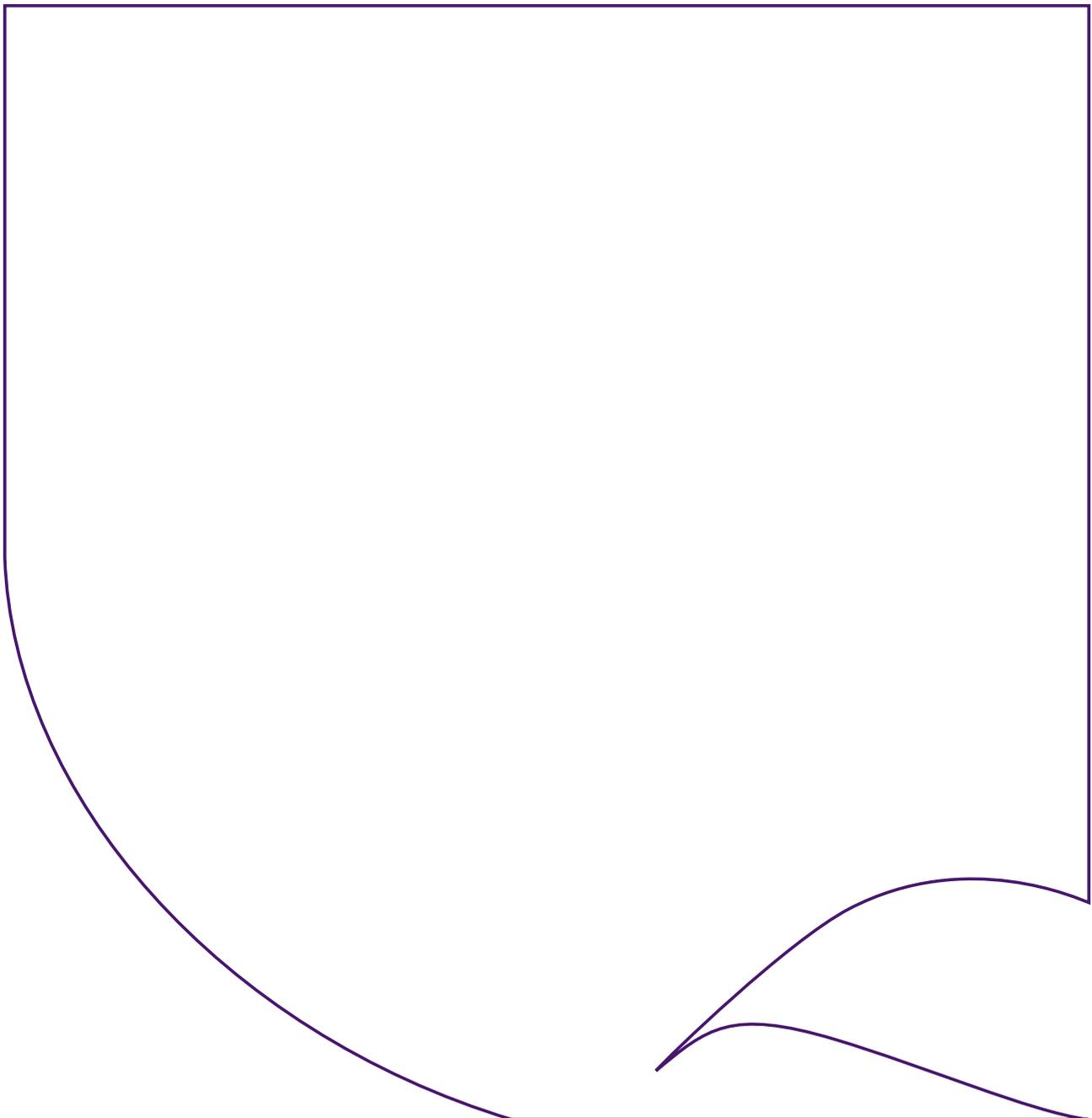


The Queensland Human Rights Act for children with disabilities at school



The *Queensland Human Rights Act 2019*: key features of the law and potential impacts for children with disabilities at school

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Madeleine Jensen, Samara Cassar and Abinaya Ketheeswaran

This paper was researched and drafted by UQ law students **Madeleine Jensen, Samara Cassar** and **Abinaya Ketheeswaran** with assistance from **Bridget Burton**, Director UQ Pro Bono Centre. It has been prepared for members of the community seeking to know more about the new Right to Education. It is based on questions from parents, carers and teachers. Student researchers undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession. It draws on earlier work by the same group with additional members **Rex Yuan** and **Liam O'Shaughnessy**.

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This document has been prepared by students from the TC Beirne School of Law at The University of Queensland to provide information about the Queensland Human Rights Act 2019. This law is very new and untested. It is the responsibility of the user to verify the accuracy, completeness, timeliness, quality or suitability for a particular use of this information. The University of Queensland make no claims, guarantees or warranties about the accuracy, completeness, timeliness, quality or suitability for a particular use of this information.

The Queensland Human Rights Act

On the 27th of February 2019 the Queensland Parliament passed the *Human Rights Act 2019* into law. The *Human Rights Act* protects 23 fundamental human rights and freedoms. The *Human Rights Act* will take effect in stages, with the option to make a complaint expected to come into effect in 2020.

The *Human Rights Act* represents an important development in the recognition of the essential role human rights play in a democratic and inclusive society.

The Queensland Act has been described as the most ‘broad reaching and accessible’ *Human Rights Act* in Australia. This is because, although the Act has been largely based upon similar legislation from Australian Capital Territory and Victoria, it also includes a right to have access to healthcare and education and provides a mechanism for complaints to be made to the Queensland Human Rights Commission.

The *Human Rights Act* applies to all state schools across Queensland.

What other mechanisms protect children with disabilities from discrimination within education system?

The *Anti-Discrimination Act 1991* (Qld) and the *Disability Discrimination Act 1992* (Cth) make discriminatory conduct in education unlawful. The legislation applies to all aspects of education and prohibits discriminatory conduct through direct or indirect exclusion, through the admission/enrolment processes, and in the general treatment of students.

Direct Discrimination

Direct discrimination occurs when a person or institution (such as a school) fails to make “reasonable adjustments” for a person with a disability or otherwise treats the person “less favourably” than he or she (or it) would treat a person without a disability in similar circumstances. Reasonable adjustments are also known as special facilities and must be provided unless this would cause unjustifiable hardship

Indirect Discrimination

Indirect discrimination occurs when a person or institution imposes apparently neutral terms or conditions which suit most people but with which people with a disability cannot, or are less able to, comply. For example, teaching in Standard English will suit most children but for many deaf students it makes equal participation in class almost impossible.

Difficulties under discrimination law

In both direct and indirect discrimination, it is accepted that inclusion, adjustments and accommodations for a person with a disability may require some expense and inconvenience. Generally, so long as it does not cause an unjustifiable or unreasonable hardship, a school needs to incur those costs and cope with the inconvenience. In practice, this has been more complicated than might be expected and has previously been the basis of many complaints. The *Human Rights Act* should provide better protection for children in Queensland schools.

Other laws and policy

All existing rights in other Acts such as the *Education (General Provisions) Act 2006* will continue to apply and, in addition, must now be interpreted compatibly with human rights principles. Policies such as Education Queensland’s Inclusive Education Policy will also continue to apply and may in fact become more authoritative and binding on schools now that it is backed up by the *Human Rights Act*.

The new Right to Education

The right to education in the *Human Rights Act* is in section 36 and says:

(1) *Every child has the right to have access to primary and secondary education appropriate to the child's needs.*

(2) *Every person has the right to have access, based on the person's abilities, to vocational education and training that is equally accessible to all.*

How will this section be interpreted by schools and the Queensland Human Rights Commission?

Some of the words in this section have been met with celebration and some with nervousness. Some parents have heard 'appropriate to your child's needs' used negatively to dismiss their legitimate concerns or to suggest a different learning environment to the one the parent has chosen for their child (eg, *a different school would be more appropriate, this one cannot meet your child's needs*). It is, however, highly unlikely that 'appropriate to the child's needs' has any sort of negative meaning in this new law. The *Human Rights Act* must be interpreted in a way that is compatible with the human rights it protects.

The *Human Rights Act* also encourages looking toward international law for help with interpretation. Access to education has been interpreted by the Committee on Economic Social and Cultural Rights as having 3 dimensions:

- Non-Discrimination - education must be accessible to all, especially the most vulnerable groups, both in law and in fact, without discrimination on any grounds;
- Physical Accessibility - education must be within a safe physical reach either by attendance at some reasonably convenient geographical location (e.g. a local school) or via modern technology (e.g. access to an online distance learning program); and
- Economic Accessibility- education must be affordable to all.

'Appropriate to the child's needs' is likely to mean that the child has a right to the adjustments, modifications and special facilities necessary to ensure that the school she attends is made appropriate to her needs (subject only to the restrictions specifically set out in the *Human Rights Act* itself). The teaching should be appropriate to her needs. Social and cultural opportunities should also be appropriate for her, and provided fairly. She will need to be kept safe and be included.

Other important rights within the Human Rights Act for children with disabilities in schools

As well as the Right to Education in section 36 there are other rights in the *Human Rights Act* which will help some students and families. Important rights include:

- Recognition and equality before the law, which includes a right to enjoy a person's human rights without discrimination – section 15
- Protection from cruel, inhuman or degrading treatment - section 17 and
- Privacy and reputation (including family and home) - section 25

The *Human Rights Act* also contains provisions that guide decision makers (including teachers and school principals, right up to Courts and Tribunals) when they make any decisions affecting someone else's rights. Decision makers must identify and give proper consideration to human rights, and must make decisions as far as possible in a way that is compatible with human rights. These provisions should lead to overall better, and clearer, decision making processes about all sorts of issues.

Common Questions

How will the Human Rights Act interact with existing funding programs for children with disabilities?

It is unlikely that the *Human Rights Act* will bring any immediate change to the way the 'Educational Adjustment Program' (EAP) is structured or delivered. That program allows Queensland schools to seek special funding for children with some specified disabilities from the Queensland government. Currently it is the responsibility of school principals to appropriately allocate EAP and other resources to support educational programs of students with disabilities and to ensure more inclusive education is achieved.

Parents with children not currently allocated EAP funding may find that the *Human Rights Act* helps them advocate for adjustments outside the EAP or 'verification' process. It is a common misconception that without funding or a 'verification' schools do not need to make adjustments for children who need them.

Children who require access to a special school will still be able to access special schooling. The *Human Rights Act* will apply within state special schools. It will also apply to distance education programs offered by the state, such as the School of Distance Education, as well as to other alternative delivery programs.

How individualised will 'inclusive practices' within mainstream schools need to be to comply with the Right to Education?

Schools will need to be very flexible. Inclusive education should provide all students with access to the facilities necessary to fully participate in learning, supported by reasonable adjustments and teaching strategies tailored to meet their individual needs. Parents can help by being as clear as possible about what works for their child and communicating this to teachers and schools in a collaborative way.

Many parents are concerned that currently flexibility often means shortened school days and delivery of only part of the curriculum – on the basis that their child seems unable to cope with full days in an unmodified school environment. That practice appears inconsistent with the provisions of the Convention on the Rights of Persons with Disabilities which says inclusive education must be directed towards the '*full development of human potential and sense of dignity and self-worth*'. Critically, persons with disabilities should receive '*[e]ffective individualised support in environments that maximize academic and social development, consistent with the goal full inclusion*'. If a practice is inconsistent with international human rights law, it will probably also be inconsistent with the *Human Rights Act*.

Can human rights be limited under the Human Rights Act?

Section 13 of the *Human Rights Act* allows for reasonable limits to be placed on human rights, which may be justified "in a free and democratic society based on human dignity, equality and freedom." When determining whether a limit is reasonable and justifiable, a number of factors may be considered. This is referred to as the '**proportionality test**'. The factors to consider when limiting a human right include:

- the nature of the human right
- the purpose of the limitation
- the relationship between the limitation and its purpose
- whether there are less restrictive and reasonably available options to achieve that purpose
- the importance of the purpose of the limitation, and
- the importance of safeguarding the human right.

The other way human rights can be limited is by different laws which impose limitations on human rights. The *Human Rights Act* deals with this by allowing decisions and actions that are not compatible with human rights if the decision maker '*could not reasonably have acted differently or made a different decision*' because of that other law (s58(2)). The various limitations mean that there will still be some balancing in difficult situations where there is a conflict of human rights, including when the behaviour of a student genuinely endangers another student or teacher. In exceptional circumstances Parliament may also override the *Human Rights Act* at the time it makes new laws (called an '*override declaration*').

Queensland Human Rights Commission - Complaints Mechanism

The Queensland Human Rights Commission

The *Human Rights Act* renames the Anti-Discrimination Commission Queensland as the Queensland Human Rights Commission (QHRC). The QHRC has several important functions which include:

- dealing with human rights complaints
- if asked by the Attorney-General, reviewing other laws to check they comply with human rights
- reviewing public entities' policies, programs, procedures, practices and services to check they are compatible with human rights
- promoting an understanding and acceptance, and the public discussion, of human rights
- making information about human rights available to the community
- providing education about human rights and the *Human Rights Act*

How does the human rights complaints procedure work?

The *Human Rights Act* introduces a dispute resolution system based on complaint and dialogue (conversation). In the first instance, individuals may make a complaint to the relevant public entity, in this case the school. If the complaint cannot be resolved directly, a person may make a complaint in writing to the QHRC.

Through its conciliation processes, the QHRC aims to “*seek meaningful resolution of the human rights complaint in a way that is relatively informal.*” They will normally do this by having a ‘conciliation conference’. A conciliation conference is a round-table meeting which will normally be held with all the parties in the one room together. Each person has an opportunity to speak and the conciliator helps them to come to an agreement. Complaints will be able to be made to the QHRC from 2020. If the parties reach an agreement it will be written down and must be complied with.

If an agreement cannot be reached that will be the end for many complaints. The QHRC will not be able to make a binding decision about any of the complaints it handles, although it may report on complaints (after removing names and other identifying features) and say publically what it thinks should be done.

Unlike most legal disputes, people will not usually be able to take breaches of the *Human Rights Act* to a Court or Tribunal. The only time a *Human Rights Act* case can go to a Court or Tribunal will be if the person has a different sort of legal action they can bring. In that situation they can also ask the Court to consider the *Human Rights Act* as well as the other legal issue. This is known as ‘piggybacking’ which just means there needs to be a right to bring a legal action under another law in order to also raise human rights arguments. A discrimination complaint would be an appropriate other legal action onto which a *Human Rights Act* argument could be ‘piggy-backed’. It is not necessary to win the other legal action in order to be successful for a breach of the *Human Rights Act*.

For legal advice or to make a complaint

Legal Aid Queensland 1300 651 188; www.legalaid.qld.gov.au

Queensland Advocacy Incorporated (07) 3844 4200; www.qai.org.au

Basic Rights Queensland 1800 358 511; www.brq.org.au

Caxton Legal Centre (07) 3214 6333 www.caxton.org.au

Australian Human Rights Commission 1300 656 419; TTY 1800 620 241 (toll free); www.ahrc.gov.au

Queensland Human Rights Commission 1300 130 670 www.adcq.qld.gov.au