

EXPLANATORY STATEMENT

Australian Education Act 2013

Australian Education Amendment (2016 Measures No. 2) Regulation 2016

Authority

Subsection 130(1) of the *Australian Education Act 2013* (the Act) empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed by the regulations, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. 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.

Legislative background

The Act is the principal legislation by which the Australian Government provides Commonwealth financial assistance for schools.

The *Australian Education Regulation 2013* (the Principal Regulation) contains a number of provisions to ensure the correct calculation and indexation of Commonwealth financial assistance for schools, and for the effective and efficient administration of that financial assistance.

The Act and Principal Regulation commenced on 1 January 2014.

Purpose and operation

Financial assistance under the Act is provided to states and territories for distribution to approved authorities for government and non-government schools, block grant authorities, capital grants authorities and non-government representative bodies. Entities approved to receive Commonwealth financial assistance under the Act, including states and territories in their capacity as approved authorities for government schools, must meet and maintain the conditions of approval outlined in the Act.

Division 3 of Part 5 of the Act provides mechanisms for the Commonwealth to provide funding to schools separate to ongoing recurrent funding (dealt with in Parts 3 and 4 of the Act) and funding for capital expenses (dealt with in Division 2 of Part 5 of the Act). Section 69A of the Act empowers the Minister to pay financial assistance for schools in circumstances prescribed in the regulations, in amounts worked out under or in accordance with the regulations.

The purpose of the *Australian Education Amendment (2016 Measures No. 2) Regulation 2016* (the Amendment Regulation) is to provide for additional Commonwealth financial assistance for schools under section 69A of the Act, in relation to students with a disability.

Regulation Impact Statement

The Office of Best Practice Regulation has advised that there is no regulatory impact arising from any of the amendments contained in the Amendment Regulation (OBPR ID 20198).

The Amendment Regulation does not materially impact on the existing regulatory requirements for approved authorities.

Commencement

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

Consultation

The Minister has consulted with the Ministerial Council as required by subsection 130(5) of the Act. The Amendment Regulation will have no significant regulatory impact on states and territories.

Statement of Compatibility with Human Rights

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

Australian Education Amendment (2016 Measures No. 2) Regulation 2016

This legislative instrument 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 *Australian Education Amendment (2016 Measures No. 2) Regulation 2016* (the Amendment Regulation) amends the *Australian Education Regulation 2013* (the Principal Regulation) to provide for additional Commonwealth financial assistance for schools under section 69A of the *Australian Education Act 2013* (the Act), in relation to students with a disability.

Human rights implications

The Amendment Regulation engages the following human rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Articles 28 and 29 of the *Convention on the Rights of the Child* (CRC)
- the rights of persons with disabilities – Articles 9 and 24 of the *Convention on the Rights of Persons with Disabilities* (CRPD)

Right to Education

The Amendment Regulation engages the right to education in Article 13 of the ICESCR. Article 13 recognises the right of everyone to education, which is directed towards the full development of the human personality and its sense of dignity, and to enable all persons to participate effectively in society. It also recognises the liberty of parents and guardians to choose non-government schools for their children, provided those schools conform to the minimum educational standards set out by the Australian Government. The right to education for children is also found in Articles 28 and 29 of the CRC.

The Amendment Regulation engages the right to education as it provides additional Commonwealth financial assistance for schools in relation to students with a disability, with the aim of improving the educational outcomes for such students. The Amendment Regulation promotes the right to education as it recognises that students with a disability have a right to education but face certain barriers to the enjoyment of that right as compared to other students. The Amendment Regulation is intended to enhance the promotion of the right to education for students with a disability by improving their access to and success of their education.

The Amendment Regulation is compatible with the right to education.

Rights of Persons with Disabilities

The Amendment Regulation also engages Articles 9 and 24 of the CRPD. Article 9 recognises the right of persons with disabilities to participate fully in all aspects of life, and Article 24 recognises the right of persons with disabilities to an inclusive education.

The Amendment Regulation provides a mechanism to deliver additional Commonwealth financial assistance for approved authorities for schools with respect to students with a disability, as informed by the nationally consistent collection of data on school students with a disability. This measure recognises the increased cost schools face in relation to providing educational outcomes for students with a disability in Australia. This measure is designed to benefit and ensure the improved educational attainment of students with a disability.

The Amendment Regulation is compatible with the rights of persons with disabilities.

Conclusion

The Amendment Regulation is compatible with human rights because it advances the protection of human rights.

Detailed explanation of the Amendment Regulation provisions

Section 1 – Name of Amendment Regulation

This section provides that the title of the Amendment Regulation is the *Australian Education Amendment (2016 Measures No. 2) Regulation 2016*.

Section 2 – Commencement

This section provides for the commencement of the various provisions of the Amendment Regulation. The provisions of the Regulation commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Amendment Regulation is made under the *Australian Education Act 2013*.

Section 4 – Schedule

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

Schedule 1 – Amendments

Item 1 sets out, for section 69A of the Act, circumstances in which the Minister may determine additional Commonwealth financial assistance for schools, and provides for the limits, conditions and requirements that relate to that financial assistance.

Section 69A in Division 3 of Part 5 of the Act provides for the establishment of discretionary funding initiatives for schools by regulation under the Act, and provides the necessary authority for the Commonwealth to make discretionary payments for such initiatives to states and territories for schools.

Subsection 69A(1) of the Act enables the Minister to determine an amount of financial assistance for a school for a year if the Minister is satisfied prescribed circumstances apply in relation to the school for that year.

In order to ensure appropriate Parliamentary oversight, the details of each initiative are set out in regulations made under section 130 of the Act. These details can include:

- the initiative's year or years of operation
- the criteria or preconditions (the 'prescribed circumstances' for subsection 69A(1)), noting that the Minister maintains discretion whether to exercise subsection 69A(1) in relation to a school or schools, and any amount to be made payable
- matters that the Minister may or must take into account in making a funding determination under subsection 69A(1)
- the amount of funding that may be paid for a school for a year (whether a fixed amount, a capped amount, or an amount worked out by formula) (see subsections 69A(2) and (3))

- the total amount of funding available for the initiative for a year(s) (which can be a fixed amount, a capped amount, or an amount worked out by formula) (see subsection 69A(4))

Item 1 establishes a discretionary funding initiative for schools for section 69A of the Act, which will provide additional Commonwealth financial assistance for schools in relation to students with a disability (SWD financial assistance).

New section 25H specifies a set of prescribed circumstances for a school for the years 2016 and 2017 (*the relevant years*) for the purposes of subsection 69A(1) of the Act. The prescribed circumstances are that the approved authority for the school has given the Department information in relation to one or more students who:

- are receiving primary education or secondary education at a school of the authority on the school's census day
- are a person with a disability
- are a person about whom the information must be provided, as specified in the Ministerial Council disability guidelines, for the year immediately prior to the relevant year (e.g. for 2015)

These prescribed circumstances reflect the intention of the SWD financial assistance, which is to assist with the cost of providing education for students who are persons with a disability, and informed by the nationally consistent collection of data on school students with a disability.

New section 25J provides that the maximum amount that is available for this funding initiative in 2016 and 2017 is \$118.248 million in total.

New section 25K sets out the following matters which the Minister may have regard to when considering how much additional Commonwealth financial assistance to provide for a school or schools under section 69A of the Act:

- information provided to the Department as part of the nationally consistent collection of data on school students with a disability
- Guidelines prepared by the Department for additional funding for students with a disability (the Guidelines)
- recommendations by non-government representative bodies for non-government schools, such as the relevant state or territory Association of Independent Schools

The Guidelines will, amongst other things, describe in further detail the underlying objective and purpose for the SWD financial assistance, and provide further detail on how SWD financial assistance may be allocated to the government and non-government school sectors.

New section 25L ensures that an approved authority can only spend, or commit to spend, SWD financial assistance for the purpose of providing school education, in the year in which it is paid or such other period as directed by the Minister. Any interest earned on the financial assistance must be spent, or committed to be spent, in the same way as the financial assistance. These are similar requirements as apply to an approved authority under section 29 of the Principal Regulation in relation to recurrent funding.

In addition, new subsection 25L(3) enables the Minister to issue written directions to an approved authority on how that authority may spend, or commit to spend, SWD financial assistance, for example by directing that the financial assistance must be spent, or committed to be spent, by the approved authority on a school or schools.

Section 34 of the Principal Regulation requires an approved authority to provide the Secretary of the Department with an auditor's or accountant's certificate every year that provides assurance that Commonwealth financial assistance provided for the authority's schools under the Act has been spent, or committed to be spent, in accordance with the Act and Principal Regulation. **Items 2 and 3** amend section 34 of the Principal Regulation to ensure that the auditor's or accountant's certificate must extend to SWD financial assistance.

Sections 35 and 36 of the Principal Regulation require approved authorities for government and non-government schools, respectively, to provide the Secretary with annual reports relating to the allocation and expenditure of Commonwealth financial assistance for their schools. **Items 4 and 5** amend sections 35 and 36 of the Principal Regulation to require those reports to identify which schools have been allocated SWD financial assistance by the approved authority, and how much assistance has been allocated.

In addition, **item 5** amends section 36 of the Principal Regulation to require approved authorities for non-government schools that have received financial assistance under the Indigenous boarders at non-government schools initiative (Subdivision A of Division 3 of Part 4 of the Principal Regulation) to identify which schools have been allocated that financial assistance by the approved authority, and how much assistance has been allocated. This corrects an oversight from when that initiative was introduced in 2014.

Item 6 inserts a new application provision for the amendments made by the Amendment Regulation, new section 69, ensuring that the amendments apply in relation to the 2016 year and later years. This ensures that SWD financial assistance can be paid for schools for 2016, and ensures that any such assistance paid for 2016 is acquitted and reported by approved authorities.