

Review of the Education (General Provisions) Act 2006

Submission to

Department of Education

29 April 2022

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# Summary

1. Thank you for the opportunity to make submissions on the focused review of the *Education (General Provisions) Act 2006* (EGP Act), as outlined in the ten consultation papers prepared by the Department of Education (the department).
2. The Commission’s submissions have focused on *School disciplinary absence and enrolment decisions* (the consultation paper), although general comments about human rights are initially provided under the heading *Education and human rights* and are applicable to all aspects of the review.
3. The structure of the submission on *School disciplinary absence and enrolment decisions* follows the structure of the consultation paper. The Commission supports many of the positive reforms being proposed.
4. However, in order to properly address high rates of school disciplinary absences, and the disproportionate representation within these numbers of Aboriginal and Torres Strait Islander children and children with disability, the Commission’s overarching recommendation is that there needs to be a substantive review of the framework for school disciplinary absences. This would be best achieved through a Parliamentary or independent inquiry.

# Introduction

1. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (AD Act)*.*
2. The Commission has functions under the AD Act and the *Human Rights Act 2019* (HR Act)to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
3. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the AD Act*,* reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act*.*

# Education and human rights

1. The HR Act establishes and consolidates statutory protections for human rights specified in sections 15 to 37. It does this by requiring:
	1. Parliament to consider rights when making laws[[1]](#footnote-1);
	2. Courts and tribunals to interpret statutory provisions compatibly with human rights, and in certain cases, apply human rights in making decisions[[2]](#footnote-2); and
	3. Public entities to act and make decisions compatibly with human rights, and to give proper consideration to human rights when making decisions.[[3]](#footnote-3)
2. An act, decision or statutory provision is compatible with human rights if it does not limit right, or limits rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.[[4]](#footnote-4) Section 13(2) of the HR Act provides an inclusive list of factors when assessing compatibility.

## Nature and scope of rights

1. When considering the compatibility of laws, policy, decisions or actions with human rights, there first must be an understanding of the rights that may be engaged, the importance of preserving the right and an assessment of the extent to which the right may be limited.
2. In the case of the EGP Act, primary consideration must be given to:
	1. The right to education (s 36 of the HR Act);
	2. The rights of children (s 26(2) of the HR Act);
	3. The right to privacy (s 25 of the HR Act);
	4. Cultural rights, both generally and the cultural rights of Aboriginal peoples and Torres Strait Islander peoples (ss 27 and 28 of the HR Act);
	5. Right to recognition and equality before the law (s 15 of the HR Act).
3. Of particular relevance is the right under section 36(1) of the HR Act ‘to have access to primary and secondary education appropriate to the child’s needs’. It is modelled on Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[[5]](#footnote-5) The importance of access to education was stated by the United Nations Committee on Economic, Social and Cultural Rights as follows:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[[6]](#footnote-6)

1. The Committee goes on to articulate the following interrelated and essential features of education that is required by the right:
	1. availability;
	2. accessibility of educational institutional programs without discrimination, and especially the most vulnerable groups,
	3. acceptability, including culturally appropriate, and
	4. adaptability, so that education adapts to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.[[7]](#footnote-7)
2. The rights of children under section 26(2) of the HR Act also protects a child’s right to education.[[8]](#footnote-8) Other matters within the scope of the rights of children are:
	1. in all matters affecting the child, the views of the child be given due weight in accordance with the age and maturity of the child;[[9]](#footnote-9)
	2. in all actions concerning children, the best interests of the child shall be a primary consideration;[[10]](#footnote-10)
	3. best interests should be adjusted and defined on an individual basis, taking into consideration the child’s personal context, situation and needs, and the particular decision being made;[[11]](#footnote-11)
	4. a child should be ‘fully prepared to live an individual life in society’;[[12]](#footnote-12) and
	5. Children differ from adults in their physical and psychological development[[13]](#footnote-13), which can require different treatment to adults.
3. Any decision or action which prevents a child from attending school or enrolling in a school, will limit the rights to education and the rights of the child. Depending on the circumstances of the child or the suspension, other rights such as the right to privacy and family, cultural rights, and equality and recognition before the law could also be limited. As articulated above, the consequences of these limitations for the child and for the community can be severe. The longer a child is prevented from engaging with school and education in the usual way, the greater the justification needs to be in order to be compatible with rights.

## Justification

1. Once it has been established that a right has been limited by a public entity, the onus is on the public entity to justify the limitation. The standard of proof is high, requiring ‘cogent and persuasive’ evidence. The burden on public entities to justify limitations must be strictly imposed where the individual concerned is particularly vulnerable.[[14]](#footnote-14)
2. In relation to the EGP Act, factors that will be relevant to an assessment of compatibility will include:
	1. Clarity of purpose for a limitation;
	2. Where possible, evidence of whether the limitation achieves the identified purpose;
	3. Whether less restrictive, reasonably available alternatives have been genuinely considered;
	4. Consideration of any disproportionate impacts on particular cohorts that could amount to unlawful discrimination;
	5. The level of involvement of children and their families in decisions being made about them, including processes that support their meaningful involvement;
	6. Transparency and accountability in decision making, and adequate oversight, including the ability to identify and address systemic issues;
	7. Accessible and clear pathways for review or appeal.

# School disciplinary absence and enrolment decisions

1. The following section provides comments on the consultation paper entitled *School disciplinary absence and enrolment decisions*. The comments appear in the order they are presented in the consultation paper, and are not indicative of the Commission’s priority of the issues.

## Maintaining enrolment during school disciplinary absences

1. Under section 329 of the EGP Act, a student is prohibited from enrolling in another State school during a ‘period of suspension’ unless enrolment is approved by the chief executive.
2. The consultation paper refers to a growing issue that parents are ceasing their enrolment immediately upon suspension. This:
	1. allows for a student to be enrolled at another state school, or potentially be re-enrolled in the same school, during what would otherwise be a suspension period; and
	2. in relation to a charge-related suspension, limits the school’s ability to obtain information from the Queensland Police Service regarding the outcome of the charges.[[15]](#footnote-15)
3. The consultation paper proposes the EGP Act be amended to prevent changes to enrolment from the time a parent is notified that a school disciplinary absence is being considered until a decision is made and/or the suspension has been completed by the student.
4. It is noted that it was not the intention of Parliament that the ‘period of suspension’ end if enrolment ceased. The explanatory notes to the Education (General Provisions) Bill 2006 state:

It should be noted that the period of suspension continues until it would have otherwise ended, regardless of whether the student’s enrolment at the State school has been ceased by the parent or student.[[16]](#footnote-16)

1. It is also noted that the issue regarding access to police information may be able to be addressed through alternative legislative amendment, which does not further limit rights to enrolment or education, although due regard will still need to be given to the student’s right to privacy.
2. Suspension, and consequently the limitation on rights, can be up to 20 school days, the equivalent of four weeks of school. If the proposed amendment is implemented, the limitation will be further extended, starting from the date of notification that a school disciplinary absence is being considered. Notification timeframes do not appear to be provided for under the Act or under policy. The issue is compounded by the possibility of a new school delaying a decision to accept or refuse enrolment, which also lacks timeframes and has up to a 40 school day review process. This is discussed further below under *Access to education while enrolment decision is pending.*
3. The ‘advantages’ of preventing changes to enrolment during the suspension period is outlined in the consultation paper at page 9. However, the Commission considers more information is needed to adequately justify why a suspended student should be prevented from seeking to fulfil their education needs at an alternative State school. For example, more clarity is needed on the purpose of the provision, given that a student is not prevented from enrolling in a non-State school or a school outside of Queensland during a period of suspension. Consideration should also be given to whether there are other ways to achieve the ‘advantages’ identified in the consultation paper, such as those described at paragraph 23 above in relation to police information. Also relevant will be how much support is provided under section 294 of the EGP Act to ensure the child’s continuing education during the suspension.

#### **Recommendation 1:** Section 329 of the EGP Act and any amendment which would prevent a child from pursuing enrolment in a different State school before and during a period of suspension limits human rights and must be adequately justified.

## Access to education while enrolment decision is pending

1. If a state school principal reasonably believes that a prospective student would, if enrolled at the school, pose an unacceptable risk to the safety or wellbeing of members of the school community, the principal must refer the application of enrolment to the chief executive. Following a show cause process, the chief executive may make a decision to refuse enrolment under Chapter 8 Part 1 Division 2 of the EGP Act.
2. As noted in the consultation paper, there is no legislated requirement or obligation on the principal or the department to provide the prospective student with access to education while the decision about enrolment at a state school is pending. The Commission supports reform to address this. The obligation to ensure access to education should be extended to children for whom exclusion is proposed, that is, before an exclusion decision is made, the principal (or the department) should be required to make arrangements to ensure the student can continue their education at another school.
3. The Commission also has the following concerns about the current refusal to enrol process:
	1. The lack of specified timeframes in multiple steps of the process, such as time limits on the decision of the principal to refer the matter to the chief executive, time limits on the chief executive to determine whether to return the matter back to the principal or ask the applicant to show cause, and time limits on making a final decision once show cause submissions have been made;
	2. Notice of a proposed decision to refuse enrolment and reasons is given in writing, and only submissions *in writing* from the applicant (which could be either the child’s parents, or the child themselves[[17]](#footnote-17)) must be considered by the chief executive in making a final decision[[18]](#footnote-18);
	3. A decision to refuse enrolment can only be reviewed internally at first instance, which can take up to 40 school days[[19]](#footnote-19), after which an application for external review can be made to the Queensland Civil and Administrative Tribunal (QCAT).[[20]](#footnote-20)
4. Some of these concerns have been addressed in later parts of the department’s consultation paper.
5. In addition to the rights to education and the rights of the child being limited by refusal to enrol processes, rights to fair hearing in the steps leading up to a potential QCAT review must be considered.
6. Any review or amendments of refusal to enrol provisions should also consider impacts and consistency with provisions for exclusion of prospective students from some or all schools under Chapter 12, Part 3, Division 5 of the EGP Act. The concerns of the Commission stated above are also applicable to these provisions.

#### **Recommendation 2:** The Commission supports legislative amendment that would impose obligations on the department to provide prospective students with access to education while they await an enrolment decision from the chief executive. This should also extend to exclusion decisions, that is, before a decision to exclude is made, the principal (or the department) should be required to make arrangements to ensure the student can continue their education at another school.

#### **Recommendation 3:** The provisions regarding refusal to enrol decisions (and exclusion of prospective students from some or all schools) be further amended to ensure compatibility with human rights, including:

#### provision of timeframes for decision making,

#### a requirement that information be provided in a manner that can be understood the parents and, if appropriate, the child,

#### allowances for submissions to be made other than in writing, and other than from the applicant (that is, the parents or the child)

#### simple and efficient processes for review of the decision.

## School disciplinary absence decisions and notice

### Substantive review of school disciplinary absences

1. The Commission supports any efforts to ‘strengthen the legislation to ensure clarity and transparency of government decisions that may limit the access and participation of young people in schooling’.[[21]](#footnote-21)
2. According to the statistics in Attachment 2 of the consultation paper, school disciplinary absences were increasing between 2013 and 2018, and decreased during 2019 and 2020. The consultation paper suggests this may be attributed to extensive state-wide training in 2019 as part of a ‘two-year project to review all school discipline procedures’[[22]](#footnote-22). The Commission encourages the Department to release reports or findings of the review which would help to develop effective, evidence-based reform.
3. Despite these positive signs, the Commission notes recent reports and media recording high rates of school disciplinary absences when compared with other states, and the disproportionate representation within these numbers of Aboriginal and Torres Strait Islander children, and children with disability.[[23]](#footnote-23)
4. The consultation paper acknowledges that Queensland state school principals have greater autonomy to make suspension and exclusion decisions than their counterparts in other states and territories.[[24]](#footnote-24) This was the result of amendments to the EGP Act in 2014, which allowed principals more flexibility and autonomy in making disciplinary decisions with less administrative ‘red tape’. Analysis of the impact of the 2014 amendments should be undertaken with consideration of whether principals are sufficiently independent and well-placed to make these decisions, or whether regional directors or the chief executive are more appropriate to make some or all of these decisions. An alternative is whether there ought to be greater oversight powers by the chief executive to address systemic concerns.
5. Further, the Commission recommends a substantive review of the framework for school disciplinary absences, with thorough stakeholder engagement and preferably through Parliamentary inquiry, that would:
	1. Clearly identify the purpose of school disciplinary absences that is consistent with a free and democratic society based on human dignity, equality and freedom.
	2. Ensure that grounds for school disciplinary absences achieves the purpose. For example, if a child is being disciplined for disengaging with school, then a suspension is not going to achieve the purpose of discipline.
	3. Ensure the legislative grounds for school disciplinary absences require consideration of the child’s individual circumstances such as behaviour history, disability, mental health and wellbeing, religious and cultural considerations, home environment, and care arrangements and their human rights both under the objects of the EGP Act and under the HR Act.
	4. Ensure the legislative grounds for school disciplinary absences require genuine consideration of alternative, less restrictive, disciplinary consequences such as detentions, discipline improvement plans, drug and alcohol education programs and that absence is a last resort. If school disciplinary absences are still imposed, then it should be for as short a time as possible.
	5. Ensure that the grounds for school disciplinary absences for a school are clearly communicated and understood by the school community. Ideally, their development, such as through a Student Code of Conduct, would be in consultation with the school community and give consideration to grounds that may indirectly discriminate against children with particular attributes.
	6. Allow for meaningful engagement in the process by the student and their parents, including an opportunity to consider, discuss and respond to relevant evidence before any decision is made. Processes should take account the student’s age and ensure information is given and received in a way that will be understood.
	7. Provide clear time limits in the making of decisions.
	8. Require clarity and transparency in decision making, and data collection to allow for oversight and review of systemic issues.
	9. Clarify and simplify review rights, including external review.
	10. Support a child’s continued education throughout the process, including where a child is proposed to be excluded ensuring the child can continue their education at another school.
	11. Impose obligations on the school to support a child’s reintegration into the school following suspension and to take proactive steps to address the behaviour or circumstances that led to the suspension.
6. As noted by the consultation paper, many of these issues are already provided for in departmental guidance.

#### **Recommendation 4:** The Commission supports a substantive review of the framework for school disciplinary absences, preferably through Parliamentary inquiry, which aims to reduce rates of school disciplinary absences and improve outcomes for children who are involved in the process.

### Timeframes

1. The proposals for reform in the consultation paper relate to timeframes for decision making and notification requirements. It is imperative that timeframes are simple and easy to follow. To this end, the department might like to consider:
	1. having only one time frame for the making of decisions and the provision of notices of the decision;
	2. having the same timeframes for similar issues, such as show cause, or rights of review, although different timeframes might be appropriate in certain circumstances.
2. The Commission also makes the following specific comments:

**Refusal to enrol**

1. The timeframes proposed still mean that a prospective student might have to wait up to wait 25 school days for a decision of the chief executive to either refer the matter back to the principal for enrolment, or require prospective student to show cause. Twenty-five school days translates to 5 weeks of missed schooling.
2. Show cause can take an additional 14 (calendar) days[[25]](#footnote-25), and there is no time frame on the chief executive to then make a decision, other than ‘as soon as practicable’[[26]](#footnote-26).
3. While specifying timeframes are an important safeguard, the timeframes proposed by the consultation paper are still too long, particularly if other amendments are not made in relation to education support while a decision is pending.

**Suspension**

1. The Commission’s view is that a timeframe of 40 school days for an internal review of a long-term suspension or a charge related suspension is too long. In many cases, it would frustrate the primary purpose of the review (ie, allow the child to return to school).
2. The Commission supports timeframes which require notice of suspension to be provided within 1 school day of the telling of suspension, allows for 20 school days to lodge a review of a suspension, and requires a decision regarding exclusion upon five school days following determination of a charge.

**Exclusion**

1. Sections 313(1) and 315(4) of the EGP Act provides a time frame of 40 school days for the chief executive to review an exclusion decision. There are no external review rights. The Commission submits that this timeframe is too long and, for simplicity, the timeframes for reviews of exclusion decisions should be consistent with suspension reviews.

#### **Recommendation 5:** In relation to timeframe proposals in the consultation paper, the Commission submits:

#### Proposed timeframes for refusal to enrol are too long. There also needs to be a maximum timeframe for the chief executive to make a decision following receipt of show cause submissions.

#### Forty school days for the chief executive to consider an internal review of suspension is too long and should be reduced.

#### Forty school days for the chief executive to consider an internal review of exclusion is too long and should be reduced and consistent with the timeframe for review of suspension decisions.

## Delegation of authority to notify a school disciplinary absence

1. The Commission does not agree with any amendment which would allow a principal to delegate decision making authority regarding school disciplinary absences.
2. However, the Commission acknowledges resourcing and other constraints on the principal’s time which may be alleviated if the requirements regarding telling the student of the suspension decision by the principal could be delegated to someone of an appropriate level. The Commission defers to the submissions of other stakeholders as to whether there are any drawbacks to such an approach.
3. Under sections 283 and 293 of the EGP Act, suspension or proposed exclusion is a 2-step process: suspension starts when the principal tells the student about it, and then the principal must give the student notice in the approved form.
4. Option 2 suggested by the consultation paper is to remove the first step, and only have suspension commence upon written notice of the decision. The Commission supports this approach for simplicity and transparency of decision making, however, submits that there should still be an obligation on the school for an appropriate person to explain the suspension and the reasons with the student and with the parents.

#### **Recommendation 6:** The Commission does not oppose delegation of the administrative requirement to tell the student of a suspension, however, defers to other stakeholders as to whether such a position should be adopted.

#### **Recommendation 7:** The Commission would support reform that suspension only commences upon written notification of the suspension with reasons, but should still be accompanied by an oral explanation of its contents to the student and to the parents.

## Appeal rights for short term suspensions

1. There are currently no rights to seek review of short term (1 to 10 school days) suspensions, and only a right to seek review by the chief executive for long suspensions (11 to 20 school days). As noted by the consultation paper, this is of particular concern for students who might be subject to multiple suspensions. There is no cap to the number of suspensions a child might receive.
2. The Commission agrees that at a certain point, a student the subject of multiple suspensions must have rights to have the decision internally and, ideally, externally reviewed. For some students, those reviews should happen automatically, without the need for the student to instigate the review themselves.
3. Further evidence from schools, students, and school communities is needed to identify what the appropriate level of oversight is. In relation to the preferred proposal in the consultation paper, given that an 11 day long-term suspension can be internally reviewed, it would be consistent that a student who has received more than 11 cumulative days suspension during a calendar year also has a right of internal review.
4. The appeals process itself must be simple to follow and accessible to the student and their parents.
5. Reforms to the school disciplinary absences framework should focus on fewer suspensions, therefore reducing the need for appeals.

#### **Recommendation 8:** The Commission supports reform that will increase review rights for students subject to suspension decisions, including automatic review to provide oversight for children who are not in a position to commence review proceedings themselves. The reviews process must be simple and accessible to students and their parents.

## Default refusal to enrol and exclusion for a prospective student

1. In relation to decisions to refuse to enrol or exclude a student from certain or all state schools, if the parent or student does not respond to a show cause notice, the chief executive *must* decide to refuse enrolment or exclude the student under sections 162(3) and 309(3) of the EGP Act.
2. The Commission submits that the chief executive maintain discretion on whether to refuse enrolment or exclude the student, even in the absence of submissions from the parent or child. This is in view of the significant limitations to human rights imposed by such a decision, and particularly a decision to exclude a person from all schools. There are also concerns whether a child (or parent) can properly participate in a show cause process that deals only in written information as outlined above under *Access to education while enrolment decision is pending*.

#### **Recommendation 9:** The Commission supports removal of provisions requiring default refusal to enrol or exclusion of a prospective student where a parent or student does not respond to a show cause notice.

1. *Human Rights Act 2019* s 38. [↑](#footnote-ref-1)
2. *Human Rights Act 2019* s 48. [↑](#footnote-ref-2)
3. *Human Rights Act 2019* s 58(1). [↑](#footnote-ref-3)
4. *Human Rights Act 2019* s 8. [↑](#footnote-ref-4)
5. Explanatory Notes, Human Rights Bill 2018 28. [↑](#footnote-ref-5)
6. United Nations Office of the High Commissioner for Human Rights, *CESCR* *General Comment No. 13: The Right to Education (Art. 13)*, UN Doc E/C.12/1999/10 (8 December 1999) [1]. [↑](#footnote-ref-6)
7. Ibid [6]. [↑](#footnote-ref-7)
8. See *Convention on the Rights of the Child* Articles 28 and 29. The Convention, and other relevant United Nations materials, has been held to inform the scope of the rights of the child protected by the Victorian *Charter of Human Rights and Responsibilities Act 2006*: *Certain Children v Minister for Families and Children* [2016] VSC 796; 51 VR 473 [146]. [↑](#footnote-ref-8)
9. *Convention on the Rights of the Child* Art 12. [↑](#footnote-ref-9)
10. *Convention on the Rights of the Child* Art 3. [↑](#footnote-ref-10)
11. United Nations Committee on the Rights of the Children, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* UN Doc CRC/C/GC/14 (29 May 2013) [32]. [↑](#footnote-ref-11)
12. *Convention on the Rights of the Child* preamble. [↑](#footnote-ref-12)
13. In the context of youth justice: Committee on the Rights of the Child: *General comment No. 24 (2019) on children’s rights in the child justice system,* UN Doc CRC/C/GC/24 (19 September 2019) [2]. [↑](#footnote-ref-13)
14. *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [108]-[109], [131]. [↑](#footnote-ref-14)
15. Pursuant to s 280C of the *Education (General Provisions) Act 2006*, the chief executive of the department only has power to seek information about a charge or conviction from the police commissioner in relation to a student enrolled at a State school. [↑](#footnote-ref-15)
16. Explanatory notes, Education (General Provisions Bill) 2006 167. [↑](#footnote-ref-16)
17. *Education (General Provisions) Act 2006* s 155(2) and (3). [↑](#footnote-ref-17)
18. *Education (General Provisions) Act 2006* ss 159(1), 160. [↑](#footnote-ref-18)
19. *Education (General Provisions) Act 2006* ss 390, 392. [↑](#footnote-ref-19)
20. *Education (General Provisions) Act 2006* s 393, 394. [↑](#footnote-ref-20)
21. Department of Education *Consultation paper -* *School disciplinary absence and enrolment decisions* 3. [↑](#footnote-ref-21)
22. Ibid 5. [↑](#footnote-ref-22)
23. See J Marszalek and J McKay, ‘Suspension rate review, Vulnerable students at risk’, *Courier Mail* (20 April 2022); Queensland Advocacy Incorporated and Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd *The need for inquiry into school disciplinary absences in Queensland state schools* (16 February 2022); L Graham et al, *Overrepresentation of Indigenous students in school suspension, exclusion and enrolment cancellation in Queensland: is there a case for systemic inclusive school reform?* (The Australian Education Researcher, 7 August 2021). [↑](#footnote-ref-23)
24. Department of Education *Consultation paper -* *School disciplinary absence and enrolment decisions* 7. [↑](#footnote-ref-24)
25. *Education (General Provisions) Act 2006* s 159(2). [↑](#footnote-ref-25)
26. *Education (General Provisions) Act 2006* ss 161 and 162. [↑](#footnote-ref-26)