

EXPLANATORY STATEMENT

Australian Education Act 2013

Australian Education Amendment (2016 Measures No. 3) 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, amongst other things, 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.

The Principal Regulation prescribes a range of matters concerning:

- the interpretation of provisions in the Act
- conditions of grants of Commonwealth financial assistance to states and territories under the Act
- matters relevant to Commonwealth financial assistance for schools, including matters relevant to the calculation of that financial assistance
- matters relevant to the provision of capital, special circumstances and prescribed circumstances funding under the Act
- matters relevant to the basic requirements of approval for approved authorities, block grant authorities, and non-government representative bodies
- matters relevant to the ongoing requirements of approval for approved authorities, block grant authorities, and non-government representative bodies

- matters relevant to the ongoing policy requirements of approval for approved authorities
- matters relevant to actions the Minister may take for failure to comply with the Act or the Principal Regulation
- other matters relevant to carrying out or giving effect to the Act

The *Australian Education Amendment (2016 Measures No. 3) Regulation 2016* (the Amendment Regulation):

- amends section 61 of the Principal Regulation to ensure that approved authorities for more than one school (that are not approved system authorities) are able to be provided sufficient flexibility, if required, in the distribution of Commonwealth financial assistance to their schools to avoid adverse financial outcomes for those schools
- amends section 29 of the Principal Regulation to provide flexibility for approved authorities that may not be able to use Commonwealth financial assistance in the year in which it is paid, and to enable the time period in which such financial assistance must be used by an approved authority to be shortened where a school of that authority may be closing or the authority will no longer be approved under the Act
- updates the national assessment program requirements in the Principal Regulation to reflect decisions of the Ministerial Council (the council of federal, state and territory Education Ministers)
- repeals sections 44 and 45 in the Principal Regulation in order to reduce the regulatory burden of school improvement plan requirements for approved authorities, to align with Government policy

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 21270).

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 impact on states and territories.

The Minister has had regard to the relevant arrangements with states and territories, in their capacity as approved authorities for government schools, as required under subsection 77(4) of the Act. These relevant arrangements are the National Education Reform Agreement, and associated bilateral agreements, and the Intergovernmental Agreement on Commonwealth financial assistance for schools.

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. 3) 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. 3) Regulation 2016* (the Amendment Regulation):

- amends section 61 of the Principal Regulation to ensure that approved authorities for more than one school are provided sufficient flexibility, if required, in the distribution of Commonwealth financial assistance to their schools to avoid adverse financial outcomes for those schools
- amends section 29 of the Principal Regulation to provide flexibility for approved authorities that may not be able to use Commonwealth financial assistance in the year in which it is paid, and to enable the time period in which such financial assistance must be used by an approved authority to be shortened where a school of that approved authority may be closing or it will no longer be approved under the Act
- updates the national assessment program requirements in the Principal Regulation to reflect decisions of the Ministerial Council (the council of federal, state and territory Education Ministers)
- repeals sections 44 and 45 in the Principal Regulation in order to reduce the regulatory burden of school improvement plan requirements for approved authorities, to align with Government policy

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)

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 the sense of its dignity, and to enable all persons to participate effectively in society. The right comprises equitable distribution of resources in educational settings across communities according to need, namely, in order to secure all children's rights within and through education to realise their potential and educational aspirations. Recognition and promotion of this right necessitates that states parties implement and institutionalise arrangements that help ensure all children can achieve these aims.

Further, the right to education 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 and promotes the right to education as it facilitates approved authorities for schools being able to have flexibility in the use of Commonwealth financial assistance, directed to ensuring Commonwealth financial assistance is appropriately targeted on the basis of demonstrated need for schools. The Amendment Regulation is compatible with, and promotes, the right to education.

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. 3) Regulation 2016*.

Section 2 – Commencement

This section provides for the commencement of the various provisions of the Amendment Regulation. The provisions of the Amendment Regulation commence on the day after the Amendment Regulation 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 inserts a definition of *PIRLS* to subsection 4(1) of the Principal Regulation, to mean the Progress in International Reading Literacy Study.

Item 2 repeals and replaces subsection 29(7) of the Principal Regulation, and inserts new subsection 29(7A).

Section 29 of the Principal Regulation sets out the requirements on approved authorities for schools in relation to spending, or committing to spend, Commonwealth financial assistance provided for those schools (recurrent funding).

Current subsection 29(7) requires recurrent funding to be spent, or committed to be spent, in the calendar year in which it is paid.

However, this raises difficulty in circumstances where an approved authority receives a larger than expected payment of recurrent funding (for example, due to an unexpected increase in enrolments) late in a calendar year, most commonly in October, and may therefore find it difficult to use that funding prior to the end of that year.

Further, where a school of an approved authority is expected to close, or it is expected that the approved authority may no longer be approved under the Act (for example, it is being wound-up), prior to the end of a calendar year, then in order to ensure appropriate accountability and protection of Commonwealth financial assistance it may be desirable to require that funding be spent prior to the end of that year.

New paragraph 29(7)(a) retains the default position, that is, recurrent funding must be spent, or committed to be spent, by an approved authority in the calendar year in which it is paid. However, this is subject to new paragraph 29(7)(b) and subsection 29(7A), which resolve the issues identified above by enabling the Minister to determine a day before, or period within which, recurrent funding must be spent, or committed to be spent. This enables the Minister to, if required, either extend the time-frame within which recurrent funding must be used by an approved authority, or require that funding be used earlier than the end of the relevant calendar year.

Items 3 – 8 make minor amendments to section 43 of the Principal Regulation with regard to the national assessment program of school students. These amendments provide minor wording changes to existing national assessments in order to reflect correct terminology.

These amendments further enable decisions of the Ministerial Council (the council of federal, state and territory Education Ministers) on when some national assessments are held to be reflected in the Principal Regulation, achieved by referencing the year as determined by the Ministerial Council. This ensures that the national assessment program continues to reflect decisions of the Ministerial Council, and therefore agreement of all Australian governments.

Item 9 inserts a new national assessment program requirement in the table in subsection 43(1) of the Principal Regulation, new item 9 of that table, the ‘Progress in International Reading Literacy Study’ (PIRLS). This amendment reflects Ministerial Council decision on PIRLS being required as part of the national assessment program every 4 years beginning in 2016, for selected students in year 4. **Item 1** inserts a new definition in subsection 4(1) of the Principal Regulation for this national assessment.

Item 10 reduces the regulatory burden on approved authorities in relation to school improvement plan(s), by repealing Subdivision D of Division 3 of Part 5 of the Principal Regulation (sections 44 and 45).

Paragraph 77(2)(d) of the Act requires an approved authority to ensure that each of its schools develop, implement, publish and review a school improvement plan in accordance with the Principal Regulation. Government policy is that in order to reduce the regulatory burden on schools and approved authorities, the requirement for a school improvement plan(s) should not be imposed. This is achieved by repealing sections 44 and 45.

Items 11 – 18 make minor amendments to section 53 of the Principal Regulation in order to reflect the correct terminology of, and bring greater clarity to, some of the performance measure reporting requirements for the national assessment program of school students. These amendments ensure section 53 continues to reflect the terminology used for performance measure reporting on the national assessment program. **Item 12** also inserts a new performance measure reporting requirement for the national assessment inserted by item 10, that is, PIRLS.

Items 19 and 20 amend section 61 of the Principal Regulation, to repeal and replace paragraph 61(3)(a) and insert new subsection 61(3A).

Subsection 78(3) of the Act, amongst other things, requires an approved authority for more than one participating school to distribute all Commonwealth financial assistance received for its schools under Part 3 of the Act (recurrent funding), in accordance with a needs-based funding arrangement that complies with any requirements prescribed by the Principal Regulation.

As all non-government schools are participating schools under the Act, this requirement extends to all approved authorities for more than one non-government school.

Section 61 of the Principal Regulation then sets out the requirements for a needs-based funding arrangement for the purposes of subsection 78(3) of the Act.

For approved authorities that are approved system authorities (for example, participating state and territory governments for their government schools), section 61 enables those approved authorities to develop their own needs-based funding arrangement, containing certain minimum requirements.

For approved authorities for more than one non-government school that are not approved system authorities, section 61 imposes different needs-based funding requirements. The amendments to section 61 affect these requirements.

In circumstances where an approved authority and its schools are receiving recurrent funding in accordance with Divisions 2 and 3 of Part 3 of the Act, referred to as ‘on the schooling resource standard’ (in other words, approved authorities and schools that are no longer receiving transitional recurrent funding), current section 61 of the Principal Regulation requires that the approved authority distribute the amount of recurrent funding received for each of its schools directly to that school.

However, this may cause difficulty for an approved authority in circumstances where, due to identified need or financial concern, it may be necessary and desirable for the approved authority to apply a flexible approach to distributing recurrent funding across its schools.

Further, as an approved authority and its schools end transition under Division 5 of Part 3 of the Act (transitional recurrent funding), and move onto the schooling resource standard, there may be potential for adverse financial outcomes for some of the schools of that approved authority due to the more flexible distribution arrangements that apply during transition no longer being available.

New paragraph 61(3)(a) and subsection 61(3A) rectifies these issues. While the default position has been retained, that is, an approved authority must distribute the exact amount of recurrent funding calculated for each of its schools to the specific school, this position is subject to new paragraph 61(3)(a) and subsection 61(3A) which enable flexibility on the distribution of recurrent funding. This is achieved by providing the Minister the discretion to determine the amount of recurrent funding that an approved authority may distribute to each of its schools. This ensures that where it appears, for example, that a school(s) of an approved authority has an identified need or may suffer an adverse financial outcome, sufficient flexibility is contained within the operation of section 61 to enable the Minister to allow redistribution of recurrent funding by that approved authority to its schools.

The amendments to section 61 are of a similar nature to the current operation of paragraph 61(3)(b) and subsection 61(4), where the Minister is able to determine the distribution of recurrent funding to each school of an approved authority that it is still in transition, that is, subject to Division 5 of Part 3 of the Act.

Item 21 inserts a new application provision, new section 70, for the amendments made by the Amendment Regulation. This application provision provides that the amendments made by all items apply in relation to the 2016 year and later years.