HIGHER EDUCATION AMENDMENT BILL 2009

EXPLANATORY MEMORANDUM

AMENDMENTS TO
HIGHER EDUCATION ACT 2004

HIGHER EDUCATION AMENDMENT BILL 2009

INTRODUCTION

The *National Protocols for Higher Education Approval Processes* (*National Protocols*) were originally approved by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) on 21 March 2000. These *National Protocols* are a key element of a national quality assurance framework for Australian higher education. They have been designed to ensure consistent criteria and standards for higher education approval processes across Australia. The *National Protocols* provide a common framework for regulating the establishment and recognition of new universities, the operation of overseas higher education institutions in Australia, the authorisation of providers of higher education other than universities and the accreditation of their courses.

On 7 July 2006, MCEETYA approved revised *National Protocols* and further revised them on 31 October 2007. Changes to the *National Protocols* were necessary to reflect experience since their adoption in 2000 and to set in place arrangements to deal with emerging challenges. The 2007 revision of the *National Protocols* replaces those approved by MCEETYA in 2000.

Individual States and Territories have the responsibility for implementing the *National Protocols* through legislation. The *Higher Education Act 2004* ("the Act") implements the *National Protocols* in Western Australia. The *Higher Education Amendment Bill 2009* has been developed to amend the Act and implement the revised *National Protocols.*

In 2009 under the Commonwealth Government's 'reform' of higher education, MCEETYA has been superseded and responsibility for higher education, including the *National Protocols* and higher education regulation has transferred to the new Ministerial Council for Tertiary Education and Employment.

OBJECTIVES OF THE BILL

The *Higher Education Amendment Bill 2009* implements the revised *National Protocols* and includes amendments to the Act arising from operational experience related to effectively implementing the *National Protocols* in Western Australia.

The amending legislation is required to discharge Western Australia's national obligations to introduce the revised *National Protocols* as soon as possible to promote national consistency in higher education regulation.

Western Australia is exposed to criticism from the industry and especially from other States and Territories and the Commonwealth who are signatories to the *National Protocols*, over the issue of national consistency and failure to implement the revised *National Protocols* by the agreed implementation date of 31 December 2007.

Institutions intending to make an application to be considered for university college status in Western Australia in line with the provisions of the revised *National Protocols* are precluded from doing so until the Act is amended.

CLAUSE NOTES

Clause 1 - Short title

This clause specifies the short title of the enacted Bill. When enacted it will be known as the *Higher Education Amendment Act 2009*.

Clause 2 – Commencement

This clause specifies when different sections of the Act will come into effect. Sections 1 and 2 dealing with the short title and commencement will come into effect on Royal Assent and the rest of the Act on a day fixed by proclamation with the possibility to fix different days for different provisions.

Clause 3 – The Act Amended

The amendments in the *Higher Education Amendment Act 2009* are to the Act.

Clause 4 – Section 3 Amended

Clause 4(1) deletes in section 3 the definitions of:

higher education award
National Protocols
recognised Australian university
section 10 determination

Clause 4(2) inserts new and amended definitions in section 3 of the Act:

Australian Qualifications Framework

Means the framework of educational qualifications stated in the implementation handbook for the Australian Qualifications Framework (AQF) published by the Australian Qualifications Framework Advisory Board as in force from time to time. The AQF is a unified system which defines and delineates national qualifications in schools, vocational education and training and the higher education sector.

Australian University College

A new definition dealing with “University College” is included.

higher education award

The new definition of “higher education award” is to ensure that all categories of higher education awards are captured by the definition and to make a clear

linkage between the definition of higher education award and the AQF as required by the National Protocols.

National Protocols

"National Protocols" means the *National Protocols for Higher Education Approval Processes* approved by MCEETYA on 31 March 2000, as amended from time to time or if the regulations declare a document to be in substitution for that protocol a reference to the substitute document as amended from time to time.

payment agreement

A payment agreement has been included in section 28 that will be entered into between the Minister and an applicant for Australian university status, for overseas university status or for self-accrediting institution status. The arrangement will cover the basis for the repayment of reasonable costs and expenses incurred by the Minister in considering the application.

section 10 determination

A section 10 determination now refers only to the recognition of overseas universities.

self-accrediting authorisation

The definition provides for the inclusion of a new type of institution, a self-accrediting non-university institution, as provided for in the revised *National Protocols*. The *National Protocols* (Protocol D) provide for higher education institutions to seek approval to self-accredit their courses. Authority to self-accredit will be limited to fields of study and AQF higher education qualification levels in which the institution has a proven track record.

Australian university

Clause 4(3) amends the current definition to incorporate "or part of an educational institution" in the definition.

non-university institution

Clause 4(4) amends the current definition to exclude in (a) "an Australian university" and in (b) "an Australian university college".

provider's authorisation

Clause 4(5) amends the definition to provide for more appropriate terminology such that a "provider's authorisation" refers to an "authorisation granted for " rather than an "authorisation given to".

Clause 5 inserts a new heading before section 6, entitled "Part 2 Division 1 – Protection of standards for higher education"

Part 2 Division 1 - Protection of standards for higher education

Clause 6 provides that section 6(1)(a) is amended to replace "a recognised Australian university" by "an Australian university" and 6(1)(b) is amended by inserting "a fine of" after the word "Penalty". Section 6(2)(c) is added such that section 6(1) which restricts the use the title "university" does not apply to an Australian university college.

Section 6(3)(a) is amended to replace "a recognised Australian university" by "an Australian university"; 6(3)(b) allows for the addition of an Australian university college; and after 6(3)(d) "a fine of" is inserted after the word "Penalty". Section 6(4) is deleted and a new section inserted which broadens the scope of this protection to include persons who are falsely representing that a course of study "will partially satisfy the requirements" for the conferral of a higher education award. Section 6(4)(a) is extended to cover "an Australian university college" and after 6(4)(b) "a fine of" is inserted after the word "Penalty".

Clause 7 provides that after section 6, new sections 7A and 7B are inserted. Section 7A deals with penalties for false representations about institutions being authorised to self-accredit higher education courses and section 7B deals with penalties for false representation that completion of a course of study would satisfy or partially satisfy the academic prerequisites for admission to a higher education course.

Clause 8 inserts a new heading, Part 2 Division 2 – Universities.

Part 2 Division 2 – Universities

Subdivision 1 – Report about criteria for establishing an Australian university

Clause 9 replaces section 7 with a new section: section 7(1) deals with a request from an educational institution to be assessed as to whether the institution may meet the criteria in the National Protocols for establishing an Australian university. Section 7(2) provides that a request or application to the Minister should involve the development of a payment agreement which, as outlined in section 28, is a written arrangement between the applicant and the Minister to pay the reasonable costs and expenses incurred in considering the request or application. Sections 7(3) – (5) deal with a request by the Minister for additional information and section 7(6) deals with providing a copy of the report of the higher education advisory committee to the applicant.

The new section 7 provides that a request from an educational institution can be made to the Minister to appoint a higher education advisory committee to report to the Minister on whether the institution may meet the criteria for establishment as an Australian university. While the Minister will provide this advice to the institution, it is for Parliament to decide whether and in what form an institution will be established as a university or as a lesser institution such as a university college consistent with the provisions of the *National Protocols*.

Clause 10 inserts a new Subdivision 2 – Recognition of overseas universities

Subdivision 2 – Recognition of overseas universities

Clause 11 amends section 8 to provide that an education institution is a recognised overseas university for the purposes of this Act if -

(a) it is an overseas university or part of an overseas university; and
(b) a section 10 determination is in force in respect of the institution.

Clause 12 amends section 9(1) such that an overseas university or part of an overseas university may apply to the Minister for a section 10 determination which determines that an overseas educational institution meets the criteria for recognition in Western Australia as an overseas university. Section 9(2) provides that the application for a section 10 determination involves the development of a payment agreement which, as outlined in section 28, is a written arrangement between the applicant and the Minister to pay the reasonable costs and expenses incurred in considering the request or application. Sections 9(3) – (5) deal with a request by the Minister for additional information

Clause 13 replaces section 10 and inserts a new section 10 – Recognition of overseas universities. Sections 10(1) – (4) deal with the process by which the Minister makes a determination that an educational institution meets the criteria for recognition as an overseas university. Section 10(5) provides that a determination made by the Minister must be tabled before each House of Parliament.

Clause 14 inserts a new section 11A which deals with further conditions that the Minister may make in relation to a section 10 determination.

Clause 15 amends sections 11(1) – (3) in relation to the suspension or revocation of a section 10 determination.

Clause 16 inserts a new heading, Part 2 Division 3 - Non-university institutions.

Part 2 Division 3 – Non-university institutions

Subdivision 1 – Authorised non-university institutions

Clause 17 deletes section 12 and replaces it with a new section 12 which deals with the conditions under which a non-university higher education institution is authorised to provide a higher education course.

Clause 18 inserts a new heading, after section 12.

Subdivision 2 – Self-accrediting authorisation of non-university institutions

Sections 13A – 13D deal with applications, standards and conditions for non-university providers seeking a self-accrediting authorisation. The Minister may grant a self-accrediting authorisation to an institution based on criteria

and standards and advice from a higher education advisory committee. Section 13A (2) provides that an application involves the development of a payment agreement which, as outlined in section 28, is a written arrangement between the applicant and the Minister to pay the reasonable costs and expenses incurred in considering the application.

Self-accrediting authorisation will relate to specified courses within a field or a range of fields of study leading to specified awards. The Minister may grant a self-accreditation authorisation subject to initial conditions as specified in section 13B(5) or any additional conditions imposed under section 13C(1) subject to natural justice provisions in sections 13C(2)(a) – (c).

Section 13D deals with the suspension or revocation of self-accrediting authorisation.

Clause 19 inserts a new heading, before section 13.

Subdivision 3 – Provider's authorisation of non-university institutions

Clause 20 amends section 13(1) by inserting after "for" – "the grant or renewal of". After section 13(2) insert sections 13(3) – (5) dealing with the Minister's request for additional information.

Clause 21 amends section 14(1)(a) by deleting "authorise a non-university institution to provide a higher course" and inserting "grant or renew a provider's authorisation for a non-university institution" and 14(1)(b) in paragraph (a) by deleting "the course" and inserting "higher education courses". Sections 14(2) and 14(3) are amended by deleting "give" and inserting "grant or renew". Section 14(4) is deleted and a new section 14(4) is inserted dealing with conditions that the Minister may apply to the granting or renewal of a provider's authorisation.

Clause 22 provides that sections 15A and15B are inserted after section 14. Section 15A determines that a provider's authorisation is to be in force for 5 years unless otherwise specified and that the Minister may extend a provider's authorisation for a further 6 months under certain conditions. Section 15A(2)(b) includes a transitional provision for providers who may need to seek an extension of their authorisation from the Minister but are within the 6 month period specified, on the commencement of the *Higher Education Amendment Act 2009*, section 15. Section 15B determines that the Minister may at any time make a provider's authorisation subject to conditions to ensure that standards in the authorisation are maintained or that the interests of students are protected, subject to natural justice provisions outlined in 15B(2).

Clause 23 amends section 15. Section 15(1) is deleted and replaced by 15(1)(a) and (b) which provide that the Minister may suspend or revoke a provider's authorisation if the non-university institution does not comply with conditions established under section 14(4) or 15B(1), or the Minister is not satisfied that standards established in the authorisation are being maintained. Section 15(2)(c) is amended by inserting "higher education" before "courses".

Clause 24 inserts a new heading before section 16.

Subdivision 4 – Accredited higher education courses

Clause 25 deletes section 16(1) by inserting new sections 16(1)(a) – (c) which establish that a higher education course provided by a non-university institution is accredited for the purposes of this Act if - (a) if it is accredited by an authorised self-accrediting non-university institution; (b) ministerial accreditation is in force as per section 18; or (c) the course is accredited by or under a written law of the Commonwealth, another State, the Australian Capital Territory or the Northern Territory. Section 16(c) provides that a course accredited elsewhere in Australia under legislation which implements the *National Protocols* will be considered as accredited in Western Australia.

Clause 26 inserts a new heading after section 16.

Subdivision 5 – Ministerial accreditation of higher education courses

Clause 27 inserts a new section 17A before section 17 which provides that this subdivision applies to a course provider that is a non-university institution.

Clause 28 amends section 17(1) by inserting after "accreditation"- "or the renewal of accreditation".

Clause 29 amends section 18(1) and (2) to delete "accredit" and insert "accredit, or renew the accreditation of". In section 18(3) delete "accredit" and insert "accredit, or renew the accreditation of" and in 18 (3)(b) delete "recognised".

Sections 18(4), (5) and (6) are repealed because of the insertion of new monitoring and enforcement powers in new sections 23A to 23C.

Section 18(7) is deleted and a new provision inserted that the Minister may make the accreditation of a higher education course subject to conditions.

Clause 30 inserts sections 19A and 19B after section 18. Section 19A determines that a ministerial accreditation of a higher education course under this section is to be in force for 5 years after the day on which the course is registered under section 23(3) unless otherwise specified and that the Minister may extend the accreditation for a further 6 months under certain conditions. Section 19A(2) includes a transitional provision for providers who may need to seek an extension of their accreditation from the Minister but are within the 6 month period specified on the commencement of the *Higher Education Amendment Act 2009* section 22. Section 19B determines that the Minister may at any time make a provider's authorisation subject to conditions to ensure that standards in the authorisation are maintained or that the interests of students are protected, subject to natural justice provisions outlined in sections 19B(2)(a)-(c).

Clause 31 amends section 19. Sections 19(1) and 19(2) are deleted. A new section 19(2) provides that the Minister may suspend or revoke the accreditation of a higher education course under certain circumstances.

Section 19(3) is amended by deleting “the ministerial accreditation” and inserting “accreditation of a higher education course”. The heading to section 19 is amended to read “Suspension or revocation of ministerial accreditation”.

Clause 32 inserts a new heading, Part 2 Division 4 – Higher education advisory committees after section 19.

Part 2 - Division 4 – Higher education advisory committees

Clause 33 deletes section 20(1) and inserts - The Minister must appoint a person or persons to constitute a higher education advisory committee (a) on receipt of a request made under section 7(1); and (b) on an application made under sections 9, 13A, 13 or 17. After section 20(1) a new section 2A is inserted which requires that the Minister, when appointing a higher education advisory committee, must provide applicants with the opportunity of commenting on the composition and membership of the committee and to take these comments into account when appointing the committee.

Clause 34 inserts after section 20 a new section 21A – Report of higher education advisory committee to be provided to applicant. This section requires the Minister to make a copy of a higher education advisory committee report available to the applicant and provide the applicant with an opportunity to request a review of the proposed report. Any request for a review must set out the grounds on which the applicant is seeking a review. On receipt of the request for a review the Minister will seek the views of the higher education advisory committee on the review and where necessary the Minster may seek additional advice.

Clause 35 inserts a new heading after section 21, Part 3A – Reviews and investigation

Part 3A – Reviews and investigation

Clause 36 amends section 22. After 22(a) insert “or”. In section 22(b) “higher education provider” is deleted and “non-university institution; or” is inserted. Paragraph 22(c) is deleted and a new paragraph is inserted which provides that the Minister may at any time review the provision and standard of an accredited course provided by an authorised non-university institution.

Clause 37 provides for new sections 23A to 23C to be inserted after section 22. Sections 23A – 23C provide a legislative scheme for the Minister to properly exercise investigative powers under the Act. The investigative provisions are based on amendments to the *Vocational Education and Training Act 1996*. Section 23A provides for the appointment of inspectors to investigate suspected contraventions of the Act by higher education providers; 23B outlines the inspectors’ powers and procedures and section 23C outlines the potential consequences of investigations.

Clause 38 inserts after section 23(2) a section 3(A) which provides that if the Minister grants a self-accreditation authorisation for a non-university institution, the Minister must arrange for the authorisation to be entered in the

register. Section 23(4) is amended by deleting “at reasonable times” and inserting “during normal office hours”.

Clause 39 inserts section 24A which provides that the Minister must ensure that a copy of the *National Protocols* is available for public inspection during normal office hours.

Clause 40 inserts section 26A dealing with protection from liability. It is important for the effective operation of the legislation that persons acting in good faith under the proposed amended Act are assured of the protection of section 26A. For example, the appointment of Chairs and members to higher education advisory committees to provide expert advice on the accreditation of higher education courses and the registration of providers is a core function under the Act. These expert committee members are largely drawn from the universities and are performing their functions effectively as a ‘community service’. Without section 26A there will be increasing difficulties attracting suitable members of higher education committees if membership carries the potential for personal liability for the carrying out of statutory functions. Section 26A will not relieve the State of any liability which means that a person disadvantaged by the negligent performance of a function under the Act has a means of redress.

Clause 41 inserts section 27A after section 26. 27A deals with evidentiary matters.

Clause 42 provides that section 28 is deleted and that a new section is introduced which provides that a written arrangement be developed between the applicant and the Minister to pay the reasonable costs and expenses incurred in considering a request or application.

Clause 43 provides that section 29 is amended to delete “jurisdiction” and insert “jurisdiction as a debt due to the Crown”.

Clause 44 amends section 30 – Regulations. In section 30(2)(d) after “determination” insert: “self-accrediting authorisation” to ensure that regulations can be made about the suspension and revocation of self-accrediting authorisations. Clause 44(2) inserts after section 30(2) a new section 30(3) which determines that the regulations may provide for a method of calculating a fee referred to in subsection 2(e), including calculation according to the costs and expenses incurred in providing the service.