EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

*Australian Education Act 2013*

*Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024*

# 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(3) of the Act provides that the regulations may allow the Minister for Education (the Minister) to determine matters in relation to anything in relation to which regulations may be made. Subsection 130(4) of the Act provides that the regulations may provide in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or other writing as in force or existing from time to time. Subsection 130(5) of the Act provides that, before the Governor-General makes a regulation for the purposes of a provision listed at paragraphs 130(5)(a) or (b), the Minister must consult with the Ministerial Council.

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, financial assistance is provided to states and territories for distribution to entities approved to receive financial assistance under the Act, including 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. Entities approved to receive financial assistance under the Act must satisfy and continue to satisfy the conditions of approval outlined in the Act.

The *Australian Education Regulations 2023* (the Principal Regulations) contain provisions concerning the calculation, indexation and setting of Commonwealth financial assistance to states and territories for schools, and for the effective and efficient administration of that financial assistance.

The Act commenced on 1 January 2014. The Principal Regulations commenced on 21 July 2023, repealing the *Australian Education Regulations 2013* and replacing it in substantially the same form.

# Purpose and operation of amendments

The purpose of the *Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024* (the Amendment Regulations) is to rectify an error as to the operation and application of section 19G of the Principal Regulations in providing for the calculation of the notional funding amount for a non-government school. Division 2 of Part 3 of the Act contains the formula which produces the total amount of recurrent funding payable by the Commonwealth for a school for a year. Section 35A of the Act provides that the Commonwealth share of the sum of a school’s base amount for a year and the school’s total loading for the year is 20% for a government school and 80% for a non-government school. Most schools will move to that share over a period of transition years. Section 35C of the Act provides that the regulations may prescribe a percentage, or a method to work out a percentage, for a non-government school for a transition year for the school that is the Commonwealth share for the school for the transition year. The notional funding amount is an amount that is part of the formula for calculating the Commonwealth share for a transition year.

The Amendment Regulations also update references from “sex” to “gender” in section 50 of the Principal Regulations to ensure consistency with national approaches to collecting data on sex and gender and the department’s practice for the collection of non-government school census data.

# Impact Analysis

The Office of Impact Analysis (OIA) has agreed an Impact Analysis is not required in relation to the Amendment Regulations (OIA24-08138).

# Commencement

The Amendment Regulations will commence on the day after the instrument is 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 16 October 2024 to consult on the Amendment Regulations. The Department of Education received responses that were supportive of the proposed amendments, and no further changes were requested. The Minister did not consult with the Ministerial Council for the purposes of subsection 130(5) of the Act as consultation was not necessary as the proposed Regulations do not make regulations for the purposes of a provision listed at paragraphs 130(5)(a) or (b).

Statement of Compatibility with Human Rights

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

*Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024*

The *Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024* (the 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 *Australian Education Act 2013* (the Act) is the principal legislation by which the Australian Government provides Commonwealth financial assistance for schools.

Under the Act, financial assistance is provided to states and territories for distribution to entities approved to receive financial assistance under the Act, including 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. Entities approved to receive financial assistance under the Act must satisfy and continue to satisfy the conditions of approval outlined in the Act.

The *Australian Education Regulations 2023* (the Principal Regulations) contain provisions concerning the calculations, indexation and setting of Commonwealth financial assistance to states and territories for schools, and for the effective and efficient administration of that financial assistance. The Amendment Regulations amend the Principal Regulations.

The purpose of the Amendment Regulations is to clarify what the notional funding amount for a non-government school is, as calculated under section 19G of the Principal Regulations. Division 2 of Part 3 of the Act contains the formula which produces the Commonwealth share of a total amount of funding for a school for a year. Most schools will move to that share over a period of transition years. Section 35C of the Act provides that the regulations may prescribe a percentage, or a method to work out a percentage, for a non-government school for a transition year for the school that is the Commonwealth share for the school for the transition year. The notional funding amount is an amount that is part of the formula for calculating the Commonwealth share for a transition year.

The purpose of the Amendment Regulations is also to update references from “sex” to “gender” in section 50 of the Principal Regulations to ensure consistency with national approaches to collecting data on sex and gender.

# 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 on the Rights of the Child* (UNCRC).

## Right to Education

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 legal guardians to choose non-government schools for their children’s education, provided those schools conform to minimum educational standards as may be laid down or approved by the government. 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 amending the method for working out the notional funding amount that is used to calculate the notional starting share for a school for a year. This measure will help to ensure that the notional starting share more appropriately reflects the intended Commonwealth funding model.

This measure will thereby have a beneficial impact on the right to education by more effectively allocating finite funding resources, and will help to ensure Australia continues to have functioning and sufficiently supported educational institutions.

# Conclusion

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

**The Hon Jason Clare MP**

**Minister for Education**

# Detailed explanation of the provisions of the *Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024*

## Section 1 – Name

This section provides that the title of this instrument is the *Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024* (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.

The only instrument that is specified in the Schedules is the *Australian Education Regulations 2023*.

## Schedule 1 – Amendments

*Australian Education Regulations 2023*

### Items [1] and [2] – Subsection 19G(4) (paragraphs (a) and (b) of the definition of *2017 school funding proportion)*

Section 19G of the *Australian Education Regulations 2023* (the Principal Regulations) defines the notional funding amount that is used to calculate the notional starting share. For schools that are not part of an approved system authority, the notional funding amount is simply the school’s total entitlement for the year. Under subsection 19G(2) of the Principal Regulations the notional funding amount for a school for 2019 is worked out differently if the approved authority for a schools in 2019 was also:

(a) the school’s approved authority in 2017; and

(b) the school’s approved system authority as defined in section 5 of the *Australian Education Regulation 2013* as in force immediately before 1 January 2018.

Section 5 of the *Australian Education Regulation 2013*, as in force immediately before 1 January 2018, provided that an approved system authority is the approved authority for an approved system arrangement. An approved system arrangement was an arrangement between the Commonwealth and an approved authority for more than one participating school providing for the needs-based distribution of funding paid to the approved authority for participating schools.

Subsection 19G(4) of the Principal Regulations outlines how the amount should be worked out for the purposes of subsection 19G(2) of the Principal Regulations. It does this by providing the method for working out the amount that is the ***notional funding amount for the school for the year***. This amount is worked out using the formula:



Paragraphs 19G(4)(a) and (b) of the Principal Regulations provide the method for working out the amount which is the ***2017 funding proportion*** for the purposes of the above formula. Because the amount identified under paragraph 19G(4)(a) is divided by the amount worked out under paragraph 19G(4)(b), paragraph 19G(4)(a) is referred to as the numerator and paragraph 19G(4)(b) is referred to as the denominator in this Explanatory Statement.

#### Amendment to the numerator (paragraph 19G(4)(a))

Item 1 of the Amendment Regulations amends paragraph 19G(4)(a) of the Principal Regulations by omitting “for 2017 that was allocated to the school for the year” and substituting “that was allocated by the approved authority to the school for 2017”.

The purpose of this item is to clarify that it is the amount allocated by the approved authority to one particular school that is the numerator. This is because the total amount of funding allocated by an approved authority to a particular school can be different to the school’s entitlement as calculated by the department as the approved authority is entitled to retain funding for meeting its administrative costs and for providing corporate services to the schools it is approved for. This amendment to paragraph 19G(4)(a) of the Principal Regulations restores the entitlement to the level originally agreed with stakeholders at the time of implementation.

Under subsection 36(1) of the Principal Regulations, an approved authority provides a report to the Secretary. The amount of financial assistance allocated by the approved authority to a school for 2017 can be identified by reference to this report.

#### Amendment to the denominator (paragraph 19G(4)(b))

Item 2 of the Amendment Regulations repeals paragraph 19G(4)(b) of the Principal Regulations and substitutes a new paragraph providing that the denominator is the sum of all amounts of financial assistance paid to the school’s approved authority in accordance with Part 3 of the Act that was allocated by the approved authority to the approved authority’s schools for 2017. Schools are not to be included in the sum where:

* The Minister has not made a determination under section 25 of the Act that applies to the school in either or both 2018 or 2019; or
* The approved authority for the school was not the approved authority for the school in 2019; or
* The approved authority for the school was not taken to be the approved authority for the school in 2019 under subsection 19G(3) of the Principal Regulations.

The purpose of this item is to clarify that the denominator should capture the amount of financial assistance allocated to all of the approved authority’s schools, other than the schools outlined in new subparagraphs 19G(4)(b)(i) to (iii). As outlined above, this is because the total amount of funding allocated by an approved authority to each of its schools can be different to the approved authority’s total entitlement because the approved authority is entitled to retain funding for meeting its administrative costs and for providing corporate services to the schools it is approved for. This amendment to paragraph 19G(4)(b) of the Principal Regulations restores the entitlement to the level originally agreed with stakeholders at the time of implementation.

The new subparagraph 19G(4)(b)(i) retains the exclusion of schools that have closed from being included in the denominator, as provided in subsection 19G(4) of the Principal Regulations as in force immediately before the Amendment Regulations commenced. The new subparagraph 19G(4)(b)(ii) excludes schools that have changed approved authorities (i.e. excluding a school that is not a school of the approved authority in 2019 from the denominator). Lastly, new subparagraph 19G(4)(b)(iii) refers to the approved authority not being taken to be an approved authority for the school in 2019 under subsection 19G(3). The purpose of subsection 19G(3) of the Principal Regulations is to ensure approved system authorities who changed legal entity status and continued to be approved for those particular schools following the status change are captured for the purposes of subsection 19G(2). This ensures that the ***notional funding amount for the school for the year*** for those particular schools is worked out under subsection 19G(4). Subparagraph 19G(4)(b)(iii), by excluding an approved authority that was not taken to be the approved authority for the school in 2019 under subsection 19G(3) of the Principal Regulations, ensures that new approved authorities who were not the approved authority in 2017 are not captured by paragraph 19G(4)(b).

### Item [3] - Before section 67

Item 3 inserts a new heading ‘Division 1 – Application provisions on the making of this instrument’ before section 67 of the Principal Regulations.

This is a technical provision to provide for the insertion of a new division under item 4.

### Item [4] – After section 68

Item 4 inserts a new division after section 68 of the Principal Regulations called ‘Division 2 – Application provisions relating to the Australian Education Amendment (Notional Funding and Other Measures) Regulations 2024’.

Following this heading, item 4 inserts new section 69 of the Principal Regulations. This is the application provision for the amendments made to paragraphs (a) and (b) of the definition of ***2017 school funding proportion*** in subsection 19G(4) of the Principal Regulations by items 1 and 2 of Schedule 1 of the Amendment Regulations. This application provision provides that the amended paragraphs 19G(4)(a) and (b) of the Principal Regulations apply in relation to working out the Commonwealth share for a non-government school for a transition year that is 2020 or later. However, paragraphs 19G(4)(a) and (b) of the Principal Regulations, as in force immediately before the Amendment Regulations commenced, apply in relation to working out the Commonwealth share for a non-government school for a transition year that is 2020, 2021, 2022 or 2023 if the Commonwealth share worked out by the new paragraphs 19G(4)(a) and (b) inserted by items 1 and 2 of Schedule 1 of the Amendment Regulations is less than the Commonwealth share worked out under paragraphs 19G(4)(a) and (b) of the Principal Regulations, as in force immediately before the proposed Regulations commenced. The purpose of new section 69 is to ensure that the retrospective application of the new paragraphs 19G(4)(a) and (b) inserted by items 1 and 2 of Schedule 1 of the Amendment Regulations only apply beneficially to the affected approved authorities.

## Schedule 2 – Information provided by approved authorities

*Australian Education Regulations 2023*

### Item [1]

This item amends subparagraph 50(1)(b)(ii) of the Principal Regulations to remove the term “sex” and replace it with the term “gender”.

The purpose of this amendment is to align the collection of data under subparagraph 50(1)(b)(ii) of the Principal Regulations with the *Australian Government Guidelines on the Recognition of Sex and Gender* (the guidelines)and the department’s practice for the collection of non-government school census data.

The guidelines provide that the preferred Australian Government approach is to collect gender information, unless there is a legitimate need to collect sex information. The department’s practice for the collection of non-government school census data is to collect gender information as M, F or X, as identified as best practice in the guidelines.

The collection of information under subparagraph 50(1)(b)(ii) of the Principal Regulations by the Department of Education is regulated by the Australian Privacy Principles in the *Privacy Act 1988* (Cth).

The *Australian Government Guidelines on the Recognition of Sex and Gender* is published on the website of the Attorney-General’s Department (www.ag.gov.au) and can be freely accessed and used by members of the public.