Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019

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Contents

Purpose of the Bill
Background: The Unique Student Identifier
Committee consideration
Senate Education and Employment Legislation Committee
Senate Standing Committee for the Scrutiny of Bills
Policy position of non-government parties/independents
Position of major interest groups
Financial implications
Statement of Compatibility with Human Rights
Parliamentary Joint Committee on Human Rights
Key issues and provisions
Access to authenticated VET transcripts
A new civil penalty regime
Penalties relating to applications for student identifiers
Penalties relating to authenticated VET transcripts
Enforcement
The Student Identifiers Special Account
Exemptions given by the Registrar

Date introduced: 28 November 2019
House: House of Representatives
Portfolio: Employment, Skills, Small and Family Business
Commencement: The day after the Act receives 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 the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at January 2020.
Purpose of the Bill

The purpose of the Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019 (the Bill) is to amend the Student Identifiers Act 2014 (the Act) to make changes to the administration of the Unique Student Identifier (USI). Namely, the Bill proposes to:

• expand the range of bodies that can use the USI service to access a person’s transcript
• introduce a civil penalty regime to cover certain contraventions of the Act
• clarify arrangements related to the administration of the Student Identifiers Special Account and
• introduce arrangements for a person to apply to be exempt from the requirement to have a USI.

Background: The Unique Student Identifier

Introduced in January 2015, the USI is a reference number that allows a student’s Australian vocational education and training (VET) records to be accessed electronically in one place, for life, irrespective of which provider the training was undertaken with. Unless they are exempt, students are required to have a USI in order to be issued a VET qualification or statement of attainment. At 30 June 2019, over 9.9 million USIs had been created. The USI is administered by the Student Identifiers Registrar (the Registrar), supported by the USI Office, and the Registrar’s functions are funded from the Student Identifiers Special Account.

Committee consideration

Senate Education and Employment Legislation Committee

At its meeting of 4 December 2019, the Senate Selection of Bills Committee determined that the Bill be referred to the Education and Employment Legislation Committee for inquiry and report by 19 February 2020.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills has considered the Bill and requested:

• the Minister’s advice as to why matters to be considered when making a determination to exempt a student from the requirement to have a USI should be in delegated legislation, and if the Bill could be amended to include ‘at least high-level guidance’ in the Act
• more detailed advice from the Minister as to why merits review will not be available in relation to such determinations by the Registrar.

At the time of writing, the Minister’s response had been received, but not yet published, by the Committee.

Policy position of non-government parties/independents
At the time of writing, no non-government parties/independents have commented on the measures proposed in the Bill.

Position of major interest groups
At the time of writing, no major interest groups have commented on the measures proposed in the Bill.

Financial implications
The Explanatory Memorandum to the Bill states that the changes are not expected to have any financial impact.9

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.10

Parliamentary Joint Committee on Human Rights
At the time of writing, the Parliamentary Joint Committee on Human Rights had not considered the Bill.11

Key issues and provisions

Access to authenticated VET transcripts
In 2017, an authenticated VET transcript (the transcript) was introduced to the USI initiative.12 The transcript is a document prepared by the Registrar that details the VET study undertaken by the individual, as prescribed by the regulations (currently the Student Identifiers Regulation 2014).13 According to the Office of the Registrar:

USI account holders can use their USI to access their national training record online in the form of a USI Transcript. The transcript should include details of all non-exempt nationally recognised training completed since 1 January 2015 and available as part of the national VET collection.14

In 2018–19, 571,242 authenticated VET transcripts were viewed using the USI’s online service.15

Currently, section 28 of the Act allows for all or part (‘an extract’) of the transcript to be released to:

• a registered training organisation (RTO) or

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10. The Statement of Compatibility with Human Rights can be found at page 13 of the Explanatory Memorandum to the Bill.
11. Parliamentary Joint Committee on Human Rights, Index of Bills and instruments considered by the committee, 19 September 2019.
• a VET-related body.\textsuperscript{16}

The release of this information is subject to \textit{access controls} set by the individual, and must not be released unless these controls have been set up.\textsuperscript{17}

Under paragraph 32(1)(f) of the Act, the Registrar is required to establish and maintain a mechanism to enable an individual to set \textit{access controls} on:

• the RTOs and VET-related bodies that may request access to their authenticated VET transcript and
• the RTOs and VET-related bodies that may request access to an extract of their authenticated VET transcript, and the content of the extract.

\textbf{Items 1, 4 to 6, 8 and 10} make amendments to the Act to expand the range of bodies that can be provided with access to a transcript under the Act. Of these items, \textbf{items 6, 8 and 10} propose to add references to an ‘other entity’ to sections 28 and 32. The remaining items make consequential amendments, including amending the simplified outline of the Act (\textbf{item 1}, which amends section 3 of the Act), amending the simplified outline of Part 3 – Authenticated VET transcripts (\textbf{item 4}, which amends section 26 of the Act) and amending the heading of section 28 (\textbf{item 5}). The requirements related to \textit{access controls} are retained. \textbf{Item 7} inserts a note at the end of subsection 28(1) to clarify that the Registrar may disclose personal information in a transcript in accordance with Australian Privacy Principle 6.\textsuperscript{18}

\textit{Entity} is defined in section 4 of the Act as a person, partnership, any other unincorporated association or body, or a trust. The \textit{Explanatory Memorandum} to the Bill provides the examples of employers, employment agencies, and licensing bodies as entities which may make use of the proposed access arrangements.\textsuperscript{19}

\textbf{A new civil penalty regime}

The Act does not currently contain any civil penalty provisions. \textbf{Item 9} adds a new civil penalty regime to the Act at \textit{proposed Part 3A}.

\textbf{Proposed section 29A} contains a simplified outline of \textit{proposed Part 3A}, which specifies that the civil penalty provisions will be for conduct relating to applying for student identifiers, altering a transcript or extract, or making a document purporting to be a transcript or extract.

\textbf{Penalties relating to applications for student identifiers}

\textbf{Proposed section 29B} contains the proposed penalties related to applications for student identifiers.

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\textsuperscript{16} \textit{VET-related body} is defined in section 4 of the Act as an Australian Government or state or territory department that deals with matters relating to VET (including funding), a body (whether incorporated or not) established by or under a law of the Commonwealth, a state or a territory that performs functions relating to VET (including funding), a \textit{VET Regulator}, or an entity specified in an instrument made by the Registrar for that purpose, under subsection 4(3). \textit{VET Regulator} is defined in section 3 of the \textit{National Vocational Education and Training Regulator Act 2011} as the National VET Regulator (that is, the \textit{Australian Skills Quality Authority} or a body of a non-referring state (that is, the \textit{Victorian Registration and Qualifications Authority} and the \textit{Western Australian Training Accreditation Council}).

\textsuperscript{17} The Act, subsections 28(1) and 28(3).

\textsuperscript{18} For more information on Australian Privacy Principle 6, see: Office of Australian Information Commissioner (OAIC), ‘\textit{Australian Privacy Principles guidelines: chapter 6: APP 6 – use or disclosure of personal information}’, OAIC website, 22 July 2019.

\textsuperscript{19} \textit{Explanatory Memorandum}, Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019, p. 5.
The USI is intended to be a single number allocated for life.\textsuperscript{20} Section 9 of the Act allows an individual to apply for their own USI, or to authorise an RTO, VET admission body, or other entity, to apply for a USI for them. In either case, the Registrar has in place arrangements to ensure the student activates their own USI account by clicking a link that is sent to contact details they nominate.\textsuperscript{21}

Under paragraph 10(1)(b) of the Act, the Registrar must not assign a USI to a student who already has one. The Act does not currently place any onus on an individual not to apply for a USI a second time, or authorise such an application.

Under \textit{proposed subsection 29B(1)}, if an individual has already been assigned a USI, which has not been revoked, and they either apply for a USI, or authorise an entity to make an application for a USI for them, they will be liable to a civil penalty of 60 penalty units ($12,600).\textsuperscript{22}

However, the \textit{note to proposed subsection 29B(1)} of the Bill states that section 95 of the \textit{Regulatory Powers (Standard Provisions) Act 2014} (the \textit{Regulatory Powers Act}) deals with mistakes of fact. This section provides that a person is not liable to have a civil penalty order made against them if, at or before the time they act in apparent contravention of a civil penalty provision:

- they considered the facts and
- were under a mistaken but reasonable belief about those facts and
- had they been correct, their actions would not have constituted a contravention of the civil penalty provision.

This means the proposed civil penalty for applying for a second USI would not apply if an individual genuinely was not aware they already had a USI when making a second application.

Additionally, under \textit{proposed subsection 29B(2)}, if an individual applies to the Registrar for a USI for someone else, without being authorised by that person, they will be liable to a civil penalty of 60 penalty units.

\textbf{Penalties relating to authenticated VET transcripts}

\textit{Proposed section 29C} would apply a civil penalty of 60 penalty units to the following actions related to transcripts:

- altering a transcript
- altering an extract, prepared by the Registrar from a transcript
- making a document that is not, but purports to be, a transcript or
- making a document that is not, but purports to be, an extract.

\textbf{Enforcement}

\textit{Proposed section 29D} allows for enforcement of the proposed civil penalty provisions under the \textit{Regulatory Powers Act}, including that:

- civil penalty provisions can be enforced by obtaining an order for a person to pay the penalty for contravening a provision, as per Part 4 of the \textit{Regulatory Powers Act}

\textsuperscript{20} Australian Government, ‘\textit{About the USI and training}’, op. cit.
\textsuperscript{21} Australian Government, ‘\textit{What does activating your USI account mean}?’ USI website, last modified 10 August 2018.
\textsuperscript{22} One penalty unit is currently $210, as per section 4AA of the \textit{Crimes Act 1914}.\textsuperscript{1}
• the Registrar can exercise the powers of an *authorised applicant* as set out in section 80 of the *Regulatory Powers Act*, including the ability to apply to a relevant court for an order that a person who has contravened a civil penalty provision pay the Commonwealth a pecuniary penalty and

• the relevant courts for the purposes of the enforcement of civil penalty provisions under the Act are the Federal Court of Australia and the Federal Circuit Court of Australia.

**Proposed section 29E** deals with infringement notices with reference to the *Regulatory Powers Act*, specifically:

• infringement notices in relation to the proposed civil penalty provisions may be issued subject to Part 5 of the *Regulatory Powers Act*, which provides that:
  
  A person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against the person for a contravention of a provision subject to an infringement notice under this Part. If the person does not choose to pay the amount, proceedings can be brought against the person in relation to the contravention.\(^{23}\)

• for the purposes of issuing an infringement notice in accordance with Part 5 of the *Regulatory Powers Act*, the Registrar is the infringement officer and chief executive and

• the Registrar may, in writing, delegate their powers under Part 5 of the *Regulatory Powers Act* to a Senior Executive Service (SES), acting SES, Australian Public Service (APS) Executive Level 2, or acting APS Executive Level 2 employee of the department, and the delegate must comply with any written directions of the Registrar.

**Items 2 and 3** make consequential amendments to:

• reflect the new civil penalty regime in the simplified outline of the Act at section 3 and

• add definitions of *civil penalty provision* and *Regulatory Powers Act* to the dictionary at subsection 4(1) of the Act.

**The Student Identifiers Special Account**

The Bill also proposes amendments to clarify and add to the Registrar’s powers under the Act in relation to the Student Identifiers Special Account (the Account).

The Account is created by section 48 of the Act and notes that it is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013*. An Act that establishes a special account specifies the purposes for which the special account can be debited.\(^{24}\) Section 50 of the Act sets out the following purposes of the Account:

(a) paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in the performance of the Registrar’s functions;

(b) paying any remuneration and allowances payable to any person under this Act;

(c) meeting the expenses of administering the Account.

Although these functions make it clear that the Registrar’s functions are to be funded from the Account, the Act does not currently specify who is responsible for managing the account. **Item 11**

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24. Department of Finance (DoF), *‘Guide to appropriations (Rmg 100): special appropriations: special accounts’*, DoF website, updated 12 December 2019.
proposes to add managing the Account to the Registrar’s functions, which are set out in section 32. Proposed paragraph 32(1)(fa) adds ‘managing the Account in such a way that ensures that the balance of the Account is sufficient to cover debits of amounts for the purposes of the Account’ to section 32.

Item 12 adds ‘or the exercise of the Registrar’s powers’ after ‘functions’ to paragraph 50(a), so that the subsection would read ‘paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in the performance of the Registrar’s functions or the exercise of the Registrar’s powers’. This amendment clarifies that the Account can be debited for costs relating to the exercise of the Registrar’s powers under the Act as well as their legislated functions.

Section 46 allows the Registrar to arrange secondments of Commonwealth or state or territory officers to the Office of the Registrar, and reimburse states or territories for the services of their officers. Section 47 allows the Registrar to also engage consultants to assist with the Registrar’s functions. However, costs associated with reimbursing states or territories for their officers, or paying consultants, are not explicitly included in the purposes of the Account listed in section 50. Item 13 therefore adds proposed paragraphs 50(ba) and 50(bb), which list these expenses.

Exemptions given by the Registrar

As outlined in the background to this Bills Digest, section 53 of the Act requires non-exempt VET students to have a USI in order to be issued a qualification or statement of attainment. The obligation under section 53 is placed on the relevant RTO. Subsection 53(3) allows the Minister to make an instrument setting out exemptions to this requirement, providing, as per subsection 53(4), that the Minister first obtains the agreement of the Ministerial Council (currently the Council of Australian Governments Skills Council). The exemptions determined by the Minister can be in reference to the following:

• the RTO doing the issuing
• the VET qualification or statement of attainment being issued and/or
• the individual to whom the qualification or statement of attainment is being issued (that is, the student).

The Student Identifiers (Exemptions) Instrument 2018 (the Exemptions Instrument) provides for the following exemptions with reference to RTOs:

• where the collection and submission of data by the RTO would conflict with defence or national security legislation or could jeopardise the security of defence, border protection, customs, national security or police personnel
• where the RTO is providing emergency or safety related services to the Australian community and the RTO:
  – is registered as a charity with the Australian Charities and Not-For-Profits Commission
  – provides volunteers, employees, contractors or other students with training or assessment in a VET course, for which it receives no payment and
  – its ability to provide services to the community may be adversely impacted if it was required to collect and submit compliant data.

25. Section 4 of the Act defines Ministerial Council as the body established by the Council of Australian Governments to deal with training and skills or otherwise a body prescribed by the regulations.
The Exemptions Instrument provides for the following exemptions with reference to students:

- where a student is not an Australian citizen and has studied offshore
- where a student has completed the requirements for a VET qualification or statement of attainment prior to 1 January 2015
- where a student has declared that they have a genuine personal objection to being assigned a USI and understand the consequences and potential consequences of not being assigned a USI.28

**Item 15** repeals subsection 53(4), which currently covers approval of the Exemptions Instrument by the Ministerial Council, and inserts new exemption provisions covering individual requests for exemption to be decided by the Registrar. The ability for the Commonwealth Minister to grant an exemption is retained, as highlighted by the new heading inserted by **item 14**. The requirement to secure the agreement of the Ministerial Council for the Exemption Instrument is also retained at **proposed subsection 53(12)**. This requirement to secure agreement would also apply if the Commonwealth Minister chooses to make an instrument setting out matters to be considered by the Registrar in determining if an individual exemption application is to be granted (**proposed subsection 53(9)**).

In summary, the proposed additions to section 53 are:

- **proposed subsection 53(5)** would allow an individual to request the Registrar make a determination that the USI requirement not apply to them
- **proposed subsection 53(6)** would require the Registrar to make, or refuse to make, the requested determination in writing—under **proposed subsection 53(10)** such a determination is not a legislative instrument
- **proposed subsection 53(7)** would require the Registrar to have regard to matters (if any) determined in an instrument made under **proposed subsection 53(9)**
- **proposed subsection 53(8)** would require the Registrar to give the individual notice of the Registrar’s decision, including, if relevant, reasons for a refusal
- **proposed subsection 53(9)** would allow the Commonwealth Minister to make a legislative instrument setting out the matters to be considered in making a decision about an exemption at the request of the individual—such an instrument would be subject to agreement of the Ministerial Council, under **proposed subsection 53(12)**. **Proposed subsection 53(13)** allows for matters covered by subsection 53(3) and **proposed subsection 53(9)** to be included in the same instrument
- **proposed subsection 53(11)** would provide that if the Registrar issues a USI to an individual with an exemption under **proposed subsection 53(6)**, this action would be taken to revoke the exemption
- **proposed subsection 53(12)** requires agreement of the Ministerial Council for the Commonwealth Minister to make a legislative instrument under subsection 53(3), or **proposed subsection 53(9)**.

As outlined earlier in this Bills Digest, the analysis of the Bill by the Senate Standing Committee for the Scrutiny of Bills focuses on these proposals, stating:

28. Ibid., section 8. See also: Australian Government, "Exemptions from reporting the USI", USI website, last modified 10 October 2018.
The committee’s view is that significant matters, such as the matters that must be considered by the Registrar when making a determination to exempt a student from the requirement to have a student identifier, should be included in primary legislation unless a sound justification is provided. 29

The Committee also draws attention to the fact that the arrangements proposed in the Bill for a determination by the Registrar as to a person’s exemption from the USI do not include the possibility of review by the Administrative Appeals Tribunal. 30 The Committee raises questions about the justifications for this approach provided in the Explanatory Memorandum to the Bill, which relate to the small proportion of individuals likely to seek an exemption, and likely delays resulting from a review. 31

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31. Ibid. See also: Explanatory Memorandum, Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019, p. 11.