

## **Review of Queensland Anti-Discrimination Act 1991 (Qld)**

### **Submission**

#### **By Rita Jabri Markwell**

1. This submission will argue the Anti-Discrimination Act 1991 (QLD) provides a slippery slope for the wellbeing, security, and education of a disabled child, as their human rights are compromised by the *reasonable terms* defence and the unjustifiable hardship defence to the extent that litigation becomes redundant for affected families.
2. Further, it will argue that due to not striking the appropriate balance, the Act insulates schools from the legal actions that would prompt necessary systemic change to funding models, thereby further entrenching inequity.
3. It puts forward several recommended amendments.

#### **Siracusa Principles**

4. A person's right to self-determination and security of person are fundamental human rights in the *International Covenant on Civil and Political Rights*. When a child or adult with a disability is placed in jeopardy by an unsafe educational environment, this erodes their sense of security and ability to fully self-determine by participating in economic, cultural, social, and political life.
5. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* provides that restrictions on these rights in the name of public health, safety, morale, and order be strictly necessary, proportionate, and the least intrusive available.
6. The defences provided by the Anti-Discrimination Act 1991 (Cth) enable, legitimise and normalise a derogation from the fundamental human rights of disabled children and adults by supporting inappropriate scenarios where that person's security or self-determination may be lawfully ignored.
7. This submission contends that the only lawful limitation on the safety, security, and self-determination of a disabled child or adult in the area of education and training can be to secure the health and safety of other students within that system – and any limitation must be strictly necessary, proportionate and the least intrusive available to reach that objective.

#### **Making Reasonable Adjustments**

8. The National Disability Standards on Education rely on the concept of 'adjustment' to place a positive obligation on education providers to take measures to assist a student with a disability. However, it rates this adjustment as a 'reasonable adjustment' as opposed to a necessary one, which would be a more faithful interpretation of General Comment No.4 on Art 24.<sup>1</sup>

---

<sup>1</sup> <https://www.refworld.org/docid/57c977e34.html>

## Limits imposed by ADA

9. The Anti-Discrimination Act 1991 (QLD) also limits positive obligations on educational providers with the unjustifiable hardship provision.

### SECTION 44 - SPECIAL SERVICES OR FACILITIES REQUIRED

(1) Subject to the [Education \(General Provisions\) Act 2006](#), it is not unlawful for an educational authority to discriminate on the basis of impairment against a person with respect to a matter that is otherwise prohibited under *subdivision 1* if—

- (a) the person would require special services or facilities; and
- (b) the supply of special services or facilities would impose [unjustifiable hardship](#) on the educational authority.

(2) Whether the supply of special services or facilities would impose [unjustifiable hardship](#) depends on the circumstances set out in [section 5](#).

### SECTION 5 - MEANING OF [UNJUSTIFIABLE HARDSHIP](#)

Whether the supply of special services or facilities would impose "**unjustifiable hardship**" on a person depends on all the relevant circumstances of the case, including, for example—

- (a) the nature of the special services or facilities; and
- (b) the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged; and
- (c) the financial circumstances of the person; and
- (d) the disruption that supplying the special services or facilities might cause; and
- (e) the nature of any benefit or detriment to all people concerned.

10. That defence applies whether direct or indirect discrimination is alleged.

11. Further, in the case of indirect discrimination, a discriminatory term imposed by an education provider can be found to be lawful if the education provider can prove it is reasonable:

### SECTION 11 – MEANING OF INDIRECT DISCRIMINATION

(1) Indirect discrimination on the basis of an attribute happens if

a person imposes, or proposes to impose, a term—

- (a) with which a person with an attribute does not or is not able to comply; and
- (b) with which a higher proportion of people without the attribute comply or are able to comply; and
- (c) that is not reasonable.

(2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example—

- (a) the consequences of failure to comply with the term; and

(b) the cost of alternative terms; and

(c) the financial circumstances of the person who imposes, or proposes to impose, the term.

(3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.

(4) In this section –

term includes condition, requirement, or practice, whether or not written.

12. This submission contends that section 44 and the carve-out of reasonable terms in section 11 are too broad in the context of disability education. These provisions enable the departure from the fundamental rights of disabled persons beyond what is 'strictly necessary' or 'proportionate' to the aim of securing public health, safety, or morale. Further, the Anti-Discrimination Act articulate the legitimate aims as per international law that may justify such a departure.
13. Additionally, from a policy perspective, this framework encourages individualised 'add-on' responses by education providers to bridge gaps between mainstream education settings a disabled student rather than using a 'safety by design' planning perspective in the original distribution of classroom resources. This enables an enormous variation of interpreted standard for 'reasonable adjustment', meaning some students with engaged school leadership, experienced teachers, and parent advocates will secure excellent adjustments – and others will not. ***A framework that increases systemic performance is needed.***
14. The outcome of this individual-focused framework is that it is left to individuals to stand up to transgressions of discrimination law – transgressions which are usually created by systemic issues. The disabled student and their advocates must see if a Court will discern the adjustment to be reasonable and survive any defence from the state based on unjustifiable hardship. This is highly discouraging to most families. If a family seeks advice from community legal advocates, they most often discourage the family from pursuing a legal complaint.
15. I have been through the QHRC and QCAT with a discrimination complaint against an education provider. I was self-representing. Education Queensland were unaware that I was a lawyer by background. Although I am limited in what I can advise, I will say that there is little incentive on Education Queensland to settle until their reach the QCAT stage. Settlements of course are not helpful to bringing about systemic change, and unless the family advocate is very skilled, the settlement is unlikely to fix the situation.
16. The Anti-Discrimination Act is not user-friendly for the community or advocates because it reserves so much power for Education Queensland that the school's incentive to mediate and problem solve at any early stage is not present.

## **RECOMMENDATIONS**

### **Removing section 44 (unjustifiable hardship)**

17. One option is to remove section 44. This would mean that when a discrimination complaint is lodged, it is up to the education provider to establish that the discriminatory conduct (whether direct discrimination or indirect discrimination through an implied term) against a disabled student, demonstrated by falling short on any of the National Disability Standards on Education, was strictly necessary, proportionate and the least intrusive option to achieving a legitimate aim – such as the public health and safety of other students. If this cannot be established, the case for discrimination is made.

#### **Alternative - Replacing section 44**

18. It might be prudent to specify the exemption, which would replace section 44. The exemption could simply state that:

An act by an education provider is not unlawful discrimination if it was strictly necessary, proportionate, and the least intrusive option available to achieve the public health or safety of other students and staff.

#### **Further qualification to section 11**

19. Further, after section 11 on indirect discrimination, I submit that further qualification should be provided. This qualification could state to the effect:

A term or condition that denies adjustments needed by a child with a disability in an education environment is not reasonable. To determine if the adjustment is necessary, a tribunal shall consider the effect on the student's

- (i) Ability to achieve learning outcomes;
- (ii) Ability to participate in courses or programs;
- (iii) Sense of security, safety, and wellbeing; and
- (iv) Independence

#### **Public test case funding for children with disabilities**

20. Finally, this submission questions whether the Anti-Discrimination Act is compliant with the right to education under the Queensland Human Rights Act and calls for public funding to support test cases for children with disabilities to test this.

#### **Human rights transparency reports by education providers**

21. The legal obligations in the Disability Education Standards already outline what disabled students and their associates can expect from education providers. This is comparable to recommendations in the online safety law environment to social media companies to adopt standard expectations about how they will mitigate the realisation of harm on users. By analogy, education providers have minimum expectations to demonstrate how they mitigate the risk of discriminatory treatment of disabled students. Transparency reports would give more power back to families and community rather than having to rely on anecdotal reports from other families about how seriously a public school takes inclusion. Currently, children and their families must often experiment through a range of schools at a significant cost to their child's psychological wellbeing and prospects for living life with a measure of independence.

#### **CONCLUSION**

22. Suppose a parent wishes to challenge a school for discrimination against their child with a disability. In that case, the argument will often be won or lost at the question of whether adjustments were reasonable or whether a school suffered an unjustifiable hardship.
23. Suppose an education provider cannot afford the cost or inconvenience of making necessary adjustments. In that case, it is not the student with a disability and their family that should bear the impact.
24. These exceptions give more off-ramps for education providers in discharging their duty of care to disabled students, rather than incentivising them to factor the necessary costs into their service model. As such, this law not only critically dilutes fundamental human rights by disabled

people at law but contributes to chronic disparities in inclusive education provision. Regrettably, the Anti-Discrimination Act, as it stands, reinforces discrimination. The 'unjustifiable hardship' provision must be deleted or significantly narrowed.

25. The Anti-Discrimination Act should aim to encourage continual improvement and best practice, not complacency and minimum effort. This submission has argued that the 'reasonable adjustment' and 'unjustifiable hardship' provisions work to focus education providers on the wrong questions, thereby entrenching discriminatory design and practice. Together they also work to dilute the fundamental rights of students with disabilities at law, discouraging students and their associates from enforcing their rights – again entrenching complacency amongst education providers.
26. While it is commendable that education providers are moving towards 'inclusive education' in policy and intent, the compromised legal frame provided by these Anti-Discrimination Act will persistently undermine the design, leadership, and systemic changes required to bring that policy into reality.

**Rita Jabri Markwell**  
**1 March 2022**

Background on the Author

I am a solicitor who was involved in two successful ADA Act complaints (one by settlement). I am also a public policy advisor in the field of online safety law, a former teacher, and most importantly of all, a parent of a child with a disability.