2016–2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN EDUCATION AMENDMENT BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education and Training, Senator the Honourable Simon Birmingham)
AUSTRALIAN EDUCATION AMENDMENT BILL 2017

OUTLINE

The Australian Education Act 2013 (the Act) came into effect on 1 January 2014, and is the principal legislation for the provision of Australian Government recurrent funding for schooling.

Funding under the Act is provided to state and territory governments for distribution to approved authorities for government and non-government schools, block grant authorities, capital grants authorities, and non-government representative bodies. Entities in receipt of Commonwealth funding under the Act must meet the conditions of financial assistance that are outlined in the Act.

The Act currently outlines funding calculations for schools, reform arrangements and a range of technical matters. The Australian Education Amendment Bill 2017 (the Bill) is presented in a single schedule divided into three parts, with changes to the calculation of funding for schools, other policy changes (relating to reform and accountability arrangements) and a range of miscellaneous and technical amendments.

As the Act currently stands, recurrent funding varies depending on negotiated arrangements with state or territory governments. Under current arrangements, all non-government schools and systems, together with states and territories that entered into bilateral agreements under the National Education Reform Agreement, are classified as ‘participating’. Only New South Wales, South Australia and the Australian Capital Territory meet the legal requirements to be ‘participating’, with other states and territories ‘non-participating’ under the Act.

The Government has provided funding to all states and territories as if they were participating under the Act, in line with the final offers made to states during negotiations in 2013. Nevertheless, the transition arrangements set out in bilateral agreements and final offers result in inconsistent arrangements that mean students with the same need in the same sector are treated differently, simply because of the state or territory in which they live. Furthermore, funding entitlements are calculated based on previous funding levels, rather than based on need as measured by the Schooling Resource Standard (SRS). It is estimated that under current arrangements it will take more than 150 years for all schools to transition to the SRS.

The Government is committed to deliver needs based funding arrangements that ensure that students with the same need in the same sector attract the same level of Commonwealth support. To this end, a number of changes are required to the calculation of financial assistance for schools under the Act.

In Part 1, the Bill will:
- retain the SRS, as recommended by the 2011 Review of Funding for Schooling, led by Mr David Gonski AC. The SRS will continue to comprise a base per-student amount, discounted by the school community’s capacity to contribute for non-government schools and supplemented by loadings for disadvantage
- move to a funding approach in which the Commonwealth will provide a consistent Commonwealth share of the SRS, being:
• 20 per cent for all government schools, which reflects the Commonwealth’s historic role as the minority public funder of this sector
• 80 per cent for all non-government schools, which reflects the Commonwealth’s historic role as the majority public funder of this sector

• ensure that all schools will transition to their relevant share of the SRS by 2027. A starting Commonwealth share percentage will be established for all Australian schools based on funding received by approved authorities for schools in 2017. This share will be adjusted each year from 2018 to 2027 until the relevant Commonwealth share is reached

• provide for transition adjustment funding to assist schools where necessary to adjust to the new arrangements during the 10 year transition period, with details of eligibility and fund implementation to be set out in the Australian Education Regulation 2013 (Regulation)

• provide updated base amounts of the SRS (for both base primary and secondary schools) for 2018, calculated using the same methodology applied to more up-to-date data (2015 MySchool and 2013-2015 NAPLAN data), and reflecting 3.56 per cent indexation for 2018

• allow for the indexation of base amounts to be tied to an indexation rate to ensure that funding growth keeps pace with cost and wages growth in the broader economy, but never drops below three per cent. A new floating indexation rate will generally apply from 2021, and will be a composite of 75 per cent of the Wage Price Index and 25 per cent of the All Groups Consumer Price Index number published by the Australian Bureau of Statistics. Nevertheless, the Bill will provide a minimum indexation rate of three per cent. In addition, a power to set a different rate of indexation through regulation is included, and for 2019 and 2020 it is intended that indexation of the base amounts will be set at 3.56 per cent to provide funding certainty while the sector adjusts to the new arrangements

• change the calculation of the ‘student with disability’ loading to include differentiated loadings to better reflect the needs of students in the top three levels of adjustment (supplementary, substantial or extensive) under the Nationally Consistent Collection of Data on School Students with Disability

• require the Minister to determine in writing each individual non-government school’s SES (socio-economic status ) score, which reflects the particular circumstances of the school, for the purpose of its capacity to contribute percentage. The power of the Minister to determine a single SES score for a group of schools by legislative instrument – which gave rise to the so-called ‘system weighted’ SES scores for certain non-government schools – is removed by the Bill

• reduce the benefit afforded to non-government primary schools under capacity to contribute calculations.

In addition to changes to the school funding model the Commonwealth is seeking to strengthen the linkage between Commonwealth financial assistance and the implementation of evidence-based reforms to improve student outcomes.

The Commonwealth will work with the states and territories to develop and deliver a new national schooling agreement that will drive reform and help to address declining student performance.

A number of consequential changes are required to the Act. The changes will reduce the level of Commonwealth government control over the way schools are operated and the way funding is used by education authorities.
In Part 2, the Bill will:

- update the Preamble and Objects of the Act to better align them with the principles of needs-based and sustainable funding, nationally-agreed goals for schooling, and nationally-agreed evidence-based reforms
- stipulate the following conditions of financial assistance on the states and territories:
  - that they implement national policy initiatives for school education as agreed by the Education Council of the Council of Australian Governments (Ministerial Council) or otherwise prescribed by the regulations
  - that they are party to a national agreement on school education (to be developed collaboratively through the Council of Australian Governments)
  - that they are party to a bilateral agreement with the Commonwealth relating to implementation of school education reform for both government and non-government schools within their jurisdiction
  - that they fulfil their obligations under the national and bilateral agreements
- leave the setting of state and territory funding to the states and territories, however, to avoid cost shifting to the Commonwealth, the states and territories will be required to at least maintain their 2017 per-student funding levels as a condition of Commonwealth funding
- stipulate the following new ongoing policy requirements for approved authorities for non-government schools:
  - that they co-operate with their respective states and territories in implementing national policy reforms and agreements discussed above
  - that they implement policy initiatives in accordance with the regulations.
- remove the outdated distinction between participating and non-participating schools to align with the Government’s policy to fund states under consistent needs-based funding arrangements
- remove the requirement for approved authorities responsible for more than one school to have implementation plans, leaving the Government to work cooperatively with jurisdictions to implement and monitor national policy agreements
- remove requirements for approved authorities to have school improvement frameworks, allowing approved authorities and schools to continue to manage their improvement processes at the local level, and reduce unnecessary red tape
- improve transparency of Commonwealth schools funding by including additional annual reporting requirements on the Minister through the publication of Commonwealth funding for all schools.

Implementing and administering the Act since 2014 has also shown some aspects to be ambiguous, unnecessary or otherwise administratively cumbersome and these will also be amended.

In Part 3, the Bill will:

- refocus the consultation process for significant regulations that impact state and territory governments, by requiring the Minister to consult with, and have regard to relevant decisions of, the Ministerial Council prior to making regulations that affect the ongoing policy or funding requirements of approved authorities for government schools, or conditions imposed on States and Territories for financial assistance received under the Act
- simplify the Act in relation to the count of students for calculating funding entitlements, and allowing regulations to specify the administrative detail of the student count
• enable some obligations of approved authorities, block grant authorities and non-
government representative bodies, e.g. to acquit Commonwealth schools funding, to
survive the revocation of their approval
• amend provisions regarding decisions to vary and revoke approvals to receive
funding under the Act, in order to enable the imposition of conditions intended to
bring approval holders into compliance with the Act, and to streamline the process
for review of decisions by removing the internal review step (approval holders will
retain the right to seek independent external review)
• amend provisions relating to reducing funding to, or recovering funding from,
approval holders due to non-compliance or overpayment, so that the Minister must
be satisfied of the circumstances giving rise to the non-compliance or overpayment
• enable broader delegation of administrative functions under the Act and Regulation
by the Secretary of the Department.

FINANCIAL IMPACT STATEMENT

The changes to the calculation of school recurrent funding under the Bill result in a
$1.5 billion increase in additional recurrent funding over Budget and forward estimates from
2017-18 to 2020-21 (an increase of $1.1 billion for government schools and an increase of
$366 million for non-government schools) and an $16.4 billion increase in recurrent funding
over 10 years from 2017-18 to 2026-27 ($10.6 billion for government schools and $5.8
billion for non-government schools).

Total recurrent funding for government schools will increase from $6.8 billion in 2017 to
$9.0 billion in 2021 (an increase of 33 per cent), and total recurrent funding for
non-government schools will increase from $10.7 billion in 2017 to $13.1 billion in 2021
(an increase of 22 per cent).

The transition adjustment measure given effect by this Bill has a financial impact of $13.4
million over the Budget and forward estimates ($39.7 million over 10 years from 2017-18 to
2026-27).
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Australian Education Amendment Bill 2017

The Australian Education Amendment Bill 2017 (the Bill) 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 Bill

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- change the calculation of the ‘student with disability’ loading to include differentiated loadings to better reflect the needs of students in the top three levels of adjustment (supplementary, substantial or extensive) under the *Nationally Consistent Collection of Data on School Students with Disability*.

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- reduce the benefit afforded to non-government primary schools under capacity to contribute calculations.

In addition to changes to the school funding model the Commonwealth is seeking to strengthen the linkage between Commonwealth financial assistance and the implementation of evidence-based reforms to improve student outcomes.
The Commonwealth will work with the states and territories to develop and deliver a new national schooling agreement that will drive reform and help to address declining student performance.

A number of consequential changes are required to the Act. The changes will reduce the level of Commonwealth government control over the way schools are operated and the way funding is used by education authorities.

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- leave the setting of state and territory funding to the states and territories, however, to avoid cost shifting to the Commonwealth, the states and territories will be required to at least maintain their 2017 per-student funding levels as a condition of Commonwealth funding
- stipulate the following new ongoing policy requirements for approved authorities for non-government schools:
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- remove the outdated distinction between participating and non-participating schools to align with the Government’s policy to fund states under consistent needs-based funding arrangements
- remove the requirement for approved authorities responsible for more than one school to have implementation plans, leaving the Government to work cooperatively with jurisdictions to implement and monitor national policy agreements
- remove requirements for approved authorities to have school improvement frameworks, allowing approved authorities and schools to continue to manage their improvement processes at the local level, and reduce unnecessary red tape
- improve transparency of Commonwealth schools funding by including additional annual reporting requirements on the Minister through the publication of Commonwealth funding for all schools.

Implementing and administering the Act since 2014 has also shown some aspects to be ambiguous, unnecessary or otherwise administratively cumbersome and these will also be amended.

In Part 3, the Bill will:

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the ongoing policy or funding requirements of approved authorities for government schools, or conditions imposed on States and Territories for financial assistance received under the Act

- simplify the Act in relation to the count of students for calculating funding entitlements, and allowing regulations to specify the administrative detail of the student count
- enable some obligations of approved authorities, block grant authorities and non-government representative bodies, e.g. to acquit Commonwealth schools funding, to survive the revocation of their approval
- amend provisions regarding decisions to vary and revoke approvals to receive funding under the Act, in order to enable the imposition of conditions intended to bring approval holders into compliance with the Act, and to streamline the process for review of decisions by removing the internal review step (approval holders will retain the right to seek independent external review)
- amend provisions relating to reducing funding to, or recovering funding from, approval holders due to non-compliance or overpayment, so that the Minister must be satisfied of the circumstances giving rise to the non-compliance or overpayment
- enable broader delegation of administrative functions under the Act and Regulation by the Secretary of the Department.

**Human rights implications**

The Bill engages the following human rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights*, and Articles 28 and 29 of the *Convention on the Rights of the Child*
- the rights of persons with disabilities – Articles 9 and 24 of the *Convention on the Rights of Persons with Disabilities*
- the right to privacy – Article 17 of the *International Covenant on Civil and Political Rights*, and Article 16 of the *Convention on the Rights of the Child*.

**Right to Education**

The Bill engages the right to education in Article 13 of the *International Covenant on Economic, Social and Cultural Rights*. 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, provided those schools conform to the minimum educational standards set out by the Commonwealth. The right to education for children is also found in Articles 28 and 29 of the *Convention on the Rights of the Child*.

One of the main aims of the Bill is to link Commonwealth funding to evidence-based reforms proven to lift student outcomes. The Bill will ensure that the Commonwealth will work collaboratively with the states and territories to develop and implement a new national agreement on school education. This promotes the right to education.

The Bill removes historically-based inequities undermining Commonwealth funding for school education, and will ensure all government and all non-government schools receive a consistent sector-based share of Commonwealth funding by 2028. This will ensure all schools are funded according to the same needs-based funding provisions of the Act. This promotes the right to education.
The Bill will decrease Commonwealth interference in the way schools are operated and free up resources to allow principals, teachers and school communities to manage delivery of education at a school more effectively. The Bill removes the requirement for approved authorities for more than one school to have an implementation plan, and for all approved authorities to have school improvement frameworks and school improvement plans in place for each of their schools. This removes duplication of existing requirements and frees up resources to focus on the delivery of education. This promotes the right to education.

The Bill is compatible with the right to education.

Rights of Persons with Disabilities

The Bill engages Articles 9 and 24 of the Convention on the Rights of Persons with Disabilities. Article 9 recognises the right of persons with disabilities to participate fully in all aspects of life, and Article 24 recognises the right of persons with disabilities to an inclusive education.

One of the key changes to the funding calculations made by this Bill is to modify the existing ‘student with disability’ loading, in order to leverage the Nationally Consistent Collection of Data on School Students with Disability (NCCD). A key aspect of the NCCD is determining the number of students who are being provided with “a reasonable adjustment to access education because of disability” and judging the level of adjustment being provided (support provided within quality differentiated teaching practice, supplementary adjustment, substantial adjustment and extensive adjustment).

The Bill amends the student with disability loading to allow for funding to be provided at different rates based on students’ required level of adjustment. This will enable funding to be better targeted to student need as identified through the NCCD. This change will help ensure that schools are resourced in order to provide school education to students with a disability.

The Bill is compatible with the rights of persons with disabilities.

Right to privacy

The right to privacy is set out in Article 17 of the International Covenant on Civil and Political Rights, and Article 16 of the Convention on the Rights of the Child.

The Act permits the use and disclosure of ‘protected information’ in accordance with the regulations, and to publish protected information other than personal information (within the meaning of the Privacy Act 1988). ‘Protected information’ is defined in section 6 of the Act as any information obtained under or for the purposes of the Act. The Act does not ‘protect’ information, in that it is not intended to prohibit the lawful use or disclosure of information obtained under or for the purposes of the Act.

The term ‘protected information’ has caused some confusion among schools and in the administration of the Act. Consequently, the Bill will change this definition to ‘school education information’.

To the extent that the right to privacy is engaged, this change to the terminology of information obtained under or for the purposes of the Act, does not impact on the right to privacy contained in Article 17 of the International Covenant on Civil and Political Rights, or Article 16 of the Convention on the Rights of the Child.
The Bill is compatible with the right to privacy.

**Conclusion**

The Bill is compatible with human rights because it advances the protection of human rights.

*Circulated by authority of the Minister for Education and Training, Senator the Honourable Simon Birmingham*
REGULATION IMPACT STATEMENT

Name of department/agency: Department of Education and Training

OBPR Reference number: 19792

Name of proposal: Schools Funding and Reform Arrangements

Summary of the proposed policy and any options considered:
The proposal in this Bill seeks to affirm a needs-based funding model. Over ten years from 2018, Commonwealth funding for schools will transition to consistent Commonwealth shares of the Schooling Resource Standard (SRS) so that students with the same need in the same sector attract the same Commonwealth funding.

The Bill will further support the implementation of evidence-based education policies that will support improved student outcomes through nationally and bilaterally agreed reform activity. It also seeks to ensure accountability for the use of Commonwealth funding by linking funding growth to the implementation of reforms.

New arrangements recognise the primary responsibility that state and territory governments have for schooling within each jurisdiction, and will focus on evidence based reform activity that will drive improvements in outcomes across all sectors.

What are the regulatory impacts associated with this proposal?
Decisions on national reforms will be made through the Ministerial Council, including Regulatory Impact Requirements—where an individual reform may have a regulatory impact on businesses, a COAG Regulatory Impact Statement process will be triggered to assess costs and benefits.

What are the regulatory costs associated with this proposal?
Nil – there are no regulatory costs for business, community organisations or individuals associated with this proposal or associated legislative changes.

Regulatory burden and cost offset estimate table

<table>
<thead>
<tr>
<th>Average annual regulatory costs (from business as usual)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Change in costs ($ million)</td>
</tr>
<tr>
<td>Total, by sector</td>
</tr>
<tr>
<td>Cost offset ($ million)</td>
</tr>
<tr>
<td>Agency</td>
</tr>
</tbody>
</table>

Are all new costs offset?
☐ Yes, costs are offset ☒ No, costs are not offset ☐ Deregulatory—no offsets required

Total (Change in costs – Cost offset) ($ million) = ($Z)
What are the offsets for the regulatory costs associated with this proposal?
N/A
AUSTRALIAN EDUCATION AMENDMENT BILL 2017
NOTES ON CLAUSES

Clause 1 - Short title
Clause 1 provides for the Act to be the Australian Education Amendment Act 2017.

Clause 2 - Commencement
Subclause 2(1) inserts a three column table setting out commencement information for various provisions in the Bill. Each provision of the Bill specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table has the effect of providing for the following commencement times:

- matters to commence on the day the Act receives the Royal Assent:
  - sections 1 to 3 and anything else in the Act not otherwise covered by the table
  - item 109 of Schedule 1
- matters to commence on 1 January 2018:
  - Schedule 1, other than item 109.

Item 109 of Schedule 1 to the Bill is a transitional provision relating to the making of regulations before 1 January 2018, when those regulations will commence on or after 1 January 2018. As it relates to the making of regulations before 1 January 2018, it needs to commence before then.

Subclause 2(2) provides that any information in column 3 of the table in subclause 2(1) is not part of the Act and may be inserted or edited in published versions of the Act.

Clause 3 - Schedule(s)
Clause 3 provides that any legislation that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule and that any other item in a Schedule has effect according to its terms.
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Act</td>
<td><em>Australian Education Act 2013.</em></td>
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<tr>
<td>BGA</td>
<td>Block grant authority.</td>
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<tr>
<td>Ministerial Council</td>
<td>Education Council of the Council of Australian Governments.</td>
</tr>
<tr>
<td>NCCD</td>
<td><em>Nationally Consistent Collection of Data on School Students with Disability.</em></td>
</tr>
<tr>
<td>NGRB</td>
<td>Non-government representative body.</td>
</tr>
<tr>
<td>Regulation</td>
<td><em>Australian Education Regulation 2013.</em></td>
</tr>
</tbody>
</table>
Schedule 1 — Amendments

Part 1 – Funding for Schools

Explanation

Consistent calculation of recurrent funding for all schools under the Act

Currently, Commonwealth recurrent funding for schools under the Act is calculated using six different methodologies, set-out across Divisions 2, 3 and 5 of Part 3, and Part 4, of the Act. These methodologies involve treating approved authorities, and the schools those authorities are approved for, in differing ways.

Recurrent funding for government schools in states and territories that are subject to Part 4 of the Act, that is, Queensland, Victoria, Tasmania, Western Australia and the Northern Territory, is not directly calculated under the Act, nor does the Act directly calculate and attribute needs-based funding loadings for those schools. Instead, recurrent funding is distributed, at the state and territory level, and indexed each year in accordance with a legislative instrument made by the Minister for Education and Training.

Recurrent funding for non-government and government schools that are subject to Division 5 of Part 3 of the Act, that is, schools whose approved authorities are in transition, is calculated at the approved authority level for all of the authority’s schools and using four differing methodologies (depending on the funding characteristics of those schools and approved authorities in 2013).

Generally, the effect of these differing methodologies is as follows:

- recurrent funding in relation to some schools is determined each year by the Minister, with the Minister able to determine any amount between a minimum floor and a maximum cap. The minimum floor is calculated by reference to a per-student amount, indexed each year by 4.7 per cent, multiplied by all the students at all the schools of the relevant approved authority. The maximum cap is calculated by reference to the total of what the schools of the approved authority would receive if those schools were subject to Division 2 of Part 3 of the Act
- recurrent funding in relation to some schools is calculated each year by reference to a per-student amount, indexed each year by 3 per cent, multiplied by all the students at all the schools of the relevant approved authority
- recurrent funding in relation to some approved authorities that are only approved for special schools or special assistance schools, is also calculated each year by reference to a per-student amount, indexed each year by 3 per cent unless increased by regulation, multiplied by all the students at all the schools of the relevant approved authority
- recurrent funding in relation to some schools that have transferred between approved authorities since 1 January 2014 is determined each year by the Minister.

The Act does not directly calculate and attribute needs-based funding loadings for these schools.
Recurrent funding for non-government schools that are subject to Division 2 of Part 3 of the Act, such funding is calculated at the school level, with loadings also calculated and attributed in relation to certain characteristics of the school and its students (for example, loadings in relation to students with a disability, students that identify as Aboriginal and Torres Strait Islander, and location and size of the school).

In addition to the six differing methodologies for calculating recurrent funding under the Act, numerous non-legislative arrangements also impact the amount of recurrent funding calculated under Division 5 of Part 3, and Part 4 of the Act.

The complexity, and inconsistency, that is inherent in calculating and providing recurrent funding for schools under the Act using six differing methodologies, gives rise to potential uncertainty for the schooling sector, creates potential inequity and confusion in relation to Commonwealth schools funding, and limits opportunities for consistency and transparency in relation to the distribution of such funding.

Amendments provided in Parts 1 and 2 of Schedule 1 to the Bill will ensure that recurrent funding for all schools is calculated from 1 January 2018 under Divisions 2 and 3 of the Act, no matter whether such schools are government or non-government, and in which state or territory they are located. These amendments will ensure that, from 1 January 2018, there is a consistent and transparent basis for the calculation of recurrent funding for schools under the Act. This will include the direct calculation and attribution of needs-based funding loadings and a single methodology for such calculation.

Recurrent funding for all schools will be subject to the formula contained in section 32 of the Act, which calculates the Commonwealth funding share of the total of the base amount for a school (representing an amount per primary and secondary student at the school) and needs-based funding loadings linked to characteristics of students and the school. These needs-based funding loadings are set out in Division 3 of Part 3 of the Act.

The Commonwealth funding share for a government school is set at 20 per cent of the base amount and loadings calculated for a school under the Act; and the Commonwealth funding share for a non-government school is set at 80 per cent of the base amount and loadings for a school calculated under the Act. Such funding shares reflect the fact that the Commonwealth is the majority public funder of non-government schools, whereas states and territories are the majority public funders of government schools.

In order for all schools to have recurrent funding calculated under the Act on a consistent and transparent basis, it will be necessary for the Commonwealth funding share for those schools to move from their current variable amounts to the relevant percentage (20 per cent or 80 per cent) over a 10 year period beginning on 1 January 2018.

Consequently, from 1 January 2018, all schools that attracted recurrent funding under the Act in 2017 will be defined as transitioning schools until the end of 2027. Transitioning schools will have a Commonwealth funding share that is adjusted over time, while still attracting needs-based funding loadings and having recurrent funding calculated on a consistent and transparent basis.

New schools – those which open on or after 1 January 2018 – will generally not be transitioning schools, and will attract the relevant Commonwealth share (20 per cent or 80 per cent) of the base amount and loadings from the start of their operations.
The amendments provided in Parts 1 and 2 of the Bill will, for the first time, ensure all schools will have recurrent funding calculated on a needs basis under the Act.

**Changes to calculation of recurrent funding for schools under the Act**

To support the approach discussed above in providing a consistent and transparent calculation of recurrent funding for all schools, elements of the way in which recurrent funding is calculated under Divisions 2 and 3 of Part 3 of the Act will be changed.

An element of the recurrent funding calculation in section 32 of the Act for a school is that school’s base amount. A school’s base amount is calculated by reference to a per-student amount for primary students, and a per-student amount for secondary students, at the school, termed ‘SRS funding amount’ under the Act. Currently, SRS funding amounts are indexed each year by a fixed 3.6 per cent.

The amendments to the Act contained in Part 1 of Schedule 1 to the Bill will affect SRS funding amounts in the following two ways:

- SRS funding amounts will, from 1 January 2018, be re-based to reflect more up-to-date data, and reflecting 3.56 per cent indexation for 2018. The SRS funding amount for a primary student for 2018 will be set at $10,953, and the amount for a secondary student for 2018 will be set at $13,764. These amounts are calculated using the same methodology used to determine the 2014 amounts, updated with 2016 My School data and 2013-2015 NAPLAN data.
- from 2021 indexation of SRS funding amounts will no longer be set by a specific percentage, rather that indexation will reflect the actual increase in costs to schools each year, set by reference to a formula reflecting yearly changes in indexes relating to prices (the Consumer Price Index) and wages (Wage Price Index). This change will ensure that the indexation of SRS funding amounts represents the fair, reasonable and transparent increase in costs to schools of providing school education. Nevertheless, to ensure certainty and stability of funding, this indexation rate can never drop below three per cent.
- a power to set a different rate of indexation through regulation is included, and for 2019 and 2020 it is intended that indexation of the base amounts will be set at 3.56 per cent to provide funding certainty while the sector adjusts to new arrangements.

The amendments provided in Part 1 of Schedule 1 to the Bill will also remove the capacity for the Minister to set SES (socio-economic status) scores by legislative instrument under the Act, and will modify the table that determines non-government schools’ capacity to contribute percentages by reference to their SES scores. A school’s capacity to contribute percentage is a factor used in the calculation of the school’s base amount, to ensure that amount reflects a school community’s capacity to financially contribute to that school.

Currently, via legislative instrument, there is a capacity for a school’s SES score to be determined in a way that such a score may not fully reflect the genuine capacity to contribute of the school community. This capacity will be removed through the amendments in Part 1 of the Bill, ensuring the transparency of the SES scores. The Minister still retains the ability to determine an SES score for an individual school if satisfied the original score does not accurately reflect the general socioeconomic circumstances of the school.

The amendments provided in Part 1 of Schedule 1 to the Bill will also change elements of the needs-based funding loadings in Division 3 of Part 3 of the Act.
The current single formula for the student with disability loading will be replaced with three formulas that reflect the three highest levels of adjustment required for a student with disability used in the NCCD. Currently, the student with disability loading is not able to reflect the differing levels of adjustment provided to students with a disability, and is not able to recognise the differing costs to schools of providing school education for such students.

The amendments provided in Part 1 of Schedule 1 to the Bill will ensure that Commonwealth recurrent funding is able to more accurately reflect whether a supplementary, substantial or extensive level of adjustment is required for a student with a disability at a school. This will ensure that schools are better placed to have the resources available to provide holistic school education to students with a disability and make decisions based on the needs of individual students.

In addition, amounts used in connection with the calculation of a school’s size loading that are indexed each year will now be indexed in the same manner as the SRS funding amounts.

**Indexation of non-government capital funding to take account of changes in student numbers**

Commonwealth funding for capital expenditure by non-government schools is calculated and payable under Division 2 of Part 5 of the Act. Section 68 of the Act prescribes the maximum amount that is payable in any year. This amount was set at $134,496,000 in 2014, and it has been indexed every year thereafter by the “indexation percentage” – which is either 100%, or the percentage prescribed in the regulations (subsection 68(3)).

The regulations have prescribed indexation factors of 102.30% for 2015 and 101.76% for 2016 (see section 24A of the Regulation. The 2017 indexation factor has not yet been prescribed).

Subsection 68(4) of the Act requires that, before the Governor-General makes regulations prescribing the indexation factor for a year, the Minister must consider changes in the indexes of building prices and wage costs prescribed by the regulations. These indexes are prescribed in section 24B of the Regulation.

However, while the indexation factor reflects changes in building costs and wage costs in the construction sector, it has not taken account of changes in enrolment in the non-government school sector. This means that, although the amount of Commonwealth funding for capital expenditure by non-government schools has kept pace with changes in costs of construction, it has not kept pace with changes in student numbers, so that it has declined marginally in real terms on a per-student basis.

Consequently, the Bill will amend subsection 68(4) of the Act to require that, before the Governor-General makes regulations prescribing the indexation factor for a year from 2018 onwards, the Minister must consider changes not only in the indexes of building prices and wage costs prescribed by the regulations, but also the change in student enrolment in non-government schools.

**Transition adjustment funding**

As all schools will have recurrent funding calculated under Divisions 2 and 3 of the Act from 1 January 2018, and as most schools will transition towards a Commonwealth funding share of either 20 per cent or 80 per cent (depending on whether the school is a government
or non-government school respectively), it may be necessary to provide limited transition adjustment funding support for some schools during this process.

Accordingly, amendments to the Act in Part 1 of Schedule 1 to the Bill will enable transition adjustment funding to be provided to vulnerable schools, in limited circumstances to be prescribed by regulations. Such funding is only intended to be available to schools where, as a direct consequence of all recurrent funding for schools being calculated under Divisions 2 and 3 of Part 3 of the Act from 1 January 2018, financial hardship has occurred and that hardship is not able to be rectified through distribution of recurrent funding by the approved authority for the school on a needs-basis.

**Analysis of clauses**

**Items 1, 6, 11 and 16** relate to ensuring that recurrent funding for all schools is calculated under Divisions 2 and 3 of Part 3 of the Act from 1 January 2018. Note that Part 2 of Schedule 1 to the Bill contains further consequential amendments to bring effect to this objective.

**Item 6** will insert definitions for *transitioning school* and *transition year* in section 6 of the Act.

Transitioning schools are those schools that attracted recurrent funding under the Act in 2017 (that is, all existing schools currently funded under the Act). Regulations may also prescribe other schools as transitioning schools (and hence set their Commonwealth share through the transitional funding mechanism in new clause 35B); this facility may be used to prevent approved authorities artificially inflating their funding by closing existing transitioning schools and re-opening them as ostensibly “new” schools, for example.

Transition years are the calendar years between 2018 and 2027, inclusive.

**Items 1 and 16** will insert a new definition of *Commonwealth share* in section 6 of the Act, and provide for that Commonwealth share in new clauses 35A and 35B in Division 2 of Part 3 of the Act. The effect of these amendments is to specify the Commonwealth funding share of the Schooling Resource Standard (SRS) for schools from 1 January 2018.

For a school that is not a transitioning school (that is, a new school that commences operations on or after 1 January 2018), new clause 35A provides that the Commonwealth share is:

- 20 per cent for a government school; or
- 80 per cent for a non-government school.

Such funding shares reflect that the Commonwealth is the majority public funder of non-government schools, whereas states and territories are the majority public funders of government schools. Nevertheless, it should also be borne in mind that government schools have a zero per cent capacity to contribute, whereas most non-government schools will have a capacity to contribute between 10 per cent and 80 per cent (see section 54 of the Act), and this capacity to contribute reduces the base amount of Commonwealth funding that a non-government school attracts under section 33 of the Act.

Clause 35A will further enable regulations to prescribe a Commonwealth share that is different to that set out above. This regulation-making power is designed to ensure that sufficient flexibility is built into the Act for future government decisions on schools funding, while maintaining appropriate and sufficient Parliamentary oversight.
For a school that is a transitioning school, new clause 35B ensures that such school will transition to the relevant Commonwealth share by the end of 2027 in a consistent and transparent manner. This will be achieved by establishing a starting Commonwealth share percentage for the school (based on recurrent funding payable to the approved authority for the school in 2017), and adjusting this percentage in 10 equal annual increments until the relevant Commonwealth share (20 per cent or 80 per cent) is reached in the last transition year, 2027.

Subclause 35B(1) sets out the formula for working out the Commonwealth share for a transitioning school for a transition year. This Commonwealth share is the school’s starting Commonwealth share, plus a specified percentage (transition rate) of the difference between its starting Commonwealth share and the usual (non-transition) Commonwealth share for that kind of school (called the final Commonwealth share).

The starting Commonwealth share for a transitioning school is the ratio of the 2017 recurrent funding amount of the school’s approved authority to the adjusted SRS amount of the approved authority.

In turn, the 2017 recurrent funding amount of a school’s approved authority is the recurrent funding to which the school’s approved authority was entitled to under the Act in 2017.

The adjusted SRS amount of a school’s approved authority is a notional amount which the approved authority would have been entitled to in 2017 for all of its schools, if Division 2 of Part 3 of the Act applied to those schools in 2017, the amendments made to Divisions 3 and 4 of Part 3 of the Act by this Bill had been in force in 2017, and the Commonwealth share was 100 per cent – that is, the schools were fully Commonwealth-funded in 2017 under the same needs-based funding model that will apply from 2018 onwards.

Note that this formula will generate a starting Commonwealth share for each transitioning school of an approved authority that is the same for every transitioning school of that approved authority. Nevertheless, there is a residual capacity to specify the starting Commonwealth share for a particular school by regulation, for example, in circumstances where the school is part of an approved authority that is not a system, but operates autonomously from all other schools of the approved authority, has markedly different characteristics from the other schools of the approved authority, and consequently should be treated as an independent school for transitional funding purposes.

Every year during the transition period, the Commonwealth share for a transitioning school will be adjusted towards the final Commonwealth share by an amount equal to the transition rate for that year multiplied by the difference between the starting Commonwealth share and the final Commonwealth transition rate for that year. The transition rate starts at 10 per cent in 2018, and increases by 10 percentage points every year thereafter; it is 20 per cent in 2019, 30 per cent in 2020, 40 per cent in 2021, etc.

Each transitioning school will have its own Commonwealth share for each transition year set mathematically under this methodology, and once the school’s starting Commonwealth share is known, it will be possible to derive its Commonwealth share in any transition year thereafter. This will give certainty of funding for the school immediately and into the future.
A capacity for an alternative transition rate for a school for a year to be set by regulation is included to account for unforeseen circumstances, and is limited to a transition rate no less than a school is entitled to under the approach specified above and no more than 100 per cent.

Importantly, during transition, any changes in student characteristics at the school (and therefore level of need as measured by the SRS) will be reflected in the school’s funding entitlement, as the funding entitlement will be calculated as a share of the SRS.

**Example of calculation of a transitioning school’s Commonwealth share**

In 2017, the 2017 recurrent funding for a non-government school’s approved authority is $7,000,000, and the adjusted SRS amount for that authority is $10,000,000.

Under subclause 35B(2), the school’s *starting Commonwealth share* is $7,000,000 divided by $10,000,000, expressed as a percentage – or 70 per cent.

Under subclause 35B(6), the school’s *final Commonwealth share* is the Commonwealth share for the school as if it were not a transitioning school – since the school is a non-government school, its final Commonwealth share is 80 per cent (see paragraph 35A(b)).

In 2018, the school’s *transition rate* is 10 per cent.

Thus, in 2018, using the formula in subclause 35B(1), the school’s Commonwealth share is:

\[ 70 + ((80 - 70) \times 10\%) = 71 \text{ per cent}. \]

In 2019, the school’s *transition rate* increases to 20 per cent.

So in 2019, using the formula in subclause 35B(1), the school’s Commonwealth share is:

\[ 70 + ((80 - 70) \times 20\%) = 72 \text{ per cent}. \]

Similarly, the school’s transition rate increases to 30 per cent in 2020, so its Commonwealth share increases to 73 per cent; its Commonwealth share is 74 per cent in 2021, 75 per cent in 2022, and so on, until in 2027 it reaches 80 per cent (equivalent to its final Commonwealth share).

**Item 11** will make a minor technical amendment to section 32 of the Act, as the Commonwealth share for a transitioning school may change year on year, and as such the formula in section 32 will reference the Commonwealth share for a school *for the year*.

**Items 5, 8, 12, 13, 14, 20, 21, 22, 23, 24, 25, 26, 27, and 28** relate to the setting and indexation of SRS funding amounts under the Act.

**Items 12 and 13** will amend section 34 of the Act to provide new, re-based and indexed, SRS funding amounts for primary and secondary students from 2018.

**Items 20, 21, 25, and 26** amend the maximum size loading amounts and the starting amounts in sections 44 and 49 of the Act respectively, to set new amounts for 2018. These amounts are factors in calculating a school’s size loading, and are simply the amounts for 2014 grown by relevant indexation since that year.
**Item 8** will insert new clause 11A in Division 2 of Part 1 of the Act (Interpretation). Clause 11A provides for the indexation factor (*SRS indexation factor*) to be applied to SRS funding amounts for a year. The SRS indexation factor for a year is the higher of 1.03 (i.e. a three per cent indexation rate) or the number worked out under subclause (2). Subclause (2) provides for the calculation of an indexation factor that comprises 75 per cent of the change in the Wage Price Index and 25 per cent of the change in the All Groups Consumer Price Index number (weighted average of the 8 capital cities), between the June quarter of the previous year and the June quarter of the current year.

New subclauses 11A(5) and (6) further enable regulations to prescribe the indexation. For 2019 and 2020 it is intended that the SRS indexation factor will be set through regulation at 3.56 per cent, to provide funding certainty while the sector adjusts to new arrangements. The new floating SRS indexation factor worked out under subclauses 11A(1) to (4) will apply from 2021.

Such flexibility is also important to enable the Commonwealth to act, if required, to meet pressing circumstances, for instance, to ensure schools are able to continue to operate with reasonable funding growth in an extreme deflationary environment (where the SRS indexation factor formula would result in zero or negative indexation), or where changes in the economy-wide CPI and WPI indexes are markedly different to changes in education cost structures.

**Item 14** will amend the formula in subsection 34(3) of the Act, to enable the SRS indexation factor determined under new clause 11A to be applied to the calculation of SRS funding amounts for the year.

**Items 22 to 24, 27 and 28** will amend sections 44 and 49 of the Act, to enable the SRS indexation factor determined under new clause 11A to apply when working out a school’s size loading each year. This ensures consistency and transparency in the indexation applied to each aspect of the calculation of recurrent funding for schools under the Act.

**Item 5** is a consequential amendment and will insert a new definition of *SRS indexation factor* in section 6 of the Act, referring to clause 11A.

**Items 3, 29 to 36, 41, 42, and 43** relate to removing the capacity for the Minister to determine SES scores for a group of schools by legislative instrument under the Act, and modifying the table setting out schools’ capacity to contribute percentages.

**Items 29 to 35** will amend sections 52 and 53 in the Act to remove the capacity for the SES scores for a group of schools to be determined by legislative instrument. Each school will have its own SES score determined administratively in accordance with the method set out in the regulations. The Minister will retain the power to determine an SES score for an individual school.

**Item 3** is a consequential amendment to the definition of *SES score* in section 6 of the Act, and **items 41 and 42** are further consequential amendments to sections 118 and 129 of the Act respectively, to reflect the amended operation of section 52.

**Item 36** will insert a modified capacity to contribute percentage table in subsection 54(3) of the Act, in order to reduce the benefit afforded to non-government primary schools under capacity to contribute calculations, which has led to some primary school students attracting
more Commonwealth funding than secondary students, notwithstanding the different cost structures of each level of education.

**Item 43** is a savings provision, ensuring that existing SES scores for schools continue to have effect until the Minister otherwise determines, by administrative decision, new SES scores.

**Item 17** will insert a new student with disability loading in the Act, by repealing and replacing section 36 of the Act. From 2018, the student with disability loading will encompass three distinct loading percentages, based upon the level of adjustment provided to a student with a disability. New subclauses 36(2), (3) and (4) set out these adjustments, being supplementary, substantial and extensive. Regulations will specify the classification of students at each of these levels of adjustment, which will be based upon the NCCD. Further to this, regulations will specify the loading percentage which attracts to each level of adjustment, replicating the current approach to setting the student with disability loading percentage by regulation. (See new subclauses 36(5) and (6)).

More information on the *Nationally Consistent Collection of Data on School Students with Disability* can be found at:


**Items 37, 38, and 39** will amend section 68 of the Act, to require the Minister to have regard to changes in student enrolment in non-government schools when having regulations made that prescribe the indexation of the non-government capital funding cap for a year under section 68.

**Items 7, 9, 10, and 40** relate to the new transition adjustment funding.

**Item 40** will insert a new clause 69B in Division 3 of Part 5 of the Act. The purpose of the new clause is to provide for the establishment of transition adjustment funding for transition schools. New subclause 69B(1) will enable the Minister to determine an amount of transition adjustment funding for a transition school for a transition year if the Minister is satisfied prescribed circumstances apply in relation to the school for that year. Under section 29 of the Act (as amended by **items 9 and 10**), amounts determined under subclause 69B(1) will be paid to states and territories at such times and in such amounts as the Minister determines.

In order to ensure appropriate Parliamentary oversight of the transition adjustment funding for transition schools, funding will be appropriated under annual appropriation Acts, and regulations made under section 130 of the Act can include:

- the eligibility criteria or preconditions for transition adjustment funding (the ‘prescribed circumstances’ for subclause 69B(1))
- matters that the Minister may or must take into account in making a funding determination under subclause 69B(1)
- the amount of funding that may be paid for a transition school for a transition year (whether a fixed amount, a capped amount, or an amount worked out by formula) (see subclauses 69B(2) and (3))
- the total amount of transition adjustment funding available for a transition year (which could be a fixed amount, a capped amount, or an amount worked out by formula – see subclause 69B(4)).
A funding determination under subclause 69B(1) is not a legislative instrument (subclause 69B(5)). Subclause (5) is included to assist readers, as any determination under subclause 69B(1) is not a legislative instrument within the meaning of section 8 of the Legislation Act 2003.

Item 7 will amend section 9 of the Act, to ensure that the provisions of the Act relating to overpayments apply to amounts determined under subclause 69B(1) and paid under section 29 of the Act. Items 9 and 10 will amend section 29 of the Act to provide for the making of payments of transition adjustment funding on account of determinations under subclause 69B(1).

Items 2, 4, 15, 18, and 19 are minor technical amendments that change the descriptor for one of the needs-based funding loadings calculated under the Act. Section 38 of the Act will now be termed socio-educational disadvantage loading, rather than the current low socioeconomic status student loading. This descriptor better aligns with the components of this loading, set-out in section 38 of the Act, which are based on the socio-educational disadvantage of a school, not the socio-economic status.

Item 44 is a savings provision, ensuring that the Act continues to apply to recurrent funding for 2017 and earlier years, as if the amendments made by the Bill had not occurred. This is important to ensure that final recurrent funding outcomes for 2017, and any related issues as to overpayments, continue to be able to be administered under the Act in force prior to the commencement of the amendments in the Bill.
Part 2 – Other Policy Changes

Explanation

Preamble and Objects of the Act

The Bill will update the Preamble and Objects of the Act to better align with long term national goals for schooling, and the principles of needs-based and sustainable funding linked to nationally agreed evidenced-based reforms.

The Preamble and Objects of the Act will also be simplified, in order to more clearly specify the primary objectives and expectations of the Act, and an overarching, principles-based outline of the objectives for the provision of Commonwealth schools funding. As the Preamble and Objects do not directly impose obligations on approved authorities, it is considered desirable for these to provide a snapshot of objectives for the provision of Commonwealth schools funding and the role of the Commonwealth, states and territories in improving educational outcomes.

Consistent calculation of recurrent funding for all schools under the Act

The Act currently distinguishes between ‘participating schools’ and ‘non-participating schools’ for the purpose of calculating recurrent funding and some associated conditions. Recurrent funding for non-participating schools is provided under Part 4 of the Act, whereas recurrent funding for participating schools is provided under either Division 2 or 5 of Part 3 of the Act.

As discussed under ‘Part 1 – Funding for schools’ above, from 1 January 2018 all schools will have recurrent funding calculated under Division 2 of Part 3 of the Act. As a consequence of this, there will no longer be a need for Division 5 of Part 3, and Part 4, of the Act and related provisions. Further to this, the distinction between participating schools and non-participating schools is no longer required. By removing this distinction, provisions in the Act that only applied to participating schools will be able to apply to all schools and the approved authorities of those schools.

The result of this change means that the Act is no longer required to reference participating schools, participating states and territories, non-participating schools and non-participating states and territories. Further, provisions in the Act that dealt with the calculation and provision of recurrent funding under either Division 5 of Part 3 or Part 4 of the Act can be removed.

In addition, the Act is also no longer required to reference relevant arrangements. Relevant arrangements are the written arrangements between the Commonwealth and an approved authority relating to financial assistance provided under the Act. Examples include the National Education Reform Agreement, its associated bilateral agreements between the Commonwealth and individual states and territories, and the implementation plans of approved authorities for non-government schools.

Relevant arrangements could, currently, impact the calculation of recurrent funding under the Act, in relation to such funding provided under Division 5 of Part 3, and Part 4. As recurrent funding is to be calculated on a consistent and transparent basis for all schools from 1 January 2018, under Division 2 of Part 3 of the Act, the concept of relevant arrangement is no longer necessary and does not promote the objectives of Commonwealth
recurrent school funding. Accordingly, references to relevant arrangements in the Act are to be removed.

Overall, this will provide a simpler, consistent and more transparent operation to the Act, where all schools are able to treated equitably and equally in the calculation of recurrent funding, and artificial distinctions between schools are no longer maintained.

**Conditions on states and territories to receive financial assistance under the Act**

The Commonwealth will seek to further strengthen the linkage between Commonwealth financial assistance and the implementation of evidence-based reforms to improve student outcomes. It is imperative that Commonwealth financial assistance for school education is used to drive better outcomes for students – to this end, the Commonwealth will work with the states and territories to develop and deliver a new national schooling agreement that will promote school education reform and help to address declining student performance.

The Bill will stipulate the following keystone conditions of financial assistance on the states and territories:

- that they implement national policy initiatives for school education as agreed by the Ministerial Council;
- that they are party to a national agreement on school education reform;
- that they are party to a bilateral agreement with the Commonwealth relating to implementation of school education reform within their jurisdiction;
- that they fulfil their obligations under the national and bilateral agreements; and
- that they avoid cost shifting to the Commonwealth, by maintaining their 2017 levels of schools funding in both the government and non-government school sector.

These conditions will act to bring a clear, coordinated, and national approach to school education reform across Australia, encompassing both the government and non-government sectors, and ensuring that school education reform is undertaken on a consistent and transparent basis.

**Reducing command and control of schools**

The Bill will amend the Act to remove the requirements for approved authorities for more than one school to have an implementation plan, and for all approved authorities to have school improvement frameworks and school improvement plans for their schools.

These requirements in the Act involve excessive Commonwealth control over, and have the potential for excessive Commonwealth interference in, the operation of schools, this being properly the responsibility of state and territory governments and the operators of non-government schools. The school improvement framework and planning requirements further duplicate existing school improvement arrangements operated by states and territories and authorities within the non-government school sector.

In addition to this, the Bill will seek to streamline other ongoing policy requirements imposed on approved authorities and their schools, by better linking these requirements with the national and bilateral agreements, and national policy objectives, provided in amended section 22 of the Act. Approved authorities for non-government schools will be required to work cooperatively with their relevant state or territory government to support the implementation of national or bilateral reforms in their schools. This will ensure that there is linked-up, coordinated and consistent expectation on all approved authorities for schools.
Analysis of clauses

Item 45 repeals the Preamble to the Act and substitutes it with a new Preamble to the Act.

Item 46 repeals section 3 of the Act (Objects of this Act) and substitutes with a new section 3).

Items 59 and 60 will insert a new subclause 22(2) and a new clause 22A so as to impose new policy and funding requirements on states and territories, as conditions of financial assistance provided to them under the Act.

Item 87 will amend paragraph 81(1)(d) to include reference to the new section 22A; the Minister will be able to revoke or vary the approval of the approved authority for government schools for non-compliance by the relevant state or territory with section 22A. Similarly, item 90 will amend paragraph 108(a) of the Act to include reference to new section 22A, enabling the Minister to reduce, delay or require repayment of funding under the Act for a state or territory’s failure to comply with section 22A.

Items 106 and 107 will amend section 128 of the Act to change reference in that provision to the National Education Reform Agreement to the national and bilateral agreements mentioned in new subsection 22(2).

Items 84 and 85 will amend section 77 of the Act to change the key policy requirements on approved authorities under the Act.

Item 84 will remove paragraphs (a), (d) and (e) from subsection 77(2) of the Act, as these conditions are requirements imposed on schools under state and territory laws, and are redundant in the Act (i.e. to reduce Commonwealth command and control over schools).

Item 86 will repeal paragraph 77(3)(d) as a consequence of the removal of school improvement framework requirements from the Act.

Item 85 will impose additional policy requirements on approved authorities for non-government schools, which will work hand-in-hand with the requirements on states and territories imposed under new subsection 22(2).

Item 92 will repeal Part 7 of the Act, relating to implementation plans of approved authorities. Requirements to implement reforms will now be imposed on states and territories through their bilateral agreements with the Commonwealth and regulation. States and territories must have, and comply with, bilateral reform implementation agreements under the new subsection 22(2); and approved authorities for non-government schools will need to co-operate with states and territories in implementing reforms under the new subsection 77(2A).

As a consequence of the repeal of Part 7 of the Act, items 88, 89, 100 and 104 amend or repeal provisions in the Act that refer to, or relate to the operation of, Part 7. Item 108 will repeal item 9 of Schedule 2 to the Transitional Act, which contains transitional arrangements for implementation plans.

Items 47, 71, 81, and 82 will make amendments to the explanatory text in the Guides in sections 4, 31 and 66 of the Act, which reflect the funding and policy amendments made to the Act in Parts 1 and 2 of Schedule 1 to the Bill.
Items 48 and 51 repeal a large number of redundant definitions in section 6 of the Act, as a consequence of the other amendments in Parts 1 and 2 of the Schedule to the Bill.

The definitions of participating school and non-participating school in section 6 defined schools by reference to the fact that they were schools for which there was an authority approved under Part 6 of the Act – that is to say, the only schools for which Commonwealth funding is payable under the Act are schools of approved authorities, and only in relation to locations and levels of education for which they are approved by the Commonwealth. Although other provisions of the Act operate to ensure that only “approved” schools attract Commonwealth funding (for example, section 23 requires states and territories to pass on funding for non-government schools to the approved authorities for those schools), with the repeal of the definitions of participating school and non-participating school and the application of the Act generally to “schools”, it is considered prudent to make it clear that Commonwealth funding is only payable for those schools for which the Commonwealth has approved an authority, location and level of education. Consequently item 72 will insert a new clause 31A into Division 2 of Part 3 of the Act to this effect.

Item 56 will repeal section 14 of the Act, which provides for a legislative instrument that specified participating states and territories; and items 49, 52, 53, 57, 61, 63, 66, 68 to 70, 73 to 75, 78, 97, and 102 will amend provisions (or headings) of the Act that only applied, or referred, to participating schools, or approved authorities for participating schools.

Item 79 will repeal Division 5 of Part 3 of the Act, which provides for funding for approved authorities of participating schools during a transition period; and item 80 will repeal Part 4 of the Act, which provides for funding for non-participating schools.

As a consequence, items 50, 54, 55, 58, 62, 64, 65, 67, 76, 77, 87, 94, 96, 98, 99, and 101 will amend or repeal provisions of the Act that refer to, or relate to the operation of, Division 5 of Part 3 or Part 4 of the Act.

Items 83, 91, and 95 will repeal subsections 73(4), 81(6) and 110(4) of the Act, respectively, which require the Minister to have regard to any relevant arrangement of an approved authority when imposing a condition on the approval of the authority, when revoking or varying an approval of the authority, or when deciding to delay, reduce or require repayment of funding under the Act.

Items 103 and 105 will amend section 127 of the Act to expand the contents of the Minister’s annual report to Parliament on the operation of the Act. The intention of these items is to enhance the transparency of Commonwealth schools funding, which will aid in achieving the objective of equitable, needs-based funding.

Item 103 will clarify that the Minister’s annual report can include specifics of financial assistance paid under the Act for individual schools, as well as the application of that financial assistance by the operators of individual schools. The intention is that the Minister will publish comprehensive and detailed information about Commonwealth funding at the school level, including, for example, a school’s base amount and the amount of each of its loadings; and the relevant factors in the funding calculations for a school, for example, the school’s Commonwealth share, SES score and capacity to contribute percentage.

Item 105 will permit the regulations to expand on the kinds of information that the Minister must report to Parliament on.
Note that the Minister is also able to publish information related to Commonwealth funding under the Act separately from (and potentially more frequently than) the annual report to Parliament; see, for example, subsection 125(2) of the Act.

**Item 109** is a transitional provision that relates to the making of regulations under the Act after the Act receives the Royal Assent, but before 1 January 2018 (when the rest of the amendments to the Act commence). This item will commence on the day the Bill receives the Royal Assent.

Currently, paragraph 22(2)(b) and subsection 77(4) of the Act require that, before regulations are made for the purposes of section 22 and 77 respectively, the Minister is to have regard to relevant arrangements of a state or territory in its capacity as the approved authority for government schools in the state or territory.

These provisions are being repealed and replaced by a new subsection 130(5) (see items 59, 145 and 174) and all references to “relevant arrangements” are being removed from the Act, with effect from 1 January 2018. New regulations will be made for the purposes of sections 22 and 77, which will reflect the new school education reforms and new intergovernmental agreements between the Commonwealth and the states and territories. Accordingly, those regulations will not “have regard to” the current “relevant arrangements”. The new regulations will commence on 1 January 2018, but naturally they will be made by the Governor-General before 1 January 2018.

It is therefore necessary to “switch off” the current requirements of paragraph 22(2)(b) and subsection 77(4) for the purposes of making those regulations.
Part 3 – Miscellaneous technical amendments

Explanation

Number of students at a school

The Bill will repeal those sections of the Act dealing with a school census, and provide that where the Act describes the number of students at a school, the method for working out that number must be prescribed in regulations.

These amendments simplify the Act and will allow for more accurate counting of students to calculate funding entitlements.

School education information

The Bill will amend the Act to provide additional clarity on the information use and disclosure provisions in the Act. Section 125 of the Act provides statutory authority to the Minister to use and disclose ‘protected information’ in accordance with the regulations, and to publish ‘protected information’. Protected information is defined in section 6 of the Act as any information obtained under or for the purposes of the Act.

Section 125 is intended to be an authorising provision, that is, to provide statutory authority to the Minister to use and disclose information obtained under or for the purposes of the Act for specified purposes. It is not intended to otherwise restrict lawful uses or disclosure of that information. Unfortunately, there has been some confusion about the operation of section 125 of the Act and the associated section 65 of the Regulation, because of the use of the term ‘protected information’. This term, when used in legislation, normally indicates that the legislation protects the information in some way, e.g. by making it an offence for the information to be used or disclosed otherwise than in the limited circumstances set out in the legislation. The Act does not ‘protect’ information obtained under it in this fashion, and is not intended to prohibit use or disclosure of information obtained under it in circumstances where it would otherwise be lawful to use or disclose the information.

This amendment will change the terminology used in the Act, from ‘protected information’ to school education information, to ensure any such confusion does not arise. This amendment will also make minor drafting changes to section 125, by removing references to ‘making a record of’ information, as that language is no longer used in the Privacy Act 1988.

This amendment will not extend the capacity of the Minister to use or disclose school education information, nor extend the definition of what is school education information.

It is proposed to amend section 65 of the Regulation following passage of the Bill to ensure that it is interpreted consistently with the above changes.

Reviewable decisions

The Bill will amend the Act to provide additional clarity to section 118 of the Act. Section 118 sets out the decisions under the Act that are reviewable decisions. Broadly, this enables the relevant person for the decision, for example an approved authority, to request internal review and review by the Administrative Appeals Tribunal. However, further clarity can be provided to section 118 on exactly which decisions under the Act are reviewable, through ensuring that the section reference in column 2 of the table in subsection 118(1), in combination with the description of the decision in column 1 of that table, are read together when interpreting which decisions under the Act are reviewable.
In addition to this, the Bill will also remove the capacity for approved authorities, BGAs and NGRBs to access internal review of a decision of the Minister to impose conditions on the approval of that authority or body, or to revoke such approval. However, access to review of such decision by the Administrative Appeals Tribunal will be maintained.

Prior to the Minister making a decision to either impose conditions on, or revoke, the approval of one of the authorities or bodies mentioned above, the Minister is required to adhere to procedural fairness principles. This, commonly, involves the Minister providing a show cause notice to the affected authority or body, requesting a submission in respect of the proposed decision and the reasons for that proposed decision. Upon such submission being received, the Minister will then consider it prior to making any final decision in the matter.

The Government considers that this robust process, which ensures adequate procedural fairness is provided to those impacted by certain decisions under the Act, negates the need for an additional layer of review once a final decision is made. Further, this also assists in ensuring that external review bodies, such as the Administrative Appeals Tribunal, are able to be involved in the review of a decision in a more timely manner.

**Former approved authorities**

The Bill will amend the Act to enable regulations to be made that extend existing requirements under the Act and the Regulation to former approved authorities, BGAs and NGRBs. The Act, in combination with the Regulation, imposes various policy and funding requirements on approved authorities, BGAs and NGRBs. Some of these requirements relate to the acquittal of Commonwealth financial assistance provided under the Act, the keeping of records, and provision of information to the Commonwealth.

However, currently requirements under the Act and the Regulation only extend to a person in relation to the period that person is approved as an approved authority, BGA or NGRB under the Act. This means that where the approval of an approved authority, BGA or NGRB is revoked, the former authority or body will still be required to comply with obligations it accrued prior to the revocation of its approval, but is not required to comply with any obligations that might accrue, or which can only be discharged, after revocation.

Many obligations on approved authorities, BGAs and NGRBs accrue only at certain points in time: obligations to provide financial information and acquittals of Commonwealth funding for a year (sections 34 and 36 of the Regulation) normally accrue in the middle of the following year; obligations to provide census data (Subdivision E, Division 3, Part 5 of the Regulation) only arise on a school’s census day. There are also obligations which are only fully discharged at certain points in time: the obligation to keep records for 7 years (section 37 of the Regulation), for example, or the obligation to provide Commonwealth auditors with access to records and premises for audit purposes (section 39 of the Regulation).

The Commonwealth must be able to account for the proper expenditure of financial assistance provided to approved authorities, BGAs and NGRBs, and ensure that such authorities and bodies are still required to keep certain records, and make those records available when required. For example, the Commonwealth may wish to audit the expenditure of financial assistance, or assess the veracity of information provided to the Commonwealth as part of the school census process.
The capacity for certain obligations to continue to apply to former approved authorities has also been part of previous school funding arrangements, where funding agreements entered into under the *Schools Assistance Act 2008* provided that certain obligations under those funding agreements survived termination of the agreements.

It should be noted that, of course, a failure by a former authority or body to comply with these ongoing obligations will not be able to be addressed by varying or revoking its approval under Part 6 of the Act, or suspending or reducing its future payments under Part 8 of the Act – simply because it no longer holds an approval and no longer receives funding under the Act. However, where a former authority or body does refuse to comply with these ongoing obligations, it will be possible to seek recovery of Commonwealth funding previously paid to the authority or body, via a state or territory, under Part 8 of the Act.

**Making regulations**

The Bill will amend the Act to clarify the consultation requirements of the Minister prior to asking the Governor-General to make regulations for the purposes of the Act, where those regulations affect the ongoing policy or funding requirements of approved authorities for government schools, or conditions imposed on states and territories for financial assistance received under the Act.

Currently, subsection 130(5) of the Act imposes a requirement on the Minister to consult with the Ministerial Council (the committee of the Council of Australian Governments comprising the Commonwealth, State and Territory Ministers responsible for education) prior to asking the Governor-General to make regulations for the purposes of the Act. However, states and territories have requested that this requirement be strengthened, to require the Minister to not just consult but to also have regard to decisions of the Ministerial Council, where the regulations in question affect government schools or conditions imposed on states and territories.

On the other hand, the current subsection 130(5) requires the Minister to consult the Ministerial Council on *all* regulations made under the Act, even those that have no impact on government schools or those that are purely administrative in nature. States and territories have agreed that such a requirement is unnecessary.

The amendments in Part 3 of Schedule 1 to the Bill will:

- impose a requirement on the Minister to have regard to decisions of the Ministerial Council in relation to regulations that will affect the ongoing policy or funding requirements of approved authorities for government schools, or conditions imposed on states and territories for financial assistance received under the Act; and
- remove the requirement for the Minister to consult the Ministerial Council on regulations having no impact on government schools or states and territories.

**Analysis of clauses**

**Item 127** will repeal sections 16 and 17 of the Act and insert a new clause 16 (Working out the number of students at a school for a year) which will provide for the regulations to prescribe a method for working out the number of students at a school for a year. It will also provide that a reference in this Act to the number of students at a school for a year is a reference to the number worked out in accordance with the regulations.

Because the detailed provisions relating to the method for counting numbers of students at a school for a year will be put into regulations, a number of amendments need to be made to
the Act to amend or repeal related provisions and notes: see items 110, 116, 121, 122, 123, 124, 125, 129, 130, 136, 137, 138, 139, 140, 141, 142, 143, and 158.

Items 112 and 113 will repeal the definition of distance education and insert the definition of distance education student. These items will replace the operation of subsection 10(5) (repealed by item 121), when a person receives primary education or secondary education by distance education, and will replicate the operation of that subsection in the definition of “distance education student”.

As a consequence of these amendments, items 118, 128, 131, 132, 133, 134, 135, and 144 amend provisions that refer to ‘distance education’, so as to instead refer to ‘distance education students’.

Items 114, 120 and 126 are consequential amendments arising from item 127 and will simplify the definitions of primary education and secondary education to refer to that in section 15 of the Act (the levels of education that constitute primary education or secondary education).

Items 115, 119, 165, 166, 167, 168, 169, 170, 171, 172, and 174 will amend section 125 and the definition of protected information to substitute that definition with the term school education information’ and to amend section 125 to reflect this new terminology. These items will also remove the words ‘make a record of’ from sections 125 and 130, as following amendments to the Privacy Act 1988 in 2013 ‘making a record of’ information is now considered to be incorporated within the concept of ‘using’ that information.

Items 117, 155, 156, and 157 will ensure that a reviewable decision under the Act is one referred to in column 1 of the table in subsection 118(1), made under the provision referred to in column 2 of that table.

Item 146 repeals subsections 81(4), 88(4) and 96(3) of the Act. These subsections currently provide that, when the Minister decides to vary the approval of an approved authority, BGA or NGRB (as the case may be), the Minister must be satisfied that the relevant organisation complies with its basic approval requirements under the approval as varied. This could have the effect of reducing the Minister’s capacity to include conditions on an organisation’s approval that are intended to bring it into compliance with its basic requirements over a period of time.

For example, if the Minister considers that an approved authority is not a fit and proper person because of defects in its governance, the Minister should be able to impose conditions on the authority’s approval that are directed at improving its governance – that is, to bring the authority back into the state of being a fit and proper person over time. There is an interpretation of subsection 81(4) that the Minister could not impose such conditions unless the authority will be a fit and proper person immediately on those conditions being imposed.

These amendments are designed to ensure that the sections of the Act dealing with variation of approval by imposition of conditions, are able to have their intended operation, and further assists the Minister in being able to pursue an option of imposing conditions rather than revocation of approval.
Consequently, subsections 81(4), 88(4) and 96(3) of the Act are being repealed so as to clarify that the Minister’s capacity to impose conditions of a remedial nature on an organisation’s approval.

Items 159, 163, and 164 will amend sections 120 and 122 of the Act to provide that a decision made under paragraph 81(a), (b) or (d), or subsection 88(1) or 96(1) of the Act— that is, a decision to vary or revoke the approval of an approved authority, BGA or NGRB— is not subject to internal review under section 120, but is reviewable by the Administrative Appeals Tribunal under section 122.

Items 160, 161, and 162 amend section 120 to clarify who must carry out an internal review of a decision— the Secretary personally, or another person delegated the power to make the original decision.

Item 176 is a savings provision that ensures that decisions made before 1 January 2018 continue to be subject to review provisions and processes that were in force before that date.

Item 147 will insert a new clause 96A in Part 6 of the Act. Clause 96A will ensure that the regulations can extend existing requirements of approved authorities, BGAs and NGRBs under the Act and the Regulation to former approved authorities, BGAs and NGRBs. These will be termed continuing requirements under the Act. Items 111 and 149 are a consequential amendment arising from the insertion of clause 96A.

Item 175 will repeal and substitute subsection 130(5) of the Act. This item will ensure that where proposed regulations will affect the ongoing policy or funding requirements of approved authorities for government schools, or conditions imposed under sections 22, 22A and 24 of the Act on states and territories for financial assistance received under the Act, the Minister must not only consult with the Ministerial Council, but must also have regard to decisions of the Council prior to the Governor-General making those regulations.

Item 145 will remove the regulation-making related consultation requirement in subsection 77(4) of the Act that will become redundant with the amendment to subsection 130(5) made by item 174.

Items 148, 150, and 151 amend sections 108 and 109 of the Act to clarify that action can be taken under section 110 of the Act (to delay, reduce or require repayment of funding under the Act) in circumstances where the Minister “is satisfied” that there has been relevant non-compliance with the Act, or that an overpayment or recoverable payment has been made.

Currently, these provisions do not require the Minister to be satisfied of the circumstances giving rise to the power to delay, reduce or require repayment of funding under the Act; there is an argument that where relevant non-compliance with the Act has occurred, or that an overpayment or recoverable payment has been made, as a matter of objective fact, the power to delay, reduce or require repayment of funding under the Act is enlivened, without the need for the Minister or his or her delegate to turn their mind to the issue. The amendments are intended to clarify that the power to delay, reduce or require repayment of funding under the Act can only be utilised when the Minister or his or her delegate is satisfied, on a reasonable evidentiary basis, that relevant non-compliance with the Act has occurred, or that an overpayment or recoverable payment has been made.

Items 152, 153 and 154 are minor stylistic amendments to that language of subsection 109(4), to change the tense in that subsection.
Item 173 amends subsection 129(3) to provide that the Secretary can delegate his or her powers under the Act to any APS employee in the Department, and is not restricted to delegating to SES employees in the Department.

The Minister’s and Secretary’s capacities to delegate their power in section 129 of the Act also relate to their powers under the Regulation (see definition of this Act in section 6 of the Act). Currently, the Minister is able to delegate his or her powers under the Act and Regulation to any APS employees in the Department (see subsection 129(1)). However, the Secretary can only delegate to SES employees.

There are a number of the Secretary’s powers under the Act and Regulation that are of a routine administrative nature – for example, to allow a period longer than 30 days for lodgement of an application for internal review (subparagraph 120(2)(c)(ii) of the Act); and to allow a period longer than 7 days after a census day for lodgement of census information (paragraph 46(5)(b) of the Regulation). It is appropriate that these powers (which are generally beneficial to approved authorities) be exercisable by officers of the Department below the level of SES employees.

Consequently, the capacity of the Secretary to delegate his or her powers under the Act and Regulation is being aligned with the capacity of the Minister to delegate his or her powers.