Education (General Provisions) and Other Legislation Amendment Bill 2024

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Committee Secretary
Education, Employment, Training and Skills Committee
Parliament House
George Street
Brisbane Qld 4000

By email: eetsc@parliament.qld.gov.au

Dear Committee Secretary

Education (General Provisions) and Other Legislation Amendment Bill 2024

Thank you for the opportunity to provide feedback on the Education (General Provisions) and Other Legislation Amendment Bill 2024 (**the Bill**).

QLS is the peak professional, apolitical body for the State's legal practitioners.

This response has been compiled with input from the QLS Privacy, Data, Technology and Intellectual Property Law Committee and Human Rights and Public Law Committee

Executive Summary

- QLS welcomes the consultation on the Bill which will affect young people and members of the community in a range of significant ways.
- Broadly, we support the measures in the Bill which seek to improve the process for dealing with suspensions and student disciplinary absences.
- We support the introduction of a new appeal right for accumulated short suspensions and the introduction of study support plans for vulnerable cohorts. However, we oppose the requirement that the total period of the current short suspension and all earlier short suspensions be a cumulative total at least 11 school days in a school year.
- The foreshadowed development of policies about suspensions, exclusion and cancellation of enrolments should be underpinned by a focus on the supports to be made available to families/caregivers, children and schools.
- We call for significant investment in funding for services to support schools, families and carers in working with students at risk of suspensions.
- As far as possible, State and Commonwealth governments' privacy frameworks should be harmonised to avoid unintended consequences.

- QLS supports aspects of the proposed measures to minimise privacy risks associated with educational technology.
- However, with respect to new section 426A, QLS does not support removal of the requirement for students and/or their parents or caregivers to consent to the disclosure of their personal information for the purpose of using an online service approved by the Chief Executive. QLS recommends that the requirement for consent be maintained.

Amendment of Education (General Provisions) Act 2006 and the *Education (General Provisions) Regulation 2017*

School disciplinary absence, enrolment decisions, and student support plans

QLS broadly supports the introduction of a new review right for students in Clause 79 of the Bill.

However, we hold reservations about new section 285(2)(a) and (b) which confines the review right in respect of a short suspension to students to have received at least one short suspension earlier in the school year, and the total period of the current short suspension and all earlier short suspensions in the school year is at least 11 school days.

It is our view that a student should not be precluded from being able to seek a review of a short suspension simply because the student does not satisfy the minimum 11 school day threshold in subsection 285(2)(b). An evidentiary basis for the 11-school day minimum is not set out in the Explanatory Notes.

The right to education is enshrined in the *Human Rights Act 2019*. Education is a significant protective factor in respect of life outcomes and potential interactions with the youth justice system.[1]

There are significant short- and long-term impacts on children subject to suspensions or exclusion. There is disproportionate impact on First Nations children and children with a disability.

We note the Queensland Family & Child Commission in its 2022 paper on 'Designing a better response to youth offending in Queensland: raising the age of criminal responsibility: Issues paper' suggested that consideration might be given to replacing school disciplinary absences with alternative education pathways to make sure children remain in contact with school.[2]

Accordingly, we take this opportunity to highlight the importance of a holistic approach and to call for investment in evidence-based alternatives to school disciplinary absences.

The legislative framework and accompanying policy on student disciplinary absences should reflect their role as options of last resort.

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[1] Bob Atkinson AO, APM, Youth Justice Reforms Review Final Report (25 February 2022) 33. Available at: https://desbt.qld.gov.au/__data/assets/pdf_file/0016/17440/youth-justice-reforms-review-march-2022.pdf.

[2] Queensland Family and Child Commission, *Designing a better response to youth offending in Queensland: Raising the age of criminal responsibility: Issues paper* (Issues Paper, 2 September 2022) 26. Available at: https://www.qfcc.qld.gov.au/sector/monitoring-and-reviewing-systems/young-people-in-youth-justice/raising-the-age-of-criminal-responsibility#:~:text=The%20issues%20paper%20sets%20out,to%2014%20years%20of%20age

As indicated above, QLS supports the measures in the Bill which seek to improve the process for dealing with suspensions and student disciplinary absences, including a new appeal right for accumulated short suspensions and the introduction of student support plans for vulnerable cohorts.

We support reform to increase transparency and accountability and note the proposal to make policies about suspensions, exclusion and cancellation of enrolments publicly available under the Bill. Consideration should also be given to how to support families/caregivers and children in accessing information about and progressing appeal processes and support.

Investment in alternatives to student disciplinary absences should include reasonable adjustments for children with disability and cultural safety and support for First Nations children. This is captured to some extent by the Bill's amendments through the introduction of student support plans and requiring a policy outlining considerations for student disciplinary absence decision makers.

However, QLS reiterates calls for significant investment in funding for services to support schools, families and carers in working with students at risk of suspensions. We note with concern that there is no specific allocation for additional costs for student support plans or services stipulated in the estimated costs for the Bill.

Information sharing with online services

Clause 113 Insertion of new s 426A

The Bill inserts a new section 426A in the *Education (General Provisions) Act 2006* (**EGP Act**) to enable a public service employee of the department to disclose personal information about a student where the online service is an *approved online service,* as determined by the Chief Executive in accordance with the considerations and process outlined in the Bill.

New section 426A removes the existing requirement for prior parent/caregiver consent to be obtained by the school for the recording, using or disclosing of personal information to an entity that provides an approved online service. For online services that require sensitive information or that are not approved online services, existing consent requirements will be maintained.

QLS supports a central approval process to improve the existing consent management arrangements and alleviate some of the issues and risks associated with school-specific approaches however we strongly recommend that the requirement for consent be maintained.

Approved online services

QLS supports measures aimed at minimising privacy risks for children engaging with online educational services.

Generally, the proposal for a centralised approval process for online services utilised by Queensland State schools is a positive step towards improved privacy protection of children engaging with education technology.

QLS also supports publication of a list of approved online services for public inspection as provided for in section 426A(3) of the Bill.

However, while the Bill outlines conditions that the Chief Executive must be reasonably satisfied of to grant an online service with an 'approved' status, we are concerned the provisions lack the necessary specificity to adequately assess potential implications for student privacy and data security.

Removal of consent

As noted above, new section 426A of the EGP Act removes the requirement for students and/or their parents or caregivers to consent to the disclosure of their personal information for the purpose of using an online service *approved* by the Chief Executive.

The existing confidentiality provisions in section 426 of the EGP Act apply to personal information that the Chief Executive 'has gained or has access to'. However, what is proposed under the Bill is prospective authorisation for the disclosure of personal information which may not even exist at the time of approval of the online service.

Further, while the Bill retains consent for the disclosure of 'sensitive information' such as health, racial or ethnic or religious personal information, the definition of 'sensitive information' in the Queensland privacy framework is narrower than that provided in existing section 6 of the *Privacy Act 1988* (Cth). It does not include for example, biometric information that is to be used for the purpose of automated biometric verification or biometric identification.

Therefore, where an online service is approved, it would potentially permit "approved online services" to collect biometric data, including facial and voice data, as well as behavioural data without consent. This is concerning given the rapid integration of generative artificial intelligence (AI) into education systems.

The review of the Commonwealth's Privacy Act (**Privacy Act review**) also recognised the 'collection, use, disclosure and storage of precise geolocation tracking data as a practice which requires consent'.[3] The proposed new section would not adequately address these developments in a manner which ensures informed consent, including to opt out.

These issues emphasise a need to consider the proposed reform in the broader legislative and technological contexts and in our view, reiterates the importance of maintaining existing consent requirements.

Sensitive information

In respect of approving an online service, QLS supports the proposed limitation in respect of the collection and storage of 'sensitive information' under new section 426A(2)(d) of the Bill. However, we encourage a more comprehensive definition of 'sensitive information' to be employed in this context.

Under the Bill *sensitive information* is defined with reference to schedule 5 of the *Information Privacy Act 2009* (**IP Act**). That definition does not currently encompass 'sensitive information' which can be inferred from information that is not itself sensitive information nor geolocation tracking data. Both of which are under consideration by the Commonwealth's **Privacy Act**.[4]

If the existing State definition remains and the Federal definition is amended as proposed under the Review, there is the potential for inconsistency in the protection of sensitive personal information of State school students in Queensland and those in Independent schools bound by the Commonwealth Privacy Act. This must be borne in mind when considering the context of the student privacy implications proposed under the Bill.

We recommend considering the recommendation from the Privacy Act review regarding amendments to the definition of 'sensitive information'. As far as possible the State and Commonwealth's privacy frameworks should be harmonised to avoid unintended consequences.

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[3] Privacy Act Review, 5.
[4] Australian Government Attorney-General's Department, *Privacy Act Review* (Report, 2022), 45 ('Privacy Act Review').

Approval process for online services

New section 426A(2)(c) provides that the Chief Executive may approve an online service as an 'approved online service' if reasonably satisfied that, inter alia, the online service is suitable to protect the privacy and online security of relevant student information that may be disclosed to, recorded or used by the service provider.

The approval process requires that 'an appropriately qualified public service employee employed in the department has assessed the online service according to a framework for assessing the matters mentioned in paragraphs (c) and (d)'. There is limited detail in the provision as to what the framework would require aside from the requirement that it be suitable to protect the privacy and online security of relevant information about a student and does not require sensitive information.

QLS submits that the starting point in analysing existing service providers must be whether the personal information needs to be disclosed. This should be reflected in the drafting.

Approved online services should also be required to adhere to transparent privacy and security protocols, such as encryption of student information and anonymisation techniques. The accreditation model should be sufficiently robust to ensure that approved services undergo regular audits and account for emerging technologies (such as AI and machine learning) and evolving privacy and risks associated with previously approved services.

New section 426A(3) mandates that the Chief Executive ensure a list of all approved online services be available for public inspection. We consider it would be prudent to also require the Chief Executive to establish a policy or procedure governing the approval process of online services, which is readily accessible for public inspection. This process may for example require the undertaking of Privacy Impact Assessments (PIAs) for all approved services which may be used.

Collaboration with reputable and secure service providers within the EdTech sector, which prioritise student privacy and data protection through strong technology credentials and expertise, is imperative.

Terms and conditions

The Bill fails to acknowledge that privacy is only one aspect of most application or online service terms and conditions, with many requiring consent from end users (such as students). The Bill does not for example, address the management of end user consent nor other key aspects such as student intellectual property rights, which may be particularly important to older students (for example, artistic works or even coding). How these issues will be managed remains unaddressed by the Bill.

The terms and conditions associated with online services commonly involve broader issues, and may cover a range of topics beyond privacy concerns such as waivers of liability and intellectual property rights. Many online services also require end-users to accept terms of use in addition to the contractual agreement under which the service is provided to the department.

The appropriateness of the Chief Executive making any such decisions on behalf of students must also be carefully considered and would not be our preferred solution. A preferable approach in our view, would be for the department to conduct an initial accreditation process, along the lines proposed in new section 426A, but to subsequently provide that information to students and families to make these decisions themselves.

At the very least, we submit that the key privacy issue of "purpose of use/disclosure" should be enshrined in the legislation. In other words, any form of Chief Executive approval or administrative accreditation of an online service should be legislatively proscribed if it would involve uses and disclosure which are not for the primary purpose of education and related secondary purposes.

Preparation of sufficient information to opt in/out

While we commend a review of existing online services to ensure compliance with a specific framework for use, consent should remain a prerequisite. As such, an 'opt in' model is preferable to the 'opt out' model proposed here (we note from the Explanatory Memorandum that the ability to 'opt out' is to be an administrative process, which is not reflected in the Bill). We do not know what is proposed in this regard.

QLS considers that education and information which empowers students, parents and caregivers including relevant criteria details would better complement an 'opt in' process. For example, the department could present a scorecard or accessible summary of key aspects of the online service or application. Empowering schools and families with this information[5] is an important component in supporting informed consent and responding to technological advances including in education technology.

As well as providing sufficient information to opt in, such a process would support individual families to make decisions to opt out or to turn off access to specific applications at any time. This approach would also, in our view, be more consistent with the protection of human rights as they relate to children and families.

The Privacy Act review report's discussion around format, timing and readability of collection notices and privacy policies[6] are also an important aspect of ensuring that accessible information is provided to students and parents and caregivers to enable them to make informed decisions about their engagement with online education services.

Age of students

We also recognise that older students may be able to opt in/out themselves, particularly in the case of 'lower risk' services.

In terms of capacity to provide consent, reform in this area should align with the proposals in the Privacy Act review. For example, any opt in from students themselves should only be recognised if the online service provider and others acting on it are able to assume, under the Privacy Act, that the student has capacity.

The proposed *Privacy Act* reforms for children include that:

- an entity must decide if a child has the capacity to consent on a case-by-case basis. If that is not practical, the entity may assume an individual over the age of 15 has capacity, unless there is something to suggest otherwise (Proposal 16.2); and
- a valid consent from a person requires that person to have capacity to "understand the nature, purpose and consequences of the collection, use or disclosure" (Proposal 16.2). This would be subject to exemptions for circumstances where a child lacks capacity but parental or guardian involvement (for the purposes of obtaining consent) could be harmful to the child or otherwise contrary to their interests.

Even in circumstances where parental consent is required, education and information should be available to both students and caregivers. Giving children access to this information supports their own education and decision-making in the longer term. For example, we note the Privacy Act review report referred to submissions made on the Privacy Legislation Amendment (Enhancing Online

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[5] See Tiffani Apps, Karley Beckman and Sarah K. Howard, 'Edtech is treating students like products. Here's how we can protect children's digital rights', *The Conversation* (online, 10 June 2022) <https://theconversation.com/edtech-is-treating-students-like-products-heres-how-we-can-protect-childrens-digital-rights-184312>

[6] Privacy Act Review (n 3) 151.

Privacy and Other Measures) Bill 2021 which indicated that children have concerns about the ways in which their location data is being used.[7]

Children and young people must be supported to understand these processes and make decisions to exercise their rights should they wish to do so.

Estimated costs

The Explanatory Notes state 'Any potential costs will be met from existing budget allocations and are anticipated to be off-set in the longer term as process efficiencies are realised.' In our view there is insufficient consideration of the financial, albeit critical, financial impacts of the Bill to ensure that online service approval processes, auditing and maintenance of public facing lists is managed appropriately. It is essential that those aspects of the reform be adequately resourced including the engagement of appropriate experts.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Rebecca Fogerty
President

[7] Privacy Act Review (n 3) 45.