



# The Right to Education – section 36

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# Human Rights Act 2019 (Qld)

Major implications:

1. **Laws must be interpreted** in a way that is 'compatible with human rights' (to the extent this is consistent with their purpose) (s48(1))
2. **Public entities must:**
  - (a) make **decisions in a way** that is compatible with human rights;
  - (b) give **proper consideration** to relevant rights when making decisions (s58(1))
3. Aggrieved persons can:
  - (a) make a **complaint to the Queensland Human Rights Commission** if they believe a public entity has contravened s58(1); (s59)
  - (b) seek **relief or a remedy through legal proceedings** in respect of a contravention of s58(1) if there is some other cause of action available to them [eg. discrimination; judicial review] (s64)

# *Human Rights Act 2019 (Qld)*

- **Civil and political rights, including:**
  - Equality before the law
  - Right to life, and protection from cruel, inhuman, degrading treatment
  - Freedom of thought, conscience, religion and belief, and freedom of expression
  - Peaceful assembly and freedom of association
  - Privacy and reputation
  - Protection of families and children
  - Right to a fair hearing
  - Humane treatment when deprived of liberty
  - Cultural rights – generally, and Indigenous-specific
  - Criminal process rights, eg. rights of children, right not to be punished more than once
- **Economic, social and cultural rights:**
  - **Right to education**
  - Right to health services

# Education rights – the status quo

- **Obligation on parents** to enrol school aged children in school and ensure the child attends; *Education (General Provisions) Act 2006* (Qld) s176(1)

But it's not always that simple...

- **Only legal avenue** for parents who are aggrieved is through **discrimination law**.

But it's not always that simple...



# Human Rights Act 2019 (Qld)

## Section 36 – Right to education

- (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 further vocational education and training that is equally accessible to all.

# Right to education – other States/Territories

- ***Human Rights Act 2004 (ACT) s27A (added 2012)***
  - (1) Every child has the right to have access to **free**, school education **appropriate to his or her needs**.
  - (2) Everyone has the right to have access to further education and vocational and continuing training.
  - (3) **These rights are limited** to the following immediately realisable aspects:
    - (a) everyone is entitled to enjoy these rights **without discrimination**;
    - (b) to ensure the **religious and moral education** of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.
- Victorian *Charter of Human Rights and Responsibilities 2006* does not include a right to education.
- ***Education and Training Reform Act 2006 (Vic)*** states that all Victorians 'should have access to high quality education' - but this provision does not give rise to a civil cause of action (s 1.2.3).

# Right to education – interpretation and application

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

BUT 'appropriate to the child's needs' is not defined, and is contestable

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

BUT isn't this internally inconsistent?

- *How should the provisions be interpreted?*
- *How should the provisions be applied?*
- *What kinds of matters are likely to be the subject of complaints?*

# Right to education – in international law

## *International Covenant on Economic, Social and Cultural Rights art 13:*

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the **full development of the human personality and the sense of its dignity**, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall **enable all persons to participate effectively in a free society**, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - (a) Primary education shall be **compulsory** and available **free** to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and **accessible to all by every appropriate means**, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made **equally accessible to all, on the basis of capacity**, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) **Fundamental education** shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The **development of a system of schools** at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. ...



# Right to education – in international law

## *Convention on the Rights of Persons with Disabilities art 24:*

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right **without discrimination** and **on the basis of equal opportunity**, States Parties shall ensure an **inclusive** education system at all levels and lifelong learning directed to:

- a. The full development of **human potential and sense of dignity and self-worth**, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, **to their fullest potential**;
- c. Enabling persons with disabilities to **participate effectively** in a free society.

# Right to education – in international law

## *Convention on the Rights of Persons with Disabilities art 24:*

2. In realizing this right, States Parties shall ensure that:

- (a) Persons with disabilities are **not excluded** from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- (b) Persons with disabilities can access an **inclusive, quality and free primary education and secondary education on an equal basis** with others in the communities in which they live;
- (c) **Reasonable accommodation** of the individual's requirements is provided;
- (d) Persons with disabilities **receive the support required**, within the general education system, to **facilitate their effective education**;
- (e) Effective individualized support measures are provided in environments that **maximize academic and social development**, consistent with the **goal of full inclusion**. ...

# Right to education – Education Queensland

## *Education Queensland Inclusive Education Policy, 2018:*

‘Inclusive education means that students can **access and fully participate** in learning, **alongside their similar-aged peers**, supported by reasonable adjustments and teaching strategies tailored to meet their **individual needs.**’

‘Our commitment means that children and young people across Queensland, from all social, cultural, community and family backgrounds, and **of all identities and all abilities** can:

- **attend their local state school** and education centre and be welcomed
- access and participate in a high-quality education and **fully engage in the curriculum** alongside their similar-aged peers
- learn in a **safe and supportive environment**, free from bullying, discrimination or harassment
- **achieve academically and socially** with reasonable adjustments and supports tailored to meet their learning needs.’

# What kinds of matters?

## 1. Impairment categories

- Education Adjustment Program (EAP) limited to children with: Autism (ASD); Hearing Impairment (HI); Intellectual Impairment (II); Physical Impairment (PI); Speech-Language Impairment (SLI); Vision Impairment (VI).
- Compare with *Anti-Discrimination Act 1991* (Qld) s 4.
- Support is available to all children, but other children do not have access to the EAP, and do not have an 'EAP Profile' (IEP).
- Notable omissions: Medical conditions (eg. epilepsy); Learning disorders (eg. dyslexia); ADHD; Mental illnesses

# What kinds of matters?

## 2. Suspensions and exclusions

- In 2017, 7% of state school students were subject to a **disciplinary absence**, including over 1000 prep students (Brisbane Times, 12/9/2018)
- **Parents of children with disabilities** commonly complain that:
  - Their child has been refused enrolment
  - They have been told their child would be better off at another school
  - Home schooling their child has been suggested to them

## 3. Accessibility

- Many children under the care of the Department of Child Safety do not attend school, particularly **children in residential care** (Walsh, 2019)  
(Even though failing to enrol a child in school or to ensure a child attends school is an offence under the *Education (General Provisions) Act 2006* s176)

# What kinds of matters?

## 4. Most commonly... (perceived) failure to make reasonable adjustments or provide special facilities or services for children with special needs

- Parents of children with special needs often complain that their child:
  - Does not have sufficient **teacher aide time**
  - Is being **bullied** by other students
  - Is being subjected to '**micro-segregation**'
  - Is being subjected to **restrictive practices**
  - Is being **excluded from certain activities**, eg. excursions, swimming lessons, carnivals, camps
- Parents may feel under pressure to enrol their child in a **special school** or to **home school** their child.

# Limits on the right to education (section 13)

Of course, there are limits... The following factors may be relevant under s13(2):

- **Cost:** *Woodbury v Australian Capital Territory* [2007] ACTDT 4
  - BUT most of the time you just need a bit of imagination
- **Perceived impact on other students:** *Purvis v NSW* (2003) 217 CLR 92
  - Physical safety and wellbeing of others – could be a reasonable limitation
  - BUT most students are supportive of children with special needs, and inclusion benefits everyone; must be a **proportionate response** to the risk
- **Less restrictive and reasonably available ways to achieve the purpose:** *Finney v Hills Grammar School* [2000] FCA 658
  - BUT most often, everyone wants the best outcome for the child – they may disagree on how to achieve it
    - => conciliation is so important

# Conciliation and the right to education

- Likely outcomes (based on discrimination complaints):
  - apologies;
  - review of school's policies;
  - agreement to develop IEP;
  - additional teacher aide support;
  - provision of other supports or modification to infrastructure;
  - provision of special equipment;
  - agreement to provide staff training;
  - review of enrolment procedures;
  - reversal of decision to restrict attendance





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