.) The Committee:

...notes that persons to whom information may be disclosed include persons who are ‘employed or engaged by a body or association’ identified in a legislative instrument (see proposed subsections 180-25(3) and (4)). The [Explanatory Memorandum] indicates that ‘where personal

1. Details of the inquiry are at:

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information is disclosed to a third party engaged by the Department...this will be under a contract of services that requires the third party to act as though it were an agency bound by the Privacy Act’. However, this requirement does not appear to be mandated by the bill.

The Committee therefore seeks the Minister’s advice in relation to whether consideration has been given to including such an obligation in the legislation or requiring such a term to be included in a relevant contract.²

The Minister responded to the Committee on 4 October 2012, drawing attention to section 95B of the Privacy Act 1988, which requires an agency entering into a Commonwealth contract to take contractual measures to ensure that the service provider does not act in a way that would constitute a breach of an Information Privacy Principle (IPP), as set out at section 14 of the Privacy Act.³ The Minister advised that the Department’s standard contracts reflected this requirement, addressing the concern raised by the Committee.⁴ He further advised that the Department will also revise its data collection protocols to require any person to whom data is disclosed to comply with the IPPs.⁵

The Minister further advised:

Furthermore, a third party contracted by the Department to conduct a survey of staff, students or former students of higher education providers or VET providers will fall within the meaning of "Commonwealth officer" for the purposes of the Higher Education Support Act 2003 (the Act). That third party will therefore be subject to the offence provisions in Division 179 of the Act, which prohibit the unauthorised disclosure of personal information.⁶

The Committee has asked the Minister to include key information set out in his response, in the Explanatory Memorandum to the Bill.⁷

Financial implications

The amendments in Schedule 1 result in an expense of $1.2 billion over four years. The amendments in Schedule 2 increase existing funding figures for the financial years 2012–13 to 2014–15 and insert funding for 2015–16. These changes will result in additional expenditure of $828.59 million.⁸

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5. Ibid., p. 426.
6. Ibid., p. 425.
7. Ibid., p.426.
8. Ibid., p.426.

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Background

As the Bill consists of three discrete Schedules, relevant background is set out below under the appropriate Schedule.

Main issues and key provisions

Schedule 1—Grants

Schedule 1 deals with the maximum payment amounts for Other Grants and Commonwealth Scholarships, to account for changes in indexation and to add the 2016 funding year.

The significant amendments in Schedule 1 are those that would allow the Minister from 2013 to determine the maximum Other Grants payment amounts under Division 41 of the HESA and the maximum Commonwealth Scholarship payment amounts under Division 46 of the HESA.

The HESA commenced in January 2004 and amongst other things provides details of annual payments to be made for Other Grants and Commonwealth Scholarships. Currently, cyclical amendments to the HESA are required to update these annual payment amounts and account for indexation.

The amendments in items 1 and 6 of Schedule 1 of the Bill do include the new figures to update amounts to take account of indexation, however these figures will only be relied on if the Minister does not determine the total yearly payments. Proposed subsection 41-45(1A) and proposed subsection 46-40(2) allow the Minister to determine the total appropriations for Other Grants and Commonwealth Scholarships from 2013 to 2016.

In respect of a year starting on or after 1 January 2017, proposed subsection 41-45(1B) and proposed subsection 46-40(3) provide that the Minister must determine the total yearly payments. Such determinations must be made before the start of the relevant year.


9. Other Grants provide funds to the higher education sector for specific purposes such as equity, capital developments, and structural reform. Commonwealth Scholarships are awarded to support eligible Indigenous students in Commonwealth supported places at universities across Australia.

10. Items 2 and 7 of Schedule 1 of the Bill respectively.

11. Items 2 and 7 of Schedule 1 of the Bill respectively.

12. Proposed subsections 41-45(1C) and 46-40(4).

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The Minister may also vary determinations before the end of the relevant year.\textsuperscript{13} Such determinations (the total yearly payments and any variations) will be legislative instruments and subject to Parliamentary scrutiny. The Explanatory Memorandum states:

The continual cycle of amendments is not the most efficient method of updating the appropriation amounts under HESA ... There will continue to be Parliamentary scrutiny of any future proposed amounts without the need for Parliament’s valuable and limited time to be used for what is otherwise a routine matter of Government business.\textsuperscript{14}

### Schedule 2—Research funding

Division 1 of Part 7 of the \textit{Australian Research Council Act 2001} sets out the approved amounts of financial assistance for approved research programs. \textbf{Schedule 2} of the Bill proposes amendments to Division 1, in particular, to sections 48 and 49 so as to apply indexation to appropriation amounts and to add the 2015–16 financial year as the last year of the forward estimates.

### Schedule 3—Use and disclosure of information

The provisions in Divisions 179 and 180 of the HESA deal with the protection, use and disclosure of information collected under the Act. \textbf{Schedule 3} of the Bill seeks to amend the HESA to authorise wider disclosure of information (including personal information) to a limited number of bodies for a limited set of purposes.

### Background

Reforms of the higher education and vocational education sectors resulted in the establishment in 2011 of the Tertiary Education Quality and Standards Agency (TEQSA) and the Australian Skills Quality Authority (ASQA) (the National Vocational Education and Training (VET) Regulator).

Provisions in the Bill will allow disclosure of HESA information (including personal information) to TEQSA or ASQA for ‘the performance of duties or functions, or the exercise of powers under, or for the purposes of the \textit{Tertiary Education Quality and Standards Agency Act 2011}, or the \textit{National Vocational Education and Training Regulator Act 2011}, respectively’.\textsuperscript{15}

The Government’s reform agenda has also resulted in the introduction of a demand driven funding system in the higher education sector and the setting of access and attainment targets in both the higher education and vocational education sectors.\textsuperscript{16} The Government argues that more accurate

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\textsuperscript{13} Proposed subsections 41-45(1D) and 46-40(5).

\textsuperscript{14} Explanatory Memorandum, op. cit.

\textsuperscript{15} Ibid.


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assessment and monitoring of these reforms will be achieved if access to unit record level information is available. The HESA does not currently permit release of data at this level as it is considered to be personal information that could be used to identify individuals. In order to provide more accurate assessment and monitoring the Bill seeks to widen the disclosure of HESA information, including student and staff information at the unit record level for ‘permitted purposes’ to the staff of state and territory agencies, higher education providers, VET providers and bodies or associations determined by the Minister by legislative instrument.

It is expected the amendments will minimise the reporting burden on education providers through allowing the Department of Industry Innovation, Science, Research and Tertiary Education (the Department) to act as a central depository for higher education data and statistics.  

According to the Department a wide range of stakeholders including the Office of the Australian Information Commissioner and the Attorney-General’s Department have had input into the drafting process that has resulted in clarifications of the types of information covered by the proposed provisions, the uses and purposes governed by the amendments, the strengthening of offence provisions and safeguards surrounding privacy.  

Key provisions

**Item 2** is the central amendment in Schedule 3 of the Bill. It proposes repeal of current Division 180 of the HESA and substitutes a new Division 180. Proposed Division 180 consists of section 180-1 to section 180-35, which are discussed below.

**Definition of ‘Higher Education Support Act information’**

**Proposed section 180-5** provides a definition of ‘Higher Education Support Act information’ (HESA information) for the purpose of authorising wider disclosure of such information. HESA information means information defined elsewhere in the Act as personal information and VET personal information, as well as any other information obtained or created by a Commonwealth officer for the purposes of the Act and information obtained or created by a Commonwealth officer as a result of a survey of staff, students or former students (as referred to in proposed section 180-30).

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18. Ibid., pp. 9-10.
19. Section 179-5, HESA.
20. Clause 72 of Schedule 1A, HESA.

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Comment

The definition of personal information in the HESA is consistent with the definition in the current *Privacy Act 1988*. However the Privacy Commissioner points out that this definition will change under the proposed reforms to the Privacy Act currently before Parliament and suggests that ‘personal information is defined [in the HESA] by incorporating the definition in the Privacy Act by reference. Accordingly, any amendment to that definition in the Privacy Act will automatically apply to the Higher Education legislation’.  

Disclosure and use of information

**Proposed section 180-10** clarifies that a Commonwealth officer may disclose HESA information to another Commonwealth officer to assist that officer in his/her official employment. The purpose of this clarification is to allow Commonwealth officers employed in the Higher Education and VET sectors to exchange and use information relevant to their employment.  

**Proposed sections 180-15** and **180-20** deals with disclosure of HESA information to TEQSA and to the National VET regulator (ASQA). Such information may be disclosed for the performance of duties or functions, or the exercise of powers under, or for the purposes of, the *Tertiary Education Quality and Standards Agency Act 2011* (proposed section 180-15), or the *National Vocational Education and Training Regulator Act 2011* (proposed section 180-20).

**Proposed subsection 180-25** deals with disclosure of HESA information to bodies other than TEQSA and the National VET Regulator. It provides that the Secretary of the Department may disclose HESA information to staff of state and territory agencies, higher education providers, VET providers and bodies or associations determined by the Minister by legislative instrument. Such information may only be disclosed for certain permitted purposes, namely: improving the provision of higher education or vocational education and training; or for research relating to the provision, including quality assurance and planning, of higher education and training. **Proposed subsection 180-25(2)** further qualifies this disclosure and provides that if the HESA information was provided by a higher education provider or a VET provider, then consent of the provider is required to disclose the information.  

*Proposed subsections 180-25(5) and 180-25(6) are offence provisions relating to misuse of personal information or VET personal information. The maximum penalty for these offences is imprisonment for two years.*

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23. Although note that consent of the provider is not required before disclosure to state or territory agencies.

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Use of information to conduct surveys

Proposed section 180-30 provides that Commonwealth officers may use HESA information to conduct surveys of staff, current students and formers students of higher education providers or VET providers for the purposes of improving the provision of higher education or vocational education and training; and for research relation to the provision, including quality assurance and planning, of higher education and training.

Comment

The Department points out that ‘a third party contracted by the government to conduct surveys is considered a Commonwealth Officer under the Act and would be subject to the provisions in the Act that regulate the activities of Commonwealth Officers including the offence provisions’. 24

General comment from interest groups

 Universities are highly supportive of the amendments relating to use and disclosure of data, arguing that they will reduce time, costs and reporting requirements. The major stakeholder, Universities Australia, states:

Section 179 of the Higher Education Support Act (2003) (HESA) currently restricts access to data contained in the Higher Education Information Management System (HEIMS) by non-authorised persons or entities. This restriction means that [Universities Australia] must undertake our public policy development work in partnership with Government agencies with publicly available data that is insufficient for this purpose, with many data being suppressed because of cell sizes that are considered too small.

... Allowing greater access to HEIMS data to additional Government agencies – particularly the Tertiary Education Quality and Standards Agency (TEQSA) – will lower the likelihood of requests for duplicate data (especially when two agencies want the same data but in different formats) and reduce the inherent inconsistency that would arise under such conditions. It would also reduce the costs incurred both by the agencies seeking the data and the universities providing it.

... Making the HEIMS data available to the sector through a centralised collection process will ensure that regulatory functions operate within known parameters and that the reporting burden on universities, particularly the duplication of effort, is kept to a minimum. Furthermore, data will be able to be utilised in more proactive ways not currently possible, and at more appropriate levels of granularity, leading to better public policy outcomes through better provision and access to information. 25

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25. Universities Australia, Submission to the House of Representatives Standing Committee on Education and Employment, Inquiry into the Higher Education Support Amendment (Maximum Payment and Other Measures) Bill
While supporting the streamlining and reduction in administrative burden that the Schedule 3 provisions provide, universities also welcome the safeguards incorporated into the Bill such as proposed subsection 180-25(2), which provides that the Secretary of the Department may only disclose information provided by a higher education or VET provider to other providers, or other bodies or associations determined by the Minister, if the provider consents to that disclosure. Proposed subsection 180-25(4) allows the Minister to determine, by legislative instrument, bodies or associations to which information may be disclosed. Such bodies and associations are not prescribed or defined in the Bill but the Department expects they will ‘only include peak bodies and other advocacy groups’ and ‘will be determined by legislative instrument in order to avoid unnecessary amendments to the Act in the event, for example, that a body changes its name’. Parliament will need to scrutinise such determinations to ensure the Department’s assumptions are correct.

The National Tertiary Education Union (NTEU) is concerned with the use and disclosure provisions, in particular the collection and sharing of student and staff personal information. Without naming particular provisions the NTEU expresses concern:

that privacy overrides proposed by this Bill will be used to drill down to individual levels and include details of staff teaching qualifications as a proxy for quality assessment ... While we support improvements to data collection, we are conscious of the potential impact that having detailed, private information of individuals accessed for the purposes of quality assessment.

The National Union of Students (NUS), which represents students, has not commented on the Bill but was consulted by the Department. As a result of NUS concerns the Department has strengthened the complaint and dispute resolution mechanisms contained in the Department’s Higher Education Data Protocols (the Protocols).

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Concluding comments

The Bill proposes significant changes to the HESA’s provisions on use and disclosure of information, including a broader definition of HESA information and wider access to such information. These changes have been drafted after consultation with stakeholders, the Office of the Australian Information Commissioner and the Attorney-General’s Department, and include a number of safeguards and offence provisions which seem, with the exception of the NTEU, to have allayed stakeholder concerns. The submissions to the House of Representatives Standing Committee on Education and Employment suggest widespread support from the higher education sector, especially for those provisions that will reduce administrative and reporting requirements.
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