

Human Rights Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Yvette D’Ath MP, Attorney-General and Minister for Justice and Leader of the House, provide this human rights certificate with respect to the *Human Rights Regulation 2020* (the Regulation) made under the *Human Rights Act 2019* (HR Act).

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The HR Act came into force on 1 January 2020.

One of the main objects of the HR Act is to help build a culture in the Queensland public sector that respects and promotes human rights. It does this by requiring public entities to act and make decisions in a way compatible with human rights.¹ Section 9 of the HR Act includes a definition of a “public entity” as meaning “an entity established under an Act when the entity is performing functions of a public nature”. Functions of a public nature include the provision of a range of services, such as emergency services, public health services, public disability services and public education (including public tertiary education and public vocational education).

At present, Queensland grammar schools, and the boards that govern them, may be inadvertently captured as either a core public entity under section 9(1)(a), or as a functional public entity under section 9(1)(f) of the HR Act. This is because Queensland grammar schools (such as Brisbane Girls Grammar, Brisbane Grammar and others) are established under the *Grammar Schools Act 2016* (Grammar Schools Act).

The Grammar Schools Act also establishes a board of trustees for each grammar school to oversee the operation of that school. The Grammar Schools Act provides that grammar school boards are statutory bodies under the *Financial Accountability Act 2009* and the *Statutory Bodies Financial Arrangements Act 1982*.

Capturing grammar schools and grammar school boards as public entities is inconsistent with the position, specifically provided for in HR Act section 9(1)(h), that non-state schools are not to be considered as public entities for the purpose of the HR Act.

Subsection 9(4)(c) of the HR Act provides that for the purposes of the Act a “public entity” does not include “an entity prescribed by regulation not to be a public entity”.

The Regulation, made under section 9(4)(c) of the HR Act, prescribes Queensland grammar schools, and the boards that govern them, as not being public entities.

¹ Sections 3(b) and 4(b) HR Act

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

It is possible that most of the human rights protected by the HR Act may be engaged by the Regulation. This is because the Regulation will limit the rights in the HR Act by excluding grammar schools from the definition of “public entity”, thereby excluding grammar schools and their boards from the obligations in section 58 of the HR Act to give proper consideration to, and act and make decisions compatibly with, human rights.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Given the possible decisions and actions that are made by grammar schools and the boards that govern them, it is possible that the Regulation engages most of the rights set out in the HR Act. A brief summary of these rights is set out below:

- **Recognition and equality before the law:** Every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. Every person is equal before the law and is entitled to equal protection of the law without discrimination. Every person is entitled to equal and effective protection against discrimination.
- **Right to life:** Every person has the right to life and the right not to be deprived of life. The right not to be deprived of life is limited to arbitrary deprivation of life.
- **Protection from torture and cruel, inhuman or degrading treatment:** A person must not be tortured or treated in a way that is cruel, inhuman or degrading. This includes that a person must not be subjected to medical or scientific experimentation or treatment unless they have given their full, free and informed consent.
- **Freedom from forced work:** A person must not be made a slave or forced to work. Forced work does not include certain forms of work or service, such as work or service required of a person who is detained because of a lawful court order.
- **Freedom of movement:** Every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.
- **Freedom of thought, conscience, religion and belief:** Every person has the right to think and believe what they want and to have or adopt a religion, free from external influence. This includes the freedom to demonstrate a religion individually or as part of a group, in public or in private.
- **Freedom of expression:** Every person has the right to hold and express an opinion, through speech, art, writing (or other forms of expression) and to seek out and receive the expression of others’ opinions.
- **Peaceful assembly and freedom of association:** Every person has the right to join or form a group and to assemble. The right to assembly is limited to peaceful assemblies.
- **Taking part in public life:** Every person in Queensland has the right and opportunity without discrimination to take part in public life. Every eligible person has the right to vote, be elected, and have access on general terms of equality to the public service and public office.

- **Property rights:** All persons have the right to own property alone or in association with others. A person must not be arbitrarily deprived of their property.
- **Privacy and reputation:** A person's privacy, family, home and correspondence must not be unlawfully or arbitrarily interfered with. A person has the right not to have their reputation unlawfully attacked.
- **Protection of families and children:** Families are recognised as the fundamental unit of society and are entitled to protection. Every child has the right, without discrimination, to the protection that is in their best interests as a child. Every person born in Queensland has the right to a name and to registration of birth.
- **Cultural rights – generally:** All persons with particular cultural, religious, racial and linguistic backgrounds have a right to enjoy their culture, declare and practise their religion, and use their language, in community with other persons of that background.
- **Cultural rights – Aboriginal peoples and Torres Strait Islander peoples:** Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people. They must not be denied the right, with other members of their community, to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture.
- **Right to liberty and security of person:** Every person has the right to liberty and security. This right protects against the unlawful or arbitrary deprivation of liberty. If a person is arrested or detained, they are entitled to certain minimum rights, including the right to be brought to trial without unreasonable delay.
- **Humane treatment when deprived of liberty:** A person must be treated with humanity and respect when deprived of liberty. An accused person who is detained must not be detained with convicted persons unless reasonably necessary, and must be treated in a way that is appropriate for a person who has not been convicted.
- **Right to education:** Every child has the right to have access to primary and secondary education appropriate to their needs. Every person has the right to have access, based on their abilities, to further vocational education and training that is equally accessible to all.

While there is uncertainty about whether grammar schools and their boards are public entities under the HR Act, if they are currently captured by the HR Act these bodies are required to give proper consideration to, and act and make decisions compatibly with, human rights. These obligations are provided by section 58. The HR Act also provides for circumstances where people are able to pursue legal proceedings (section 59) and make complaints (sections 64) where they believe a public entity has failed to meet its obligations under section 58.

To the extent that actions and decisions by grammar schools and their boards may engage with the rights protected under the HR Act, prescribing that grammar schools and the boards that govern them are not public entities may limit the rights protected under the HR Act. This is because it will exclude these bodies from the obligation on public entities to give proper consideration to, and act and make decisions compatibly with, human rights. As a result of the exclusion, people (including students and teachers) will not be able to bring complaints or legal proceedings in reliance on sections 58, 59 and 64 against grammar schools and their governing boards to seek to uphold rights set out in the HR Act.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the Regulation is to bring the application of the HR Act to grammar schools, and the boards that govern them, into line with its application to other non-state schools (which are specifically identified as not being public entities in section 9(1)(h) of the HR Act).

Capturing grammar schools and grammar school boards as public entities (and subsequently binding them to the obligations under section 58 of the HR Act) is inconsistent with the position that non-state schools not be considered public entities for the purposes of the HR Act. The Regulation is therefore amending an ambiguity in the HR Act. This is because it is recognised that while educating students is a public function, in the case of the grammar schools, it is not being delivered by or on behalf of the State.

Further, it is considered that non-state schools do not form part of the Queensland public sector and therefore it is not appropriate to bind them to an Act which has a specific purpose to build a culture of human rights in the Queensland public sector.

Ensuring the application of the HR Act extends only to functions on a public nature performed by or for the State is a proper purpose in line with section 13 of the HR Act.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The Regulation will achieve its purpose as it prescribes grammar schools, and the boards that govern them, as not being public entities for the purposes of the HR Act. It will therefore ensure consistency in relation to the application of the HR Act with respect to grammar schools and other non-state schools.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No other less restrictive ways of achieving the purpose have been identified. The only way in which to put the inconsistency beyond doubt is for a regulation to be made under section 9(4)(c) of the HR Act, prescribing Queensland grammar schools not to be public entities pursuant to the HR Act.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitations, I consider that the importance of ensuring that, consistent with the position in respect of non-state schools, the HR Act does not apply to Queensland grammar schools, and the boards that govern them, outweighs the need to preserve rights that are limited by the Regulation.

Conclusion

I consider that the *Human Rights Regulation 2020* is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
Attorney-General and Minister for Justice
Leader of the House

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