



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

18 March 2021

The Hon Alan Tudge MP
Minister for Education and Youth
Parliament House
CANBERRA ACT 2600

Via email: alan.tudge.mp@aph.gov.au

CC: DLO.Tudge@dese.gov.au

Dear Minister,

Commonwealth Grant Scheme Guidelines 2020 [F2020L01609]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Matters more appropriate for parliamentary enactment

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

Section 10 of the instrument sets out 'national priorities' in relation to the provision of higher education for the purposes of paragraph 30-20(b) of the *Higher Education Support Act 2003*. This has the effect of setting out priority areas for the purpose of national higher education policy.

From a scrutiny perspective, the committee generally considers that significant matters, such as setting out significant elements of national higher education policy, are more appropriately enacted via primary legislation. Where significant matters are nevertheless left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be provided in the explanatory statement. In this instance, the committee notes that the explanatory statement to the instrument does not provide any information as to why it is considered necessary and appropriate to leave these matters to delegated legislation.

In light of the above, the committee requests your advice as to why it is considered necessary and appropriate to set out national priorities in relation to the provision of higher education via delegated, rather than primary, legislation.

Compliance with Legislation Act 2003 – incorporation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirements prescribed by paragraph 15J(2)(c) of the *Legislation*

Act 2003 (Legislation Act), which provides that the explanatory statement to an instrument must contain a description of any incorporated documents and indicate how they may be obtained.

In this instance, the instrument makes reference to certain Field of Education codes set out in the Australian Bureau of Statistics' *Australian Standard Classification of Education*. However, neither the instrument nor the explanatory statement indicates whether the document is incorporated by reference and, if so, the manner of incorporation (that is, whether it is incorporated at a particular time or as in force from time to time) and where it may be obtained.

The committee therefore requests your advice as to whether the Australian Bureau of Statistics' *Australian Standard Classification of Education* is incorporated by reference and if so, the manner in which the document is incorporated and where it may be accessed free of charge.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **1 April 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdic.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



The Hon Alan Tudge MP

Minister for Education and Youth

Ref: MC21-001810

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells *Concetta*

Thank you for your letter of 18 March 2021 in which you raise the scrutiny concerns of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) in relation to the *Commonwealth Grant Scheme Guidelines 2020* (the Instrument). I provide the following advice in response to the Committee.

Matters more appropriate for parliamentary enactment – national priorities

Section 10 of the Instrument sets out ‘national priorities’ in relation to the provision of higher education. It is appropriate for these matters to be specified in delegated legislation, noting that paragraph 30-20(b) of the *Higher Education Support Act 2003* (the Act) expressly allows me to specify national priorities in the Instrument. This is a longstanding power that has been in the Act since it was first enacted in 2003 and has not been amended since that time.

As such, national priorities were previously specified in the *Commonwealth Grant Scheme Guidelines 2012* (which were repealed by the Instrument).

Under the Act, non-Table A providers (non-university higher education providers) can only receive Commonwealth Grant Scheme (CGS) funding in relation to the national priorities set out in the Instrument. This is a key mechanism used to ensure that limited Commonwealth funding is appropriately targeted to improving education outcomes in areas of national priority, such as nursing and education.

Further, national priorities may change as Australia’s workforce evolves over time. As such, it is vital that there is flexibility to specify new and different national priorities via a legislative instrument. Having this flexibility will also ensure the rapid implementation of Government funding decisions. For example, a number of non-university higher education providers were awarded CGS funding through the 2020–21 Budget for short courses in areas of national priority to support students, and the recently unemployed, to undertake higher education and ultimately position our nation and workforce to recover from the economic downturn caused by the COVID-19 pandemic.

Compliance with *Legislation Act 2003* – Incorporation

I confirm that the Australian Bureau of Statistics (ABS) *Australian Standard Classification of Education 2001* (ABS document), as in force or existing from time to time, is incorporated by reference in accordance with subsection 14 of the *Legislation Act 2003*.

The ABS document is freely available to the public on the ABS website at www.abs.gov.au/ausstats/abs@.nsf/0/E7779A9FD5C8D846CA256AAF001FCA5C. The Department of Education, Skills and Employment's website also includes information about the allocation of units to funding clusters (www.dese.gov.au/higher-education-loan-program/resources/2021-allocation-units-study-funding-clusters).

I will amend the Explanatory Statement for the Instrument in due course to reflect the above advice.

I trust this information is of assistance.

Yours sincerely

Alan Tudge

12 / 5 / 2021



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13 May 2021

The Hon Alan Tudge MP
Minister for Education and Youth
Parliament House
CANBERRA ACT 2600

Via email: alan.tudge.mp@aph.gov.au

CC: DLO.Tudge@dese.gov.au

Dear Minister,

Commonwealth Grant Scheme Guidelines 2020 [F2020L01609]

Thank you for your response of 12 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 12 May 2021. Based on your advice regarding the necessity of setting out the national priorities in an instrument to ensure flexibility in responding to changing education and workforce needs and confirmation that the Australian Bureau of Statistics' *Australian Standard Classification of Education* is incorporated in the instrument as in force from time to time, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to include this further information. This undertaking has been listed in Appendix D of *Delegated Legislation Monitor 7 of 2021*.

In light of this, the committee has resolved to withdraw the disallowance notice in place on the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation