

Education Legislation (COVID-19 Emergency Response) Regulation 2020

Explanatory notes for SL 2020 No. 104

Made under the *COVID-19 Emergency Response Act 2020*, *Education (Accreditation of Non-State Schools) Act 2017*, *Education (General Provisions) Act 2006*, *Education (Overseas Students) Act 2018*, *Education (Queensland College of Teachers) Act 2005* and *Education (Queensland Curriculum and Assessment Authority) Act 2014*

General Outline

Short title

Education Legislation (COVID-19 Emergency Response) Regulation 2020

Authorising law

Sections 8 and 13 of the *COVID-19 Emergency Response Act 2020*

Section 179 of the *Education (Accreditation of Non-State Schools) Act 2017*

Section 434 of the *Education (General Provisions) Act 2006*

Section 104 of the *Education (Overseas Students) Act 2018*

Section 298 and 181 of the *Education (Queensland College of Teachers) Act 2005*

Section 92 of the *Education (Queensland Curriculum and Assessment Authority) Act 2014*

Policy objectives and the reasons for them

On 29 January 2020, the then Minister for Health and Minister for Ambulance Services declared a public health emergency (COVID-19 emergency) under section 319 of the *Public Health Act 2005* due to the outbreak of COVID-19 in China, its pandemic potential due to cases spreading to other countries, and the public health implications within Queensland resulting from recently arrived travellers from the epicentre of the outbreak. The COVID-19 emergency was declared for all of Queensland.

On 11 March 2020, the Director-General of the World Health Organisation declared the COVID-19 emergency a global pandemic.

The COVID-19 emergency represents a significant risk to the health and wellbeing of many Queenslanders and has caused adverse economic and social consequences on a global scale. In response, the Australian and State Governments have introduced measures to prevent the

spread of COVID-19. A key measure is a requirement for people to practice social distancing which is intended to reduce transmission of the COVID-19 between persons.

The *COVID-19 Emergency Response Act 2020* (ER Act) came into effect on 23 April 2020. The ER Act establishes a legislative modification framework of general application across the statute book allowing legislative requirements to be modified in the following areas, should that be required:

- attendance at places or meetings, making and associated use of documents and physical presence requirements;
- statutory timeframes; and
- proceedings of courts and tribunals.

As part of this modification framework, extraordinary Regulations can be made to amend statutory requirements in Queensland legislation for a limited period to address the impacts of the COVID-19 emergency.

An extraordinary Regulation under the ER Act should only be made if necessary for a purpose of the ER Act, such as to protect the health, safety and welfare of persons affected by the COVID-19 emergency; and to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency.

A number of legislative instruments under the education portfolio have regulatory requirements that are impacted by the COVID-19 emergency, and require an extraordinary Regulation to address them.

The purpose of the *Education Legislation (COVID-19 Emergency Response) Regulation 2020* (the Regulation) is to modify legislative requirements to address education portfolio related issues that have arisen as a consequence of the COVID-19 emergency and the associated social restrictions under the authority of the ER Act. The provisions made under the authority of the ER Act in the Regulation are in relation to the following matters:

- attendance at places or meetings and physical presence requirements under the *Education (General Provisions) Act 2006* (EGP Act) and *Education (Queensland College of Teachers) Act 2005* (QCT Act); and
- statutory timeframes under the EGP Act and *Education (Accreditation of Non-State Schools) Act 2017* (EANNS Act).

Additionally, the Regulation amends the *Education (Queensland Curriculum and Assessment Authority) Regulation 2014* (QCAA Regulation) and *Education (Overseas Students) Regulation 2018* (EOS Regulation) to enable fees to be waived or reduced during emergencies such as the COVID-19 emergency.

Requirements to attend / meetings

The ER Act provides that if legislation requires a person to physically attend a place or attend a meeting for a particular purpose or particular matter, a regulation may make provision about how the purpose or matter can be achieved or otherwise dealt with in a modified way, including by doing any of the following:

- providing that the person may attend the place or meeting for the purpose or matter in a way that does not involve physical attendance (for example, using communication technology);
- modifying a procedure or requirement relating to a meeting;
- suspending a requirement or entitlement for a person to attend a place or meeting;

- suspending a requirement for an entity to call or hold a meeting; and
- providing for any matter incidental to the purpose or matter.

There are a number of provisions under education legislation where attendance at a meeting is a requirement.

Investigations under the Education (Queensland College of Teachers) Act 2005

A key function of the Queensland College of Teachers (QCT) is to ensure the professionalism and integrity of Queensland's teaching profession. Under the QCT Act, QCT investigators are authorised to conduct investigations in relation to these functions.

However, the current social distancing measures may impact investigations undertaken by QCT investigators if they are not able to effectively use their Notice to Produce/Attend powers. Currently, in section 181 of the QCT Act, a QCT investigator may, when carrying out an investigation and by notice, require a person to attend a place to answer questions or produce a stated thing.

Given the current social distancing measures, the Regulation provides that the requirement under the QCT Act for attendance during investigations in section 181 is broad enough to enable meetings to occur by means other than physical attendance, such as via communication technology. Additionally, it is also necessary to allow for production of things via online or post where necessary, rather than in person.

P&C meetings under the Education (General Provisions) Act 2006

The EGP Act and EGP Regulation prescribe requirements in relation to meetings of Parents and Citizens' Associations (P&Cs). To ensure members of P&Cs are able to meet their legislative obligations, it is necessary to clarify that these meetings can be held via communication technology.

Statutory timeframes

The ER Act provides that if an Act stipulates a period within which an entity must do a thing, or a period at the end of which a thing expires, a regulation may:

- modify the period; or
- authorise an entity to be able to modify the period and delegate this power.

The ER Act provides examples of things this power relates to, including:

- making an application;
- paying an amount;
- exercising a power;
- performing a function;
- making a decision; and
- expiry of an authority, licence or permit.

If a period is extended under this power, the period may be extended only for a period that ends on or before 31 December 2020.

While it is difficult to assess exactly the full impact of the COVID-19 emergency on Queensland's education sector during 2020, it is clear there has been a major impact on the normal functioning of schools, including transitions to online education programs and reduction in administrative capabilities as a consequence of social distancing measures.

For this reason, a number of statutory requirements in relation to when certain things must be done or when things expire may need modification.

Requirements under the EGP Act

The EGP Act and EGP Regulation contain requirements in relation to P&Cs, including the holding and timing of meetings and audits, to ensure transparency and integrity and support school planning in normal school years. Under section 135 of the EGP Act, P&Cs are required to have their accounts audited by 31 May of the following year. Additionally, under section 44 of the EGP Regulation, the annual general meeting (AGM) of a P&C for a year must be held within three months after the end of the preceding financial year (that is 31 March 2020).

Unless the relevant P&Cs' constitution provides otherwise, the quorum for an AGM is 10 P&Cs members. Section 123 of the EGP Act and section 42 of the EGP Regulation requires officers of P&Cs to be elected by the members of the P&Cs at the AGM. If a P&C does not meet its statutory requirements in relation to its AGM, the election of officers and resolutions made at the AGM may potentially be considered not valid.

Under current and likely ongoing social distancing measures in response to the COVID-19 emergency, P&Cs may not be able to conduct meetings in accordance with the timeframes required by the EGP Act and EGP Regulation. The delays imposed by the COVID-19 emergency on AGMs and other processes may also lead to difficulties in enabling P&Cs to finalise actions, such as having their accounts audited by 31 May.

Under section 13 of the ER Act, the power to modify timeframes under the legislation can have a retrospective effect from 19 March 2020. It is proposed that the power for the chief executive to extend when an AGM must be conducted and when audits of accounts are required to be provided to the chief executive have retrospective application. The retrospective operation of the extension will allow these P&Cs to comply with the legislation in relation to the timing of their audits and AGMs during the COVID-19 emergency.

The proposed new power would also enable an extension of other timeframes under the EGP Act where necessary, such as when a School Council member's terms expire under section 90 of EGP Act. This would address an issue if a member's two-year term is completed during the COVID-19 emergency, and physical voting is not able to take place to elect a new member during this period.

The new power is the only way the chief executive can extend statutory timeframes under the EGP Act. Given the power will be exercised by the chief executive (or an appropriately qualified officer delegated by the chief executive), there will be robust checks and balances in place to ensure any extension granted is for a justified and appropriate purpose, relevant to the COVID-19 emergency.

While the general power to extend periods and expiry is required for the instances outlined above, it is not required for all parts of the EGP Act. The power to extend statutory timeframes in relation to home education could cause an expectation that this power will be implemented by stakeholders, even if it is not necessary. The Department of Education is able to manage processes in relation to the regulation of home education during the COVID-19 emergency, and no power to extend timeframes is required. Therefore, the power is not extended to matters under Chapter 9, Part 5 of the EGP Act.

Requirements under the EANNS Act

Under the EANSS Act, the Non-State School Accreditation Board (the Board) is the regulator and key decision maker in the accreditation of non-State schools. While in some cases the Board has power of extensions for particular matters, in many cases throughout the EANNS Act, the Board has no ability to extend statutory timeframes under the Act.

Changes to schooling arrangements and administrative practices to ensure social distancing measures during the COVID-19 emergency may impact the ability of non-state schools and the Board to meet statutory timeframes. Inspections of schools may be delayed due to social distancing and this can impact other regulatory processes. Non-state schools and their governing bodies may also experience difficulties obtaining appropriate information within prescribed timeframes during show cause and applications processes.

Given the impact of the COVID-19 emergency on the functioning of schools, it is appropriate and practical that the Board be able to extend timeframes where necessary under the EANNS Act until 31 December 2020.

Examples of where the Board may need to exercise this power include when an accredited school must respond to a show cause notice under section 67 of the EANNS Act; and when the Board must conduct an initial assessment of a new school under section 30 of the EANNS Act.

Fee waivers and reductions

The COVID-19 emergency has significantly impacted the economy of Queensland. The payment of fees, as required by legislation, is one financial impost on Queenslanders that, in certain circumstances, can be waived or reduced to ease the financial burden on Queenslanders adversely affected by circumstances beyond their control. Section 30B of the *Statutory Instruments 1992* provides that where a law allows a statutory instrument to prescribe a fee, the power to prescribe the fee also includes a power to exempt a person from paying the fee or waiving payment of fee for a person or matter.

Accordingly, a number of fees may be waived or reduced during the COVID-19 emergency under the QCAA Regulation and under the EOS Regulation. To allow for this, an amendment is required to the QCAA Regulation and EOS Regulation to allow fees to be waived or reduced under exceptional circumstances such as the COVID-19 emergency. As there may be times when such a power is required to respond to potential future health emergencies or natural disasters, the new provisions will continue to be in effect beyond the COVID-19 emergency.

Given potential future health emergencies or natural disasters and their duration are difficult to predict, there is a need for flexibility as to how these fees can be waived or reduced to make them administratively effective. For this reason, the authority to waive or reduce fees is required to be provided to the chief executive under the EOS Act, and the Queensland Curriculum and Assessment Authority (QCAA) under the QCAA Act. This will allow the chief executive and QCAA respectively to waive or reduce fees when necessary and for a period appropriate to the emergency.

Achievement of policy objectives

The Regulation achieves its policy objectives by:

- Enabling attendance at meetings during investigations under the QCT Act to be via communication technology (such as online meeting platforms). Additionally, it allows a thing required at a meeting to be produced via online or post where necessary, rather than in person.
- Clarifying that P&Cs meetings can be held via communication technology.
- Enabling the chief executive to extend when things must be done by and when things expire under the EGP Act and EGP Regulation. In some situations, this power will be able to be applied retrospectively. The power is not extended to matters under Chapter 9, Part 5 of the EGP Act.

- Enabling the Board to extend when things must be done by and when things expire under the EANNS Act and EANSS Regulation.
- Amending the QCAA Regulation and EOS Regulation to allow fees to be waived or reduced by the QCAA or chief executive respectively under exceptional circumstances such as the COVID-19 emergency or a natural disaster. The new provisions will continue to be in effect beyond the COVID-19 emergency, to enable fee waivers and reductions to respond to potential future health emergencies or natural disasters.

The proposed amendments provide appropriate flexibility in the legislative framework during the COVID-19 emergency. Their effect will expire on 31 December 2020, in accordance with the ER Act (apart from the fee waiver/reduction provisions).

Consistency with policy objectives of authorising law

The Regulation is consistent with the following main purposes of the ER Act:

- to protect the health, safety and welfare of persons affected by the COVID-19 emergency; and
- to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements.

The Regulation is also consistent with the policy objectives of other authorising legislation:

- The EGP Act's objective to make available to each Queensland child or young person a high-quality education by encouraging parental and community involvement in the operation of State educational institutions by enabling the establishment of school councils for State schools; and the formation of P&Cs for State instructional institutions.
- The objects of the EANNS Act to uphold the standards of education at non-State schools by establishing the Board and an accreditation regime for the accreditation of non-State schools.
- The objects of the QCT Act to uphold the standards of the teaching profession by monitoring compliance with and enforcing this Act.
- The QCAA Act by ensuring that the QCAA can provide services under the QCAA Act during emergency situations without having to charge a fee for that service.
- The EOS Act by ensuring the chief executive can provide services under the EOS Act during emergency situations without having to charge a fee for that service.

Inconsistency with policy objectives of other legislation

The Regulation, under the authority of the ER Act, is not inconsistent with the policy objectives of other Queensland legislation.

Benefits and costs of implementation

The majority of amendments are not expected to increase costs for Government or impacted entities. They ensure greater flexibility in the regulatory framework during the COVID-19 emergency and its associated social restrictions.

The waiving of fees may have a minor impact on revenue for the Department of Education and QCAA. However, the impact is expected to be minor and temporary and acceptable given the impact of the COVID-19 emergency on Queensland society.

Consistency with fundamental legislative principles

Consideration of possible inconsistencies with fundamental legislative principles is provided below. Note: further consideration of these inconsistencies is provided in the explanatory notes for the ER Act.

Section 4(3)(c) *Legislative Standards Act 1992*: Whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

A provision in the Regulation allows the chief executive (under the EGP Act) and Board (under the EANSS Act) to, in special circumstances related to the COVID-19 emergency, extend legislated timelines for a variety of actions under the Acts and associated regulation. This power is potentially inconsistent with section 4(3) of the *Legislative Standards Act 1992* (LSA). However, such an amendment is justified given the major upheaval to education and administrative processes as a consequence of COVID-19, as well as the potential danger to individuals and society if social distancing measures are not observed.

The proposed new provisions limit the ability to make an extension or variation to the chief executive (or an appropriately qualified officer delegated by the chief executive) or the Board. They would allow an appropriate level of temporary flexibility in the legislation during the COVID-19 emergency. The provisions ensure that regulators and others subject to legislative requirements (such as P&Cs and non-state schools) can continue meeting their statutory obligations during the COVID-19 emergency, without risking the health and safety of people.

The provisions are consistent with the powers provided under the ER Act and its purpose to establish a legislative modification framework of general application across the statute book allowing statutory timeframes to be modified if necessary to protect the health, safety and welfare of persons affected by the COVID-19 emergency; and to facilitate the continuance of public administration and other activities disrupted by the COVID-19 emergency.

Additionally, the Regulation amends the EOS Regulation and QCAA Regulation to allow the chief executive under the EOS Act and the QCAA under the QCAA Act to, in special circumstances such as the COVID-19 emergency or a natural disaster, waive or reduce prescribed fees, and this may also be inconsistent with section 4(3) of the LSA as it sub-delegates the Regulation's authority to waive or reduce fees to the chief executive and QCAA.

Emergency events are impossible to predict and the impacts almost immediate. In such events, there is a need for flexibility to ensure actions, such as the waiver or reduction of fees, are timed appropriately to address the nature of and duration of the emergency. The proposed provision ensures that there is an effective and flexible mechanism in which waivers or reductions can be put in place by providing authority to appropriate decision makers to waive or reduce fees during emergency events.

The amendments are justified given the major financial impact that the COVID-19 emergency or other potential future emergency events may impose on Queenslanders and their economic circumstances, and the need to ensure there is an appropriate and flexible mechanism for the waiver or reduction of fees when such emergencies occur. The limitations on when the power to waive or reduce fees (only in exceptional circumstances such as the COVID-19 emergency or major natural disasters) can be used and who can use it (the chief executive under the EOS

Act and the QCAA under the QCAA Act) also ensure that the power will not be applied inappropriately.

Section 4(3)(g) *Legislative Standards Act 1992*: Whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

Providing for retrospective operation of modifications to time periods potentially departs from the fundamental legislative principle that requires that legislation should not adversely affect rights and liberties or impose obligations retrospectively.

Under section 13 of the ER Act the power to modify timeframes under the legislation can have a retrospective effect from 19 March 2020. This power recognises that the impact of the COVID-19 emergency was significant prior to legislation being put in place. The retrospective aspect of these provisions ensure that regulated entities and administrators are able to appropriately address issues that arose between 19 March 2020, when significant social restrictions were put in place, and the commencement of the necessary legislation to address these issues.

The power for the chief executive to extend when a P&C's AGM must be conducted and when P&Cs must provide audited accounts to the chief executive have retrospective application in the Regulation. The EGP Regulation, under the authority of the EGP Act, requires that the AGM must be held by 31 March; however, the ER Act only came into effect on 23 April 2020. The social distancing measures came into full effect on 19 March 2020, with issues relating to COVID-19 arising earlier. Therefore, a significant number of P&Cs have not been able to hold their AGM as required under the EGP Regulation and the retrospective operation of the extension will allow these P&Cs to comply with the legislation.

Additionally, the ability to audit accounts may be subject to the conduct of the meetings. The Regulation will not be in effect before the deadline for audited accounts to be given to the chief executive by 31 May. Therefore, the chief executive's power to extend timeframes in relation to auditing is also applied retrospectively, so that it will have effect even though the extraordinary regulation commences post 31 May.

Section 4(4) *Legislative Standards Act 1992* – Whether legislation has sufficient regard to the institution of Parliament. Delegation of legislative power should only be in appropriate cases and to appropriate persons.

The use of secondary instruments to implement the modification framework represents a potential departure from the fundamental legislative principle requiring that legislation has sufficient regard to the institution of Parliament (section 4(2)(b) of the LSA). However, the new provisions are consistent with the modification framework established by the ER Act which enables various Acts to be amended by subordinate legislation (such as a regulation), should that be required for a temporary period during the COVID-19 emergency.

Consultation

The QCT was consulted and supported the provisions relevant to their investigations under the QCT Act. The Board was consulted and were supportive of the temporary power to extend timelines under the EANSS Act. The Queensland Council of P&Cs was consulted and support the power of the chief executive to extend timeframes under the EGP Act. The QCAA was consulted and supported the amendment to allow fees to be reduced or waived.