

LI 2023/31 - Explanatory statement -

EXPLANATORY STATEMENT

Student Assistance Act 1973

Student Assistance (Education Institutions and Courses) Amendment (No. 2) Determination 2023

Purpose

The *Student Assistance (Education Institutions and Courses) Amendment (No. 2) Determination 2023* (the Amendment Determination) amends the *Student Assistance (Education Institutions and Courses) Determination 2019* (the Determination) to ensure new startup year courses are approved tertiary courses, in accordance with the startup year measure. The determination of these courses for the purposes of the *Student Assistance Act 1973* (the Act) allows students undertaking these courses to qualify for student payments, subject to other relevant criteria being met.

Background

To qualify for student payments under the *Social Security Act 1991*, students must be undertaking an approved course of education or study. The *Social Security Act 1991* provides that a course is an approved course of education or study if it is a course determined under section 5D of the Act to be a secondary course or a tertiary course for the purposes of that Act (subsection 541B(5) for youth allowance, section 569B for austudy payment and section 1061PC for pensioner education supplement).

Further, to qualify for ABSTUDY in accordance with the ABSTUDY Policy Manual, students must be undertaking an approved course. All mainstream courses determined under section 5D of the Act are approved for ABSTUDY purposes (section 11.5.1 of the ABSTUDY Policy Manual).

Subsection 5D(1) of the Act provides that the Minister may, for the purposes of the Act, determine in writing that:

- (a) a course of study or instruction is a secondary course, or a tertiary course; or
- (b) a part of a course of study or instruction is a part of a secondary course or part of a tertiary course.

The Determination specifies the courses and parts of courses determined by the Minister for these purposes.

Startup year courses

The amendments made by the Amendment Determination are intended to support amendments to primary legislation, including the *Higher Education Support Act 2003*, the Act and the *Social Security Act 1991*, to give effect to the startup year measure. These are contained in the *Education Legislation Amendment (Startup Year and Other Measures) Act 2023*, which commenced on 28 June 2023.

The startup year measure is intended to establish STARTUP-HELP assistance as a new income contingent loan under the *Higher Education Support Act 2003*, to support student participation in startup year courses at Australian higher education providers. It is intended that from early 2024, startup year courses will be available at Australian universities and university colleges for final year undergraduate students, current post-graduate students and recent graduates. As part of this initiative, it is intended that students undertaking startup year courses, who are entitled to STARTUP-HELP assistance under the *Higher Education Support Act 2003*, may be able to qualify for student payments.

The Amendment Determination amends the table in Schedule 2 to the Determination to provide that new startup year courses are approved tertiary courses. In the Amendment Determination, startup year courses are referred to as “accelerator program courses”, consistent with amendments to primary legislation. Combined courses that include a startup year course (or accelerator program course) are also new approved tertiary courses under these changes. This will ensure that students undertaking these new courses may qualify for youth allowance (student), austudy payment and pensioner education supplement under the *Social Security Act 1991*, and ABSTUDY in accordance with the ABSTUDY Policy Manual, subject to meeting all relevant criteria.

Information sharing

Information about a student that is collected by an officer for the purposes of a social security payment will have the character of protected information under the social security law. Similarly, information about a student collected for the purposes of ABSTUDY will have the character of protected information under the Act.

The *Social Security (Administration) Act 1999* (Administration Act) and the Act have protections in place that limit the way in which protected information is handled. Under Division 3 of Part 5 of the Administration Act, and Division 3 of Part 10 of the Act, a person will be authorised to record, disclose or use protected information, for example, where this is for the purposes of the social security law or the Act, with consent or in accordance with a public interest certificate. If the recording, disclosure or use of protected information is not authorised under the Administration Act or the Act and the person knows or ought reasonably to know that the information is protected information, the person may commit an offence that is punishable on conviction by imprisonment for a term not exceeding two years.

Availability of independent review

Decisions made under the social security law in relation to student payments are generally subject to internal and external merits review under Parts 4 and 4A of the Administration Act. Decisions made under the ABSTUDY Policy Manual relating to ABSTUDY eligibility or entitlement are subject to internal merits review and judicial review. ABSTUDY debt recovery decisions are subject to internal and external merits review under Part 9 of the Act. Such decisions will include those based on the approved courses in the Determination.

Commencement

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

Disallowable instrument

The Amendment Determination is made under subsection 5D(1) of the Act. Subsection 5D(3) provides that a determination under subsection 5D(1) is a legislative instrument. The Amendment Determination is a disallowable instrument for the purposes of the *Legislation Act 2003*.

Consultation

The department consulted with Services Australia and the Department of Education on the text of the Amendment Determination.

Impact Analysis

The Amendment Determination does not require an Impact Analysis, as it is unlikely to have a more than minor regulatory impact (OIA23-04995).

Explanation of the Provisions

Section 1 provides that the name of the instrument is the *Student Assistance (Education Institutions and Courses) Amendment Determination 2023*.

Section 2 provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 provides that the authority for making the instrument is subsection 5D(1) of the *Student Assistance Act 1973*.

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. In making the instrument, the Minister is relying on this subsection in conjunction with the instrument-making power in subsection 5D(1) of the Act.

Section 4 provides that the *Student Assistance (Education Institutions and Courses) Determination 2019* is amended as set out in the applicable items in Schedule 1, and any other item in Schedule 1 to this instrument has effect according to its terms.

Schedule 1 – *Student Assistance (Education Institutions and Courses) Determination 2019*

Schedule 1 to the Amendment Determination sets out the amendments to the Determination.

Item 1 inserts a new definition at the beginning of section 4 of the Determination, before the definition of “accredited higher education course”. The new definition of “accelerator program course” provides that this term has the same meaning as it does in the *Higher Education Support Act 2003*. Startup year courses are referred to in that Act as “accelerator program courses”, and this term is used in the Amendment Determination.

The table in Schedule 2 to the Determination specifies approved tertiary courses for the purposes of paragraph 11(1)(a), and subsections 11(2) and 12(1) of the Determination.

Items 2 and 3 amend table item 6 of the table in Schedule 2 to the Determination, to provide for startup year courses (or accelerator program courses) as approved tertiary courses, for the purposes of these provisions. This means that students undertaking these new courses may qualify for youth Allowance (student), austudy payment and pensioner education supplement under the *Social Security Act 1991*, and ABSTUDY in accordance with the ABSTUDY Policy Manual, subject to meeting all relevant criteria.

Paragraph 11(1)(a) of the Determination relevantly provides that for paragraph 5D(1)(a) of the Act, a tertiary course is a full-time course that is:

- specified in Column 1 of the table in Schedule 2 to this instrument; and
- provided by the education institution specified for that course in Column 2 of that table.

Subsection 11(2) provides that, without limiting subsection 11(1), a course that meets the requirements of paragraph (1)(a), (b) or (c) and is not a full-time course is a tertiary course for the purposes of section 1061PC of the *Social Security Act 1991*. Section 1061PC of that Act defines an approved course of education or study for the purposes of pensioner education supplement.

Subsection 12(1) provides that for the purposes of paragraph 11(1)(c) of the Determination, a course is a tertiary course if:

- the course is specified in Column 1 of item 5, 6, 8, 9, 10 or 11 of the table in Schedule 2 to this instrument; and
- it was a tertiary course under an instrument made under subsection 5D(1) of the Act; and
- the course is not a tertiary course under paragraph 11(1)(a) of this instrument.

Item 2 makes a minor amendment to table item 6 of the table in Schedule 2 to the Determination. This item inserts “; or” at the end of subparagraph (h)(iv) in table item 6, to provide for the addition of new paragraphs (i) and (j), as inserted by **item 3** below.

Item 3 inserts new paragraphs (i) and (j) into table item 6, after paragraph (h). New paragraph (i) inserts “accelerator program course” into the table, to ensure it is an approved tertiary course under the Determination. A new definition of “accelerator program course” is inserted into section 4 of the Determination by **item 1** above.

New paragraph (j) is intended to apply to combined courses that include an accelerator program course. For such a course to be an approved tertiary course, it must meet the requirements specified in new subparagraphs (j)(i) to (iv). These are that the course must:

- include an accelerator program course (this is defined in section 4 of the Determination, inserted by **item 1** above); and
- include an undergraduate or postgraduate accredited higher education course that leads to one of the qualifications in paragraphs (a) to (g) in table item 6. These are:
 - associate degree;
 - associate diploma;
 - Bachelor degree;
 - bridging study for overseas-trained professionals;
 - postgraduate bachelor degree;
 - Masters qualifying course; or
 - any of the following that is not a VET course – diploma, advanced diploma, graduate certificate or graduate diploma; and
- be identified in the institution’s handbooks as a combined course; and
- not include a course accredited at Masters level (other than a course specified in Schedule 3 to the Determination).

These requirements are similar to those for current approved combined courses in paragraph (h) of table item 6. These include that the relevant institution providing the combined course must recognise and publish the course as a combined course in their handbooks.

In the case of accelerator program courses and combined courses that include an accelerator program course, the course must be provided by a higher education provider within the meaning of the *Higher Education Support Act 2003*. This is consistent with the courses already specified in table item 6.

Statement of Compatibility with Human Rights

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

Student Assistance (Educational Institutions and Courses) Amendment (No. 2) Determination 2023

The *Student Assistance (Education Institutions and Courses) Amendment (No. 2) Determination 2023* (the Amendment Determination) 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

The Amendment Determination amends the *Student Assistance (Education Institutions and Courses) Determination 2019* (the Determination). The tertiary courses specified in Schedule 2 to the Determination are approved “tertiary courses” for the purposes of the *Student Assistance Act 1973*. The determination of these courses as tertiary courses allows people studying those courses to qualify for student payments, that is, youth allowance (student), austudy payment and pensioner education supplement under the *Social Security Act 1991*, and ABSTUDY in accordance with the ABSTUDY Policy Manual, provided they meet the other eligibility criteria for those payments.

The Amendment Determination adds new startup year courses (or accelerator program courses), and combined courses that include these courses, to Schedule 2, in accordance with the startup year measure.

Human rights implications

The Amendment Determination engages the following human rights:

Right to Education

The Amendment Determination engages the right to education contained in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 13 recognises the important personal, societal, economic and intellectual benefits of education. Article 13 also provides the secondary education in all its different forms, including higher education, shall be made generally available and accessible to all by every appropriate means.

By determining that new startup year courses are approved tertiary courses, which in turn assists people studying those courses to qualify for student payments, the Amendment Determination may enable students to access education and is therefore compatible with human rights.

Right to Social Security

The Amendment Determination engages the right to social security contained in Article 9 of the ICESCR. Article 9 requires that a system be established under domestic law and that public authorities must take responsibility for the effective administration of the system.

The social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

Article 4 of the ICESCR provides that countries may limit the right to social security in a way determined by law only in so far as this may be compatible with the nature of the rights contained within the ICESCR and solely for the purpose of promoting the general welfare in a democratic society. Such a limitation must be proportionate to the objective to be achieved.

The Act provides access to social security, and the ABSTUDY Policy Manual provides access to ABSTUDY, for students through equity measures that provide financial assistance to help meet the costs associated with study. To qualify for student payments, a student must meet specified criteria, including in relation to their course of study, study load and study progress.

A student undertaking a course specified in the Determination may be able to qualify for student payments under the social security law, that is, youth allowance (student), austudy payment and pensioner education supplement, as well as ABSTUDY under the ABSTUDY Policy Manual, provided they meet the other eligibility criteria for those payments.

By determining that new startup year courses, and certain combined course including a startup year course, are approved tertiary courses, which in turn assists people studying those courses to qualify for student payments, the Amendment Determination may enable more students to access social security payments and is therefore compatible with human rights.

Conclusion

The Amendment Determination is compatible with human rights as it promotes and supports the right to education and the right to social security. To the extent a human rights obligation is engaged or limited, the impact is for a legitimate objective and is reasonable, necessary and proportionate.

The Hon Amanda Rishworth MP, Minister for Social Services