

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

Australian Education Act 2013

Australian Education Amendment (2023 Measures No. 1) Regulations 2023

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 which provides for Commonwealth financial assistance for schools.

Under the Act, financial assistance is provided to states and territories for distribution to approved authorities for government and non-government schools. Entities approved to receive Commonwealth financial assistance under the Act, including approved authorities, 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 on matters concerning conditions and calculations of grants of Commonwealth financial assistance to states and territories for schools, matters relevant to the effective and efficient administration of that assistance, and matters relevant to the provision of prescribed circumstances funding under the Act.

The Act and Principal Regulation commenced on 1 January 2014.

Purpose and operation of amendments

The purpose of the *Australian Education Amendment (2023 Measures No. 1) Regulations 2023* (the Amendment Regulations) is to enable the Commonwealth to pay specified amounts of adjustment funding to certain highly disadvantaged independent schools, and to increase the funding limit for the Targeted Round of the Schools Upgrade Fund to enable additional funding to be provided for schools to upgrade their learning facilities and for equipment to support students.

Adjustment funding for highly disadvantaged independent schools

The amount of financial assistance that a school attracts for a year is calculated using the formula in Division 2 of Part 3 of the Act. The financial assistance consists of a base amount for the school, plus loadings for schools with students with greater needs. The formula for

calculating the socio-educational disadvantage loading (SED loading) requires the input of the number of students at the school for the year identified by the Australian Curriculum Assessment and Reporting Authority (ACARA) as being in the lowest and second lowest socio-educational disadvantage quarter; and the low English proficiency loading (LEP loading) requires the input of the number of students at the school for the year identified by ACARA and as having a disadvantaged language background other than English.

Since 2017, in some instances and as an interim measure, ACARA used fixed percentages for the above student numbers where accurate data for these cohorts was not available. Accurate data was not available for certain highly disadvantaged independent majority Aboriginal and Torres Strait Islander schools, special assistance schools and special schools. ACARA has now advised that sufficiently accurate student data is now available, and that from 2023 ACARA intends to identify the student numbers using actual student data, rather than fixed percentages. The use of actual student numbers rather than fixed percentages will result in some schools receiving less funding in 2023 than they did in 2022.

Adjustment funding, which will taper each year, will be provided to certain highly disadvantaged independent schools to smooth their transition to reduced funding. This adjustment funding is to be delivered under section 69A of the Act. Section 69A of the Act provides that the Minister may, in writing, determine an amount of financial assistance that is payable to a State or Territory for a school for a year if the Minister is satisfied that prescribed circumstances apply in relation to the school for that year. The regulations may prescribe matters that the Minister may or must have regard to in making a decision under section 69A.

The Amendment Regulations insert a new Part 9 into Schedule 1 to the Principal Regulation which prescribes the circumstances that must be satisfied for a determination of adjustment funding, limits to the amount of adjustment funding that may be determined, and requirements for how adjustment funding must be spent.

Targeted Round of the Schools Upgrade Fund

The other purpose of the Amendment Regulations is to increase the funding limit for the Targeted Round of the Schools Upgrade Fund from \$18 million to \$21.6 million. The purpose of the Schools Upgrade Fund is to provide more equitable access to resources to support schools to help keep students and school staff safe, and get students' education back on track after disruptions caused by COVID-19. The increase to the funding limit for Targeted Round School Upgrades is needed to enable the delivery of additional election commitments for infrastructure projects in schools that were transferred from the Infrastructure, Transport, Regional Development, Communications and the Arts portfolio to the Education portfolio in 2023.

Impact Analysis

The Office of Impact Analysis (OIA) has agreed an Impact Analysis is not required to the adjustment funding for highly disadvantaged independent schools' regulation amendment (OIA23-04857).

The OIA has agreed an Impact Analysis is not required in relation to the amendment on the Schools Upgrade Fund Targeted Round (OIA23-04847).

Commencement

The Amendment Regulations commence on the day after they are registered on the Federal Register of Legislation.

Consultation

The Minister for Education wrote to all state and territory Education Ministers, Independent Schools Australia and the National Catholic Education Commission on 19 April 2023 to formally consult on an exposure draft of the Amendment Regulations. The Department of Education received responses that were supportive of the proposed amendments, and no changes to the proposed amendments were requested.

Statement of Compatibility with Human Rights

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

Australian Education Amendment (2023 Measures No. 1) Regulations 2023

The *Australian Education Amendment (2023 Measures No. 1) Regulations 2023* (Amendment Regulations) 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 purpose of the *Australian Education Amendment (2023 Measures No. 1) Regulations 2023* (the Amendment Regulations) is to enable adjustment funding to be provided for certain highly disadvantaged independent schools and to increase the funding limit for the Targeted Round of the Schools Upgrade Fund to enable additional funding to be provided for schools to upgrade their learning facilities and for equipment to support students.

Adjustment funding for highly disadvantaged independent schools

The amount of financial assistance that a school attracts for a year is calculated using the formula in Division 2 of Part 3 of the Act. The financial assistance consists of a base amount for the school, plus loadings for schools with students with greater needs. The formula for calculating the socio-educational disadvantage loading (SED loading) requires the input of the number of students at the school for the year identified by the Australian Curriculum Assessment and Reporting Authority (ACARA) as being in the lowest and second lowest socio-educational disadvantage quarter; and the low English proficiency loading (LEP loading) requires the input of the number of students at the school for the year identified by ACARA and as having a disadvantaged language background other than English.

Since 2017, in some instances and as an interim measure, ACARA used fixed percentages for the above student numbers where accurate data for these cohorts was not available. Accurate data was not available for certain highly disadvantaged independent majority Aboriginal and Torres Strait Islander schools, special assistance schools and special schools. ACARA has now advised that sufficiently accurate student data is now available, and that from 2023 ACARA intends to identify the student numbers using actual student data, rather than fixed percentages. The use of actual student numbers rather than fixed percentages will result in some schools receiving less funding in 2023 than they did in 2022.

Adjustment funding, which will taper each year, will be provided to certain highly disadvantaged independent schools to smooth their transition to reduced funding. This adjustment funding is to be delivered under section 69A of the Act. Section 69A of the Act provides that the Minister may, in writing, determine an amount of financial assistance that is payable to a State or Territory for a school for a year if the Minister is satisfied that prescribed circumstances apply in relation to the school for that year. The regulations may prescribe matters that the Minister may or must have regard to in making a decision under section 69A.

The Amendment Regulations insert a new Part 9 into Schedule 1 to the Principal Regulation which prescribes the circumstances that must be satisfied for a determination of adjustment

funding, limits to the amount of adjustment funding that may be determined, and requirements for how adjustment funding must be spent.

Targeted Round of the Schools Upgrade Fund

The other purpose of the Amendment Regulations is to increase the funding limit for the Targeted Round of the Schools Upgrade Fund from \$18 million to \$21.6 million. The purpose of the Schools Upgrade Fund is to provide more equitable access to resources to support schools to help keep students and school staff safe, and get students' education back on track after disruptions caused by COVID-19. The increase to the funding limit for Targeted Round School Upgrades is needed to enable the delivery of additional election commitments for infrastructure projects in schools that were transferred from the Infrastructure, Transport, Regional Development, Communications and the Arts portfolio to the Education portfolio in 2023.

Human rights implications

The Amendment Regulations engage the right to education under Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and Articles 28 and 29 of the *Convention of the Rights of the Child* (UNCRC). The Amendment Regulations also engage the right to education for persons with a disability under Article 24 of the *Convention on the Rights of Persons with Disabilities* (CRPD).

Right to Education

The Amendment Regulations positively engage 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 Amendment Regulations promote the right to education by providing adjustment funding for certain highly disadvantaged independent schools which will assist those schools in continuing to provide quality education to students. The funding will also support parents and guardians who choose non-government schools for their children. This measure will thereby have a beneficial impact on the right to education and will help to ensure Australia continues to have functioning and sufficiently supported schools.

The Amendment Regulations also promote the right to education by increasing the amount of financial assistance that may be determined for Targeted Round School Upgrades. This funding increase will enable additional support to be provided to both government and non-government schools in delivering quality education and will help to ensure Australia can continue to have functioning and sufficiently supported education institutions. This measure will thereby have a beneficial impact on the right to education.

Right to education – Persons with a disability

Article 24 of the CRPD provides that State Parties recognise the right of persons with disabilities to education and shall ensure an inclusive education system. To realise this right,

State parties need to ensure that persons with disabilities are not excluded from the general education system on the basis of disability, reasonable accommodation of the individual's requirements is provided, and persons with disabilities receive the support required, within the general education system, to facilitate their effective education.

The Amendment Regulations support the right to education for persons with a disability by providing additional financial support to certain special assistance schools and special schools who provide education to students with a disability. This funding will allow these schools to continue to provide students with the support and reasonable accommodations required to facilitate their effective education.

Conclusion

The Amendment Regulations are compatible with human rights because they promote the right to education under the ICESCR and the UNCRC and the right to education for persons with a disability under the CRPD.

Minister for Education, The Hon Jason Clare MP

Detailed explanation of the provisions of the *Australian Education Amendment (2023 Measures No. 1) Regulations 2023*

Section 1 – Name

This section provides that the title of the instrument is the *Australian Education Amendment (2023 Measures No. 1) Regulations 2023* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations commence on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Amendment Regulations are made under the *Australian Education Act 2013* (the Act).

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

Australian Education Regulation 2013

Part 1—Adjustment funding for highly disadvantaged independent school students

Item 1

This item inserts a new Part 9 into Schedule 1 to the *Australian Education Regulation 2013* (the Principal Regulation) to provide adjustment funding for certain highly disadvantaged independent schools.

Section 69A of the Act provides for funding in prescribed circumstances. The Minister may, in writing, determine an amount of financial assistance that is payable under subsection 69A(1) of the Act to a State or Territory for a school for a year if the Minister is satisfied that prescribed circumstances apply in relation to the school for that year.

New clause 38 of Schedule 1 sets out the circumstances that the Minister must be satisfied apply in relation to a school, for the purposes of making a determination of financial assistance for the school under subsection 69A(1) of the Act. The circumstances are that for a school for a year from 2023 to 2026 (inclusive):

- the school is an independent school, being one other than a government school or a Catholic systemic school; and
- the school is a majority Aboriginal and Torres Strait Islander school, or a special assistance school, or a special school; and
- the school is included in the table in Schedule 3; and
- the approved authority for the school has provided the information mentioned in section 56 of the Principal Regulation that is relevant to working out the school's

socio-educational disadvantage loading (SED loading) and low English proficiency loading (LEP loading) for the year; and

- the SED loading and LEP loading amounts for the school for the year, when worked out using information provided under section 56 of the Principal Regulation, is lower than the SED loading and LEP loading amounts for the school for the year when worked out using numbers identified by the Australian Curriculum Assessment and Reporting Authority (ACARA) for the year by using the method it used in 2022 to work out the number of students by the application of fixed percentages.

The amount of financial assistance that a school attracts for a year is worked out using the formula in Division 2 of Part 3 of the Act. The financial assistance consists of a base amount for the school, plus loadings for schools with students with greater needs. Under section 38 of the Act and subsections 18(1) and (2) of the Principal Regulation, the formula for working out the SED loading requires the input of ‘the number of students at the school for the year identified by ACARA as being in the lowest, and second lowest, socio-educational disadvantage quarter. Similarly, under section 39 of the Act and subsection 18(3) of the Principal Regulation, the formula for working out the LEP loading requires the input of ‘the number of students at the school for the year identified by ACARA as disadvantaged language background other than English students’.

In 2022 ACARA identified the relevant student numbers (in quartile 1, quartile 2, and who have a disadvantage language background) by applying fixed percentages of the schools’ total student numbers. This method was used as an interim measure because accurate data was not available for certain highly disadvantaged independent majority Aboriginal and Torres Strait Islander schools, special assistance schools and special schools. The fixed percentages used were:

- for independent majority Aboriginal and Torres Strait Islander schools: 90% of students are in quartile 1, 10% of students are in quartile 2, and 90% of students have a disadvantaged language background other than English.
- for independent special schools and independent special assistance schools: 80% of students are in quartile 1, and 20% of students are in quartile 2.

New clause 39(1) of Schedule 1 prescribes that the maximum amount payable for a school for a year, for the purposes of paragraph 69A(2)(b) of the Act, in relation to the circumstances mentioned above, must not exceed:

- for 2023 – 100% of the base adjustment amount for the school specified in the table at Schedule 3,
- for 2024 – 75% of the base adjustment amount for the school specified in the table at Schedule 3,
- for 2025 – 50% of the base adjustment amount for the school specified in the table at Schedule 3, and
- for 2026 – 25% of the base adjustment amount for the school specified in the table at Schedule 3.

New clause 39(2) of Schedule 1 provides that the total of the amounts that the Minister determines for a year, for the purposes of paragraph 69A(4)(a) of the Act, in relation to the

circumstances mentioned above, must not exceed \$62,774,474 for 2023, \$47,080,856 for 2024, \$31,387,237 for 2025 and \$15,693,619 for 2026.

New clause 40(1) sets out, for the purposes of paragraph 78(2)(a) of the Act, that an approved authority for a school must spend, or commit to spend, financial assistance that is payable for the school under subsection 69A(1) of the Act, in the circumstances mentioned above:

- for the purpose of providing school education at a school for which the authority is approved; and
- in accordance with any written directions given by the Minister.

New clause 40(2) has the effect that the purpose of providing school education includes the purposes set out in subsections 29(2) and does not include the purposes set out in subsection 29(3) of the Principal Regulation.

New clause 40(3) provides that financial assistance mentioned in subclause 40(1) must be spent, or committed to be spent:

- by the day or within the period directed in writing by the Minister; or
- if there is no such direction, in the year in which the assistance is paid to the approved authority.

New clause 40(4) provides that for the purposes of clauses 40(1) and 40(3)(a), the Minister may give written directions to an approved authority.

New clause 40(5) provides that any interest earned on financial assistance mentioned in subclause 40(1) must be spent, or committed to be spent, in the same way as the financial assistance.

Any instrument made under new clause 40 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*.

Item 2

This item inserts a new Schedule 3 to the Principal Regulation. Schedule 3 provides the base adjustment amounts for the purposes of Part 9 of Schedule 1 to the Principal Regulation.

The schools included in new Schedule 3 were selected based on the following criteria:

- in 2022, the school was an independent majority Aboriginal and Torres Strait Islander school, special assistance school, or special school; and
- the school's SED loading and LEP loading amounts for 2022 were greater than zero; and
- the number of students in quartiles 1 and 2 relied upon in working out the SED loading amount for 2022, and the number of students with a disadvantaged language background other than English relied upon in working out the LEP loading amount for 2022, was the number identified by ACARA by the application of fixed percentages.

The base adjustment amounts for each school in Schedule 3 have been calculated to reflect an estimate of the reduced amount of SED loading and LEP loading to the schools due to these fixed percentages no longer being used to calculate those loadings. The amount is inclusive

of both the Commonwealth funding share and an assumed 20 per cent state and territory share. Specifically, the base adjustment amounts reflect the difference between:

- the SED loading and the LEP loading amounts for the school for 2023, when worked out using ‘fixed percentages’, forecasted as at 7 December 2022, and
- the SED loading and LEP loading amounts for the school for 2023, when worked out using 2022 actual student background data from ACARA, forecasted as at 7 December 2022.

Part 2 – Targeted round school upgrades funding limit

Item 3

Item 3 amends clause 31 of Schedule 1 to the Principal Regulation to provide a \$1.6 million increase to the upper limit of the total amount of financial assistance that may be determined for schools for 2022 and 2023 taken together, through the Targeted Round of the School Upgrades Fund. That is, the upper limit is prescribed to be \$21.6 million rather than \$18 million.

The purpose of the Schools Upgrade Fund is to provide more equitable access to resources to support schools to help keep students and school staff safe, and get students’ education back on track after disruptions caused by COVID-19. The proposed increase to the Targeted Round School Upgrades funding limit is necessary to enable the delivery of additional election commitments for infrastructure projects in schools that were transferred from the Infrastructure, Transport, Regional Development, Communications and the Arts portfolio to the Education portfolio in 2023.