

EXPLANATORY STATEMENT

Australian Education Act 2013

Australian Education Amendment (2018 Measures No. 2) Regulations 2018

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, indexation and setting 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.

Commonwealth 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 for non-government schools (in order to provide capital funding for capital projects at such schools), and non-government representative bodies for non-government schools. An approved authority is the legal entity approved to receive Commonwealth financial assistance for one or more schools under the Act. Approved authorities, 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.

Commonwealth financial assistance for non-government schools under the Act is determined by reference to a base amount for every primary and secondary student and supplemented with six loadings that provide extra needs-based funding for disadvantaged students or schools. For most non-government schools, the base amount is discounted by the capacity to contribute percentage, which is calculated by reference to the socio-economic status (SES) score of the school. The capacity to contribute percentage estimates the anticipated capacity of the school community to financially contribute towards the school's operating costs. The Act specifies the capacity to contribute percentage that applies for each SES score.

Under section 52 of the Act, the Minister (currently the Minister for Education) must determine the SES score for most non-government schools.

A determination of an SES score for a school must be in accordance with the Principal Regulation unless the Minister is satisfied doing so would result in an SES score that does not accurately reflect the general socio-economic circumstances of persons responsible for students at the school.

Under section 21 of the Principal Regulation, the Minister may request a statement of the residential addresses of students at relevant non-government schools. The statement of residential addresses of students contributes to the calculation of the SES score for a school. The Australian Government department responsible for administering the Act (currently the Department of Education and Training (the department) is provided the residential address of each student at relevant non-government schools.

Purpose and operation of amendments

The purpose of the *Australian Education Amendment (2018 Measures No. 2) Regulations 2018* (the Amendment Regulation) is to amend the Principal Regulation to require approved authorities for certain non-government schools to provide information about students and persons responsible for students to the department, in addition to the abovementioned statement of student residential addresses.

The additional information required to be provided is the names and residential addresses of persons responsible for students at a relevant non-government school (generally parents and legal guardians), as well as other information determined by the Minister by legislative instrument.

In addition, the Amendment Regulation will formalise the collection of each student's primary or secondary student status and boarding status.

The amendments contained in the Amendment Regulation do not extend to government schools, special schools, special assistance schools, sole provider schools and schools that are a majority Aboriginal and Torres Strait Islander schools for a year, as these schools do not require SES scores for calculation of Commonwealth financial assistance. The amendments contained in the Amendment Regulation also do not apply to circumstances where a student is a distance education student, as such students are not included in the calculation of the SES score for a school. This is in line with current practice.

The statement of residential addresses of students that the Minister may request under section 21 of the Principal Regulation, contributes to the calculation of the SES score for a school. Under the existing methodology for calculating SES scores (see section 23 of the Principal Regulation), a school community's capacity to financially contribute towards the operating costs of the school is calculated based on an averaging of certain indicators for each Australian Bureau of Statistics (ABS) Statistical Area Level 1 (SA1) in which the students at the school reside, and hence is why the residential addresses of students is collected. That is, the SES score for a school is based on an averaging of characteristics of all people residing in a certain geographical area, not just families of students attending the school.

The National School Resourcing Board (the Board) recently completed a review into the existing methodology for calculating SES scores for schools, titled *Review of the socio-economic status score methodology* (<https://www.education.gov.au/review-socio-economic-status-ses-score-methodology>). One of the Board's recommendations was that SES scores for schools should be calculated based on a direct measure of the income of the persons responsible for students in schools (for example, parents and legal guardians). The Board considered that such a measure

would be a more fit-for-purpose, transparent, and reliable way in which to determine a school community's capacity to financially contribute to a school. The Board recommended further consultation with the non-government school sector and experts on the development of, and transition to, such a new direct measure for implementation from 2020.

On 20 September 2018 the Government announced its response to the Review. The Government agreed to all of the Board's recommendations.

The amendments contained in the Amendment Regulation will help provide a robust and reliable set of data on which the Government can undertake necessary policy development and analysis, to support the development of a new direct measure of a school community's capacity to financially contribute to a school, as recommended by the Board. The additional information required to be provided by approved authorities for certain non-government schools will form part of the evidence-base for future changes to the methodology for calculating SES scores, and will help enable better targeting of financial support for non-government schools in circumstances where parents and guardians may have less capacity to contribute.

It is important to note, the Amendment Regulation does not change the current methodology for calculating SES scores for schools.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation has agreed a RIS is not required for the Amendment Regulation (OBPR ID 24034).

Commencement

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

Consultation

The National Catholic Education Commission (NCEC) and Independent Schools Council of Australia (ISCA) were consulted on the Amendment Regulation in August 2018, as part of ongoing engagement in relation to the National School Resourcing Board's *Review of the socio-economic status score methodology*. The Minister for Education wrote to ISCA and NCEC on 7 September 2018 to formally consult on the Amendment Regulation. ISCA provided written feedback. ISCA raised concerns about the quality and availability of data for a 2018 collection. These concerns will be addressed through the department providing detailed guidance to approved authorities ahead of a collection.

Additionally, all State and Territories were informed of the proposed Amendment Regulation.

All feedback was considered by the Australian Government.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*
Australian Education Amendment (2018 Measures No. 2) Regulations 2018

The *Australian Education Amendment (2018 Measures No.2) Regulations 2018* (Amendment Regulation) 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

The *Australian Education Act 2013* (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, indexation and setting of Commonwealth financial assistance for schools, and for the effective and efficient administration of that Commonwealth financial assistance.

The Act and Principal Regulation commenced on 1 January 2014.

Commonwealth 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 for non-government schools (in order to provide capital funding for capital projects at such schools), and non-government representative bodies for non-government schools. An approved authority is the legal entity approved to receive Commonwealth financial assistance for one or more schools under the Act. Approved authorities, 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.

Commonwealth financial assistance for non-government schools under the Act is determined by reference to a base amount for every primary and secondary student and supplemented with six loadings that provide extra needs-based funding for disadvantaged students or schools. For most non-government schools, the base amount is discounted by the capacity to contribute percentage, which is calculated by reference to the socio-economic status (SES) score of the school. The capacity to contribute percentage estimates the anticipated capacity of the school community to financially contribute towards the school's operating costs. The Act specifies the capacity to contribute percentage that applies for each SES score.

Under section 52 of the Act, the Minister (currently the Minister for Education) must determine the SES score for most non-government schools. A determination of an SES score for a school must be in accordance with the Principal Regulation unless the Minister is satisfied doing so would result in an SES score that does not accurately reflect the general socio-economic circumstances of persons responsible for students at the school.

Under section 21 of the Principal Regulation, the Minister may request a statement of the residential addresses of students at relevant non-government schools. The statement of residential addresses of students contributes to the calculation of the SES score for a school. The Australian Government department responsible for administering the Act (currently the Department of Education and

Training (the department) is provided the residential address of each student at relevant non-government schools.

The purpose of the *Australian Education Amendment (2018 Measures No. 2) Regulations 2018* (the Amendment Regulation) is to amend the Principal Regulation to require approved authorities for certain non-government schools to provide information about students and persons responsible for students to the department, in addition to the abovementioned statement of student residential addresses.

The additional information required to be provided is the names and residential addresses of persons responsible for students at a relevant non-government school (generally parents and legal guardians), as well as any other information determined by the Minister by legislative instrument.

In addition, the Amendment Regulation will formalise the collection of each student's primary or secondary student status and boarding status.

The amendments contained in the Amendment Regulation do not extend to government schools, special schools, special assistance schools, sole provider schools and schools that are a majority Aboriginal and Torres Strait Islander schools for a year, as these schools do not require SES scores for calculation of Commonwealth financial assistance. The amendments contained in the Amendment Regulation also do not apply to circumstances where a student is a distance education student, as such students are not included in the calculation of the SES score for a school. This is further in line with current practice.

Under the existing methodology for calculating SES scores (see section 23 of the Principal Regulation), a school community's capacity to financially contribute towards the operating costs of the school is calculated based on an averaging of certain indicators for each Australian Bureau of Statistics (ABS) Statistical Area Level 1 (SA1) in which the students at the school reside, and hence is why the residential addresses of students is collected. That is, the SES score for a school is based on an averaging of characteristics of all people residing in a certain geographical area (SA1), not just families of students attending the school.

The National School Resourcing Board (the Board) recently completed a review into the existing methodology for calculating SES scores for schools, titled *Review of the socio-economic status score methodology* (<https://www.education.gov.au/review-socio-economic-status-ses-score-methodology>). One of the Board's recommendations was that SES scores for schools should be calculated based on a direct measure of the income of the persons responsible for students in schools (for example, parents and legal guardians). The Board considered that such a measure would be a more fit-for-purpose, transparent, and reliable way in which to determine a school community's capacity to financially contribute to a school. The Board identified that advances in government agency data linkages mean that income information does not need to be collected directly from parents and legal guardians in order to develop such a measure. The Board recommended further consultation with the non-government school sector and experts on the development of, and transition to, such a new direct measure for implementation from 2020.

On 20 September 2018 the Government announced its response to the Review. The Government agreed to all of the Board's recommendations.

The amendments contained in the Amendment Regulation will help provide a robust and reliable set of data on which the Government can undertake necessary policy development and analysis, to

support the development of a new direct measure of a school community's capacity to financially contribute to a school, as recommended by the Board. The additional information required to be provided by approved authorities for certain non-government schools will form part of the evidence-base for future changes to the methodology for calculating SES scores, and will help enable better targeting of financial support for non-government schools in circumstances where parents and guardians may have less capacity to contribute.

It is important to note, the Amendment Regulation does not change the current methodology for calculating SES scores for schools.

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* (UNCRC); and
- the right to privacy – Articles 17 and 24(1) of the *International Covenant on Civil and Political Rights* (ICCPR), and Article 16 of the UNCRC.

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. It also recognises the liberty of parents and guardians to choose non-government schools for their children's education, provided those schools conform to minimum educational standards. The right to education for children is also found in Articles 28 and 29 of the UNCRC.

The requirement for certain non-government schools to provide additional information about students and persons responsible for students, in addition to a statement of student residential addresses, will enable the Government to undertake policy development and analysis necessary to support the exploration of a new direct measure of a school community's capacity to financially contribute to a school. It will also inform changes to the methodology for calculating SES scores for relevant non-government schools to better target the calculation of Commonwealth financial assistance.

These measures promote the right to education by seeking to develop a fit-for-purpose measure of a school community's capacity to financially contribute to a school, to enable the better targeting of financial support for non-government schools in circumstances where parents and legal guardians may have less capacity to financially contribute to a school. This supports and ensures Australia continues to have functioning educational institutions that are available in sufficient quantity and receive sufficient Commonwealth financial assistance. These measures also support the liberty of parents and legal guardians to choose non-government schools for their children by ensuring non-government schools receive targeted Commonwealth financial assistance according to a school community's capacity to financially contribute to a school. This will support parents and legal guardians of various socio-economic backgrounds to select non-government school tuition for their children.

The measures in the Amendment Regulation are compatible with the right to education and promote the right to education.

Right to Privacy

The Amendment Regulation engages the right to privacy in Article 17 of the ICCPR as it authorises the collection of personal information about students and persons responsible for students (parents and legal guardians), and which can then be used and disclosed in accordance with the Principal Regulation.

Article 17 of the ICCPR recognises a person's right to protection against unlawful or arbitrary interference with their privacy and family, and provides that persons have the right to protection of the law against such interference. 'Privacy' is understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The right to privacy for children is also found in Article 24(1) of the ICCPR, and Article 16 of the UNCRC.

In order for interference with privacy not to be arbitrary, the interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR, and should be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality to the end sought and necessity in the circumstances. The limitation on privacy must also be authorised under domestic law, which should be precise and not give decision-maker too much discretion in authorising interferences with privacy.

The purpose of collecting the additional information about students, and persons responsible for students, is to support the policy development and analysis of a new direct measure of a school community's capacity to financially contribute to a school. In turn, this will help enable the better targeting of financial support for non-government schools in circumstances where parents and legal guardians may have less capacity to contribute financially to the school. Improving the way in which Commonwealth financial assistance for schools is calculated so its allocation may be better targeted to help meet the educational needs of school students, is a legitimate and important social policy objective of Government.

Requiring approved authorities to provide the additional information is compatible with the human right to privacy because it is reasonable in the context of the ICCPR. In particular, this requirement is necessary to achieve the legitimate policy objective and proportionate to this objective. The Amendment Regulation follows an extensive analysis of potential approaches by the Board and is consistent with its findings. The additional information required by the Amendment Regulation is the minimum necessary to develop a direct measure of capacity to contribute.

If further information is required to develop the new direct measure of capacity to contribute, the Amendment Regulation will enable the Minister for Education to specify other information that approved authorities are required to provide, through legislative instrument. As such additional information must be specified through legislative instrument, any such changes would continue to be subject to Parliamentary oversight and potential disallowance.

The requirement that the information be provided for all relevant students (i.e. it is mandatory for schools to report this information) is necessary and reasonable in achieving the legitimate policy objectives of the Amendment Regulation, as it will ensure the Government can undertake analysis using a complete data set that accurately represents the school community of each relevant

non-government school. An incomplete data set could misrepresent the capacity to contribute of a school community relative to other schools, resulting in funding not being targeted at non-government schools in circumstances where parents and legal guardians may have less capacity to financially contribute to a school.

The Government is confident that appropriate protocols have been put in place to mitigate the risk of identifiable data being used or disclosed without authorisation. There will be safeguards to protect the privacy of individuals, as follows:

- it is envisaged that the additional information may be disclosed to the ABS for linking with personal income tax data collected by the Australian Taxation Office (ATO) and ABS Census data, such as through an approved project conducted in accordance with the Multi-Agency Data Integration Project (MADIP). The MADIP is a partnership among six Australian Government agencies that brings important national datasets together securely to maximise their value for policy analysis, research, and statistical purposes. Any additional information to be disclosed to the ABS will be authorised by law under the Principal Regulation (see section 65 of the Principal Regulation).
- the ABS conducts the MADIP in accordance with its mandate to collect, compile, analyse, and disseminate statistics, under the *Australian Bureau of Statistics Act 1975* and the *Census and Statistics Act 1905*. The collection and use of personal information in the MADIP is consistent with applicable legislation such as the *Privacy Act 1988*, including the Australian Privacy Principles. The Government is satisfied that the ABS has sufficient security and data protections in place for the transmission and storage of personal information.

information is to be disclosed to the ABS for the sole purpose of undertaking analysis and related work to support the development of a potential new direct measure of capacity to contribute. Partner agencies to the MADIP will not have access to this information and the ABS will not use this information for unrelated purposes.

- the department will only be able to access de-identified information in the ABS' secure DataLab, through its personnel who have been seconded to the ABS to work on the particular MADIP project. Departmental personnel who have access to the DataLab will be subject to the same rigorous security, privacy, and confidentiality requirements as ABS officials.

In addition, approved authorities for non-governments schools will be provided with a privacy notice, that complies with Australian Privacy Principle 5, to distribute to the school community to advise, amongst other things, of the information being provided to the department and the purposes for which it is being provided. This notice will cover:

- what information is being collected
- the purpose of the collection
- the legislative authority for the collection
- how the information that is collected may be used or disclosed
- how to contact the department for further information regarding privacy.

As standard practice, the Government commissioned a Privacy Impact Assessment (PIA), which was completed on 14 September 2018. The PIA report is published on the department's website at:

<https://docs.education.gov.au/node/51436>. The department has implemented the PIA's recommendations.

Any potential impact of the Amendment Regulation on an individual's right to privacy is lawfully enacted, is proportionate and reasonable and not considered arbitrary as it is done to achieve legitimate policy objectives, and any personal information will be securely handled. Finally, the application of the *Privacy Act 1988*, and the department's compliance with it, will further ensure any personal information is used, managed and disclosed only in accordance with Australia's privacy laws. As such, the Amendment Regulation is compatible with and protects the right to privacy.

Conclusion

The Amendment Regulation is compatible with human rights because it promotes the right to education under the ICESCR and the UNCRC and any potential limitations to the right to privacy are reasonable, necessary and proportionate in achieving legitimate policy objectives.

Dan Tehan
Minister for Education

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 (2018 Measures No. 2) Regulations 2018*.

Section 2 – Commencement

This section provides for the commencement of the 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 – Schedules

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 repeals subsection 21(2) of the Principal Regulation, as a consequence of the amendments in **item 4**. Subsection 21(2) required that the statement of the residential addresses of students for a school must not explicitly identify a student. Repealing this requirement is necessary to facilitate the provision of the statement of residential addresses of students at the same time as the additional information set out in item 4, including the name and address of each person responsible for a student. Whilst the collection of this additional information is not intended to explicitly identify a student, identification of a student may be a consequence of the provision of the name and address of each person responsible for that student.

Item 2 amends subsection 52(1) of the Principle Regulation, to require an approved authority for a school to provide the information mentioned in new section 58B.

Item 3 inserts new subsection 52(3C) into the Principle Regulation, to require that the information mentioned in new section 58B must be given to the Department by the day and in the way determined by the Minister.

Item 4 inserts new section 58B into the Principle Regulation, to require the provision of certain additional information in relation to each student at a school.

The information required by new section 58B is: (a) the name and residential address of each person responsible for the student; (b) whether the student is a primary or secondary student; (c) whether the student boards at the school; and (d) any other information determined by the Minister, by legislative instrument. In addition, if the school has more than one location (i.e. campus), the information must be provided for each location of the school.

The capacity to require an approved authority to provide any other information determined by the Minister, through legislative instrument, will simplify the administrative process for incorporating information into future collections, whilst ensuring such changes continue to be subject to Parliamentary oversight.

The requirement to provide the information set out in new section 58B does not extend to government schools, special schools, special assistance schools, sole provider schools and majority Aboriginal and Torres Strait Islander schools. In addition to this, the requirement to provide the information set out in new section 58B does not extend to distance education students.