

EXPLANATORY STATEMENT

Australian Education Act 2013

Australian Education Amendment (2017 Measures No. 3) Regulations 2017

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.

Subsection 130(5) of the Act requires the Minister to consult the Ministerial Council (the Council of Australian Governments Education Council) prior to the Governor-General making regulations for the purposes of the Act. Subsection 22(2) of the Act requires the Minister to have regard to any decisions of the Ministerial Council relating to national policy initiatives for school education prior to the Governor-General making regulations for the purposes of section 22 of 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 Regulations) 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 Regulations commenced on 1 January 2014.

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 Regulations prescribe 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 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 Regulations
- other matters relevant to carrying out or giving effect to the Act.

Purpose and operation of amendments

The *Australian Education Amendment Act 2017* (the Amendment Act) will amend the Act with effect from 1 January 2018, to give effect to the Australian Government's reforms of Commonwealth schools funding arrangements. The *Australian Education Amendment (2017 Measures No. 3) Regulations 2017* (the Amendment Regulations) will make amendments to the Principal Regulations that are consequential to the amendments to the Act, as well as amendments to improve the operation of the Principal Regulations. In particular, the Amendment Regulations will:

- prescribe the intergovernmental agreements relating to school education reform, for the purposes of subsection 22(3), and paragraphs 22(2)(a) and (b), of the Act
- prescribe the starting Commonwealth share (and hence transitional funding paths) for schools of certain approved authorities that would otherwise attract unintended funding outcomes for the period 2018-2027 if not so prescribed, for the purposes of subsection 35B(2) of the Act
- address the differences between primary education and secondary education provided in certain schools located in South Australia
- enhance oversight and accountability for funding provided to block grant authorities for capital expenditure at non-government schools
- clarify the purposes for which Commonwealth recurrent schools funding can be used by approved authorities for non-government schools
- clarify the ongoing reporting requirements of block grant authorities and non-government representative bodies
- amend the prescribed circumstances and amounts payable provisions which relate to the National Adjustment Assistance Fund.

Regulation Impact Statement (RIS)

The Regulatory Impact Statement for the changes to Commonwealth financial assistance for schools is included in the Explanatory Memorandum to the Australian Education Amendment Bill 2017, which can be found at www.legislation.gov.au.

The Amendment Regulations will not have a substantial impact on approved authorities, non-government representative bodies and block grant authorities. The Office of Best Practice Regulation has agreed that a RIS is not required for the amendments to the Principal Regulations (OBPR ID 19792).

Commencement

Sections 1 to 4 of the Amendment Regulations commence on the day after it is registered on the Federal Register of Legislation. The amendments to the Principal Regulations, contained in Schedule 1 to the Amendment Regulations, will commence on the later of:

- the day after the Amendment Regulations are registered
- immediately after the commencement of Schedule 1 to the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017* on 1 January 2018.

Consultation

Pursuant to subsection 130(5) of the Act, the Minister consulted with the Ministerial Council by seeking feedback on an exposure draft of the Amendment Regulations. The National Catholic Education Commission (NCEC) and the Independent Schools Council of Australia (ISCA) were also consulted as part of the exposure draft process.

The NCEC, ISCA and all States and Territories except Tasmania provided feedback. Each response was considered by the Australian Government and informed the development of the Amendment Regulations.

The Minister has also had regard to decisions of the Ministerial Council relating to national policy initiatives for school education. Recognition of the role of the Ministerial Council and existing national policy initiatives was considered and integrated into the drafting and development of the School Funding and Reform Principles, to be inserted in section 10 of the Principal Regulations through the amendments contained in the Amendment Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*
Australian Education Amendment (2017 Measures No. 3) Regulations 2017

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 (2017 Measures No. 3) Regulations 2017* (the Amendment Regulations) will amend the *Australian Education Regulation 2013* (the Principal Regulations) to:

- prescribe the intergovernmental agreements relating to school education reform, for the purposes of subsection 22(3), and paragraphs 22(2)(a) and (b), of the Act
- prescribe the starting Commonwealth share (and hence transitional funding paths) for schools of certain approved authorities that would otherwise attract unintended funding outcomes for the period 2018-2027 if not so prescribed, for the purposes of subsection 35B(2) of the Act
- address the differences between primary education and secondary education provided in certain schools located in South Australia
- enhance oversight and accountability for funding provided to block grant authorities for capital expenditure at non-government schools
- clarify the purposes for which Commonwealth recurrent schools funding can be used by approved authorities for non-government schools
- clarify the ongoing reporting requirements of block grant authorities and non-government representative bodies
- amend the prescribed circumstances and amounts payable provisions which relate to the National Adjustment Assistance Fund.

Human rights implications

The Amendment Regulations engage 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).

Article 13 of the ICESCR 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. 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 Regulations make consequential amendments, arising from amendments to the Act by the *Australian Education Amendment Act 2017*, which will remove historically-based inequities in Commonwealth funding for school education and will ensure all government and all non-government schools receive a consistent share of Commonwealth funding by 2028. This consistent funding approach emphasises the needs of each student, increases opportunities for quality education and promotes the right to education.

The Amendment Regulations also ensure that schools located in South Australia that provide Year 7 education at the secondary level, in accordance with the *Australian Curriculum*, attract secondary education level funding from the Commonwealth. The Amendment Regulations further contains provisions to ensure that Commonwealth funding to support school education is used for its intended purpose through transparent oversight and accountability requirements.

These measures are compatible with the right to education.

Conclusion

The Amendment Regulations are compatible with human rights because they advance the protection of human rights.

Simon Birmingham
Minister for Education and Training

Detailed explanation of the Amendment Regulations provisions

Section 1 – Name of Amendment Regulations

This section provides that the title of the Amendment Regulations is the *Australian Education Amendment (2017 Measures No. 3) Regulations 2017*.

Section 2 – Commencement

This section provides that the provisions of the Amendment Regulations commence as follows:

- Sections 1 to 4 – the day after the Amendment Regulations are registered.
- Schedule 1 – the later of:
 - the day after the Amendment Regulations are registered
 - immediately after the commencement of Schedule 1 to the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017*.

Section 3 – Authority

This section provides that the *Australian Education Amendment (2017 Measures No. 3) Regulations 2017* are made under the *Australian Education Act 2013*.

Section 4 – Schedule(s)

This section provides that 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

Item 1 inserts definitions for *Capital Grants Program Guidelines* and *commit to spend* in subsection 4(1) of the Principal Regulations.

Capital Grants Program Guidelines means the *Capital Grants Program Guidelines* issued by the Department, as in force from time to time¹.

The Capital Grants Program Guidelines will provide general instructions to block grant authorities about the administration, management and accountability requirements of the capital grants funding program. The instructions that will be provided in the Capital Grants Program Guidelines are currently available in the Capital Grants Program – Operating Manual, which is a long standing and accepted guide for block grant authorities. The Capital Grants Program Guidelines will be publicly available during 2018 on the Department’s website (www.education.gov.au).

Commit to spend, for an approved authority, block grant authority or non-government representative body in relation to financial assistance payable under the Act, includes where the authority or body commits to spend that financial assistance in circumstances where the authority or body:

¹ Subsection 130(4) of the Act provides that, despite subsection 14(2) of the *Legislation Act 2003*, the regulations may adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time.

- has entered into a legal arrangement under which the authority or body will be liable to pay an amount; or
- an amount will become due and payable under a law of the Commonwealth, a State or a Territory that the authority or body is required to meet; and
- the time for payment of the amount has not yet arisen and the authority or body sets aside all, or part of, the financial assistance to pay the amount.

‘Committing’ financial assistance is an important concept in the Act and Principal Regulations in the context of financial reporting obligations. This amendment is to provide some clarity about the application of the term in the context of financial assistance paid under the Act.

Item 2 repeals sections 7 and 8 of the Principal Regulations, and replaces those sections with a new section 7.

New section 7 will provide that for schools located in South Australia, other than those specified in Schedule 3, the levels of education that make up primary education are foundation to year 7, and the levels of education that make up secondary education are years 8 to 12.

For schools located in all other States and Territories, and those schools located in South Australia specified in Schedule 3, the levels of education that make up primary education are foundation to year 6, and the levels of education that make up secondary education are years 7 to 12.

The substantive effect of these amendments is to provide a mechanism whereby certain schools located in South Australia are able to have year 7 recognised as a secondary level of education, for the purposes of calculation of Commonwealth recurrent schools funding. **Item 37** adds Schedule 3 – Levels of education: certain schools in South Australia into the Principal Regulations for this purpose.

South Australia is currently the only State in which the State Government still considers year 7 to be a primary level of education. Therefore, it has also been considered primary education for the purposes of the calculation of Commonwealth recurrent schools funding purposes. However, the year 7 curriculum is the same throughout Australia, and a significant number of non-government schools in South Australia have begun delivering year 7 in a secondary environment. This amendment will mean schools listed in Schedule 3 will have their Commonwealth recurrent schools funding for students in year 7 calculated on the same basis as other secondary levels of education, thereby reflecting the cost of the provision of secondary education for those schools.

Items 3 and 4 amend section 9 of the Principal Regulations to provide that the levels of education that constitute primary education and secondary education for a special school in all States and Territories is that provided to students aged 4–11 and 12–21 respectively. This amendment reflects current operational practice and aligns the treatment of students in special schools in South Australia with the other States and Territories.

Item 5 inserts a new subsection (6) in section 10 of the Principal Regulations to provide that, for the purposes of subsection 22(3) of the Act, the agreement known as the School Funding and Reform Principles is prescribed for the 2018 calendar year. Consequently, States and Territories that are party to the Principles will satisfy the conditions for Commonwealth financial assistance set out in paragraphs 22(2)(a) and (b) of the Act.

Subsection 22(2) of the Act (once amended by the *Australian Education Amendment Act 2017* with effect from 1 January 2018) provides that payments of financial assistance under the Act to a State or Territory is subject to the conditions that the State or Territory: (a) is a party to a national agreement relating to school education reform; and (b) is a party to an agreement with the Commonwealth relating to implementation by the State or Territory of school education reform. Subsection 22(3) provides that the Principal Regulations may prescribe agreements for the purposes of paragraphs 22(2)(a) and (b).

The School Funding and Reform Principles is considered to be both a ‘national agreement relating to school education reform’ and ‘an agreement with the Commonwealth relating to implementation by the State or Territory of school education reform’ for the purposes of subsection 22(3), and paragraphs 22(2)(a) and (b), of the Act. However, it is intended that this will apply for the 2018 calendar year only.

During 2018, the Government will work with the governments of the States and Territories to deliver a new national school education reform agreement, and bilateral school education reform implementation agreements tailored to each jurisdiction’s needs and environment; the Government intends to prescribe these agreements in the Principal Regulations for 2019 onwards.

Item 6 inserts a new section 16A into the Principal Regulations which provides, for the purposes of subsection 35B(2) of the Act, that the starting Commonwealth shares for schools of certain approved authorities is as set out in Schedule 4 at the end of the Principal Regulations. **Item 37** adds Schedule 4 – Starting Commonwealth shares for certain schools, into the Principal Regulations for this purpose.

Subsection 35B(2) of the Act provides the standard method for calculating the starting Commonwealth share for a transitioning school in a transition year. The method calculates the starting Commonwealth share based on total amounts of recurrent funding that relate to the approved authority for the school, resulting in the same share for each school of the approved authority. Subsection 35B(2) also enables the starting Commonwealth share for a school to be prescribed in the regulations.

Approved system authorities are able to redistribute funding amongst their schools according to their own needs-based funding arrangement (in compliance with subsection 78(5) of the Act). However, for schools whose approved authority does not have the capacity to redistribute funding, such schools need to have their starting Commonwealth share calculated at the individual school level. To do otherwise would lead to unintended funding outcomes for the affected schools. The amendment to the Principal Regulations sets starting Commonwealth shares for schools whose approved authority is an approved authority for more than one school but is not an approved system authority, in order to ensure that such unintended funding outcomes do not arise.

Items 7-11 amend section 29 of the Principal Regulations which outlines the requirements for approved authorities relating to spending (or committing to spend) financial assistance provided under Division 2 of Part 3 of the Act (recurrent funding for schools).

Item 10 inserts a number of additional purposes for which recurrent funding must not be used which apply to most non-government schools (those whose capacity to contribute is not zero²).

² The schools with 0% capacity to contribute are set out at subsection 54(1) of the Act, being government schools, special schools, special assistance schools, majority Aboriginal and Torres Strait Islander schools, and sole provider schools.

These additional purposes are:

- the purchase of land or a building for the school
- the construction of a building or part of a building for the school
- capital improvements, and
- any form of loan, credit or other interest in relation to the above three bullet points.

However, recurrent funding may be used to make payments of interest on any such loan, credit or other interest, as it is generally recognised as expenditure for the general recurrent operating expenses of a non-government school. This will be achieved through the insertion of new subsection 29(3A) in **item 11**.

It should also be noted that the reference to 'other interest' in the fourth bullet point above is a reference to a legal interest, for example an option to purchase land. It is not intended to extend to payments of interest per what is expressly allowable in new subsection 29(3A).

These amendments clarify existing policy of the Government in relation to restrictions on the use of recurrent funding for capital purposes.

Items 7 and 8 are consequential amendments arising from **item 10**. **Item 9** clarifies the general restriction on use of recurrent funding by approved authorities, to not be used as security for any form of loan, credit, payment or other interest.

Items 12-15 amend section 30 of the Principal Regulations which provides for how block grant authorities (the bodies which receive and administer non-government school capital grants) can spend capital funding provided under the Act. These amendments make it a requirement that any capital funding received under the Act (including any interest earned on it) must be spent in accordance with the Capital Grants Program Guidelines (defined in **item 1**).

The Capital Grants Program Guidelines will provide general instructions to block grant authorities about the administration, management and accountability requirements of the capital grants funding program. The instructions that will be provided in the Capital Grants Program Guidelines are currently available in the Capital Grants Program – Operating Manual, which is a long standing and accepted guide for block grant authorities. Including a reference to the Capital Grants Program Guidelines clarifies the administration requirements of block grant authorities in the Principal Regulations.

Item 16 makes a minor change to section 34 of the Principal Regulations, replacing the word 'for' with 'in', to clarify that the acquittal certificate provided by approved authorities, block grant authorities and non-government representative bodies to the Secretary must acquit financial assistance paid in the relevant year. This amendment aligns the legislative requirements for such certificates with stakeholder and departmental expectation.

Items 17-26 amend section 36 of the Principal Regulations which sets out reporting requirements relating to financial assistance and financial operations for non-government schools. Subsections 36(1) and 36(2) of the Principal Regulations currently set out a number of financial reporting requirements that apply to approved authorities, block grant authorities, and non-government representative bodies for non-government schools. This amendment removes block

grant authorities and non-government representative bodies from the requirements in these subsections.

The amendments will instead require block grant authorities and non-government representative bodies to provide reports in accordance with the Capital Grants Program Guidelines and the Non-Government Reform Support Fund Guidelines respectively.³ This amendment reflects new program management arrangements agreed to by the Government.

Item 27 amends section 38 of the Principal Regulations to provide that approved authorities, block grant authorities and non-government representative bodies must prepare the audited financial statements to cover all money received by the authority or body in the relevant year (as opposed to just financial assistance paid under the Act). This amendment only applies to the non-government school sector, as section 38 does not extend to the States and Territories and government schools. The Government consulted with the non-government sector about the revised requirement.

Item 28 removes references to students with disability from sections 48 and 50 of the Principal Regulations, which outline the information required in government and non-government school census responses respectively. These amendments remove duplication with section 58A of the Principal Regulations, that would have otherwise arisen from 1 January 2018 when the amendments contained in the *Australian Education Amendment Act 2017* come into effect.

Item 29 inserts section 72 into the Principal Regulations. Section 72 is an application provision that ensures that the Principal Regulations, as in force for years before 2018, continue to have effect for the purposes of financial assistance for years prior to 2018.

It is often the case that decisions and determinations in relation to a particular calendar year occur after the end of that year, because of the timing of certain data collections or delays in receipt of information necessary to make those determinations. Section 72 ensures that, where a determination needs to be made in 2018 (or later) that relates to financial assistance for an earlier year, the Principal Regulations as in force before 2018 will apply. However, new subsection 72(2) will ensure that those amendments that relate to reporting of financial assistance received in a year will apply to financial assistance received in 2017 – which will need to be reported on in 2018 in accordance with the new requirements.

Items 30, 31 and 35 amend certain titles within Schedule 1 of the Principal Regulations, such that Part 2 is renamed ‘Additional financial assistance and adjustment funding for non-government schools’; Division 1 of Part 2 is renamed ‘Additional financial assistance for low growth non-government schools for 2018’; and Part 4 is renamed ‘Additional financial assistance for system weighted average SES schools for 2018’. This ensures that the headings of these parts of the Principal Regulations align with the names and descriptions of the various funding initiatives used publicly to date, thereby minimising confusion.

Items 32–34 and 36 amend clauses 7 and 8 of Schedule 1 of the Principal Regulations, and Schedule 2, which relate to the National Adjustment Assistance Fund.⁴

³ A definition of Non-Government Reform Support Fund Guidelines is inserted into the Principal Regulations by the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017*.

⁴ Schedule 1 – Funding in prescribed circumstances was inserted into the Principal Regulations by the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017*.

Clause 7 prescribes the circumstances in which the Minister may, under section 69B of the Act, determine additional funding amounts for non-government schools in the transition years 2019 to 2027 inclusive.

Item 32 amends paragraph 7(1)(c) to remove the criteria that a school must have a per student reduction in funding during their transition to a consistent Commonwealth funding share, and substitutes with the criteria that the school's Commonwealth share for the relevant transition year is greater than 80%.

The per student amount of recurrent funding for a school can fluctuate each year, whereas a school's Commonwealth share for a transition year is known with certainty in advance of the year. Amending the criteria to require that the school's Commonwealth share for the relevant transition year is greater than 80%, will provide greater certainty as to whether a school meets the prescribed circumstances for the National Adjustment Assistance Fund. **Item 33** is a consequential amendment arising from **items 32** and **34**.

Clause 8 establishes the maximum amounts payable under the National Adjustment Assistance Fund. **Item 34** repeals subclauses 8(1) and 8(2). Subclause 8(2) currently sets the maximum amount of funding for a school for a year, with reference to per student amounts for the school. Removing this school level maximum amount will provide greater certainty for schools funded under the National Adjustment Assistance Fund, by removing the risk that the maximum amount is breached inadvertently due to fluctuating data affecting the per student amount for a school. The repeal of subclause 8(1) would be a consequential amendment arising from the repeal of subsection 8(2).

Item 36 repeals the reference to subclause 7(2) of Schedule 1 from Schedule 2 of the Principal Regulations⁵, as a consequence of the amendments to clause 7 in **items 32** to **34**.

Item 37 inserts Schedule 3 – Levels of education: certain schools in South Australia and Schedule 4 – Starting Commonwealth shares for schools of certain approved authorities (see **items 2** and **6** respectively).

⁵ Schedule 2 – Per-student amounts for 2017 for certain schools was inserted into the Principal Regulations by the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017*.