

Review of Queensland's Human Rights and Anti-Discrimination Framework

INDEPENDENT SCHOOLS QUEENSLAND SUBMISSION



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About Queensland Independent Schools

Community confidence in the independent schooling sector remains strong with more than 160,000 students enrolled in more than 230 independent schools across Queensland. These schools educate approximately 18 per cent of the state's total school-age population.

Independent schools are valued institutions and a pivotal part of Queensland's education system. They are valued schooling choices for families, hubs of human and community connection, places of intellectual, civic and social development, employers and employment generators, education innovators and change-makers.

Independent schools are as unique as the communities they serve and offer parents a choice in the education of their children. Common to all independent schools is their commitment to strong student outcomes, high standards of behaviour, and the welfare and wellbeing of students.

Many independent schools educate international students or specialise in the education of students with disability. There has also been strong growth in the number of Special Assistance Schools for students who have disengaged from mainstream schools, and trade training schools that combine senior year studies with practical vocational education and training.

Over the past five years, enrolments at Queensland independent schools have increased significantly. This growth is a clear indication that parents value an independent education and are prepared to invest their after-tax incomes in their child's schooling.

Independent Schools Queensland (ISQ) is the peak body representing Queensland's independent schooling sector. Independent Schools Queensland represents the interests of its member schools, fosters choice in education and protects the autonomy of independent schools. ISQ is a not-for-profit organisation and membership of ISQ is voluntary.

Review of Queensland's Human Rights and Anti-Discrimination Framework

Independent Schools Queensland (ISQ) welcomes the opportunity to respond to the Independent Strategic Review of Queensland's human rights and anti-discrimination framework, including the operation of the *Human Rights Act 2019* (Qld) (HRA) and the *Anti-Discrimination Act 1991* (Qld) (ADA), and the uncommenced amendments to the ADA made by the *Respect at Work and Other Matters Amendment Act 2024* (Qld) (Respect at Work Act).

ISQ supports a framework that effectively protects people from unlawful discrimination and promotes respect for human rights. At the same time, the framework must be clear, proportionate and capable of practical implementation.

Independent schools already operate within a complex regulatory environment. Whilst independent schools are not public entities under the HRA, they have obligations under the ADA, as well as Commonwealth anti-discrimination legislation, employment and work health and safety laws, child safety requirements and education-specific regulation.

ISQ has focused this submission on the discussion questions that have particular relevance to independent schools. The absence of a response to another question should not be taken as either support for or opposition to the proposal concerned.

Strategic Review of the QHRC and a reformed complaints framework

A10: *Should there be any conditions on when, where and how the QHRC can participate in a proceeding before a court or tribunal?*

ISQ considers that the QHRC can appropriately contribute to proceedings involving significant or unsettled human rights questions. However, appropriate safeguards are required where the Commission may have previously dealt with the same or related subject matter through its complaint-resolution, conciliation or investigative functions.

The Discussion Paper itself identifies the Commission's existing intervention role and raises the question of conditions governing its participation.

ISQ considers that published criteria should address:

- the legal or systemic significance of the matter including whether the Commission can make a distinct contribution beyond the parties and other interveners;
- whether the QHRC has previously been involved in the same or related matter;
- the protection of confidential information obtained through complaint or conciliation processes; and
- whether participation could create actual or perceived issues concerning institutional impartiality.

A party should be able to understand the capacity in which the Commission is participating and how information obtained through any earlier QHRC process will be protected.

A12: *What is your experience of the QHRC's education services and are any improvements required?*

ISQ considers that the Commission's education function will become increasingly important if Queensland's anti-discrimination framework places greater proactive obligations on organisations.

The QHRC currently provides education and training in relation to both the ADA and HRA. While ISQ recognises the value of these services, the cost of accessing training can present a practical barrier to widespread participation. Some short online training sessions are priced at more than \$100 per participant for approximately two hours of training. For an individual participant this may appear modest, but the cost becomes significant where an organisation needs to train multiple employees.

This is particularly relevant for independent schools. Obligations under the ADA are not matters relevant only to a school's governing body, principal or human resources staff. Discrimination obligations can affect decisions and interactions across a school, including employment, enrolment, student support, reasonable adjustments and the delivery of education. If broader proactive duties are introduced, schools may also need to ensure that staff across the entire organisation understand the conduct to be prevented and their role in supporting compliance.

Requiring schools to purchase individual training places for multiple staff can therefore create a significant cumulative cost, particularly for smaller schools and schools with limited administrative and compliance resources. A regulatory framework that increasingly expects organisations to take proactive steps to prevent discrimination should be accompanied by accessible education that enables them to understand and implement those obligations.

ISQ considers that core regulatory guidance and foundational training on the ADA and HRA should be freely available, including online modules capable of being accessed by multiple staff within an organisation. Paid specialist, tailored or advanced training could appropriately supplement those resources, but paid training should not become necessary for organisations and their staff to understand and implement their statutory obligations.

For independent schools, freely available guidance should also include practical education-sector examples addressing employment, enrolment, reasonable adjustments, safeguarding and the operation of exemptions. These resources should be developed in consultation with affected sectors and, wherever practicable, be available before significant new obligations commence.

- *A18: Do you support aligning the complaints framework in the ADA with the Draft Anti-Discrimination Bill 2024?*
- *A19: Should there be any further or different changes to that complaints framework?*

ISQ sees merit in greater consistency and flexibility in complaint handling, particularly where this facilitates early and proportionate resolution. However, alignment should not occur at the expense of procedural fairness or sufficient certainty for respondents.

The Discussion Paper identifies proposed reforms including preliminary inquiries, greater discretion not to deal with complaints, a two-year complaint period, more flexible dispute resolution and removal of some of the existing prescriptive requirements concerning responses and conciliation.

Any revised framework should preserve clear requirements concerning the substance of a complaint and appropriately screen complaints before respondents are required to participate in extensive dispute resolution.

In particular, ISQ considers that:

- a respondent should receive sufficient particulars to understand the alleged conduct, protected attribute or other statutory basis of the complaint;

- parties should have a reasonable opportunity to provide relevant information;
- existing safeguards concerning frivolous, trivial, vexatious, misconceived or unsubstantiated complaints should remain;
- the QHRC should have clear published criteria governing decisions not to deal with complaints and the choice of dispute-resolution method;
- lawful reliance on a statutory exemption should be capable of being considered at an appropriate early stage; and
- increased flexibility should be directed towards early and proportionate resolution rather than increasing uncertainty or unnecessary escalation.

These protections are particularly important where a complaint concerns conduct that may be contested or sensitive but is nevertheless potentially authorised by a statutory exemption.

Further Review of the *Human Rights Act 2019*

B18: *Do sections 9(1)(h), 9(2)(a) and 10 of the HRA require amendment to clarify what constitutes a functional public entity, for example non-government service providers?*

ISQ does not consider that amendment is presently required insofar as the provisions apply to independent schools generally.

The HRA distinguishes between an entity performing a function of a public nature for the State or another public entity and a non-government organisation carrying out its own functions. Section 10 provides factors relevant to determining whether a function is public in nature.

Independent schools have distinct governance arrangements, educational philosophies and responsibilities to their school communities. Their operation within a statutory accreditation and government funding framework should not, in and of itself, mean that they perform education on behalf of the State.

If amendments to sections 9 or 10 are nevertheless contemplated, ISQ recommends specific consultation with the non-government schooling sector to ensure that changes intended to clarify other government service-delivery arrangements do not inadvertently broaden the application of the HRA to independent schools.

Review of the uncommenced *Respect at Work Act* reforms

C4: *What are the unintended consequences of retaining the present definition of "irrelevant criminal record"?*

ISQ's principal concern is the interaction between the proposed attribute and schools' safeguarding responsibilities.

Independent schools make suitability and safeguarding decisions concerning employees, prospective employees, volunteers and contractors who may have access to children or perform child-related work. Statutory screening regimes such as blue card and teacher registration requirements provide important safeguards, but they do not necessarily replace an organisation's assessment of risk and suitability for a particular role.

The proposed definition is broad and encompasses a range of circumstances including unfinalised charges, withdrawn charges, acquittals, convictions that are not "directly relevant", spent

convictions and matters dealt with through youth justice processes. The Review itself identifies possible difficulties associated with determining whether a conviction is "directly relevant".

ISQ considers that protection from discrimination based on genuinely irrelevant history may be appropriate. However, the legislation should expressly preserve a school's ability to consider lawfully obtained information where it has a reasonable and proportionate connection with safeguarding, child safety, the responsibilities of the role or a genuine assessment of suitability.

Relevant considerations may include:

- the nature and circumstances of the conduct;
- the period that has elapsed;
- evidence of rehabilitation;
- the responsibilities of the proposed role;
- access to children;
- positions of authority or trust; and
- applicable child-safety and safeguarding obligations.

Existing exceptions, including section 108 of the ADA concerning what is reasonably necessary to protect health and safety at a workplace, should not be assumed to provide a complete answer to the particular safeguarding responsibilities of schools.

C5: Are there any unintended consequences from retaining the proposed new attribute of "expunged conviction"?

ISQ does not identify the same safeguarding concerns with the separately defined "expunged conviction" attribute. The Discussion Paper distinguishes that attribute from the significantly broader definition of "irrelevant criminal record" and describes its operation by reference to convictions expunged or extinguished under specified legislation.

C7: What are the unintended consequences of retaining the new attribute "a combination of two or more of any of the above attributes"?

ISQ recognises the importance of ensuring that discrimination involving intersecting protected characteristics can be addressed by the Act.

However, the proposed creation of a separate combined-attributes attribute may introduce unnecessary uncertainty. The Discussion Paper distinguishes that approach from proposed section 8(2), which would already recognise discrimination relating to individual attributes, two or more attributes, or their combined effect. It raises concern that the additional attribute could operate as an uncertain "catch all".

For schools, the practical issue is whether an organisation can identify prospectively what conduct the law prohibits, particularly if it is also subject to a positive duty to take preventative action.

A complainant should therefore be required to identify the relevant protected attributes, conduct or practice, alleged disadvantage and sufficient connection between those matters. The combined-attributes mechanism should not permit an otherwise unidentified basis of discrimination to substitute for those elements.

Given proposed section 8(2), ISQ questions whether the additional attribute in section 7(4) is necessary.

C10: Are there any unintended consequences of retaining the new definitions of "direct discrimination" and "indirect discrimination"?

ISQ supports clearer and more accessible discrimination tests and recognises the benefit of removing unnecessary complexity associated with hypothetical comparators.

However, implementation must preserve a clear causal relationship between the protected attribute and unfavourable treatment. This is particularly important for schools, where decisions may involve several legitimate considerations including educational requirements, student and staff safety, behaviour management, safeguarding and available resources.

For indirect discrimination, the proposed test focuses on whether a condition, requirement or practice has, or is likely to have, a disadvantaging effect and whether it is reasonable. The proposed reforms also expressly extend the concept to creating a disadvantaging environment.

The assessment of reasonableness should permit proper consideration of the nature and extent of disadvantage, legitimate educational and safeguarding objectives, available alternatives, feasibility, cost, school resources and other applicable legal obligations.

Before commencement, ISQ recommends testing the definitions against practical school-based scenarios including enrolment, reasonable adjustments, curriculum participation, behaviour management, suspension and exclusion.

C11: Should the current burden of proof be changed to a "shifting" burden of proof and, if so: (a) should it apply only to direct discrimination; and (b) what should a complainant be required to prove before the burden shifts?

ISQ does not object in principle to consideration of a shared or shifting burden of proof.

Independent schools, as employers, already operate under a reverse-onus mechanism in Fair Work general protections matters. It can also be appropriate for a respondent to establish matters particularly within its knowledge, including the reasons for its decision.

However, the key issue is when the burden shifts.

The proposed Queensland provision would shift the burden where there are facts from which a contravention could be found in the absence of another explanation. The Discussion Paper distinguishes this model from the existing ADA allocation and examines both the *Fair Work Act 2009* (Cth) and *Equality Act 2010* (UK) approaches.

ISQ considers that before the burden shifts, a complainant should be required to establish sufficient objective facts identifying:

- the protected attribute or prohibited conduct relied upon;
- the treatment, condition, requirement or practice complained of;
- the alleged disadvantage or unfavourable treatment; and
- facts capable of supporting a connection between the protected attribute and alleged contravention.

The respondent may then reasonably bear the burden concerning matters particularly within its knowledge, including its reasons for a decision, the reasonableness of a condition or practice or an exemption on which it relies.

Any shared-burden model should therefore include a meaningful prima facie threshold and should not effectively require a school to disprove an allegation before an adequate evidentiary basis has been established.

C12: Are there any unintended consequences that may arise if the positive duty were implemented in Queensland?

ISQ supports proactive measures to prevent unlawful discrimination. However, the key risk associated with the proposed Queensland positive duty is the cumulative regulatory burden created by overlapping proactive obligations.

The Queensland duty would require reasonable and proportionate measures to eliminate discrimination, sexual harassment, harassment on the basis of sex and other objectionable conduct as far as possible. The Discussion Paper recognises that it would be broader than the Commonwealth *Sex Discrimination Act 1984* (Cth) positive duty because it would extend across protected attributes and areas of activity.

Notably, the Discussion Paper states that no estimate of direct compliance costs or detailed cost-benefit analysis was prepared for the Respect at Work Bill. ISQ therefore supports the Review's preliminary position that implementation should be further delayed while the operation of relevant Commonwealth arrangements can be assessed and recommends a regulatory impact and cost assessment ahead of a decision to implement the Queensland positive duty.

If the Queensland duty ultimately proceeds, careful consideration should also be given to how it applies in the education context. Independent schools are regulated under the ADA both as employers and as providers of education, meaning a positive duty extending across all areas of activity could have a broader practical application than a duty focused on employment.

ISQ supports proactive measures to prevent unlawful discrimination in education. At the same time, the design and implementation of any positive duty should recognise the distinctive role of independent schools and the diversity they provide within Queensland's education system. Independent schools offer educational choices that reflect the educational philosophies, values and genuine needs of the communities they serve.

It is important that any positive duty should be sufficiently clear and proportionate to prevent unlawful discrimination without inadvertently limiting the capacity of schools to maintain their legitimate educational character, ethos and service offering, or unnecessarily constraining the choices available to families. In practice, schools would also need to reconcile any new preventative obligations with existing responsibilities relating to reasonable adjustments, student safety and wellbeing, child safeguarding, and the rights and needs of other students.

C13: Would it be appropriate for the QHRC to have a regulatory and enforcement function as contemplated by the positive duty provisions?

ISQ considers that further consideration should be given to the appropriate regulatory model before the QHRC is provided with additional regulatory and enforcement functions in relation to the proposed positive duty.

If the positive duty proceeds, a key consideration should be how compliance can be supported and monitored without unnecessarily duplicating existing regulation. This is particularly relevant for independent schools, which already operate within an extensive regulatory framework. Providing

the QHRC with a separate regulatory and enforcement role may result in the same or related conduct being subject to oversight through multiple regulatory frameworks.

ISQ considers that, if the duty ultimately proceeds, collaborative or co-regulatory approaches should be considered as an alternative to establishing the QHRC as the sole or primary regulator of compliance with the positive duty. Queensland's Child Safe Organisations framework provides one possible model. Under that framework, the Queensland Family and Child Commission (QFCC) acts as the central oversight body while working collaboratively with existing sector regulators.

A similar approach could be considered under the ADA, whereby the QHRC retains responsibility for expertise, guidance and oversight of the anti-discrimination framework while working with existing sector regulators where compliance issues arise within regulated sectors.

Any such model would require clear delineation of roles, appropriate information-sharing arrangements and safeguards against unnecessary duplication of investigations, reporting requirements or enforcement activity. The experience of other regulatory frameworks also demonstrates the importance of considering potential fragmentation and increased costs and burden, when multiple regulators have potentially overlapping functions.

Regardless of the regulatory model adopted, ISQ considers that the approach should be supportive, educative, risk-based and proportionate, with an emphasis on helping organisations understand and meet their obligations.

- *C14: Should the power to inquire into a complaint be separate from the QHRC's investigative function?*
- *C15: Should the QHRC have a power to investigate potential systemic contraventions of the ADA?*
- *C16: Should this power be subject to any conditions?*

ISQ supports a clear distinction between preliminary inquiry for the purpose of assessing and facilitating resolution of a complaint and formal investigation for regulatory or enforcement purposes. The Review itself identifies the potential tension between an investigative function and the QHRC's role as an impartial conciliator, and the need to consider appropriate separation between those functions.

Clear separation is important so that parties understand the purpose for which information is being requested, the powers being exercised and the potential consequences of their participation.

Consistent with its response to C13, ISQ does not support providing the QHRC with a standalone power to investigate potential systemic contraventions of the ADA without first considering whether a collaborative regulatory model would provide a more proportionate and effective response. The QHRC should continue to play a central role in preventing discrimination through complaint handling, education, guidance, legal and policy work, research and the identification of systemic issues. However, where potential systemic non-compliance arises within an already regulated sector, the preferred approach should be for the QHRC to work with the relevant sector regulator rather than automatically commencing a parallel investigation.

Such an approach would enable the QHRC to contribute its specialist anti-discrimination expertise while drawing on the relevant regulator's sector-specific knowledge and existing oversight mechanisms. For independent schools, this would reduce the risk of duplication, inconsistent

regulatory expectations and multiple regulatory processes concerning substantially the same conduct.

Should the QHRC be given a systemic investigation power, that power should be subject to clear statutory conditions and procedural safeguards. At a minimum, there should be a reasonable and evidenced basis for suspecting systemic non-compliance, and consideration should be given to the seriousness and systemic nature of the conduct, the public interest and proportionality of an investigation, whether another regulator is already considering substantially the same conduct, and whether the matter could be addressed more appropriately through education, complaint resolution or coordinated regulatory action.

- *C18: Should the QHRC have an express power to issue guidelines, including at the request and cost of a person or entity with duties under the ADA?*
- *C19: Should compliance with a guideline issued by the QHRC be a relevant circumstance in proceedings?*

ISQ supports an express power for the QHRC to develop practical compliance guidelines. Core guidance explaining statutory obligations should, however, be freely and publicly available. Organisations should not be required to purchase guidance or training simply to understand what is required of them under the ADA. Sector-specific or bespoke advisory services could appropriately be offered separately, but comprehensive public guidance should be available before significant new obligations, such as a positive duty, commence.

There is also merit in recognising good-faith compliance with applicable QHRC guidance as a relevant circumstance in determining whether an organisation has met its obligations, particularly where the legislation requires reasonable and proportionate preventative measures. This would provide organisations with greater certainty when taking proactive steps to comply with the ADA.

However, it is important that the status and legal effect of QHRC guidelines should be clearly defined. Guidelines should support compliance and provide practical examples of how statutory obligations may be met, rather than operate as an additional source of mandatory requirements not contained in the ADA. Compliance with a guideline may therefore be a relevant consideration but should not necessarily be determinative, particularly where an organisation can demonstrate that it adopted other reasonable and proportionate measures appropriate to its circumstances.

Conclusion

ISQ considers that Queensland's human rights and anti-discrimination framework should provide effective protection against unlawful discrimination while remaining sufficiently clear for duty holders to understand and implement their obligations.

For independent schools, the key issues raised by the proposed reforms are:

- safeguarding must remain central to decisions concerning suitability for child-related work;
- new discrimination concepts must provide sufficient legal certainty;
- any shifting burden of proof must operate only after a meaningful evidentiary threshold has been met;
- any positive duty must be justified having regard to existing Commonwealth, workplace, child-safety and education obligations;
- the application of a positive duty to education requires specific assessment and should not be treated as an extension of an employment-focused compliance model;

- collaborative regulatory models should be considered before establishing additional and potentially duplicative investigation or enforcement functions;
- complaint resolution, conciliation, investigation and enforcement functions must be subject to clear separation and procedural safeguards;
- core regulatory guidance and foundational training should be freely accessible; and
- amendments to the HRA should not inadvertently alter the established position of independent schools under the functional public entity provisions.

ISQ welcomes continued consultation with the Review and the Queensland Government on the design and implementation of any reforms affecting the independent school sector.

Further information

ISQ welcomes the opportunity to provide further information if required or to participate in future consultation in this work.

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