

EXPLANATORY STATEMENT

Australian Education Act 2013

Australian Education Amendment (2019 Measures No. 1) Regulations 2019

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.

Under the Act, Commonwealth financial assistance 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 schools), and non-government representative bodies (NGRBs) for non-government schools. 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 *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 assistance.

The Act and Principal Regulation commenced on 1 January 2014.

Purpose and operation of amendments

The purpose of the *Australian Education Amendment (2019 Measures No. 1) Regulations 2019* (the Amendment Regulation) is to support implementation of the Choice and Affordability Fund that was announced in the Australian Government's response to the National School Resourcing Board's *Review of the socio-economic status score methodology*. The Choice and Affordability Fund will provide the non-government sector with a flexible means of driving government priorities, including support for parental choice and diversity in the schooling system, providing structural adjustment assistance, lifting outcomes in underperforming schools and targeting extra support for non-government

schools who need additional assistance. For instance, schools in regional and remote areas and in drought affected areas.

The Choice and Affordability Fund is to be delivered by NGRBs. Commonwealth funding for NGRBs is provided under section 70 of the Act which permits the Minister to determine an amount of financial assistance payable to a State or Territory for a year for an NGRB for a non-government school.

The Amendment Regulation seeks to ensure that Commonwealth funding for NGRBs is determined with reference to certain matters, including the Choice and Affordability Fund Guidelines, and is used for its intended purpose. The amendments specify the matters which must be considered before funding is determined for an NGRB, amend existing accountability and reporting requirements for NGRBs to provide more detailed financial information and incorporate requirements relevant to the Choice and Affordability Fund.

In particular, the Amendment Regulation:

- prescribes matters the Minister must have regard to in determining an amount of financial assistance for an NGRB for a year, including the Choice and Affordability Fund Guidelines;
- amends the provisions which specify the requirements relating to the way NGRBs must spend financial assistance, including in accordance with the Choice and Affordability Fund Guidelines;
- amends reporting requirements to provide greater clarity on how financial assistance provided to NGRBs is being spent, or committed to be spent; and
- ensures existing provisions relating to the way NGRBs must spend financial assistance continue to apply in relation to financial assistance payable for years before 2020.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation has agreed a RIS is not required for the Amendment Regulation (OBPR ID 24214).

Commencement

The Amendment Regulation commences on 1 January 2020.

Consultation

The National Catholic Education Commission (NCEC) and Independent Schools Council of Australia (ISCA) were consulted in 2018 in relation to the development and implementation of the Choice and Affordability Fund, including its regulatory parameters. The Minister for Education wrote to ISCA and NCEC, and all State and Territory Education Ministers on 15 March 2019 to formally consult on the Amendment Regulation. All feedback received during the consultation process was considered in the development of the Amendment Regulation.

Statement of Compatibility with Human Rights

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

Australian Education Amendment (2019 Measures No. 1) Regulations 2019

The *Australian Education Amendment (2019 Measures No. 1) Regulations 2019* (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 of the Legislative Instrument

The *Australian Education Act 2013* (the Act) is the principal legislation by which the Australian Government provides Commonwealth financial assistance for schools.

Under the Act, Commonwealth financial assistance 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 schools), and non-government representative bodies (NGRBs) for non-government schools. 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.

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and reporting requirements for NGRBs to provide more detailed financial information and incorporate requirements relevant to the Choice and Affordability Fund.

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- amends reporting requirements to provide greater clarity on how financial assistance provided to NGRBs is being spent, or committed to be spent; and
- ensures existing provisions relating to the way NGRBs must spend financial assistance continue to apply in relation to financial assistance payable for years before 2020.

Human rights implications

The Amendment Regulation engages the following human right:

- 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).

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 non-government school sector has a significant role in providing school education in Australia. These measures promote the right to education by supporting the implementation of the Choice and Affordability Fund, which will enable NGRBs to provide additional support to non-government schools in relation to Australian Government priorities. These priorities include support for parental choice and diversity in the schooling system, providing structural adjustment assistance, lifting outcomes in underperforming schools and targeting extra support for non-government schools that need additional assistance. The provision of support to the non-government school sector via NGRBs recognises the sector's important role in delivering school education, and helps to ensure Australia can continue to have functioning, sufficiently supported educational institutions. It also recognises the importance of supporting the liberty of parents and guardians to choose non-government schools, including schools that ensure the religious and moral education of their children in conformity with their own convictions.

The Amendment Regulation adjusts reporting and accountability requirements for NGRBs, to encompass requirements relevant to the Choice and Affordability Fund. This includes

requiring NGRBs to use funding and provide reports in accordance with fund-specific guidelines and their written arrangements with the Secretary. Working with NGRBs through cooperative arrangements, establishing fund-specific guidelines and applying existing legislative compliance mechanisms will ensure Commonwealth funding is used for its intended purpose to support school education. Mechanisms that enable the effective administration and monitoring of funding provided to support school education promote the right to education by seeking to ensure that schools and students receive the intended support.

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

Conclusion

The Amendment Regulation is compatible with human rights because it promotes the right to education under the ICESCR and the UNCRC.

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 (2019 Measures No. 1) Regulations 2019*.

Section 2 – Commencement

This section provides that the Amendment Regulation commences on 1 January 2020.

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 amends subsection 4(1) of the Principal Regulation to include a definition of ‘Choice and Affordability Fund Guidelines’ to mean the *Choice and Affordability Fund Guidelines* issued by the Department, as in force from time to time. **Item 1** also inserts a note stating that the Choice and Affordability Fund Guidelines could in 2020 be viewed on the Department’s website.

Subsection 130(4) of the Act provides the legislative authority for the Choice and Affordability Fund Guidelines to be incorporated into the Principal Regulation. In particular, subsection 130(4) provides that, despite the operation of the *Legislation Act 2003*, the Principal Regulation may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time.

The incorporation of the Choice and Affordability Fund Guidelines applies from the time the Amendment Regulation commences, at which point the Guidelines themselves will have been made.

The purpose of the Choice and Affordability Fund Guidelines is to set out the requirements for NGRBs in relation to the administration, use and reporting relating to the Choice and Affordability Fund, within the parameters of the requirements specified in the Act and Principal Regulation. The Choice and Affordability Fund Guidelines will include the priorities of the fund, estimated distribution of funding by school sector and State and Territory for 2020, and funding arrangements for future years. The Guidelines will also contain information on the required content of work plans and annual reports.

The Choice and Affordability Fund Guidelines will be made freely available on the Department of Education and Training’s website (<http://www.education.gov.au>) by 1 January 2020.

Item 2 inserts new Division 4 into Part 4 of the Principal Regulation to prescribe, for the purposes of paragraph 130(2)(b) of the Act, matters the Minister must have regard to in determining an amount of financial assistance payable to a State or Territory for a year for an NGRB for a non-government school under section 70 of the Act.

Paragraph 130(2)(b) provides that, if the Act permits or requires a decision to be made, the regulations may prescribe matters the decision-maker may or must (as prescribed by the regulations) have regard to in making the decision.

New subsection 25B(1) requires that the Minister, in making a determination under section 70 of the Act, must have regard to the following matters:

- the Choice and Affordability Fund Guidelines;
- the Non-Government Reform Support Fund Guidelines;
- any written arrangement entered into between the Secretary and the NGRB relating to financial assistance payable to the body under Division 4 of Part 5 of the Act (funding for NGRBs); and
- the amount specified in subsection 25B(2) of the Principal Regulation as the total amount of financial assistance under Division 4 of Part 5 of the Act for the matters set out in the Choice and Affordability Fund Guidelines for all NGRBs for the year.

New subsection 25B(2) specifies that for the purposes of paragraph 25B(1)(d) (dot point four above), the total amount of financial assistance under Division 4 of Part 5 of the Act for the matters set out in the Choice and Affordability Fund Guidelines is:

- for all NGRBs approved for non-government schools that are Catholic systemic schools for 2020 – \$61.5 million;
- for all other NGRBs approved for non-government schools for 2020 – \$41.5 million; and
- for each later year – the amount worked out by multiplying the total amount of financial assistance for the previous year by the SRS indexation factor for the current year.

Prescribing the matters the Minister must have regard to when making a determination under section 70 of the Act provides further guidance in relation to the exercise of this Ministerial discretion. The Minister may have regard to other matters, in addition to the matters listed above.

Item 3 inserts new paragraphs 31(1)(c), (d) and (e) into the Principal Regulation to require an NGRB to spend, or commit to spend, financial assistance that is payable to it under Division 4 of Part 5 of the Act, in accordance with:

- the Choice and Affordability Fund Guidelines; and
- any written arrangement entered into between the Secretary and the NGRB relating to financial assistance payable to the NGRB under Division 4 of Part 5 of the Act; and
- any written directions of the Minister.

These requirements are in addition to paragraphs 31(1)(a) and (b) of the Principal Regulation which already require an NGRB to spend, or commit to spend, this financial assistance for the purpose of supporting school education and in accordance with the Non-Government Reform Support Fund Guidelines.

Item 4 repeals subsection 31(2) of the Principal Regulation, which requires that NGRBs must spend, or commit to spend, financial assistance:

- in the year in which it was paid; or
- before the day, or within the period specified in any determination made by the Minister.

Item 4 also repeals subsection 31(3) of the Principal Regulation, which gives the Minister the power to determine a day before, or a period within which, an NGRB must spend, or commit to spend, financial assistance, as mentioned in the second dot point above. The Non-Government Reform Support Fund Guidelines and the Choice and Affordability Fund Guidelines will specify the timeframe in which NGRBs must spend or commit to spend financial assistance received for 2020 and each later year for the matters specified in the respective guidelines. **Item 20** saves subsection 31(3) in relation to financial assistance that is payable for 2019 and each earlier year.

Items 5–18 amend subsection 34(3) of the Principal Regulation. Paragraph 34(3)(b) of the Principal Regulation currently requires an NGRB to provide, in a certificate given to the Secretary relating to a year, the amount of financial assistance spent, or committed to be spent, in the year in accordance with section 31, and whether interest earned on financial assistance has been spent, or committed to be spent, in the year in accordance with section 31 only.

The amendments require an NGRB to provide, in a certificate given to the Secretary relating to a year, the following information about financial assistance paid to it in accordance with the Act:

- the amount of financial assistance spent in the year in accordance with section 31;
- the amount of financial assistance committed to be spent in the year in accordance with section 31;
- whether interest earned on financial assistance has been spent or committed to be spent in the year in accordance with section 31; and
- the amount of financial assistance paid in a previous year that has been spent, or committed to be spent in accordance with section 31, including amounts of financial assistance committed in a previous year but spent in the current year.

Item 19 amends subsection 36(6) of the Principal Regulation. Subsection 36(6) of the Principal Regulation currently requires an NGRB to give the Secretary a report or reports for each year in accordance with the Non-Government Reform Support Fund Guidelines only.

The amendments require an NGRB to give the Secretary a report or reports for each year (as required by subsection 36(1)) in accordance with:

- the Choice and Affordability Fund Guidelines; and
- the Non-Government Reform Support Fund Guidelines; and
- any written arrangement entered into between the Secretary and the NGRB relating to financial assistance payable to the body under Division 4 of Part 5 of the Act (funding for NGRBs).

Item 20 inserts new subsection 74(1) into the appropriate position in Part 8 of the Principal Regulation. New subsection 74(1) provides that despite the amendments made by **items 3**

and 4 of Schedule 1 to the Amendment Regulation, section 31 of the Principal Regulation as in force immediately before the commencement of that Schedule, continues to apply in relation to financial assistance that is payable for 2019 and each earlier year. **Item 20** also inserts new subsection 74(2) to provide that the amendments made by **items 5–19** of Schedule 1 to the Amendment Regulation apply in relation to 2020 and each later year.