



3 April 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Dan.Tehan.MP@aph.gov.au

CC: Rob.Mason@dese.gov.au; Amanda.Gilkes@dese.gov.au

Dear Minister,

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 [F2019L01699]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate 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 this matter.

Merits review

Item 3 of Schedule 2 to the instrument inserts new Chapter 2 into the Higher Education Provider Guidelines 2012 (principal guidelines). New section 2.10.5 of the principal guidelines requires the HELP Tuition Protection Director (Director) to give written notice to each higher education provider liable to pay a HELP tuition protection levy which sets out the amount of the levy, the calculation for each levy component that applies to the provider, and the day by which the provider must pay the levy.

New sections 2.10.25 to 2.10.35 of the principal guidelines set out the circumstances in which a liable provider may request a review of a such a determination by the Director, the options available to the Director in reviewing the decision, and the notice requirements attaching to the review decision.

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review.

Following informal engagement with your department, the committee understands that the determination of levy components involves, at most, the exercise of strictly confined discretion, concerning the assessment of additional information or evidence provided by

the provider. Nevertheless, the capacity of the decision-maker to exercise some discretion, albeit minor, combined with the availability of internal review, indicates that the determination of levy components cannot accurately be described as 'automatic'.

Accordingly, the committee requests your advice as to what characteristics of the determination of levy components justifies the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

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.

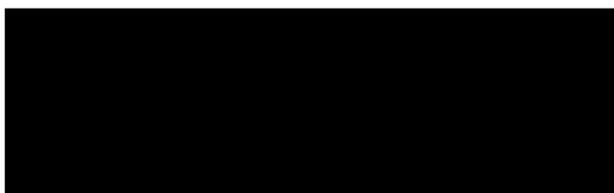
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 April 2020**.

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 sdlc.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 Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MS20-000355

24 APR 2020

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

Dear Senator

Concetta,

Thank you for your letter of 3 April 2020 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's assessment of the Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 (Amendment Guidelines). I appreciate the time you have taken to bring this to my attention.

You have sought advice as to what characteristics of the determination of levy components justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *'What decisions should be subject to merit review'*? (ARC Guidance Document).

The determination of a HELP tuition protection levy (levy) imposed by the *Higher Education Support (HELP Tuition Protection Levy) Act 2020* (Levy Act) is not subject to external merits review by the Administrative Appeals Tribunal or other review body. In my view, the characteristics of the decisions that support the basis for determination of the levy are factually based and there is very limited scope for disagreement about whether or not the particular facts have occurred. Accordingly, I consider the decision is one which does not necessitate an external review process.

Chapter 3 of the ARC Guidance Document outlines decisions that are considered to be unsuitable for merits review, which include decisions that may be described as automatic or mandatory. That is, decisions made where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances. The levy determinations can be classified as automatic or mandatory in nature, as the determinations are based on measurable factual data, such as student numbers, completion rates and compliance history. These are largely quantitative in nature and do not invite subject deliberation.

Automatic or mandatory decision

The calculation and total amount of the different components of the levy are based on a method prescribed in the Levy Act and legislative instruments made under that Act by the HELP Tuition Protection Director and by me as the responsible Minister. The statutory obligation to pay the levy is based on the factual circumstances of the provider and based on a formulaic calculation. In other words, there is no discretion exercisable around the factors relevant to the levy determination, which is based on categories of statistical and other data which must be considered when making a determination.

The automatic or mandatory character of the decision flowing from those facts, which is made by reference to clear targeted factors, means that any external review would necessarily be confined to ascertaining whether or not the relevant facts have occurred. As the facts are based on measurable data (such as student numbers, completion rates and compliance history) the decision-maker's discretion, to the extent it may be exercised, is strictly confined to an objective assessment of that data. Accordingly, the determination of the levy does not involve significant discretionary elements and therefore the decision is one which is characterised as automatic or mandatory.

Internal review process

Levy determinations are subject to internal review processes under section 2.10.25 (determination made by the HELP Tuition Protection Director) and section 2.10.30 (internal review of the determination) of the Amendment Guidelines. I consider that the internal review process in the Amendment Guidelines provides a robust and accountable mechanism for review of a levy determination through re-examination or recalculation of the levy amount.

Under section 2.10.35, higher education providers that receive a levy notice from the HELP Tuition Protection Director have the right to request a review of the determination of a levy component or components. This review is conducted by the HELP Tuition Protection Director, who may affirm, vary or set aside the levy determination in the levy notice, and, if the decision is set aside, may make a further decision. In requesting a review of a determination, a leviable provider may supply any further information or evidence it wishes the HELP Protection Director to consider. In addition, a leviable provider may lodge a complaint about the handling of the determination process with the Department of Education, Skills and Employment (the department) to investigate in accordance with its complaints policy and procedures. If a provider is not satisfied with the way the department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman.

Decisions made by the HELP Tuition Protection Director in relation to the levy determination were not made subject to independent merits review because the nature of those decisions are not such as would require an external tier of review.

Levy components

The levy is comprised of three components: the provider's administrative fee component, risk rated premium component and special tuition protection component for the year. The Levy Act prescribes that the Minister for Education is responsible for making the legislative instrument for the administrative fee component and the HELP Tuition Protection Director is responsible for making the legislative instrument for the risk rated premium component and special tuition protection component.

In setting an administrative fee component, I may determine a maximum amount for an administrative flat charge and also a per student amount. These amounts must not be higher than the upper limits set out in subsection 9(3) of the Levy Act. The Australian Government Actuary was closely consulted in setting these upper limit amounts. Subsection 9(3) gives providers transparency and certainty as to the maximum possible amounts that can be charged for the administrative fee component.

The risk rated premium component is calculated based on the provider's level of exposure under the Higher Education Loan Program (HELP), in terms of total student numbers and total HELP loan amounts, as well as the provider's risk of default based on certain risk factors, including course completion, student volatility, average loan size and non-compliance history. In setting the risk rated premium and special tuition protection components, the HELP Tuition Protection Director must have regard to the advice of the HELP Tuition Protection Fund Advisory Board and the sustainability of the HELP Tuition Protection Fund. Additionally, before the HELP Tuition Protection Director makes a legislative instrument, the Treasurer must approve the legislative instrument in writing. This provides an extra level of oversight, accountability and independent scrutiny of the legislative instrument. It also enables the quality and consistency of levy determination decisions to be closely monitored.

The legislative instruments that set the levy components are also subject to Parliamentary scrutiny and the disallowance process.

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely



DAN TEHAN



21 May 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Dan.Tehan.MP@aph.gov.au

CC: Rob.Mason@dese.gov.au; Amanda.Gilkes@dese.gov.au

Dear Minister,

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 [F2019L01699]

Thank you for your response of 24 April 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument. The committee considered your response at its private meeting on 20 May 2020, and resolved to seek your further advice about the matter outlined below.

Availability of independent review

As you are aware, the instrument inserts new sections 2.10.25 to 2.10.35 into the Higher Education Provider Guidelines 2020 (principal guidelines). These sections set out the circumstances in which a leviable provider may request a review of a levy determination by the Director, the options available to the Director in reviewing the decision, and the notice requirements attaching to the review decision. The instrument provides for internal review of these decisions; however, it does not appear to provide for independent merits review of the same decisions.

Following informal engagement with your department, the committee sought your formal advice as to what characteristics of the determination of levy components justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's (ARC) guidance document, *What decisions should be subject to merits review?* (ARC guidance document).

In your response to the committee, you advise that the automatic or mandatory nature of the decisions relating to the determination of levy components makes them inappropriate for independent merits review. In support of your advice, you explain that 'there is no discretion exercisable around the factors relevant to the levy determination', as the determination 'is based on categories of statistical and other data which must be considered when making a determination'.

The committee shares your view, and the view of the ARC, that automatic or mandatory decisions are not suitable for independent merits review. However, the committee remains concerned that, unlike strictly automatic or mandatory decisions, the relevant decisions in this instance require the decision-maker to exercise some discretion, albeit minor. This appears to be reflected in your advice that:

As the facts are based on measurable data (such as student numbers, completion rates and compliance history) the decision-maker's discretion, to the extent it may be exercised, is strictly confined to an objective assessment of the data.

In the committee's view, the fact that a decision is based on quantitative data, is not, of itself, a reason to exclude such a decision from independent merits review. In this regard, the committee understands that such decisions are often subject to independent merits review by the Administrative Appeals Tribunal in relation taxation. Moreover, the committee considers that the availability of internal review under the principal guidelines, as amended by the instrument, indicates that there is some scope for disagreement about the relevant data.

Accordingly, in the absence of any other reason to exclude independent merits review for decisions made under the principal guidelines, as inserted by the instrument, the committee remains of the view that independent merits review should be made available.

The committee therefore requests your advice as to whether the instrument could be amended to provide for independent merits review of decisions made under new sections 2.10.25 to 2.10.35 of the Higher Education Provider Guidelines 2020.

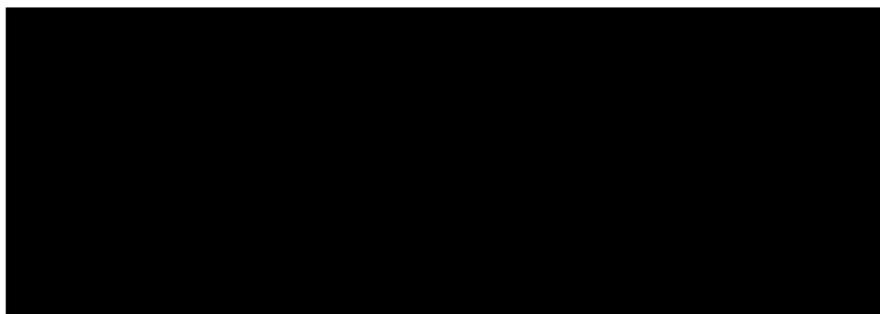
I note that on 14 May 2020, the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider the instrument. Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 2020**.

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 sdlc.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 Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MS20-001150

05 JUN 2020

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

Dear Senator

Concetta,

Thank you for your response letter of 21 May 2020 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) further assessment of the Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 (the Instrument). I appreciate the time you have taken to seek further advice and bring this matter again to my attention.

I note the Committee's ongoing concerns that, unlike strictly automatic or mandatory decisions, the relevant decisions in relation to the HELP tuition protection levy require the decision-maker to exercise some discretion, albeit minor, and that the availability of internal review under the *Higher Education Provider Guidelines 2012* (the Guidelines), as amended by the Instrument, indicates that there is some scope for disagreement about the relevant data.

I also acknowledge the Committee's view that independent merits review should be made available, and that you have sought advice as to "whether the instrument could be amended to provide for independent merits review of decisions made under new sections 2.10.25 to 2.10.35 of the Higher Education Provider Guidelines 2020".

After further consideration of the matter, and in line with the Committee's advice, I have made the Higher Education Provider Amendment (AAT Review) Guidelines 2020 under section 238-10 of the *Higher Education Support Act 2003*. This amendment instrument has amended the Guidelines to provide for the availability of independent merits review by the Administrative Appeals Tribunal of a review decision made by the HELP Tuition Protection Director in relation to the HELP tuition protection levy under section 2.10.30 of the Guidelines.

I understand that the Committee gave notice of a motion on 14 May 2020 to disallow the Instrument to allow additional time for the Committee to consider the Instrument. I trust the action that I have undertaken in amending the Guidelines to provide for independent merits review, addresses the Committee's concerns. Therefore, on that basis, I kindly request that the Committee undertakes to have the notice of motion to disallow the Instrument withdrawn.

I have enclosed for the Committee's information a copy of the *Higher Education Provider Amendment (AAT Review) Guidelines 2020*.

Thank you again for raising this matter with me. I trust this information is of assistance.

Yours sincerely



DAN TEHAN



Higher Education Provider Amendment (AAT Review) Guidelines 2020

I, Dan Tehan, Minister for Education, make the following guidelines.

Dated 05 JUN 2020

[REDACTED]

Dan Tehan
Minister for Education

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1 Name

This instrument is the *Higher Education Provider Amendment (AAT Review) Guidelines 2020*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	<i>The day after this instrument is registered.</i>	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under section 238-10 of the *Higher Education Support Act 2003*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Higher Education Provider Guidelines 2012

1 After section 2.10.35

Insert:

Administrative Appeals Tribunal review

2.10.40 An application may be made to the Administrative Appeals Tribunal for the review of a decision that has been affirmed, varied or set aside under section 2.10.30.

2 Section 2.10.40

Omit “2.10.40”, substitute “2.10.45”.

3 Section 2.15.1

Omit “sections 166-10 and 166-15”, substitute “sections 166-15 and 166-20”.



AUSTRALIAN
SENATE

Senate Standing Committee for the

Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600

02 6277 3066 | sdhc.sen@aph.gov.au

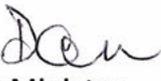
www.aph.gov.au/senate_sdhc

27 August 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Dan.Tehan.MP@aph.gov.au

CC: Rob.Mason@dese.gov.au; Amanda.Gilkes@dese.gov.au



Dear Minister,

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 [F2019L01699]

Thank you for your response of 22 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

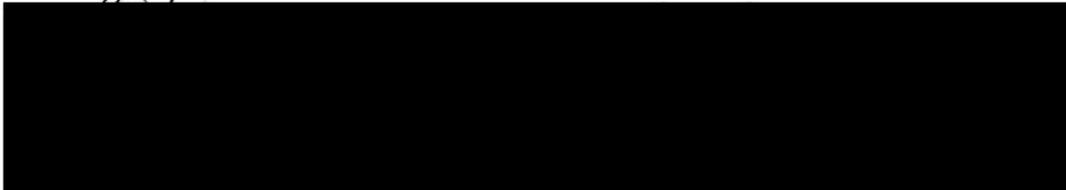
The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your amendment to the instrument to provide for independent merits review, which addresses the committee's scrutiny concerns. This action has been listed as an implemented undertaking in *Delegated Legislation Monitor 9 of 2020*.

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