

Human Rights Month 2019 Speaker Series: “What is the right to education?”

Presented by Professor Tamara Walsh, TC Beirne School of Law,
University of Queensland.

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SCOTT MCDOUGALL, QUEENSLAND HUMAN RIGHTS COMMISSIONER: I'd like to acknowledge the traditional owners of the particular land we're meeting on today, which is the Turrbal people, and pay our respects to their elders, past and present. Obviously when we're talking about the right to education and we're talking about rights generally, Aboriginal people come right front and centre into the frame and today's presentation, I think, will bring that to the fore quite clearly.

Today's speaker I'm really proud to have doing our very first speech of the human rights speaker series for Human Rights Month. It's something the Commission has been doing for a number of years, but it's great to have a Human Rights Act to talk about in Human Rights Month, rather than just a concept. Here we are on the cusp of implementing this Act and it's a great way to promote it in this Human Rights Month leading up to the anniversary on 10 December.

So today's speaker is a colleague of mine and a friend who I've had the good fortune of working closely with for probably 15 years or so, going back to a campaign on rights to public space back in the mid-2000s. Professor Tamara Walsh has degrees in both law and social work and her interest is in social welfare and law. Her research studies examine the impact of law on vulnerable people, including children and young people, people experiencing homelessness, people on low incomes, people with disabilities, mothers and carers. Most of her studies are sociolegal and empirical in nature and she draws on human rights discourse to explore the influence that the law has on complex social problems. This one is very complex.

Her research has spanned 15 years and has been widely published both in Australia and internationally. She undertakes pro bono legal practice in her spare time in child protection and lectures in human rights law and family law. Ladies and gentlemen, would you please welcome Professor Tamara Walsh to deliver our first speech in Human Rights Month. Thank you.

PROFESSOR TAMARA WALSH, UNIVERSITY OF QUEENSLAND: Thank you, Scott. Thank you. Can you hear me okay? Is that working? Yes. Wonderful. Thank you, Scott, for that introduction. I'd also like to acknowledge the traditional owners of the land on which we meet today and pay my respects to the elders past, present and emerging. I'd also like to acknowledge any Indigenous people in the room today and thank them for their service to our community, and also acknowledge all of the Indigenous educators out there that our children are privileged to know and learn from; I know my children have benefitted hugely from the wisdom of the Indigenous women they've had the pleasure of knowing throughout their education.

Well, you would be aware in March this year parliament passed our Human Rights Act and we're now one of three jurisdictions in Australia that has human rights legislation, Victoria

and the ACT being the other two. Now, we are going to talk about the right to education today but I figured that since this is the first presentation in a series that it might be worth me starting with just a bit of an overview on what some of the legal implications are of this new Act, but I see here you have some wonderful resources on your chairs that pretty much say exactly what I'm about to say. So that is available for you to peruse and is I think a really good summary.

If I could just start with some of those - the major legal implications. So the first one as you will see is that laws must be interpreted in a manner that is consistent with human rights to the extent that that is possible, consistent with their purpose. So that means that all legislation, and that includes delegated legislation, has to be read and applied with human rights in mind. Now, of course, there's a long list of human rights that are included in the Act and you have a list of those in your resources here, I'll come back to those in a moment as you saw.

Secondly, the public entity provisions. So public entities are government entities and so that's defined as including anything from public service employees to ministers to entities that exercise public functions - state schools are an example of that. Public entities, as of January 2020, will be required to act and make decisions in a way that is compatible with human rights and in making decisions they'll be required to give proper consideration to relevant human rights. Now, the bar for proper consideration is set quite high by the Victorian courts. So the Victorian courts have said, it's not enough to invoke a charter-like mantra. So it's not enough to say, 'we've considered human rights and we've decided this'.

What the courts in Victoria look for is a really clear engagement with all relevant human rights. They require documentation to prove that genuine engagement; a check-list is not enough. It's not enough to give lip service to human rights but rather what they've said is a true weighing up of balancing human rights against countervailing public and private interest is needed, along with public evidence that that has occurred.

Thirdly, we now have a new complaints mechanism available for people who believe that their human rights have been breached under the Act. So aggrieved persons will be able to make a complaint to the Queensland Human Rights Commission and the Commission will be able to determine whether to take that matter to a conciliation conference. Now, I'll talk a little bit more about conciliation in a moment. It's important to note that the other human rights jurisdictions don't have that avenue available to them. This is the first opportunity that we've had to see how this mechanism could work in Australia. So those of us who are sitting by watching are very excited to see what the implications of that will be.

The other avenue for potential complaint is through legal proceedings. The only time people would be able to do that is if they have another cause of action that they can come to the courts with. So people won't be able to go straight to a court with a human rights complaint, they will need another cause of action to piggy back their human rights complaint or two. What's an example of another cause of action? Things like anti-discrimination law are the obvious example in light of today's application, judicial review applications, so are any situation where a decision-maker has capacity to exercise discretion. Often there will be an opportunity to make human rights arguments in addition to those kinds of matters.

So in terms of what human rights are covered, you have that information before you. These are only some of them. From a legal perspective it's important to note that they split into civil and political, and economic, social and cultural rights. One thing that's unique about the Queensland Act is the separation of our two cultural provisions. There is a specific Aboriginal

and Torres Strait Islander cultural rights provision and a general cultural rights provision. Some of these other rights are relevant to the discussion today, particularly the protection of children's best interests, right to a fair hearing and of course the right to an education.

Before I talk a little bit about what the differences might be once the right to education becomes applicable, I thought it might be worth just having a bit of a discussion about what things look like at the moment - what the status quo is. So at the moment parents have a legal obligation, as you all know, to send their children to school and to enrol them in a school but, of course, it's not always that simple. For parents with children with disabilities, many of them report gate keeping by schools. Situations where schools will not accept the enrolment of a child or will suggest to the parent that their child would receive more or better support at another school.

Once a child with disabilities is enrolled, again that's not the end of the story. Often parents will allege their parents isn't receiving the amount or type of support that they think they require to achieve socially and academically. Whether that perception is justified is another issue, but in the event that they wish to take the complaint further, the only avenue they currently have is through a legal discrimination complaint. That's not a simple matter either. So parents will often not want to argue discrimination in their particular instance. They just want what's best for their child. They just want a good outcome and many of them won't want to go to a tribunal and allege that their child has been prejudiced against or mistreated as a result of their disability.

Also if they're seeking to have their child enrolled in a school or to keep their child at a school it's not helpful for them to go in and set up an adversarial relationship with staff. What we'd all like to see is an opportunity for those relationships to be maintained and even strengthened through the process. That's not how it is at the moment. The other difficulty that parents experience when they do take their matter through the discrimination route is that they find quite quickly that it's difficult to meet the legal test for discrimination. So even though everyone in the room might agree that perhaps things could have been done better or differently, a parent might not actually legally be able to prove that their child was discriminated against on the basis of their disability.

So it's our belief with the status quo in mind that the introduction of the right to education has the capacity to bridge this gap. It allows the focus to be on the outcome rather than why or how we didn't manage to get there. Interestingly, also many of us believe that a lot of human rights based action is going to occur within the right to education space. The reason we think that is because disability doesn't discriminate on the basis of family background or income. So there are a lot of very well resourced people, a lot of very well educated people whose children have disabilities and who feel really frustrated with the process as it exists. So many of us believe that these parents are going to be relieved that there is potentially another avenue of redress available to them and we feel that they might choose to take it.

So this is what the relevant section looks like. Section 36 says that every child has the right to have access to primary and secondary education appropriate to the child's needs. 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. Now, the ACT Human Rights Act also has a right to education. It wasn't in the original version of the Act, it was added in 2012. They're quite similar provisions. The difference is, I suppose, that the ACT Act has an additional subsection (3) which says the right to education is limited to ensuring non-discrimination and to protecting parents' rights to choose schooling for their child in conformity with their own convictions. In the Queensland Act the right to non-discrimination

in exactly those terms is protected at section 15 (2), so I wonder if that's why there was a decision made not to copy the ACT provision.

Also interestingly to note that the Victorian Charter of Rights and Responsibilities doesn't have a right to education within it. The Education and Training Act includes a section that says Victorians should have access to high quality education but there's no capacity to enforce that. So it's not a legal right per se.

Now, in terms of our provision, there are a couple of ambiguities that are subject to a bit of discussion at the moment in legal circles. First of all, appropriate to the child's needs isn't defined and of course it's contestable. And equally accessible to all based on the person's abilities seems like it could be internally inconsistent - how can something equally accessible also be based on a person's abilities? I wonder also if that provision is potentially inconsistent with discrimination law in the sense that discrimination legislation would require that reasonable adjustments be made so that the person's abilities are already taken into account and appropriately accommodated. I don't know. All of this is going to be up for discussion and debate. As I say, there's already quite a bit of discussion going on about these things and quite a bit of discussion about what kinds of matters are likely to be the subject of complaints and I'll talk more about that in a moment.

In terms of predicting how the provisions will be interpreted, our best source of guidance is the ICESCR, the International Covenant on Economic, Social and Cultural Rights. Section 48 (3) of our Human Rights Act says that we can look to international law to assist us in interpreting a provision and we're told in the explanatory note to the Human Rights Act that this is the article that our provision is based on. So what I find interesting about this provision is the emphasis on the role education plays in the development of the personality, one's sense of dignity and one's capacity to participate in society.

I think it's really important to recognise the role that education plays in enabling people with disabilities, in particular, to realise their other human rights. The Committee on the Rights of Persons With Disabilities has noted that education is the primary means by which persons with disabilities can lift themselves out of poverty and participate fully in their communities. It's also the primary means by which whole societies can achieve inclusivity because fundamental cultural shifts occur when you create an educational environment that values diversity. That recognises that people have the right to learn and the right to fulfil their potential.

I would note also the mention of fundamental education there which has been defined as basic literacy and numeracy. In my research on poverty and homelessness, this is something I come across a lot in the sense that you'll be aware of course that many young people disengage from the education system quite early when they're living in chaotic households and what that means is that as adults they can end up missing some of those really fundamental skills and my feeling is that this is a really important gap in the adult education system that needs to be fulfilled and in so many studies I do that's what people are crying out for.

If we also look at the Convention on the Rights of Persons With Disabilities we see again an emphasis on inclusivity and opportunity and the right to achieve their fullest potential and participate effectively in society. If we look further again, we see the goal of full inclusion being mentioned, and the important fact that this is made possible only by the reasonable accommodation that we make within our systems to support people with disabilities to receive that effective education.

Now, none of this is inconsistent with Education Queensland policies, as many of you will know. If we have a look at the Inclusive Education Policy we see very similar sentiments. The idea that children should be able to be educated at their local school, they should be able to be educated alongside their similar aged peers, they should be supported to access the curriculum and participate...It also affirms a need to comply with obligations under discrimination law, to provide those reasonable adjustments that are necessary.

So it would seem then that in philosophy there's no difference but our concern is that in practice there might need to be. There are a few issues that we have identified in the course of our work that might be worth mentioning as potential areas of complaints in future. So the first one is the impairment categories under the education adjustment program. I've been saying for a long time that I think these are legally problematic and I'm surprised this hasn't yet been litigated. Many of you would be very aware of these. For those of you that aren't, in order for a child to be eligible for the education adjustment program in QLD they need to be verified as coming within one of six impairment categories. They are these: autism, hearing impairment, intellectual impairment, physical impairment, speech-language impairment, and vision impairment.

It's not all that easy to be verified. For instance, not all levels of hearing impairment will be included, and anecdotally schools will say it's virtually impossible to get a child verified under the speech and language category, although I gather those criteria have recently changed. If a child isn't verified, as coming within one of these impairment categories, they won't be eligible to access the EAP. Now, that doesn't mean they won't receive support. That would be unlawful. But it does mean they won't automatically access the same type or level of support as a child who is verified under one of the impairment categories.

Now, it's patently obvious in looking at these that there are a number of disabilities that are not included in that list. The obvious examples are ADHD and other behavioural related disorders, epilepsy and other medical conditions, dyslexia and other learning disorders, and of course mental illness. In my view, this is a classic case of indirect discrimination. I'm surprised it has not yet been litigated yet. There's a chance it might be in the future.

Secondly, many of us, no doubt many of you in this room, are concerned about the rate at which children are being suspended and excluded from schools. You'll be aware no doubt that it was reported in the media last year that 7% of state school students were subject to disciplinary absences in 2017, including over a thousand preps. I don't have access to the data, but for those of you who do I'm sure you would find that many and possibly most of these kids would come under the definition of disability under the Anti-Discrimination Act. Parents constantly complained their children are refused enrolment and that their children are dealt with once they are enrolled in ways that involve excluding the child, or restricting the number of hours they are permitted to attend to school. Clearly that's a potential compromise of their right to education.

Once the Act comes into effect, they will need to demonstrate that exclusion is the least restrictive alternative available to them in order to be rights compliant. Thirdly, other areas of my research are suggesting that we may have a problem with accessibility that not all children of school age are attending school. My research would suggest it is a particular problem with respect to children in out of home care, especially those who are in residential care. In fact, in a study I just released, I had a number of youth workers and lawyers say to me, 'none of my kids in residential care attend school'. Again, I think this is an area that

might end up the subject of a complaint and to my mind it's a clear breach of the Education Act before you even start talking about human rights.

Of course, the complaints that we most commonly see as lawyers are around the failures to make the reasonable adjustments that the parents are requesting. So that can include all kinds of things like being excluded from swimming or excursions, being bullied and also being subject to practices like micro segregation, which is where the child is placed in a room away from their peers for some or sometimes all of the day. In situations like that many parents will say, well, if my child is not going to be in the classroom I may as well home school them. Many parents report to us they feel pressured to home school their children under those situations. Again, that is arguably a potential breach of a child's right to education. Certainly that will be up for debate when the Act comes into effect.

What I would say to both sides of the equation, we all need to come to the table with an open mind and with the best interests of the child in mind first and foremost. Now, of course, my experience if all parties already view the situation that way, I hope that conciliation provides us with an opportunity to bridge the gap between parties in these sorts of situations. I think it's easy to become alarmist but I think I can reassure you that unreasonable outcomes are highly unlikely. Section 13 of our Human Rights Act reminds us that all human rights are subject to limitation. There are a number of reasonable limitations that might apply in these kinds of cases. Cost is one example.

Sometimes it will impose an unreasonable cost burden on the department to accommodate certain requests of parents but equally in many cases there's no or little cost required to make many of these adjustments. A colleague of mine in the UQ School of Education, what she does for a living is determine what kinds of changes or adaptations can be made to the curriculum to make it accessible for children with disabilities. She always says all that's needed is a bit of creativity.

Sure, impacts on other students are something we need to take into account and ensuring the physical safety of students and staff may be a reasonable limitation of an individual child's human rights when it's serious enough. Experience and research would suggest that having a child with disabilities in a mainstream classroom is good for everybody. It's good for the other students in the class, good for teachers and it's good for the child themselves. Benefits accrue to everyone. I think that should probably be our starting point and, of course, according to the Act, any limitation that is placed on human rights needs to be proportionate to the risk that's posed.

Importantly, the best indication we have in terms of where the line is between reasonable and unreasonable, is the concept of least restrictive alternatives. Both international case law and Victorian case law would suggest to us that if a public entity can demonstrate genuine engagement with every relevant human right, if they can prove that that was documented at the time and if they can demonstrate that the action that they took was the least restrictive alternative available to them then a court will generally find in their favour.

So genuine thought needs to be given to what the best response is in light of relevant human rights. It's important that we come to the table with an open mind. I think in the context of human rights, conciliation is really appropriate and potentially really useful in addressing these kinds of complaints. Many of us believe that better outcomes will come from being able to sit down and talk about these things rather than teachers and schools seeing parents as litigious and parents seeing schools as unhelpful and discriminatory.

All of the evidence suggests that the flood gates won't open. There's no evidence from other jurisdictions to suggest we will suddenly get lots and lots of matters coming before the courts. If we do, these are the most likely outcomes based on outcomes of conciliation complaints in discrimination. They're much more likely to involve action than compensation. That's what parents tend to want.

So really the benefits that can accrue from us all being able to sit down and talk about this, I think, are important and I would, again, just emphasise that it's unlikely that we're going to see lots of litigation and lots of conflict. I think the benefit of human rights is that we might actually be able to get around that.

Thank you.