EQUALITY OF OPPORTUNITY FOR ALL?

An Assessment of the Effectiveness of the Anti-Discrimination Act 1991 (Qld) as a Tool for the Delivery of Equality of Opportunity in Education to People with Impairments

A Thesis Submitted for the Degree of Doctor of Philosophy

ELIZABETH ANNE DICKSON

BA (Hons) LLB (Hons) Dip Ed
University of Queensland

TC Beirne School of Law
University of Queensland

May 2007
DECLARATION BY THE CANDIDATE

I DECLARE THAT the work presented in this thesis is, to the best of my knowledge and belief, original and my own work, except as acknowledged in the text, AND THAT the material has not been submitted, either in whole or in part, for a degree at this or any other university

ELIZABETH ANNE DICKSON
ACKNOWLEDGEMENTS

I thank my parents, Barbara and Dugald Macmillan, for their encouragement, help and good humour.

I thank my husband, Ross Dickson, and my children, Kathleen, James, John and Peter, for their love and patience.

I thank my colleague, Joy Cumming, for her wise words and friendship.

I thank my supervisors, Reid Mortensen and Tamara Walsh, for their always astute commentary on my research and writing.
PUBLICATIONS RELEVANT TO THE THESIS

Refereed Articles


Dickson, Elizabeth, ‘Disability Discrimination, the Unjustifiable Hardship Exemption and Students with Disability Related Problem Behaviour’ (2004) 9(2) Australia and New Zealand Journal of Law and Education 37


Dickson, Elizabeth, ‘Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in its Interpretation and Application’ (2003) 8 Australia and New Zealand Journal of Law and Education 45

Case notes and Commentary


The primary object of the *Anti-Discrimination Act 1991* (Qld) (*QADA*) is to ‘promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation’. The aim of this thesis is to determine whether the *QADA* has been an effective tool for delivering equality of opportunity in education to Queensland people with impairments. A communitarian context is adopted as the conceptual framework for this evaluation. Communitarians recognise that each citizen is, prima facie, entitled an ‘inclusive’ education in the mainstream community. The thesis canvasses recent Queensland education policy which emphasises, consistent with communitarian theory, that an ‘inclusive’ education should be made available to students with impairments encompassing both access to a regular education in a mainstream classroom and access to the full range of educational opportunities open to other citizens. The thesis contends that this kind of inclusion is an important benchmark of ‘equality of opportunity’. The policy of inclusion is informed by a shift in the understanding of the nature of disability and of the place of people with disabilities in the wider community. Disability, the social restriction experienced by people with impairments, is now widely regarded as, to a large extent, a social construction. Disability flows from the failure of society to accommodate the different needs of people with impairments. Moreover, the accommodation of people with impairments is now asserted as a rights issue rather than a welfare issue. People with impairments claim the same basic rights as people without impairments, including a right to educational opportunities. The terms of the *QADA*, it is argued in the thesis, have been influenced by these developments in disability theory. Evidence of education practice and the body of case law that has gathered over the 16 years since the *QADA* was enacted, however, suggest that the implementation of ‘inclusive’ education policy has met with resistance from those charged with providing educational opportunities to students with impairments. It has proved particularly difficult to deliver inclusion to students with certain types of impairments, particularly intellectual and behavioural impairments. To this extent, the thesis identifies a dissonance between education policy and practice and suggests that the legislation has not delivered an unfettered right to equality of opportunity for people with impairments. Analysis of discrimination in education cases decided under the *QADA*, and under similar legislative regimes in other Australian jurisdictions, demonstrates that respondent education institutions have utilised a variety of strategies constructed from the terms of the legislation in attempts to defeat claims of discrimination and to defend prima facie discriminatory practices. The thesis analyses the elements of these strategies and how they have been promulgated in the cases. A number of limits on the right to equality of opportunity are extrapolated from the cases. Overt limits arise when inclusion of a student with impairment compromises the health and safety of others in the education community or has a detrimental effect on the learning environment. An overt limit also arises in respect, particularly, of tertiary institutions which are entitled to exclude students who cannot maintain legitimate academic standards. Another overt limit, albeit narrower, is acknowledged when the financial cost of inclusion compromises the viability of the education provider or, in some circumstances, prejudices other students in the education institution. The thesis also identifies a series of covert limits which, although not made explicit in the cases, may be inferred from the reasoning which informs them. At this level, the financial cost of inclusion
may be detected as an issue behind the overt health and safety and learning detriment limits identified above. It appears that courts and tribunals are also less likely to recognise a right to inclusion when a student does not take appropriate steps to mitigate his or her disability. Finally, there is some suggestion that a right to a mainstream education will not be recognised where a court or tribunal considers there to be no objective ‘benefit’ to the student arising from the inclusion. The thesis considers the legitimacy of the limits to equality developed in the cases and of the strategies underpinning the limits, in communitarian terms, and in terms of contemporary disability theory.

The law as stated in the thesis is current to 28 February 2007.
# TABLE OF CONTENTS

| CHAPTER 1 | INTRODUCTION .......................................................... | 1 |
| CHAPTER 2 | COMMUNITARIAN EDUCATION .......................................... | 21 |
| CHAPTER 3 | THE MEANING OF DISABILITY ......................................... | 59 |
| CHAPTER 4 | QUEENSLAND EDUCATION POLICY .................................... | 78 |
| CHAPTER 5 | THE IMPACT OF THE LEGISLATION .................................. | 108 |
| CHAPTER 6 | EXEMPTIONS .............................................................. | 158 |
| CHAPTER 7 | AN IMPLIED DUTY OF REASONABLE ACCOMMODATION ............ | 198 |
| CHAPTER 8 | THE DEFINITION OF IMPAIRMENT ................................... | 217 |
| CHAPTER 9 | THE COMPARATOR ........................................................ | 239 |
| CHAPTER 10 | CAUSATION ............................................................... | 279 |
| CHAPTER 11 | LESS FAVOURABLE TREATMENT ....................................... | 330 |
| CHAPTER 12 | INDIRECT DISCRIMINATION .......................................... | 350 |
| CHAPTER 13 | CONCLUSION ............................................................ | 400 |
| BIBLIOGRAPHY ............................................................. | 422 |
| TABLE OF CASES .......................................................... | 437 |
| TABLE OF LEGISLATION .................................................. | 445 |
CHAPTER 1

INTRODUCTION

I THE AIM OF THE STUDY

The education of people with impairments is a contentious issue. Students and their families, teachers and policy makers hold a variety of different views as to the kind of education which should be made available. In respect of the compulsory years of education, the primary point of disagreement would appear to be whether people with impairments should be educated in a special setting or in their local mainstream school. In respect of tertiary education, the controversy has been to what extent education standards and procedures should be modified to accommodate students with impairments.

Recent Queensland education policy has emphasised that an ‘inclusive’ education should be made available to students with impairments encompassing both access to a regular education in a mainstream classroom and access to the full range of educational opportunities open to other citizens. This policy is informed by a shift in the understanding of the nature of disability and of the place of people with disabilities in the wider community. Disability, the social restriction experienced by people with impairments, is now widely regarded as, to a large extent, a social construction. Disability flows from the failure of society to accommodate the different needs of people with impairments. To use a simple example, a person with a

---

1 The term ‘mainstream’ is used as a tag to identify the hundreds of ‘regular’ classrooms in ‘regular’ schools which cater to ‘regular’ students. The term ‘regular’, in turn, is used to mean non-segregated or mainstream. The term ‘regular’ is frequently used by educationists to describe non-segregated or mainstream schools and classes as distinct from schools and classes with a special purpose or clientele. See, for example, Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September, 2002, 444 (Dr John Enchelmaier).
mobility impairment may be ‘disabled’ from entering a building not because he or she uses a wheelchair, but because the building has no wheelchair access. Moreover, the accommodation of people with impairment is now asserted as a rights issue rather than a welfare issue. People with impairments claim the same basic rights as people without impairments, including a right to educational opportunities.

The terms of the Anti-Discrimination Act 1991 (Qld) (QADA), it can be argued, have been influenced by both the social model of disability and by a perception of disability as premised on a rights rather than a welfare discourse. The Act was intended to ‘promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation’. Evidence of practice that has accumulated over the 16 years since the QADA was enacted, however, suggests that the implementation of ‘inclusive’ education policy has not been without problems. It has met with resistance from those charged with providing educational opportunities to students with impairments. It has proved particularly difficult to deliver inclusion to students with certain types of impairments, particularly intellectual and behavioural impairments.

The aim of this study is to determine whether the QADA has been an effective tool for delivering equality of opportunity in education to people with impairments. Certainly, students with impairments have used the QADA to challenge what they see as their discriminatory exclusion from educational opportunities. Indeed, the first

---

2 Here, and throughout the thesis, unless otherwise stated, the use of the term ‘right’ is intended to imply its generic, ‘dictionary’ meaning as ‘a benefit or claim entitling a person to be treated in a particular way’ and is not intended to imply a meaning consistent with any particular theoretical framework. For the adopted definition see Peter Butt (ed), Butterworth’s Concise Australian Legal Dictionary (3rd ed, 2004) 381.

3 Anti-Discrimination Act 1991 (Qld) (QADA) s 6(1).
Australian impairment discrimination case in the education field was a Queensland case involving a primary school student with intellectual impairments who had been excluded from her mainstream primary school. Analysis of discrimination in education cases decided under the *QADA*, and under similar legislative regimes in other Australian jurisdictions, suggests that respondent education institutions could attempt a variety of strategies constructed from the terms of the legislation both to defeat claims of discrimination and to defend prima facie discriminatory practices. The thesis considers the utility and legitimacy of these strategies in terms both of communitarian thinking, and of contemporary disability theory.

A communitarian context has been adopted as the conceptual framework for this study of the effectiveness of the *QADA*. Communitarianism, while a relatively recently badged philosophy, has been embraced by many major political figures of the last decade, including Bill Clinton, Tony Blair, and, it has been more controversially suggested, George W Bush. On the Australian political stage, communitarian rhetoric, emphasising a need to balance individual rights against community welfare, emanates from both sides of politics. Mark Latham, for example, Labor candidate for Prime Minister at the 2004 federal election, has explained his communitarian ideals in his more serious and influential political writings. The communitarian catchphrase ‘mutual responsibility’ has become identified with many policy initiatives at both the

---

4 *L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207.*
5 Communitarian theorist William Galston was an adviser to Clinton during his term as President of the United States of America. See also, Amitai Etzioni, ‘The Third Way is a triumph’, *New Statesman*, (London) (1996), 25 June 2001, 25.
state and federal level of politics. Moreover, in relation, specifically, to education policy, there has been a recent emphasis on both ‘values’ and ‘citizenship’ education which is clearly aligned with a communitarian emphasis on the citizen’s obligation to contribute to the good of society. In Australia, the Federal Government has passed legislation which aims to ensure that a minimum standard of citizenship education is provided for all. At the state level, the rhetoric of education for citizenship permeates Education Queensland policy documents. There is a clear emphasis on the development of ‘active and productive citizens in a just and democratic society’.

II THE SCHEME OF THE ANTI-DISCRIMINATION ACT 1991 (QLD)

As noted above, the purpose of the QADA is plainly stated. It is ‘to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation’. The QADA is generic as opposed to subject specific anti-discrimination legislation such as the Racial Discrimination Act 1975 (Cth) or the Sex Discrimination Act 1984 (Cth). It prohibits discrimination on the basis of a variety of protected areas, including impairment, in a variety of protected areas, including education. Impairment is generously defined to encompass physical, sensory, intellectual and behavioural

---

9 Consider, for example, the approach of both the Federal Coalition Government and the Queensland Labor Government to indigenous affairs. For a recent news report linking Australian indigenous affairs policy to the notion of ‘mutual responsibility’ see Nicolas Rothwell, ‘Remote Control’, The Australian, September 30, 2006.
10 See the Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Act 2004 (Cth) and the companion Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Regulation 2005 (Cth) Schedule 1, Part 4. Federal funding of schools is linked to the meeting of performance targets including student performance on assessments of ‘civic knowledge and understanding’ and ‘citizenship participation skills and civic values’.
11 Relevant documents are analysed in Chapter 4: Queensland Education Policy.
13 QADA s 6(1).
14 QADA s 7(h).
15 QADA Division 3.
impairments.\textsuperscript{16} The Act acknowledges that discrimination can occur both in the enrolment process\textsuperscript{17} and after a student is enrolled at an education institution.\textsuperscript{18}

The Act recognises and prohibits two distinct forms of discrimination.\textsuperscript{19} First, ‘direct’ discrimination on the basis of a protected attribute, such as impairment, occurs when a person with the protected attribute is treated ‘less favourably’ than a person without the protected attribute in ‘circumstances which are the same or not materially different’.\textsuperscript{20} In the context of the education of people with impairments, direct discrimination might arise if a person is denied enrolment \textsuperscript{21} or denied an educational opportunity\textsuperscript{22} on the basis of an impairment. Secondly, ‘indirect’ discrimination arises when a condition is imposed upon a person with a protected attribute that he or she cannot comply with and a higher proportion of people without the attribute can comply.\textsuperscript{23} These conditions are seldom expressly stated and imposed. Instead they are inferred from the treatment of the person with the protected attribute. A person with a mobility impairment, for example, may not be able to comply with a condition that he or she be able to climb steps in order to participate in a graduation ceremony,


\textsuperscript{17} QADA s 38.

\textsuperscript{18} QADA s 39.

\textsuperscript{19} QADA s 9.

\textsuperscript{20} QADA s 10(1). The operation of the direct discrimination provision is further considered in Chapter 8, Strategies for Exclusion: The Comparator and Chapter 11, Strategies for Exclusion: Less Favourable Treatment.

\textsuperscript{21} See, for example, the QADA case L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207.

\textsuperscript{22} See, for example, the QADA case I v O’Rourke and Corinda State High School and Minister for Education for Queensland [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) (‘I’).

\textsuperscript{23} QADA s 11(1). Indirect discrimination is considered in detail in Chapter 12, Strategies for Exclusion: Indirect Discrimination.
while a higher proportion of people who have no mobility impairment could climb the steps.\textsuperscript{24}

It should be noted that the Act purports to prohibit only ‘unfair’ discrimination.\textsuperscript{25} To this extent, the Act recognises that there are circumstances where discrimination will not be unfair and, therefore, will not be unlawful. A scheme of exemptions operates to excuse prima facie cases of discrimination in circumstances the parliament recognises as legitimising the ‘less favourable’ treatment of people with a specified protected attribute.\textsuperscript{26} The most significant exemption relevant to impairment discrimination is the unjustifiable hardship exemption.\textsuperscript{27} An educational authority may defeat a claim of discrimination against a person with an impairment by proving that to accommodate that person would cause unjustifiable hardship.\textsuperscript{28} The hardship may be financial or merely circumstantial arising from the disruption caused to staff or other students by the inclusion of a person with an impairment.\textsuperscript{29} Similarly, an educational institution may defeat a claim of indirect discrimination by proving that a prima facie discriminatory condition imposed on a person with impairment is ‘reasonable’.\textsuperscript{30} The reasonableness enquiry is into ‘all the relevant circumstances’ and involves a balancing of the interests of the community as well as the complainant and the respondent.\textsuperscript{31}

\textsuperscript{24} See the \textit{QADA} case \textit{Kinsela v Queensland University of Technology} [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997).

\textsuperscript{25} \textit{QADA} s 6(1).

\textsuperscript{26} \textit{QADA} exemptions are considered in detail in Chapter 6, Strategies for Exclusion: Exemptions.

\textsuperscript{27} See, in relation to the protected area of education, \textit{QADA} s 44.

\textsuperscript{28} \textit{QADA} ss 5, 44 and 205.

\textsuperscript{29} See, for example, the \textit{QADA} case \textit{K v N School (No 3)} [1996] 1 QADR 620.

\textsuperscript{30} \textit{QADA} ss 11(1)(c) and 206. The reasonableness enquiry is considered in detail in Chapter 12, Strategies for Exclusion: Indirect Discrimination.

\textsuperscript{31} \textit{QADA} s 11(2) and 1 [2001] QADT 1 (Unreported, President Copelin, 31 January 2001). See also, Elizabeth Dickson, ‘Disability Standards for Education and the Obligation of Reasonable Adjustment’, (2006) 11(2) \textit{Australia and New Zealand Journal of Law and Education} 23.
III LEGAL MATERIALS

The primary focus of the thesis is Queensland anti-discrimination legislation and case law set in the wider context of Australian discrimination law jurisprudence. All relevant legislation and all available case law from all Australian jurisdictions are canvassed for the purpose of highlighting the strengths and weaknesses of the QADA as a tool for the delivery of equality of opportunity in education to people with impairments. Because of the strong similarities between the terms of the QADA and the Disability Discrimination Act 1992 (Cth) (DDA), the DDA is a constant focus of the thesis. It is important to note, of course, that as federal legislation with Australia-wide application, the DDA also makes remedies available to Queenslanders complaining of discrimination in education, in ‘competition’, perhaps, with the QADA.

Where appropriate, and for the purpose not of explaining the law in those places, but of illuminating potential deficiencies in the protection of Queensland people with disabilities, comparisons have been made between the development of this area of the law in Australia and in other similarly situated jurisdictions. The United Kingdom and the United States have proved particularly fruitful sources of contrasting approaches to some of the difficult issues which have perplexed Australian legislators and judges.

While the United States pioneered anti-discrimination law, generally it approaches the education entitlements of people with disabilities through a different matrix. A right for ‘individuals with disabilities’ to a ‘free and appropriate education in the least
restrictive environment’ is enshrined in legislation. A recurring issue in the thesis is the legal response to the inclusion of students with impairment related behavioural problems. It is useful to compare and contrast the approach taken by US legislators and courts to this issue with the approach taken in Australia.

The United Kingdom legislated for protection from discrimination in education some years after Queensland and had the benefit, perhaps, of considering the development of discrimination law jurisprudence in other countries when determining the scope of that protection. The Disability Discrimination Act 1995 (UK) is different in some important respects from the relevant Australian legislation. It creates, for example, a positive duty to make ‘reasonable adjustments’ for students with disabilities. There are also, however, many fundamental similarities with Australian legislation like the QADA and, especially in the fact that it is attribute-specific legislation, with the DDA. It is of particular interest that the similar language of the UK and Australian legislation has been interpreted differently by English and Australian courts. The divergence in approach is particularly stark and particularly significant in relation to what has proved to be, perhaps, the most controversial issue in Australian discrimination law: the nature of the comparator for the purpose of proof of less favourable treatment, and, thus, direct discrimination.

33 Individuals with Disabilities Education Act 2004 20 USC § 1400.
34 Education was became a protected area in the Disability Discrimination Act 1995 (UK) in 2002. See the Special Educational Needs and Disability Act 2001 (UK).
35 Disability Discrimination Act 1995 (UK) s 28C. The issue of reasonable adjustment is considered in detail in Chapter 7: An Implied Duty of Reasonable Accommodation.
36 See Chapter 10: The Comparator.
IV The Structure of the Thesis

The body of the thesis is arranged in three sections. The first section details the theoretical context underpinning the evaluation of the effectiveness of the QADA. The second section considers evidence of the failure of the QADA to deliver equality of opportunity in education to people with disabilities. The third section comprises analysis of the various strategies for exclusion of people with disabilities which have been constructed from the terms of the QADA.

A The Theory Informing the Thesis

As noted above, a communitarian context is the general conceptual framework used for evaluating the effectiveness of the QADA and other disability discrimination legislation. Disability theory, however, is also significant to this evaluation. The operation of the Act is tested against a framework of what communitarians would accept as legitimate education policy and practice. It must also be tested against a framework of the appropriate social response to disability. It is interesting also to consider Queensland education policy, both for its resonance of communitarian rhetoric and of the social model of disability and for the purpose of comparing the policy with the reality of what occurs in Queensland education institutions.

1. Chapter 2: Communitarian Education

In this chapter the communitarian theory of education is explained. Communitarians emphasise the significance of both the ‘explicit’ and ‘implicit’ curricula of schools in the character formation of citizens. The explicit curriculum comprises what is formally taught to students in the class room. Communitarians are adamant that all people are entitled to explicit instruction in the core knowledge necessary to allow
them to function within the community as effective citizens.\textsuperscript{37} This information will vary from community to community but will include both the history of the community and its political structure and, importantly, the values shared by the community. The implicit curriculum is that which is communicated to students by their experience of the way a school is structured and operated. In fact, Etzioni regards the ‘experiences school generates’ as more important than the explicit curriculum, as the ‘single most important factor that affects education’.\textsuperscript{38} Ideally, the way a school is managed and its enrolment demographics should both model the values taught explicitly in that school. In this context, the values of tolerance and inclusivity are particularly important.\textsuperscript{39}

There is a lack of communitarian writing expressly on the issue of the education rights of people with disabilities. Indeed, there is a lack of writing on this issue by authors of any theoretical persuasion. The delay of the development of theory in this area is attributable to a number of factors. First, the education of people with disabilities has only recently come to be treated as a rights rather than as a merely technical issue. Secondly, people with disabilities cannot be treated as an homogenous group for the purpose of the articulation of policy as each individual’s experience of impairment and resulting disability is different. Finally, it is not advisable, or perhaps, even possible, to extrapolate a theory of education for people with disabilities from theories developed in relation to other historically ‘oppressed’ groups. This is because the inclusion in mainstream institutions, like education institutions, of people with


\textsuperscript{38} Amitai Etzioni, \textit{The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda} (1993)115.

\textsuperscript{39} See, for example, Henry Tam, \textit{Communitarianism: A New Agenda for Politics and Citizenship} (1998) 8.
disabilities, imposes material costs on the community of a kind which are not imposed when people of a particular race, sex or religion are included. Expensive, special facilities and services are frequently required to support the inclusion of people with disabilities.

A communitarian theory in relation to the education of people with disabilities is nevertheless postulated from more general communitarian writing. It is argued that communitarians would see people with disabilities as possessing a prima facie right to education on the same terms as people without disabilities. This right, however, would be required to yield when its exercise threatened the good of the community as a whole.

2 Chapter 3: The Meaning of Disability

Over the course of recent decades disability has become a contested term and a contested concept. Although many sources use the terms interchangeably, ‘impairment’ and ‘disability’ are best regarded as having quite distinct meanings. This thesis adopts, in respect of these terms, the meanings which have come to be preferred by the disability lobby.\(^1\) ‘Impairment’ refers to the underlying physical, intellectual or psychiatric condition which affects a person. ‘Disability’ is the social restriction which attaches to that condition. It is worth noting that the text of the QADA is

\(^1\) See Mike Oliver and Colin Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (1998) 13 ff. Oliver and Barnes provide a thorough summary of the meanings attributed to the terms impairment and disability by a variety of institutions including the UN and various organisations ‘controlled and run by disabled people’.
consistent with this usage of the terms in that it creates ‘impairment’ as the protected attribute and defines it in fundamentally medical, technical terms.\footnote{QADA Schedule Dictionary. Contrast the Disability Discrimination Act 1992 (Cth) (DDA) which defines ‘disability’ in almost identical terms to the QADA definition of ‘impairment’. See DDA s 4.}

Different ‘models’ of disability have been postulated to explain the environmental and functional restrictions experienced by people with disabilities. While it is not the main focus of the present research to identify and to explain these theories, some elaboration is necessary because their influence can be detected in both the terms of the QADA and in the strategies for exclusion constructed from its terms. With the emergence of the disability rights movement came a new and influential model of disability. The ‘social model’ of disability locates the source of disability in the failure of society to adapt to accommodate the different demands made by different impairments. It rejects the view that disability is caused by the failure or the inability of a person with an impairment to adapt to their environment. Under the social model, the cause of disability is not an individual person’s deficiency or difference, but society’s failure to be flexible, tolerant and inclusive. Further, the solutions to disability are not so much medical and technical as social and political.

An assessment is made of the suitability of the social model for analysis of the QADA and of its influence on that legislation. The role of anti-discrimination legislation as a tool for compelling a social response to impairment and, thus, towards the elimination of disability is also examined.
3 Chapter 4: Queensland Education Policy

Queensland Education policy has been influenced by both communitarian theory and the social model of disability. This chapter examines policy documents which have shaped the delivery of education services in Queensland at the time that complaints of discrimination against students with impairment began to proliferate. They set an interesting context for the comparison of policy ‘guarantees’ of equal access to education services for people with disabilities with what services are actually delivered.\(^42\) Legislation is shaped by and reflects government policy and, as such, the text of both the QADA and the Education (General Provisions) Act 1986 (Qld)\(^43\) are scrutinised for evidence of any underpinning policy. What various courts and tribunals called upon to interpret the legislation have inferred about its policy is also examined.

Perhaps the most significant policy examined in this chapter is the policy revealed in the documents generated by the institutions that deliver education services in Queensland. Education Queensland, the government department responsible for the delivery of such services in Queensland, is the largest provider of those services through its state-wide network of schools. Education Queensland policy documents relating to education in general and, specifically, to the education of students with disabilities, are readily accessible. It is more difficult, however, to locate relevant policy from the independent school sector.


\(^{43}\) In late 2006 the Education (General Provisions) Act 1986 (Qld) was replaced by the Education (General Provisions) Act 2006 (Qld). Most provisions of the new Act came into force on 30 October 2006. While reference is made to the 2006 Act and comparisons made with the 1986 Act, analysis in the thesis focuses primarily on the 1986 Act which provided the legislative context in Queensland at the time the education case law discussed in the thesis was developing.
An important preliminary point raised in this chapter is that, although education policy documents invariably acknowledge that an ‘inclusive’ service is provided, what is meant by ‘inclusive’ and related terms is not always clearly articulated. The statement that a school or school system is ‘inclusive’ implies that students of different sexes, ethnicities, religions and abilities are all to be educated together. It is difficult, however, to rely on any promises of inclusion in mainstream schools that appear to be offered to students with disabilities in these documents, because the terminology of inclusion is used so loosely. It is deployed to encompass a range of enrolment options from ‘full inclusion’ in a mainstream class room to the occasional visit to a mainstream campus. There is an inference to be drawn from these documents that the ‘fashionable’ rhetoric of inclusion, which has come to be regarded as the ‘prevailing orthodoxy’, is exploited as a strategy to improve the ‘image’ of an education provider.

B Evidence of the Impact of the Legislation

1 Chapter 5: The Impact of the Legislation

This chapter considers a number of different indicators which suggest that the QADA, and other similar Australian statutes, have not delivered an unfettered right to equality of opportunity in education to people with impairments. Perhaps the most persuasive evidence of the impact of the legislation lies in the outcomes of the cases brought under its authority. Statistical evidence from Education Queensland is also relevant for the insight it gives into the enrolment options accessible to people with impairments.

44 See Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Education of students with disabilities (2002) (‘Senate Report’). The Senate Report concluded that ‘inclusive practices’ have become the ‘prevailing orthodoxy’ in Australia in regard to the education of students with disabilities: 29, [3.1].
The education of people with disabilities has been a focus in numerous recent reports. Most comprehensive, perhaps, are the reports of the Senate enquiry into the education of students with disabilities45 and the Productivity Commission enquiry into the *Disability Discrimination Act 1992* (Cth) (*DDA*).46 Both enquiries took comprehensive submissions from education institutions, peak disability groups and individuals with disability, and both reports suggest problems with the operation of anti-discrimination legislation in Australia.

It is also significant that the Federal Government has acted unilaterally to introduce the *Disability Standards for Education 2005* (Cth) under the authority of the *DDA*.47 The introduction of these standards, which must be met by education institutions in order for them to satisfy their obligations under the *DDA*, is designed to improve access to educational opportunities for people with disabilities. The question is whether their introduction implies, therefore, that legislative regimes such as the *QADA* are failing to deliver in this respect.

### C. Strategies for Exclusion

The *QADA* expressly acknowledges that there will be some situations where discrimination will be tolerated by creating a scheme of exemptions which, if proved, will excuse behaviour which potentially offends the Act. Respondents in education discrimination cases have been quick to invoke the protection of these exemptions. They have also, however, attempted numerous other strategies to avoid liability in these cases. Some courts and tribunals, for example, have been invited to find an

---

45 Ibid.  
47 See *DDA* ss 31-34.
implied duty of reasonable accommodation contained in the terms of the \textit{QADA} and similarly, in the \textit{DDA}. The definitions of impairment and disability have also been manipulated in attempts to edit certain classes of impairment from the protective scope of the legislation. The elements of both direct and indirect discrimination have been scrutinised for loopholes which would allow the discriminatory treatment of people with disabilities.

1 \textbf{Chapter 6: Exemptions}

It is consistent with communitarian theory that individual rights are limited when their assertion would jeopardise the well-being of the community. It is potentially, valid, therefore, for a scheme of exemptions, such as that found in the \textit{QADA}, to limit an individual’s right to education. While the \textit{QADA} exemptions are, prima facie, informed by a need to protect community interests, this chapter considers whether there are problems with their construction and application in the case law and whether they have been argued in circumstances outside what would seem to be their intended scope.

2 \textbf{Chapter 7: An Implied Duty of Reasonable Accommodation}

Legislation in similarly situated jurisdictions, such as the United States of America and the United Kingdom, places a positive duty on education institutions to take reasonable steps to accommodate students with impairments.\textsuperscript{48} There is no similar duty expressly contained in the terms of any of the Australian anti-discrimination statutes.\textsuperscript{49} This chapter investigates whether such a duty may nevertheless be inferred from the terms of such legislation. It also explores whether a duty of reasonable

\textsuperscript{48} \textit{Individuals with Disabilities Education Act} 2004 20 USC § 1400; \textit{Education Act 1996} (UK) s 316.

\textsuperscript{49} Or, indeed, in the terms of any Australian education act.
accommodation may operate as a shield as well as a sword in the context of discrimination law disputes.

3 Chapter 8: The Definition of Impairment

A dramatic challenge to liability for discriminatory treatment of students with impairments has been to argue that the treatment has not been because of any impairment recognised by anti-discrimination legislation. This strategy was promulgated in what has proved, perhaps, to be the most significant Australian anti-discrimination litigation in the field of education to date, the Purvis case. In that case, the complainant exhibited problem behaviour caused by a brain damage. Nevertheless, it was argued that the behaviour was not part of his ‘disability’ for the purpose of the legislation. This chapter scrutinises the authenticity and appropriateness of this strategy in the contexts, particularly, of the stated purpose of anti-discrimination legislation and of disability theory.

4 Chapter 9: The Comparator

Proof of direct discrimination requires evidence of less favourable treatment. This necessitates a comparison of the treatment of the complainant with the treatment of another person, a ‘comparator’, without the complainant’s impairment. Great controversy has surrounded the issue of the nature of the required comparison when the complainant has been excluded from some opportunity as a result of problem behaviour caused by impairment. This chapter examines the approach taken by the

---


51 See, for example, *QADA* s 10 (1), *DDA* s 5(1).
courts to the construction of the comparator and the ramifications of that approach for the remedial scope of Australian anti-discrimination legislation.

5 Chapter 10: Causation

Several strategies for exclusion have been extrapolated from the requirement that there be a causal link between the impairment of a complainant and his or her less favourable treatment. It has sometimes been possible to prove, for example, that any detriment suffered by a complainant has been caused by the nature of his or her impairment and not by the respondent’s treatment.52 This chapter considers whether the success of this strategy reveals a problem with the social model of disability which explains disability as resulting from institutional failure to accommodate difference.

Other causation-related strategies for exclusion, explored in this chapter, like the comparator strategy, depend on a problematic teasing out of the complainant’s behaviour as a factor separate from his or her impairment. Can it be legitimately argued that the complainant’s treatment was not ‘on the ground’ of impairment but of the behaviour related to it? Another controversial situation has arisen when a respondent is aware of the complainant’s behaviour but not of the impairment which causes it. Can it be said in that situation that less favourable treatment caused by behaviour is also caused by the undisclosed impairment?

Arguments about motive and intention have also been important. While the QADA expressly provides that motive is not relevant to the determination of discrimination, this chapter examines whether it is, nevertheless, relevant to proof of a causal link between impairment and treatment.

6 Chapter 11: Less Favourable Treatment

In an argument that seems to oppose the policy of inclusion, respondents in several Queensland cases have asserted that complainants excluded from their mainstream schools have not been treated less favourably than other students. Respondents have claimed that the treatment of those students has, rather, been ‘individualised’ treatment, the ‘best’ treatment or even ‘more favourable’ treatment, in that special services and facilities have been offered to them at special schools. This chapter investigates what argument of this kind suggests about litigants’ views of the nature and purpose of education, and how these views fit with the communitarian conceptual framework of the nature and purpose of education.

7 Chapter 12: Indirect Discrimination

Indirect discrimination is explicitly limited in scope in that it must be ‘not reasonable’ before it will be prohibited by the legislation. The reasonableness enquiry involves consideration of all the relevant circumstances including the impact on the complainant of allowing the discrimination and on the community of removing the discrimination. This chapter examines how the reasonableness enquiry has affected the educational opportunities of people with disabilities. A further focus of this

53 See, for example, L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207, P v Director-General, Department of Education [1995] 1 QADR 755.
54 All three arguments were advanced in P v Director-General, Department of Education [1995] 1 QADR 755.
chapter, however, is whether technical aspects of proof of indirect discrimination, such as proof of the imposition of a ‘term’ and of inability to comply with that term, have been manipulated as strategies to deny liability.

8 Chapter 13: Conclusion

The final chapter addresses the question upon which the thesis is based: is the QADA an effective tool towards delivery of equality of opportunity to Queensland people with impairments? Limits to equality of opportunity are extrapolated from the case law and their legitimacy tested against the frameworks of communitarianism and disability theory. Consideration is given to whether strategies for exclusion adopted by litigants have undermined the purpose of disability discrimination law and whether law reform is required so that the QADA may more effectively serve the people with impairments it promises to protect
CHAPTER 2
COMMUNITARIAN EDUCATION

In order to contextualise an examination of the effectiveness of the QADA in delivering equality of opportunity in education to students with disabilities, the theoretical framework of a communitarian view of the purpose and function of education will be adopted. The fundamental purpose of this chapter is to outline that communitarian view. An attempt is also made to explain the lack of clearly developed and articulated theory in relation to the education entitlements of people with disabilities. A communitarian theory of those entitlements is then postulated.

I COMMUNITARIAN THEORY OF EDUCATION

Communitarians regard the school\(^1\) as one of the most significant social institutions. The school is a community within a community. It is both a microcosm of the wider community and a place of transition from the family to the wider community. If schools fill the intermediate space between family and society, they fill also the intermediate time between infancy and adulthood.\(^2\) Members of society spend their childhood, adolescence and, often, early adulthood in schools. Indeed, contact with schools begins increasingly early as large numbers of children attend preschools and childcare centres with both explicit and implicit education programmes. Contact with schools also lasts increasingly longer as governments emphasise the retention of students to Year Twelve as an indicator of the State’s commitment to and success in

\(^1\)The term ‘school’ is used generically to encompass the range of education institutions from pre- to post-compulsory education. The role of the tertiary education institution is, however, considered explicitly at Part I C, below.

educating its citizens. Further, many students are embracing what Australian communitarian and former federal Opposition Leader, Mark Latham, in his more substantial political writings, sees as the future of education - ‘life-long learning’ - thus extending their exposure to education institutions well into adulthood.\(^3\)

Etzioni articulates a common but controversial communitarian belief that families, generally, have abandoned their traditional role of imparting character and morality to children. Families have been disempowered and impoverished by divorce, by demanding workplaces and by the drive for individual achievement. They ‘have been dismembered, or the parents are overworked or consumed by other concerns and ambitions’\(^4\). Schools, therefore, must fill the void and teach the lessons once taught by parents and community elders: ‘If the moral infrastructure of our communities is to be restored, schools will have to step in where families, neighbourhoods and religious institutions have been failing’.\(^5\) Schools, therefore, have the primary responsibility – above family, above neighbourhood, above church – for building citizens who are equipped to create a strong, free, democratic society.

Schools of every kind have this responsibility: ‘all educational institutions from playgroups and nurseries to schools and universities need to accept that they have a vital responsibility for the character formation of the young’.\(^6\) Communitarians regard education as the co-operative responsibility of the whole community – not just

---


\(^5\) Ibid.

of teachers or of the government. Tam envisages the school as a hub of community action and interaction:

In conjunction with family centres, schools should also provide a focal point for community action. Parents and their children should have the opportunity to experience with other families diverse approaches to improving their communities’ way of life…

Community groups should operate through schools to identify and target support towards those who are most in need of their help. School grounds provide a common meeting place for families to give each other support.  

Communitarianism is, perhaps, still to reach the point where it could be described as a coherent philosophy. Etzioni claims to have ‘invented’ communitarianism a mere decade ago: ‘We adopted the name Communitarianism to emphasise that the time had come to attend to our responsibilities to the conditions and elements we all share, to the community’. Its roots can be traced back centuries, however, to the philosophy of Aristotle. More recent roots can be traced to the writings of prominent American philosopher, John Dewey. However, while communitarianism may still be evolving, common themes on the role of schools are repeated in the writings of individual communitarian theorists. There are, perhaps, two dominant theories. First, schools have an explicit role of teaching students the practical and moral information they need to function as citizens. Secondly, schools have an implicit role of modelling to students the structure and shape of democratic society.

Communitarians see social reform not as a revolutionary but as an evolutionary process. The education policy and practice they advocate may not bring instant improvement but will deliver results as today’s children mature to virtuous adulthood:

---

7 Ibid 201.
8 Etzioni, above n 4, 15.
9 Eg Walzer, above n 2, 179; Markate Daly, Communitarianism: A New Public Ethics (1994) xiii.
10 Eg Walzer, above n 2, 179; Daly, above n 9, 154ff.
‘The purpose of such actions is to help to develop the next generation as responsible citizens even if it is too late for some members of the present generation’.  

A The Explicit Role of the School

Communitarians repeatedly refer to two kinds of knowledge which must be an element of the explicit curriculum of the school. The first of these is the ‘common knowledge’ needed by citizens to belong to and to function effectively within the community. The second is perhaps a subset of the first, the core values of the community.

1 Citizenship Education

Communitarians regard it as right that a community secure its own future by introducing new members to the core knowledge which unites and distinguishes that community. Responsibility for determining the scope and content of this core knowledge lies, presumably, with the State as the ‘community’ within which all smaller communities ‘nest’. In Queensland the core curriculum which must be studied in all recognised education institutions from pre-school to year twelve is determined by the State. Communitarians, while insisting that core knowledge must be identified and passed on from generation to generation, do not spell out in specific detail the content of that core knowledge. It is right, perhaps, that they do not, for the details will surely vary from State to State, from region to region, even from community to community.

11 Tam, above n 6, 76.

12 It should be noted, however, that the Federal Government has displayed increasing interest in influencing the content and administration of the core curriculum and particularly in respect of values education. See Schools Assistance (Learning Together through Choice and Opportunity) Act 2004 (Cth). Via this act and associated regulations, which are presently in draft form only, the adoption of core values strategies by individual schools has been made a pre-requisite to federal funding.
Walzer insists that ‘simple equality’ demands that all future citizens need an education. Further, students must learn to be ‘citizens first’. Any differences in the treatment of students related to their different destinations in life – worker, manager, professional – should be postponed until ‘shared knowledge’ of the information ‘citizens need to know’ is achieved: ‘Everyone studies the subjects that citizens need to know’.13 The goal of teachers here is not to provide equal chances but to achieve equal results. Mastery of the subject matter is crucial: ‘common work’ for a ‘common end’.14 Walzer admits, however, that it is not at all clear just how long it takes to learn one’s ‘social catechism’ or what knowledge is included in ‘knowing one’s way around a modern city’.15 Required knowledge does include, however, ‘the history and law of their country’.16

Galston describes civic education as ‘the formation of individuals who can effectively conduct their lives within, and support, their political community’.17 Civic education cannot be ‘homogeneous and universal’: ‘It is, by definition, education within, and on behalf of a particular political order’.18 Galston claims that civic education is based more on rhetoric than on rationality. The aim of such education is the creation of citizens who embrace, perhaps without question, core knowledge as ‘valid and binding’.19 According to Galston, the responsibility, indeed the right, of the state is to pass on this core knowledge even if it is at odds with parental beliefs.20

---

13 Walzer, above n 2, 203.
14 Ibid 206.
15 Ibid 207.
17 Ibid 243.
18 Ibid.
19 Ibid 244.
20 Ibid 252.
Mark Latham, speaking as a political theorist rather than as a politician, echoes communitarian rhetoric in an Australian voice. He opines that the state must give its people, via education, a ‘platform of citizenship on which to stand’, a platform from which they can pursue economic and social opportunity and freedom.\textsuperscript{21} The ‘platform of citizenship’ supports, however, not only individual opportunity and freedom but also collective wellbeing. The ‘quality and equality’ of our society and, indeed, the ‘capability’ of the nation, are threatened when people do not learn the core knowledge which underpins ‘social connectedness’.\textsuperscript{22}

For writers such as Walzer, Galston, Tam and Latham, mastery of core knowledge is a pre-requisite for citizenship. Through inculcation of this core knowledge, the state not only ‘reproduces’ itself, it also produces citizens who both belong to society, in that they share knowledge of its history and adopt its key beliefs, and are equipped to participate in and to contribute to community life.

\textbf{2 Values Education}

Values education is an aspect of education for citizenship – shared principles are integral to shared citizenship.\textsuperscript{23} Communitarians, dispelling fear that the articulation and inculcation of core values is exclusionary and authoritarian, insist that it is both possible to identify values which are common across cultures, which prevail ‘beyond all our differences’,\textsuperscript{24} and to impart those values without infringing essential freedoms.

\begin{footnotes}
\item[21] Latham, above n 3, xi.
\item[22] Ibid xii.
\item[23] Galston, above n 16, 245.
\item[24] Ibid.
\end{footnotes}
Communitarians seem less reluctant to spell out the values that ought to be taught than the rest of the content of core knowledge. The Responsive Communitarian Platform – a document drafted by Etzioni, Galston, Glendon and supported by many other prominent communitarians – spells out the ‘values Americans share’ and which schools ‘ought to teach’:

… that the dignity of all persons ought to be respected, that tolerance is a virtue and discrimination abhorrent, that peaceful resolution of conflicts is superior to violence, that generally truth telling is morally superior to lying, that democratic government is morally superior to totalitarianism and authoritarianism, that we ought to give a day’s work for a day’s pay, that saving for one’s own and one’s country’s future is better than squandering one’s income and relying on others to attend to one’s future needs.\(^\text{25}\)

Supporters of the platform dismiss as ‘farfetched’ the ‘fear that our children will be “brainwashed” by a few educators’.\(^\text{26}\)

Tam, writing from a British perspective, distils from a decade of communitarian thinking four key values: love and compassion for others, the critical quest for truth, the pursuit of fairness and personal fulfilment. Tam regularly uses the ‘shorthand’ terms: love, wisdom, justice and fulfilment.\(^\text{27}\) Tam addresses ‘the myth that the teaching of common values must involve authoritative assumptions’.\(^\text{28}\) He advocates teaching methods which involve ‘co-operative inquiry’ into, and the modelling of, principled behaviour as superior alternatives to authoritarian ‘chalk and talk’.\(^\text{29}\)

Analysts of communitarian thinking have also attempted to identify and enumerate communitarian values. Frazer, for example, compiled a useful list of what she claims

\(^\text{25}\) Etzioni, above n 4, 258-9.
\(^\text{26}\) Ibid 259.
\(^\text{27}\) See for example, Tam, above n 6, 15, 59-62, 234-5.
\(^\text{28}\) Ibid 66.
\(^\text{29}\) Ibid.
to be ‘communitarian values’ for a NUD.IST\(^{30}\) analysis of ‘the corpus of “political communitarianism”’.\(^{31}\) The analysis was conducted as a research strategy in the preparation of her critique, *The Problems of Communitarian Politics*. Frazer distinguishes ‘political’ communitarians such as Etzioni and Tam from ‘philosopher’ communitarians such as those involved in the ‘liberal v communitarian debate’, for example Walzer and MacIntyre.\(^{32}\) Frazer’s list of communitarian values is as follows: ‘civic spirit, solidarity, equality, democracy, voluntary service, social capital, common good, participation, political power, cleanliness, responsibility, self-discipline, mutuality’.\(^{33}\)

Supporters of the Communitarian Platform and Tam identify a lack of values in education as dangerous.\(^{34}\) Galston reiterates what he claims to be a ‘basic fact of liberal sociology’: ‘the greatest threat to children in modern liberal societies is not that they will believe in something too deeply, but that they will believe in nothing very deeply at all’.\(^{35}\) An absence of overt values education does not mean an absence of values education altogether. No individual, no social institution is morally neutral. Each person, each organisation, each administration reveals a moral code – or lack of it – through behaviour tolerated, decisions made, actions taken. The Responsive Community Platform is clear on this theme:

> In effect, the whole school should be considered a set of experiences generating situations in which young people learn the values either of civility,

\(^{30}\) NUD.IST is a computer software program which is used to analyse text and data. It allows researchers to identify the incidences in text of a particular word or phrase. The program was developed by Sage Publications Software and is distributed by Scolari. NUD.IST is an acronym for non-numerical unstructured data indexing searching and theorizing.


\(^{32}\) Daly, above n 9, xi. Note that MacIntyre is reluctant to align his philosophy with communitarianism: see, for example, Alasdair MacIntyre, ‘I’m not a communitarian but...’ (1991) 1(3) *The Responsive Community*, 91.

\(^{33}\) Frazer, above n 31, 249.

\(^{34}\) Etzioni, above n 4, 259; Tam, above n 6, 57.

\(^{35}\) Galston, above n 16, 255.
sharing, and responsibility to the common good or of cheating, cut-throat competition and total self-absorption.  

The values education implicit in the ‘set of experiences’ which is school will be considered in detail below.  

Values education need not be a discrete subject within the school curriculum. Values can be taught and learned across the curriculum; explanation and discussion of values can be integrated into every existing subject. It should not matter, therefore, which subjects students are interested in, which subjects they choose to study.  

It could be argued that the immersion of the curriculum in values in this fashion better represents the role of values as underpinning a community’s way of life. Values become a part of every aspect of learning and of life, not simply a separate ‘subject’ to be timetabled into the busy individual’s schedule.  

B Implicit Content of Schooling  

Communitarians regard the school culture as imparting important lessons to students. These lessons are not studied, rather they are absorbed, simply by ‘being’ at school. Etzioni, for example, regards the ‘experiences school generates’ as the ‘single most important factor that affects education’, placing it above both the explicit curriculum and teaching strategies. Experiences, says Etzioni, are ‘more effective teachers than lectures’. Walzer makes a similar claim: ‘the content of the curriculum is probably 

36 Etzioni, above n 4, 259.  
37 See Part I B.  
38 Tam, above n 6, 59.  
39 Etzioni, above n 4, 115.  
40 Ibid 103.
less important that the environment in which it is taught’. Latham explains that schools are institutions where students learn not only from teachers but also from their interactions with each other. He argues that people are more likely to learn ‘right and wrong’ from each other than from ‘the top-down creation of public laws’.

Schools have the opportunity to model the democratic community for students in two ways: first, how a school is managed can model core democratic values in action; secondly, the demographic structure of a school can model the inclusive nature of democratic society.

1 School Management

Etzioni argues the first step in enhancing the role of the school as a ‘moral educator’ is to ‘increase the awareness and analysis of the school as a set of experiences’. His implication is that the school culture should not simply evolve, it should be deliberately constructed. While students may learn lessons from school management unconsciously, those lessons should be consciously formulated:

Ideally, the teachers and principals of each school should at least once every three years engage in an extensive ‘retreat’. Here they would spend a weekend, in some secluded place, drawing on professional facilitators, examine the experiences their school generates. They would agree to set aside cognitive questions about the curriculum… and focus on one question: what experiences do we fashion?

Schools, says Etzioni, are not simply ‘a collection of teachers, pupils, classrooms and curricula’. What happens in the car parks, cafeterias and corridors is an equally

---

41 Walzer, above n 2, 215; Tam, too, makes this point, above n 6, 63.
42 Latham, above n 3, 307.
43 Etzioni, above n 4, 105.
important ingredient of the education experience. The school must maintain fairness
and discipline in those places as well as in the classroom.

Students will thus be given a consistent message of the importance of self-discipline
and of respect for others. Etzioni is particularly critical of schools which treat
students as mini-adults who are ‘pleased’ rather than ‘cultivated’ or ‘enriched’. There is an implied criticism of extreme liberalism here, of the ‘I’m OK, you’re OK’
approach to life choices which communitarians regard as having undermined the
moral substructure of society. Students must be shown, fearlessly, that there are
‘rules’ and that not all behaviour is tolerable. Tam is equally critical of tolerance of
‘do-as-you please individualism’:

In the absence of any consistent guidance about what is to be done for the good of all,
the young could easily grow up with the impression that one choice is as good as
another and that in making their choices they do not owe a duty to the wider
community.48

A school can identify particular lessons which need to be imparted and manipulate the
school environment to enhance that lesson. In this way the implicit curriculum can be
made to support the explicit curriculum. Etzioni cites the famous ‘blue-eye/brown-
eye’ experiment conducted by Iowa teacher, Jane Elliott, in 1968, to explain how
experiences can be deliberately generated to teach important lessons. While Elliot’s
lesson was conducted in the classroom, similar lessons can be deliberately generated
outside the classroom. Etzioni gives his own example of how ‘self imposed ghetto

47 Ibid.
48 Tam, above n 6, 59.
49 Etzioni, above n 4, 157. in response to the assassination of Martin Luther King, Jane Elliott exposed
her students to experience as a ‘minority group’ by conducting a class room experiment where her
students were labelled and treated as inferior or superior according to eye colour. For further detail see
like behaviour’ by different racial groups within a school can be combated by the planning of interracial activities, meetings and events: ‘whatever the school tries, it should be aware that its actions, and the experiences they generate, go further in affecting the moral conduct of the students than most lectures or exhortations’. Etzioni suggests that students should also be encouraged to examine their behaviour with a view to understanding and then improving it. Another coincidence of the explicit and implicit curricula occurs here. For Tam, such coincidence is ideal. The ‘real challenge’ of moral education, according to Tam, is ‘to enable pupils to develop the skills and confidence in exploring how these [values] are best realised in practice’.51

Although theorists such as Etzioni and Tam do not spell it out, the clear implication is that there should be a high degree of conformity between the explicit and implicit moral lessons learned at school. If what happens at a school is not consistent with the moral code expressly advanced by that school, then the only ‘values’ lessons learned by students will be, first, cynicism and, secondly, that there is no coherent moral order which informs the community.

2 School Demographics

Democratic society purports to be inclusive. Communitarians insist that democratic schools should, similarly, be inclusive. The role of the school is not merely to mirror the community at large, however. The school has the opportunity to model inclusive policies and practices to the broader community, teaching both students and their parents that such policies and practices are essential in a genuine democracy.

50 Ibid 107.
51 Tam, above n 6, 60.
The rationale for inclusion is not only that it is just. Inclusion enables both the experience of collective action and the personal growth necessary to develop as an effective citizen:

Inclusive communities enable all members to participate in the collective processes affecting their lives … Human beings need to relate to others on a substantial basis to develop their experience of love, collaboration in the discovery of truths, establish justice and expand their opportunities for genuine fulfilment. Only inclusive communities which respect their members as having equal shares of the overall power for determining collective action, and welcome their exercise of that power, can ensure that what people need for common life will be sustained in practice.52

Tam asserts than an inclusive community would not tolerate schools which encouraged or even allowed ‘supremacy’ in access to education based on ‘wealth, race, religion, sex, or any form of group allegiance’.53 Further, it is vital that citizens learn to work together. As such, ‘differentiation according to a narrow range of academic abilities would produce citizens who are ill at ease with co-operating with others who possess different skills and abilities’.54 Inclusive schooling, therefore, is both just and a training for citizenship.

Walzer stresses the characteristic normative structure of the education process, emphasising that ‘education distributes to individuals not only their futures but their presents as well’.55 If students – in their present – are to belong to and be accepted in the community they must be accepted in school as well. The structure of the school is, however, a potent agent for reform of the structure of society. Walzer refers to Dewey’s notion of the school as a ‘special social environment’ protected – to some extent – from external social and economic pressures.56 The school has the

52 Ibid 8.
53 Ibid.
54 Ibid.
55 Walzer, above n 2, 198.
56 Ibid 199.
opportunity to organise itself according to principles of equality and the power to model equality as a desirable social good.

For Walzer ‘simple equality’ is not the ultimate goal but a good basis for building true social justice, ‘complex equality’. For Walzer, ‘simple equality’ in the ‘sphere’ of education is achieved by the provision of equal access to education for all: ‘The simple equality of students is relative to the simple equality of citizens: one person/one vote, one child/one place in the educational system’.57

The embedding of the school in the neighbourhood is also acknowledged as important by Walzer. In principle ‘neighbourhoods have no admission policies’.58 Moreover, when a community comes to regard a school as its own, ‘its existence may serve to heighten feelings of community’.59 Walzer draws the following conclusion: ‘The democratic school, then, should be an enclosure within a neighbourhood, a special environment within a known world where children are brought together as students exactly as they will one day come together as citizens’.60 Walzer admits that no educational system can ever be the ‘same for all’61 and that ‘neighbourhood schools will never be the same across different neighbourhoods’.62 As such, the simple equality of ‘one child/one place in the education system’ is not the end of the story of justice in the sphere of education, but it is, nevertheless, a good start:

57 Ibid 202-3.
58 Ibid 224.
59 Ibid.
60 Ibid 225.
62 Ibid 225.
I think it is fair to say that when neighbourhoods are open (when racial or ethnic identity is not dominant given membership and place) and when every neighbourhood has its own strong school, that justice has been done.63

C Tertiary Education

The function of tertiary education institutions within a communitarian education system is not clearly explained by communitarian theorists. It is possible, however, to postulate from other more general education writings the proposition that some form of specialisation requiring some form of legitimate selection process is acceptable at the tertiary level.

McIntyre identifies one of the major roles of modern education systems to be ‘to fit the young person for some particular role and occupation in the social system’64 and this view would seem to strike a chord with current expectations of the tertiary education sector held by government, employers and even, or perhaps especially, students. Similarly, Walzer acknowledges that some students are better suited to a more ‘specialised education’.65 Indeed, he claims that as the community needs ‘leaders’, there is a ‘need for a selection process aimed at locating within the set of future citizens, a subset of future experts’.66 Walzer sees such ‘specialised education’ as a kind of ‘office’ to be earned. It is the ‘monopoly of the talented’ but, nevertheless, a ‘legitimate’ monopoly.67 Walzer counsels, however, that the early identification of future ‘specialists’ and the ‘tracking’ of them through the education

---

63 Ibid.
65 Walzer, above n 2, 208-220.
66 Ibid 208.
67 Ibid 211.
system should be avoided. This is for two clearly ‘communitarian’ reasons: first, education as a citizen must come first: ‘if the community that one wants to defend is a democracy … no form of recruitment can precede the ‘recruitment’ of citizens’. Secondly, to ‘pick out the future specialists early on’ denies others the ‘chance at inspiration’. An inclusive foundation of citizenship education for all, of ‘common work for a common end’, therefore, must precede ‘specialised education’. It can be postulated, then, that if specialisation and the skilling up of ‘experts’ is to be delayed, its appearance is most appropriate at the tertiary level of post-compulsory education by which time there has been maximum exposure for all to the essential lessons of citizenship.

Bellah, Madsen, Sullivan, Swidler and Tipton, however, are suspicious that too close a focus on academic achievement has undermined the American schools’ role in education for citizenship: ‘on the whole Americans have done better in developing their educational resources for the transmission of specialised knowledge and skills than they have for citizenship’. They are critical of the competitive American approach to education, an approach which resonates in Australia:

Life … is a competitive race to acquire the objective markers (College Boards, admission to the right school, GPA, LSAT, advanced degree, entry into the right organisation, promotion to high-echelon positions) that give access to all the good things that make life worthwhile (attractiveness to a desirable mate, purchase of an appropriate home, American Express gold card, vacations in Europe).

The authors’ ironic words reinforce the clear implication that obsession with the ‘competitive race’ comes at the cost of a life with ‘larger moral meaning’ and of

---

68 Ibid.
69 Ibid.
70 Ibid 220.
72 Ibid 436.
‘contribution to the common good’. It is notable that they suggest that institutionalised obsession with academic achievement threatens not only the socialisation of the intellectually ‘feeble’ via their exclusion, but also the socialisation of the intellectually ‘strong’ by blinding them to the moral dimension of their actions.

Bellah, and his co-authors, insist that even at – perhaps particularly at – the university level, ‘education can never merely be for the sake of individual self-enhancement. It pulls us in to the common world or it fails altogether’. Change must occur ‘particularly in our economic and government institutions’ which ‘show that we understand education less obsessively in terms of ‘infrastructure for competition’ and more as an invaluable resource in the search for the common good’. While for Walzer, then, citizenship education provides a common foundation which precedes the ‘office’ of ‘specialised education’ for future ‘experts’, for Bellah and his co-authors, citizenship education is an imperative which must be paramount throughout all levels of education.

II THE THEORETICAL BASIS OF THE RIGHT OF PEOPLE WITH DISABILITIES TO AN INCLUSIVE EDUCATION

While communitarians have written prolifically and specifically on the role of education in the community and on the role of the school in providing education, they have produced little on the specific issue of education for people with disabilities. This lack of theory is not a deficiency of communitarianism alone. There is little explicit description of the education entitlements of people with disabilities or analysis of the theoretical basis for such an entitlement provided by any school of

73 Ibid 43.
74 Ibid 176.
75 Ibid 175.
philosophy.\textsuperscript{76} By contrast there appears to be almost universal acknowledgement, at the level of education policy, of a ‘right’ to inclusion in mainstream classes for people with disabilities.\textsuperscript{77} As the moral basis of this right, however, is not articulated, it could be argued that policy amounts to little more than what Barton calls ‘romantic visions and idealistic rhetoric’\textsuperscript{78} and what Slee calls ‘fashionably inclusive discourse’.\textsuperscript{79} Further, the term ‘inclusion’ is itself vague, subject to different interpretations to match different policy agenda.\textsuperscript{80}

It is clear that education for people with disabilities is a complex issue which requires a considered theoretical response. The formulation of a considered response, however, has been hindered by a variety of historical, political and definitional factors.

People with disabilities are, perhaps, the last historically oppressed group to assert a right to ‘social justice’. Indeed, it was not until the 1980s that the claim of oppression was made. It was not until then that people with disabilities began to group as a political force, demanding self-determination and control of the policy and research agenda relating to disability issues.\textsuperscript{81} Before the emergence of the ‘politics of

\begin{footnotes}
\item[76] Fazal Rizvi and Bob Lingard, ‘Disability, education and the discourses of justice’ in Carol Christensen and Fazal Rizvi (eds), \textit{Disability and the Dilemmas of Education and Justice} (1996) 9, 23.
\item[77] Inclusion policy in the Queensland context will be considered in Chapter 4: Queensland Education Policy.
\item[78] Len Barton, ‘Disability and the Necessity for a Socio-Political Perspective’ in Len Barton, Keith Ballard and Gillian Fulcher (eds), \textit{Disability and the Necessity for a Socio-Political Perspective} (1992) 2.
\item[80] For analysis of the different readings of ‘inclusion’ and related terms see Part I, Chapter 4: Queensland Education Policy.
\item[81] Jane Campbell and Mike Oliver, \textit{Disability Politics: Understanding our past, changing our future} (1996); Mike Clear (ed) \textit{Promises Promises: Disability and Terms of Inclusion} (2000).
\end{footnotes}
disablement,” the disability sector was dominated by charity organisations and disability policy was dominated by a charity rather than a rights discourse. Provision for people with disabilities was predicated on the benevolence of society rather than on the rights of individuals.

The dominance of the ‘medical model’ of disability, whereby disability is constructed as an individual problem growing from an individual pathology, a problem to be solved via expert diagnosis and treatment, reinforced the benevolent charity approach to people with disabilities. Under this model, disability is seen as confined to the medical/technical arena and excluded from the rights arena.

Slee argues that not only educators, but also ‘middle Australia’, persist in seeing educational disablement as a ‘technical’ issue rather than as a human rights issue and, as a result, the claims of people with disabilities continue to fail to have an impact on Australia’s political agenda. Slee highlights one aspect of ‘middle Australia’ which has, perhaps, contributed to a delay in the recognition of rights for people with disabilities – ignorance about disability. A powerful mythology surrounds disability. On the one hand there is the image of the ‘hero’ triumphing over adversity to succeed in the ‘normal’ world. Campbell, ironically, calls this the image of the ‘super crip’.

On the other hand, there is the image of the victim of a cruel fate who is to be, at best, pitied, or, at worst, feared and avoided. The public has relegated responsibility for

---

82 Oliver coined this phrase as the title of his book which postulates disability as oppression: Mike Oliver, *The Politics of Disablement* (1990).
83 For more detailed analysis of disability policy see Chapter 3: The Meaning of Disability.
84 Different models of disability and their implications are analysed in Part II, Chapter 3: The Meaning of Disability.
85 Slee, above n 79, 121.
86 Campbell, an activist for rights for people with disabilities in Britain, is, herself, a person with a disability.
people with disabilities to ‘experts’ for so long that there is a profound ignorance in the general community of the interests of people with disabilities. Community attitudes are informed by stereotype and misinformation rather than by any objective understanding of the realities of disability.

Another factor which has contributed to the delay in the emergence of the ‘politics of disablement’ is the diversity of disability. People with disabilities are not a group defined by some common genetic or cultural feature.\(^{87}\) There is a large number of different kinds of disability. Each variety of disability makes its own demands of the person with that disability and of society. Further, disability affects a person to differing degrees according both to that person’s individual pathology and to that person’s role and place in society. Each individual’s experience of disability is unique. To this extent, it is impossible to articulate ‘norms’ of disability, hazardous to generalise about the nature of disabilities, and difficult to formulate the appropriate social response to disabilities. Thus, the articulation of theory in this area is constrained.

The diversity of disability has created problems even within the disability lobby. Oliver concedes that there is not uniformity of purpose or ‘equality of opportunity’ within various disability action groups within Britain. He acknowledges that, at least at first, disability politics was dominated by ‘white wheelchair users’.\(^{88}\) Simone Apsis, a British campaigner for inclusive education, argues that people with

\(^{87}\) It is increasingly recognised in relation even to issues of sex, race and class that it is essential to recognise the diversity of interests within groups typically regarded as homogenous. O’ Brien, for example, refers to the phenomenon of the ‘commatisation’ of difference – sex, comma, race, comma, class, comma – to describe this failure to account for the differences within and the intersections between different groups: M O’Brien, ‘The commatisation of women; Patriarchal fetishism in the sociology of education’ (1984) 15 (2) *Interchange* 43.

\(^{88}\) Campbell and Oliver, above n 81, 193.
disabilities who do not have ‘learning difficulties’ avoid collaboration with people who do have learning difficulties because of fear they will be labelled ‘stupid, thick, mental and mad by the non-disabled public’. Evidently, the mythology of disability is powerful even among some people with disabilities.

Finally, it is not possible simply to extrapolate a theory of disability discrimination from theoretical statements made in relation to sex, race or religious discrimination. This is because the removal of discrimination against people with disabilities imposes ‘costs’ on the community which are not imposed in the removal of discrimination against a sex, race or religious group. These costs may be financial in that environments and procedures and facilities must be modified to accommodate the needs of the people with disabilities. Where a number of people with disabilities, each with different needs, are to be accommodated, the number of modifications which must be made is multiplied and so too is the cost.

The accommodation of people with disabilities in schools, for example, may mean that ramps and lifts must be installed, learning materials supplied in Braille or in audio form, learning assistants employed and so on. Different teaching strategies tailored to different learning styles and learning capabilities may need to be developed and implemented.

The inclusion of some students with disabilities may impose emotional and even physical costs on other members of the school community. The case of Purvis illustrates that such costs may be significant. The complainant in that case was a

89 Quoted in Ibid 97.
thirteen-year-old boy who had been excluded from South Grafton High School as a result of his ‘problem’ behaviour. Daniel’s behaviour was caused by and a consequence of brain damage sustained during infancy as a result of an infection with encephalitis. Over the course of the 1997 school year Daniel was suspended several times and ultimately excluded for repeated verbal abuse and violence which included kicking not only furniture and school bags but also other children and teaching staff. A majority of the High Court held that Daniel’s exclusion did not offend the DDA.

How these costs are to be absorbed by the community is not directly addressed by the disability lobby, except to the extent that they imply that the costs are a perception rather than a reality, arising from ingrained prejudice. Oliver, for example, is of the opinion that it is difficult for the community to cope with people with disabilities ‘emerging from…passive, safe stereotypes and becoming powerful human beings’.91 Christiansen asserts that many of the problems or costs perceived to be created by the inclusion of people with disabilities in ‘mainstream’ schools are instead attributable to an inflexible school system which has not been structured to cater for individual difference.92 Slee calls for the current school system to be disbanded and ‘the reconstruction of schooling which takes all comers and supports pride in difference’.93 While the source and extent of the costs flowing from the inclusion of people with disabilities in ‘mainstream’ schools may be contested, how such costs are to be accommodated must be a consideration in theory development in this area.

91 Campbell and Oliver, above n 80, 192.
92 Carol Christensen, ‘Disabled, handicapped or disordered: “What’s in a name?”’ in Carol Christensen and Fazal Rizvi (eds), Disability and the Dilemmas of Justice and Education 63.
93 Slee, above n 79, 121.
There has been some effort, retrospectively and historically, to analyse the theoretical underpinnings of the inclusion movement. Rizvi and Lingard, for example, after claiming that the field of ‘special education’ is ‘largely devoid of any discussion of the moral premises upon which it is based’, attempt to fill the vacuum.\textsuperscript{94} It could be argued, however, that they have merely shopped from a variety of theories in order to postulate what is needed in disability theory, resulting in a melange of sometimes incompatible ideals: ‘What is required now is a ‘complex equality’ construction with a strong recognition of cultural rights within a broad redistributive framework’.\textsuperscript{95} Thus, Rizvi and Lingard have combined the ‘best’ of communitarianism, cultural recognition theory and liberalism.

Christensen\textsuperscript{96} asserts that a right to inclusion is best understood in terms of a Rawlsian redistribution of social goods: social justice requires the ‘equal distribution of primary social goods…unless unequal distribution is to the advantage of the less favoured’.\textsuperscript{97} Christensen also points, however, to deficiencies in redistributive approaches, such as that of Rawls, which account for the fact that although inclusion is repeatedly promised, it has not yet been delivered to an extent satisfactory to people with disabilities.\textsuperscript{98} Christensen claims that redistributive approaches which leave intact social structures and attitudes that marginalise people with disabilities will not deliver justice to people with disabilities.\textsuperscript{99} It is a problem of redistributive approaches that

\textsuperscript{94} Rizvi and Lingard, above n 76, 23.
\textsuperscript{95} Ibid 25.
\textsuperscript{96} Christensen, above n 92, 70.
\textsuperscript{97} John Rawls, \textit{A Theory Of Justice} (1971).
\textsuperscript{98} See Chapter 5: The Impact of the Legislation for an appraisal of the status of ‘inclusion’ in Australia.
\textsuperscript{99} See Christensen, above n 92, 71. It could be argued, however, that to imply criticism of Rawls in this respect is to misunderstand and to misrepresent his approach to the redistribution of social goods. Rawls’ two principles of justice acknowledge that before any distribution of goods takes place, basic liberties must first be guaranteed to each person. The basic liberties include freedoms specified by the liberty and integrity of the person. Further, Rawls held that, within his second principle of justice, fair equality of opportunity (including freedom from social discrimination) must also be assured before
they require the ‘labelling ‘of a person as ‘less favoured’ before they attract a distribution. In the context of disability, where the very meaning of disability is contested, such labelling serves, Christensen claims, to entrench the stereotyped view of people with disabilities as ‘deficient’.100

Taylor, Rizvi, Lingard and Henry imply a similar criticism of redistributive approaches. They argue that such approaches fail to acknowledge that a simple distribution of goods, expressed in the context of education as, say, equal access to schooling for people with disabilities, will not deliver social justice if the school culture remains the same. They argue that for genuine inclusion to be delivered, ‘policies must demand cultural and symbolic changes to the ways schools are structured’.101

Slee, too, joins the chorus of criticism of Rawls: ‘this new calculus of redistributive justice…fails to confront disablement as an issue of cultural politics’.102 Chiefly, it does not recognise the ‘cultural disrespect’ shown to people with disabilities. Slee calls for ‘sorry books’ to be made available for signing as a step towards reconciliation of people with disabilities with non-disabled people.103

100 Ibid 72.
102 Slee, above n 79, 125.
103 Ibid 120.
Writers such as Christensen, Taylor, Rizvi and Slee are attracted to the ‘politics of recognition’, espoused by feminist theorists such as Fraser and Young, and which emphasises the sources of injustice and oppression as cultural domination, non-recognition and disrespect. While the calls of these writers for the complete destructuring and restructuring of the existing school system have been dismissed by some as ‘ideological’ and, generally, fail to acknowledge the considerable costs, both financial and in terms of social disruption, which would accrue to such a project, the acrimony which swirls around the issue of inclusion suggests that their emphasis on the need for cultural as well as economic solutions to the problems of delivering justice to people with disabilities is valid.

III A COMMUNITARIAN THEORY OF EDUCATION FOR PEOPLE WITH DISABILITIES

While communitarian writers have published little work explicitly on inclusive education for people with disabilities it is possible to extrapolate a theory from their general theory of education combined with their comments directly on point. It is clear that communitarianism offers the best features of both liberal and feminist theory in relation to treatment of people with disabilities. It acknowledges both that a redistribution of goods is necessary to people with disabilities and that such ‘simple equality’ alone cannot deliver justice. Further, in their emphasis on democracy as inclusive, communitarians recognise the entitlement to respect as citizens and the right to self-determination of people with disabilities which are also at the heart of the ‘politics of recognition’. Communitarianism offers a solution to another problem with

105 See, for example, Josephine Jenkinson, Mainstream or Special? Educating students with disabilities (1997).
106 See Walzer, above n 2.
the Rawlsian version of liberalism. The fundamental Rawlsian ideal of ‘fair equality of opportunity’ fails to account for the right to their share of social goods for some people with disabilities. Howe, speaking in the context of education, explains that some students ‘by the nature and severity of their disabilities…are precluded from enjoying equality of educational opportunity’ and argues that some other ‘rationale’ must be advanced for educating such students. Communitarianism offers such a rationale via emphasis on education not so much as an instrument of opportunity as of inclusion. The fundamental purpose of education is not to provide opportunities to students but to provide the information students need to belong to and to participate in the community.

Although communitarians are suspicious of ‘rights talk’ and regard the creation of new rights as an excess of liberalism and expensive to the community, it is clear that inclusion in society is a right for all citizens. Tam puts this bluntly: ‘democratic society is inclusive’. While most communitarian writing on inclusion relates to themes of sex, race and religious discrimination, there are some statements which extend the right to inclusion explicitly to people with disabilities. Tam, demonstrating some sensitivity to the ‘politics of disablement’, says that citizens vulnerable to discrimination because of disability ‘should have confidence that society as a whole is on their side, and should not be made to feel isolated as troublemakers who refuse to accept their lot’. It is the role of the community not merely to care for people with disabilities, but to empower them to play an active part in the determination of their

---

108 See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991); and Etzioni, above n 4.
109 Tam, above n 6, 8.
110 Ibid 137.
futures and to preserve their dignity and responsibility.\textsuperscript{111} Isaacs makes a similar point, explaining that people with disabilities are citizens within a community entitled to be recognised as ‘active and autonomous participants in society’.\textsuperscript{112} Their membership of the community presupposes both their recognition as citizens and their entitlement to inclusion and support. Hauerwas stresses the interdependence of community and the need for correlation between beliefs and actions. He observes that people without disabilities learn and grow from their interactions with people with disabilities, highlighting one way that people with disabilities can demonstrate ‘mutual obligation’, can give back to the community.\textsuperscript{113}

Of the communitarian theorists, MacIntyre has produced the most comprehensive analysis of the ‘place’ of a person with a disability within the community. MacIntyre’s rhetoric focuses more on recognition and respect than on rights and obligations, importing, perhaps, some of the ideas of writers like Fraser and Young into communitarian theory. He implies that respect from others and self-respect are important aspects of this place. Recognition from the community is fundamental to this respect and self-respect. Fundamental to community recognition is the understanding that ‘each member of the community is someone from whom we may learn and may have to learn about our common good and our own good, and who always may have lessons to teach us about those goods that we will not be able to learn elsewhere’\textsuperscript{114} Unlike many writers about disability, MacIntyre confronts the issue that some forms of disability will limit the opportunities of those ‘afflicted’. He speaks of those ‘whose extreme disablement is such that they can never be more than

\textsuperscript{111} Ibid 134.
\textsuperscript{112} Kenneth Howe, above n 107, 59.
passive members of the community, not recognising, not speaking or not speaking intelligibly, suffering but not acting.115 However, like Hauerwas, MacIntyre emphasises that even those members of the community who cannot actively participate in community life, have the important – if passive – role of providing others with the opportunity to learn through caring and giving. MacIntyre emphasises, further, that as teachers of the vital virtue of ‘just generosity’, people with disabilities are entitled to ‘political recognition’ in the form of respect from the community.116

As the school is both a microcosm of and the model for the wider community it follows that the communitarian school is inclusive. Walzer has emphasised the relationship between school and neighbourhood. It is important that all children have access to their neighbourhood schools.117 Further, while it is impossible and probably pointless to insist that a school’s student body reproduce a pattern which exactly replicates a democratic social pattern, it is ‘crucial’ that schools ‘aim at a pattern of association anticipating that of adult men and women in a democracy’.118 Walzer elaborates: ‘one could not conceivably organise a democratic society without bringing together people of every degree and kind of talent and lack of talent’.119

Yet, communitarians clearly recognise that access to school does not necessarily equate with inclusion. Walzer sees equality of access to education as delivering

116 Ibid 140.
117 Walzer, above n 2, 222.
118 Ibid 217.
119 Ibid 221.
‘simple equality’ to students, but he is quick to point out that ‘simple equality’ is soon lost – for no educational system can ever be the ‘same for all’.120

Equal access to school does not guarantee equal treatment or opportunity at school. Like Slee and Christiansen, communitarians acknowledge that the school culture, and not only its enrolment policies, must be inclusive. The school is the training ground for citizenship – students learn both from the explicit curriculum and from the implicit curriculum – the school culture – the information they need to function as citizens. This information includes the virtue of not only tolerance but also respect for diversity.121 Tolerance and respect for diversity must be apparent not only in the lessons taught in the classroom but also in the demographics and governance of the school. Reform of school culture is necessary for genuine inclusion to occur. Unlike the more radical methods of reform advocated by Slee and Christiansen, however, communitarians regard reform as an evolving process: while benefits may not be delivered to the present generation of learners, incremental cultural changes can deliver benefits to future generations.122

Communitarians emphasise the interdependence of community: self is constructed not only from individual traits but also from membership of the community. This is the main reason, perhaps, that inclusion is of such importance to communitarians – if a person is excluded from society, he or she is excluded from the opportunity not only of complete citizenship but also of complete development as a person. The community provides both emotionally and physically for each citizen but does so on

120 Ibid 202.
121 The Responsive Community Platform provides that citizens must learn ‘respect for others as well as self-respect’ and that ‘tolerance is a virtue and discrimination abhorrent’: see Etzioni, above n 4.
122 Tam, above n 6, 76.
the basis of mutual obligation and, as such, each citizen must be ‘responsive’, must
give to the community to balance what they take. Slee’s cogent criticism of
contemporary society is that people with disabilities trade in a currency which is not
recognised as valuable.¹²³ That is, people with disabilities are commonly regarded as
having little or nothing to contribute to the community. For communitarians, one
purpose of inclusive education is for the various members of a community to learn
from and through our relationships with others.¹²⁴

A Limits on the right to an inclusive education

Whilst inclusion is a fundamental tenet of communitarianism, communitarian theory
does imply some limits to the right to an inclusive education. A corollary of the
principles of mutual obligation and of community interdependence is that when the
‘hard cases’ arise, that is, when problems of competing rights and obligations arise,
these problems are resolved in the manner which will benefit the wider community
rather than the individual. The Responsive Community Platform rationalises this
preference on the basis that individual rights and freedoms are best protected in a
strong community: ‘neither human existence nor individual liberty can be sustained
for long outside the interdependent and overlapping communities to which we all
belong…The exclusive pursuit of private interest erodes the network of social
environments on which we all depend and is destructive to our shared experiment in
democratic self-government’.¹²⁵ It can be extrapolated from this preference for
community welfare over individual ‘rights’ that when problems of competing rights
and obligations arise in respect of the inclusion of people with disabilities in

¹²³ Slee, above n 79, 128.
¹²⁴ See, for example, Hauerwas, above n 113, 149ff. See also Alasdair MacIntyre, above n 114.
¹²⁵ Etzioni, above n 4, 258.
mainstream schools, the right to inclusion must in some circumstances be surrendered for the good of the community. Competing rights and obligations are most acutely apparent in the case of the inclusion of students with intellectual and neurological disabilities in mainstream schools where the disability causes behaviour which compromises the quality and the safety of the learning environment for other students and the working environment for staff.

Walzer cautions that when it comes to the ‘difficult’ distributive problem of deciding who goes to which school and with whom, it must be remembered that ‘it isn’t only [school] places that are distributed to children; children themselves are distributed among the available places’. 126 Not all children can study together in the one class or even at the one school. Different decisions, ‘political’ decisions, must be made allocating students to places.

While communitarians tend to focus on education as socialisation for citizenship, others, particularly employers and even parents and students themselves, focus on education as preparation for the workplace, as a means of sorting students into boxes for life. MacIntyre identifies one of the major roles of modern education systems as ‘to fit the young person for some particular role and occupation in the social system’. 127 What happens, however, when the ‘socialisation’ and the ‘sorting’ roles of education clash? What happens if, before a child’s ‘socialisation as a citizen’ is complete, that child’s intellectual ability – or disability – determines the time has come for him or her to be ‘sorted’ into a ‘special’ school or out of school altogether? What happens when the inclusion of some hinders the development of others?

---

126 Walzer, above n 2, 214.
127 MacIntyre, above n 64.
Communitarian writers, particularly Tam and Walzer, reveal some sensitivity to the moral and social difficulties raised in attempting to answer such questions.

Tam and Walzer do contemplate that some form of ‘streaming’ may be necessary to accommodate the different abilities of students. Streaming, says Tam, has ‘the advantage of developing pupils with diverse potentials’. Walzer admits ‘there are educational reasons for separating out children who are having special difficulties with mathematics, for example’. The best inference to be drawn from their ‘streaming’ comments is that it should result in the accommodation of some students in separate classes at their neighbourhood school rather than in their relocation to a different school altogether. This inference is supported by the fact that both Tam and Walzer are adamant that a policy of total segregation of students with learning difficulties is not only undemocratic, it is counterproductive for the community. Tam cautions that ‘total segregation could mean that a culture of co-operative citizenship could be seriously undermined’. Walzer argues that segregated schools could reinforce inequality in the wider community:

… there are neither educational nor social reasons for making such distinctions across the board, creating a two-class system within the schools, or creating radically different sorts of schools for different students. When this is done, and especially when it is done early in the education process, it is not the association of citizens that is being anticipated but the class system in roughly its present form.

Tam is wary of parents who, wanting the ‘best’ for their own children, selfishly insist on segregating from the mainstream those students whose needs are perceived as interfering with the academic progress of their peers. The ‘best’ course for some individuals may have as its corollary the ‘worst’ course for other individuals, and for

---

128 Tam, above n 6, 68.
129 Walzer, above n 2, 221.
130 Tam, above n 6, 68.
131 Walzer, above n 2, 221.
the community as a whole: ‘the admission policy of schools must ultimately help to meet the needs of the community as a whole and not just some parents who do not care about the needs of others’. Walzer wryly points out that ‘the adult world is not segregated by intelligence’. Segregation, Walzer reiterates, is practically and politically wrong: ‘in a practical sense we are required by our work to mix up and down the status hierarchy; further, democratic politics requires that we mix with a wide range of people’.

As noted earlier, Walzer also nods to the ‘sorting’ role of education by acknowledging that not only are some students better suited to a more ‘specialised education’, it is also in the community’s interests to provide it to them. Such specialised – and potentially exclusive – education, however, must be delayed until the foundations of citizenship have been laid for all.

Walzer also makes one curious comment which suggests a clear limit to the right to an inclusive education: ‘Except for a total incapacity to learn, there are no reasons for exclusion that have to do with the school as a school’. Unfortunately, Walzer does not elaborate on how the ability or inability to learn is to be assessed. Further, Walzer’s comment is somewhat contradictory in light of the communitarian insistence that many lessons – often very valuable moral lessons – are absorbed not by conscious intellectual effort but by experience. Walzer’s comment also fails to account for the strong assertion of such communitarians as Hauerwas and MacIntyre that we learn

---

132 Tam, above n 6, 74.
133 Walzer, above n 2, 221.
134 Ibid 221.
135 Ibid 208ff: See above n 65.
136 Ibid 221.
essential life lessons from shared experiences with people with disabilities.\footnote{See, for example, Hauerwas, above n 113, 149ff; MacIntyre, above n 114.} It should, however, be acknowledged, that Hauerwas and MacIntyre do not explicitly contemplate the class room as the context for that learning or the difficulties that might attend the meshing of formal instruction and the informal lessons learned through interaction with people whose impairments impact on the learning environment. Walzer’s throwaway line suggests, perhaps, that where there is a clash, the communitarian ideal of the classroom as model of democratic society yields to the communitarian ideal of the classroom as a place of explicit instruction in the skills prerequisite to citizenship.

While Walzer’s ‘total incapacity to learn’ comment is problematic and lacks, perhaps, the detail of mature theory, it, at the very least, indicates a willingness to confront the hard case of the student with severe intellectual or behavioural disability who asserts a right to education at his or her neighbourhood school – the hard case which continues to challenge the Australian legal system and legal systems worldwide. This is a case writers such as Slee and Christiansen seem reluctant to address explicitly. To this extent, their rhetoric seems as vague and illusory as the empty rhetoric of inclusion that they deride.

It should be noted at this point that communitarian writers have not directly addressed the issue of whether the allocation of extra resources to support the inclusion of students with disabilities prefers the good of the individual student to the good of the community. There is no explicit set of guiding principles, therefore, to inform an assessment of whether or when community spending to support inclusion of people
with disabilities threatens to compromise the welfare of the whole community. The lack of explicit writing in this area is, no doubt, symptomatic of the general lack of writing in disability theory. Nevertheless, it may be speculated that, as it is a basic tenet of communitarianism, the good of the community prevails over the good of the individual citizen, and where spending on a minority threatens the good of the community as a whole, that spending may be justifiably curtailed. Whether ‘cost to the community’ arguments should be allowed to justify the exclusion of a student with a disability from a mainstream school, and by implication exclusion from access to citizenship and participation in community, however, remains unclear.

IV CONCLUSION: FUNDAMENTAL PRINCIPLES OF THE COMMUNITARIAN APPROACH TO EDUCATION FOR PEOPLE WITH DISABILITIES

Several principles underpinning the communitarian approach to education for people with disabilities can be postulated from communitarian writings in the area. First, communitarian education is inclusive in the sense that there is a prima facie right for any student – regardless of sex, race, culture, religion or ability - to education in a mainstream setting. The fundamental rationale for such inclusion is that communitarian society is inclusive and school is both a microcosm of and a model for communitarian society. Further, every student must have access to necessary lessons which must be learned before he or she is equipped to function effectively as a citizen. The necessary lessons are learned through both the explicit curriculum of the school and the implicit curriculum which comprises its environmental and administrative culture.
Secondly, the right to inclusion in the mainstream setting for people with disabilities is of particular importance because some necessary lessons are best learned alongside those with disabilities. By providing the opportunity for others to learn, students with disability are contributing to the good of the community and, as such, entitled to be accorded the respect of the community.

Thirdly, communitarians acknowledge that there may be a limited place for the ‘streaming’ of students according to ability where that streaming is appropriate to achieve specific desirable education outcomes. One such appropriate situation may arise in relation to the education of students with disabilities. The ‘streaming’ of classes, however, should not justify the exclusion from a mainstream community school of students with disabilities. ‘Streamed’ classes can be provided within a mainstream setting to maximise the opportunities for development of an inclusive culture.

Fourthly, another place where students with disabilities may legitimately be ‘streamed’ out of educational opportunity is at the level of the tertiary institution. McIntyre has acknowledged that an important purpose of education is to fit students for work and in our society the tertiary education institution is where that kind of education typically takes place.\(^{138}\) Walzer has described the kind of specialised education which is characteristic of tertiary education as an office to be earned and as the legitimate monopoly of those with the requisite talent.\(^{139}\) As such, if a person with a disability cannot meet the genuine educational requirements of a tertiary course they may rightfully be excluded.

\(^{138}\) McIntyre, above n 64.
\(^{139}\) Walzer, above n 2, 211.
Fifthly, it is a basic tenet of communitarian philosophy that in a competition between what is good for the community and what is good for the individual citizen, community prevails. Therefore, where the inclusion of a student with a disability in a mainstream education setting compromises the ability to learn of the majority of students, it may be necessary for the exclusion of that student from the mainstream setting. Similarly, where the inclusion of a student with an impairment compromises the safety of other members of the school community the exclusion of that student may be warranted. While communitarians have not expressly considered, for example, the implications of the inclusion of students with problem behaviour for the educational opportunities and the safety of others, it is clearly consistent with communitarian principles that majority rights should prevail in such a case. Whether the financial cost to the community of supporting students with disabilities in mainstream schools, however, is ever sufficient to compromise the general good, and thus to justify the exclusion of such students remains unclear.

Finally, and most controversially, at least one writer, Walzer, has suggested that the exclusion from a school altogether may be allowable where a student, by reason of impairment, demonstrates a ‘total incapacity to learn’.\textsuperscript{140} This assertion, however, fails to account for the more dominant communitarian view that students with a disability have a teaching as well as a learning role. Thus, there is a clear rationale for the inclusion of even those students who lack the capacity to learn on the basis that they have the capacity to teach.

\textsuperscript{140} Ibid 221.
In summary, although communitarians are suspicious of ‘rights’ talk, it may be postulated that in a communitarian society a student with a disability has a prima facie right to inclusion in a mainstream school. The communitarian preference for the good of the community above the good of the individual, however, means that communitarians will concede a ‘thicker’ set of limitations on individual rights and freedoms than would be the case under, say, a liberal analysis. The individual’s right to inclusion, therefore, will yield to the extent necessary to protect the rights of others in the community. In this situation the benefit to the community of a learning environment which models and promotes inclusion is displaced by a detrimental disruption to others in that learning environment. Complete exclusion from a mainstream school, however, is justified only when the inclusion of a student with a disability compromises the ability to learn or safety of the other students at the school.
CHAPTER 3

THE MEANING OF DISABILITY

The meaning of disability and of related terminology is contested. Similarly, a range of theories has been advanced as to the cause of disability and as to how it may be mitigated. The dominant competing theories of the cause and management of disability are the ‘medical model’, which postulates disability as a medical problem to be ‘solved’ by medicine and technology, and the ‘social model’ which postulates disability as arising from the failure of society to adjust to the difference of a person with impairment. The underlying premise of anti-discrimination legislation is that disability is, at least to some extent, a ‘social construct’, and that, as such, disability can be reduced or even removed by social adjustment. There is clear evidence of the ‘social model’ of disability in the terms of the Anti-Discrimination Act 1991 (Qld) (QADA) and of similar Australian legislation. The legislation does contain, however, some explicit limits to liability\(^1\) which curb the social response required to some impairments. As such, they allow the disability of some complainants to continue without amelioration. These limits suggest that only discrimination which is ‘unfair’\(^2\) will be sanctioned, with ‘fairness’ to be determined by a balancing of the rights to inclusion of the complainant with impairment against competing rights held by the wider community. The balancing expressly contemplated by the legislation, is, prima facie, consistent with the approach taken to ‘rights clashes’ by communitarian

\(^1\) The most significant explicit limits are the unjustifiable hardship exemption and the requirement that an indirectly discriminatory term be ‘not reasonable’: See Anti-Discrimination Act 1991 (Qld) (QADA) ss 5, 10(5), 11(1)(c). These limits are discussed later in the present Chapter and in detail in Chapter 6: Exemptions and Chapter 12: Indirect Discrimination.

\(^2\) See QADA s 3. The removal of ‘unfair’ discrimination is a primary objective of the QADA: see QADA s 6(1).
theorists who insist that the greater good of the community must prevail when threatened by individual rights claims advanced by individuals.³

I THE LANGUAGE OF DISABILITY

The terms ‘impairment’ and ‘disability’ have been subject to a variety of readings.⁴ It is important to be careful in the use of these terms, and allied terms such as ‘handicap’; language is ‘political’ and the way these terms are employed can reveal and reinforce stereotypical ideas of disability. Indeed, Barton argues that language contributes to ‘discriminatory practices’: ‘our definitions are crucial in that they may be part of and further legitimate disablist assumptions’.⁵ Oliver and Barnes claim that there is increasing awareness that the social response to a group is both reflected and reinforced by the language used to define that group and cite, as examples, the pejorative implications that have come to accompany terms such as cripple, spastic and Mongol.⁶

With heightened awareness of disability as a human rights issue, and not merely as a medical issue, came a need to distinguish between the meanings of the words impairment and disability, in order to reinforce the fact that a ‘medical’ condition could and should be distinguished from its social ramifications. An attempt was made

---

³ See, for example, Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991); Amitai Etzioni, The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda (1993) 258. Analysis in later Chapters will demonstrate, however, that the application of express limits to liability may not always be made consistently with either the objects of anti-discrimination legislation, disability theory or communitarian theory. See, particularly, Chapter 6: Exemptions, Chapter 12: Indirect Discrimination and Chapter 13: Conclusion.

⁴ See Mike Oliver and Colin Barnes, Disabled People and Social Policy: From Exclusion to Inclusion (1998) 13 ff. Oliver and Barnes provide a thorough summary of the meanings attributed to the terms impairment and disability by a variety of institutions including the UN and various organisations ‘controlled and run by disabled people’.


⁶ Oliver and Barnes, above n 4, 13.
by the World Health Organisation, in 1980, to impose clarity and consistency of usage. The WHO document, ‘The International Classification of Impairment, Disability and Handicap,’\textsuperscript{7} defined impairment as ‘any loss or abnormality of psychological, physiological or anatomical structure or function’;\textsuperscript{8} disability as ‘any restriction or lack (resulting from an impairment) of ability to perform an activity in a manner or within the range considered normal for a human being’\textsuperscript{9} and handicap as ‘a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal’.\textsuperscript{10} The WHO definitions were influential, but were criticised as founded on assumptions about the existence, and the desirability, of ‘normality’\textsuperscript{11}. Further, the use of the term ‘handicap’ has been abandoned for its controversial connotations of begging, ‘cap-in-hand’.\textsuperscript{12}

The readings which have come to be preferred by people with disabilities,\textsuperscript{13} and by organisations associated with them, restrict ‘impairment’ to meaning the physical, intellectual or psychiatric condition which affects a person. ‘Disability’ refers to the social restriction experienced by a person with an impairment.\textsuperscript{14} These are the


\textsuperscript{8} Ibid 47.

\textsuperscript{9} Ibid 143.

\textsuperscript{10} Ibid 180.

\textsuperscript{11} See, for example, Oliver and Barnes, above n 4, 15: ‘Clearly, this typology is founded on assumptions about the existence and nature of intellectual and physical ‘normality’. WHO has developed a new regime to replace that developed in 1980: \textit{International Classification of Functioning, Disability and Health}, WHA54.21, 9th plen mtg (2001). This regime instead of defining disability and related terms, ‘is a classification of health and health related domains that describe body functions and structures, activities and participation’ which are ‘classified from body, individual and societal perspectives’ and also take into account environmental factors: see \textit{International Classification of Functioning, Disability and Health: Introduction} \texttt{<http://www3.who.int/icf/icftemplate.cfm?myurl=introduction.html%20&mytitle=Introduction>} at 20 July 2005.

\textsuperscript{12} See, for example, Oliver and Barnes, above n 4, 17. Oliver and Barnes refer the reader to other commentators who make the same point. See also Julie Smart, \textit{Disability, Society, and the Individual} (2001) 59.

\textsuperscript{13} See Oliver and Barnes, above n 4, 16-19.

\textsuperscript{14} The cause of this social restriction is, in turn, subject to debate. This issue is considered at Part II, below.
definitions adopted for the present research. The phrases, ‘person with an impairment’ and ‘person with a disability’, will also be used instead of the phrases, ‘impaired person’ and ‘disabled person’. This usage is consistent with that of Queensland Government departments, such as Disability Services and Education Queensland, and with a widespread preference for emphasising that people with disabilities are ‘people first’.15

These readings have been adopted for this research to aid clarity and consistency of analysis, but it must be acknowledged that it is almost impossible to avoid some degree of confusion in that these readings are not adopted uniformly by researchers and commentators on disability. Indeed, common usage is such that the terms ‘impairment’ and ‘disability’ are used almost interchangeably with little appreciation of conceptual differences between the two. It is notable, for example that although the QADA prohibits discrimination on the ground of ‘impairment’, in the Disability Discrimination Act 1992 (Cth) (DDA), the protected attribute is ‘disability’.16 The definition of ‘impairment’ in s 4 QADA is, however, essentially the same as the definition of ‘disability’ in s 4 DDA.17 There is further potential for confusion in the failure of those involved in the making, interpreting and applying of anti-discrimination law to make their understanding of the words explicit, or to use them in a consistent manner. The second reading speech in support of the Anti-

15 It is evidence of the shifting sands underlying language usage in the area of disability studies, however, that Oliver and Barnes prefer the phrase ‘disabled person’ claiming that it better represents both the disabling effect of society upon a person with an impairment, and disability as a political identity. They argue that the phrase ‘person with a disability’ reinforces the stereotype that disability belongs to and is the problem of an individual person and is not, therefore, a matter which can or should be addressed by social reform. Oliver and Barnes stress that such niceties of language usage are not merely ‘semantics’ or ‘political correctness’ but are ‘an attempt to inject an important and meaningful voice into an exclusionary process’. See Oliver and Barnes, above n 4, 19.

16 The definition of impairment in the QADA is considered at Part IV, below.

17 The differences between the QADA and the Disability Discrimination Act 1992 (Cth) (DDA) definitions are considered Part IV, below.
Discrimination Bill 1991(Qld), and the debate following, for example, do not explicitly acknowledge, or, by inference, reveal an understanding by the parliament, that different readings may be attached to the terms impairment and disability.\footnote{18} 

\section*{II Disability Models}

If the term disability is contested, then so too is the concept. Different ‘models’ of disability have been postulated to explain the environmental and functional restrictions experienced by people with disabilities. It is not the main focus of the present research to identify and to explain these theories, except to the extent necessary that their influence can be detected in the legal response to problems with the creation and protection of the right to education of people with disabilities. There are, however, two dominant models of disability which should be explained to inform the present research – these can be called the ‘medical model’ and the ‘social model’.

\subsection*{A The Medical Model\footnote{19}}

Disability has not always been regarded as a sociological issue.\footnote{20} Sociologists, along with most members of society, accepted that disability was a medical issue. Under the medical model, impairment, whether physical, intellectual or psychiatric, imposes limitations on those it ‘afflicts’. Impairment is equated with inferiority and abnormality. Not only the treatment of the impairment, but also the management of the resultant disability, is the domain of medical doctors and other ‘experts’. The

\footnote{18} It is clear, however, in the decision to choose ‘impairment’ rather than ‘disability’ to describe the protected attribute, that those responsible for the drafting of the bill were informed about these differences and their significance.\footnote{19} See Deborah Marks, Disability: Controversial Debates and Psychological Perspectives (1999) Chapter 3 for a comprehensive discussion of the scope and impact of the medical model. Oliver calls the medical model the ‘individual model’ to emphasise that the effect is to cast disability as the problem and responsibility of individuals rather than of society.\footnote{20} See Barton, above n 5, 8.
medical model casts people with impairments as dependent rather than independent, and views the allocation of resources to people with impairments as determined by needs rather than rights. Thus, the model is associated with a ‘charity’ rather than with a ‘rights’ approach to the provision of health, educational and care facilities for people with impairments. Further, people with impairments are routinely excluded from mainstream society because they, supposedly, cannot adapt to a ‘normal’ environment or function as ‘normal’ students, workers or citizens. If the ‘miracles’ of modern medicine and technology cannot cure or control impairment, then a ‘sufferer’ must bear his or her limitations stoically, if not heroically.

The medical model has attracted criticism as perpetuating the myth – or, some may claim, the reality – of ‘normal’ society where difference justifies marginalisation, if not exclusion. It has been further criticised as creating a culture of dependency among people with disabilities, denying them both the right to and the skills to demand self-determination. Perhaps the most persuasive criticism of the medical model is that it fails to acknowledge the disabling effect on people with impairments of a society built to cater for norms of ability and behaviour. Thus, the solutions to

---


22 See, for example, Felicity Armstrong and Len Barton, ‘Is there anyone there concerned with human rights?’ in Felicity Armstrong and Len Barton (eds) Disability, Human Rights and Education (1999) 212; Marks, above n 19, 63-5; Oliver, above n 21, 6.

disability posited under the medical model are medical and technical, not social and political.24

Barton points out that criticism of the medical model must not be taken as suggesting that people with impairments do not need medical support. Criticism is targeted at the cultural effects of an unquestioning acceptance that impairment and disability are no more than medical, technical issues:

What is being challenged are the social conditions and relations in which such [medical treatment] encounters take place, the enveloping of their identity in medical terms, the importance of their voice being heard and a much more effective participation in decisions which affect them. 25

B The Social Model26

The social model of disability is fundamentally different from the medical model in that it postulates the source of disability as the failure of society to adapt to accommodate the different demands made by different impairments. It rejects the view that disability is caused by the failure or the inability of a person with an impairment to adapt to their surroundings. Thus, under the social model, the cause of disability is not an individual person’s deficiency or difference, but society’s failure to be flexible, tolerant and inclusive. Disability is not so much a ‘personal tragedy’ as society’s creation. Strategies for the management of disability are not so much medical and technical as social and political. Resources such as health care,
accommodation and education are allocated not according to objectively ascertained need, but as rights.

It has been argued that the treatment of disability as a medical rather than as a social issue amounts to oppression of people with disabilities. The rise in acceptance of disability as a social construct has been accompanied by the emergence of action groups dedicated to raising awareness of disability as a social and political issue, and a human rights issue. It can be argued that legislation, such as the QADA and DDA, is evidence both of acceptance that the provision of services and facilities to people with disabilities is a rights issue and, that an agenda to protect such rights is necessary.

The social model of disability has attracted some criticism. The principal criticism is, perhaps, that it does not acknowledge the individuality of impairment or the pain and limitation which flows from the impairment itself. It is interesting in this context to note the genesis of the social model, as acknowledged by Oliver. While Oliver is regarded as the first to name and explain the ‘social model’, he claims inspiration from the distinction between impairment and disability adopted by the British disability action group, Union of the Physically Impaired Against Segregation (UPIAS). The social model was first conceptualised, therefore, in the context of the experiences of people with physical impairments. It is difficult to explain how the social model accounts for all of the limitations experienced by people with

27 See, for example, Colin Barnes, Disabled People in Britain and Discrimination: a case for anti-discrimination legislation (1991), Barton, above n 5, Jane Campbell and Mike Oliver, Disability Politics: Understanding our Past, Changing our Future (1996), Mike Oliver, The Politics of Disablement (1990), Mike Oliver, Understanding Disability: From Theory to Practice (1996).
28 For detail of the criticism see Marks, above n 19.
29 Mike Oliver, Understanding Disability: From Theory to Practice (1996) Chapter 3.
disabilities, and, particularly, by those with intellectual disabilities.\footnote{Simone Apsis suggests that even within the disability movement there is ‘discrimination’ against people with ‘learning difficulties’. She suggests that there is a tendency among people with physical impairments to apply the ‘medical model’ to those with intellectual impairments, to believe that the problems experienced by people with intellectual impairments are more individual and more likely to be caused by impairment than by disabling social barriers. Quoted in Jane Campbell and Mike Oliver, above n 27, 97.} It is, therefore, a potentially valid challenge to the social model that in the case of some types and degrees of impairment, no amount of social adjustment or accommodation or attitudinal change will deliver equal opportunity. Oliver acknowledges this criticism of the social model and concedes that ‘most disabled people’ can cite examples of how their impairment has created restrictions. Oliver insists, however, that the existence of personal limitations should not deflect attention from the ‘social barriers of disability’.\footnote{Oliver, above n 29, 38.}

Smart\footnote{Julie Smart, \textit{Disability, Society, and the Individual} (2001) 59. Smart provides a slightly different schema of disability models from the one explained here. She adopts the medical model and the social model, as described above, but identifies a third influential model, the ‘functional model’, which focuses on the impact of the functions of an individual on his or her disability. This model explains the fact, for example, that an amputated finger would not be considered a disability for most people, but it certainly would be a disability for a concert pianist. See 38-40.} suggests that the two models of disability should be regarded as intersecting. While her claim that ‘no one today subscribes to a single disability model’ ignores the political standpoint of writers such as Barnes, Oliver and Barton, the implication that no one model can account for all instances of disability is perhaps valid. It will be seen that it is the difficult task of tribunals and courts, charged with the responsibility of applying anti-discrimination law, to determine the threshold between disability which is an aspect of an individual’s impairment and disability which is a social construct.\footnote{See particularly, Part I, Chapter 10: Causation.} The scheme of the legislation, and its application in the courts, suggests that it is only the latter which may be prevented by the law.
III DISABILITY AND THE FUNCTION OF ANTI-DISCRIMINATION LEGISLATION

Barton claims that to be disabled is to be discriminated against, to be isolated and restricted. Barton advocates anti-discrimination legislation as a necessary weapon in the ‘struggle’ to combat discrimination against people with disabilities. Anti-discrimination legislation is ‘public confirmation that discrimination against disabled people is not acceptable’. Barnes also suggests that anti-discrimination legislation is essential as it emphasises the cultural and political shift towards viewing provision for people with disabilities as ‘rights’ rather than ‘needs’. Like Barton, Barnes suggests that a principal effect of anti-discrimination legislation is to demonstrate that discrimination will not be tolerated, but Barnes also regards as important the establishment of a legislative framework to enforce inclusivity – enforcement provisions back rhetoric with action.

It can be argued that the underlying premise of anti-discrimination legislation is that disability is a social construct. The legislation makes discrimination against people with impairments unlawful. Therefore, it is an acknowledgement that the attitudes and actions of others can infringe upon the rights of people with disabilities. It is acknowledgement that limitations faced by people with disabilities flow from their treatment and not merely from their impairment. Their limitations, therefore, are a social construct rather than a ‘personal tragedy’. Legislation is also acknowledgement that disability is a social and not merely an individual problem and that ‘solutions’ to the limits attached to disability must come from society as a whole and not only from the individual with the medical ‘problem’ – ‘solving’ disability will not be achieved.

34 Barton, above n 5, 13. See also Armstrong and Barton, above n 22, 212.
35 Barton, above n 5, 13.
only through medical treatment and management of impairment but through attitudinal and behavioural change. The scope of the protected areas in anti-discrimination legislation – education, employment, accommodation, goods and services - reveals acceptance that discrimination and, by implication, disablement, exist as institutional and not merely individual phenomena.

Lindsay, however, speaking in the context of Australian anti-discrimination legislation, identifies a conceptual clash between the objects of the legislation and the scheme it creates to promote those objects. While the policy underpinning the legislation reflects the rhetoric of social justice and inclusion, the making of an anti-discrimination claim involves a complex and technical legal process which reinforces difference and objectifies the experience of the complainant. Lindsay is particularly critical of the legislative requirement that a comparison be made between the treatment of the complainant and the treatment of those without impairment, claiming that such a comparison emphasises the difference of the complainant. While a comparison is explicitly required in the proof of direct discrimination, a comparative element is also at the heart of proof of indirect discrimination, where the effect of the discriminatory term on the complainant must be compared with the effect on people without the impairment.

37 This point, and others referred to below, was made in an address to the ANZELA conference, Brisbane 2-4 October, 2002. Lindsay was speaking to her conference paper co-authored by Mary Keefe Martin: K Lindsay and M Keefe-Martin ‘Issues in Australian Disability Discrimination Case Law and Strategic Approaches for the Lawful Management of Inclusion’ (Paper presented at the Australia and New Zealand Education Law Association Conference on Legal Risk Management, Safety, Security and Success in Education, Brisbane, September 2000).
38 See QADA s 10; DDA s 5.
39 See QADA s 11; DDA s 6.
Lindsay’s argument gels with Christensen’s critique of the ‘labelling’ of people with disabilities as reinforcing their difference and justifying their isolation.\textsuperscript{40} To bring an anti-discrimination claim it is necessary to prove that the complainant is ‘impaired’ or ‘disabled’ – to bring such a claim therefore, is to submit to a labelling which denies individuality and which is predicated on a system of norms. Christensen calls for a reconstruction of the education system and, by implication, of society, to acknowledge that ‘all students are…different, complex and whole’.\textsuperscript{41} In a system which recognised and valued diversity and difference, the labels ‘disabled’ or ‘impaired’ would cease to have currency or relevance. Lindsay concedes, however, that it is difficult to conceptualise a legislative system for the prevention of discrimination on the ground of impairment or disability which is not premised on the proof of impairment or disability, suggesting that the present scheme may be ‘the best we can do’.\textsuperscript{42}


Under the scheme of the \textit{QADA}, discrimination, on the basis of impairment, is prohibited.\textsuperscript{43} ‘Impairment’ is defined as follows:

\begin{enumerate}
\item the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or
\item the malfunction, malformation or disfigurement of a part of the person's body; or
\item a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
\item a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
\item the presence in the body of organisms capable of causing illness or disease; or
\end{enumerate}

\begin{flushright}
\textsuperscript{40} Carol Christensen, ‘Disabled, handicapped or disordered: “What’s in a name?”’ in Carol Christensen and Fazal Rizvi (eds), \textit{Disability and the Dilemmas of Justice and Education} (1996).
\textsuperscript{41} Ibid 77.
\textsuperscript{42} Lindsay, above n 37.
\textsuperscript{43} \textit{QADA} s 7(1)(h).
\end{flushright}
f) reliance on a guide dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that--
g) presently exists; or
h) previously existed but no longer exists.

If the meaning of impairment explained above is accepted, then it must also be accepted that the legislation prohibits discrimination on the basis of a medical condition. The definition of impairment provided in QADA supports this interpretation. The definition is ‘medical’, recognising impairment that is physical, intellectual, psychiatric and biological. The definition recognises that impairment can be caused by a number of factors – illness, disease, injury, malfunction, malformation, disfigurement and infection. In the context of what has come to be the widely accepted meanings of impairment and disability, it is appropriate that the term impairment rather than disability is attached to such a definition.

Not only does the QADA create impairment as a protected attribute, its operation is also such that it recognises that disability flows from the social response to impairment. Thus, it can be argued that Queensland legislation recognises that disability is, or at least can be, a social construct. Discrimination – different treatment on the ground of impairment – is the disabling agent. Equal opportunity to enjoy ‘rights’ such as education and employment is curtailed, for the impaired person, not only by the impairment and its physical, intellectual or psychiatric effects, but also by the actions or failures of others. The QADA prohibits not only direct discrimination, differential treatment, it also prohibits indirect discrimination, the imposition of a term with which a person with an impairment cannot comply, but with which a higher

---

44 See Part I, above.
45 QADA s 4.
proportion of people without the impairment can comply, and which is not ‘reasonable’.\textsuperscript{46} Through this prohibition on indirect discrimination, the \textit{QADA} also recognises that institutions and programs designed for ‘normal’ citizens can have a disabling effect for those with an impairment.

Further evidence of recognition of the social model can be found in the fact that the \textit{QADA} prohibits discrimination not only on the basis of characteristics the impaired person actually has, but also on the basis of characteristics which are presumed of or imputed to him or her.\textsuperscript{47} Thus the Act is alive to the fact that socially entrenched stereotypes of an impairment can influence how a person with that impairment is treated by others.\textsuperscript{48} Similarly, \textit{QADA} prohibits discrimination on the basis of past as well as present impairment,\textsuperscript{49} reflecting awareness that any stigma associated with an impairment can linger even after the physical or psychiatric effects of that impairment no longer exist.\textsuperscript{50}

Still further evidence of recognition of the social model is found in the Act’s explanation of the meaning of direct discrimination: ‘in determining whether a person

\textsuperscript{46} \textit{QADA} s 11.

\textsuperscript{47} \textit{QADA} s 8(b) and (c).

\textsuperscript{48} That discrimination can arise out of attitudes is acknowledged in the second reading speech by the Attorney General, Dean Wells, supporting the Anti-Discrimination Bill 1991 (Qld), Queensland, \textit{Parliamentary Debates}, Legislative Assembly, 26 November 1991, 3195 (Dean Wells, Attorney-General).

\textsuperscript{49} \textit{QADA} s 8(d).

\textsuperscript{50} It should be noted that, in one respect, the Queensland definition (and that of the \textit{Equal Opportunity Act 1984} (SA) s 5, the \textit{Equal Opportunity Act 1984} (WA) s 4, the \textit{Anti-Discrimination Act 1992} (NT) s 4 and the \textit{Equal Opportunity Act 1995} (Vic) s 4) is less generous than that in the \textit{Disability Discrimination Act 1992} (Cth) (\textit{DDA}), the \textit{Discrimination Act 1991} (ACT) s 5AA, the \textit{Anti-Discrimination Act 1998} (Tas) and the \textit{Anti-Discrimination Act 1977} (NSW) (‘\textit{NSWADA}’). The Commonwealth, ACT and Tasmanian legislation prohibit discrimination on the basis not only of present or past disability but also on the basis of a disability that may exist in the future. NSW legislation prohibits discrimination on the basis of a disability that a person will have, or that it is thought a person will have in the future (\textit{NSWADA} s 49A(c)). The \textit{DDA} definition was tested in \textit{Beattie v Maroochy Shire Council} [1996] HREOCA 40 (Unreported, Carter P, 20 December 1996).
treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.\textsuperscript{51} This provision recognises that the elimination of discrimination may require positive action by others to accommodate the needs of the person with the impairment. Thus, the Act suggests that managing impairment is not the responsibility solely of the person with that impairment but also of society at large.\textsuperscript{52}

Another example of the influence of the social model of disability is found in the express provision, in relation to indirect discrimination, that ‘it is not necessary that the person imposing, or proposing to impose the term is aware of the indirect discrimination’.\textsuperscript{53} It is the very nature of indirect discrimination that it follows from policies and practices which are geared to mainstream society. Thus, indirect discrimination is the product of a ‘disabling’ society which does not accommodate difference. While there is no equivalent provision in relation to direct discrimination, there is little doubt that in that situation, too, there need not be awareness by the discriminator that the treatment complained of is discriminatory. It is expressly provided that ‘it is not necessary that the person who discriminates considers the treatment less favourable’.\textsuperscript{54} It is also provided, in relation to direct discrimination,

\textsuperscript{51} QADA s 10(5).
\textsuperscript{52} How this section has been parlayed into a positive duty to make ‘reasonable accommodation’ of a person who is impaired will be considered in Chapter 7: An Implied Duty of Reasonable Accommodation.
\textsuperscript{53} QADA s 11(3).
\textsuperscript{54} QADA s 10(2). Note that there is no equivalent provision in the DDA. The meaning of the term ‘less favourable’ was considered in the QADA context in L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207 (‘L’), and in P v Director-General, Department of Education [1996] 1 QADR 755 (‘P’). See Chapter 11: Less Favourable Treatment.
that the discriminator’s ‘motive for discriminating is irrelevant’. This provision suggests that there is no need to prove an intention to treat the complainant ‘less favourably’ on the ground of disability. Collectively, these sections address the fact that disabling attitudes and policies exist at a subconscious level among members of society and within social institutions. The approach intrinsic in these provisions is, therefore, consistent with the attribution of disability to the social response to impairment.

**V Legislative Limits on the Social Response to Disability**

The *QADA* does provide express limits on the responsibility of society to remove discrimination and, therefore, to diminish disability. Such limits, generally, require a balancing of the competing interests of the person with impairment and the rest of the community. Most significantly, the Act creates the ‘unjustifiable hardship’ exemption applicable only to cases of alleged unlawful discrimination on the ground of impairment. It is stated in the second reading speech, delivered by the Attorney-General, Dean Wells, in support of the *Anti-Discrimination Bill 1991 (Qld)*, that one of the functions of exemptions in the proposed Act is ‘to balance the complex needs of society’. It is, therefore, explicitly contemplated that there will be occasions

---

55 *QADA* s 10(3). Note that there is no equivalent provision in the *DDA*.
56 For a detailed discussion of the relevance of motive and intention to proof of discrimination see Chapter 10: Causation.
57 Although ‘unjustifiable hardship’ is often characterised as a defence, technically, it is created as an exemption in the *QADA*. Consideration of ‘unjustifiable hardship’ arises only after a determination that a prima facie case of unlawful discrimination is made out. Proof that special services or facilities are required by the complainant, and that the provision of those services or facilities would impose ‘unjustifiable hardship’ on the respondent, then has the effect of exempting the respondent from the operation of the Act in the case under consideration. This sequence is spelt out in *P* [1996] 1 QADR 755. For further consideration of the unjustifiable hardship and other exemptions to unlawful discrimination see Chapter 6: Exemptions.
58 In relation to educational institutions, the unjustifiable hardship exemption is created in s 44 *QADA* s 44. Unjustifiable hardship is defined in *QADA* s 5.
when the rights of people who are impaired will be required to yield to the rights of others. The unjustifiable hardship exemption is raised when special services or facilities are required in order to avoid discrimination against a person with an impairment, and the provision of those services or facilities imposes, or would impose, unjustifiable hardship on the person or institution that would be responsible for their provision. The exemption, as such, is linked to the definition of direct discrimination which, as noted above, expressly contemplates that special services or facilities may be required to be provided in order to avoid discrimination.\textsuperscript{60} Some of the circumstances relevant to a determination of whether unjustifiable hardship is established are set out in the Act itself:

\begin{itemize}
\item[a)] the nature of the special services or facilities; and
\item[b)] the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged; and
\item[c)] the financial circumstances of the person; and
\item[d)] the disruption that supplying the special services or facilities might cause; and
\item[e)] the nature of any benefit or detriment to all people concerned\textsuperscript{61}
\end{itemize}

The list is not closed, leaving a tribunal or court the discretion to consider other factors presented as relevant by the parties to a particular case.

The definition of indirect discrimination is similarly qualified by the rider that, for the discriminatory term to be unlawful, it must be ‘not reasonable’.\textsuperscript{62} The Act states that...
whether a term is reasonable depends on all the circumstances of the case. It specifies some relevant circumstances, but, again, the list is not closed:

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

There is some overlap between the relevant circumstances for establishing unjustifiable hardship and the relevant circumstances for determining whether a discriminatory term is reasonable. Cost to the alleged discriminator and their financial circumstances are specified as relevant for both determinations. In relation to unjustifiable hardship the Act explicitly requires consideration of ‘the nature of any benefit or detriment to all people concerned’, that is, a balancing of the competing interests of the person with the disability and of others affected by his or her accommodation.

The legislated limits outlined above recognise that the ‘cost’ of removing discrimination is such that it would place an unacceptable burden on the community. As such, they reflect the preference for majority rights over individual rights that underpins communitarian theory. ‘Rights talk’, communitarians argue, cannot be allowed to dominate a responsible weighing of the entitlements of the individual citizen against the good of the whole community. As Etzioni has cautioned, ‘[t]he exclusive pursuit of private interest erodes the network of social environments on which we all depend and is destructive to our shared experiment in democratic self-

---

63 QADA s 11(2).
64 Re unjustifiable hardship see QADA s 5(b) and (c); re indirect discrimination see QADA s 11(2)(b) and (c).
65 QADA s 5(e).
66 A more thorough comparison of the unjustifiable hardship exemption and the reasonableness enquiry is provided in Part III C, Chapter 12: Indirect Discrimination.
67 See Glendon, above n 3.
The express limits in the *QADA* contemplate and seek to guard against an ‘erosion’ of social networks such as those found at educational institutions.

**VI Conclusion**

While there is strong and consistent evidence of the influence of the social model of disability embedded in the terms of the *QADA*, the Act does not guarantee the elimination of all social restrictions and conditions which impinge on the right to inclusion in mainstream society of people with impairments. Indeed, the Act’s primary purpose is to eliminate only what is cryptically described as ‘unfair’ discrimination. The unjustifiable hardship exemption and the requirement that an indirectly discriminatory term be ‘not reasonable’ have the clear potential to limit the social response required to impairment, and, therefore, to erode the right of a person with an impairment to ‘equality of opportunity’. It will be seen in later chapters that, in many instances, the potency of the legislative demands made of citizens and institutions, in order that people with impairments are not to be disabled by discriminatory social responses, is diluted by the effect of these two exculpatory provisions. Later chapters will also demonstrate, however, that many strategies in addition to those expressly contemplated by the legislation have been employed to deny liability for discrimination, to limit the scope of the social response required to disability and, thus, to limit the opportunity for people with impairments to be educated alongside other citizens at the neighbourhood school.

---

68 Etzioni, above n 3, 258.
69 *QADA* s 6.
70 The operation of the unjustifiable hardship exemption and relevant case law are considered in detail in Part V, Chapter 6: Exemptions. The operation of the reasonableness requirement in relation to indirect discrimination and related case law are considered in detail in Part III, Chapter 12: Indirect Discrimination.
A number of different sources are available which provide insight into Queensland policy on inclusive education. Queensland government policy on inclusive education can be inferred from the text of the *Anti-Discrimination Act 1991* (Qld) (*QADA*), the *Education (General Provisions) Act 1989* (Qld) (*Education Act*)\(^1\) and in interpretations of that legislation by judges and tribunal members.\(^2\) More overt statements of policy are to be found in documents produced by the government department responsible for the administration of State education, Education Queensland. Although policy documents are not, generally, readily made available by private institutions, the policies of a variety of independent schools that do publicise their stance on inclusion are also available to be examined. It is submitted that legislative and institutional policy will influence the scope of the right of people with disabilities to an inclusive education. A clear understanding of policy is, however, complicated by competing models of inclusion and by differing understandings of the terminology associated with inclusion.

---

\(^{1}\) In late 2006 the *Education (General Provisions) Act 1989* (Qld) was replaced by the *Education (General Provisions) Act 2006* (Qld). Most provisions of the new Act came into force on 30 October 2006. While reference is made to the 2006 Act and comparisons made with the 1989 Act, analysis in the thesis focuses primarily on the 1986 Act which provided the legislative context in Queensland at the time the education case law discussed in the thesis was developing. See particularly Part II A, below.

\(^{2}\) Only explicit comments of judges and tribunal members are considered. Analysis of any policy, preconception or ideology implicit in the text of judgments and decisions is beyond the scope of this enquiry. It is acknowledged, however, that there is a growing science of such textual analysis of and application of linguistic theory to judicial statements. See, for example, Lawrence M Solan, *The Language of Judges*, (1993) and Susan U Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (1998).
I WHAT IS INCLUSION?

Analysis of the implications of policy documents on education for people with disabilities is hampered by the problem that different authors use the terms ‘inclusion’ and ‘inclusive education’ to mean different things. There is room, therefore, for confusion if policy documents are relied on as indicating what a school or school system offers in practice to students with a disability.3

On one end of the scale, inclusion can be taken to mean the inclusion of people with disabilities in mainstream classes, on a full time basis. ‘Mainstream’ may be used as a tag to identify the hundreds of ‘regular’ classrooms in ‘regular’ schools which cater to ‘regular’ students.4 Fulltime inclusion in such a class may be seen as symbolic of the fact that a student with a disability, too, is acknowledged as a ‘regular’ student. This kind of inclusion may be tagged ‘full inclusion’ and, perhaps because of its symbolic importance, it is the preferred option for many families of a student with a disability. It is also, probably, the most expensive variety of inclusion, as special facilities,

---

3 This problem was highlighted in the recent report of the Senate enquiry into education for people with disabilities: Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, *Education of students with disabilities* (2002) (‘Senate Report’) 29-34 [3.1]-[3.19]. The *Senate Report* identifies two ‘basic positions in regard to inclusion’, 30 [3.5]. The first is explained as ‘a single educational setting where students with disabilities are taught, for the most part, in regular classes and where special needs are assessed and supported, as far as possible, within this setting’, 30 [3.6]. Under this model, however, ‘there may be provision for partial withdrawal of individuals or groups depending on needs and individual programs’, 30 [3.6]. The second position on inclusion ‘assumes complete inclusion, with all students in the same classroom all the time’, 30 [3.7]. The *Senate Report* regards this second position as ‘utopian’, 30 [3.7]. Nevertheless it is the understanding of inclusion preferred by many parents and educationists who champion inclusion in a mainstream setting as a ‘human right’. The first position on inclusion, the *Senate Report* asserts, would be better described as ‘integration’, 30 [3.6], in that it does not contemplate the complete inclusion of a student in a mainstream setting. The *Senate Report* finds that ‘inclusion practices in Australian schools lean strongly to an integration model’, 30-1 [3.8]. The report is discussed further in Part IV C, Chapter 5: The Impact of the Legislation.

4 ‘Regular’ is used to mean non-segregated or mainstream. The term ‘regular’ is frequently used by educationists to describe non-segregated or mainstream schools and classes as distinct from schools and classes with a special purpose or clientele. See, for example, Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September, 2002, 444 (Dr John Enchelmaier).
resources and personnel are almost invariably required to support a student with a
disability in a mainstream classroom.

On the other end of the scale, inclusion may be used to describe the inclusion of
people with disabilities in mainstream classrooms on a flexible, part time basis. Such
an arrangement is common when one school campus incorporates both mainstream
classrooms and ‘special education’ classrooms. ‘Special education’ students may
mingle with ‘regular’ students during breaks. They may participate in some
mainstream classes and then relocate to ‘special education’ classrooms for special
purpose classes.\footnote{It should be noted that some school systems, such as Education Queensland, may offer full inclusion
to some students and a part time arrangement to others dependant on both the individual circumstances of a student and the facilities available at schools in that student’s area. See the discussion of Education Queensland placement policy at Part III B, below.} This form of inclusion is less expensive to implement as facilities,
resources and personnel required to support a particular disability may be clustered at
a school designated to cater to students with that disability. The term ‘inclusive
curriculum’ is also frequently used in policy documents. ‘Inclusive curriculum’ is a
somewhat nebulous phrase used to imply that a school promotes, through its teaching
and organisation, a culture of tolerance and inclusion of people of different abilities,
genders, races and religions. The fact that a school or school system is described as
having an ‘inclusive curriculum’ should not be taken as any guarantee that it includes
students with disabilities in mainstream classes.

The problem is, therefore, that when an education system or institution promotes
itself, usually in fulsome terms, as committed to inclusion, inclusive education or an
inclusive curriculum, it is not necessarily clear whether it is committed to full
inclusion in a mainstream class, or to some hybrid mainstream class-special class
arrangement, or simply to the encouragement of a culture of inclusion among its students. The problem is compounded by an irresistible inference, in some cases, that an institution may market itself as ‘inclusive’ to attract the prestige of conforming with what has come to be regarded as the ‘prevailing orthodoxy’, while never explicitly promising, or intending to be held to a promise of, ‘full’ inclusion. The practice of Queensland education institutions in relation to inclusion of students with impairments, as distinct from their policy on inclusion, is considered in Chapter 5.

II QUEENSLAND LEGISLATION

A Education (General Provisions) Act 1989 (Qld) 7

In Australia, there is no constitutional right to education or specific legal protection of a right to education. Further, there is no legislative framework designed specifically to provide for the inclusive education of people with disabilities. 8 There is, however, legislation which renders education compulsory for children within specified age

6 The Senate Report concluded that ‘inclusive practices’ have become the ‘prevailing orthodoxy’ in Australia in regard to the education of students with disabilities: Senate Report, above n 3, 29, [3.1].

7 In late 2006 the Education (General Provisions) Act 1989 (Qld) was replaced by the Education (General Provisions) Act 2006 (Qld). See above n 1. A review of the 1989 Act commenced in October 2004 with the release by the Education Minister of the consultation paper Education Laws for the Future. Queensland Parents for People with a Disability (QPPD) called for parents of students with disabilities to provide feedback on the consultation paper and published a guide to structuring such feedback: Queensland Parents for People with a Disability, Review of the Qld Education Act 1989 <http://www.qppd.org.au/Issues/Ed%20Act%20Review.pdf> at 13 March 2005. The consultation paper foreshadowed the insertion of an object clause into a new Act which would include a ‘guiding principle of providing education programs to suit the learning needs of individual students, including those who may be educationally disadvantaged on the basis of culture, linguistic background, gender, disability, location or socioeconomic status’: Queensland Government, Department of Education and the Arts, Education Laws for the Future (2004) 6. This object clause has not, however, been inserted into the new Act. The Education (General Provisions) Act 2006 (Qld) retains many of the provisions of the Education General Provisions Act 1989 (Qld) including, in substance, those discussed, below: s 114 (see 2006 Act s 176), s 24 (see 2006 Act s 50), s 14 (see 2006 Act s 12),

8 In this respect the Australian approach can be contrasted with the approach in the United States of America. While there is no constitutional right to education in the United States (See San Antonio Independent School District v Rodriguez, 411 US 1 (1973)), there is specific legislation suggesting a commitment to inclusion which provides that students with disabilities are entitled to a ‘free and appropriate public education’ in the ‘least restrictive environment’: Individuals with Disabilities Education Act 2004 20 USC § 1400. Similarly, in the UK, since 2001, there has been a prima facie ‘duty to educate children with special educational needs in mainstream schools’: see Education Act 1996 (UK) s 316. The Education Act 1996 (UK) was amended to create the duty by the Special Educational Needs and Disability Act 2001 (UK) C 10, s 1.
Further, a free education, provided by the State, is notionally available to all.\textsuperscript{10} In Queensland, the \textit{Education Act} spells out the entitlement to education of Queensland students as follows:

**Provision of State Education**

(1) For every student attending a State educational institution...there shall be provided an educational program in such subjects and of such duration as the Minister approves that--
(a) has regard to the age, ability, aptitude and development of the student concerned;
(b) is an integral element within the total range of educational services offered with the approval of the Minister first had and obtained;
(c) takes account and promotes continuity of the student's learning experiences;
(d) recognises and takes account of the nature of knowledge;
(e) has regard to whether enrolment is compulsory or non-compulsory.

(2) The duration of the educational program must be based on the basic allocation to a student.\textsuperscript{11}

The \textit{Education Act} can be read as providing for the education of students with disabilities in state schools, particularly by its direction that ‘an educational program’ ‘has regard to the age, ability, aptitude and development of the student concerned’. In respect of non-state schools the Act specifies that the Education Minister ‘may provide, or contribute, special education for persons with a disability’.\textsuperscript{12} The entitlement to education of any student with a disability is limited to the ‘basic allocation’\textsuperscript{13} of 24 semesters.\textsuperscript{14}

The unwillingness of Education Queensland to extend the schooling available to a student with a disability was displayed in the case of a visually impaired student, Dean Hashish, who was refused the opportunity to continue his schooling at the

\textsuperscript{9} In Queensland, \textit{Education (General Provisions) Act 1989} (Qld) (‘\textit{Education Act}’) s 114 (See \textit{Education Act 2006} (Qld) (‘\textit{Education Act 2006}’) s 176).
\textsuperscript{10} In Queensland, \textit{Education Act} s 24 (see \textit{Education Act 2006} s 50).
\textsuperscript{11} \textit{Education Act} s 14 (see \textit{Education Act 2006} s 12).
\textsuperscript{12} \textit{Education Act} (Qld) s 15 (see \textit{Education Act 2006} s 420).
\textsuperscript{13} \textit{Education Act} (Qld) s 5 (see \textit{Education Act 2006} s 11(1)).
\textsuperscript{14} \textit{Education Act} (Qld) s122, s 123 (see \textit{Education Act 2006} s 60).
Narbethong School for the Visually Handicapped beyond his eighteenth birthday.\textsuperscript{15} Hashish complained of impairment discrimination under the \textit{QADA} but, ultimately, the case was decided on the basis of the scope of his entitlement to ‘special education’ as provided for in the \textit{Education Act}. While a majority of the Queensland Court of Appeal\textsuperscript{16} ultimately found that the Education Minister was authorised by the \textit{Education Act} to terminate the complainant’s enrolment at Narbethong, the \textit{Education Act} was subsequently amended to clarify the entitlement of students to the ‘basic allocation’ of 24 semesters.\textsuperscript{17}

\begin{center}
\textbf{B Anti-Discrimination Act 1992 (Qld) (QADA)}
\end{center}

As there is no specific provision mandating the inclusion of students in mainstream schools in Queensland legislation, people seeking to assert a right to inclusive education must rely on anti-discrimination legislation. They must bring a complaint under the relevant legislation – in Queensland, the \textit{QADA} – that they have been treated ‘less favourably’ than people without disability. The argument frequently advanced by people with disabilities is that people without disabilities attend mainstream schools and, therefore, to deny people with disabilities inclusion at mainstream schools is to treat them less favourably. This section considers whether any policy of inclusive education can be detected in the terms of the \textit{QADA}.


\textsuperscript{16} The termination of enrolment was held by McPherson JA and Thomas J to be lawful on the basis that via the \textit{Education Act} 

\textsuperscript{17} \textit{Education and Other Legislation Amendment Act} 1997 (Qld) s 11.
The objects of the *QADA* are generic rather than specific to people with disabilities, as the Act addresses discrimination on a wide range of grounds in addition to what the Act calls ‘impairment’. The long title of the Act states the intention of the Queensland Parliament as follows: ‘to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct’. The protected areas, where discrimination on the ground of a protected attribute is unlawful, include work and goods and services as well as education.

The cautious phrase ‘unfair discrimination’ from the long title warrants comment as it suggests a limit on the ‘protection’ afforded by the Act. It naturally implies that there are circumstances when discrimination will not be actionable as ‘unfair’. Further, it foreshadows the creation under the Act of exemptions which render behaviour which is prima facie discrimination, lawful.

Parliament’s statement, at reason 6(c), is particularly interesting in the context of the present thesis: ‘The Parliament considers that…the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone’. This statement is intended to be read, no doubt, as a rationale for the education of the community to respect people regardless of their ‘difference’, and to cease discrimination against people because they are different. It also suggests acknowledgement of community resistance to the recognition of ‘rights’ for people protected by the Act and that the community may need to be ‘taught round’ to

---

18 *Anti-Discrimination Act 1991* (Qld) (*QADA*) s 7(1).

19 The effect of these exemptions on the provision of education to people with disabilities will be analysed in Chapter 6: Exemptions.
acceptance of the Act. The *QADA* expressly contemplates education programmes for the community ‘to promote the purposes of the Act’. The Anti-Discrimination Commission is vested with that function.\(^{20}\)

It is tempting to read the statement at reason 6(c) as sympathetic to the communitarian rationale for education – communitarians would agree that education of citizens in core values such as inclusiveness, or what the *QADA* describes as appreciation and respect of ‘the dignity and worth of everyone’ must necessarily improve the ‘quality of democratic life’.\(^{21}\)

The reasons for enacting the *QADA* also include, at reason 6(a), ‘[t]he Parliament considers that…everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination’. As noted above, there is no express recognition of a right to education, let alone of a right to an inclusive education for people with disabilities. This is only to be expected, as there is no constitutional right to education or specific legal protection of a right to education in Australia.\(^{22}\) The *QADA* acknowledges, however, the ratification by the Commonwealth of an assortment of international human rights instruments, many of which do recognise rights to education.\(^{23}\)

Although the *QADA* does not refer to or create an express right to education, it does, explicitly, make discrimination in the provision of education unlawful. Section 38

\(^{20}\) *QADA* s 235(d).

\(^{21}\) See Part I A 2, Chapter 2: Communitarian Education.

\(^{22}\) See above n 8.

\(^{23}\) See, for example, Article 28 of the *Convention on the Rights of the Child*; Article 6 of the *Declaration of the Rights of Disabled Persons*. 
relates to access issues, and makes it unlawful for an educational authority to discriminate in failing to accept an enrolment, in processing an enrolment, in the setting of criteria for enrolment or in the imposition of terms on enrolment. Section 39 relates to discrimination against students once they are enrolled; an educational authority must not discriminate by varying the terms of a student’s enrolment or by denying or limiting access to a benefit, or by exclusion, or by treating a student unfavourably in any way in connection with training or instruction. The broad terms of s 39 reveal that the Parliament acknowledges the potential for discrimination not only at the point of enrolment but also during the course of enrolment. The wording of ss 38 and 39 reveals an understanding of a fundamental tenet of inclusive education – inclusion of students involves more than their admission to school; it requires their inclusion also in the day to day events and experiences of the whole school community.

1 Judicial Readings of the Policy of Anti-Discrimination Legislation

Commissioner Atkinson, of the Queensland Anti-Discrimination Tribunal (QADT), stated, in relation to the Disability Discrimination Act 1992 (Cth) (DDA), that the ‘undoubted goals’ of that Act are ‘inclusiveness, access and availability’. She made this comment in her decision in Kinsela v QUT, 24 a case alleging discrimination in the area of education. Kinsela’s complaint was brought under the DDA rather than the QADA. At the time of hearing, an agreement existed, between the Federal Government and the Queensland Government, that complaints under the DDA, originating in Queensland, as well as complaints under the QADA, would be heard by the Queensland Anti-Discrimination Tribunal. The purpose of the DDA, though

---

specific to people with disabilities, is similar in its terms to the QADA. Kinsela’s case arose out of a complaint of discrimination by a student in a wheelchair that he could not participate fully in his university graduation ceremony because of access problems associated with the venue where the graduation ceremony was scheduled. His complaint of discrimination was upheld by Commissioner Atkinson who found that it was not a ‘trivial matter’ to be able to sit with fellow graduands and to ‘process’ to the stage with them for the actual degree presentation.

Generally tribunal members and judges have been able to decide cases without needing, or choosing, to comment explicitly on the issue of whether the QADA, or similar Australian legislation, promulgates a policy of ‘inclusion’ in education. There is some tangential reference to the issue by Commissioner Keim, in the QADT case P, in his finding that people with disabilities have ‘a prima facie right to choose to be educated in their local school’. Commissioner Innes of the Human Rights and Equal Opportunity Commission (HREOC), in his decision in the case of Purvis v State of New South Wales, also entered the inclusion debate when he stated that segregated education for students with disabilities is ‘by its nature, discriminatory’. While the statements of Commissioner Keim and Commissioner Innes imply a ‘right’ to inclusion, the source of such a right is not directly attributed to legislation. Indeed the

25 Disability Discrimination Act 1992 (Cth) (DDA) s 3(a)(1): ‘To eliminate, as far as possible, discrimination against persons on the ground of disability in the [area] of…education’; compare with the QADA long title: ‘by protecting them from discrimination’; DDA s 3(b): ‘to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community’; compare with the QADA long title: ‘to promote equality of opportunity for everyone’, and with parliament’s reason 6(a): ‘everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination’; DDA s 3(c): ‘to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community; compare with Parliament’s reason, QADA reason 6(c): ‘the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone’.

26 P v Director-General, Department of Education (Qld) 1 QADR 755, 783.

27 Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117.

28 Ibid 75178 [7.2].
source of such a right is not clearly articulated at all. It could, perhaps, be inferred that tribunal members make such claims based on their perception of a community acceptance of such a ‘right’ or, more controversially, based on their own belief in such right. It is significant, in the sense that ‘rights talk’ does not mean that rights will be enforced – ultimately the student complainants in both P and the Purvis case were lawfully excluded from their school of choice.29 It is clear, therefore, that despite acceptance of a right to inclusion, that right to inclusion is seen as having limits.

The decision of the High Court allowing the exclusion of the complainant in Purvis represents the most complete examination of the inclusion issue by an Australian court to date. Gummow, Hayne and Heydon JJ found that any discrimination against Daniel Hoggan was not unlawful and only commented generally, in support of their interpretation of the DDA, that the international treaties which legitimise its enactment and inform its objects are ‘aspirational’ documents.30 Gleeson CJ,31 McHugh and Kirby JJ32 and Callinan JJ,33 however, all made some explicit comment on whether and to what extent there is a right to a ‘mainstream’ education available to students with disabilities.

29 Commissioner Innes, at first instance, did find that the complainant, Daniel Hoggan, had been the subject of unlawful discrimination. The Federal Court, the Full Federal Court and a majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon J and Callinan J) all held, however, that there had been no unlawful discrimination. See State of New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission (2001) 186 ALR 69; Purvis v New South Wales (Department of Education and Training) (2002) 117 FCR 237; Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92.

30 Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92 (‘Purvis’) 153 [197] and 156 [206]. The constitutional validity of the DDA derives from Commonwealth ratification of international human rights treaties (specified in the DDA) under the external affairs power: see Commonwealth of Australia Constitution Act 1900 (Cth) s 51 (xxix); DDA s 12 (8).


32 Ibid 94 [123].

33 Ibid 164 [238].
There is a measure of overlap in the analyses of these four judges, despite the fact that McHugh and Kirby JJ ultimately found, in a minority judgment, that Daniel Hoggan had been the subject of unlawful discrimination. All four implied that the source of any right to inclusion could be traced to the international rights treaties behind the *DDA*. All four agreed that a mainstream education may not be available where the inclusion of a student impinged on the safety of other students and staff. Three implied that a further limit may arise when educational opportunities of other students are adversely affected. Although these limits are not limits which have been expressly considered by communitarians, they are consistent with the communitarian contention that the right of an individual may be required to yield to the greater good.

Gleeson CJ located the limit to inclusion as occurring when the safety of others is threatened by the inclusion. He made the clear point that the *Purvis* case concerned a clash between competing rights: ‘The present case illustrates that rights, recognised by international norms, or by domestic law, may conflict. In construing the Act, there is no warrant for an assumption that, in seeking to protect the rights of disabled pupils, Parliament intended to disregard Australia's obligations to protect the rights of other pupils’.

Gleeson CJ implied that school students – and, indeed, staff – have a right to safety which school administrators have a duty to protect. He questioned whether Parliament is constitutionally entitled to enact legislation which does not allow competing rights to be reconciled:

---

34 Their discussion of international rights treaties as the source of Australian rights, however, was to be expected in that the constitutional validity of the *DDA* derives from Commonwealth ratification of such human rights treaties: see above n 30.

35 See Part IV, Chapter 2: Communitarian Education.

…a contention that the legislative power of the Commonwealth Parliament extends to obliging State educational authorities to accept, or continue to accommodate, pupils whose conduct is a serious threat to the safety of other pupils, or staff, or school property, would require careful scrutiny. 37

In discussing the scope of the unjustifiable hardship exemption to unlawful discrimination which could have been raised by the respondent school to refuse an application for enrolment by Daniel Hoggan, McHugh and Kirby JJ, like Gleeson CJ, found that ‘the Act provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff’. 38 Like Gleeson CJ, they found that a limit on the right to inclusion of students with disabilities would arise when the safety of others was put at risk: ‘The nature of the detriment likely to be suffered by any persons concerned, if the student was admitted, would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides’. 39 Arguably, however, they implied a further limit by stating that ‘any negative impact that may be caused by the presence of a student with disability in a mainstream class is a proper matter to be considered when making a decision on whether that individual student can be admitted’. 40 The vague phrase ‘any negative impact’ may be broad enough to encompass an adverse impact on the educational opportunities of others in a classroom.

Callinan J was prepared to make explicit the limit implied by McHugh and Kirby JJ. Citing the International Covenant on Economic, Social and Cultural Rights, he found that any right to inclusion of students with a disability must be weighed against the

37 Ibid 99 [6].
38 Ibid 94 [123].
39 Ibid.
40 Ibid.
‘the right of everyone to education’.

41 That universal right, he found, ‘could be adversely affected by an insistence that the education to which a disabled person is equally entitled should be provided in circumstances which cause disruption to the education of others’. 42 Callinan J was also concerned that the right to safety of others must be paramount. Emphasising the ‘quasi-criminal’ nature of Daniel Hoggan’s behaviour, he, like Gleeson CJ, cast doubt on the constitutional validity of legislation which would compel States to ignore State criminal laws by excusing or allowing violent behaviour, even when caused by disability, to continue to pose a threat to others.43

Although the full impact of the decision of the High Court in Purvis is yet to be assessed and understood, and although the case comprehends only a limited discussion of inclusion policy, it is clear from the case that the High Court of Australia has not been prepared to find that an unfettered right to inclusion is policy of the DDA. Although there are constitutional issues relevant to the interpretation of the DDA44 which are not relevant to the interpretation of the QADA, the QADA relies on the same ‘aspirational’ international instruments as the DDA to inform its objectives. Thus, it is likely that the limits to inclusion recognised by the High Court in Purvis would be recognised by a subsequent court as applicable to the QADA.

41 Ibid 164 [238] n 166.
42 Ibid.
43 Ibid 172-3 [266] and 174 [271].
44 See 28.
III EDUCATION QUEENSLAND POLICY

Since the implementation of the QADA, Education Queensland has generated several dedicated policy documents on inclusive education and other more general policies relevant to inclusive education. Policies specifically addressing the education of people with impairments have recently been updated in response to recommendations of the Ministerial Taskforce on Inclusive Education. In 2005, an Inclusive Education Statement was released and this statement, in conjunction with the new Education (General Provisions) Act 2006 (Qld), which substantially came into force in October 2006, informed the development of a revamped inclusive education policy, also released in the second half of 2006. The Inclusive Education Statement and policy document both commit Education Queensland ‘to enhancing equitable educational opportunities and improved outcomes for all students’. It is too early to ascertain whether this commitment has or will result in positive action to support a culture of inclusion of students with impairments. A more significant focus for this study is the policies that were replaced in 2006, as they represent the policy

---

45 See Ministerial Taskforce on Inclusive Education (students with disabilities) (Queensland), Report, June 2004. The Taskforce, established in March 2002, reported in June 2004. The Taskforce found ‘that current policy statements, developed and added to over time, now carry incongruencies that need to be addressed by a comprehensive review to align them with projected new directions on inclusive education’: Ministerial Taskforce on Inclusive Education (students with disabilities) (Queensland), Report, June 2000, 11. The ‘new directions’ referred to relate to the revamping of the ascertainment process which determines the level of support needed by each student with disability. See below n 79. See also Minister for Education and the Arts (Queensland), The Ministerial Taskforce on Inclusive Education (students with disabilities): Government Response, June 2004, 4. The Taskforce Report and Government Response are discussed in Chapter 5: The Impact of the Legislation, Part IV A.


framework which supported those administrative actions by Education Queensland staff which have given rise to complaints of discrimination in education since the enactment of the QADA.

A Queensland State Education 2010

Queensland State Education 2010 (QSE-2010) is the current lead policy document of Education Queensland. QSE-2010 is a contemporary vision for education in the year 2000 and beyond. It sets out the ‘future strategy’ for Queensland State Education. The Queensland Premier, Peter Beattie, has suggested that QSE-2010 is ‘a broad description of the future for Education Queensland, not a detailed road map of how to get there’. It must be acknowledged, therefore, that QSE-2010 sets out policy; it does not, necessarily, describe current practice.

QSE-2010 provides a detailed consideration of the purpose of education. It is stated that a clear purpose must be articulated which ‘acknowledges different, legitimate views and interests in a negotiated and harmonious community settlement’. A clear purpose must be articulated so as not to leave the education system ‘vulnerable to purpose by default’. The ‘central purpose’ determined by Education Queensland as its guiding aim is as follows:

… to create a safe, tolerant and disciplined environment within which young people prepare to be active and reflective Australian citizens with a disposition to lifelong learning. They will be able to participate in and shape community, economic and

---

51 Ibid forward.
53 Ibid 11.
54 Ibid 11. An interesting comparison can be drawn, here, with the communitarian view that no institution is morally neutral and that an absence of overt values education at a school does not mean an absence of values education altogether, as values are implicit in the school culture: See Amitai Etzioni, The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda (1993) 259; Henry Tam, Communitarianism: A New Agenda for Politics and Citizenship (1998) 57.
political life in Queensland and the nation. They will be able to engage confidently with other cultures at home and abroad. 55

Clear communitarian themes are identifiable in this purpose. Etzioni can be heard in the call for a ‘safe, tolerant and disciplined environment’; 56 Tam in the quest for ‘active and reflective’ citizens, 57 Latham in the recognition of the ideal of ‘lifelong learning’ 58 and Walzer in the aim of producing students who ‘participate in and shape’ their society. 59 The image of ‘nested’ communities, also familiar in communitarian theory, 60 is reflected in the aim to prepare students for life in ‘Queensland’, the ‘nation’ and ‘abroad’.

In the explication of this central purpose, communitarian themes are further developed. An ‘Australian identity’ must be distilled in a ‘multi cultural’ society and world. In working to achieve the Australian identity, citizenship is stated to be the ‘central organising idea’:

… citizenship as a part of a shared democratic culture which emphasises participatory political involvement and which strives to avoid social disadvantage that denies individuals full participation in society. Education will lead to the development of free, active and equal Australian citizens who have the capacities to choose their identities, entitlements and duties within the prevailing political and legal framework. 61

This passage reveals a clear communitarian ideal of education for all as providing access to citizenship for all and a clear communitarian belief that both duties and rights attach to citizenship. 62

55 QSE-2010, above n 50, 12.
56 Amitai Etzioni, above n 51, 259.
57 Henry Tam, above n 54, 134.
59 Michael Walzer, Spheres of Justice: A Defence of Pluralism and Equality (1983) 202-3, 225. See also Tam, above n 54, 8.
60 See, for example, Walzer, above n 59, 224-5.
61 Ibid.
62 See, for example, Etzioni, above n 54, 258-9; Stanley Hauerwas, Sanctify Them in Truth: Holiness Exemplified (1998) 151.
QSE-2010 recognises, as do communitarians, that schools can influence the structure of community and enhance a sense of community:

Preparing students as citizens … means they should acquire the ability and motivation to participate in and shape … community life, which values civil society – that network of relationships, neither government nor market, through which diverse groups interact on a basis of trust for the common good, and social capital – the fuel of civil society. This is the basis for social cohesion and fairness.63

QSE-2010 reveals a strong emphasis on inclusion as a strategy which is both just and sensible – the social ideal of equality demands inclusive schools but so too does the need to develop cohesive communities and informed citizens. Thus, as communitarians have argued, inclusion is both for ‘individuals’ and for the ‘common good’:

[schools] will seek to add value to individuals and the common good by giving the opportunity to all, irrespective of background or circumstance, to reach the highest levels of schooling and attainment.64

QSE-2010 goes so far as to state that ‘inclusiveness … is guaranteed’.65 The document acknowledges as ‘fundamental’ to a ‘fair society’ that even the ‘least able’ and those ‘adversely affected by social and economic change’ should have access to the knowledge needed to ‘be active in the life of the community’.66

QSE-2010 makes it clear that, ideally, inclusive schools should be embedded in neighbourhoods:

… schools must work directly with … diversity and complexity to make sure all students have a successful experience of school. In short, the approach taken by different schools must match the characteristics of their communities, schools must be flexible enough to accommodate the individual learning needs of different students, and the curriculum must be sufficiently forward looking to anticipate their future pathways and needs schools need to differentiate.67

---

63 Ibid.
64 Ibid.
66 Ibid.
Schools are envisaged as ‘community assets’ that can be developed via ‘community partnerships’. Individual schools are expected to devise school specific policies which respond to the needs not only of students and their parents but also of local communities. School based management, which devolves administrative and budget decisions to the individual school level, is, as such, integral to the achievement of schools embedded in communities. There is also the opportunity under some of the preferred management models for members of the community to be consulted on school development issues and even to be represented on the school council and thus influential in the administration of the school. A variety of models is postulated including ‘community hubs in full service schools that through links to other government and community services provide a focus for community service delivery and community development’.

This has much in common with Tam’s model of the school as a community meeting place and reflects the communitarian ideal of the school as both resourced by and resourcing the community in which it is based.

Finally, the rhetoric of QSE-2010 indicates that while schools are perhaps immediately accountable to parents, they are ultimately accountable to the community: ‘Accountability for schools, in a pluralist democracy, is negotiated with their communities’. A plea is made that schools ‘should not be held accountable for systematic or social problems’. Such a plea amounts, perhaps, to a tacit acknowledgement of the potential of schools to shape both individual lives and communities.

---

68 Ibid 19.
69 Ibid 9.
70 Tam, above n 54, 78.
71 QSE-2010, above n 50, 11.
72 Ibid.
B Curriculum Studies 05: Education Provision for Students with Disabilities

While QSE-2010 sets the guiding policy agenda for Education Queensland for the present decade, Curriculum Studies 05 (CS-05) relates specifically to policy in respect of people with disabilities. Although this document contains a commitment to ‘providing equitable educational opportunities’ to students with disabilities, and acknowledges a ‘system- wide commitment to inclusive schooling’, its rhetoric is not as confident, or as comforting, perhaps, to people with disabilities as the assurance in QSE-2010 that ‘inclusiveness is guaranteed’. Indeed, CS-05 is commonly known within Education Queensland as the ‘placement policy’, revealing the departmental orthodoxy that a variety of ‘placement’ options is available for students with disabilities. CS-05 states that ‘a flexible model of delivery of educational services is essential’ and anticipates ‘the provision of a range of flexible curriculum options that allow access and participation and which ensure that educational outcomes are maximised’. The document is guided, therefore, not only, nor even, perhaps, principally, by commitment to a right to inclusion in mainstream schools. There is a clear emphasis on the attainment of ‘educational outcomes’. A ‘horses for courses’ policy approach is constructed whereby a student is matched to the ‘curriculum option’ which will ‘maximise’ his or her ‘educational outcomes’. This policy underpins placement practice in Queensland schools for students with disabilities.

Education for students with disabilities is available in a variety of settings. The ‘most

74 Ibid para 1.1.
75 Ibid para 1.5.
77 CS-05, above n 73, para 1.2.
78 Ibid para 1.5.
inclusive’ option is placement in a ‘regular’ class at a ‘regular’ school. The next option is placement at a special education unit (SEU) attached to a ‘regular’ school. The ‘least inclusive’ option is placement at a ‘special school’ located on its own campus.

The ‘flexible model’ strategy is supported by a process called ‘ascertainment’: each student is assessed in order to ascertain his or her special education needs. The ascertainment process is outlined in the policy document *Student Management 15: Ascertainment Procedures for Students with Disabilities 1998* (‘SM-15’). The process identifies both the ‘support needed’ by a student and the ‘programs which can support this need’. One of six levels of ‘specialist educational support’ is recommended and the recommended level ‘must be considered when discussing program options with parents and caregivers’. *SM-15* is frank in stating that ‘[i]t is not expected that the expertise to support these students will exist in every school’.

Placement proceeds on the basis of whether the level of support ‘recommended’ is available in a particular school. The practical outcome of the ascertainment process,

---


80 SM-15, above n 79, para 1.2(b).

81 SM-15, above n 79, para 1.2(c).

82 SM-15, above n 79, para 1.4.

83 SM-15, above n 79, para 3.2.
therefore, is that despite the rhetoric of inclusion, inclusion in a mainstream school of the students' choice is not available as a ‘right’ to students with disabilities but only when the ‘recommended’ support is available at that school.

The ‘flexible model’ policy of CS-05 also underpins the strategy of ‘clustering’ which further erodes any ‘right’ to inclusion in the mainstream school of their choice for students with disabilities. Action Plan: Educational Provision for Students with Disabilities 1998-2002 is a document informed by CS-05 which describes how Education Queensland puts the policy stated in CS-05 into practice. This plan describes clustering as ‘an effective means of meeting the unique needs of students with disabilities within a reasonable proximity to their homes’. Clustering involves the grouping of students with disabilities who have been ascertained as having ‘similar education needs’. Different schools are resourced to support different ‘special needs’ and as such, only specific schools will cater to a particular cluster of students. While clustering may be a cost effective measure for the accommodation of the ‘special needs’ of students, its practical result is that students are excluded from schools which do not cater to their disability. Further, the scope of difference within and therefore the inclusiveness of schools are reduced.

The ‘flexible model’ policy and its emphasis on education services which enable students with disabilities to ‘maximise their outcomes’ explains, perhaps, Education Queensland’s emphasis in cases such as L v. Minister for Education for the State of

---

85 Ibid 6.
86 Ibid.
Queensland\textsuperscript{87} and \textit{P v. Director-General Department of Education}\textsuperscript{88} on the setting and measuring of education goals for the students in those cases. While the parents in \textit{L} and \textit{P} insisted on a right to inclusion in mainstream classes for their children, Education Queensland insisted on placing the students in schools suited to their ascertained ‘support needs’. For the complainants in these cases it is clear that school is as much, if not more, about social interaction and community acceptance than achievement of ‘academic’ milestones. For the respondent schools, however, the focus is on ‘maximising outcomes’. The clash of expectations and emphases is clear in the rhetoric of \textit{P}, for example. P was a primary school student with Down’s syndrome. It was acknowledged in that case that the respondent, Education Queensland, was troubled by P’s mother’s ‘insistence on her model of inclusion’.\textsuperscript{89} It argued that ‘the complainant’s mother had insisted on physical inclusion when this was neither satisfactory nor conducive to P’s educational needs’.\textsuperscript{90} The respondent led evidence that ‘the gap between P and his classmates was widening’\textsuperscript{91} and argued that P should be placed at a ‘special school’ on the basis that it could provide an appropriate setting to assist P in achieving his ‘educational goals’.\textsuperscript{92}

\textbf{C Curriculum Studies 15: Principles of Inclusive Curriculum}\textsuperscript{93}

\textit{Curriculum Studies 15} (‘\textit{CS-15}’) is not specific to students with disabilities, but is nevertheless relevant to their situation in that it sets out the principles of inclusive

\textsuperscript{87} \textit{L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207 (‘\textit{L}’).}
\textsuperscript{88} \textit{P v Director-General, Department of Education (1996) 1 QADR 755 (‘\textit{P}’).}
\textsuperscript{89} Ibid 759.
\textsuperscript{90} Ibid 767.
\textsuperscript{91} Ibid 761.
\textsuperscript{92} \textit{P} (1996) 1 QADR 755, 765.
curriculum which ‘all educators must apply’ in meeting the needs of the ‘full range of social and cultural groups’. This policy statement reveals some sensitivity to the argument that physical inclusion is not all that is required for the genuine inclusive education of students with disabilities. It recognises that the learning processes adopted in schools must also be inclusive by addressing ‘barriers that limit students’ opportunities, participation and benefits from schooling’ and by promoting strategies which ‘include, value, and use as a basis for learning, the full range of social and cultural groups’. Further, educators are directed to develop a curriculum which encourages students to ‘question how disadvantage has developed’, ‘challenge rather than accept social injustice’ and ‘empower people to participate as equals’.

Whilst the sentiments of this document accord with communitarian ideals in relation to the ‘education for citizenship’ of students, it could be argued that the strategies of ascertainment and clustering operate to produce an education system in Queensland where the demographics of a school may be edited of difference, with the result that the implicit curriculum of that school may not reinforce its explicit curriculum in respect of what is taught about the virtues of tolerance and respect for diversity.

**IV Education Policy in Queensland Independent Schools**

Although Education Queensland documents necessarily influence policy in independently owned Queensland education institutions, in that independent schools must report to the Minister for Education on their provision of ‘special education’ in

---

94 Ibid, Accountabilities.  
95 Ibid, Policy Statement para (a).  
96 Ibid, Policy Statement para (b).  
97 Ibid, Policy Statement para (c).
order to operate within the law, independent schools routinely develop their own policy documents. Indeed, it could be argued that each independent school strives to develop, and even to market, a unique character as part of its strategy to attract students. Most independent schools publish ‘mission statements’ which purport to encapsulate the ethos of the school. It may be surmised that these statements are intended to inform the policy direction of the school. Policy statements specific to the treatment of students with disabilities or even specific to enrolment and management issues are, generally, not made available to the public. This may be because such policies are not in place or, because such policies are kept private to the school community.

Some of Queensland’s larger operators of independent schools have published statements of policy relevant to inclusive education, if not specifically to people with disabilities. Some insight is available into the policies of schools operated by the Lutheran Church of Australia, the Anglican Church of Australia, the Uniting Church in Australia and the Catholic Church. In general, while their policies suggest a commitment to the inclusion of students with disabilities, consistent with the tenets of the Christian faith, there is little explicit detail provided of the character of that inclusion. Specifically, there is no stated commitment to provide a mainstream education to students with disabilities.

98 Education Act (Qld) s 15.

99 It should be noted that none of the Queensland schools operated by these churches has been involved in litigation involving allegations of disability discrimination. To date there has been only one case brought under the QADA against a Queensland independent school – K v N School (No 3) [1995] 1 QADR 620. In that case a small Christian independent school in Brisbane successfully raised the unjustifiable hardship exemption to resist a complaint of unlawful discrimination brought by a student with an intellectual disability who had been excluded from the school. See Part V D, Chapter 6: Exemptions. There have been cases in other jurisdictions involving independent schools, including the DDA cases Hills Grammar School v Human Rights and Equal Opportunity Commission (2000) 100 FCR 306 and Catholic Education Office v Clarke (2004) 138 FCR 121.
Information on the inclusion policy of Lutheran Schools in Queensland\(^{100}\) comes from an unusual source – an application for an exemption from the education provisions of the *DDA*. The Queensland District of the Lutheran Church of Australia was refused an exemption which would have allowed it to institute potentially discriminatory procedures for the assessment of the needs of students with disabilities enrolled or applying for enrolment at their schools.\(^{101}\) Although the Lutheran school system does not make publicly available any dedicated policy on the education of students with disabilities, such a policy was referred to in affidavit evidence provided to HREOC in support of the exemption application:

> It is part of the education policy of the Lutheran Church to provide equal opportunity to students, whether enrolled or potential applicants, irrespective of any particular attribute or disability held by the student. The Lutheran Church of Australia Queensland District By-Laws Part B, Schedule IV (relating to College Councils) states at clause 7 that:
> “Subject to the power of management vested in the Council, the College shall be open to persons without discrimination to class, race or belief”.
> Further, we have a discrimination policy which formalises our longstanding approach to affected classes of student.\(^{102}\)

The Anglican Schools Commission of the Diocese of Brisbane\(^{103}\) has published a ‘Summary Ethos Statement for Anglican Schools in the Province of Queensland’.\(^{104}\)

---


\(^{101}\) The application was for an exemption under *DDA* s 55. See *Notice of HREOC exemption decision re: Lutheran Church of Australia Queensland District* (10 June 1997) <http://www.hreoc.gov.au/disability_rights/exemptions/Lutheran_Schools/Lutheran_schools.html> at 27 June 2005. The substance of the exemption application is considered in Part IV Chapter 6: Exemptions.

\(^{102}\) See *Notice of HREOC exemption decision re: Lutheran Church of Australia Queensland District* (10 June 1997) 2.2 (6). The relevant affidavit was provided by Kenneth Albinger, Director of Schools, Lutheran Church of Australia, Queensland District.

\(^{103}\) Anglican schools in the Diocese of Brisbane include St Margaret’s, St Aidan’s and the Anglican Church Grammar School.

Like communitarian writings, the document emphasises the importance of ‘civilised community’, stating that ‘Anglian schools should be characterised by tolerance and respect for difference’. The document also makes a commitment to a ‘service ethic’ and to ‘social justice’ and pronounces the ‘willingness of Anglican school communities to serve God and His people in the wider community as critical participants’. The statement ‘seeks to define the normative features of an ideal Anglican school’ but its effect is persuasive rather than prescriptive. The Commission operates in an advisory capacity only, and each school is governed by its own council which is free to set its own policy agenda and to generate its own policy documents.

The Queensland Synod of the Uniting Church in Australia commissioned a review of Church schools in Queensland in the late 1990s. The Schools Review Task Force published its findings in July 1999. The Report shows a sensitivity to the need for schools to be inclusive, but does not directly address the inclusion of students with disabilities. It makes a series of recommendations for the future direction of ‘Uniting Church-related’ schools. The Task Force reported having struggled with ‘the two basic issues of elitism and accessibility’. Concern is expressed that the fees charged by many church schools render them inaccessible to many and create a perception that they are elitist. The Task Force acknowledged that ‘[t]his is a very serious matter as it suggests our schools stand in contrast to the Gospel’s concern for

105 Ibid 1.
106 Ibid 2.
107 Ibid 1.
109 Ibid 5.
110 Ibid 17.
all people, which must include the outsiders, the poor and the underprivileged’.  

The Task Force recommended that the Synod ‘affirms that all students have the right to receive the best education available to them’ and, further, ‘that all church schools should, in principle, be accessible to all students’.  

The Report makes clear the expectation that ‘[i]f a school is to be called a “church school”, it is to be expected at the least that the mission statement of the school will include the basic elements of the mission charter of the church’.  

However, as with the case of Anglican schools, Uniting Church-related schools are, generally, operated by autonomous school councils empowered to make their own policy.  

The Catholic Church is the largest provider of education, apart from the State, in Queensland.  

It operates primary, secondary and tertiary education institutions. Unlike the Anglican and Uniting Churches, the Catholic Church does choose to direct policy for many Church affiliated schools. A minority of Catholic schools are owned and administered by independent school councils or Catholic orders, but the majority by the Catholic Education Office. The Catholic Education Council in Queensland document, Our Priorities for 2002-2006 sets out the current priorities for the Queensland Catholic school community. Unlike the Anglican and Uniting Church documents described above, this document does directly address disability issues. It

111 Ibid.  
112 Ibid 23.  
113 Ibid 16.  
114 It is interesting to note that ‘Educang’ an education provider established co-operatively by the Uniting and Anglican churches in Queensland recently established a separate ‘special education’ facility attached to Forest Lake College. It could be argued that this is evidence that both the Uniting and Anglican churches promulgate options other than inclusion in a mainstream school for students with disabilities.  
115 In the Archdiocese of Brisbane, for example, there are 130 Catholic schools administered by Brisbane Catholic Education: Brisbane Catholic Education, Schools <http://www.bne.catholic.edu.au/pub/parents/schools.htm >at 27 June 2005.  
is a comprehensive policy document intended to inform the future direction of Catholic education in Queensland. There is a stated ‘intention’ to ‘enhance school based curriculum which is focused on improving developmentally appropriate student learning outcomes for all students of varying needs and abilities’.\textsuperscript{117} There are several further ‘expectations’ relating to the in-servicing of teaching staff and the resourcing of schools to cater to the needs of students with disabilities.\textsuperscript{118} It is notable that the rhetoric of the document is ‘technical’ – focussing on issues such as ascertainment, guidance, counselling and resources. There are no general statements committing to a right to, or a policy of, inclusion. There is, however, reference to ‘the Catholic commitment to social justice’ and the stated expectation that this commitment will be ‘promoted and supported at the school and system level’.\textsuperscript{119}

A companion document, however, does contain specific detail on inclusion policy. *Inclusive Practices in Queensland Catholic Schools* indicates that Catholic schools in Queensland ‘celebrate the uniqueness of students within the learning community’\textsuperscript{120} and that ‘inclusive practices…are foundational to the ethos of the schools’.\textsuperscript{121} There is, however, no specific commitment to the provision of mainstream education to students with disabilities; rather a commitment is made to ‘provide equitable access to the curriculum, offer maximum learning opportunities, and work towards meeting the educational and social needs of all students’.\textsuperscript{122} Brisbane Catholic Education acknowledges as policy, however, that resource issues may limit the availability of full inclusion to students with disabilities: ‘Brisbane Catholic Education will provide

\footnotesize
\textsuperscript{117} Ibid para I1.3.
\textsuperscript{118} See ibid paras E1.9, E1.10 and E1.11.
\textsuperscript{119} Ibid para E2.7.
\textsuperscript{121} Ibid
\textsuperscript{122} Ibid.
an appropriate Catholic education for students with special educational needs according to the availability of physical, human and financial resources'.

V CONCLUSION

Once policy documents have been collected and analysed, the interesting exercise of measuring ‘practice’ against ‘policy’ can be carried out. Are policy promises of ‘inclusion’, ‘equality’ and ‘social justice’ delivered to Queensland students? ‘Practice’ can be determined from statistical and anecdotal evidence of the placement of students with disabilities, and from a variety of reports which consider the issue of inclusive education. ‘Practice’ can also be inferred from the growing body of case law on discrimination in education. Evidence of the ‘practice’ of inclusion in Queensland schools is considered in Chapter 5.

123 Brisbane Catholic Education, Special Education: Policy.
CHAPTER 5

THE IMPACT OF THE LEGISLATION

The *Anti-Discrimination Act 1991* (Qld) (*QADA*), and other similar Australian legislation, have not delivered an unfettered right to equal opportunity in education to people with disabilities. Anecdotal evidence suggests that the legislation has not significantly affected education opportunities for many students with impairments.¹

The most persuasive indication of the failure of anti-discrimination legislation in this area, however, is to be found in the fact that most court proceedings against education providers initiated by people with disabilities, under the authority of the legislation, have been unsuccessful.² A further indication of failure is the statistical evidence that a significant proportion of Queensland students with disabilities are still educated in segregated settings. Several reports have also found that an inclusive education is not available to many students with disabilities in Queensland. The probable inference to be drawn from these reports is that anti-discrimination legislation has not ‘solved’ the problem of exclusion of students with disabilities. While some of these reports were commissioned by disability action groups, with an explicit agenda to promote inclusion, the Australian Senate³ and the Productivity Commission⁴ have also conceded a need for improvement.

² It is true that many claims of discrimination are conciliated without proceeding to trial. It is also true, however, that they are conciliated in the legal context set by the decided cases. In respect of apparently ‘generous’ agreements it is important to note that conciliated outcomes do not set binding legal precedents. Summaries of some conciliated *Disability Discrimination Act 1992* (Cth) (*DDA*) complaints are available at <http://www.hreoc.gov.au/disability_rights/decisions/conciliation.html>. The following ‘reminder’ precedes the summaries: ‘Conciliated settlements are usually made without admission of liability and may not provide firm precedents for the outcome in other cases’.
It is of further significance that standards for the education of people with disabilities have recently been introduced by the Commonwealth in order to address perceived failures of the Disability Discrimination Act 1992 (Cth) (DDA), and by implication, of State legislation such as the QADA, to deliver equality of educational opportunity to students with disabilities.

It must be acknowledged, however, that evidence of the failure of anti-discrimination legislation is complicated by the use of different measurements of the success of strategies to deliver equality of opportunity to students with disabilities and, particularly, by different understandings of the term ‘inclusion’. As noted in Chapter 3, the meaning of this word varies to match the agenda of its user. Although the inclusion of students with disabilities in regular classrooms is not accepted as desirable by all parties involved in the education process – administrators, teachers, parents, students – it is nevertheless the ‘prevailing orthodoxy’ underpinning education policy in Australia. Inclusion of people with disabilities in mainstream society – a ‘regular’ class in a ‘regular’ school may be considered a microcosm of mainstream society - is also a fundamental aim of anti-discrimination legislation and of disability services legislation. Furthermore, the inclusion in mainstream social settings of people with disabilities is seen by communitarian theorists as a corollary of citizenship and as a right which yields only when its maintenance impinges on the

---

5 See Part I, Chapter 4: Queensland Education Policy. See also an analysis of the different meanings of the term inclusion in Senate Report, above n 3, 29-34 [3.1]-[3.19]. The findings of the Senate Report are discussed below at Part IV C.
6 See Chapter 4: Queensland Education Policy n 4.
7 Senate Report, above n 3, 29 [3.1].
8 See DDA s 3, Anti-Discrimination Act 1991 (Qld) (QADA) Parliament’s reasons for enacting this Act. See also the analysis of the policy of the QADA in Part II B, Chapter 4: Queensland Education Policy.
9 See Disability Services Act 1992 (Qld) ss 9 and 17. Section 17 is particularly explicit: ‘programs and services should be designed and implemented to promote the inclusion of people with disabilities in the life of the local community’.
greater good.\textsuperscript{10} For the purpose of analysis of the evidence presented in this chapter, therefore, equality of opportunity in education is taken to mean equality of opportunity to enrol in a ‘regular’ class in a ‘regular’ school. Inclusion in this sense is, as such, adopted as the bold benchmark of equality of opportunity in education. It is also acknowledged, however, that the legislation should protect a right to ‘substantive inclusion’ as well as mere ‘physical inclusion’ by compelling adjustment to accommodate student impairment.

\section{Complaints of Discrimination in Education}

The following table indicates that over the course of the last decade, complaints of discrimination in education on the ground of impairment have frequently dominated discrimination in education complaints accepted by the Queensland Anti-Discrimination Commission:

Table 1: Discrimination in Education Complaints, Queensland Anti-Discrimination Commission\textsuperscript{11}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Discrimination in education complaints</td>
<td>22</td>
<td>16</td>
<td>15</td>
<td>16</td>
<td>48</td>
<td>11</td>
<td>27</td>
<td>35</td>
<td>21</td>
</tr>
<tr>
<td>Discrimination in education on the ground of impairment complaints</td>
<td>7 Not available</td>
<td>8 Not available</td>
<td>11 Not available</td>
<td>23 Not available</td>
<td>6 Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
</tr>
<tr>
<td>Percentage of total education claims</td>
<td>32% (largest category) Not available</td>
<td>53% Not available</td>
<td>69% 48% (largest category) Not available</td>
<td>55% Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{10} See Part III, Chapter 2: Communitarian Education.


110
Although detailed complaints statistics are not available for the years 2002-2003, 2003-2004 and 2004-2005 it is interesting to note that the ADCQ has reported that impairment complaints now represent the single largest category of complaints accepted.12

Human Rights and Equal Opportunity Commission (HREOC) Australia-wide complaints data over the same period also suggest a readiness on the part of complainants to use the legislation to enforce a right to education:

Table 2: Discrimination in Education Complaints, Human Rights and Equal Opportunities Commission13

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total DDA complaints received by area</strong></td>
<td>899</td>
<td>45</td>
<td>34</td>
<td>51</td>
<td>65</td>
<td>82</td>
<td>98</td>
<td>90</td>
<td>Not available</td>
</tr>
<tr>
<td><strong>Total discrimination in education complaints</strong></td>
<td>99</td>
<td>713</td>
<td>754</td>
<td>583</td>
<td>789</td>
<td>870</td>
<td>905</td>
<td>906</td>
<td>Not available</td>
</tr>
<tr>
<td><strong>Percentage of total complaints received by area</strong></td>
<td>11%</td>
<td>5%</td>
<td>4%</td>
<td>9%</td>
<td>8%</td>
<td>9%</td>
<td>11%</td>
<td>10%</td>
<td>Not available</td>
</tr>
</tbody>
</table>

Despite the fact that complaints data suggest a significant number of complaints of discrimination in education have been made under anti-discrimination legislation, very few of these complaints proceed to final hearing. Complaints are often


111
withdrawn, declined or settled via conciliation before hearing. HREOC publishes regular summaries of decisions to decline or terminate complaints and also of conciliated outcomes. These summaries do not, however, cover every case declined, terminated or conciliated by HREOC.

II DECIDED CASES

Although the QADA and the DDA have been in force for over a decade, and although anti-discrimination legislation was first enacted in an Australian jurisdiction (New South Wales) almost 30 years ago, there is still only a handful of tribunal or court decisions on point. This can be explained, perhaps, by the clear message given by the decided cases that there is no clearly defined right to inclusion and, at least for many students with severe intellectual and behavioural impairments, there may be no right to inclusion. It has even been claimed that rather than protecting a right to freedom from discrimination, anti-discrimination legislation has been used to ‘legitimise the very practices it is designed to overcome’. Jones and Basser Marks cite the cases L v Minister for Education for the State of Queensland, and Hashish v Minister for Education for Queensland, both cases which, arguably, narrowed significantly the right to education of Queensland people with disabilities, in support of their

14 QADA ss 139, 140, 158 and 159; DDA ss 71 and 74.
20 L v Minister for Education for the State of Queensland [1995] 1QADR 207 (‘L’).
21 Hashish v Minister for Education for Queensland [1998] 2 Qd R 18 (‘Hashish’).
proposition that ‘[r]elying on anti-discrimination measures to remedy social ills is a business fraught with danger’.\textsuperscript{22}

The few Australian decided cases do demonstrate that those ‘hard cases’ which proceed to trial or hearing are only rarely resolved in favour of the complainant. In Queensland, of the cases which have proceeded to hearing under the \textit{QADA}, only two have been resolved in favour of the complainant – \textit{I v O’Rourke and Corinda State High School and Minister for Education for Queensland}\textsuperscript{23} and \textit{I on behalf of BI v State of Queensland}.\textsuperscript{24} In \textit{Corinda}, the complainant, who had both intellectual and physical impairments, succeeded in proving only one of three allegations of discrimination arising from restrictions placed on her access to and enjoyment of a variety of school activities. She was awarded $3000 damages and, on the basis of the mixed outcome of the trial, complainant and respondent were directed to bear their own costs.\textsuperscript{26} This costs decision, inevitably, further eroded the ‘victory’ of the complainant. In the more recent case of \textit{BI}, however, the complainant was awarded damages of $25 000 after he was excluded from school for absenteeism related to his schizophrenic illness.

Australia-wide, despite the decisions in \textit{Corinda} and \textit{BI}, case law and tribunal decisions in favour of complainants suggest that the legislation operates to favour the inclusion of students with physical impairments over the inclusion of students with

\textsuperscript{22} Jones and Basser Marks, above n 19, 78.
\textsuperscript{23} I v O’Rourke and Corinda State High School and Minister for Education for Queensland [2001] QADT 1 (31 January 2001) (‘Corinda’).
\textsuperscript{24} I on behalf of BI v State of Queensland [2005] QADT 37 (Unreported, Dalton P, 14 December 2005) (‘BI’).
\textsuperscript{26} Corinda [2001] QADT 2 (30 April 2001). See \textit{QADA} s 213 re the power of the Queensland Anti-Discrimination Tribunal (QADT) to order a party to pay costs.
intellectual impairments. This is even more clearly the case when a student’s impairment has the consequence of affecting the ability to control behaviour resulting in ‘disruption’ to the regular classroom routine. It will be seen later in this chapter that the evidence from the decided cases conforms with other evidence that students with intellectual impairments are less likely to be accepted as students at regular schools.

A Physical Impairment

The DDA decided cases clearly suggest that likelihood of success is linked to variety of impairment. To date almost all successfully litigated claims have been brought by people with physical or sensory impairments. In *Kinsela v Queensland University of Technology* the complainant used a wheelchair. In *Finney v Hills Grammar School*, the complainant had cerebral palsy and used a wheelchair. In *Travers v New South Wales*, the complainant had cerebral palsy. In *Murphy and Grahl v the State of New South Wales*, the complainant child had a physical impairment and used a wheelchair. In *Clarke v Catholic Education Office & Anor*, and *Hurst and Devlin v Education Queensland*, the complainants had hearing impairments. In *Bishop v*

---

27 A few students with intellectual and behavioural impairments have conciliated some relief. See the sample summaries of conciliated *DDA* complaints <http://www.hreoc.gov.au/disability_rights/decisions/conciliation/education_conciliation.html> at 22 February 2005. Of the 42 summaries provided one involved a student with psychiatric impairment, three involved students with intellectual impairments, nine involved students with developmental or behavioural impairments, such as Asperger’s syndrome, Autism and ADHD, and two involved students with intellectual and behavioural impairments.

28 *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4.


31 *Murphy and Grahl v The State of New South Wales (NSW Department of Education) and Wayne Houston* [2000] HREOC NoH98/73 (‘*Grahl*’).


33 *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) (‘*Hurst and Devlin*’). The complainant Hurst succeeded only upon appeal to the Full Federal Court. See:
The complainant was not physically or intellectually impaired but had a learning disorder, dyslexia. It should also be noted that these ‘successful’ cases are almost all concerned with allegations of a discriminatory failure to accommodate the needs of an enrolled student with a disability rather than with allegations of discriminatory failure to enrol or expulsion.

‘Exclusion’ cases are most often brought by students with intellectual and or behavioural disabilities. The first exception is *Finney*, which arguably set a benchmark in relation to the enrolment of students with a physical disability but with ‘normal’ intellectual function. In that case an independent Sydney school had argued that the enrolment of the seven year old Scarlet Finney would impose an ‘unjustifiable hardship’ on the school, particularly in that modifications to the school campus would be required to accommodate Scarlet’s wheelchair. The Federal Court refused to interfere with a HREOC determination that any financial costs caused to the school by enrolling Scarlet would not support a finding that the unjustifiable hardship exemption should be available to the school.35

The second exception is *Grahl*, which, it could be argued, involves the ‘constructive’ exclusion of a student. The enrolment of Sian Grahl, a five year old child with the degenerative physical condition, Spinal Muscular Atrophy, but without intellectual disability, was initially, but reluctantly, accepted by the Bellingen Primary School in New South Wales. The subsequent treatment of Sian and her parents by the School, however, suggests an attempt to force them from the school community. Allegations

---

*Hurst v Education Queensland* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006).


of discrimination centred on the placement of an industrial bin in the ‘disabled’
parking space routinely used by Sian’s family and on the locking of the only entrance
to the school grounds which was easily accessible by wheelchair. These incidents
were accepted by HREOC as evidence of ‘an unsympathetic, uncaring and negative,
hostile environment or mindset which the school by its principal and some staff had
created and demonstrated and as a result of which Sian was limited in her access to
the wholesome benefits of a proper education and of a supportive educational
environment’. It is interesting that HREOC noted that the particularly gross
eamples of discrimination found proven in this case were inconsistent with the
relevant education authority’s policy to include students with disabilities.

Cases from other Australian jurisdictions decided for the complainant have also
concerned physical or sensory impairment. In Rocca v St Columba’s College Ltd and
Rogers the complainant, who had mild cerebral palsy, was granted an interim
injunction by the Victorian Civil and Administrative Tribunal (VCAT) compelling the
respondent school to keep open a place for her pending trial. The VCAT also found
in Beasley v Department of Education and Training that a student with hearing
impairment had been both directly and indirectly discriminated against as a result of
his school’s method of instruction not accounting for his impairment. In Krenske-
Carter v Minister for Education, two incidents of indirect discrimination were

36 Grahl [2000] HREOC NoH98/73 [6.7].
38 Ibid.
39 Rocca v St Columba’s College Ltd and Rogers [2003] VCAT 774 (Unreported, Judge Bowman V-P,
23 June 2003).
40 It appears that the matter ultimately settled as it did not proceed to trial.
41 Beasley v Department of Education and Training [2006] VCAT 187 (Unreported, McKenzie DP, 17
February 2006). The complainant was only partially successful and failed to prove some of his claims
of discrimination.
proved by a complainant with the auto-immune disorder, Lupus. She was awarded $4000 damages by the Equal Opportunity Tribunal of Western Australia.

**B Behavioural and Intellectual Impairment**

Australia-wide, there has been only one successful education discrimination case brought by a student with a behavioural impairment, to date. While BI concerned a student with schizophrenia, however, his exclusion from school was premised not on any problem behaviour within school but upon his repeated and prolonged absences from school. Dalton P of the Queensland Anti-Discrimination Tribunal (QADT) noted, however, that Education Queensland policy was deficient to the extent that it did not provide for the development of programs for students with ‘mental illnesses’ and ordered that ‘the facts of this case be brought to the attention of relevant officers within Education Queensland’.43

Australia-wide, to date, there have been only two successful cases brought by students with an intellectual impairment. In the QADA Corinda case, however, the complainant was both intellectually and physically impaired and the focus of the successful complaint in that case was discrimination on the basis of physical disability. The successful claim related to the complainant’s exclusion from an

---

43 BI [2005] QADT 37 (Unreported, Dalton P, 14 December 2005). Note that the complainant did not proceed with other complaints alleging discrimination arising out of, first, an earlier exclusion of the complainant for allegedly stealing a wallet and, secondly, the alleged failure of the respondent properly to identify the complainant’s disability and to ascertain his resultant special educational needs. See Pagura-Inglis v Minister for Education [2003] QADT 18 (Unreported, Member Roney, 23 October 2003); Pagura-Inglis v State of Queensland [2004] QADT 42 (Unreported, Member Roney, 7 December 2004); I on behalf of BI v State of Queensland [2006] QADT 19 (Unreported, Dalton P, 11May 2006) [3]-[5]. It is also interesting to note that the complainant used his award of damages to establish a scholarship fund to support the studies of a student with a psychiatric impairment at the Queensland Conservatorium of Music at Griffith University. It is believed to be the first fund of its kind in Australia. See Margaret Wenham, ‘Landmark fund for mentally ill’, The Courier Mail (Brisbane), 18 April 2007, 28.
excursion because of her use of a wheelchair. The complainants in *State of Victoria v Bacon & Ors*,44 a case brought under the *Equal Opportunity Act 1995* (Vic), had sought continued access to special school education after reaching the age of 18. The complainants were all intellectually impaired and had hoped to enter an ‘18+’ transition course at a special school operated by the respondent, but which the respondent proposed to close. The Victorian Court of Appeal found that the Victorian Education Department's policy of excluding funding to all students of 18 years or over in State run schools, unless they were enrolled for a VCE course, amounted to indirect discrimination against persons with an intellectual disability.45

By contrast, there have been numerous failed cases advanced by complainants with intellectual or behavioural disorders under both the *DDA*46 and various State anti-discrimination statutes.47 After the decision in the *QADA* case, *L*, where the suspension and proposed exclusion of a complainant with a developmental disorder which manifested as disruptive behaviour was found not to be unlawful discrimination, there was a perception that the scope of any right to inclusion had been significantly narrowed. The case excited extensive media coverage and

---

polarised public opinion on the issue of inclusion.48 According to Queensland Parents for People with a Disability (QPPD) advocate, Donna Ball, Education Department resources available to support inclusion were reduced after the decision in L: ‘Following the anti-discrimination stuff I think there were a lot of people starting to not have as much. The Education Department won, even though they said nobody won, all of a sudden they had the ability to turn people away’.49 Mother of the complainant in L, Michelle O’Flynn, lamented the administrative ramifications of her daughter’s case: ‘So now of course students with disabilities and their families have to contend with a range of restrictive policies one being the enrolment and placement policy’.50 Queensland Advocacy Incorporated (QAI), which had funded L’s case before the QADT, argued that the case confirms that in inclusion cases ‘litigation remains a last resort’ because of ‘the time and cost involved’.51 In fact, after L, QAI made a policy decision ‘not to take on any further inclusion education legal matters in the near future’.52 It was decided that there were ‘other areas where we should be directing our resources’.53 The similar QADA behaviour impairment cases of P and K, heard shortly after L, were also decided against the complainants. No such ‘behaviour’ case has since proceeded to final hearing before the QADT.

Similarly, the Victorian Equal Opportunity Tribunal in Lynch, the New South Wales Anti-Discrimination Tribunal in M and C, the Federal Magistrates Court in Minns,
and the Anti-Discrimination Tribunal of Tasmania in *Treloggen* have all authorised the exclusion from mainstream education of students with problem behaviour caused by disability. The position in relation to complainants alleging discrimination on the basis of disability induced behaviour has been recently clarified by the decision of the High Court of Australia in *Purvis*. In that case, a majority of the Court held that the exclusion of the complainant was lawful even though his problem behaviour was caused by his various impairments.

### C Tertiary Students and the Failure to Meet Course Requirements

Several cases involving tertiary students have demonstrated the difficulty of proving that exclusion on the basis of failure to meet course requirements because of disability is unlawful discrimination. In the QADT case, *Brackenreg*, the complainant had a disorder affecting the spinal cord, syringomyelia, had been treated for cervical cancer, and most significantly, perhaps, in terms of her capability as a student, had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). The complainant was excluded from her Bachelor of Laws degree course at Queensland University of Technology as she was ‘in breach of both the double fail rule and the progression rule’.

President Copelin, of QADT, decided in that case that ‘[t]here is no obligation on the respondent to pass a student just because they have a disability’. In a similar case, *W v Flinders University of South Australia*, brought under the *DDA*, the complainant, who had an undisclosed psychiatric condition, was excluded after failing to meet the course requirements of her teaching degree. Like the QADT,

---

54 *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 (‘*Purvis*’).


56 *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4 iv].

57 *W v Flinders University of South Australia* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998) (‘*W*’).
Commissioner McEvoy of the HREOC emphasised in W that a university is ‘not obliged to forgo the academic requirements of its course for people with disabilities’. In both Brackenreg and W it was found that the respondents had acted appropriately and to the extent required by law to accommodate the disability of the complainants.58

Similar claims have failed under the Anti-Discrimination Act 1977 (NSW).59 The recent case of Hinchliffe v University of Sydney60 has added another layer of complexity to the status of the rights of tertiary students with a disability and demonstrates in a different context that it is difficult for tertiary students to prove unlawful discrimination. In that case, a student with a visual impairment claimed that

---

58 In a more recent DDA case the Federal Court and the High Court of Australia have refused leave to appeal applications brought by a student with a depressive illness excluded from university after failing to meet course requirements. Driver FM of the Federal Magistrates Court had found that the complainant was not discriminated against on the ground either of disability or of race, as the complainant had alleged, and that the nature of the complainant’s depressive illness was that he was unable to accept the justice of the university’s decision to exclude him: Chung v University of Sydney [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001); Chung v University of Sydney [2002] FCA 186 (Unreported, Spender J, 21 November 2002); Chung v University of Sydney [2002] HCA S87/2002 (Unreported, Gaudron, McHugh JJ, 5 November 2002). See also the DDA litigation involving the dismissal by the Federal Court of a complaint of disability and race discrimination by Charles Pham after his failure to appear at trial: Pham v University of Queensland [2001] FCA 1044 (Unreported, Heerey J, 30 July 2001); Pham v University of Queensland [2002] FCAFC 40 (Unreported, Drummond, Marshall, Finkelstein JJ, 1 March 2002); Pham v Human Rights and Equal Opportunity Commission [2002] FCAFC 353 (Unreported, Whirlam, North, Weinberg JJ, 6 November 2002). See also the DDA litigation surrounding the claim of Chandra Sluggett who was excluded from the University of South Australia after failure to meet course requirements. A childhood infection with polio caused impaired mobility, and she claimed that she had been the victim of indirect discrimination in that she had access difficulties at the university campus. HREOC found that any indirect discrimination was reasonable and dismissed the claim. Upon review, the Federal Court could find no legal error in the HREOC finding. An appeal to the Full Court of the Federal Court was dismissed: Sluggett v Flinders University of South Australia [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000); Sluggett v Human Rights & Equal Opportunity Commission [2002] FCA 987 (Unreported, Drummond J, 9 August 2002); Sluggett v Flinders University of South Australia [2003] FCAF 27 (Unreported, Spender, Dowsett, Selway JJ 5 March 2003). See also the recent refusal of the Federal Court to grant an extension of time to file her application and claim under the Human Rights and Equal Opportunity Commission Act 1986 (Cth) to failed doctoral student, Stanisława Bahonko, on the basis of a lack of evidence to support her claims that examiners had failed her because of her race and an imputed disability: Bahonko v Royal Melbourne Institute of Technology [2006] FCA 1325 (Unreported, Weinberg J, 11 October 2006).

59 See Harding v Vice-Chancellor, University of New South Wales [2003] NSWADT 74 (Unreported, Hennessey D-P, Members McDonald and Weule, 15 April 2003) where complaints of impairment, age and sex discrimination were dismissed under NSWADA s 111 as lacking in substance and because of the complainant’s failure to appear. See also Reyes-Gonzalez v NSW TAFE Commission [2003] NSWADT 22 (Unreported, Ireland J, Members Silva and Strickland, 3 February 2003).

she had been the victim of discrimination in that the University of Sydney had failed to provide course materials to her in an accessible form. The case is interesting because, unlike other university cases, the complainant was not failing subjects. On the contrary, she achieved a distinction, two credits and four passes in her first semester of studies in Occupational Therapy at the University of Sydney and a high distinction, three distinctions, a credit and four passes in the second semester. By her own admission her results would ‘probably not be perceived as being poor’. Her claim was, nevertheless, that her academic future had been compromised by what she presented as the University’s failure to provide her with course materials in an acceptable format which accommodated her disability. She was not successful, however, in proving her case of indirect discrimination, with Driver FM finding that the actions of University disability support staff were ‘sufficient and adequate’.  

III STATISTICAL EVIDENCE

A Productivity Commission Review of the DDA

The Productivity Commission Review of the Disability Discrimination Act 1992 (PC Review), released in April 2004, is a voluminous analysis of the social impact of that legislation in the decade following its implementation. The Commission received 373 submissions and conducted hearings in all capital cities. The hearings were attended by 190 individuals and organisations. The findings of the PC Review relevant to disability discrimination in education will be discussed below. However, the PC

---

61 Ibid [66].
62 Ibid [25].
63 Ibid [121].
67 PC Review, above n 4, G1.
68 See Part IV D.
Review is also useful as the most comprehensive source of recent Australian data relating to the education of people with disabilities.

1 Vocational Education and Training (VET)

Since 1994 VET students have been asked to identify their disabilities on enrolment forms. Although such reporting is voluntary and, as such, not ‘completely reliable’ data collected suggest that participation rates in the VET sector have increased substantially over the last decade. The number of students with self-identified disabilities grew at an average rate per annum of 11.2%, while the student population grew at an average rate of 5.2%. Statistics suggest that students with a wide range of disabilities are accessing VET. Enrolment forms provide for students to report a disability which is physical, hearing, visual, intellectual, a chronic illness or ‘other’. The most common disabilities reported in 1996, 1999 and 2000 were physical, visual and intellectual, but more than 30% of VET students who reported having a disability did not specify the nature of the disability. Data suggest, however, that students with a disability were less likely to be enrolled in specific job related courses, such as engineering or business studies, and more likely to be enrolled in generic courses, such as study skills and job-seeking skills. In 1996, 47% of students with disabilities were enrolled in generic courses. By 2000, however, this proportion had lessened to 27%.

Notably, students with a disability were less likely to complete their selected subjects than other students. In 1996, for example, 71.2% of students with a disability

69 PC Review, above n 4, B7.
70 Ibid Table B7, B13.
71 See Ibid Table B2, B8. These are the three years compared in the table.
72 Ibid B9.
successfully completed subjects for which they were enrolled, compared with 76.8% of all students. In 2000 the comparable figures were 74.3% and 80.1%.73

2 University

Nationally consistent information relating to the participation of students with disabilities at the university level has been collected since 1996.74 Like VET students, university students are required only to self-report disability on enrolment forms. Thus, like VET data, there is some question as to the accuracy of information. Between 1996 and 2003 the number of students self-reporting a disability increased from 1.9% of all enrolled students to 3.6% of all enrolled students.75 This figure of 3.6% is approaching the participation target of 4% set by the Commonwealth’s Higher Education Equity Program in 1990.76

University students report disability according to a different set of classifications from VET students – hearing, learning, mobility, visual, medical and other. The largest number of students – 33.3% in 1996 and 33.6% in 2000 – reported a medical disability. It is, perhaps, not unusual, in the context that university is the tertiary study destination of academically ‘elite’ students, that no student specified an intellectual disability.77 Data analysed by the Productivity Commission suggest that students with disabilities were more likely to study arts, humanities and social sciences than other students and less likely to study business, administration,

---

73 Ibid Table B4, B10.
74 Ibid p B.11.
75 Ibid Table B5, B11.
76 Ibid B11.
77 Ibid Table B6, B11.
economics and engineering. Similar percentages of students, however, enrolled in education, health, law and legal studies and sciences.\textsuperscript{78}

As with the VET sector, students with disabilities were found to be more likely to fail their courses. In 2000, for example, 81% of students with disabilities passed their year’s studies while 87% of other students passed.\textsuperscript{79} Further, students with disabilities are less likely to pursue post-graduate studies than others. In 2000, 15.7% of university students with a disability were enrolled in post-graduate studies compared with 20.5% of others.\textsuperscript{80}

\section*{3 Primary and Secondary Schooling}

The \textit{PC Review} publishes some information relating to the primary and secondary years of schooling but, generally, it is not as comprehensive as that reported for the tertiary sector. This is partly explained by the fact that, while data relating to tertiary studies have been quite comprehensively and uniformly collected across Australia, data relating to primary and secondary schooling are compromised by different disability definition categories and collection and reporting methods in different states.\textsuperscript{81} Particularly confusing are the statistics relating to the proportion of students with disabilities placed in mainstream as distinct from special schools.

The Australia-wide data presented by the Productivity Commission suggest that a vast majority of students with disabilities attend mainstream schools. In 2002, for example, 98,064 Full time Equivalent (FTE) students were enrolled in mainstream

\textsuperscript{78} See Ibid Table B7, B13 for data from 2000.
\textsuperscript{79} Ibid B13.
\textsuperscript{80} Ibid Table B7, B13.
\textsuperscript{81} See Ibid Box B1, B2.
schools and only 19,627 in special schools. The Productivity Commission concedes, however, that the classification ‘mainstream’ collapses into one category a variety of placement options, ranging from full-time placement in a mainstream class in a mainstream school through to placement in a special education unit attached to a mainstream school but with no guarantee of significant access to a mainstream environment. The PC Review states that ‘[f]or students with moderate to severe disabilities in particular, the extent to which they are participating in mainstream classes, instead of separate ‘special education’ classes located within a mainstream school is not clear’. It is particularly important for the present study that placement statistics for students with disabilities reported by Education Queensland are disappointingly – it has even been suggested, deliberately – ambiguous. Education Queensland placement policy and related statistics require closer analysis.

B Education Queensland

Clear statistical information on the placement of students with disabilities in Queensland schools is not easily accessible. Independent schools do not publish statistics reporting on the number of students with disabilities enrolled, and it is

---

82 See Ibid Figure B2, B4. These are Productivity Commission estimates based on unpublished data from the Department of Education, Science and Training.
83 Ibid B5.
84 See below n 87.
85 The Productivity Commission reported that, in 2002, 117,808 FTE students were identified as having a disability by their State or Territory government and that, of these, 83% attended Government schools, 12.6% Catholic schools and 5.4% Independent Non-Government schools. See PC Review, above n 4, B3-B4. Australian Bureau of Statistics statistics for 2002 show that 69% of all students attended Government schools and 315 Non-Government schools: Australian Bureau of Statistics, ‘2002 Education and Training: Primary and secondary education’, Yearbook Australia 2002 (2002). <http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/06FE53B35F00F26CCA256B3500187314> at 26 February 2005. The evidence of the disparity between these two sets of statistics is that students with disabilities are more likely to enrol at a Government than at a Non-Government school. It is tempting to suggest the additional implication that Non-Government schools have not been required, legislatively or otherwise, to accommodate students with disabilities to the same extent as Government schools. In this context it is interesting to consider the QADA case of K (1996) 1 QADR 620, where a small independent Brisbane school proved unjustifiable hardship in the cost of accommodating a student with an intellectual disability to defeat a prima facie finding that their exclusion of that student
difficult to generalise on independent school policy based on the anecdotal and case law information which is available.\textsuperscript{86} Education Queensland does make available some statistical detail of the placement of students with disabilities, but it will be seen that the published information is not sufficient to allow for complete analysis of the placement trends. Indeed, it has been speculated that the withholding of information allows a public perception that more students with disabilities are included in regular schools than is, in reality, the case.\textsuperscript{87}

Despite the promise of ‘inclusion’ implicit in the policy rhetoric examined above,\textsuperscript{88} Education Queensland, in practice, provides multiple options for placement of students with impairments. They may be placed in a regular class within a regular school, with their special needs catered for by onsite or visiting specialist staff. They may be placed in a special education unit which operates on or adjacent to the campus of a regular school and which allows, for students with impairments, a degree of inclusion in regular classes and activities. Finally, students may be placed at a special school which operates independently of regular schools and which segregates students with impairments from regular schools and their students. A further refinement of the placement system is that special schools and special education units within

---

\textsuperscript{86} Some detail of published policies of Anglican, Uniting Church, Catholic and Lutheran Schools is included in Part IV, Chapter 4: Queensland Education Policy.

\textsuperscript{87} Evidence to Senate Employment, Workplace Relations and Education Committee, Brisbane, 6 September 2002, 409 (Phillip Tomkinson, Vice-President, Queensland Parents for People with a Disability). See also the questioning by Senator Tierney of Michael Walsh, Acting Director, Inclusive Education Branch, Curriculum Directorate, Education Queensland: Evidence to Senate Employment, Workplace Relations and Education Committee, Brisbane, 6 September 2002, 494-8. Senator Walsh was disappointed at the lack of statistical detail made available to the Inquiry on matters such as placement and staff training. His comments included, ‘You leave it at a bit of a disadvantage if you do not know such a fundamental fact’, at 491; ‘It should not be too hard to do the maths on this’ at 495; and, ‘I am amazed you do not know’ at 498. The Senator asked Walsh to take several questions on notice.

\textsuperscript{88} See Part III, Chapter 4: Queensland Education Policy.
mainstream schools may cater for students with a range of different impairments or, instead, may focus on a particular impairment.

In Queensland, at present, a student does not have unfettered freedom to enrol at the school of his or her choice. The enrolment in a particular State school of a student with an impairment is, in theory, negotiated by the student’s parents with representatives of Education Queensland. In theory, parents may choose any state school for their child. Enrolment options are, however, in practice, limited by the kind and degree of impairment of the student, by the options available in the location where a student lives and by the services and facilities available at particular schools. Transport assistance, for example, may only be made available to a student to the nearest school deemed appropriate for that student by Education Queensland. The withholding of transport assistance to other schools has created a financial pressure on parents to accept the Education Queensland preferred option.  

In order to inform decisions about the placement and level of support to be provided to students, Education Queensland relies on a system of ‘Disability Categories’. The categories ‘describe conditions of need which restrict student access and participation relating to learning environments and/or learning outcomes’. Education Queensland focuses on the ‘impact upon educational matters’ whatever the cause of disability and acknowledges that no system of categories can

---

89 Glenis Green, ‘Taylah’s mum just wants a fare go’, The Courier Mail (Brisbane), 22 August 2000, 8.
90 Education Queensland, Defining students with Disabilities in Queensland State Schools: Discussion stimulus paper (2001), [3]. Categories supported under the ascertainment process are Physical, Hearing, Vision, Deafblind, Speech-Language, Autistic Spectrum and Intellectual. The following categories may attract funding via other mechanisms: Early Developmental, Specialised Health and Mental Health. Descriptions of these categories are provided at [3].
91 Ibid.
comprehensively cover the ‘full range of restrictions on learning’ in that disability is a ‘broad term’. The claim is, therefore, that the system is based on the ramifications and not the cause of disability for a particular student, even though the system is based on the classification of students according to impairment type.

In 2001 Education Queensland initiated a review of the ‘adequacy and accuracy’ of the disability categories as presently defined. It is noted that the reviewed policy and procedures documents retained the same five disability categories. More comprehensive definitions of each category have, however, been developed to be used in conjunction with detailed diagnostic criteria statements. Education Queensland acknowledges that a student may meet the criteria of multiple disability categories.

The real significance of the categories is that they are a feature of the ‘ascertainment’ process. This is the process of determining the level of support which will be made available to a student with a disability. The support provided is funded by a mix of state and federal government monies. Students are classified as falling within a particular disability category and then are further classified according to the level of

---

92 Ibid.
93 Ibid.
94 Ibid preamble.
96 Ibid 17-50.
97 Ibid 4.
98 It should be noted that ascertainment is also conducted by independent schools as a prerequisite step to accessing government funds to support students with impairments. See *Education (Accreditation of Non-State Schools) Regulation 2001* (Qld) s 8. As explained in Part III, Chapter 4: Queensland Education Policy, a new scheme, designed to replace ascertainment, is to be phased in over a three year period commencing in January 2005. An Education Adjustment Program profile (EAP profile) will replace the present IEP. The new scheme retains the disability categories applicable to the ascertainment procedure. See Chapter 4: Queensland Education Policy, n 45 and 79.
100 Ibid 51.
their ‘support requirements’. The levels range from level 1, least support, to level 6, most support. An Individual Education Plan (IEP) is prepared for students ascertained at levels 4, 5 and 6. An IEP is a plan, negotiated by parents, education professionals and the student, to determine the student’s needs and learning priorities for the next six months. The reality is that students ascertained as requiring the higher levels of support – and, therefore, the most ‘expensive’ students to support – will have more limited placement options and therefore more limited access to ‘inclusion’ than students ascertained at the lower level of need. This is because the support ‘ascertained’ as necessary for a particular student may be made available only at a particular school or type of school. Transport assistance is made available to a student with a particular type of disability to attend the nearest school equipped to provide resources for that disability.

Although it is claimed by Education Queensland that parents can send their child to a school that does not have the specialist resources, and that Education Queensland ‘would provide some resources to that school in order to support the student’ and ‘would ensure that the student got a level of resources that was sufficient for them to be able to access the curriculum’, the anecdotal and statistical evidence suggests that most students ascertained at levels 4 – 6 comply with the ‘aggregated resources’ approach and attend the school deemed most suitable by Education Queensland. The evidence of QPPD Vice-President, Phillip Tomkinson, to the recent Senate Inquiry into the Education of People with Disabilities was that it was a ‘myth’ that students in segregated schools and units are there through choice: ‘We have evidence at QPPD around the placement policy of

---

101 Ibid 69.
103 Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September, 2002, 502 (Michael Walsh, Acting Director, Inclusive Education Branch, Curriculum Directorate, Education Queensland).
students in schools to show that in many instances parents are pressured to accept segregation. The word parents frequently use to describe their negotiation with Ed Queensland over placement is “blackmail”.105

Statistics provided to the Senate Inquiry state that as of February 2002, 12,617 students with disabilities, representing approximately 2.87% of the school age population, attended Education Queensland schools.106 Eighty percent of students with disabilities attended regular schools or schools with special education units, while 20% attended special schools.107 However, no further breakdown of the 80% figure, showing details of how many students were in regular classes and how many in Special Education Units (SEUs), or of the level of access to regular classes provided to students in SEUs, was provided in Education Queensland’s submission to the Inquiry or at the hearing, attracting the criticism of both the QPPD and of Senator Tierney, sitting on the hearing.108 An Education Queensland spokesman told the Inquiry, “There is no evidence or information available in relation to your question as to how many students can be integrated into a regular classroom”.109 The only clear statistic available, therefore, is that 20% of students attend special schools and, as such are segregated from regular classes, not ‘included’.110

---

105 Evidence to Senate Employment, Workplace Relations and Education Committee, Brisbane, 6 September 2002, 409 (Phillip Tomkinson, Vice-President, Queensland Parents for People with a Disability).
106 Ibid 483.
107 Ibid.
108 Ibid 495.
109 Ibid 493.
110 There is an argument, however, advanced by the supporters of special schools that inclusion is not about location so much as attitude and that on this basis it is possible for a student with a disability to receive an ‘inclusive education’ in a segregated setting.
Evidence was provided to the Senate Inquiry that the number of special schools has declined from 87 in 1990 to 47 in 2002.\textsuperscript{111} There has been a concurrent increase, however, in the number of SEUs attached to regular schools. Evidence to the Productivity Commission put the number of SEUs at 219 in 2001.\textsuperscript{112} Dr John Enchelmaier, Vice-President of the Australian Federation of Special Education Administrators, cautioned the Senate Inquiry that placement at an SEU was no guarantee of inclusion: ‘We have got to be careful that the establishment of units is not equated necessarily with inclusion. Inclusive practices can be based on in such a dispersal of expertise and students, but it is not a given. Unless there are some incentives and some environmental support for it, you will not get inclusion’.\textsuperscript{113}

Ms Fiona Connolly, QPPD representative on the Queensland Ministerial Taskforce on Inclusive Education, told the Senate Inquiry in relation to the 80 percent figure, ‘we do not know how many of their schools operate in a very exclusive manner, even within a regular setting. They may well be in a unit that has six-foot fences and there is no traffic between those environments. From that, we do not really know how many are included’.\textsuperscript{114} Michael Walsh, Acting Director of the Inclusive Education Branch of Education Queensland, suggested that the majority of students in special education units in regular schools would attend regular classes, but admitted that ‘it does not necessarily mean that if you are in a special education unit attached to a

\textsuperscript{111} Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September, 2002, 443 (Dr John Enchelmaier, Vice-President of the Australian Federation of Special Education Administrators).

\textsuperscript{112} PC Review, above n 4, B5.

\textsuperscript{113} Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September, 2002, 444 (Dr John Enchelmaier).

\textsuperscript{114} Ibid 419
regular school you will at any point in time be in a regular classroom. You can attend the unit and not attend regular classes’.

Other statistics published by Education Queensland, reporting 2004 data, provide more precise detail of the placement of students by disability. Statistics are available showing the placement in either ‘regular’ schools or special schools of students ascertained at levels 4, 5 and 6, according to variety of impairment. Again, no distinction is made between placements in a ‘regular’ class at a ‘regular’ school or in an SEU attached to a ‘regular’ school, meaning that some students reported as attending ‘regular’ schools may, in fact, be spending a proportion of their time in a ‘segregated’ setting. The statistics do reveal, however, evidence of a hierarchy of stigma according to type of impairment, in that students with intellectual impairments are significantly more likely to be placed in a special school than students with physical impairments or sensory impairments. The incidence of placement in a special school also increases in step with ascertainment level. Thus, for example, of 209 hearing impaired students ascertained at level 4 none were placed in special schools while of the 238 students classified at level 6 only 5 were placed in special schools. Of the 405 students with physical impairments ascertained at level 4 none was placed in a special school and of the 382 students ascertained at level 6, 15 were placed in special schools. The figures for students with intellectual impairments are markedly different. While there is a similar level of inclusion for students ascertained at level 4, students ascertained at level 6 are significantly more likely to find

---

115 Ibid 493.
themselves in a special school than are students who are physically impaired or blind. Of the 255 students with intellectual impairment ascertained at level 4, none is placed in a special school, but, of the 3234 ascertained at level 6, 1919 are placed in special schools.

The statistics also suggest a higher incidence of intellectual impairment than of other impairments. This higher incidence is partially explained by the fact that students with multiple disabilities are reported once for each category and that students with an intellectual impairment frequently also have a physical or sensory impairment. It can be deduced from this overlap in the statistical reporting that many of the students with physical and sensory impairments reported as placed in a special school will also have an intellectual impairment. It is fair to speculate from these statistics that a majority of students indicated as placed in ‘regular’ schools who are placed in SEUs are likely to be students with intellectual impairments. The evidence suggests a clear link between intellectual impairment and placement in segregated or partially segregated settings. The evidence also suggests, therefore, that students with intellectual impairment face a higher level of stigma than students with physical or sensory impairments in that they are less likely to be included in regular classes. Further, the table, below, demonstrates that when statistics from 2004 are compared with equivalent statistics from 2001118 it is clear that while there has been some improvement in terms of the mainstream inclusion of students with physical impairments since 2001, the same level of improvement has not been evident for students with intellectual impairments:

Table 3: Education Queensland Special School Enrolments by Impairment

<table>
<thead>
<tr>
<th>Category by Impairment</th>
<th>2001 number of students in special school/number of students</th>
<th>2001 percentage of students placed in a special school</th>
<th>2004 number of students in special school/number of students</th>
<th>2004 percentage of students placed in a special school</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing impairment</td>
<td>6/260</td>
<td>2.3%</td>
<td>5/238</td>
<td>2.1%</td>
</tr>
<tr>
<td>Physical impairment</td>
<td>43/374</td>
<td>11.5%</td>
<td>15/382</td>
<td>3.9%</td>
</tr>
<tr>
<td>Intellectual impairment</td>
<td>1766/2770</td>
<td>65.5%</td>
<td>1919/3234</td>
<td>59.3%</td>
</tr>
</tbody>
</table>

If there is discrimination against some groups in that their placement options, despite policy pronouncements to the contrary, are limited, then this may suggest that anti-discrimination legislation is not delivering ‘equality of opportunity,’ in terms of equal access to mainstream schools, to all people with disabilities. Indeed, Senator Campbell, Chair of the Senate Inquiry, found it ‘odd that there have been so few prosecutions’ of complaints of discrimination in education in Queensland.¹¹⁹ In response to evidence from Dr Christina Van Krayenoord, Director of the Schonell Special Education Research Centre, that she believed that independent schools ‘may, in fact, seek ways of precluding students from attendance or enrolment in their schools, despite the antidiscrimination [sic] legislation’, Senator Campbell commented, ‘The obvious question follows, then: is this not a breach of the law?’¹²⁰

IV REPORTS

During the last decade several reports from a variety of Australian jurisdictions have indicated that inclusion in mainstream schooling settings is not available as of right to

¹¹⁹ Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September 2002, 412.
¹²⁰ Ibid 458.
students with disabilities. At first glance, the most comprehensive report appears to be based on a study conducted by Darrell Wills and Robert Jackson for the National Council on Intellectual Disability (NCID). This study produced a ‘report card’ on inclusive education practices in Australia.121 This ‘report card’ was highly critical of Australian education policy and practice and recorded a ‘D’ grade for the inclusion of students with disabilities. The value of the ‘report card’, however, has been questioned by the Report of the Senate Inquiry into the Education of Students with Disabilities, which casts doubt on its claimed link with UNESCO122 and on its methodology,123 and implies it is driven by an ideology out of touch with the ‘more basic concerns’ of parents.124 The Senate Report concludes that the report’s findings ‘appear to reflect the preconceptions of its researchers and authors and are of doubtful validity’.125

Mike Clear, editor of an important assessment of the delivery of disability services in New South Wales,126 reviews several reports on the education of people with disabilities in that State which indicate continuing problems with the implementation of uniform access to inclusive education.127 Ultimately, he concludes that neither

122 Senate Report, above n 3, 36 [3.25].
123 Ibid.
124 Ibid 30 [3.4].
125 Ibid 45 [3.55].
126 Mike Clear (ed), Promises Promises: Disability and Terms of Inclusion (2000).
legislative nor policy initiatives have succeeded in delivering a ‘guaranteed’ equality of opportunity in education:

Anti-discrimination legislation in New South Wales and State government policy initiatives in school education and significant efforts of TAFE education appear to have created greater awareness, some higher skills amongst staff and greater opportunities for disabled students to access and participate in the benefits of education, but they do not guarantee that educational structures will include and appropriately support a disabled person in any reliable way.  

In her more recent assessment, Katherine Lindsay finds that the evidence from the reports is ‘remarkably consistent’ and suggests that while statistics for that State might indicate that ‘physical inclusion’ in mainstream classes is available for a ‘majority of students’, a mere physical presence in a mainstream classroom does not equate to equality of opportunity in education.  

Lindsay is prepared to make the link between the failures of legislative protection and the failures of inclusion practice in New South Wales: ‘it is not apparent that the broad and deep objectives of inclusion are reflected in Australia’s disability discrimination laws, neither in their drafting nor in their interpretation’.  

The principal focus of the present analysis is on reports with more specific or more recent relevance to Queensland: first, the report of the Ministerial Taskforce on Inclusive Education, tabled in June 2004; secondly, the QPPD report, There’s Small  

---

130 Ibid 373.
132 Lindsay, above n 129, 377.
133 Ibid 387.
134 Ministerial Taskforce on Inclusive Education (students with disabilities) (Queensland), Report, June 2004 (‘Taskforce Report’).

**A Ministerial Taskforce on Inclusive Education (students with disabilities).**

The provision of education to students with disabilities was the subject of a recent Ministerial Inquiry in Queensland. Early in 2002, the Education Minister announced a plan ‘designed to support inclusive education for all students enrolled in state schools’. The ‘seven-point plan’ involved the creation of a task force to report to the Minister, an action plan for students with disabilities, a staff college to provide professional development to the teachers of students with disabilities, a summit on inclusive education, the development of a strategic plan for a five-year capital works program to commence in 2003, the trial of a post-compulsory school education certificate to recognise the school achievements of students with disabilities and ‘the reorganisation of facilities within the department to ensure they are consistent with an inclusive education framework’. While it is perhaps too early to assess the impact of all seven points of this plan, the Ministerial Taskforce has completed its brief. Its report tabled in June 2004, however, amounts to tacit acknowledgement that the

---


136 Above n 3.

137 Above n 4.


Queensland Education system, to that date, had failed to deliver its ‘guarantee’ of inclusion to students with disabilities in that it foreshadows new policies and ‘new directions on inclusive education’. Further, there is an implied criticism of the Government’s record on inclusion in its Recommendation 1, ‘[t]hat the Queensland Government publicly support the vision and benefits of an inclusive society’. Most damning, however, is their conclusion, in relation to students whose disabilities exhibit as problem behaviours, that as some teachers and schools do not have the necessary expertise or support to deal with the behaviour, ‘it would appear that suspension and eventual exclusion of these students is becoming common practice’.

The Taskforce was briefed, in March 2002, to ‘provide advice on how to make the schooling system more inclusive for students at educational risk, in particular students with disabilities and learning difficulties’. The Report articulates firm support for inclusive education as an aspect of ‘human rights’. Its rhetoric reflects a communitarian emphasis on education as providing access to citizenship: ‘The core social context that illuminates the plight of marginalised groups is the issue of human rights, which has at its centre the concept of human dignity, social justice and the achievement of full citizenship’; ‘The education of students with disabilities is central to the concept of human dignity and the achievement of full citizenship’.

140 In Education Queensland’s lead policy document, *Queensland State Education 2010*, the claim is made that ‘inclusiveness is…guaranteed’: Education Queensland, *Queensland State Education 2010* (2000), 13. This policy document, and its promises, are analysed in Part III, Chapter 4: Queensland Education Policy.
141 Education Queensland policy updates made in 2006 in response to the Taskforce Report are discussed in Part III, Chapter 4: Queensland Education Policy.
143 Ibid 11.
144 Ibid 5.
145 Ibid 10.
146 Ibid 5.
The Report recommends change to both placement policy and practice identifying ‘some organisational structures, and core beliefs and practices...that hinder the provision of quality curriculum and pedagogy for students with diverse learning needs’.

It is particularly significant that the Report identified a ‘dissonance between policy and practice’ and acknowledged that different understandings of terms such as inclusion lead to ‘inconsistencies in interpretation and expectation’.

It highlights the fact that existing policy documents, such as the ‘placement policy’, SM–18, carry incongruities that need to be addressed by a comprehensive review to align them with projected new directions on inclusive education. While the Report does not go so far as to recommend that the ‘new directions’ should comprehend mainstream education as a right for students with disabilities, it clearly implies that there should be greater access to the mainstream school. It supplies its own definition of ‘inclusive education’ as ‘a process of responding to the uniqueness of individuals, increasing: their presence, access, participation, and achievement in a learning society’. While this definition is, perhaps, wide enough to embrace the existing range of placement options available in Queensland, it is clear that the Taskforce envisages fundamental change to that range:

How can inclusive schools be created from the present arrangement of regular, social units/classes and special schools? Many current and past initiatives to support students with disabilities have served to separate them (and their teachers) from their (respective) peers. Teachers who have taught students with disabilities in special schools and units have usually undertaken training programs different from those of other teachers. In contrast, implementation of the vision requires provision of such specialist expertise to support diverse learners, their teachers and parents/caregivers, in inclusive education environments.

147 Ibid.
148 Ibid 11.
149 Ibid.
150 This policy is analysed in Part III, Chapter 4: Queensland Education Policy.
151 Taskforce Report, above n 142, 11.
152 Ibid 18.
In another tacit acknowledgement of past failures, the Minister for Education, responding to the Report, announced a 10 point plan ‘to boost inclusive education for students’. The plan includes the establishment of a ministerial advisory committee, the updating of syllabuses, the establishment of a research program, and the provision of additional funding, including funding for professional development for Education Queensland staff. It is anticipated that the institutional change required to deliver what the Taskforce called ‘the new vision of inclusion’ will not be rapid and that significant planning for that change will be required. Indeed, the first concrete change to emerge from the Taskforce Report was the establishment of a Ministerial Advisory Committee briefed ‘to provide advice on strategies to promote inclusive programs and curriculum for students with disabilities’. Cynics may claim that the ‘7 point plan’ and ‘Ministerial Taskforce’ of 2002 have produced, in 2005, a ‘10 point plan’ and ‘Ministerial Advisory Committee’. Nevertheless, the ‘10 point plan’ adopts all but one of the taskforce recommendations and does promise a change in culture which may well help more students with disabilities to enjoy inclusion in a mainstream school. Perhaps the major (and most welcome), change, to date, to emerge from the ‘10 point plan’ is the revamping of the controversial ascertainment program. A new ‘more flexible resourcing methodology’ is to be phased in over five years commencing in January 2005. Further, the Queensland Government has recently delivered on a commitment that ‘Education Queensland policies for students with

154 *Taskforce Report*, above n 142, 18.
155 The 12 recommendations relate to ‘leadership’, ‘community and family expertise’, improved accountability to families’, ‘an inclusive and responsive curriculum’, empirical support for the vision’, ‘equitable use of resources’, and ‘a confident and capable workforce’. See *Ibid* 7-8. Recommendation 3, “[t]hat the minister prepare and promulgate a green paper on Inclusive Education”, was not supported by the government on the basis that it may ‘slow the process of improvement’: Minister for Education and the Arts (Queensland), *The Ministerial Taskforce on Inclusive Education (students with disabilities): Government Response*, June 2004, 3.
disabilities will be reviewed to ensure that processes and mechanisms for the inclusion of parents/caregivers in decision making and participation in their child’s education are made explicit.¹⁵⁷ New ‘inclusive education’ policy documents were released during 2006.¹⁵⁸ As noted earlier, however, it is too early to judge the impact of these revamped policies on the education rights of Queensland students with disabilities.¹⁵⁹

**B QPPD: There’s small choice in rotten apples**

QPPD is a federally funded advocacy organisation association for people with disabilities. The following ‘mission statement’ reveals its priorities:

QPPD vigorously defends justice and rights for people with disabilities by exposing exclusionary practices, speaking out against injustices and promoting people with disabilities as respected, valued and participating members of society.¹⁶⁰

QPPD has been an important advocate for inclusive education in Queensland and has made submissions to both the *PC Review* and the Senate *Inquiry into the Education of Students with Disabilities*. The QPPD report, *There’s Small Choice in Rotten Apples*, publishes the results of a small survey conducted by the organisation into Education Queensland placement policies and the parental response to those policies. The survey was self-selecting, with participants drawn from among people who had previously been involved in a QPPD ‘phone-in’ research project, QPPD members, members of other (unspecified) parent support organisations, and all schools in three (unspecified) Queensland Education Districts.¹⁶¹ Of the surveys distributed, 247 were

---

¹⁵⁸ See discussion of these documents in Part III, Chapter 4: Queensland Education Policy.
¹⁵⁹ See Part III, Chapter 4: Queensland Education Policy.
¹⁶¹ Ibid 15.
returned, representing a response rate of 11%. Focus group discussions were held to draw out a narrative response to the survey issues and to ‘validate the survey data’. Although not stated explicitly, the implication of the Report is that both survey respondents and focus group participants were parents of children with disabilities. It is a basic premise of the QPPD platform that part of any right to education is the right of parents and their children to choose the school the children attend. Moreover, this right to choose should be available to all students regardless of disability. Perhaps the major finding of the Report is that participants did not believe that there was a genuine choice of schooling options available for their children and that both the ascertainment process and Education Queensland placement policy were constraints on choice. A majority (73%) of the participants in the research asserted that they would not send their child to their present school if it were not for the fact of the child’s disability. Participants reported feeling pressured to enrol their children at the Education Queensland recommended school:

It is difficult to take the option which is not recommended by EQ. Parents feel that they are punished for insisting on inclusion, whereas the recommended option laden with the incentives of resources, therapy, transport and other supports is sometimes very hard to resist.

The clear implication, therefore, of the Report is that the funding policies of Education Queensland limit the range of education options effectively available to

---

162 Ibid.
163 Ibid.
164 See the following statements for example: ‘In answer to the survey question asking parents to identify the age of their child with disability, 85% indicated that their child was in the 6 to 18 years of age bracket’ (15); ‘A range of criteria was used to select participants for the focus groups; geographical, is child of school age, does the child attend a private or state school, and the ascertainment type and level of the child’s disability’ (17). See also the summary of the focus group participants: Appendix B.
165 Ibid 10-11.
166 Ibid 17.
167 Ibid 36.
students with disabilities: ‘This research exposes the non-sense of choice for parents of students with disability’.\footnote{168}{Ibid 38.}

While there is little explicit reference to the role of disability discrimination legislation in protecting a right to choice in education, there is a suggestion made that the unjustifiable hardship exemption has been instrumental in allowing schools to avoid the accommodation of students with disabilities.\footnote{169}{Ibid 33 and 34. The operation of the unjustifiable hardship exemption in the education context is discussed in detail in Part V, Chapter 6: Exemptions.} The authors of the Senate Inquiry into the Education of Students with Disabilities dismissed QPPD as having an agenda too ‘radical’ to attract wide community support.\footnote{171}{See Senate Report, above n 3, 37 [3.28]: ‘The QPPD agenda appears to be much wider than the immediate concerns of students with disabilities. It has much to do with transforming the administrative and pedagogical culture of schools as a catalyst for social change. In arguing that the education needs of students with disabilities are no different from the education needs of other students, QPPD is expressing a view that is unlikely, in the committee’s view, to find support in the education community as a whole’.} It will be seen, however, that the findings of QPPD’s report are, perhaps, not too different from the findings of the Senate Inquiry itself.

C Senate Report

The Senate Inquiry into the Education of Students with Disabilities arose from concerns about the effectiveness of Commonwealth programs affecting the teaching of students with disabilities and the effectiveness of the delivery of Commonwealth funds towards supporting such programs.\footnote{172}{Ibid Preface xix.} The Senate Report acknowledges that the policy of inclusive education ‘is widely accepted as likely to lead to the most
desirable learning outcome for students. The Senate Report further contends that
‘[i]nclusive education… recognises the human rights and equal entitlements of those
with disabilities and embraces certain social responsibilities and ethical goals which
are supposed to be consistent with a polity such as Australia’. The Report notes,
however, the failure of anti-discrimination legislation to protect a right to equal
opportunity in legislation as a matter of concern:

Social justice demands that students with disabilities should have equal access to
education. Commonwealth, state and territory anti-discrimination legislation support
this fundamental principle, yet there still appear to be marked disparities in the
quality of educational opportunities offered to students with disabilities.

Like the QPPD report, therefore, the Senate Report suggests that there is a right to
equal access to education options. Unlike the QPPD report, however, the Senate
Report implies that there should be limits on inclusion. It is interesting that one of the
limits implied in the Report coincides with a limit implied by communitarian
commentators. That is, where the inclusion of the student with disability interferes
with the rights to education of other students, the rights of the majority (that is, of the
other students) should prevail. The Report notes that withdrawal from mainstream
classes is indicated where a student with disability interferes with the ability to learn
of other students or impinges on the safety of other students. In another respect,
however, the Report countenances withdrawal from the mainstream setting in a wider
range of circumstances relating to educational ‘benefit’ for the student with disability
than, it seems, would be countenanced by communitarians. While at least one
communitarian commentator, Walzer, has suggested withdrawal only when a student

---

173 Ibid Preface xxi.
174 Ibid.
176 Ibid Preface xix.
177 Ibid Preface xxiii.
has demonstrated a complete incapacity to learn, the Report suggests withdrawal of students, either completely or partly, from the mainstream setting, where that setting is ‘not beneficial’ to the student. This more flexible approach raises but does not address an issue which has perplexed some tribunals hearing complaints of education discrimination: does the legislation protect a right to access the same range of educational options as that available to ‘regular’ students or only a right to access what experts determine is the ‘best’ choice – in terms of educational benefit – for a particular student. This more flexible approach, too, excites but does not explicitly address the conflict among education commentators as to what is ‘best’ for students with disabilities. The language of the Report does, however, suggest support for education ‘moderates’ who contend that an ‘inclusive’ education is possible in a segregated setting. The Report suggests, for example, that

[i]nclusive education must continue to embrace a number of learning centre options, where required. A small minority of students will need varying levels of withdrawal from the mainstream classroom, depending on the nature of their condition, if their needs are to be properly met.

The Report also suggests, in a review of the debate as to the meaning of ‘inclusion’, that while schools and their staff will have to be prepared to engage in ‘philosophical discussion’ with a view to reform of present placement practices, ‘full inclusion’ is ‘utopian’. The Report also notes that ‘State education departments have maintained a pragmatic attitude to what constitutes inclusion’. The Report, therefore, concludes that while ‘full inclusion’ is not a reality in Australia, it is not achievable or

180 Senate Report, above n 3, Preface xxi.
181 Ibid 30 [3.7].
182 Ibid 34 [3.19].
even desirable. Nevertheless, the Report acknowledges that there is room for improvement and, particularly, that ‘physical inclusion’ of a student is not sufficient to deliver equality of opportunity in education. The Report suggests that statistics which purport to show reduced numbers of ‘special’ schools and increased numbers of ‘special education’ students included in mainstream schools distort the reality that many students, represented as placed in mainstream schools, spend much of their time segregated from mainstream classes, in special education units or classes.\textsuperscript{183}

The Senate Report’s review of inclusion practice has a particular focus on Queensland. The stated reason for this focus is that ‘its policy of “ascertainment” has been criticised as indicating a lack of commitment to inclusion’.\textsuperscript{184} This reason echoes the finding of the QPPD report. The Senate Report acknowledges that there is some parental dissatisfaction with the placement practices not only in Queensland, but Australia-wide.\textsuperscript{185} Despite adverse comment made by members of the Inquiry about the obfuscation of Education Queensland officials during the Brisbane hearings of the Inquiry,\textsuperscript{186} however, the Report accepts that Education Queensland is committed to improving its service to students with disabilities and comments favourably on its plan to review the ascertainment process.\textsuperscript{187}

The understanding of inclusion preferred by the Report generally conforms to that postulated by education policy makers. The Report is committed to a ‘flexible interpretation of inclusive education evolving in accordance with local circumstances,

\textsuperscript{183} Ibid 31-2 [3.11]-[3.12].  
\textsuperscript{184} Ibid 36-7 [3.27].  
\textsuperscript{185} Ibid 44 [3.51].  
\textsuperscript{186} See above nn 84 and 87.  
\textsuperscript{187} Senate Report, above n 3, 38 [3.31]. Detail of the ensuing review is provided in Part III, Chapter 4: Queensland Education Policy. See also Part IV A, above.
and in sympathy with broad opinions and attitudes which are influenced by improved knowledge and deeper understanding of the needs of students with disabilities"; that is an interpretation of inclusion which encompasses a range of educational options for students with disabilities, of which ‘full inclusion’ is but one. Even against the benchmark of this ‘moderate’ understanding of inclusion, however, the Report acknowledges that education institutions have thus far not delivered the same quality or equality of opportunities to students with disabilities as to other students. Non-compliance with anti-discrimination legislation is highlighted as a reason behind the continued less favourable treatment of students with disabilities:

Although the Disability Discrimination Act has been in force since 1992 it has become evident that, in its application to education, the objectives of the Act are yet to be fully realised. Evidence provided to the committee suggests that there is considerable variation in legislative compliance among the states and territories as well as differences in compliance between the government and non-government school sectors.

The Report does not offer a detailed explanation of how continued non-compliance is possible in light of the enforcement provisions of such legislation but does seem to accept evidence of a reluctance to rely on legislative remedies. It cites the opinion of Queensland academic, Mary Keefe Martin, that reluctance is ‘because of complex complaint-based appeal processes, unwanted expense and publicity, the exemption clause of unjustifiable hardship and the stress of lengthy court cases’. The Report suggests that those most vulnerable to discrimination are those students with ‘less traditional disabilities’:

---

188 Ibid [3.52].
189 Ibid 115 [7.21].
192 Senate Report, above n 3, 116 [7.25].
Of particular concern is the extent to which students with ‘less traditional disabilities’ are managed. The legislation relies on the concept of reasonable adjustment being made to provide substantive equality for students with disabilities. For some disabilities such as conductive hearing losses, learning disabilities, and some behavioural disorders this is clearly not happening in all instances.  

‘Less traditional disabilities’, the inference seems to be, require substantial – and usually expensive – adjustments to the school environment and procedures, as well as attitudinal adjustment on the part of the school community. Further, the Report acknowledges a clear link between funding allocations and placement outcomes for students with disabilities: ‘There is unambiguous evidence of under-resourcing of programs aimed at bringing students with disabilities into the mainstream of learning’.  

The recommendations made in the Senate Report suggest that the Senate Committee sees the solutions to discrimination in education as administrative and fiscal and not simply as legislative. The majority of the recommendations relate to the improvement of teacher training and of resourcing for the education of people with disabilities.  

One of the more significant recommendations and it will be seen, one of the recommendations acted upon promptly by the Commonwealth, is, however, for legislative action by the implementation of disability standards for education. The significance of the implementation of disability standards for education will be further considered below.

193 Ibid, Preface xix.
194 PC Review, above n 4, Recommendations xii-xv.
195 Ibid, Recommendation 17, 118: ‘the committee recommends that the Attorney-General formulate the Disability Standards for Education 2002, under paragraph 31 (1) (b) of the Disability Discrimination Act 1992; it also recommends that the Commonwealth take the necessary legislative action to put the education standards beyond legal challenge’.

In 2003, the Productivity Commission was briefed to report on ‘appropriate arrangements for regulation’ taking account, among other things, of the following:

[T]he social impact in terms of costs and benefits that the legislation has had upon the community as a whole and people with disabilities, in particular its effectiveness in eliminating, as far as possible, discrimination on the ground of disability, ensuring equality between people with disabilities and others in the community, and promoting recognition and acceptance of the rights of people with disabilities. 197

The PC Review acknowledges that ‘exclusion from, and segregation in, education’ is ‘[a]rguably, one of the most serious forms of disability discrimination (in terms of long-term effects on individuals)’.198 The PC Review finds that the DDA has ‘been reasonably effective in improving educational opportunity for tertiary students with disabilities, with mixed results in school education’.199 It implies, however, a hierarchy of disability implied also in other evidence considered in this chapter, stating that the DDA has been ‘more effective for people with mobility, sight or hearing impairments than for people with mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome’.200 The PC Review starts from the premise, however, that this hierarchy may be justified in that ‘there is a limit to how far [the DDA] can address the disadvantages that some face’.201 Its view of anti-discrimination legislation is that it ‘benefits most those against whom discrimination is most unreasonable; that is, where the disability is least

197 Ibid Terms of Reference 2(a), lv. The Review was conducted pursuant to the Productivity Commission Act 1998 (Cth) s 11.
198 PC Review, above n 4, 83.
199 Ibid Overview xxxiii. See also Finding 5.2, LVII: ‘The Disability Discrimination Act 1992 appears to have had some beneficial effects in education, although it has not been wholly successful in eliminating discrimination for students with disabilities. It appears to have been reasonably effective in improving educational opportunities for tertiary students with disabilities with mixed results in schools’. See Statistical Evidence, Part III, above.
200 Ibid Overview xxxiii.
201 Ibid.
relevant (in degree or kind) to the circumstances’. The pragmatic, but somewhat controversial implication, in terms of disability theory, seems to be twofold: first, that the more severe the disability, the more ‘reasonable’ the discrimination; secondly, that some incurable disadvantage can be traced to a disability itself and not to any lacking in the social response to that disability.

The *PC Review* canvasses a range of evidence from the many submissions on education, some arguing that the *DDA* has benefited students with disabilities and some suggesting little beneficial impact. The Productivity Commission seems to accept, however, that statistical data is a deceptive indicator of success, particularly in the context of ‘improved’ participation rates in mainstream education. It cites the evidence of People with Disability Australia that these statistics pick up a range of students who have always been in the mainstream environment but who, encouraged by present funding allocation arrangements, have been identified as having a disability in order to attract a greater level of support. It also refers to the evidence of People with Disability Australia that enrolment in a mainstream environment does not guarantee social inclusion and that statistics reporting increased enrolments in mainstream schools are misleading because they include students enrolled at special education units attached to mainstream schools but who may, in fact, have little access to the benefits of that mainstream environment.

---

202 Ibid xxxiv.
203 How the courts have constructed ‘reasonableness’ in the context of indirect discrimination and the ramifications of this construction in terms of disability theory is considered in detail in Part III, Chapter 12: Indirect Discrimination.
204 *PC Review*, above n 4, xxxiii-xxxiv. A similar issue, the finding by various courts and tribunals that detriment is caused by impairment itself and not by discrimination, and the ramifications of this finding in terms of disability theory is explored in Part I, Chapter 10: Causation.
The *PC Review* concludes that it is ‘difficult (or arguably impossible)’ to attribute improvements in outcomes for people with disabilities to the *DDA* ‘because so many other policies and factors also affect education experiences and outcomes’.\(^{205}\)

Presumably, however, the inverse is not necessarily true as the Review does identify specific failings of the *DDA* and makes specific recommendations as to how the effectiveness of that Act, and, by implication, the effectiveness of similar legislation, such as the *QADA*, could be improved. In the context of education, the most important recommendations relate to the introduction of a general duty to make ‘reasonable adjustments’,\(^{206}\) reform of the scope and application of the unjustifiable hardship exemption,\(^{207}\) extension of the definition of disability ‘to explain that behaviour that is a symptom or manifestation of disability is a part of the disability for the purposes of the Act’,\(^{208}\) shifting the burden of proof that indirect discrimination is reasonable from the complainant to the respondent,\(^{209}\) and clarification of the effect on the scope of the *DDA*,\(^{210}\) and on State legislation, of the implementation of disability standards under the *DDA*.\(^{211}\) Although the *PC Review* does not explicitly set out how, the genesis of each of these reforms can be traced to the case law interpreting the *DDA* and similar State legislation. Each of the proposed reforms will

---

\(^{205}\) Ibid B21.

\(^{206}\) Ibid, Recommendation 8.1. Compare with finding 8.1 The *DDA* has been amended to make the unjustifiable hardship exemption available after enrolment: see *DDA* s 22(4); *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth). See Chapter 7: An Implied Duty of Reasonable Accommodation.

\(^{207}\) Ibid, Recommendations 8.2 and 8.3. Compare with findings 8.2, 8.3, 8.4 and 8.5. See Part V, Chapter 6: Exemptions.


be discussed, in detail, in the context of the relevant case law in later chapters of this thesis.212

V DISABILITY STANDARDS

Both the Senate Report and the PC Review clearly imply that the implementation of disability standards for education under the DDA should improve educational opportunities for students with disabilities.213 If disability standards are needed, it can be argued, then existing legislation does not have the ‘teeth’ to deliver equal opportunity to people with disabilities. The DDA provides that the relevant Minister may formulate standards in relation to a range of service areas including the education of persons with a disability.214 The effect of standards is that compliance with them by a service provider will amount to compliance with the DDA.215 Standards for education were first mooted in 1995 with a taskforce of representatives from the Commonwealth and each State and Territory established to formulate draft standards. Draft standards were finalised in 2002, but although implementation of standards came to be regarded almost as inevitable, disagreement between the members of the committee, particularly in relation to the cost of implementation, meant that the process of implementation had effectively stalled.216 A frustrated Commonwealth Minister for Education, Science and Training, Brendan Nelson, announced, in July

212 See above nn 205-210.
214 DDA s 31(1)(b).
215 DDA s 34.
216 See Senate Report, above n 3, 114 [7.17]-[7.18]
2003, that the Commonwealth would act unilaterally to implement the standards.\textsuperscript{217} They were enacted in 2005.\textsuperscript{218}

The Senate Report found that standards were a ‘necessary step’\textsuperscript{219} and likely to be a more successful means than legislation alone of delivering education opportunity to people with disabilities:

\begin{quote}
The formulation of education standards is an essential part of the overall legislative scheme developed to reduce discrimination in education. While existing law will be able to deal with matters contained in the standards, the committee has learnt that the Act by itself is not necessarily the most effective or efficient means of achieving this aim.\textsuperscript{221}
\end{quote}

The Disability Standards for Education 2005 (Cth) (‘Standards’) cover the areas of enrolment, participation, curriculum development, accreditation and delivery, student support services and harassment and victimisation. They set out the rights of students with disabilities in each area and the concomitant legal obligations of education authorities and providers. They give examples of steps that must be taken by education authorities to amount to compliance. Most significantly, perhaps, the Standards purport to extend the (then) scope of the DDA by making available the unjustifiable hardship exemption after enrolment and by introducing an obligation upon education authorities to make reasonable adjustment to student disabilities.\textsuperscript{222} In

\textsuperscript{217} See Brendan Nelson, ‘Most State and Territory Education Ministers Vote Against Disability Standards’ (Press Release, 11 July 2003).

\textsuperscript{218} Disability Discrimination (Education Standards) Act 2005 (Cth) (‘Standards’).

\textsuperscript{219} See Senate Report, above n 3, 114 [7.18].

\textsuperscript{221} Ibid [7.19].

\textsuperscript{222} The fact that the DDA did not in its original form make the unjustifiable hardship exemption available to legitimise the exclusion of a student once enrolled was significant in the context of the Purvis case. See Elizabeth Dickson, ‘Disability Discrimination in Education: Purvis v New South Wales (Department of Education and Training), amendment of the education provisions of the Disability Discrimination Act 1992 (Cth) and the formulation of Disability Standards for Education’ (2005) 24(1) University of Queensland Law Journal 213.
order to address concerns that these extensions may be ‘beyond power’, the *DDA* was amended, in February 2005, to provide them with clear legislative support.

How the *Standards* will interact with State anti-discrimination legislation is, however, still the subject of some controversy. The Productivity Commission received conflicting legal advice on the issue. One opinion was that subordinate Federal legislation, such as standards, could not displace State laws. A conflicting opinion was that, by the operation of section 109 of the *Australian Constitution*, standards, regardless of their status as subordinate legislation, would oust state legislation to the extent of any inconsistency. The debate is further complicated by the fact that the *DDA* seems to contemplate maximising the legislative protection from discrimination available to people with disabilities, providing that the *DDA* ‘is not intended to exclude or limit the operation of a law of a State or a Territory that is capable of operating concurrently with the Act’. The Queensland Anti-Discrimination Commission (QADC) suggested to the Productivity Commission that it may be desirable for the *QADA* to continue to be available, unimpeded by standards, to enforce ‘a higher level of compliance in some areas than that negotiated under disability standards’. The Productivity Commission considered it ‘inappropriate’, however, for State legislation to impose higher levels of compliance than those

---


224 *Disability Discrimination (Education Standards) Act 2005* (Cth) Schedule 1 s 4.


226 *DDA* s 13(3).

227 *PC Review*, above n 4, 414.

228 *PC Review*, above n 4, 412-13. The QADC also submitted that compliance with a higher standard set by state legislation would amount to compliance with the *DDA* and, as such, there would be no inconsistency between state legislation and the *DDA*. See 414.
‘negotiated’ under standards.\textsuperscript{229} Its concern was that even if State regimes provided a greater degree of protection to people with disabilities, disparity between Commonwealth and State anti-discrimination regimes was nevertheless undesirable as it would create ‘uncertainty’.\textsuperscript{230} It is inevitable that the problem question of the interrelationship between Commonwealth and State legislation in this area will not be resolved until it is clarified by further legislative reform or considered by the High Court. The recommendation of the Productivity Commission is that the \textit{DDA} be amended ‘to clarify that where disability standards and State and Territory legislation address the same specific matter, the disability standards should prevail’.\textsuperscript{231} Even if this should be done, however, it is likely that some period of confusion will ensue until the courts can clarify the extent of any inconsistency between the different regimes. Indeed, further uncertainty is likely in that it remains to be seen not only whether the standards will improve education opportunities for people with disabilities but also whether they occasion new opportunities for litigation as complainants ask the courts to clarify the content of the newly expanded unjustifiable hardship exemption, the extent of the newly created obligation to make reasonable adjustment and what level of action amounts to compliance with the standards sufficient to oust the protection of the anti-discrimination provisions of the \textit{DDA}.\textsuperscript{232}

\begin{flushright}
\textsuperscript{229}Ibid 415. \\
\textsuperscript{230}Ibid 414. \\
\textsuperscript{231}Ibid, Recommendation 14.2. \\
\textsuperscript{232}The Allen Consulting Group cost-benefit analysis of the \textit{Standards} found that their introduction may lead to ‘relatively small’ increased dispute costs for ‘private education providers for which it is unclear whether or not they will be able to claim…undue hardship’. See Allen Consulting Group, \textit{The Net Impact of the Introduction of the Disability Standards for Education} (Report to the Department of Education, Science and Training (Australia), 2003) <http://www.dest.gov.au/ Research/ docs/july_03/DDA_Standards.pdf> at 6 December 2005. See also Elizabeth Dickson, ‘Disability Standards and the Obligation of Reasonable Adjustment’ (2006) 11(2) \textit{Australia and New Zealand Journal of Law and Education} 23.
\end{flushright}
VI Conclusion

The best evidence available indicates that, in practice, there is no unfettered right to education available to Australian students with disabilities. The evidence suggests that statistics which imply increased rates of enrolment in mainstream learning environments are a misleading indicator of improved options for people with disabilities. The evidence also suggests that, post-enrolment, students may still be the victims of discriminatory policies and practices. Finally, the evidence suggests that there may be a hierarchy of disability in terms of any right to education, with the content of any right contracting as the kind or level of disability becomes more severe. While educational options for students with disability are affected by a complex interplay of administrative and policy as well as legislative considerations, it is surely the case that administrative and policy decisions must be made against a background determined by legislative obligations. It remains for analysis, therefore, how legislation which appears full of promise for people with disabilities has failed to deliver on that promise.
CHAPTER 6

EXEMPTIONS

The *Anti-Discrimination Act 1991* (Qld) (*QADA*), like most similar Australian legislation, provides for several exemptions to unlawful discrimination against students with disabilities. Exemptions are available for acts which are authorised by other legislation,\(^1\) for acts ‘reasonably necessary’ to protect public health,\(^2\) and for acts ‘reasonably necessary’ to protect the health and safety of people at a place of work.\(^3\) A respondent may also seek to prove the ‘unjustifiable hardship’ exemption which renders lawful a prima facie case of discrimination.\(^4\) Finally, the Queensland Anti-Discrimination Tribunal (QADT) may grant a ‘special’ exemption where it sees fit.\(^5\)

Although there are only a few cases on point, the decided cases suggest that these exemptions frequently operate to defeat claims of discrimination. Indeed, the fact that there are so few cases on point may, perhaps, be attributed to the success that respondents have experienced in the raising of exemptions. The fact that exemptions are created by legislation acknowledges that there will be instances when the inclusion in mainstream institutions, such as education institutions, of people with disabilities will create an unreasonable burden for others. As already noted exemptions operate to restrict the social response required to impairment and, as such, are express limits on the implied legislative approval of the social theory of

\(^1\) *Anti-Discrimination Act 1991* (Qld) (*QADA*) s 106; cf *Disability Discrimination Act 1992* (Cth) (*DDA*) s 47.

\(^2\) *QADA* s 107; cf *DDA* s 48.

\(^3\) *QADA* s 108. There is no equivalent *DDA* exemption.

\(^4\) *QADA* s 44; cf *DDA* s 22.

\(^5\) *QADA* s 113; cf *DDA* s 55.
disability. Further, the availability of exemptions which allow discrimination where inclusion would interfere with the health or safety of others, or create some ‘unjustifiable hardship’ is consistent with communitarian theory. Exemptions authorise a balancing of competing considerations raised by the inclusion of people with disabilities and anticipate that any right to inclusion may yield to majority rights where that inclusion causes ‘hardship’. Communitarian theory acknowledges that individual rights are not to be enforced when to do so would interfere with the rights of the majority. Analysis of how the exemptions have been interpreted and applied in the education cases, however, reveals several theoretical and technical problems with their scope and application. In particular, decided cases suggest problems with the exemptions’ application to the situation of students with impairment-related problem behaviours.

I ACTS AUTHORISED BY OTHER LEGISLATION

The QADA creates an exemption for discriminatory acts done in compliance with or specifically authorised by an existing provision of another Act. The theoretical underpinning of this exemption is that if parliament has specifically provided for a matter to be dealt with in a particular way in one piece of legislation, then it is not to be taken to be overriding that specific provision through the general terms of anti-discrimination legislation. This exemption is not, perhaps, within the compass of those exemptions which fit the communitarian view as to the interplay of human rights except to the limited extent that all legislation is, arguably, informed by a balancing of the competing interests of different sectors of the community.

---

7 See Part III A, Chapter 2: Communitarian Education.
Unlike the equivalent provision in the Disability Discrimination Act 1992 (Cth) (DDA), s 106 is not a ‘sunset clause’ and thus continued, at least until the commencement of the new Education (General Provisions) Act 2006 (Qld), in October 2006, to have the potential to counter any claim of discrimination by a student where the treatment complained of was apparently authorised by the then Education (General Provisions) Act 1989 (Qld). A perhaps unanticipated consequence of the enactment of the new legislation is that, as it will not have been ‘existing’ legislation at the time the QADA was passed, acts done in compliance with it may not be protected by QADA s 106. It has proved to be a significant exemption for Education Queensland and has been successfully relied upon to defeat claims of discrimination as recently as 2007.9

The exemption was successfully raised in an impairment discrimination context in the QADT case, L v Minister for Education.10 L was a seven-year-old girl with an intellectual impairment and was enrolled in a Year Two class at her local state school. L’s teachers complained that they were having ‘difficulty managing her behaviour’ and, in particular, her ‘frequent crying…her lack of ability to concentrate on tasks, her failure to return to class after breaks, her limited vocabulary, and hygiene

---

8 DDA s 47 creates exemptions for ‘anything done in direct compliance with a prescribed law’ and, for a period of three years from the commencement of the Act, for ‘anything done in direct compliance with another law’. It is noted that the wording of the DDA provision is narrower than the wording of the QADA provision – s106 QADA: ‘an act that is necessary to comply with, or is specifically authorised by…an existing provision of another Act’.

9 See Malaxetxebarria v. State of Queensland [2007] QCA 132 (Unreported, Williams and Keane JJA and Lyons J, 20 April 2007). In early 2004, Education Queensland refused a request for the acceleration of Gracia Malaxetxebarria, then nine years of age, from Year Six to Year Nine. Education Queensland argued, engaging QADA s 106, that this refusal was not unlawful age discrimination in that they were obliged by The Education (General Provisions) Act 1989 (Qld) s 12 to provide each student with an appropriate program of instruction which took into account a variety of considerations including age.

10 L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207 (‘L’).
revolving around her propensity to regurgitate and toileting accidents’.  

11 Staff were also concerned that a ‘disproportionate’ amount of time was spent on L, compromising the attention given to other students.  

12 The school guidance officer recommended that L be placed in a special school. Several meetings were held between Education Queensland staff and L’s parents but no agreement could be reached on a segregated placement for L. Following the failure to negotiate a mutually satisfactory placement for L, she was suspended, and her exclusion proposed, on the grounds of ‘behaviours prejudicial to the good order and discipline of the school; and heightened health and hygiene risks to other students’.  

13

The respondent contended that L’s suspension was authorised by s 24 of the Education (General Provisions) Act 1989 (Qld) (Education Act), a provision which was in existence at the commencement of s 106 QADA. The respondent argued that s 24(2) of the Education Act gave the Acting Principal of the school in question specific authority to suspend L and that, providing the Director of the Region then formed the opinion that a recommendation ought to be made for exclusion pursuant to s 25, s 24(5) required him to extend her suspension and that, as such, the allegedly discriminatory act of suspending L was, in fact, necessary to comply with s 24(5). The opinion that exclusion should be recommended had to be formed on the basis of a satisfaction that L had been guilty of ‘disobedience, misconduct or other conduct prejudicial to the good order and discipline’ of the school where she was enrolled.  

---

11 Ibid 209.  
12 Ibid.  
The scope of s 39(e) of the *Equal Opportunity Act 1984*(Vic) (*VEOA*),\(^{15}\) worded in similar terms to the *DDA* provision, was considered by the High Court in the case of *Waters v. Public Transport Corporation*.\(^{16}\) Section 39(e) provided that the *VEOA* ‘does not render unlawful…an act done by a person if it was necessary for the person to do it to comply with a provision of…any other Act’. Mason CJ\(^{17}\) and Brennan,\(^{18}\) Deane,\(^{19}\) Gaudron\(^{20}\) and McHugh\(^{21}\) JJ held that s 39(e) protected only acts that it was necessary to do in order to comply with a specific requirement directly imposed by the relevant provision and not acts done to comply with a requirement imposed by some person exercising a power granted under the relevant legislation. Dawson and Toohey JJ\(^{22}\) read s 39(e) more widely, as excusing acts necessary to carry out specific directions given under statutory authority but not when the carrying out of the direction required an exercise of discretion and the discretion could be exercised in a non-discriminatory manner. There was no support in the High Court, therefore, for a reading of s 39(e) as excusing discretionary acts authorised by other Acts.

In *L*, Commissioner Holmes, considering the decision in *Waters*, focused on the fact that s 39(e) *VEOA* was worded differently, more narrowly, than s 106(1)(a) *QADA* and accepted the High Court’s decision in *Waters* as authority only for the proposition that such exemption clauses are to be read narrowly, in keeping with the objects of anti-discrimination legislation.\(^{23}\) Commissioner Holmes went on to find that the wording, ‘specifically authorised’, in s 106(1)(a) was clear and found no basis for the

\(^{15}\) See now *Equal Opportunity Act 1995* (Vic) s 69.
\(^{16}\) *Waters and Others v Public Transport Corporation* (1991) 173 CLR 349 (*‘Waters’*).
\(^{17}\) Ibid 370.
\(^{18}\) Ibid 381.
\(^{19}\) Ibid.
\(^{20}\) Ibid 370.
\(^{21}\) Ibid 414.
\(^{22}\) Ibid, 389-90.
argument that the section did not exempt discretionary acts.\textsuperscript{24} Accordingly, she found that the suspension of L, a discretionary act authorized by s 24 of the \textit{Education Act}, was an exempt act by the operation of s 106(1)(a) \textit{QADA}.\textsuperscript{25} She found that, by analogy, any expulsion of L pursuant to the exercise of a power granted by s 25 of the \textit{Education Act} would be similarly exempt.\textsuperscript{26}

It is interesting that while Commissioner Holmes did not acknowledge the potential of s 106 to undermine the effectiveness of the \textit{QADA} to counter discrimination by facilitating the exclusion of students with impairments, particularly where those impairments manifested as problem behaviour, she did imply a criticism of a system whereby the school authorities relied on such draconian measures to effect their preferred placement for L:

> I have expressed some concern during the hearing of this case that the Department was in effect driven into a position where suspension and exclusion were the only means of achieving what it regarded as a proper placement for L, and that the procedure, being all that was available to achieve that outcome, was adopted.\textsuperscript{27}

Commissioner Holmes suggested that a complainant could contend that the decision maker’s opinion, required under s 24(5) of the \textit{Education Act}, was not properly formed, and so bring the decision making process into issue, but such a contention was not advanced in L’s case.\textsuperscript{28}

There are some limits on the scope of s 106 to exclude students with disabilities. First, the combined force of the suspension and exclusion provisions of the \textit{Education Act} and s 106 \textit{QADA} will not be available to an independent school which seeks to

\begin{itemize}
\item \textsuperscript{24} Ibid.
\item \textsuperscript{25} Ibid.
\item \textsuperscript{26} Ibid.
\item \textsuperscript{27} Ibid 218.
\item \textsuperscript{28} Ibid.
\end{itemize}
discriminate against a student with an impairment. Secondly, the suspension and exclusion provisions cannot be invoked to refuse enrolment to a student. Therefore they cannot be used in conjunction with s 106 to justify discrimination at the point of enrolment. Thirdly, the timing of a complaint by a student might pre-empt the availability of the exemption. In P,\textsuperscript{29} for example, the complaint of discrimination was made before any action to suspend or exclude P and the school in question did not take such action after the complaint. P’s mother withdrew him from school because of a proposal that he be relocated away from the regular school where he was enrolled to a special education unit. The respondent indicated to the tribunal, however, that if P’s mother had continued to send him to his regular school, procedures to suspend and, ultimately, exclude P, under ss 24 and 25 of the \textit{Education Act}, would have been commenced. Somewhat ironically, the respondent argued, unsuccessfully, that as there had been no attempt to suspend or to exclude P there had been no ‘less favourable’ treatment of him by the school.\textsuperscript{30} Finally, it could be argued that it would be less likely that an opinion could be reasonably formed that a physical impairment – as distinct from an intellectual impairment causing behaviour problems - equated with ‘conduct prejudicial to…good order and discipline’ for the purpose of authorising suspension or exclusion pursuant to the \textit{Education Act}.

II  ACTS REASONABLY NECESSARY TO PROTECT PUBLIC HEALTH

Section 107 \textit{QADA} exempts from liability potentially discriminatory acts which are ‘reasonably necessary to protect public health’. This exemption was also raised by the respondent in \textit{L}. L had problems with toileting and regurgitation. It was argued,\textsuperscript{29} \textit{P v Director-General, Department of Education} [1995] 1 QADR 755 (‘\textit{P}’).\textsuperscript{30} Ibid 777-8. The ‘less favourable treatment’ argument in \textit{P} is further discussed in Part I, Chapter 11: Less Favourable Treatment.
despite evidence that L’s ‘hygiene problems’ had been well managed during her enrolment by ‘strict attention to cleaning procedures’, that the presence of L at the school created a public health risk. This argument failed, Commissioner Holmes concluding that evidence of the risk provided by the respondent was too imprecise to prove the exemption.\textsuperscript{31} Commissioner Holmes also noted a fundamental hypocrisy in the respondent’s argument: ‘the very fact that the Respondent advocates a placement of L in an alternative educational institution suggests that it does not itself consider that L’s removal from contact with other students is necessary to protect public health’.\textsuperscript{32} The respondent sought to relocate L to a different school – one it considered better suited to her needs. It was not seeking to exclude L from all schools. This willingness to relocate L implies that the public health exemption was argued out of expediency rather than out of any genuine fear that the accommodation of L placed teachers and other students at risk. Further, the raising of this exemption by Education Queensland, suggests an unfortunate and uninformed stereotyping of people with disabilities as ‘unclean’ and ‘contagious’. Stereotyping such as this has been blamed as the root cause of discrimination against people with disabilities.\textsuperscript{33} This exemption is likely to be established only in circumstances where there is an unusually high risk to public health posed by the accommodation of a particular student and where that risk cannot be effectively managed by regular routines of hygiene management and cleaning. If it is established it is likely to justify exclusion from all schools and not just from regular schools. An illustrative case, concerning

\textsuperscript{31} L [1995] 1 QADR 207, 212.
\textsuperscript{32} Ibid.
\textsuperscript{33} See, for example, Roger Slee, ‘Special education and human rights in Australia: how do we know about disablement and what does it mean for educators?’ in F Armstrong and L Barton (eds), \textit{Disability, Human Rights and Education: Cross-cultural perspectives} (1999) 123.
the equivalent *DDA* exemption,34 is *Beattie v Maroochy Shire Council*.35 In that case, two children who had not been vaccinated in accordance with the recommended childhood vaccination schedule were refused enrolment at childcare facilities operated by the respondent on the basis that they posed an infection hazard. President Carter of the HREOC found that the failure to enrol the children was discrimination on the basis of ‘future disability’ but that the discrimination was not unlawful, under s 48 *DDA*, because ‘it was reasonably necessary to protect public health’.36

### III ACTS REASONABLY NECESSARY TO PROTECT THE HEALTH AND SAFETY OF PEOPLE AT A PLACE OF WORK

Section 108 *QADA* provides that ‘A person may do an act that is reasonably necessary to protect the health and safety of people at a place of work’. This exemption was raised in *P*, though not pursued ‘with any great vigour’ by the respondent.37 *P* was a primary school student with Down’s syndrome. The evidence was that *P* exhibited behaviour which was potentially of danger to others. *P* was prone to screaming, running away and splashing water. More significantly, however, he had thrown chairs, books, building blocks and other equipment, hitting other children. He had, on occasion, ‘head-butted’, pushed, shoved or slapped other children and adults. One staff member had to take sick leave after *P* ran into her, injuring her back. Teachers claimed that *P*’s inappropriate behaviour occurred ‘frequently’ throughout each day and complained of increased stress levels as a result of *P*’s inclusion. A complaint of unlawful discrimination was made under the *QADA* when the Queensland Department of Education proposed to remove *P* from his mainstream school.

---

34 *DDA* s 48.
36 Ibid [52].
Commissioner Keim considered the wording of the workplace health and safety exemption was broad enough to allow him to consider evidence of a safety risk to students as well as to workers at the school and canvassed the evidence which could be relied on for the purpose of establishing the exemption – P had thrown blocks and a chair, and had jumped onto desks and onto other children. There was some evidence that teachers and children had been hurt by P. One teacher was caused to go on sick leave after falling as the result of a collision with P. Commissioner Keim cautioned against expecting a standard of behaviour from children with impairments that is not expected of students without impairment and found that ‘reckless and silly behaviour’ such as that attributed to P could be ‘ameliorated by good teaching methods’. Commissioner Keim acknowledged that the ‘impulsive, careless or even reckless’ behaviour of any children posed a risk of injury to others.38

Commissioner Keim was not prepared to find that the removal of P was ‘reasonably necessary’ to protect others and found that there were alternative strategies available to manage the risk which would allow P to stay at school. He extended the reasoning of Commissioner Holmes in L, in relation to the public health exemption, to the present case – if a child were to be transferred to another school, it could not be convincingly argued that the child posed a risk to the safety of others.

There is no equivalent of the workplace health and safety exemption in s 109 QADA available under the DDA and, as such, it could not be argued in the Purvis case. In Purvis, however, the High Court signalled an interest in the impact of the inclusion of

38 Ibid 789.
Daniel Hoggan not only on the safety of other members of his school community but also on the duty of the school to ensure the safety of all members of the school community. This issue was mooted in the Full Federal Court where it was noted that the respondent owed a duty of care to the staff and students of the Grafton High School and that compelling the school to accommodate a volatile student such as Daniel placed the school in a position where they could not easily discharge that duty. Ultimately, in the High Court, the judgment of Gleeson CJ, in particular, indicated concern about interference with the school’s obligations. He emphasised the fact that the school owed a ‘duty of care’ to students and staff and insisted that

…there is no warrant for an assumption that, in seeking to protect the rights of disabled pupils, Parliament intended to disregard Australia's obligations to protect the rights of other pupils. Furthermore, a contention that the legislative power of the Commonwealth Parliament extends to obliging State educational authorities to accept, or continue to accommodate, pupils whose conduct is a serious threat to the safety of other pupils, or staff, or school property, would require careful scrutiny.

There are clear parallels between P’s behaviour and that of Daniel Hoggan. In P, Commissioner Keim cautioned that one ‘must remember that any group of young children impose [sic] dangers for members of that group and for those who seek to control and educate them’ in that children may cause injury to each other or teachers ‘through impulsive, careless or even reckless behaviour’. While Commissioner Keim compared P’s behaviour with the usual boisterousness of childhood, however, the majority of the High Court emphasised the seriousness of Daniel’s behaviour,

---

42 Ibid 99 [6]. McHugh and Kirby JJ also alluded to the duty of care issue at 123 [94]. Callinan J highlighted what he perceived as a potential clash between anti-discrimination law and criminal law at 174 [271].
even suggesting it as having a criminal element. It is, no doubt, significant that while P was only nine years old at the time of his removal from his mainstream school, Daniel Hoggan was twelve years old and over the age of criminal responsibility. Nevertheless, the risk of harm to others, which proved so persuasive to the courts in the Purvis litigation, is suggested by the facts of P.

The potential for conflict between the obligations placed upon a school by statute, tort and contract law and the obligations placed upon it by anti-discrimination legislation is also demonstrated in the context of workplace health and safety legislation. The urgency of this conflict is apparent in the NSW case O'Sullivan v New South Wales (Department of Education and Training). In that case, the NSW Department of Education and Training was convicted of three offences arising from failures to meet their obligation under s 15(1) of the Occupational Health & Safety Act 1983 (NSW) to ensure the ‘health, safety and welfare at work’ of three employees at Kurrambee School for Special Purposes, a ‘school for children with physical, intellectual or psychological disabilities that preclude them from attending a normal school’. The prosecutions arose out of assaults on staff by two male students at the school. The Tribunal found, in relation to the charges, that staff had not been provided with

---

44 Gummow, Hayne, and Heydon JJ found that ‘Daniel’s actions constituted assaults’ but considered it ‘neither necessary nor appropriate to decide whether he could or would have been held criminally responsible for them’: Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92, 161 [227]. Callinan J characterised behaviour such as that displayed by Daniel as ‘criminal or quasi-criminal conduct’: Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92, 174 [271].

45 Note that, in Queensland, QADA s 106, discussed above, could not be relied upon to allow legislative provisions obliging employers to ensure health and safety in the workplace (see, for example Workplace Health and Safety Act 1995 (Qld) s 28) to override competing obligations in the QADA because relevant Queensland legislation came into force after the QADA. This point was clarified by the QADT in McDonald v Queensland Rail [1998] QADT 8 (Unreported, Commissioner Keim, 1 May 1998).


adequate resources, equipment or information to prepare them to manage the behaviour of the students in question. The Department was fined $160,000.\textsuperscript{48}

In light of the concerns raised about student and staff safety in the Purvis case, and in light of the decision in O’Sullivan, it is therefore possible that the s 109 exemption might be pursued with increased vigour in a future QADA case to excuse the exclusion of a ‘dangerous’ student.\textsuperscript{49}

### IV TRIBUNAL GRANTED EXEMPTION

Section 113 QADA provides that the QADT may grant an exemption from the operation of the Act. The grant of the exemption is discretionary and the legislation offers no guidance on the exercise of that discretion. Cases emphasise, however, that the purposes of the QADA must be taken into account in the decision making process.\textsuperscript{50} While the primary purpose of the Act is to protect against ‘unfair discrimination’,\textsuperscript{51} it is nevertheless anticipated that not all discrimination will be unfair, particularly in the provision of a range of exemptions.\textsuperscript{52} In relation to s 113, therefore, the best guidance available is that a tribunal should weigh the need to protect against ‘unfair discrimination’ against evidence that a specific instance of


\textsuperscript{49} Note, on this point, recent legislative change in this area which anticipates, perhaps, a greater reliance on health and safety concerns to authorise exclusion of students with ‘problem’ behaviour from state schools in Queensland. The Education (General Provision) s Act 2006 s 162(4), which commenced 30 October 2006, provides that the Chief Executive [of Education Queensland] must decide to refuse to enrol a student if he or she poses ‘an unacceptable risk to the safety or wellbeing of members of the school community’ at the particular school to which the student has applied for enrolment. See also ss 157-63. Presumably, a refusal of enrolment at one school does not prevent the student concerned applying for enrolment at another, perhaps ‘special’, school.

\textsuperscript{50} See for example Exemption Application re: Zig Zag Young Women’s Resource Centre Inc [2004] QADT 41 (Unreported, Member Rangiah, 21 December 2004) [7]; Exemption application re: Golden Casket [2002] QADT 16 (Unreported, Member Tahmindjis, 26 August 2002).

\textsuperscript{51} QADA s 6(1).

\textsuperscript{52} QADA s 6(2).
discrimination is not unfair. To date, the QADT has granted exemptions to a wide variety of enterprises including women-only gyms, a sexual assault counselling service for women, an organisation advertising for workers aged over a particular age and to Boeing Australia Holdings Pty Ltd who, for defence security reasons, was required by US regulations to employ only nationals of Australia and the United States.

While the QADT has not, to date, been asked to consider the exemption in an education context, the DDA equivalent of this exemption was sought by the Lutheran Schools of Queensland. The Lutheran Schools proposed to institute an assessment regime for students with disabilities seeking enrolment at their schools. They argued that such a scheme was necessary to allow them to determine what special services and facilities were required by applicants and whether they could be enrolled by a school without causing it unjustifiable hardship. The scheme was potentially discriminatory in that only students with disabilities would be assessed. There is little doubt that the Lutheran Schools were motivated to make the claim because, at that time, the unjustifiable hardship defence was not available to excuse the exclusion of an already enrolled student. The Lutheran Schools, therefore, were seeking to reduce the risk of enrolling a student who would ultimately prove difficult

---

57 DDA s 55.
58 Notice of HREOC exemption decision re: Lutheran Church of Australia Queensland District (Unreported, President Wilson, 10 June 1997).
to accommodate. HREOC refused to grant the exemption suggesting that the circumstances of the case were such that the ‘special measures’ exemption would be available to answer any claim that the proposed assessment regime was discriminatory. The DDA authorises the taking of ‘special measures’ to ‘afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to…education’.\(^{59}\)

The advantage of a tribunal granted exemption over the special measures exemption is that it operates to prevent claims of discrimination from being made against the exempt party in respect of the exempt behaviour – it is a ‘pre-emptive strike’. The special measures exemption, however, can be raised only to resist a claim once made. The issue of the scope of s 55 DDA came before the High Court in the Purvis case. It is interesting that McHugh and Kirby JJ found that a tribunal granted exemption could have been appropriately applied for in the circumstances of that case – that is after the complaint had been made.\(^{60}\) They expressly agreed with the view of Commissioner Innes of HREOC on this point and disagreed with the analysis of the Full Federal Court.\(^{61}\)

The Full Federal Court had found that the exemption was ‘ill-designed to deal with such an issue’ as the problem posed by the inclusion of a difficult student.\(^{62}\) They noted the ‘time, expense and staff disruption involved’ and were concerned that students and staff would ‘live with the threat of injury or abuse, may suffer actual

\(^{59}\) DDA s 45(b)(i). Compare QADA s 104. A significant difference between QADA s104 and QADA s 113 is that the latter operates to prevent claims of discrimination from being made. Section 104 is raised, by contrast, to resist a claim of unlawful discrimination.

\(^{60}\) Purvis (2003) 217 CLR 92,129 [111].

\(^{61}\) Ibid.

\(^{62}\) Purvis (2002) 117 FCR 237, 247-8 [27].
injury or abuse, and classes and other educational endeavours [would] be disrupted while the outcome of the application was awaited. Further, the Full Federal Court was concerned that ‘the school would ultimately be subject to a discretionary judgment by a body which does not have the responsibility for managing the student’. All of these concerns are perhaps curious in that, presumably, the applicability of any exemption is an issue which may only be resolved subject to the costs and delays inherent in the legal process and to the scrutiny of a court or tribunal ‘which does not have the responsibility for managing the student’.

McHugh and Kirby JJ dismissed the concerns of the Full Federal Court and found that

[the terms of the section indicate that it is flexible enough to apply to situations such as those that arose following the enrolment of Mr Hoggan. Indeed, the section seems wide enough to permit the grant of an exemption from the Act's provisions generally in all cases where the violent behaviour of students with a disability may pose a threat to other pupils or staff. And there is nothing to stop the making of an urgent application in respect of a particular student, if necessary.]

V Unjustifiable hardship

The unjustifiable hardship exemption is available to respondents, in one form or another, in most Australian and many international statutes prohibiting

63 Ibid.
64 Ibid.
66 It is interesting to note that QADA s 44 was amended in October 2006 to make it subject to the new Education (General Provisions) Act 2006 (Qld). See Education (General Provisions) Act 2006 (Qld) s 512(1) sch 1. This amendment is consistent with a new emphasis in that act on authorising exclusion on the basis of ‘an unacceptable risk to the safety or wellbeing of members of the school community’ caused by student problem behaviour. See above n 49.
67 In respect of discrimination in education see Disability Discrimination Act 1992 (Cth) s 22, Anti-Discrimination Act 1977 (NSW) s 49L(5), Anti-Discrimination Act 1991 (Qld) s 44, Anti-Discrimination Act 1998 (Tas) s 48 (The Tasmanian legislation does not provide the exemption directly in respect of education but it is available in respect of the provision of access to premises and the provision of goods and services. It may, therefore, be available to an education provider, in the sense that the provision of education involves the provision of access to premises and the provision of a service); Equal Opportunity Act 1984 (WA) s 66(4); Discrimination Act 1991 (ACT) s 51. Both the Victorian and the Northern Territory legislation have a different formula in that an exemption is created
discrimination on the ground of impairment or disability. The usual formula is that where it can be demonstrated that the accommodation of a person with a disability would cause unjustifiable hardship to a respondent, a prima facie case of discrimination will be excused as lawful. This exemption is, perhaps, the most commonly argued exemption in the context of claims of discrimination in education against people with disabilities, and the most controversial. One parent, whose daughter was denied a remedy for discrimination on the basis of the exemption, has dubbed it a ‘lucky dip’. The discretionary nature of the balancing process required of hearing tribunals by the unjustifiable hardship enquiry was highlighted by Tamberlin J, of the Federal Court, as involving ‘the weighing of indeterminate and largely imponderable factors and the making of value judgments’. This discretionary element makes it difficult to be specific about the scope of the exemption. Further, each case will turn on an individual set of facts. As the Queensland Anti-Discrimination Tribunal (QADT)) has pointed out,

it is stating the obvious to say that questions of unjustifiable hardship can only be determined by reference to the peculiar features of the case in question. There is such a range of variables, including the type of disability, the characteristics of the school, and the attitudes of the people involved, as to make comparisons pointless.

Case analysis does, however, allow some generalisations to be made about when the exemption will be applied.

---

where the provision of services or facilities is not ‘reasonable’. See Equal Opportunity Act 1995 (Vic) s 39; Anti-Discrimination Act (NT) s 58.
69 Evidence to Senate Employment, Workplace Relations and Education References Committee, Parliament of Australia, Brisbane, 6 September 2002, 412 (Michelle O’Flynn). Michelle O’Flynn is a member of the disability lobby group, Queensland Parents for People with a Disability, and the mother of the complainant in L [1995] 1 QADR 207.
71 L (1996) 1 QADR 207, 213 and 216.
A Proof of Unjustifiable Hardship

The cases suggest a three-stage process is to be applied in determining whether inclusion of a complainant causes an unjustifiable hardship.\(^{72}\) The first step is to establish that special services and facilities are in fact required to accommodate the complainant. ‘Services and facilities’ encompass, for example, specialist teaching, supervision by aides and modification to grounds and buildings. Proof of this requirement has been an issue in some cases. In \(L\), for example, the complainant argued that there were no special services or facilities required as many students with disabilities are placed in regular schools – as such, the complainant argued there was nothing ‘special’ about her attendance at a regular school. This argument was rejected with Commissioner Holmes finding that ‘\(L\) has in the past required, and in the future will continue to require, services and facilities of a distinct character individual to her.’\(^{73}\) The complainant also argued that there was no extra service or facility provided to \(L\) in that the respondent was obliged to provide special education to \(L\). Commissioner Holmes rejected this argument, too, finding that there is nothing ‘mandatory’ about the power to provide special education, located in the *Education (General Provisions) Act 1989* (Qld); there is a discretion to supply ‘special education’ not an obligation.\(^{74}\) In the more recent QADA case of *I v O’Rourke and Corinda State High School and Minister for Education for Queensland*,\(^{75}\) which concerned allegations of discrimination against a student with physical and intellectual impairments, Education Queensland failed to prove the exemption in

---

\(^{72}\) This process is recognised in other kinds of discrimination cases as the appropriate methodology for a tribunal to follow. See, for example, *Cocks v The State of Queensland* (1994) 1 QADR 43, a QADA case involving access to a public building, and *Scott and Disabled Peoples International v Telstra* (1995) EOC ¶ 92-719, 78401, a DDA case involving access to telephone services by people with visual impairment.

\(^{73}\) *L* [1995] 1 QADR 207, 216.

\(^{74}\) *Education (General Provisions) Act 1989* (Qld) s 12; *L* [1995] 1 QADR 207, 215.

\(^{75}\) *I v O’Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 (Unreported, Commissioner Copelin, 31 January 2001) (‘*Corinda*’).
relation to the exclusion of the complainant from a school excursion because they failed to demonstrate that any special services or facilities would have been required to accommodate I’s needs on the excursion.\footnote{The respondents relied on the exemption created in both the education area \cite{QADA s 44} and the goods and services area \cite{QADA s 51}. This suggests, of course, that education authorities are not only in the business of providing education, they provide services as well and attract obligations under the \textit{QADA} via the performance of that function. The excursion party was to travel to the island via barge, the ‘Tangalooma Flyer’, and the respondents also alleged that this means of transport was not safe for ‘I’. They raised the workplace health and safety exemption but QADT found that this exemption was not available in that the ‘Flyer’ was not a ‘workplace’ of the complainant but a mode of transport for her \cite[11.1.3.a]{11.1.3.a}. There was a further finding that there was ‘insufficient expert evidence’ that the complainant’s health and safety would have been put at risk by travelling on the Flyer. Indeed, there was evidence that students, similarly reliant on a wheelchair, had successfully taken part in the excursion in previous years \cite[11.1.3.b]{11.1.3.b}. The Tribunal found the direct discrimination claim proved and ‘I’ was awarded $3,000 compensation for her exclusion from the excursion.}

The second step is to establish the extent of the special services and facilities which are required. Proof of extent has been controversial in the cases with parties providing competing cases of what inclusion of the complainant involves. In the \textit{DDA} case, \textit{Finney},\footnote{\textit{Finney v The Hills Grammar School} [1999] HREOCA 14 (Unreported, Commissioner Innes, 20 July 1999).} for example, Commissioner Innes of HREOC concluded that many of the modifications deemed necessary by the respondent school were ‘clearly not services and facilities’\footnote{Ibid [7.5].} in fact required by the complainant and that the respondent had overstated the extent of modifications and consequent expenditure necessary to accommodate her. Scarlett Finney, a 7 year old student with spina bifida, had been refused enrolment by the Hills Grammar School because it claimed that her inclusion would necessitate expensive adjustments to the school buildings and grounds. Commissioner Innes found that the school’s assessment of the extent of the services and facilities required to accommodate Scarlett, and their consequent decision to refuse to enrol Scarlett, was informed by ‘general or stereotypical
assumptions rather than made about Scarlett in particular’. He was critical of the school’s failure to organize an adequate expert assessment of Scarlett’s need and the impact of those needs on the school.80

The third step in proof of unjustifiable hardship involves a balancing of multiple considerations in order to determine whether any ‘hardship’, caused to the respondent by the provision of the services and facilities, is ‘unjustifiable’. The balancing act required in the decision making process is, as emphasised above, highly discretionary – again allowing scope for individual beliefs to intrude. The precise nature of the guidance provided in the legislation as to relevant circumstances in the unjustifiable hardship enquiry varies from jurisdiction to jurisdiction. Generally, legislation countenances consideration of the financial cost of accommodating a particular student, any benefit and any detriment which would follow from that student’s inclusion and the nature or effect of the disability. Further, legislation authorises consideration of the ramifications of inclusion for ‘all concerned’, not just the educational institution or authority. The QADA relevant circumstances are as follows:

(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.81

The DDA provisions differ from the QADA provisions, but it is clear that there are strong similarities between the two sets of relevant circumstances. It is significant that both allow consideration of benefit or detriment caused ‘to all concerned’:

79 Ibid.
80 Ibid.
81 QADA s 5.
(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
(b) the effect of the disability of a person concerned; and
(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
(d) in the case of the provision of services, or the making available of facilities – an action plan given to the Commission under section 64. 82

B The Scope of the Exemption

The exemption is frequently argued on the basis of hardship arising from the financial cost of supplying the extra services and facilities which may be required to accommodate the impairment of a person. 83 In cases involving the provision of education to a student with an impairment another ground which is repeatedly raised, however, is the ‘hardship’ created for the school community by problem behaviour caused by a student’s impairment. Although the exemption could not be raised in the context of the Purvis case, 84 McHugh and Kirby JJ suggested that this variety of hardship to class mates and teachers could attract the exemption. A line of decisions under the QADA, L, 85 K v N School, 86 and P, 87 however, suggests problems with the applicability of the unjustifiable hardship exemption in the situation where the hardship is alleged in the ‘detriment’ caused to staff and students who work and study alongside the student with the challenging behaviour.

82 DDA s 11.
84 See Part V C, below.
85 L (1996) 1 QADR 207.
86 K v N School (No. 3) (1997) 1 QADR 620 (‘K’).
C Purvis v State of New South Wales (Department of Education and Training)\textsuperscript{88}

Under, the DDA, the unjustifiable hardship exemption, to date, has only been litigated in the education context in respect of a student with a physical impairment seeking enrolment.\textsuperscript{89} The operation of the unjustifiable hardship exemption as created in the DDA has, however, been the recent subject of discussion by the High Court in the disability discrimination in education case, Purvis. The DDA differs from other Australian legislation in that, until recently, the exemption was only available to educational institutions to resist an allegation of discrimination arising from a refusal to enrol a student with a disability.\textsuperscript{90} The exemption was not available to resist allegations of discrimination arising from the treatment of a student after he or she is enrolled. Amendments to the DDA which extend the scope of the exemption to the post-enrolment context came into force in August 2005.\textsuperscript{91} At the same time, the long anticipated Disability Standards for Education 2005 (Cth) came into force.\textsuperscript{92} The Standards also make the unjustifiable hardship exemption available both to resist an enrolment and to justify the exclusion of an enrolled student.\textsuperscript{93}

\footnotesize{88 Purvis (2003) 217 CLR 92.}
\footnotesize{90 It was comprehensively aired in this context in Finney v Hills Grammar School (2000) EOC 93-087 (HREOC) (digest and extract); Finney v The Hills Grammar School [1999] HREOCA 14 (Commissioner Innes, 20 July 1999). Note, however, that an educational institution may have been able to raise the exemption after enrolment where discrimination was framed in terms of denial of access via DDA s 23(2) – access to premises. See Sluggett v Flinders University of South Australia [2000] HREOC H96/7 (Unreported, Commissioner McEvoy, 14 July 2000).
91 Disability Discrimination Amendment (Education Standards) Act 2005 (Cth) s 3.
92 See Philip Ruddock and Brendan Nelson, ‘Improved opportunities for students with disabilities’ (Press Release, 15 June 2004). Explanatory memoranda to the DDA amendments suggest that the DDA must be amended to make the exemption available post enrolment to ‘support’ the operation of the Standards. See Explanatory Memorandum, Disability Discrimination Amendment (Education Standards) Bill 2004 (Cth), outline. If the Standards, but not he DDA itself, make available the exemption post-enrolment there is an argument that the Standards operate in a manner not authorised by the parent legislation.
93 Disability Standards for Education 2005 (Cth) s 10.2.}
In their minority judgment in *Purvis*, McHugh and Kirby JJ considered how the unjustifiable hardship exemption might assist educational authorities seeking to refuse enrolment to students with problem behaviour such as that displayed by Daniel Hoggan. Daniel was excluded from South Grafton State High School after repeated incidents of violence against classmates and teachers. It is a relevant circumstance, for the purpose of proof of unjustifiable hardship, that ‘detriment’ is likely to be suffered by ‘any persons concerned’ as a result of the accommodation or inclusion of a person with a disability. McHugh and Kirby JJ expressed the view that such detriment ‘would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides’ and, further, that it would allow ‘consideration of the duty of care owed by the educational authority to the other pupils’.

The inference to be drawn from the minority judgment of McHugh and Kirby JJ, in *Purvis*, is therefore, that the State would likely have succeeded had it sought to justify a refusal to enrol Daniel Hoggan on the basis of the hardship it would cause. A further inference seems irresistible that, had the unjustifiable hardship exemption been available after enrolment under the *DDA*, the State may well have proved the exemption to justify Daniel’s exclusion. McHugh and Kirby JJ made the explicit finding that ‘the limited operation of s 22(4) is anomalous and requires correction by the parliament’. Their suggestion was, therefore, that the solution to an educational authority’s problem of balancing its competing duties to students with disabilities and to ‘normal’ students and staff, did not lie in the *DDA* as it stood, but in amending the *DDA* to make available the unjustifiable hardship exemption after enrolment. There

---

94 See *DDA* s 11(a); cf *QADA* s 5(d).
95 *Purvis* (2003) 217 CLR 92, 123 [94].
96 Ibid 124 [96].
is little doubt that recent amendments to the DDA which make the exemption available after enrolment were prompted by the analysis of McHugh and Kirby JJ in Purvis.

D The Queensland ‘Behaviour’ Cases

The QADA has always made available the unjustifiable hardship exemption after enrolment. L, P and K all involved the issue of proof of unjustifiable hardship in circumstances similar to that of Daniel Hoggan: that is, where enrolled students proved difficult to accommodate on account of their behaviour. The exemption was successfully raised in each of the three cases which all involved attempts to exclude students with intellectual impairments and related ‘impaired’ behaviour from ‘regular’ schools. The facts of L and P are outlined, above. In K, a complaint of discrimination was made after K was excluded from her small, independent primary school when she was eleven years old. She had attended the school for three years, from the beginning of 1993. The evidence was that, while K was not violent nor ‘difficult to control’, she displayed ‘significant problem behaviours’, the most pronounced being ‘fits of screaming’ and hyperventilation. As in the case of L, the respondent was concerned about the amount of time ‘spent’ on K, and claimed that this increased pressure on staff and created anxiety. It was interesting in this case that three parents gave evidence that they would remove their children from the respondent school should K be allowed to return.

97 See Parts I, II and III, above.
98 K (1997) 1QADR 620, 621.
99 Ibid 622.
E Problems with the Applicability of the Unjustifiable Hardship Exemption to ‘Behaviour’ Cases

Analysis of the Queensland ‘behaviour’ cases, L, K and P, indicates that, despite the suggestion of McHugh and Kirby JJ in Purvis that problem behaviour could amount to unjustifiable hardship, there may still be problems with applying the exemption in cases such as the Purvis case. The decisions in L, K and P suggest several controversial issues in relation to proof of unjustifiable hardship in behaviour cases. Although in each of the Queensland cases unjustifiable hardship was proved on the basis of such ‘detriment’, the process of proof was, in principle, flawed. First, anti-discrimination legislation requires that the unjustifiable hardship must arise from the provision of goods or services to a student with a disability. Secondly, hardship must be to the educational authority. Thirdly, the solution posited by schools in each case, and, by implication, regarded as appropriate by the QADT, was to relocate ‘problem’ students from their mainstream school to a special school, where, presumably, the same problem behaviours would arise and impose the same ‘detriment’ on staff and students.

1 ‘Supply of Special Services or Facilities’ in the Queensland Cases.

In all three Queensland cases the focus was on two varieties of hardship with each alleged by the respondent school to be ‘unjustifiable’. First, each respondent argued hardship in the financial cost of providing specialist teaching to the complainant in a mainstream setting. Secondly, each respondent argued hardship in accommodating the difficult behaviour of the complainant. In both L and P the Tribunal refused to find hardship in the financial costs attendant on providing an education for the

---

100 See, for example, QADA s 44(1)(b); cf DDA s 22(4).
101 See, for example, QADA s 44(1)(b); cf DDA s 22(4).
complainant in a State School – suggesting that it will be difficult for the State, with vast resources at its disposal, to prove financial hardship in accommodating a student with an impairment at a regular school. In K, the Tribunal did accept that financial hardship was unjustifiable. The respondent school was a small independent school with limited resources and the evidence was that, even with the support of government grant monies, the school could not afford to provide the services and facilities required by K. In L, K and P, however, the Tribunal found unjustifiable hardship was caused to the staff and students of the school simply by their presence at the school.

The wording of the QADA, as noted above, authorises consideration of the ‘nature of any benefit or detriment to all people concerned’ in determining whether the supply of services and facilities causes unjustifiable hardship. In L, K and P, significant detriment was alleged to the staff and students who were affected by the difficult behaviour of the complainant children. At this point, parallels with the Purvis case are clear. The circumstance, ‘detriment to any person concerned’, suggested by McHugh and Kirby JJ as relevant in behaviour cases, was the circumstance deemed of special relevance in each of the Queensland cases. In L it was found that ‘the demands that would be imposed on the teacher involved, pending resolution of L’s present behavioural problems, are of themselves such as to constitute unjustifiable hardship’. In K it was found that

there is another respect [apart from financial hardship] in which hardship would be caused, namely the stress caused to teachers who have inadequate experience and expertise in teaching special needs children, particularly in a context where the school's attempt to educate K so far has been relatively misguided and unsuccessful,

102 L (1996) 1 QADR 207, 216.
and where there has been considerable animus built up between the school and the child's parents.  

In *P*, Commissioner Keim noted that the situation faced by those staff and students required to associate with *P* was ‘intolerable’.

The difficulty is that the wording of the QADA is clear that the hardship must be caused by the supply of the special services or facilities: it is not unlawful to discriminate if ‘the supply of special services or facilities would impose unjustifiable hardship’. The difficulty is that the detriment to the students and staff found to exist in each of these cases was not – at least in any conventional sense – caused by the supply of services and facilities to the complainant, but by the simple presence of the complainant in the classroom. A similar disjunction is apparent in the terms of the DDA where although ‘detriment likely…to be suffered by any persons concerned’ is expressed as a relevant circumstance, the exemption arises when a person ‘if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability’ and the ‘provision’ of those services or facilities would impose unjustifiable hardship. On the facts of the *Purvis* case, for example, the hardship alleged would be detriment to staff and students in the risk to them posed by Daniel’s propensity to violence. This hardship is factually unrelated to the provision of any facilities or services to Daniel. Unfortunately, the problem of this disjunction was not addressed by McHugh and Kirby JJ in their analysis of the exemption.

---

103 K (1997) 1QADR 620, 624. It is especially interesting in this case that the School’s own failure to train staff ultimately allowed them to rely on the unjustifiable hardship exemption.
105 QADA s 44(1)(b).
106 DDA s 22(4).
The detriment to others envisaged by the description of the relevant circumstances provided in both the QADA and the DDA is, perhaps, of the kind canvassed in the Finney case. In that case it was alleged that detriment would flow to other members of the school community in that teachers would be forced to work longer hours – perhaps necessitating greater remuneration – to implement curriculum changes necessary to accommodate Scarlett Finney, and that the parent body would be forced to pay higher fees to cover the cost of capital works required to provide access to Scarlett.

In Finney there is a clear link between this alleged detriment and the supply of services and facilities. In L, K and P, and by implication, Purvis, there is arguably no link. In those cases, therefore, there is arguably no discretion to consider the detriment alleged as relevant to the determination of whether unjustifiable hardship exists. Commissioner Keim, in P, however, was alert to this conceptual gap in the legislation and provided a ‘solution’ – a tenuous solution based on an artificial definition of services and facilities designed to allow the section to work. As noted above, Commissioner Keim defined services and facilities widely to include the tolerance, camaraderie and friendship shown to P by staff and students at his school. In constructing his definition of services and facilities, Commissioner Keim relied on the cautionary advice relating to statutory interpretation given by Mason CJ and Gaudron J in their judgment in Waters v Public Transport Corporation:

107 It is arguable, however, that even in Finney, consideration of such detriment should not have been relevant to proof of unjustifiable hardship in that the legislation provides that the hardship must be to the educational institution. See below: ‘Is hardship to staff and students hardship to an “educational authority”?"
have a special responsibility to take account of and give effect to the statutory purpose.\textsuperscript{108}

In the \textit{Waters} case, the Court took such an approach to read down the scope of an exemption. Here, Commissioner Keim uses the principle expounded in \textit{Waters} to increase the scope of an exemption:

\ldots the statutory objects of the Act will not be served by a restrictive reading of an exemption provision which results in an unrealistic or illogical application of the Act any more than they are served by a narrow and restrictive reading of the primary provisions of the Act prohibiting discrimination on certain grounds so as to cause the Act to have no more than a residual impact\ldots In the present case, in my view, s. 44 and s. 5 together need to be given a reasonably broad construction in order to avoid defeating the objects of the Act by producing an unreasonable, illogical or "intolerable" situation.\textsuperscript{109}

It is a bold move, perhaps, to claim advice delivered by the High Court in support of statutory interpretation which delivers the statutory object of reducing discrimination, as supporting, in \textit{P}, an interpretation which excuses discrimination. The inference is possible that Commissioner Keim considered the hardship caused by \textit{P}'s behaviour to be so ‘unjustifiable’ that he simply made the words of the \textit{QADA} fit the circumstances of the case. Moreover, and somewhat ironically in view of the approach of McHugh and Kirby JJ to the unjustifiable hardship exemption expressed in \textit{Purvis}, it is apparent that to make the exemption fit the facts of \textit{Purvis} would require exactly the same variety of ‘artificial construction’ they condemned in that case.\textsuperscript{110} It is clear that some amendment of the section is necessary to allow tribunals to consider any detriment which may be caused by the mere inclusion of a student without resort to linguistic gymnastics. Indeed, the \textit{QADA} already includes an exemption in the protected area of employment where the ‘circumstances of impairment’ would create unjustifiable hardship:

\textsuperscript{109} \textit{P} (1996) 1 QADR 755, 785.
\textsuperscript{110} \textit{Purvis} (2003) 217 CLR 92, 124 [96].
36 Circumstances of impairment

(1) It is not unlawful for a person to discriminate on the basis of impairment against another person with respect to a matter that is otherwise prohibited … if the circumstances of the impairment would impose unjustifiable hardship on the first person.

(2) Whether the circumstances of the impairment would impose unjustifiable hardship on a person depends on all the relevant circumstances of the case, including, for example--

(a) the nature of the impairment; and

(b) the nature of the work or partnership.

The QADT has not taken the opportunity to consider in any detail the ‘circumstances’ where this exemption may be applicable.\textsuperscript{111} An exemption in similar terms in the education area would, however, address the concern that ‘hardship’ may flow from factors other than the supply of services or facilities.

2 Is Hardship to Staff and Students Hardship to an ‘Educational Authority’?

There is a further problem with the intersection of the provision creating the unjustifiable hardship exemption for educational institutions and the provision defining unjustifiable hardship apparent in both the \textit{QADA} and the \textit{DDA}. The exemption is made available only in respect of unjustifiable hardship proved to an \textit{educational authority}. The \textit{QADA} and the \textit{DDA} define ‘educational authority’, in identical terms. It ‘means a person or body administering an educational institution’.\textsuperscript{112} Clearly, hardship to staff and students cannot be characterised as hardship to an ‘educational authority’ without taking significant liberty with the meaning of the words of the statutory definition. This problem is not addressed in any of the Queensland behaviour cases. It is, however, briefly touched on – without satisfactory resolution – in another Queensland education case, the \textit{Corinda} case.\textsuperscript{113}

\textsuperscript{111} See \textit{Gray v Queensland Rail [2000]} QADT 3 (Unreported, Commissioner Pope, 30 March 2000); The exemption was raised and dismissed as unproved in this case without any close analysis of its scope.

\textsuperscript{112} \textit{QADA} s 4; \textit{DDA} s 4.

\textsuperscript{113} \textit{Corinda} [2001] QADT 1 (Unreported, Commissioner Copelin, 31 January 2001).
In that case, the relevant issue was whether the imposition of a financial burden on students at a State high school could be taken to be unjustifiable hardship to Education Queensland, an ‘educational authority’. The complainant had alleged discrimination arising from issues relating to venues selected by Corinda State High School for two functions – the school formal and the school graduation dinner. The formal took place at the Greek Club and the graduation dinner on ‘The Island’, a restaurant barge on the Brisbane River. The complaints arose out of access and toilet arrangements for the complainant at both venues and out of concerns about emergency evacuation procedures on ‘The Island’.

As already noted, *QADA* provides that the cost of supplying special services or facilities is relevant to the consideration of whether hardship is unjustifiable.114 In this case, it was accepted that alternative venues with acceptable access would have imposed an additional cost. The problem was that any additional cost would have been borne by the other students attending the formal and dinner and not by the school. Hardship arising from this additional cost, therefore, would be borne by students and not by an ‘educational authority’.115 However, proof of unjustifiable hardship requires proof of imposition of unjustifiable hardship on the educational authority or supplier of goods and services.116 There was no evidence presented of the financial circumstances of the school and, as such, of whether the school, rather than the students, could afford to take on the extra costs of a different venue. The QADT acknowledged that the legislative policy is such that the only ‘person’, for

---

114 *QADA* s 5 (b).
115 Nor, indeed, would the additional cost be borne by a ‘supplier of goods and services’. The same problem arises, therefore, in respect of proof of unjustifiable hardship under other sections, such as *QADA* s 51(1)(b), which is applicable to the goods and services protected area.
116 *QADA* s 44 (b) and s 51 (1)(b).
whom cost is relevant, in a consideration of unjustifiable hardship, is the school. The Tribunal attempted to avoid the problems raised by this finding by simply stating that

[w]hile there is no evidence that the respondents could not afford to pay for supplying the special services or facilities (by arranging and paying for other venues if they were suitable), I believe it would be highly unusual for a school (rather than the attending students) to pay for events such as school balls or dinners such as the ones the subject of this dispute.117

In a further attempt to avoid the problem, the Tribunal considered the cost to students as part and parcel of ‘detriment’ which would be caused if the venues were changed. Section 5(e) includes as relevant circumstances in proof of unjustifiable hardship ‘the nature of any benefit or detriment to all people concerned’. The Tribunal found that the school was obliged to consider a multiplicity of issues in selecting suitable venues and that detriment to the other students in terms of cost, security, transport, and supervision issues outweighed the benefit which would flow to the complainant. Again, however, this detriment to other students does not mesh easily with a finding of unjustifiable hardship to the school, the ‘educational authority’, as contemplated by the legislation. Direct hardship to the school was at best, tangential and minimal, arising out of the ‘disruption’ caused through any relocation of the events.118 Nevertheless, the Tribunal found that the unjustifiable hardship exemption was made out.

This issue was also raised, briefly, in argument before the High Court in the Purvis case with Gleeson CJ questioning the applicability of the unjustifiable exemption to the case of a school challenged by the problem behaviour of a student. He asked counsel for the appellant how hardship on an educational authority would ‘pick up

117 Corinda [2001] QADT 1 (Unreported, Commissioner Copelin, 31 January 2001) 11.2.2.3.
118 Disruption is a relevant consideration: QADA s 5 (d).
danger to students’. Counsel for the appellant argued that those affected were within the care of the educational authority and that ‘obviously the educational authority runs an institution and has certain obligations, some legal, some moral, some practical, in the way it deals with students, so it is unjustifiable hardship to the educational institution’. Gleeson CJ was not convinced, saying, ‘I am not sure that that is all there is to it’. This exchange of views in Purvis further emphasises the need for clarification of the scope of the unjustifiable hardship exemption. Plainly, some amendment of both the QADA and the DDA, and similar Australian legislation, is desirable if hardship to people or bodies other than an educational authority is unequivocally sufficient to ground a finding of unjustifiable hardship.

3 Why is Behaviour Considered Detrimental to Others in a ‘Mainstream’ School Not Considered Detrimental to Others in a ‘Special’ School?

It is tempting to ask why the argument which proved persuasive against the public health exemption, in L, and against the workplace health and safety exemption, in P, was not raised against the unjustifiable hardship exemption in either of those cases, or in K. That is, if the presence of a student with behaviour difficulties is enough to create an unjustifiable hardship to the staff and students in a regular school, why does it not cause similar hardship to the staff and students at a ‘special’ school? The answer given to this conundrum, would, perhaps, be that the staff in special schools is specially trained to cope with problem behaviours and that there is a smaller student

---

120 Ibid.
121 Ibid.
122 See above n 67.
123 Or provider of goods and services, or provider of accommodation, or employer, and so on. This problem with the terms of the legislation arises with the operation of the exemption in all protected areas.
staff ratio in those schools, ‘diluting’ the hardship. However, it could be argued – and, in fact, was argued in expert evidence in each of the Queensland cases – that specialist teacher training and extra staff would similarly mitigate the problems at a regular school. So, this answer is, arguably, no good answer at all. This answer also fails to address the situation of fellow students: if ‘normal’ students cannot be asked to bear the ‘hardship’ of sharing a classroom with a ‘problem’ student, why should ‘special’ students be expected to do so? There is the suggestion here of an educational sub-culture where students with impairment are expected to accommodate the needs and demands of other students with other impairments while ‘normal’ students are not. It could be argued that this ‘two-tiered’ system implies more favourable treatment of ‘normal’ students, and, further, resonates the anachronistic and discriminatory view that students with impairments should be grouped together and removed from public view. Further, such a system is inconsistent with the fundamental communitarian tenet that democratic society is inclusive. Tam has warned that ‘total segregation could mean that a culture of co-operative citizenship could be seriously undermined’. 124 Walzer has pointed out that ‘the adult world is not segregated by intelligence’. 125 The segregation of people with impairments is, as such, practically and politically wrong: ‘in a practical sense we are required by our work to mix up and down the status hierarchy; further, democratic politics requires that we mix with a wide range of people’. 126

In P, Commissioner Keim found that the accommodation of the complainant not only caused unjustifiable stress to the staff and students at his school, it also hindered the

126 Ibid.
educational opportunities of his classmates because teacher time was deflected from
other students by his needs and because his behaviour disrupted learning in the
classroom.\textsuperscript{127} To argue that this educational ‘hardship’ to other students would justify
the complainant’s exclusion is also difficult when the proposal was that he be
relocated to another school where, presumably, he would continue to disrupt the
learning of others. Does it matter less if the learning of a student with an impairment
is disrupted than if the learning of a ‘normal’ student is disrupted? Is the education of
students with impairments less important than the education of ‘normal’ students?
Again, it could be answered that specialist staff and extra staff mitigate the disruption
at a special school. Again this answer is undone by the fact that specialist staff and
extra staff could be made available in a regular classroom.

The problem raised by this analysis is not easily cured by legislative amendment.
Ironically, it appears that the ‘hardship’ may be removed by the provision of special
services or facilities in the form of more staff and more supervision, not simply by
relocation to another school. That there is reluctance to place extra staff at regular
schools to support students with impairments can be explained, at a policy level, by
funding considerations. Education Queensland, for example, has a policy of the
clustering of resources at particular schools to suit particular classes of impairment in
order to maximise the efficient use of department resources.\textsuperscript{128} However, there is
compelling evidence presented in each of the Queensland cases that suggests that, at a
cost, the accommodation of any student with any impairment is possible in a regular
classroom. In \textit{P}, for example, Commissioner Keim conceded,

\textsuperscript{127} \textit{P} (1996) 1 QADR 755, 785.
\textsuperscript{128} Education Queensland, ‘Curriculum Studies 05: Education Provision for Students with Disabilities’
I am not convinced...that it was impossible or completely impractical to adjust arrangements so that a mix of services could be provided at some non-segregated campus outside the Aitkenvale Special School. It seems to me not unreasonable that, if a dual enrolment was considered for P by which he would be taxied from one campus to another, it might also be possible to consider taxiing services including staff resources from one campus to another.129

In K, Commissioner Holmes made a similar finding:

At the end of the day, I formed the impression that K could properly be educated in a regular classroom setting with opportunities for withdrawal, provided appropriate specialist assistance of the kind proposed by Dr Giorcelli and Mr Worthington was forthcoming. I accept Dr Sigafos's evidence that such behavioural problems as K evinces can be managed by appropriate intervention.130

In L, Commissioner Holmes found that with full-time special education assistance L could be accommodated in a regular classroom.131 The QADT has not been prepared to rely on this evidence, however, to the extent necessary that it may find for the complainant. It has found, at least where the respondent is the State, that financial hardship is not unjustifiable, but it has not been prepared to impose the financial cost of accommodating students with behavioural difficulties on educational authorities, by making a finding of unlawful discrimination and ordering that the complainant be returned to a mainstream school. It can be seen that to find unjustifiable hardship in the effect on learning and in the ‘stress’ caused by the behaviour problems of students with impairments, effects which could be mitigated – at a cost – is, perhaps, in reality, to find unjustifiable hardship in a financial sense after all. This link is made explicit in K:

…given the evidence as to the financial basis of the school, I am satisfied that provision of the necessary services to K would cause hardship. I am also satisfied that there is another respect in which hardship would be caused, namely the stress caused to teachers who have inadequate experience and expertise in teaching special needs children, particularly in a context where the school's attempt to educate K so far has been relatively misguided and unsuccessful, and where there has been considerable

129 P (1996) 1 QADR 755, 787. Commissioner Keim ultimately decided, however, that Education Queensland was not obliged to deliver such a ‘mix of services at some non-segregated campus’ on the basis that P’s mother did not co-operate with the department to the extent necessary for such a plan to be effected: 787.
131 L (1996) 1 QADR 207, 216.
animus built up between the school and the child's parents. The latter is a hardship which could be overcome with appropriate specialist assistance; the difficulty is that one then returns to the problem of how that assistance is to be funded.\textsuperscript{132}

In \textit{K}, it was easy to concede that the complainant could be catered for, at a cost, in a ‘regular’ school, because of the finding that the cost of providing special services and facilities would cause unjustifiable hardship to that small, independent, ‘regular’ school. The link has not been so easy to concede, perhaps, in cases where the defendant is the State and financial hardship is difficult, if not impossible, to prove.

It is interesting to note that in the \textit{Purvis} case, too, the HREOC found that more could have been done by South Grafton High to accommodate Daniel, in terms of specialist support and teacher training. The HREOC went a step further than the QADT, however, and found that the failure to accommodate Daniel was unlawful discrimination.\textsuperscript{133} The HREOC also found that the failure to provide this accommodation was causally related to Daniel’s expulsion in that proper accommodation would have mitigated his behaviour problems.\textsuperscript{134} These findings were not addressed in the Federal Court hearings. In the High Court, McHugh and Kirby JJ affirmed the HREOC findings that proper accommodation had not been made and, further, that ‘if the accommodation had been provided, more probably than not, the misbehaviour would not have occurred.’\textsuperscript{135} While, Commissioner Innes, of the HREOC, and McHugh and Kirby JJ, unlike the QADT, were prepared to make findings which would force the State to take the expensive steps necessary to accommodate Daniel in his mainstream school, their views yielded to the majority finding in the High Court that there had been no discrimination against Daniel.

\textsuperscript{132} \textit{K} (1997) 1QADR 620, 623.
\textsuperscript{133} \textit{Purvis obo Hoggan v New South Wales (Department of Education)} [2001] EOC ¶ 93-117, 75172-5 [6.4].
\textsuperscript{134} Ibid.
\textsuperscript{135} \textit{Purvis} (2003) 217 CLR 92, 128 [107], 136-7 [134]-[138].
VI Conclusion

It is instructive to note the conceptual gap between the policy reasons frequently advanced for not implementing complete inclusion of students with impairments at ‘regular’ schools and the reasons accepted as just by the QADT. One reason advanced is that many families prefer a segregated setting for their children. The other, more controversial, reason is that the cost of effecting full inclusion is prohibitive: scarce resources are best distributed by the clustering of those resources at regular schools designated for a particular impairment, or at special schools or units. The difficulty is that, in each individual case, the State can afford the cost of the requisite services and facilities but, when the cases are multiplied, the cost becomes prohibitive. In this context, it is interesting to note the response of the disability sector to the cases of P and L – they were seen as putting to rest any chance of succeeding against the State in a claim for inclusion at a mainstream school. Unjustifiable hardship on the basis of detriment to others, and not of financial hardship, was found in those cases, but the denial of a remedy for discrimination in those cases, it can be suggested, must ultimately have saved the State a significant amount of money. By glossing over the construction difficulties raised by applying

---

136 Ibid 164 [239].
138 See, for example, Senate Report, above n 136, 2 [1.6], 43 [3.47]; Education Queensland, ‘Curriculum Studies 05: Education Provision for Students with Disabilities’ Department of Education Manual, Procedures 1.4.
139 After L, Queensland Advocacy Incorporated, which funded the case, made a policy decision ‘not to take on any further inclusive education matters in the near future’. It was decided there were ‘other areas where we should be directing our resources’: Queensland Advocacy Incorporated, Annual Report (1995-1996).
the unjustifiable hardship exemption to the situation where the behaviour of a student with a disability causes ‘detriment’ to staff and other students, and by avoiding the policy issue of why problem behaviour is ‘detrimental’ in a mainstream school but not in a ‘special’ school, the QADT has not only saved teachers and students in mainstream schools ‘hardship’, it has saved the State money. Another concern is that the State appears willing – or, at least, has been compelled – to apply resources to facilitate the inclusion of students with physical impairments. This has, it may be argued, promoted a hierarchy of impairments with students with intellectual or behavioural impairments afforded fewer opportunities for inclusion.140 Although the decision of McHugh and Kirby JJ, in the Purvis case, apparently confirms the availability of the unjustifiable hardship exemption in behaviour cases brought under the DDA and similar legislation, the problems with the construction of this controversial exemption suggest that it will inevitably attract close judicial scrutiny in the future.

Communitarians have not explicitly advanced the appropriate solution to either the detrimental impact on others of including students with behaviour problems or the prohibitive cost to the state of including students with ‘expensive’ disabilities. As already suggested, however, the communitarian solution would probably be to allow the exclusion of students with disabilities in either case – the good of the majority prevails over the good of the individual.141 It could be argued, however, that the legislation, and the courts which apply it, should not dress up unaffordable financial

140 See Julie Smart, Disability, Society, and the Individual (2001). Smart has theorised that there is a hierarchy of disability according to type of disability whereby people with physical impairment are afforded greater access to and acceptance by society than people with intellectual or psychiatric impairments. Education Queensland statistical data also support the conclusion that there is such a hierarchy. See Part III B, Chapter 4: The Impact of the Legislation.
141 See Part VI, Chapter 2: Communitarian Education.
detriment in other guises and should be more frank in acknowledging that there are financial limits even to the state’s ability to include all comers. Further, it is unlikely that communitarians who have written so eloquently on the place of people with intellectual disabilities in mainstream community would condone the supply of expensive support to people with challenging physical disabilities but not to those with challenging intellectual and behavioural disabilities, particularly where the evidence is that such support would allow their inclusion without detrimental impact on others. To allow the creation of a hierarchy of disability is inconsistent with the fundamental right to equality of citizens. As Tam has succinctly stated, ‘democratic society is inclusive’.\footnote{Tam, above n 123, 8.} To remove such students from the mainstream classroom is to deny them – and others – the opportunity to learn the lessons of citizenship, and particularly the values which prevail ‘beyond all our differences’.\footnote{William Galston, \textit{Liberal Purposes: Goods, Virtues and Diversity in the Liberal State} (1991) 245.} Etzioni has emphasised, for example, that schools ‘ought to teach’ that ‘the dignity of all persons ought to be respected, that tolerance is a virtue and discrimination abhorrent’.\footnote{Amitai Etzioni, \textit{The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda} (1993) 258.} Further, to prefer physically impaired students to those with intellectual and behavioural impairments undermines ‘mutual obligation’ in that it denies those with intellectual or behavioural impairment the opportunity to ‘give back’ to the community in response to what they have taken. As McIntyre has explained each citizen is both learner and teacher: ‘each member of the community is someone from whom we may learn and may have to learn about our common good and our own good, and who always may have lessons to teach us about those goods that we will not be able to learn elsewhere’.\footnote{Alasdair MacIntyre, \textit{Dependant Rational Animals} (1999) 135.}
CHAPTER 7

AN IMPLIED DUTY OF REASONABLE ACCOMMODATION

Some Australian cases have suggested that anti-discrimination legislation requires not only that educational institutions not treat students less favourably on the ground of disability, but also that they take positive steps to accommodate or to adjust to a student’s impairment. At first glance, this willingness to impose positive duties on education providers suggests recognition that disability is a social construct and that disability can be controlled, limited, reduced or even removed by institutional and environmental adaptation. The Productivity Commission has argued that the imposition of a positive duty of accommodation or adjustment is an essential element of effective anti-discrimination legislation:

The Commission considers that the task of eliminating discrimination cannot be adequately addressed in the absence of a duty to make reasonable adjustments. If disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages.¹

The Commission argued that adjustment is necessary to deliver substantive equality ‘because it addresses the environmental barriers that are so disabling to people with impairments’.²

The cases reveal, however, that the finding of a duty to accommodate a student may work not only as a sword to prosecute claims of unlawful discrimination but also as a shield to defend them. Any duty imposed by courts and tribunals, to date, has been moderated by a constraint of reasonableness. Education providers have been required

² Ibid.
to make only a ‘reasonable adjustment’ or to take a ‘reasonably proportionate response’. The concept of reasonable adjustment, it could be argued, is potentially consistent with communitarian theory in that it allows a balancing of competing interests, with the right of the person with impairment to inclusion yielding when majority rights are infringed by that inclusion.3

This reasoning of those Australian tribunals which have found an implied duty of reasonable adjustment was, doubtless, influenced by the fact that a duty to take positive steps to mitigate disability is commonly found in anti-discrimination legislation in other jurisdictions. In the United States, for example, the Americans with Disabilities Act of 1990 contains an obligation of ‘reasonable accommodation’.4 The obligation is limited by a defence of ‘undue hardship’.5 Thus, in this legislation there is an express link between two concepts similar to that implied in the context of Australian legislation.6 Similarly, the European Community has adopted a directive that, in the employment context, ‘reasonable accommodation shall be provided’ to people with disabilities ‘to guarantee compliance with the principle of equal treatment

3 See Part IV, Chapter 5: Communitarian Education.
4 Americans with Disabilities Act of 1990 42 USC §§12101-12213. See, for example, in relation to employment discrimination § 12111(9) and § 12112 (b)(5)(a).
5 Americans with Disabilities Act of 1990 42 USC §§12101-12213. See, for example, in relation to employment discrimination § 12111(10)(B).
6 It is interesting to note a similar case law controversy in the USA to the ‘reasonable accommodation’ controversy here. The US Supreme court has recently implied from the terms of the Americans with Disabilities Act of 1990 a limit upon the duty of reasonable accommodation which arises even when undue hardship cannot be proved. The court has re-invigorated the meaning of ‘reasonableness’ finding in that word a limit separate from the limit of undue hardship: U.S. Airways, Inc. v Barnett, 535 US 391 (2002). The US National Council on Disability has described the decision as ‘troubling because it allows employers to evade providing accommodations that do not cause an “undue hardship”, by endorsing a separate “reasonableness” standard into the law's requirement for reasonable accommodation’. See National Council on Disability, Reasonable Accommodation after Barnett (2003) <http://www.ncd.gov/newsroom/publications/2003/accommodation.htm> at 27 July 2005. This approach of the US Supreme Court, although it post dates the Australian case law discussed below, resonates in that Australian case law.
in relation to persons with disabilities’. The limit to the accommodation which must be provided occurs when to provide accommodation would ‘impose a disproportionate burden’. In 2002, the Disability Discrimination Act 1995 (UK) was amended to extend a duty to make ‘reasonable adjustments’ to schools. Previously, the duty had applied in the employment context. Schools must now take ‘such steps as it is reasonable for it to have to take’ to ensure that ‘disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled’. What is and is not ‘reasonable’ is not spelled out in the legislation but provision is made for guidance via regulation.

Australian courts and tribunals have, no doubt, also been influenced in their reasoning on the reasonable adjustment issue by statements in the Explanatory Memorandum to the Disability Discrimination Bill 1992 (Cth) and in the second reading speech for that bill which imply that such a duty is to be part of the Disability Discrimination Act 1992 (Cth) (DDA). The Memorandum stated that ‘[t]he Bill also provides that only reasonable accommodation need be made for people with disabilities, and persons against whom complaints are made will be able to argue that accommodation necessary to be made will involve unjustifiable hardship on that person’. In the second reading speech, in the context of employment discrimination, the Deputy Prime Minister said, ‘there is an exemption which does not prohibit discrimination if the person is not able to perform adequately the inherent requirements of the job, even

---

8 Ibid.
9 Disability Discrimination Act 1995 (UK) s 6: ‘duty of employer to make adjustments’.
10 Disability Discrimination Act 1995 (UK) s 28C.
11 Disability Discrimination Act 1995 (UK) s 28C(3).
12 Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth).
where reasonable accommodation has been made’. Several subsequent speakers at the second reading stage also accepted that such a duty existed. In fact the concept of reasonable accommodation caused some alarm to one member of the Opposition:

Not only do we have people assessing the almost unassessable things such as feelings and humiliation, but the Bill also provides for things like reasonable accommodation needs. Who determines what is reasonable? Is there a community standard as to what reasonable accommodation is? Is reasonable accommodation in northern Australia the same as in southern Australia? There is a great diversity. If we are going to put into place legislation that addresses these things, we will have to have a lot more clarity than is provided by generalised terms such as `reasonable accommodation’.

In Purvis v New South Wales, however, five members of the High Court considered the issue of whether the terms of the DDA contained an implied duty of ‘reasonable accommodation’ and concluded that they did not. While this decision casts doubt on the legitimacy of the reasoning of earlier cases which did find such a duty, it is nevertheless useful to examine the reasoning in those cases in order both to understand the complex insinuations of meaning in the legislation, and to appreciate the willingness of courts and tribunals to infer methods of denying liability for discrimination from the terms of the legislation.

I THE LEGISLATIVE FOUNDATION OF THE IMPLIED DUTY OF REASONABLE ACCOMMODATION

The Anti-Discrimination Act 1991 (Qld) (QADA) provides that for the purposes of the definition of direct discrimination, ‘the fact that the person with the impairment may require special services or facilities is irrelevant’ in the determination of whether the

13 Commonwealth, Parliamentary Debates, House of Representatives, 26 May 1992, 2750 (Brian Howe, Deputy Prime Minister).
14 See, for example, Commonwealth, Parliamentary Debates, House of Representatives, 19 August 1992, 144 (Bruce Scott); Commonwealth, Parliamentary Debates, Senate, 7 October 1992, 1309 (GEJ Tambling).
17 The analysis of the reasonable accommodation issue by the High Court is considered at Part II, below.
circumstances of the person with the impairment are the same or not materially different from the circumstances of a person without an impairment.\textsuperscript{18} Prima facie, the effect of this subsection is that a respondent cannot argue that the circumstances of X and the circumstances of Y are materially different because, for example, X needs a ramp for wheelchair access, an aide, a guide dog or extra time for an exam and Y does not. To allow these environmental ramifications of a disability to make the circumstances of X and Y different would in many instances make it impossible to prove a discrimination claim. Further, it is obvious that one, if not the only, reason people discriminate against others with disabilities is because they fear or resent the need to accommodate that disability.

The reasoning of QADT President Copelin in \textit{Brackenreg v Queensland University of Technology}\textsuperscript{19} seems to take the effect of this rider to the definition one step further, towards imposing a responsibility on respondents to make ‘reasonable adjustment’\textsuperscript{20} for people with disabilities. President Copelin described the scope of the duty of Queensland University of Technology (QUT) to students with disabilities thus:

\begin{quote}
There is no obligation on the respondent to pass a student just because they have a disability. Their obligation is to reasonably make available such special services or facilities which may be necessary to enable a student with disabilities to undertake studies.\textsuperscript{21}
\end{quote}

The reasoning behind this statement of obligation is not clearly stated but may nevertheless be inferred: if an educational institution discriminates because it fails or refuses to make a reasonable adjustment, then it necessarily follows that for an educational institution not to discriminate it must make reasonable adjustment.

\textsuperscript{18} \textit{Anti-Discrimination Act 1991 (Qld) (QADA) s 10(5)}.
\textsuperscript{19} \textit{Brackenreg v Queensland University of Technology [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) (‘Brackenreg’)}.
\textsuperscript{20} \textit{Brackenreg [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)].}
\textsuperscript{21} \textit{Brackenreg [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)].}
President Copelin found in *Brackenreg* that there was no discrimination because QUT had made ‘reasonable adjustment to allow the complainant to compete on a level playing field’.22

The decision in *Brackenreg* echoes a trend evident in several decisions in cases brought under the *DDA*. Mansfield J in *A School v Human Rights and Equal Opportunity Commission and Another*23 cautiously canvassed the idea that there may be an ‘obligation to take positive action’24 to accommodate a person with a disability. Mansfield J recognized that three aspects of the *DDA* suggest such a positive obligation. First, the *DDA* stipulates that less favourable treatment of a person because they need support from, for example, a therapeutic device,25 an assistant26 or a guide dog27 is discriminatory. It is thereby acknowledged in the *DDA* that special devices or aids may be necessary for a person with a disability. Secondly, proof of the unjustifiable hardship exemption28 is predicated on the fact that ‘services or facilities’ must be provided for a person with a disability. Thirdly, the *DDA* expressly provides that ‘circumstances … are not materially different because of the fact that different accommodation or services may be required by the person with a disability’.29 Mansfield J tentatively concluded:

> Thus it is not necessarily the case that where the DD Act applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services.30

---

22 *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)].
24 Ibid 103.
26 *DDA* s 8.
27 *DDA* s 10.
28 *DDA* s 22(4).
29 *DDA* s 5(2); cf *QADA* s 10(5).
Various commissioners of the HREOC have also embraced the view that there is a requirement to make ‘reasonable accommodation’. Commissioner Nettlefold in \textit{Garity v Commonwealth Bank of Australia}\textsuperscript{31} considered that the principle of reasonable accommodation ‘should be regarded as a central principle of disability discrimination law. The proper construction of the [DDA] shows that the principle of reasonable accommodation is contained in it’.\textsuperscript{32} Commissioner Nettlefold considered that the word ‘favourably’ as used in s 5 of the \textit{DDA} ‘adverted to the notion of giving aid or help’.\textsuperscript{33}

Commissioner McEvoy in her decision in \textit{Mrs Cowell and Fleur Cowell v A School},\textsuperscript{34} delivered after Mansfield J remitted the matter to HREOC following the Federal Court hearing outlined above,\textsuperscript{35} unequivocally accepted that action amounting to ‘appropriate accommodation’ of a student’s disabilities is required:

\begin{quote}
It is my view that the substantial effect of section 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing in the provision of appropriate accommodation or other support as may be required as a consequence of the disability, so that in truth, the person with the disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances.\textsuperscript{36}
\end{quote}

Despite argument from the New South Wales Education Department that there was no statutory basis for the existence of a reasonable accommodation test, ‘apart from the limited terms of s 5(2)’ and that educational institutions were motivated by ‘other statutory and policy reasons’ and not by any requirement of reasonable accommodation in their treatment of students with disabilities, Commissioner Innes,

\textsuperscript{32} Ibid 6.4.
\textsuperscript{33} Ibid.
\textsuperscript{34} \textit{Mrs Cowell and Fleur Cowell v A School} [2000] HREOC No97/168 (Unreported, Commissioner McEvoy, 10 October 2000) (‘\textit{Cowell}’).
\textsuperscript{36} \textit{Cowell} [2000] HREOC No97/168 (Unreported, Commissioner McEvoy, 10 October 2000) [5.2.2].
at first instance in Purvis, concluded that ‘the accepted approach of the courts is that the respondent has an obligation to make a reasonably proportionate response to the person’s disability’.37

Both Commissioner McEvoy in Cowell and Commissioner Innes in Purvis were influenced by the decision of the United States Court of Appeal in Southeastern Community College v Davis38 and the decision of the New South Wales Court of Appeal in Jamal v Secretary, Department of Health.39 The Courts in both these cases grappled with the distinction between adjustments for disability that are ‘reasonable’, and therefore required of a respondent, and those which are ‘substantial’ and therefore not required. The Courts in both Davis and Jamal did not acknowledge a ‘positive obligation’ or a duty of ‘affirmative action’ on a respondent’s part, preferring the more subtle terminology adopted by both Commissioners McEvoy and Innes: the requirement of a reasonably proportionate response.

The findings of Commissioner Innes in Purvis suggest that the ‘reasonable accommodation’ concept could operate as both a sword and a shield in discrimination cases. Whereas in Brackenreg and Cowell it worked to defend claims of discrimination, in Purvis, at least in the HREOC, it worked to prove a failure to provide for the complainant’s needs which was sufficient to amount to discrimination. While in Brackenreg and Cowell no discrimination was found in that the respondents’ actions were found to have been ‘reasonably proportionate’, in Purvis, Commissioner Innes identified ‘three actions’ which the respondent should have taken to make its

37 Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117, 75170 [6.3].
39 Jamal v Secretary, Department of Health (1988) 14 NSWLR 452.
actions reasonably proportionate. Commissioner Innes was satisfied that if the
following three actions had been taken, the respondent’s ‘actions would have been
reasonably proportionate in the circumstances, and discrimination would not have
taken place’:

- [the respondent] should have more broadly consulted in the development of
  Daniel’s discipline and welfare policy

- … once the policy was in place and being followed the respondent should
  have been more prepared to be flexible in allowing changes.

- … the advice of special education experts should have been taken more
generally. 40

It could be argued that the actions specified are vague in their formulation: ‘more
broadly consulted’, ‘more prepared to be flexible’, ‘taken more generally’. As such,
the findings of Commissioner Innes in *Purvis* were clearly likely to cause a measure
of discomfort for educational institutions used to more specific determinations that,
for example, not providing wheelchair ramps, or extra time on exams or access to
excursions, is discriminatory. Still it must be noted that even in this decision, which
could be seen as pushing the boundaries of the operation of anti-discrimination law in
Australia, there is implicit acknowledgement that only a ‘reasonable’ response will be
demanded of education providers and that, as such, there is no legislative guarantee
that a student with an impairment will be accommodated in his or her school of
choice.

Application for review by the Federal Court of the decision in *Purvis* was made by the
respondent pursuant to the *Administrative Decisions (Judicial Review) Act 1977*
(Cth). Emmett J found for the appellant, reversing the finding of the HREOC that

---

Daniel Hoggan had been discriminated against in his treatment at the South Grafton High School. Emmett J found that, ‘s 5(2) does not appear to have any relevant application in the present case’ and read down the meaning of ‘accommodation’ in the Act to that provided in the definitions section – ‘residential or business accommodation’.

He found that the school’s treatment of Daniel was not discriminatory because it was on the ground of his behaviour and not on the ground of his disability, and that the hearing commissioner had erred in his interpretation of the definition of disability in s 4 DDA. Emmett J’s decision was, subsequently, affirmed by the Full Federal Court.

The Full Federal Court, in its consideration of the circumstances of the Purvis case backed away from imposing a requirement that a ‘reasonably proportionate response’ be made to an impaired student. Indeed, it backed away from imposing any positive obligation on an alleged discriminator. It was particularly critical of the findings of Commissioner Innes of discrimination by the respondent school in its management of Daniel Hoggan.

The findings of discrimination which were made by the HREOC in relation to acts or omissions other than expulsion go further and impose positive duties on the school to manage the conduct of the student, presumably regardless of cost or impact upon other school activities, without explaining why such measures would not involve a breach of s 22(2)(a) or (c). The critical points are that there is no criterion of reasonableness in s 22(2) and no equivalent of s 22(4) in relation to a student once enrolled.

---

41 DDA s 4(2).
42 See Chapter 8: The Definition of Disability.
44 Commissioner Innes made these findings of discrimination in addition to finding that Daniel’s exclusion had breached the DDA. See Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117, 75172-5 [6.4].
The reasoning of the Full Court is not transparent here. It could be argued that the Court was suggesting that to take positive measures to accommodate a student with a disability amounts to discrimination against students without disability. The implication appears to be that the ‘cost and impact’ of taking positive measures for the student with the disability will, to adapt the terminology of s 22(2)(a), ‘limit’ or ‘deny’ the ‘access’ of other students to ‘benefits’ provided by the school. Alternatively, to adapt the terminology of s 22(2)(c), the cost and impact will ‘subject’ other students to ‘detriment’. There are problems with this line of reasoning. Firstly, it is difficult to reconcile with s 5 of the DDA or with the terms of the unjustifiable hardship exemption in s 22(4). Section 5(1) spells out that discrimination occurs when a person with a disability is accorded less favourable treatment than a person without a disability in ‘circumstances that are the same or not materially different’. Section 5(2) stipulates that ‘circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability’. If this interpretation of the reasoning of the Full Court is accepted, then it must also be accepted that the provision of ‘different accommodation or services’ must be cost and impact neutral or risk ‘discriminating’ against persons who do not have a disability. Such a narrow reading of s 5 is surely against the spirit and purpose of the legislation. Further, while the unjustifiable hardship exemption \(^{46}\) was not, at the time of the Full Federal Court hearing, \(^{47}\) available to an educational institution once a student is enrolled, its terms clearly indicate that parliament

---

\(^{46}\) DDA s 24(4).

\(^{47}\) In February 2005 Commonwealth amending legislation was passed which replaced the existing unjustifiable hardship exemption created by DDA s 24(4) with a broader unjustifiable hardship exemption available to education institutions to resist claims of discrimination made by students after their enrolment. See Disability Discrimination Amendment (Education Standards) Act 2005 (Cth) s 3. See Part V C, Chapter 6: Exemptions.
anticipated that the accommodation of a student with a disability would ‘cost’ in terms of money and resources because qualification for the exemption follows from such a cost being proved ‘unjustifiable’. Finally, it goes, perhaps, without saying, that discrimination, to contravene the DDA, must be on the ground of disability. Therefore ‘discrimination’, as contemplated by the Full Federal Court, against what the justices call ‘ordinary’ students\textsuperscript{48} would not offend the DDA. This is surely a very clear explanation of ‘why such measures would not involve a breach of s 22(2)(a) or (c)’.

Alternatively, it could be argued that the Full Court was suggesting that the taking of ‘special measures’ by the school in the treatment of Daniel himself may have offended s 22(2)(a) or (c). The implication of this reading is that different treatment on the ground of disability is, prima facie, discriminatory. This reading, too, seems out of step with the intention and terms of the DDA. Again, the wording of s 5(2) DDA explicitly contemplates that special measures may be necessary to accommodate disability and, further, that a failure to provide such special measures may amount to discrimination. Queensland case law suggests that different treatment is not automatically discriminatory treatment. In \textit{P v Director-General, Department of Education},\textsuperscript{49} for example, Commissioner Keim postulated a two-stage test: first, it must be established that the complainant’s treatment was different; secondly, it must be determined whether that different treatment is less favourable.\textsuperscript{50} Further the case law suggests that what constitutes less favourable treatment cannot be determined solely by objective measures; the subjective view of the complainant of their

\begin{footnotesize}
\textsuperscript{48} Purvis \textit{v} New South Wales (Department of Education and Training) (2002) 117 FCR 237, 247 [26].
\textsuperscript{49} \textit{P v Director-General, Department of Education} [1995] 1 QADR 755 (‘\textit{P}’).
\textsuperscript{50} \textit{P} [1995] 1 QADR 755, 766.
\end{footnotesize}
treatment is also influential in the decision making process. For example, in another Queensland case, *L v Minister for Education*,\(^{51}\) in *P* and in the HREOC finding in *Purvis*, the subjective view of their treatment of the complainants was important in proof of discrimination. Each of those complainants was found to have been discriminated against in that they were denied access to the school of their choice, even though expert evidence was that the school of choice may not have been the ‘best’ school for their particular educational needs.\(^{52}\) The Full Federal Court reading also suggests a failure to understand the social model of disability and that disability, for an impaired person, may flow from institutions, such as schools, which cater for and aim to reproduce norms of behaviour. Finally, this reading suggests a failure to understand that equality amounts to ‘treatment as equals’ and not to ‘equal treatment’.\(^{53}\)

The Full Court, by its own analysis, was influenced in its reasoning on the ‘positive duties’ issue by the fact that ‘there is no criterion of reasonableness in s 22(2) and no equivalent of s 22(4) [the unjustifiable hardship exemption] in relation to a student once enrolled’.\(^{54}\) That is, the legislation did not explicitly envisage a limit on any obligation to accommodate a student with a disability once that student is enrolled, nor did it explicitly empower a court to balance competing demands for scarce resources according to what is ‘reasonable’ on the facts of any case.

---

\(^{51}\) *L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207*

\(^{52}\) See Part I, Chapter 11: Less Favourable Treatment.


\(^{54}\) *Purvis v New South Wales (Department of Education and Training) (2002) 117 FCR 237, 247 [26].* But see above n 47 for the current position.
II PURVIS AND THE HIGH COURT ANALYSIS OF ‘REASONABLE ACCOMMODATION’

Since the decision of the High Court in Purvis there seems little doubt that the DDA, and, perhaps state legislation such as the QADA which utilise similar formulae for discrimination, are not to be read as containing an implied duty of reasonable accommodation. Before the High Court, the Attorney General and HREOC both argued that a duty was to be implied from the terms of s 5(2) DDA which anticipates that affirmative action may be required of a service provider because ‘different accommodation or services may be required by the person with a disability’.55 Counsel for the complainant argued that it was to be inferred from the fact that the unjustifiable hardship exemption created by the Act imposed a ‘burden’ on a potential discriminator.56

Five members of the Court considered the issue. Gummow, Hayne and Heydon JJ contrasted the nature of the DDA with that of similar statutes in the UK, USA and the European Community which do oblige reasonable accommodation. They simply concluded that such a duty is not part of the DDA:

The principal focus of the Act, however, is on ensuring equality of treatment. In this respect it differs significantly from other, more recent, forms of disability discrimination legislation. In particular, for present purposes, it is important to notice that, unlike the Disability Discrimination Act 1995 (UK) (“the 1995 UK Act”), the Americans with Disabilities Act of 1990 (“the ADA”) or the European Community Directive for "establishing a general framework for equal treatment in employment and occupation”, the Act does not explicitly oblige persons to treat disabled persons differently from others in the community. The Act does not, for example, contain provisions equivalent to ss 5 and 6 and ss 28B to 28G of the 1995 UK Act which expressly oblige employers and educational authorities to make “reasonable adjustments” to accommodate disabled persons.57

55 Purvis (2004) 217 CLR 92, 120-1 [85]. The equivalent provision in the Queensland legislation is QADA s 10(5): ‘In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant’.
57 Purvis (2004) 217 CLR 92, 155 [203].
McHugh and Kirby JJ acknowledged that ‘[d]isability discrimination is different from other types of discrimination, such as sex or race discrimination, in that its elimination is more likely to require affirmative action than is the case with sex and race discrimination’, but they were not prepared to find a positive obligation to take affirmative action. Unlike Gummow, Hayne and Heydon JJ, however, they reprised and rejected the reasoning of the various tribunals which had been prepared to infer such a duty, reasoning which had influenced submissions on the point by the Federal Attorney General, HREOC and the complainant. The essence of the analysis of McHugh and Kirby JJ was that while service providers such as educational institutions may, ‘as a practical matter’, have to accommodate people with disabilities to avoid a finding, via DDA s 5, that they have committed unlawful discrimination, there is no express or implied obligation to do so. The Act ‘recognises’ but does not ‘oblige’ accommodation: ‘[n]o matter how important a particular accommodation may be for a disabled person or disabled persons generally, failure to provide it is not a breach of the Act per se’. The limit upon that accommodation which must be delivered lies in the operation of the unjustifiable hardship exemption. The Act provides that in certain areas of activity, a service provider must accommodate a person’s disability only to the point that it causes the service provider unjustifiable hardship:

58 Purvis (2004) 217 CLR 92, 121 [86].
59 While concurring with the finding of both the Federal Court and the Full Federal Court that there is no implied duty of reasonable accommodation McHugh and Kirby JJ are critical of Emmett J’s rather obvious method of avoiding so finding of limiting the meaning of ‘accommodation’ to that provided in DDA s 4(1): ‘In the Federal Court, however, Emmett J said the case does not appear to have anything to do with “accommodation” or “services”. He referred to the definition of these terms in s 4(1) of the Act. Section 4(1) declares that “accommodation” includes “residential or business accommodation”. But this is an inclusive definition. The objects of the Act would be seriously undermined if “accommodation” was confined to residential or business accommodation. It is hardly to be supposed that material circumstances for the purpose of s 5 of the Act do not include the accommodation of the disabled by providing ramps in appropriate cases’. Purvis (2004) 217 CLR 92, 121 [87].
60 Purvis (2004) 217 CLR 92, 125-7 [100]-[106].
61 Ibid 127 [104].
62 Ibid.
Adding the qualification “reasonable” to the requirement of accommodation imposes an unwarranted gloss on the Act - which reconciles the competing interests of the disabled and those with whom they interact by the more stringent standard of “unjustifiable hardship”. Substituting the notion of reasonableness for “unjustifiable hardship” is an error.\(^63\)

The unjustifiable hardship exemption, they found, is the means by which the DDA ‘provides for a balance to be struck between the rights of the disabled child and the rights of other pupils and, for that matter, teaching staff’.\(^64\) McHugh and Kirby JJ accepted that the attraction of finding a duty of reasonable accommodation is that it fills the gaps in the scope of the unjustifiable hardship exemption.\(^65\) They resisted, however, misrepresenting the will of the parliament to solve the ‘problem’ that the exemption was not available to education institutions once they had enrolled a student: ‘Parliament has chosen to qualify the accommodation requirement by using a standard of unjustifiable hardship. It is not for the courts to change this standard by treating it as equivalent to reasonableness’.\(^66\)

### III Disability Standards for Education and Reasonable Accommodation: The Future

At the time of the decision of the High Court in Purvis, the Disability Standards for Education 2005 (Cth) were only in draft form. The draft Standards purported, however, to impose an obligation of ‘reasonable adjustment’ on education providers in a number of areas: enrolment, participation, curriculum development and delivery and student support services. This initiative was designed to ‘strengthen’ the DDA and was intended, generally, as a positive step towards delivery of educational

\(^{63}\) Ibid 122 [89].  
\(^{64}\) Ibid 123 [94].  
\(^{65}\) Ibid 122 [90].  
\(^{66}\) Ibid 125 [98], 122 [90] and 124 [96].
‘justice’ to people with disabilities.\textsuperscript{67} McHugh and Kirby JJ, in \textit{Purvis} suggested that this obligation to make reasonable adjustment was inconsistent with the terms of the \textit{Standards’} parent legislation, the \textit{DDA}, and as such, by implication, unenforceable.\textsuperscript{68} The \textit{DDA} has since been amended to bring the \textit{Standards} ‘within power’.\textsuperscript{69} The \textit{DDA} now provides that ‘[f]or the avoidance of doubt, disability standards may require a person or body dealing with persons with disabilities to put in place reasonable adjustments to eliminate, as far as possible, discrimination against those persons’.\textsuperscript{70} The \textit{Standards} came into force in August 2005 without substantial change to the draft form.\textsuperscript{71} It is likely that they will create a new battlefield in respect of claims of disability discrimination in education\textsuperscript{72} in that compliance with the \textit{Standards} excuses education providers from the scope of the unlawful discrimination provisions of the \textit{DDA}.\textsuperscript{73} The principal question for future courts hearing future education complaints made under the \textit{DDA} may well be whether the respondent has acted in compliance with the \textit{Standards}. Only if non-compliance can be demonstrated will the issue of unlawful discrimination be revived. Although some guidance is provided as to relevant considerations to be taken into account when determining whether adjustments are ‘reasonable’\textsuperscript{74} it will be necessary to make the long wait for case law

\textsuperscript{68} \textit{Purvis} (2004) 217 CLR 92, 125 [99].
\textsuperscript{70} \textit{DDA} s 31(1A).
\textsuperscript{71} Obligations to make reasonable adjustment in the areas outlined above are found in \textit{Disability Standards for Education 2005} (Cth) (‘\textit{Standards}’) in ss 4.2, 5.2, 6.2 and 7.2.
\textsuperscript{72} At least in respect of claims brought under the \textit{DDA}. How the \textit{Standards} will affect claims brought under state anti-discrimination legislation is unclear. See Australian Government Solicitor, Letter of Advice re Productivity Commission’s Inquiry into the Disability Discrimination Act (1992), 10 February 2004 <http://www.pc.gov.au/inquiry/DDA/advice/ags1/ags1.pdf> at 25 June 2005, 4-5. The advice suggests that further amendment to the \textit{DDA} may be necessary if the Commonwealth intends that compliance with the \textit{Standards} should displace obligations arising under State legislation. See also Part V, Chapter 5: The Impact of the Legislation.
\textsuperscript{73} \textit{DDA} s 34.
\textsuperscript{74} \textit{Standards} Part 3. See particularly s 3.4(2).
to emerge in this area before confident comment can be made on how the reasonable adjustment provisions of the Standards will be interpreted and applied. It is interesting in the early days of this new regime to note, however, that the Standards explicitly divorce the concept of unjustifiable hardship from the concept of reasonable adjustment. Both concepts are retained - ‘to provide a balance between the interests of providers and others, and the interests of students with disabilities’\textsuperscript{75} - but they have independent operation:

The Standards generally require providers to make reasonable adjustments where necessary. There is no requirement to make unreasonable adjustments. In addition, section 10.2 provides that it is not unlawful for an education provider to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the provider. The concept of unreasonable adjustment is different to the concept of unjustifiable hardship on the provider. In determining whether an adjustment is reasonable the factors in subsection 3.4 (2) are considered, including any effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students, and the costs and benefits of making the adjustment. The specific concept of unjustifiable hardship is not considered. It is only when it has been determined that the adjustment is reasonable that it is necessary to go on and consider, if relevant, whether this would none-the-less impose the specific concept of unjustifiable hardship on the provider.\textsuperscript{76}

While ‘balance between the interests’ of schools, students and staff is an acceptable objective in terms of communitarianism, the Standards deliver a ‘thickening’ of the protection available to education providers wishing to resist the inclusion and inclusive treatment of students with disabilities in that there will be two tiers of limits to the adjustment required. First, an adjustment will not be required if it is ‘unreasonable’, and secondly, a reasonable adjustment will not be required if it imposes ‘unjustifiable hardship’. The availability of the unjustifiable hardship ‘exception’ to the obligations imposed by the Standards is confirmed\textsuperscript{77} and the DDA

\textsuperscript{75} Standards s 10.2(3) note.
\textsuperscript{76} Standards s 3.4 note.
\textsuperscript{77} Standards Part 10.
This ‘two tier’ system of defences aligns with the controversial approach adopted by the US Supreme Court in Barnett but is a novelty and an unknown quantity in the Australian context and will, no doubt, increase the complexity of cases in this area. Confusion will, no doubt, also arise from the fact that many of the factors to be taken into account when determining ‘reasonableness’ overlap with those to be taken into account when determining ‘unjustifiable hardship’. These include the effect of the disability concerned, financial cost to the education provider and the benefits of making an adjustment. It has been seen, in the previous chapter, that criteria such as these are formulated with sufficient vagueness to allow courts extensive discretion in determining the correct ‘balance of interests’ in each case. Whether the implementation of the duty of reasonable adjustment in addition to the existing unjustifiable hardship exception works to deliver greater equality of opportunity to students with disabilities or greater scope to exclude them remains to be seen.

78 Standards s 10(2) note.
80 DDA s 11(b); Standards s 3.4(2)(c) and (d).
81 DDA s 11(c); Standards s 3.4(2)(e).
82 DDA s 11(a); Standards s 3.4(2)(e).
83 See Part V, Chapter 6: Exemptions.
CHAPTER 8
THE DEFINITION OF IMPAIRMENT

Perhaps the most dramatic challenge to liability which has been advanced in the context of Australian disability discrimination cases is the argument that the complainant is not ‘impaired’ or ‘disabled’ for the purpose of the legislation and thus not entitled to its protection. This was the principal argument before the High Court of Australia in the important Disability Discrimination Act 1992 (Cth) (DDA) case, Purvis v New South Wales,¹ which involved a teenaged student with problem behaviour caused by a brain impairment. The New South Wales Department of Education argued in Purvis that the complainant’s child, Daniel Hoggan, had been excluded from his mainstream state high school not because of his brain impairment but because of his behaviour. Whilst the Department conceded that his behaviour was caused by his impairment, it argued that it was not within the scope of the definition of disability provided in the DDA. The complainant’s argument was that Daniel’s problem behaviour was a manifestation of his impairment and, thus, within the protected attribute of disability as defined. Ultimately, the High Court refused to limit the scope of the definition of disability in the DDA and found that, for the purposes of the DDA, a disability did include the behaviours caused by that disability. The grappling of lower courts and tribunals with this issue in Purvis and other similar cases, however, gives interesting insights into the efficiencies and deficiencies of Australian anti-discrimination legislation, as well as into judicial understandings of the nature and scope of disability. Before analysing more closely the Australian

I THE MEANING OF DISABILITY: THE USA AND THE UK

The experience of other similarly situated jurisdictions certainly suggests that resisting liability through challenging the disability of the complainant is a common defence strategy. It could be speculated that the problem of having to identify and highlight impairment and, therefore, difference, may be reduced or even removed in legislative systems which create a ‘right’ to education. In the USA, for example, the *Individuals with Disabilities Education Act (IDEA)*\(^2\) creates a right to a ‘free and appropriate public education’ in the ‘least restrictive environment’, for Americans with disabilities. Under that regime, the main focus of the legislative enquiry would, perhaps, be on the appropriateness of the education provided to an individual and not on the proof of impairment of that individual. Closer examination of the US law indicates, however, that this is not the case. It is particularly interesting, from an Australian perspective, that in the US it appears to be students with physical disabilities who are entitled to fewer education guarantees than those with intellectual and learning disabilities – the opposite to what cases in Australia suggest about the Australian system.\(^3\) Proof of a particular variety of disability is necessary to attract the protection of *IDEA*. For the purpose of that legislation, ‘child with a disability’ means a child with one of a list of impairments ‘who, by reason thereof, needs special education and related services’.\(^4\) The effect of that limiting phrase is that many students – and especially students with physical impairments who do not need ‘special

---

\(^2\) *Individuals with Disabilities Education Act 2004* 20 USC §1400 (‘*IDEA*’).

\(^3\) See Part II, Chapter 5: The Impact of the Legislation.

\(^4\) *IDEA* s 1401(3).
education’ – are unable to access the protection of the legislation. They are not left without any legislative remedy. They are able to rely on general anti-discrimination provisions in the Rehabilitation Act. The Rehabilitation Act, however, does not deliver the same suite of educational ‘rights’ to students with disabilities as IDEA. While the principal purpose of IDEA is to create educational rights, with incidental protection against discrimination, the Rehabilitation Act is generically anti-discrimination legislation. Unlike IDEA, for example, the Rehabilitation Act does not guarantee students with disabilities a ‘free and appropriate public education’, the development of an individual education plan, nor does it provide the same level of procedural safeguards. Further, the definition of disability in the Rehabilitation Act is the same as that which has attracted controversy in the context of the companion legislation, the Americans with Disabilities Act. Proof of disability for the purpose of that legislation requires proof of an impairment that substantially affects one or more major life activities; or a record of having such impairment, or being regarded as having such an impairment. This definition of disability has been interpreted narrowly by the US Supreme Court to deny protection to individuals whose disability is mitigated by medication or therapy to the extent that there is no substantial effect on life activity. In Sutton v United Airlines the US Supreme Court held that the plaintiffs, short-sighted sisters who had been refused employment by the respondent airline on account of that visual impairment, did not have a disability within the meaning of the Americans with Disabilities Act because their visual impairment was

---

6 For more detailed analysis of the differences between IDEA and the Rehabilitation Act see Peter W D Wright and Pamela Darr Wright, Wrightslaw: IDEA 2004 (2005) appendix 1.
7 Americans with Disabilities Act of 1990 42 USC §§12101-12213. This Act is the key anti-discrimination legislation in the US and prohibits discrimination in areas such as government activity, employment, accommodation and transportation.
8 Americans with Disabilities Act of 1990 42 USC §12102(2).
corrected by the wearing of glasses. As a result, United Airlines could lawfully discriminate against the sisters on the basis of their visual impairment. It is interesting to note that this reading of disability as referring to a restriction on ‘life activities’ gels with the reading preferred by disability lobby groups. The reading is, nevertheless, problematic in this context because it allows a restriction on the major life activity of employment without acknowledging that this amounts to a socially constructed disability.\(^{10}\) The *Sutton* case clearly allows a manipulation of the definition of disability to narrow the class of people who are able to invoke the protection of anti-discrimination legislation.

In the United Kingdom the *Disability Discrimination Act 1995* (UK) utilises a similar formula to that adopted in the US for the definition of disability: ‘a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’.\(^{11}\) The definition has, however, been construed differently in this jurisdiction. Further, the definition has been litigated in the context of education discrimination cases. The High Court of England and of Wales has recently heard appeals from three decisions of the Special Educational Needs and Disabilities Tribunal (SENDIST) that students did not have a disability within the meaning of the *Disability Discrimination Act 1995* (UK) because there was no substantial interference with their ability to carry out day to day activities.\(^{12}\) In each case the High

\(^{10}\) See Part II, Chapter 3: The Meaning of Disability.

\(^{11}\) *Disability Discrimination Act 1995* (UK) c 50, s 1. Education became a protected area under that legislation in 2002: see *Special Education Needs and Disabilities Act 2001* (UK) c 10 pt 2 c 1 and c 2; *Disability Discrimination Act 1995* (UK) c 50 pt 4.

The Court applied reasoning adopted in the context of employment cases\textsuperscript{13} to the education context. The High Court held that SENDIST had erred in law in deciding that there was not a ‘substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’ by focussing on what the child could do and not on what he could not do or could do only with difficulty. Each case was remitted for rehearing to the SENDIST. Here we see, perhaps, a clearer recognition than US cases such as \textit{Sutton} demonstrate, that the issue of disability should be determined in the context of the discriminatory treatment of the complainant - and not before. The effect of the decision in \textit{Sutton} is that a person with an impairment who cannot demonstrate a restriction on ‘life activities’ because, for example, that impairment is negatived by technology or medication, will not be protected by anti-discrimination legislation. This means that discrimination against a complainant on the basis of stereotyped rather than actual ‘limitations’ is allowed to proliferate. The approach of the High Court of England and Wales, by contrast, recognises the fact that disability arises from ill-informed assumptions about and reactions to the capabilities of people with impairments.

\section*{II Australian Case Law on the Meaning of Impairment}

Although the definition of impairment or disability is cast very broadly in Australian anti-discrimination legislation to include physical, intellectual, psychiatric and sensory impairments,\textsuperscript{14} it has nevertheless caused controversy in the context of education discrimination cases. Unlike the USA and the UK, however, the controversy has not centred on excluding certain groups who cannot demonstrate


\textsuperscript{14} See Part IV, Chapter 3: The Meaning of Disability.
inability to carry out ‘life activities’ from the definition itself. It has centred, instead, on which aspects of a person’s acknowledged impairment are protected by the legislation. In Australia the key controversy has been whether a complainant’s impairment includes its behavioural manifestations. Does schizophrenia, for example, include the behavioural manifestation of rude and abrupt interpersonal skills? Does intellectual impairment include the behavioural manifestation of a propensity to scream out, interrupt and run away? Functional limitations such as these have long been acknowledged as intimately connected with and caused by underlying impairment. Indeed, it is frequently only behavioural manifestations which disclose ‘hidden’ impairment. To fail to recognise behavioural manifestations as part of the impairment which causes them results, in particular, in hardship for people with intellectual and psychiatric impairment. This failure also supports a hierarchy of impairment which prefers people with physical impairment whose ‘difference’ is obvious and whose impairment, is, arguably, more readily accommodated by the community. The installation of ramps and lifts, the provision of special equipment and technology can mitigate the disability experienced by people with physical impairment. The inclusion of people with intellectual and psychiatric impairments, and their ‘challenging’ behaviour, however, can often only be achieved through

15 See, for example, *X v McHugh* (1994) 56 IR 248.
16 See, for example, *L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR* (*L*).
17 See National Council on Intellectual Disability, ‘Human Rights Legislation Fails People with Disability and their Families: We need a better way of supporting a fair society’ (Press Release, 4 September 2001). See also the World Health Organisation definition of ‘disability’ as ‘any restriction or lack (resulting from an impairment) of ability to perform an activity in a manner or within the range considered normal for a human being: World Health Organisation, *International classification of impairments, disabilities and handicaps: A manual of classification relating to the consequences of disease* (1980). While the WHO definition is now rejected by the disability lobby in favour of a reading of disability as the social restriction experienced by a person with impairment it indicates recognition that impairment does cause functional limitations. The disability lobby today regards such functional limitations as part of a person’s impairment. See Part I, Chapter 3: The Meaning of Disability.
18 See Parts III B and IV D, Chapter 5: The Impact of the Legislation.
attitudinal change and the willingness of others to accept some level of personal ‘discomfort’.

A Queensland Case Law on the Meaning of Impairment

The issue of whether impairment includes its behavioural manifestations was raised in Australia’s first education discrimination case, the *Anti-Discrimination Act 1991 (Qld)* (*QADA*) case of *L v Minister for Education for the State of Queensland*.\(^{19}\) In *L*, the respondent argued that the appropriate comparison, for deciding the question of whether *L* had been treated ‘less favourably’ than a person without *L*’s impairment, was between *L* and another student without *L*’s impairment but who exhibited *L*’s disruptive behaviours. The respondent contended that it was clear that *L* had not been discriminated against because she had been treated ‘precisely as a student without her impairment but displaying similar disruptive behaviour would have been’.\(^{20}\)

Commissioner Holmes of the Queensland Anti-Discrimination Tribunal (QADT) rejected this argument, adopting the earlier decision of the Human Rights and Equal Opportunity Commission (HREOC) in the employment case, *X v McHugh*,\(^ {21} \) that aspects of behaviour caused by a person’s impairment are not to be ‘treated as divorced from it’.\(^ {22}\) In *X* the complainant was dismissed on account of his difficulties relating to colleagues and clients. President Wilson\(^ {23} \) found there was a ‘remarkable correspondence between the problems associated with the complainant's work

---

\(^{19}\) *L* [1995] 1 QADR.

\(^{20}\) Ibid 211. The character of the comparator required by the *Anti-Discrimination Act 1991 (Qld)* (*QADA*) s 10 and similar provisions in anti-discrimination legislation from other Australian jurisdictions is considered in detail in Chapter 9: the Comparator.

\(^{21}\) *X v McHugh* (1994) 56 IR 248.

\(^{22}\) *L* [1995] 1 QADR 207, 211.

\(^{23}\) It is worth noting that President Wilson had retired from a distinguished career on the High Court before taking up the HREOC appointment.
performance and the symptoms of his disability\textsuperscript{24} and that his dismissal was unlawful on the basis that the complainant’s difficulties were manifestations of his disability, schizophrenia:

In the light of this evidence, I find that the respondent's evaluation of the complainant's work performance between May and November 1992 namely, lack of interpersonal skills, failure to exercise reasonable judgement and refusal to accept counselling reflected a manifestation of the symptoms of the complainant's illness. The dismissal therefore discriminated against the complainant on the ground of his disability.\textsuperscript{25}

The issue was raised again in the later Queensland case, \textit{P v Director-General, Department of Education}.\textsuperscript{26} It was argued for the respondent in that case ‘that a person without P’s impairment who exhibited such behaviour would be asked to leave Rasmussen School and, perhaps, subjected to more formal disciplinary procedures’.\textsuperscript{27} The ‘logic’ of the argument extended to the claim that P had, therefore, been treated ‘the same, or not materially different from, or even more favourably than a person without his impairment’.\textsuperscript{28} Commissioner Keim, citing with approval the decisions in both \textit{L} and \textit{X v McHugh}, accepted the complainant’s argument that ‘those aspects of P’s behaviour which arise from his impairment must not be relied upon for the purposes of comparison’.\textsuperscript{29}

\textbf{B The High Court and the Meaning of Impairment: \textit{IW v City of Perth} \textsuperscript{30}}

The High Court was first invited to consider the meaning and scope of disability in \textit{IW v The City of Perth} a case brought under the \textit{Equal Opportunity Act 1984 (WA)}.\textsuperscript{31} In

\begin{itemize}
\item \textsuperscript{24} \textit{X v McHugh} (1994) 56 IR 248, 258.
\item \textsuperscript{25} Ibid.
\item \textsuperscript{26} \textit{P v Director-General, Department of Education} [1995] 1 QADR 755 (‘P’).
\item \textsuperscript{27} Ibid 778.
\item \textsuperscript{28} Ibid.
\item \textsuperscript{29} Ibid.
\item \textsuperscript{30} \textit{IW v The city of Perth} (1997) 146 ALR 696 (‘IW’).
\item \textsuperscript{31} The relevant protected attribute under the \textit{Equal Opportunity Act 1984 (WA)} is ‘impairment’.
\end{itemize}
that case, the complainant’s contention was that he, and other people with AIDS, had been discriminated against by the City of Perth on the basis of characteristics generally imputed to people with AIDS. The respondent contended that while the notional person with whom the impaired person is to be compared is not impaired, he or she retains the characteristics imputed to the impaired person. Brennan CJ and McHugh, Dawson and Gaudron JJ did not find it necessary to address this issue, rejecting the complainant’s appeal on the grounds that he lacked standing and that the City had not failed to provide a service on the ground of impairment. Toohey,32 Gummow33 and Kirby JJ,34 however, all considered the issue and all concluded that characteristics which, in the words of the relevant legislation, ‘appertain generally, or are generally imputed to persons having the same impairment as the aggrieved person’35 must be ignored for the purpose of the comparison. To do otherwise, would ‘fatally frustrate’36 the objects of anti-discrimination legislation. Thus, Toohey, Gummow and Kirby JJ held that the comparison required for the purpose of identifying ‘less favourable treatment’, and, thus, discrimination, is between a person with the complainant’s impairment but without the characteristics ‘imputed’ to them as a result of their impairment.

In IW the characteristics sought to be separated, and not allowed to be separated, from the impairment were ‘imputed’, rather than actual. It could be argued that the case for not allowing the separation of actual characteristics from the impairment which

32 IW (1997) 146 ALR 696, 719.
33 Ibid 725.
34 Ibid 745-8.
causes them is surely even stronger and consistent with the approach taken by the QADT in \( L \) and \( P \).\(^{37}\) The reading of impairment as including its manifestations – actual or imputed – is clearly consistent with the social model of disability which contends that disability results from the often ill-informed reactions of others to impairment.\(^{38}\) Excluding people with impairments based on untested pre-conceptions about the nature of their impairments exacerbates disability. Similarly, responding to behaviour caused by impairment rather than to the impairment which causes it exacerbates disability. Allowing discriminators to act because of behaviour, without requiring them first to consider its connection with underlying impairment, allows discriminators to avoid strategies which could mitigate disability because they can lawfully adopt the simpler, and often cheaper, course of exclusion.\(^{39}\)

**C The Definition of Disability and the Purvis case**

1 **Purvis: Human Rights and Equal Opportunity Commission**

The behaviour issue was raised for the first time in an education context under the DDA in *Purvis*, and was considered by HREOC,\(^{40}\) the Federal Court,\(^{41}\) the Full Federal Court\(^{42}\) and the High Court.\(^{43}\) Commissioner Innes, of HREOC, found that

---

\(^{37}\) The decision in *IW* was, however, distinguished by the Full Federal Court in *Purvis* as relevant to ‘a different issue in a different statutory setting’: *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237, 246-7 [24].

\(^{38}\) See, for example, Roger Slee, ‘Special education and human rights in Australia: How do we know about disablement, and what does it mean for educators?’ in Felicity Armstrong and Len Barton (eds), *Disability, Human rights and Education: Cross-Cultural Perspectives* (1999) 125.

\(^{39}\) In the context of the *Purvis* legislation, for example, HREOC found that the school system could have done more to accommodate Daniel Hoggan’s impairment, to mitigate the effects of the violence which flowed from it and, thus, to avoid the ‘need’ for him to be excluded. See *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶ 93-117, 75172-5 [6.4]. In the High Court, McHugh and Kirby JJ, in their minority judgment accepted the finding of HREOC on the point. See *Purvis* (2003) 217 CLR 92, 127-8 [106]-[107].

\(^{40}\) *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶ 93-117.

\(^{41}\) *New South Wales (Department of education and Training) v Human Rights and Equal Opportunity Commission and Another* (2001) 186 ALR 69.

the New South Wales Department of Education had discriminated against Daniel Hoggan and awarded him damages in the amount of $25,000. Daniel was a thirteen-year-old boy affected by multiple medical conditions stemming from a brain infection in infancy. Significantly, the evidence was that this infection damaged the frontal lobes of Daniel’s brain, the part of the brain responsible for regulating behaviour. It was not in dispute that Daniel’s difficult behaviour was caused by his medical conditions. The complainant’s argument, therefore, was that Daniel’s disability, within the meaning of the Act, included his behaviour. As such, treatment of Daniel on the ground of his behaviour was, in effect, less favourable treatment of Daniel on the ground of his disability. Commissioner Innes, following the earlier decision of HREOC, *X v McHugh*, accepted this argument:

> To accept the formulation proposed by the respondent (separating Daniel's behaviour somehow from his disability) would mean that no student with behaviours caused by or integrally linked to their disability could be discriminated against because manifestation of the disability is disturbed behaviour which could pose a risk of injuring others. Any action then taken by a school to suspend or exclude such a child because they posed a safety risk would be permissible. This would circumvent the clear legislative intent to make unlawful discrimination against a person because of a disorder, illness or disease that results in disturbed behaviour: *X v McHugh* (supra).

Commissioner Innes highlighted what was to prove to be a significant problem for later courts involved in the *Purvis* litigation, the safety risk posed by Daniel Hoggan’s exclusion. He saw the solution to this problem as lying within the terms of the legislation and suggested that the appropriate course of action for a respondent concerned by a safety risk posed to others by the inclusion of a person with disability

---

44 It should be reiterated that the Disability Discrimination Act 1992 (Cth) (*DDA*) uses the term disability where the *QADA* uses the term impairment. As argued in Chapter 3: Meaning of Disability, above, in the context of current disability theory the term impairment is a more accurate descriptor of the protected attribute. In this Part, however, the term disability is frequently used when the term impairment would be technically more accurate because disability is the term used in the *DDA* and the term used in the analysis of the *DDA* by the courts involved in the *Purvis* dispute.
related problem behaviour was to apply for a special exemption under the *DDA*.\textsuperscript{46} Later courts, however, did not consider the utility of the tribunal granted exemption or dismissed it as inappropriate to the circumstances raised by the *Purvis* case.\textsuperscript{47}

### 2 Purvis: Federal Court of Australia

In the Federal Court, Emmett J authorised a strategy for exclusion based on a manipulation of the terms of the definition of disability in the *DDA*.\textsuperscript{48} He held that behaviour could and should be divorced from underlying impairment because analysis of the grammatical structure of the definition of discrimination indicated that this was the will of Parliament. Emmett J concluded that Commissioner Innes of HREOC had treated Daniel’s disability as falling within the parameters of paragraphs (f) and (g) of the definition:

(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction…

(g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour…\textsuperscript{49}

Emmett J held that the language of each of those paragraphs distinguished disability from its ‘symptoms’ and that it is only the ‘disorder, or malfunction’ (para (f)) or the ‘disorder, illness or disease’ (para (g)) which causes the symptoms, which ‘constitutes’ the disability for the purpose of the *DDA*, and not the symptoms.\textsuperscript{50} Emmett J was of the view that it ‘would have been possible for the Parliament to define disability by reference to symptoms that have a particular cause. For example,
it would have been possible to define disability as “disturbed behaviour that results from a disorder, illness or disease”’. He concluded that it was evidence of the Parliament’s intention that disability did not include its symptoms that the Parliament had not taken such an approach to the definition.

Emmett J also constructed a very technical line of reasoning in criticising HREOC for treating the behaviour of Daniel as ‘necessarily being the manifestation of his disability’. He held that, while Daniel’s behaviour ‘was in fact the result of or caused by his disability, that behaviour is not necessarily caused by or the result of a disability such as the disability of the complainant’. Emmet J’s narrow interpretation of disability allowed him to conclude that that relevant comparator – for the purpose of determining whether Daniel Hoggan had been treated less favourably than a person without his disability would have been in the same circumstances – was a person who exhibited Daniel’s ‘challenging behaviour’, but who did not have Daniel’s ‘disability’:

If such a hypothetical student would not have been suspended and would not have been excluded from the School, it would follow that the Complainant was treated less favourably than such a hypothetical student. However, if such a hypothetical student would have been treated in the same way, there was no discrimination.

The respondent was able to demonstrate that the ‘hypothetical student’ would have been treated in the same manner as Daniel Hoggan, and, therefore, that there had been no discrimination.

51 Ibid 77 [38].
52 Ibid.
53 Ibid 79 [45].
54 Ibid 80 [52].
Emmett J indicated that, ‘The position [with regard to the definition of disability] might have been different in a case where the disability necessarily resulted in the relevant behaviour’. The implication of this difficult line of reasoning appears to be that where the symptom of a disability – such as challenging behaviour, for example – can be caused by something other than disability – such as wilfulness, or boredom, for example – then that symptom can never be regarded as part of the disability for the purpose of attracting the protection of the DDA. It has already been noted that, at the time of the Purvis litigation, the unjustifiable hardship exemption was not available to education authorities once they had enrolled a student with a disability. As such, the Federal Court had no ‘tailor made’ means of rendering Daniel Hoggan’s exclusion lawful. This problem confronted and confounded Emmett J and subsequent courts involved in the matter. While it is obvious that Emmet J was keen to locate a legislative imprimatur for the exclusion of Daniel Hoggan, and his narrow reading of the definition of disability delivered such an imprimatur, his reasoning is clearly inconsistent with the current understanding of impairment as including functional limitations. Moreover, it is potentially offensive to people with impairments in that it implies that there should be no differentiation between their situation and the situation of a person who intentionally or negligently behaves badly. It is also a concern that a narrow reading of disability has the clear potential to erode the protective scope of the DDA. Could an education provider argue that because learning slowly can be caused by factors other than disability – laziness, for example – a person with an intellectual impairment affecting their ability to learn does not have a disability within the meaning of the Act? Could it be argued that because seizures – a form of ‘disturbed

---

55 Ibid 77 [36].
56 See Part V C, Chapter 6: Exemptions.
57 It should be remembered, on this point, that the paragraph of the definition of disability, in DDA s 4, which relates to learning difficulties, paragraph (g), was considered By Emmett J and, subsequently, by
behaviour’ – can be caused by factors other than impairment – blood sugar irregularities, high temperature, drug reactions, shock, physical trauma, for example – a person with epilepsy does not have a disability for the purposes of the Act?

3 **Purvis: Full Court of the Federal Court of Australia**

The Full Federal Court essentially adopted the reasoning of Emmett J on the disability definition and affirmed his decision that there had been no actionable discrimination against Daniel Hoggan:

> In our opinion … Justice Emmett was correct in holding that HREOC had misdirected itself as to the proper construction of s 4 of the Act in regarding the conduct of the complainant which occasioned the actions of those in charge of the school as part of the disability of the complainant. In our opinion, that conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes. The same may be said of subs (f). The other subsections do not involve conduct. 58

The Court also affirmed the decision of Emmett J that the appropriate comparator is a hypothetical person exhibiting Daniel’s behaviour but without his ‘disability’: ‘like conduct is to be assumed in both cases’. 59 The Full Court characterised the approach of HREOC to the comparator question as ‘capricious’ and expressed the view that, even if conduct is separated from the disability which causes it, it is still ‘at least possible that enquiry may show that the complainant was treated more harshly than another exhibiting similar conduct at school, but without disability would have been’. 60 The Court also held that, by contrast, the consequence of the argument that

---

59 Ibid 248 [29].
60 Ibid. See also 249-50 [34].
disability includes conduct would be that a lawful exclusion of a student with a disability would not be possible:

any exclusion from ordinary classes, or special physical or other restraints imposed as a price of attendance at ordinary classes, would be a breach of s 22(a) or (c), as the anti-social behaviour caused by the brain damage would be the cause of the special and detrimental treatment.61

In reaching its decision, the Full Court was not inclined to follow case law referred to on behalf of the appellant, on the basis that there was no decision available which would ‘satisfactorily resolve the issue’.62 The Court distinguished the decision in X v McHugh as ‘it arose in an employment setting under a previous statute and [asserted] the result without setting out any satisfactory comparative analysis such as is required by s 5 or its equivalent’.63 The Court also declined to follow the view expressed by some members of the High Court in IW, that ‘characteristics’ which attach to a disability must be ignored for the purpose of determining the relevant comparator: ‘the dicta of Toohey J and Kirby J’ was ‘directed to a different issue in a different statutory context’.64

The Full Court stated, in reference to the line of cases in which ‘the issue of what constitutes the proper construction called for by discrimination legislation has been much discussed’, that ‘it is difficult not to conclude that some of the reasoning has been affected by a view as to outcome’.65 It could be argued, however, that the reasoning of the Full Court itself in Purvis has been similarly affected.66 The Court

61 Ibid 247 [26].
62 Ibid 246 [24].
63 Ibid.
64 Ibid. See also 248-9 [31]-[33].
65 Ibid 250 [35].
was clearly concerned about safety risk problem first identified by Commissioner Innes in the HREOC decision:

It must be steadily borne in mind that the expulsion of the complainant followed repetitive anti-social and violent conduct towards other students and staff which was plainly unacceptable in a primary [sic] school. It was disturbing to the function of education and threatened the safety of other students and staff. Those responsible for administration of the school owed a duty of care to the other students in the school, the teachers and the teacher’s aides, with potential liability for any breach of that duty (Commonwealth v Introvigne (1981) 150 CLR 258). 67

The Court suggested that if the law were applied so as to recognise a right to inclusion for Daniel Hoggan, and others like him, then staff and students ‘injured’ by this inclusion would be without redress – that is, they could not remove the source of their harm, as ‘the school authorities are hamstrung by the law in adopting normal measures of control’. 68 While the Court implied a very strong policy argument for finding that the exclusion of Daniel Hoggan was not unlawful, ultimately it relied on a dry and technical statutory interpretation argument to deliver what it clearly regarded as the just ‘outcome’. Somewhat ironically, the Court concluded that, rather than deliver a judgment ‘affected by a view as to outcome’, it is preferable to adopt ‘the safest course [which] is to be guided by the ordinary meaning of the words of ss 4 and 5 of the Act as they apply to the facts of this case’. 69

It is, perhaps, a fair assessment of the Full Court decision in Purvis, that a practical distinction is implied for the complainant, between disability caused by society and disability caused by his particular medical condition. The outcome for the complainant is that he has no recognised right to attend the school of his choice. The finding of the Full Court that symptoms are to be separated from the underlying

impairment which causes them effectively means that the inability to attend the school of choice is not on account of the education authority’s response to the complainant’s impairment but on account of the impairment induced behaviour. While Commissioner Innes in the HREOC hearing of Daniel’s case had squarely located the cause of Daniel’s inability to attend the South Grafton High School in the failure of the school to prepare for and to adapt to Daniel’s educational and behaviour management needs, the Full Court located the cause in Daniel’s impairment induced behaviour. While the enquiry in HREOC concentrated not only on the effects of Daniel’s inclusion on others, but also on what it considered the demonstrated failure of the school to adapt to Daniel’s needs, the enquiry in the Full Court concentrated only on what the Court characterised as the ‘draconian consequences’ of the inclusion of Daniel for the school community. Thus, the Full Federal Court did not entertain the possibility that Daniel’s disability, as expressed in his inability to attend his chosen school, could be even partly the result of an inflexible society.

4 Purvis: The High Court of Australia

Six of the seven Justices of the High Court found that the definition of disability did include manifestations of disability and, as such, revealed some sensitivity to disability theory and the concerns of people with disabilities that the cause and effect of disability had not been properly comprehended by lower courts. Callinan J did not decide the point but appeared out of step with the sentiments of the rest of the

70 ibid 247-8 [27].
71 See National Council on Intellectual Disability, ‘Human Rights Legislation Fails People with Disability and their Families: We need a better way of supporting a fair society’ (Press Release, 4 September 2001): allowing the separation of impairment from its manifestations ‘has simply provided institutions set on continuing discriminatory practices with a technical loophole that will make complaints of disability discrimination increasingly difficult’.

234
Court in that he was impressed by the arguments which had succeeded in the Federal Court and Full Federal Court:

Paragraph (g) internally does appear to distinguish between the disorder, illness or disease and the behavioural results of any of them, perhaps indicating thereby that the condition and the behaviour are different and separate, and that the reference to behaviour is adjectival only.\textsuperscript{72}

He was adamant, moreover, that ‘[t]he definition of disability is not to be read as covering criminal or quasi-criminal behaviour’.\textsuperscript{73}

Gleeson CJ found that the definition is wide enough to include manifestations but nevertheless seemed reluctant to make the concession:

It may be accepted, as following from pars (f) and (g) of the definition of disability, that the term "disability" includes functional disorders, such as an incapacity, or a diminished capacity, to control behaviour. And it may also be accepted, as the appellant insists, that the disturbed behaviour of the pupil that resulted from his disorder was an aspect of his disability.\textsuperscript{74}

McHugh and Kirby JJ, however, were unequivocal in their rejection of the Federal Court reading of disability and held that to limit the definition of disability in the manner adopted by the Federal Court and Full Federal Court would undermine the remedial nature of the DDA:

To construe ‘disability’ as including functional difficulties gives effect to the purposes of the Act. Such a construction accords with the Act's beneficial and remedial nature. In this case, the damage to Mr Hoggan's brain is a 'hidden' impairment - it is not externally apparent unless and until it results in a disability. It is his inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person in areas covered by the Act, and gives rise to the potential for adverse treatment. To interpret the definition of ‘disability’ as referring only to the underlying disorder undermines the utility of the discrimination prohibition in the case of hidden impairment.\textsuperscript{75}

\textsuperscript{72} Purvis (2004) 217 CLR 92, 173 [272].
\textsuperscript{73} Ibid 173 [271].
\textsuperscript{74} Ibid 100 [11].
\textsuperscript{75} Ibid 119 [80].
Moreover, McHugh and Kirby JJ appeared convinced that the approach taken to the meaning of disability in the lower courts had been influenced by preconceptions as to the desirable outcome of the case\(^{76}\) and took the opportunity to deliver a terse lecture on the principles of statutory interpretation:

The correct path of judicial interpretation - as always - requires that the Act be applied according to its terms and purposes. If its application in a particular case operates or may seem to operate harshly, it is a matter for the Parliament to correct. And it should not be forgotten that construing the Act narrowly because of the consequences in a particular case may lead to injustices in other cases perceived by the judicial mind as more deserving. In matters of anti-discrimination law generally, and disability law in particular, judicial intuition as to what is "draconian" must be kept in firm check, for sometimes it will be based unconsciously on the very attitudes that the law is designed to correct and redress.\(^{77}\)

Gummow, Heydon and Hayne JJ also found that a narrow reading of disability was not consistent with the nature of disability:

To identify Daniel's disability by reference only to the physiological changes which his illness brought about in his brain would describe his disability incompletely. His disability is a particular type of disorder, a particular kind of malfunction of his brain, a loss of a particular aspect of his mental functions.\(^{78}\)

### III  CONCLUSION: THE RAMIFICATIONS OF THE PURVIS DECISION ON THE MEANING OF DISABILITY

Since the decision of the High Court in *Purvis* it appears that it is now settled law that the definition of disability in the *DDA* is to be read widely to encompass functional limitations and behavioural manifestations caused by underlying impairment. By implication, it appears that the similar definitions of disability and impairment in other Australian anti-discrimination legislation, including the *Anti-Discrimination Act 1991* (Qld) (*QADA*), are also to be read widely. Indeed, the QADT, applying the

\(^{76}\) ‘The learned judges of the Full Court of the Federal Court who heard the case felt driven to adopt the construction they placed on the Act because of what they expressed as an intuitive feeling that reading the Act in the way contended for by the appellant would impose “draconian consequences” on the first respondent’. *Purvis* (2004) 217 CLR 92 129 [134].

\(^{77}\) *Purvis* (2004) 217 CLR 92, 103 [19].

\(^{78}\) Ibid 157 [211].
QADA, has always preferred a wide reading as demonstrated in the early cases of L and P.

Ultimately, however, the ‘generous’ reading of the meaning of disability adopted by six of the seven members of the High Court did not assist Daniel Hoggan and is unlikely to assist future litigants who assert claims of unlawful discrimination because of behaviour caused by impairment. What the High Court gave with one hand it took away with another. The majority of the High Court found that Daniel Hoggan had not been treated less favourably than another student ‘in circumstances that are the same or are not materially different’. The majority authorised consideration of Daniel’s behaviour, even though it was caused by and, indeed, part of, his disability, as a relevant circumstance to be taken into account when determining whether there had been less favourable treatment. Gleeson CJ and Gummow, Heydon, Hayne and Callinan JJ, did not endorse the approach to the comparator issue taken in lower courts and all found that Daniel Hoggan’s comparator for the purpose of determining whether there had been unlawful discrimination was a person with his ‘bad behaviour’ but without his disability. The understanding of the nature of disability displayed by Gleeson CJ and by Gummow, Hayne and Heydon JJ in their construction of the meaning of disability, therefore, did not apply across their handling of all issues in the case and another means of denying a remedy to Daniel Hoggan was engineered from the terms of the legislation. Like the Federal Court, the majority of the High Court was concerned that an education authority could not meet its obligations to ensure the safety of the wider school community if forced to accommodate ‘problem’ students

79 See DDA s 5.
80 See DDA s 5.
with disabilities. Whilst this concern is a legitimate one, and, indeed, demonstrates a preference for majority rights over individual rights which would be respected by communitarian thinkers, it will be seen that the ‘comparator’ solution posited by the High Court is at odds with both disability theory and the objects of anti-discrimination legislation. The foundations and ramifications, both theoretical and practical, of the High Court analysis of the characteristics of the comparator will be considered in detail in the next chapter.

CHAPTER 9

THE COMPARATOR

Several strategies for exclusion have been derived from the terms of the definition of direct discrimination provided in the *Anti-Discrimination Act 1991* (Qld) (*QADA*). Direct discrimination arises ‘if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different’.

This definition, suggests a series of intersecting questions: Who is the appropriate ‘comparator’, the appropriate ‘other person without the attribute’, when determining whether treatment is ‘less favourable’? When will the circumstances of the person without the impairment be ‘materially different’? What is ‘less favourable treatment’? How these questions have been answered by a variety of courts and tribunals has had significant ramifications for the scope of protection available to people with disabilities seeking an inclusion in mainstream schools. The *QADA* also requires that discrimination must be ‘on the basis of’ a protected attribute. Strategies for exclusion have been generated from argument that any ‘less favourable treatment’ of the complainant was not ‘on the basis of’ and thus not caused by the impairment of the complainant. Related arguments about the relevance of motive and intention to a finding of discrimination have also been raised. The cases demonstrate that highly technical arguments about the terms of the legislation have not only defeated individual claims of discrimination, they have also diminished the effectiveness of the legislation as a tool for its intended

---

1 *Anti-Discrimination Act 1991* (Qld) (*QADA*) s 10; c/f *DDA* s 5(1): For the purposes of this Act, a person ( *discriminator*) discriminates against another person ( *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

2 *QADA* s 7; cf *Disability Discrimination Act 1992* (Cth) (*DDA*) s 5(1): ‘on the ground of’.
purpose of social reform. This chapter will consider how courts have constructed the appropriate comparator for the purpose of determining whether a complainant has been treated ‘less favourably’ than that comparator. Chapter 10 will examine causation as an issue relevant to proof of discrimination and Chapter 11 will consider the nature of ‘less favourable treatment’ in the education context.

1 WHO IS THE APPROPRIATE COMPARATOR IN AUSTRALIA?

Complainants and respondents have argued diametrically opposed interpretations of the ‘identity’ of the notional comparator required for the purpose of determining whether the complainant has been treated ‘less favourably’ and, thus, has been a victim of discrimination. The question is particularly poignant in the context of impairments which cause problem behaviours which impact on others. In education cases this problem behaviour might be the impulsiveness of a person with Down’s syndrome, the problems with bowel control and regurgitation of a person with a developmental disorder, or most problematically, the unwilled violence of a person with brain damage. The question is not only poignant but crucial to outcome in these cases. Complainants have argued that the appropriate comparator is a person without the impairment and without the impairment induced behaviour. If the comparison is between the treatment of the person with the problem behaviour and the treatment of a person without it then it is obviously easier to prove ‘less favourable treatment’ because it could only rarely be proved that a person without the behaviour would have been disciplined or excluded in the same manner as the complainant. Respondents have argued that the appropriate comparator is a person without the impairment but

3 P v Director-General, Department of Education [1995] 1 QADR 755 (‘P’).
4 L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207 (‘L’).
with the behaviour. When the behaviour is common to complainant and comparator it is obviously easier to rebut any allegation of discrimination as it could only rarely be proved that the comparator would not have been disciplined or excluded in the same manner as the complainant. The decision of the High Court in *Purvis v State of New South Wales (Department of Education and Training)*\(^6\) appears to have settled the answer to the comparator question: the appropriate comparator is a person without the complainant’s impairment but with the complainant’s behaviour. The stunning ramification of this answer is that it will be difficult for a person with impairment related problem behaviour which affects others in the school environment ever to assert a right to inclusion in a mainstream school.\(^7\) The answer provided by the majority of the Court in *Purvis*, however, was directly at odds with the view taken by the minority, by earlier benches of the High Court, and by assorted anti-discrimination tribunals.\(^8\) Further, the answer suggests a fundamental misconception of the nature of disability which is best understood as encompassing not only any underlying physical impairment but the functional limitations which attach to that impairment.\(^9\) Despite the fact that six of the seven members of the High Court accepted that the *Disability Discrimination Act 1992* (Cth) (*DDA*) definition of disability included behavioural manifestations, the majority judges, Gleeson CJ and Gummow, Hayne and Heydon JJ, with whom Callinan J agreed on the point, manipulated a solution for the respondent school by allowing the teasing out of the behaviour from the disability in a manner at odds with their professed understanding of disability. To allow the unwilled acts of the complainant to be compared with the willed violence of a person without

\(^6\) Ibid.

\(^7\) Further, the reasoning adopted by the majority in *Purvis* on the comparator question has already been applied in several employment cases: See below at Part II B.

\(^8\) See Part II, Chapter 8: The Definition of Impairment.

disability must understandably be offensive to those with disabilities and their supporters.

A The High Court Majority Approach to the Comparator in Purvis

1 Gleeson CJ

In Purvis, Gleeson CJ was, perhaps, most blunt in his analysis of the comparator issue. His approach was clearly informed by his view that if it were required to include the complainant, Daniel Hoggan, the respondent school would be placed in an untenable position whereby it could not reconcile the ‘conflict between its responsibilities towards a child who manifests disturbed behaviour and its responsibilities towards the other children who are in its care, and who may become victims of that behaviour’.10 As explained in earlier chapters, Daniel Hoggan was excluded from his mainstream state high school after repeated incidents of violence against the property and person of others in the school community.11 According to Gleeson CJ, a comparison between the treatment of Daniel and the treatment of a notional person without Daniel’s disability, but with his behaviour, would permit ‘due account to be taken of the first respondent's legal responsibilities towards the general body of pupils’.12 Gleeson CJ also asserted that ‘[i]f the person without the disability is simply a pupil who is never violent, then it is difficult to know what context is given to the requirement that the circumstances be the same’.13

---

13 Ibid.
2 Gummow, Hayne and Heydon JJ

This last comment foreshadowed the more complex approach to the comparator issue taken by Gummow, Hayne and Heydon JJ and accepted by Callinan J. Gummow, Hayne and Heydon JJ, unlike Gleeson CJ, appeared not to reject outright the proposition that the comparator is a person without the disability but with the behaviour. Their solution was to allow the behaviour which is caused by and is part of the disability to be considered as a relevant ‘circumstance’ when comparing the treatment of Daniel Hoggan and the treatment of another without his disability:

It may readily be accepted that the necessary comparison to make is with the treatment of a person without the relevant disability. Section 5(1) makes that plain. It does not follow, however, that the "circumstances" to be considered are to be identified in the way the appellant contended. Indeed, to strip out of those circumstances any and every feature which presents difficulty to a disabled person would truly frustrate the purposes of the Act. Section 5(2) provides that the relevant circumstances are not shown to be materially different by showing that the disabled person has special needs. The appellant's contention, however, went further than that. It sought to refer to a set of circumstances that were wholly hypothetical - circumstances in which no aspect of the disability intrudes. That is not what the Act requires.

This is a new configuration of a ‘circumstances’ argument advanced and dismissed in earlier cases. The argument in those earlier cases was that the fact of the complainant’s impairment, when manifest in challenging behaviour, was enough to render his or her circumstances ‘materially different’ from the circumstances of a person without impairment. The implicit, if not express, corollary of this argument is that the circumstances of the complainant are individualised to the extent that there cannot be a proper comparison made between his or her treatment and the treatment

14 Ibid 175 [273].
15 Ibid 160 [222].
of another. As such there cannot be proof of ‘less favourable treatment’. This argument was rejected by some members of the High Court for the same reason that they rejected the more basic argument that the notional comparator should exhibit the same behaviour as the complainant: it would undermine the purpose of anti-discrimination law in that the circumstances of the person with the impairment and the person without the impairment would always be materially different and thus outside the remedial scope of the legislation. In *IW v City of Perth*, both Justice Kirby\(^\text{17}\) and Justice Toohey, \(^\text{18}\) with whom, ironically in view of his position in *Purvis*, Gummow J agreed on the point, \(^\text{19}\) cited with approval the oft quoted words of Sir Ronald Wilson, President of the HREOC:

> It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.\(^\text{20}\)

The approach of Gummow, Hayne and Heydon JJ in *Purvis* still highlights the ‘circumstances’ of the complainant and comparator as crucial to proof of discrimination. It is different from the circumstances argument in earlier cases, however, in that instead of confining the bad behaviour to the circumstances of the complainant they give it also to the circumstances of the comparator – complainant and comparator have circumstances which are ‘materially the same’ in that both behave badly. The approach of Gummow, Hayne and Heydon JJ, is, in fact, only

\(^{17}\) *IW v City of Perth* (1996) 191 CLR 1, 67.
\(^{18}\) Ibid 33.
\(^{19}\) Ibid 40-1.
linguistically, not essentially, different from the argument adopted by Gleeson CJ that the required comparison should be between the complainant and a person without the complainant’s impairment but with his or her behaviour.

Gummow, Hayne and Heydon JJ stressed that it is the ‘actual’ circumstances of the complainant rather than the ‘hypothetical’ circumstances – ‘defined by excluding all features of the disability’\(^\text{21}\) – of a notional comparator which must be the focus. Gummow, Hayne and Heydon JJ stated that the circumstances ‘include all of the objective features which surround the actual or intended treatment of the disabled person’\(^\text{22}\) and include relevant aspects of the person’s disability: ‘[i]t would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability’.\(^\text{23}\) In *Purvis*, Daniel Hoggan’s ‘violent actions towards teachers and others’\(^\text{24}\) formed part of the circumstances to be taken into account when comparing his treatment with how others without his disability would have been treated.

Gummow, Hayne and Heydon JJ argued that their approach did not distinguish ‘between the cause of a person's disability and the effects or consequences of it’.\(^\text{25}\) It is, they claimed, ‘a construction which embraces the importance of identifying (as part of the relevant circumstances) all the effects and consequences of disability that

\(^{21}\) *Purvis* (2003) 217 CLR 92, 161 [223].  
\(^{22}\) Ibid 161 [224].  
\(^{23}\) Ibid.  
\(^{24}\) Ibid 161 [225].  
\(^{25}\) Ibid 162 [230].
are manifested to the alleged discriminator’.\textsuperscript{26} This language, however, is deceptive – the ‘effects or consequences’ of a disability, the ‘circumstances’, are not identified in order that they may be accommodated, they are identified in order to distinguish people with disabilities from ‘normal’ people and ‘normal’ behaviour and to legitimise their treatment.

There is a different reading of the required comparison here, from that intended by the \textit{DDA}. The \textit{DDA} defines discrimination as occurring when ‘the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability’.\textsuperscript{27} According to the formula of Gummow, Hayne and Heydon JJ, the relevant enquiry is not that stipulated in the Act – whether the complainant is treated ‘less favourably’ – but, rather, ‘how would that person [the ‘discriminator’] treat another in those same circumstances?’\textsuperscript{28} or ‘what would have been done in \textit{those} circumstances if the person concerned was not disabled’.\textsuperscript{29} Their formula implies that there will be no discrimination if the ‘disabled’ complainant who ‘misbehaves’ is treated in the same manner as a ‘person without disability’ who ‘misbehaves’. The ‘effects or consequences’ of the disability – but not the underlying cause – are transferred to a ‘normal’ comparator. The problem with this is that, for the ‘normal’ comparator, these ‘circumstances’ are not inevitable or unwilled or unintended. Further, the ‘misbehaviour’ of the ‘normal person’ is not the result of any failure of a hostile or unaccommodating community to adapt to impairment.

\textsuperscript{26} Ibid.
\textsuperscript{27} \textit{DDA} s 5.
\textsuperscript{28} \textit{Purvis} (2003) 217 CLR 92, 162 [230].
\textsuperscript{29} Ibid 160 [223].
The effect of the approach postulated by the majority in *Purvis* is not that the disability is taken out of the comparison, rather it is the focus of the comparison. While they may claim that ‘[i]t may readily be accepted that the necessary comparison to make is with the treatment of a person without the relevant disability’ the effect of their formula is that the ‘disability’ of the complainant – but not its explanation – is applied to the ‘normal’ comparator as well as to complainant. Because the ‘normal’ person who ‘misbehaves’ would be sanctioned, it is appropriate that the complainant be sanctioned. In that this approach seizes on the protected attribute – which the majority accepts includes its ‘manifestations’ – to justify exclusion of the complainant, it is an approach which promotes rather than precludes the marginalisation of people with disabilities and, as such, an inversion, perhaps, even, a perversion of the scheme of anti-discrimination legislation. Further, it is a denial of the truth that equal treatment may deliver inequality. As acknowledged by McHugh J in the key High Court discrimination case, *Waters v Public Transport Corporation*, ‘discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different’.

---

30 Ibid 160 [222].
31 See *Griggs v Duke Power Co*, 401 US 424 (1971). In *Griggs*, the US Supreme Court first highlighted how apparently ‘equal’ treatment could have a discriminatory effect. In that case a literacy test was applied to all potential employees of the respondent. It was held that the test was unnecessary when applied to unskilled workers and discriminated against African American workers who had not had the same access to educational opportunities as white applicants. The notion that equal treatment may deliver inequality of outcome is enshrined in the indirect discrimination provisions of the Anti-Discrimination Act 1991 (Qld) and the Disability Discrimination Act 1992 (Cth) and of other Australian anti-discrimination legislation. Indirect discrimination is discussed in Chapter 12: Indirect Discrimination. For a theoretical discussion of the difference between ‘equal treatment’ and ‘treatment as equals’ see Ronald Dworkin, *Taking Rights Seriously* (1977) 370.
Gummow, Hayne and Heydon JJ were adamant that their approach ‘does not frustrate the proper operation of the Act’.33 Earlier judges, when addressing the comparator issue, however, were concerned about ‘fatally frustrating’ the ‘purpose’ of the Act.34 It could be argued that the majority in Purvis have delivered an interpretation of DDA s 5 which will not frustrate what they see as the Act’s ‘proper operation’ of ‘protecting’ the public rather than one which will not frustrate the ‘purpose’ of the DDA: ‘to eliminate, as far as possible, discrimination against persons on the ground of disability’, ‘to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community’ and ‘to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community’.35

Gummow, Hayne and Heydon JJ have also, clearly, been influenced by a perceived need to deliver an interpretation of the DDA which allows for ‘a proper intersection between the operation of the Act [DDA] and the operation of State and Federal criminal law’:

Daniel’s actions constituted assaults. It is neither necessary nor appropriate to decide whether he could or would have been held criminally responsible for them. It is enough to recognise that there will be cases where criminal conduct for which the perpetrator would be held criminally responsible could be seen to have occurred as a result of some disorder, illness or disease. It follows that there can be cases in which the perpetrator could be said to suffer a disability within the meaning of the Act.36 It would be a startling result if the Act, on its proper construction, did not permit an employer, educational authority, or other person subject to the Act to require, as a universal rule, that employees and pupils comply with the criminal law.37

34 See above n 20.
35 DDA s 3.
37 Ibid 162 [228].
II **PURVIS APPLIED**

A **Education Cases**

The majority approach in *Purvis* has been followed in a later disability discrimination in education case brought under the *DDA*. In *Tyler v Kesser Torah College* Driver FM, of the Federal Magistrates Court, found that the temporary exclusion of a student with Down’s syndrome, who had, allegedly, thrown an object from a balcony which hit a teacher, was not discriminatory. There were problems with proof of a link between the disability of the complainant and his behaviour with Driver FM noting that ‘while there is clearly evidence that Joseph presented with behavioural difficulties, I have no medical evidence at all that these were a consequence of his Down’s syndrome’. Nevertheless, the decision arguably extends the scope of *Purvis* beyond the context of students proved to be violent to apply to students who simply stand accused of being violent. Although Driver FM refused to find that the complainant had thrown the object or even that he was ‘involved’ in the throwing incident, he found that a comparator without the complainant’s disability but similarly standing accused of throwing would also have been temporarily excluded.

Driver FM, like the majority of the High Court, was impressed by duty of care issues and found that ‘[i]t would have been irresponsible for Rabbi Spielman [the principal] to have taken no action as that would have exposed the College to substantial risk’. The majority approach in *Purvis* has also been applied in an education case beyond the context of the *DDA*. The Victorian Civil and Administrative Tribunal relied on it

---

39 Ibid [105].
40 Ibid.
41 Ibid [107].
42 Ibid.
to defeat a claim of discrimination made under the *Equal Opportunity Act 1995* (Vic) by a student with problem behaviour linked to his disabilities. In *Zygorodimos v State of Victoria, Department of Education and Training* the plaintiff student had been shifted to a different class in response to his behaviour problems and the stress they caused his teacher. He had not exhibited ‘violence’ of the kind complained of in *Purvis* but had nevertheless been ‘difficult’. He had, among other misdemeanours, thrown tantrums, been inattentive, put ‘inappropriate objects’ in his mouth, and run from the classroom. This case demonstrates not only a willingness to apply the majority approach in a less ‘dangerous’ context than that postulated in *Purvis*, but also in the context of state legislation where the availability of other exemptions would have already, perhaps, allowed an ‘out’ to a court keen to authorize the apparently ‘less favourable’ treatment of a ‘problem’ complainant. It is of further interest that the Court refused to consider evidence of other ‘circumstances’ asserted by the complainant to be relevant to his treatment. This evidence may have brought into issue the appropriateness of the school’s response to the complainant’s behaviour:

Before leaving this claim I should add that Mr Gray, counsel for Ben, relied on various matters which he said I should take into account to formulate the proper comparator. These included provisions concerning disciplinary policies of state schools in the Education Regulations 2000, the absence of a provision for the transfer of a child from one class to another in VCD's code of student conduct, and views expressed by some of the witnesses, such as the education expert Professor Branson, about when it would be appropriate to transfer a child for behavioural reasons from one class to another. While this evidence may be appropriate in general terms in dealing with the challenging behaviour of children, the only evidence which, in my view, is relevant to the proper comparator here, is how Dr Pearce would have treated a child other than Ben without epilepsy, but with similar behaviour.

---


Ibid [49].


*Zygorodimos* [2004] VCAT 128 (Unreported, McKenzie DP, 3 February 2004) [100].
In a controversial *Anti-Discrimination Act 1977* (NSW) case, *Chinchen*, the New South Wales Administrative Appeals Tribunal (NSWADT), at first instance, found that several allegations of discrimination on the basis of an undiagnosed and undisclosed learning disability had been proved. Rhys Chinchen was a student who had been assessed as ‘gifted’ but who, nevertheless, was experiencing difficulty completing set tasks at school. The complainant’s case was that Rhys had been treated less favourably in that he had been removed from an ‘extension’ class to a mainstream class as a result of his failure to maintain the standards required for inclusion in the extension class, which in turn, was a result of his learning disorder. It was also alleged that the failure to have Rhys tested in order to determine the reason for his difficulties at school was discriminatory. While raising *Purvis* as a relevant authority and purporting to apply the majority approach in *Purvis* to the comparator, the NSWADT excluded any characteristics related to the disorder – the difficulty with completing school work, for example – from the relevant circumstances to be taken into account. The State appealed but, before hearing, the matter was settled. The parties agreed that the original decision would be set aside, that there had been no unlawful discrimination and that each party would carry its own costs. Upon consenting to the settlement, the Appeal Tribunal noted that the parties had agreed that the Hearing Tribunal had erred in the comparison made for the purpose of determining whether there had been less favourable treatment. It had failed to determine the proper circumstances in which to compare the treatment accorded to Rhys and the treatment accorded to a hypothetical student without motor dyspraxia and thereby failed to determine that Rhys Chinchen was treated less

---


48 *Ibid* [244]-[253].

49 In accordance with the terms of the *Administrative Decisions Tribunal Act 1997* (NSW) s 86.
favourably than another student without motor dyspraxia in the same or similar circumstances…

Although the reasoning is not fully developed in the appeal decision, a proper application of the *Purvis* approach would suggest that the treatment of Rhys should be compared with the treatment of another student without his learning disorder but with his difficulty in keeping up with the tasks in the extension class. If the State can then show that such a comparator would also have been excluded from the extension class and would not have been tested, then there will be no less favourable treatment. Upon this analysis, the *Purvis* approach can again be seen to have significantly eroded the opportunities available to students with impairments. It could be argued, and the hearing Tribunal accepted such an argument, that educators are in a position to recognize the symptoms of a learning disorder such as that displayed by Rhys Chinchen, and, further, may reasonably be expected in such a case to seek expert guidance and intervention so as to minimize any detriment to the learning opportunities of the affected student. Indeed, evidence was presented to the hearing Tribunal that it was acknowledged in NSW Education Department policy documents that ‘government schools have a responsibility to identify their gifted students’ and to be alert to and prepared to intervene in respect of learning disorders which ‘may inhibit the expression of giftedness’.

---

52 Ibid [36].
While the focus of the present study is on discrimination in education, it is interesting to note the potential for the decision in *Purvis* to erode the protective scope of anti-discrimination law in other contexts, and particularly in the protected area of employment. In *Purvis*, McHugh and Kirby JJ warned of the potential of the majority approach to undermine the efficacy of disability discrimination legislation by analysing an example of a disability which ‘manifests itself in ways that society perhaps finds more acceptable than in cases where the disability manifests itself in dangerous conduct’. They cited the example of *Randell v Consolidated Bearing*, which was decided on the basis that manifestations were part of the disability and excluded from the comparator. In that case the plaintiff’s dyslexia manifested as an inability to manage the stock numbering system used by his employer. It was held that to dismiss the plaintiff because of this difficulty was unlawful discrimination on the ground of disability. While it was found in *Randell* that a relatively simple adjustment to the stock management system would have allowed the complainant to continue effectively in his job, since *Purvis* it is arguable that a similar case would be differently decided on the basis that the defendant could, perhaps, demonstrate that an employee without dyslexia but with a difficulty with numbers would have been dismissed. Therefore, the unintended upshot of the majority approach in *Purvis*, it could be argued, is that the pressure to accommodate difference is removed from respondents. It is significant, in this context, that McHugh and Kirby JJ found in *Purvis* that more could have been done to accommodate Daniel and that if he had been properly accommodated his problem behaviour would likely have been mitigated and his expulsion avoided:

---

53 *Purvis* (2003) 217 CLR 92, 144 [168].
To obtain access to the benefits of an education at the High School and to overcome his behavioural problems, Mr Hoggan required accommodation. His disabilities required the educational authority to adjust the DWD Policy to suit his needs, to provide teachers with the skills to deal with his special problems and to obtain the assistance of experts to formulate proposals for overcoming those problems. On the findings of the Commissioner, if that accommodation had been made, it is likely that the educational authority would not have denied the benefits to Mr Hoggan or subjected him to the detriments that it did because it is likely that he would have behaved.55

The warning given by McHugh and Kirby JJ was prescient in that the comparator approach taken by the majority in Purvis has already been applied in a growing number of employment cases.56 In Power v Aboriginal Hostels Limited,57 for example, Selway J of the Federal Court postulated the following blunt approach to the situation of employees with disabilities who are dismissed for absenteeism:

If the employer would treat any employee the same who was absent from work for some weeks (whether or not the employee had a disability or not) then this would not constitute discrimination under the DDA. On the other hand, if the employer terminates the employment of an employee who has a disability (including an imputed disability) in circumstances where the employer would not have done so to an employee who was not suffering a disability then this constitutes discrimination for the purpose of the DDA.58

56 See also the following cases where disability discrimination was found after the majority approach to the comparator issue in Purvis was applied: Nesci v TAFE Commission of NSW (No 2) [2005] NSWADT 183 (Unreported, Judicial Member Britton, Members Weule and Lowe, 8 August 2005); Trindall v NSW Commissioner for Police [2005] FMCA 2 (Unreported, Driver FM, 7 February 2005); Ware v OAMPS Insurance Brokers Ltd [2005] FMCA 664 (Unreported, Driver FM, 29 July 2005).
58 Ibid 259 [8]. In this case, however, it was conceded that the complainant had been dismissed because of his employer’s concerns that his depression would recur rendering him unfit for his duties. See [2] and [4]. The complainant had, in fact, been wrongly diagnosed with depression and this misdiagnosis had been communicated to the respondent by the complainant’s doctor. Selway J accepted that there had been unlawful discrimination against the complainant on the ground of his ‘presumed’ disability in that the respondent did not argue that it would have dismissed an employee without disability who had been absent for a similar period. Selway J seemed bemused by this ‘concession’ of the respondent which, he found ‘seemed to…go considerably further than the evidence required’ [9]. It is likely that the respondent made the concession, however, in order to facilitate its argument that the dismissal on the ground of disability was authorised under the ‘inherent requirements’ exemption. Selway J set aside the earlier decision of the Brown FM that the inherent requirements exemption had been proved [Power v Aboriginal Hostels Limited [2003] FMCA 42 (Unreported, Brown FM, 3 March 2003)] and remitted the matter back to the Federal Magistrates Court for further hearings. Selway J found that a decision of discrimination on the ground of presumed disability was not compatible with a finding that the disability prevented the complainant’s ability to perform the inherent requirements of his job.
The words of Selway J illustrate quite clearly the potential of the comparator approach authorised by the High Court majority to undermine the protective scope of anti-discrimination legislation. It appears from the explanation in *Power* that if an employer would treat everybody ‘badly’, by sacking them for absenteeism, then there can be no discrimination against a person with disability in that they are not treated ‘less favourably’ than those without disability. Further, there is no allowance made in this explanation for the fact that the person with disability may be absent for some legitimate reason associated with his or her disability, while the person without disability may be illegitimately taking a ‘sickie’.

*Forbes v Australian Federal Police*59 illustrates very clearly the erosion of the protective scope of anti-discrimination legislation foreshadowed in the earlier case of *Power*. In *Forbes* the Full Federal Court followed the majority approach in *Purvis* to inform their decision that there was no unlawful discrimination in the decision of the AFP not to re-employ an employee who had been absent from work for an extended period on account of her depressive illness because a person without disability who had been similarly absent, and with a similarly ‘broken’ relationship with her employer, would not have been reemployed:

The difficulty is that the appellant must establish that the AFP treated her less favourably, in circumstances that are the same or are not materially different, than it treated or would have treated a non-disabled person. The approach of the majority in *Purvis* makes it clear that the circumstances attending the treatment of the disabled person must be identified. The question is then what the alleged discriminator would have done in those circumstances if the person concerned was not disabled. Here, the appellant was not reappointed because the history of her dealings with the AFP, including her absence from work for nearly three years, showed that the employment relationship had irrevocably broken down. There is nothing to indicate that in the same circumstances, the AFP would have treated a non-disabled employee more favourably (emphasis in original).60

---

60 Ibid [80]-[81].
In *Fetherston v Peninsula Health*, Heery J of the Federal Court followed the majority approach in *Purvis* and authorised the dismissal of a doctor with deteriorating eyesight. Although much of the analysis in that case rested on the ‘relevant circumstance’ that the complainant, fearing dismissal, had refused to allow an assessment of his eyesight, the Court made the explicit finding that there was no discrimination in the failure of the respondent to supply aids to the complainant which, he had argued, would have allowed him to continue effectively in his role as a doctor:

Any failure by the respondents to provide aids for Dr Fetherston did not contravene the Act. The Act does not impose a legal obligation on employers, or anyone else, to provide aids for disabled persons: *Purvis* at [203] and [218]. The Act does deal with various aids: palliative and therapeutic devices and auxiliary aids (s 7), interpreters, readers and assistants (s 8), and guide dogs, hearing assistance dogs and trained animals (s 9). However, none of those sections mandate the provision of such aids. Rather they provide that there will be discrimination for the purposes of the Act if a person is treated less favourably because of the fact that he or she is accompanied by or possesses such aids. Nor can any of the aids that Dr Fetherston requested be considered as “opportunities for promotion, transfer or training, or … other benefits associated with employment” within the meaning of s 15(2)(b).

This is another alarming elaboration on the majority approach in *Purvis*. It must be questioned, however, whether the Court’s assertion that the DDA does not ‘mandate’ the provision of aids to people with disabilities accounts for the fact that the failure to provide such aids can expose a respondent to a finding of unlawful indirect discrimination. The Full Court of the Federal Court in *Catholic Education v Clarke*

---

62 Ibid [77]-[79].
63 See Chapter 12: Indirect Discrimination. In the recent cases *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [380]-[381] and *Hurst v State of Queensland* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006), for example, Education Queensland was held to have indirectly discriminated against two students with hearing impairments because it failed to provide them with Auslan interpreters to assist in their classroom instruction. A similar finding was made in *Clarke v Catholic Education Office & Anor* [2003] 202 ALR 340 [49].
cautioned against a reading of Purvis and a construction of the DDA as ‘precluding’ any requirement of ‘positive discrimination’.64

It is of further concern that the comparator approach of the majority in Purvis has been imported to another variety of discrimination where ‘manifestations’ of a protected attribute may challenge employers – pregnancy. In Dare v Hurley,65 a Sex Discrimination Act 1984 (Cth) case, the complainant had been dismissed after making a request for leave as a result of her pregnancy. Driver FM, of the Federal Magistrates Court, did find that the complainant had been treated less favourably than a hypothetical comparator who was not pregnant but who had made a similar request for leave. His reasoning, applying the majority approach in Purvis, however, suggests a potential for the lawful dismissal of pregnant women where employees who are not pregnant, but who ‘manifest’ the same demands upon an employer, would be treated in the same ‘unfavourable’ way. The respondent’s case in Dare v Hurley was harmed by evidence that he had produced an employee manual ‘as a guide to the way employees were expected to work and would be treated’66 and which outlined circumstances where leave would be available. Driver FM found that the respondent was a person who ‘placed great store on following procedures’ and that ‘[i]n the circumstances, it is reasonable to expect that the hypothetical comparator would have been treated in accordance with those procedures’.67 It is tempting to speculate, however, on whether a logical extension of the application of the majority approach to the comparator in Purvis to a case such as this, is that an employer, who has no ‘procedures manual’ and who treats everyone unfairly – that is, the kind of employer

---

65 Dare v Hurley [2005] FMCA 844 (Unreported, Driver FM, 12 August 2005).
66 Ibid [112].
67 Ibid.
anti-discrimination legislation would seek to reform – would escape liability under that legislation in that they could, presumably, prove they would unfairly sack not only a ‘pregnant’ employee but also a ‘comparator’ who was not pregnant. As Selway J said in Power when explaining the majority approach to the comparator in Purvis, ‘If the employer would treat any employee the same who was absent from work for some weeks (whether or not the employee had a disability or not) then this would not constitute discrimination under the DDA’.68

The recent decision of the QADT in Edwards v Hillier and Educang69 shows both that the comparator analysis has been applied outside the context of disability discrimination and also that it has been adopted for the purpose of applying the QADA. In Edwards, the complainant was seeking to return to her job as registrar at Forest Lake College on a part time basis following a period of maternity leave. The College would make the job available to her only on a fulltime basis. The QADT found that there had been no direct discrimination in that the College would have refused to employ any person who was not available to work full time:

> Even if a preference for part-time work and a practical inability to work full-time could be regarded as so bound up in the attributes of parental status and family responsibilities as to be part of them, the complainant’s direct discrimination claim would still not succeed because the appropriate comparison is with another person who prefers not to, and practically cannot, meet the respondents’ requirement to work full time, but who is not a parent with family responsibilities. This was the reasoning of the majority in Purvis v New South Wales.70

The complainant was not left without a remedy, however, as Dalton P found that the facts established a case of indirect discrimination: the term imposed on Edwards that she work fulltime, and with which she could not comply because of her family

---

68 See above n 58.
70 Ibid [87].
responsibilities, was not reasonable. The application of the law in this case, suggests, perhaps, that allegations of discrimination may, after Purvis, be more effectively mounted as indirect discrimination cases.71

III THE INTERNATIONAL COMPARATOR

The problem posed by students who display disability related difficult behaviour is not exclusive to Australia. It is instructive to compare how the United States and the United Kingdom have dealt with the ‘comparator’ issue.

A The US Position on Students with Disabilities who ‘Misbehave’

While the position in the United States remains in stark contrast to the position in Australia, recent legislative amendments have eroded the procedural protections available to US students with disabilities who ‘misbehave’. In the United States, the issue of students with disability induced problem behaviour is addressed in the context of the Individuals with Disabilities Education Act (IDEA) which creates a positive right to inclusion for students with disabilities in ‘the least restrictive environment’.72 The ‘normal’ disciplinary procedures available in respect of ‘normal’ students are not considered appropriate for IDEA protected students. Thus, the legislation does not require a comparison to be made between how a student with disability who misbehaves is treated and how a student without disability who misbehaves would be treated. The general rule is that a student with a disability can

71 It is possible to plead direct and indirect discrimination as alternative cases: see, for example, Minns v State of New South Wales [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002).
72 Individuals with Disabilities Education Act 20 USC § 1412(a)(5)(A) (‘IDEA’). Federal financial assistance is available to the states if they comply with IDEA. It was held in by the US Supreme Court that a court called on to assess compliance with the Act must ask two questions: first, whether the state has complied with the procedures set forth in the Act; secondly, whether the individualised education plan (IEP) implemented through he Act’s procedures is reasonably calculated to allow the child to receive educational benefits: Board of Education v Rowley, 458 US 176, 206-7 (1982). IDEA states a preference for mainstreaming ‘special needs’ students whenever possible: IDEA § 1412(5)(A).
be suspended for a maximum of 10 days for discipline code violations.\textsuperscript{73} While a school can seek, via court intervention, to have a student’s placement changed where there is a risk of injury to self or others, a change in placement can only be authorised after an exhaustive process of notices and independent ‘due process’ hearings.\textsuperscript{74} ‘Stay put’ provisions allow many children with disabilities threatened with a change of placement to stay in their current placement until review procedures available under the legislation are exhausted.\textsuperscript{75} A ‘manifestation determination’ hearing, conducted by the school authority, the student’s parent and members of the Individualised Education Plan [IEP] team for the student,\textsuperscript{76} must be scheduled within 10 days of any decision to seek to change the placement of a child because of a discipline code violation.\textsuperscript{77} The hearing will determine whether the behaviour was ‘caused by, or had a direct and substantial relationship to the child’s disability’ or if the conduct was a ‘direct result of the local educational agency’s failure to implement the [child’s] IEP’.\textsuperscript{78} If the behaviour is determined to be a result of either it will be held to be a manifestation of the child’s disability.\textsuperscript{79} The legislative presumption appears to be that behavioural manifestations of disability evidence a deficiency of the student’s placement in not addressing the behaviour, as where the behaviour is determined to be a ‘manifestation’ the general rule is that the student must be allowed to return to school and the onus is on the school to adjust the student’s individual education program to address what can be done to mitigate the causes and effects of the behaviour.\textsuperscript{80} Only if the hearing determines that the behaviour is not a manifestation

\textsuperscript{73} \textit{IDEA} § 1415(k)(1)(B).
\textsuperscript{74} \textit{IDEA} § 1415(i).
\textsuperscript{75} \textit{IDEA} § 1415(j).
\textsuperscript{76} \textit{IDEA} § 1415(k)(1)(E).
\textsuperscript{77} \textit{IDEA} § 1415(k)(1)(E).
\textsuperscript{78} \textit{IDEA} § 1415(k)(1)(E).
\textsuperscript{79} \textit{IDEA} § 1415(k)(1)(F).
\textsuperscript{80} \textit{IDEA} § 1415(k)(1)(F).
of the student’s disability will regular disciplinary procedures be applicable.\textsuperscript{81} A right is retained by the student, however, to ‘receive educational services…so as to enable the child to continue to participate in the general educational curriculum’,\textsuperscript{82} albeit in a different, and, perhaps, ‘more restrictive’ environment. Moreover, and again reflecting an emphasis on institutional accommodation of problem behaviour, \textit{IDEA} mandates an institutional response which may ultimately resolve behaviour problems by providing that students who are removed from their current placement ‘shall…receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur’.\textsuperscript{83}

\textit{Honig v Doe and Smith}\textsuperscript{84} is the only US Supreme Court case directly on point. The case demonstrates an insistence on both due process and parental involvement in the treatment of students with disabilities which is not standard in the Australian context. In \textit{Honig} it was held that the indefinite suspension of two teenaged students whose violence was a manifestation of their impairments, pending the outcome of exclusion proceedings, offended the stay put provisions contained in \textit{IDEA}. Doe was a ‘socially and physically awkward 17 year old who experienced considerable difficulty controlling his impulses and anger’.\textsuperscript{85} He was suspended after he had ‘choked [a] student with sufficient force to leave abrasions on the child’s neck, and kicked out a window while being escorted to the principal’s office afterwards’.\textsuperscript{86} Smith was suspended after a pattern of inappropriate behaviour including ‘stealing, extorting

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} \textit{IDEA} § 1415(k)(1)(C).
\item \textsuperscript{82} \textit{IDEA} § 1415(k)(1)(D)(i).
\item \textsuperscript{83} \textit{IDEA} § 1415(k)(1)(D)(ii).
\item \textsuperscript{84} \textit{Honig v Doe and Smith} 484 US 305 (1988).
\item \textsuperscript{85} Ibid 312.
\item \textsuperscript{86} Ibid 313.
\end{itemize}
\end{footnotesize}
money from fellow students, and making sexual comments to female class mates’. 87
The Court refused to entertain a defence argument that it should recognise a ‘dangerousness’ exception to the stay-put rule and found that Congress had deliberately removed from schools the opportunity to make unilateral decisions to exclude students with disabilities. 88 The Court explained that Congress had enacted the Education of the Handicapped Act (EHA) (now known as IDEA) in order to correct a culture of excluding students with disabilities on account of ‘behavioural problems’:

…Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (1972), and PARC, 343 F. Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. Mills in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labelled four of the seven minor plaintiffs “behavioural problems”, and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F. Supp., at 869-870. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, id., at 868-869, 875, the District Court enjoined future exclusions, suspensions, or expulsions “on grounds of discipline”. Id, at 880. 89

The majority judgment, 90 delivered by Brennan J, emphasised that ‘the Act [EHA] establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate’. 91 The majority held, further, that schools are not without remedy in the case of ‘violent’ students in that that they can utilise disciplinary proceedings mandated by the legislation, including suspension

---

87 Ibid 315.
88 Ibid 323.
89 Ibid 324.
90 The minority dissent delivered by Scalia J, with whom O‘Connor J agreed, did not address the substantive issues of the case but would have dismissed it on the basis that, as the plaintiffs were no longer in school, they were no longer entitled to relief.
91 Ibid 311-12.
for up to 10 days.\textsuperscript{92} It stressed, however, that in the case of ‘a truly dangerous child’\textsuperscript{93} if parents refuse to agree to an alternative placement judicial relief may be sought in the form of an injunction ordering the relocation of the child.\textsuperscript{94}

The case of \textit{Consolidated School District No 93 v John F}\textsuperscript{95} is a ‘garden variety’ example of many more recent cases which illustrate the United States position.\textsuperscript{96} John, a student with Attention Deficit Hyperactivity Disorder (ADHD), was suspended for the last 22 days of the 1992 school year for threatening another student through references to the Columbine School massacre which had occurred three days earlier. The Illinois District Court found that John’s suspension was in violation of \textit{IDEA}, the school having failed to follow the procedural safeguards mandated by that legislation. Holderman J found that the school was in breach of the legislation in that it ‘did not modify [John’s] IEP, discuss ways to address his behavioural problems, or consider ways in which in-school devices and services could address his behaviour problems’.\textsuperscript{97} John was awarded US $22,300 damages in respect of his unlawful suspension.

A suite of amendments to \textit{IDEA} in 2004, in force from July 2005, however, has diminished procedural safeguards for students who display problem behaviour as a result of disability, suggesting, perhaps, that problem behaviour is an ongoing

\textsuperscript{92} Ibid 326.  
\textsuperscript{93} Ibid.  
\textsuperscript{94} Ibid 328.  
\textsuperscript{95} \textit{Community Consolidated School District No 9 v John F}, 33 IDELR ¶ 40 (ND Ill 2000). \textit{IDEA} has been the subject of extensive litigation and has given rise to its own series of case reports: \textit{Individuals with Disabilities Education Law Report} (IDELR).  
\textsuperscript{96} See also, for example, \textit{Colvin v Lowndes County, Mississippi School District}, 147 Educ L Rep 601 (ND Miss 1999); \textit{JC v Regional School District No 10}, 147 Educ L Rep 935 (D Conn 2000); \textit{Farrin v Maine School Administrative District No 59}, 170 Educ L Rep 565 ( D Me 2001).  
\textsuperscript{97} \textit{Community Consolidated School District No 9 v John F}, 33 IDELR ¶ 40 (ND Ill 2000) 12.
challenge for school systems around the world. A particularly sharp erosion of rights has arisen from the fact that the circumstances in which a child can be removed from school, pending the implementation of IDEA hearing procedures, have been enlarged. Before 2004, IDEA had expressly authorized schools unilaterally to remove children to an interim alternative educational setting for up to 45 days for drug and weapon offences, even when the offence was caused by the student’s disability. This was the only circumstance when behaviour caused by disability could result in removal from school without a hearing. Now schools may unilaterally remove children in the additional circumstance that they have ‘inflicted serious bodily injury’, and for a longer period of 45 school, rather than calendar, days. Further, when the matter does go to hearing, the hearing officer is no longer required to consider whether the school made a reasonable effort to minimize the risk of harm through the use, for example, of supplementary aids and services.

B The US Position Compared with the Australian Position

It is tempting to compare the IDEA focus on the school’s responsibility to accommodate, adjust to and mitigate the student’s problem behaviour with the minority approach taken by McHugh and Kirby JJ, in Purvis, to the events culminating in Daniel Hoggan’s expulsion. As noted earlier in the chapter, McHugh and Kirby JJ were of the opinion that more could have been done to accommodate Daniel and that ‘if that accommodation had been made, it is likely that the educational authority would not have denied the benefits to Mr Hoggan or

---

98 IDEA § 1415 (k)(1)(G). Note, however, that during these periods of suspension, and after a change of placement, IDEA requires that the affected student continue to ‘receive educational services…so as to enable the child to continue to participate in the general educational curriculum’ See above nn 82 and 83.

99 See above n 55.
subjected him to the detriments that it did because it is likely that he would have behaved'.

The 2004 amendments undoubtedly bring the US position closer to the Australian position by allowing a wider scope for schools to remove students from their preferred school and by diluting the expectation that schools will proactively reduce the potential for student violence by reacting to and accommodating the disability causes of that violence. Despite the amendments, however, the emphasis on behavioural modification interventions, the opportunity for co-operative decision making between parents and school and the scope for independent and expedited enquiry into threatened sanctions of students with disabilities, aligned with the presumption that an accommodating mainstream placement is the norm, mean greater protection for ‘problem’ students exists in the United States. Further, the US position is clearly more in concert with the communitarian value placed on citizenship and with prevailing disability theory. It is the communitarian view that a person, disabled or otherwise, has a prima facie right to inclusion as a corollary of citizenship. Tam, for example, counsels that citizens vulnerable to discrimination because of disability ‘should have confidence that society as a whole is on their side, and should not be made to feel isolated as troublemakers who refuse to accept their lot’. According to Tam, it is the role of the community to empower people with disabilities to play an

101 See, for example, the manifestation hearing process outlined above. It should also be noted that his or her parents are automatic members of each student’s IEP team [20 USCA § 1414 (d)(1)(B)]. In a recent decision (14 November 2005) of the US Supreme Court, ‘the co-operative process it establishes between parents and schools’ was described as the ‘core’ of IDEA: Schaffer v Weast, 546 US 49 (2005). There is concern, however, that this decision will reduce the remedial effectiveness of IDEA. IDEA is silent on the point of who bears the burden of proof in due process hearings where the appropriateness of the terms of the IEP of a student with a disability is challenged [see 1415 (b)]. In Schaffer it was held by a majority of the US Supreme Court that the burden lies on the party making the challenge – that is, invariably, the student with disability.
active part in the determination of their futures. Further, education institutions, as microcosms of wider society, are expected to model democratic inclusion to the student body. Although communitarians acknowledge that there will be circumstances where the right to inclusion must yield, there is a heavy onus on the community to be tolerant, inclusive and accommodating of difference. Walzer has emphasized that it is ‘crucial’ that schools ‘aim at a pattern of association anticipating that of adult men and women in a democracy’. Moreover, the social theory of disability postulates disability as caused by the failures of mainstream society to accommodate impairment, and like IDEA, starts from the premise that society must adjust to mitigate the ramifications of impairment.

C The Comparator in the United Kingdom

The comparator issue has been the subject of significant litigation in the United Kingdom. The courts there, though, admittedly in the context of a differently worded statute, have reached the opposite conclusion from that of the High Court of Australia: the appropriate comparator is a person without the disability, and without the behaviour, of the person alleging discrimination. This conclusion was reached by the English Court of Appeal in the seminal employment discrimination case, Clark v Novacold, discussed below. Disability discrimination in education cases have followed Clark v Novacold, finding that in the case of the treatment of students like

---

103 Ibid 134.
105 See Part II B, Chapter 3: The Meaning of Disability.
106 The Disability Discrimination Act 1995 (UK). The terms of the legislation as relevant to the comparator issue are discussed, below.
107 Clark v TDG Ltd (t/a Novacold) [1999] 2 All ER 977 (‘Clark v Novacold’). Clark v Novacold is further discussed at Part III D, below.
Daniel Hoggan, who misbehave as a result of their disabilities, the required comparison is with the treatment of students who do not misbehave.

McAuley Catholic High School v C,\textsuperscript{108} the first reported case concerning the application of the \textit{Disability Discrimination Act 1995} (UK) (DDA (UK)) in an education context, concerned the exclusion of a student with autistic spectrum disorder who, after a long history of being bullied, reacted with verbal and physical aggression towards students and staff. The English High Court affirmed the finding of the Special Educational Needs and Disability Tribunal (SENDIST) that the boy’s exclusion amounted to unlawful discrimination and, importing \textit{Clark v Novacold} principles into the education context, held that the required comparison was between his treatment and the treatment of another without his ‘disorderly behaviour’. Unlike the DDA, the DDA (UK) does expressly impose a positive duty on education providers to accommodate students with disabilities.\textsuperscript{109} In McAuley Catholic High School v C, SENDIST identified a failure of the school to provide the necessary personal guidance and support to the plaintiff and ordered the school to produce an action plan to deal with the specific needs of pupils with autistic spectrum disorder and to establish a mentoring system.

In a similar case, \textit{T v Governing Body of OL},\textsuperscript{110} the exclusion of an 8 year old student for behaviour related to her disability, including the biting, hitting and kicking of other students and teachers, was found to be less favourable treatment. In this case however, the High Court affirmed the SENDIST finding that the treatment was

\textsuperscript{108} McAuley Catholic High School v C [2004] 2 All ER 436.
\textsuperscript{109} See Part II A, Chapter 4: Queensland Education Policy, n 8.
\textsuperscript{110} T v Governing Body of OL [2005] All ER 213.
‘justified’. The student’s exclusion, Goudie J said, ‘on any view, at least provided some respite to the school, its pupils and its staff’.\textsuperscript{111} This case illustrates, of course, a significant point of difference between the DDA, as it was enacted at the time of the\textit{Purvis} hearing, and the\textit{DDA (UK)} – the availability of the ‘justification’ defence.\textsuperscript{112} Like the\textit{QADA}, and several other Australian state acts,\textsuperscript{113} the\textit{DDA (UK)} allows, via the justification defence, for a finding of less favourable treatment while acknowledging that, in some situations, that treatment is ‘justified’.\textsuperscript{114} It can be speculated that the existence of this defence allowed the English courts – like the Queensland courts before them – to take a more ‘disability friendly’ approach to the comparator issue, as they could deliver an interpretation of the discrimination provisions consistent with prevailing disability theory and the remedial purpose of anti-discrimination legislation, secure in the knowledge that a defence was available to protect those discriminators who could not avoid harming the complainant without risking harm to others.

\textbf{D Purvis: Distinguishing the UK Approach to the Comparator}

The majority of the High Court in\textit{Purvis}, perhaps for obvious reasons, was reluctant to follow the UK approach to the comparator, highlighting what they claimed to be significant differences in the UK definition of direct discrimination in the\textit{DDA (UK)}.

First, Gummow, Hayne and Heydon JJ claimed that the focus of the\textit{DDA} is on ‘equality of treatment’ and that in this respect it differs from legislation in similarly situated jurisdictions, like the\textit{DDA (UK)}, which specifically obliges reasonable

\textsuperscript{111} Ibid 214.
\textsuperscript{112}\textit{DDA (UK)} s 28B(1)(b): discrimination will only be established if a ‘responsible body’ ‘cannot show that the treatment is justified’. Compare with the ‘unjustifiable hardship’ defence in Australia.
\textsuperscript{113} See Part V, Chapter 6: Exemptions n 67.
\textsuperscript{114} See Part IV, below.
accommodation.\textsuperscript{115} While even the minority in \textit{Purvis} agreed that there is no duty of reasonable accommodation to be implied from the terms of the \textit{DDA}\textsuperscript{116} it is, perhaps, understating the effect of the Act to assert that its principal focus is on ensuring equality of treatment. As noted earlier, the High Court has acknowledged as a fundamental tenet of discrimination that it can arise from the equal treatment of those who are not ‘equal’ as well as from the unequal treatment of equals.\textsuperscript{117} Sackville and Stone JJ, of the Full Federal Court, in their joint judgment in \textit{Clarke},\textsuperscript{118} distanced themselves from the \textit{Purvis} majority’s understanding of the focus of the legislation, warning that the approach in \textit{Purvis} should not be parlayed into an approach which denies any place for ‘positive discrimination’ within the scope of the Act.\textsuperscript{119} Sackville and Stone JJ pointed out that Gummow, Hayne and Heydon JJ, themselves conceded ‘there is considerable room for debate about when apparently “equal” treatment is to be understood as being discriminatory and apparently unequal treatment is not’.\textsuperscript{120} Sackville and Stone JJ implied that, at least in the context of indirect discrimination, the kind of discrimination found to have occurred in \textit{Clarke}, positive discrimination may be required in order to avoid liability:

The reasoning in the joint judgment in \textit{Purvis} does not support the proposition that the appellants appeared to be urging, namely that the \textit{DD Act} should be construed so as to preclude any requirement that an educational authority ‘discriminate positively’ in favour of a disabled person.\textsuperscript{121}

The finding in \textit{Clarke} was that discrimination had arisen through the refusal of the respondent to provide an Auslan interpreter to assist the complainant child in his

\textsuperscript{115} \textit{Disability Discrimination Act 1995} (UK) ss 5 and 6 and ss 28B–28G.
\textsuperscript{116} \textit{Purvis} (2003) 217 CLR 92, 127 [104].
\textsuperscript{117} See above n 32.
\textsuperscript{118} \textit{Catholic Education Office v Clarke} [2004] 138 FCR 121.
\textsuperscript{119} Ibid 140-1 [91]-[93].
\textsuperscript{120} Ibid. See \textit{Purvis} (2003) 217 CLR 92, 156 [207].
\textsuperscript{121} Ibid 141 [93].
secondary school studies. A condition was imposed on the complainant that he receive instruction in English. While he could not comply with this condition, others in his peer group could. The provision of an Auslan interpreter, it can be inferred from the words of Sackville and Stone JJ, would be a variety of ‘positive discrimination’ – Jacob Clarke would be treated differently from his peers, but this different treatment was necessary to avoid a discriminatory outcome.

While Gummow, Hayne and Heydon JJ did not directly address the point, McHugh and Kirby JJ, in Purvis, also pointed out that the failure to take positive steps to accommodate a student with disability can expose an education institution to a finding that they have discriminated against that student. Like the majority in Purvis, they found no obligation to take positive steps, but unlike the majority they acknowledged that the failure to do so may amount to discrimination. McHugh and Kirby JJ provided a more sophisticated analysis of the terms of DDA s 5 in order to inform their conclusion. They focused on the intersection between the contentious phrase in s 5(1), ‘in circumstances which are the same or are not materially different’, and the rider in s 5(2), ‘[f]or the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability’. This rider amounted to acknowledgement that accommodation may need to be delivered to a person with a disability:

No matter how important a particular accommodation may be for a disabled person or disabled persons generally, failure to provide it is not a breach of the Act per se. Rather, s 5(2) has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with and without disabilities. No doubt as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of
discrimination. But that is different from asserting that the Act imposes an obligation
to provide accommodation for the disabled.\textsuperscript{122}

In the context of direct discrimination too, therefore, it is arguably a misconstruction
of the \textit{DDA} to claim its ‘principal focus’ as delivery of ‘equal treatment’. Close
analysis of the terms of the \textit{DDA} (UK) suggests that it requires a comparison which is
not substantially different from that required by the \textit{DDA}. As Gummow, Hayne and
Heydon JJ explained, the \textit{DDA} (UK) requires an enquiry into the \textit{reason} for the
treatment of the complainant and a comparison with the treatment of a person to
whom that \textit{reason} does not apply:

In the 1995 UK Act, for example, the focus is not upon the cases of different \textit{persons}
(one disabled, one not) in the same or not materially different circumstances. As was
pointed out in \textit{Clark v TDG Ltd}, the focus of the 1995 UK Act is much narrower. It
looks only to the \textit{reason} for the treatment of the disabled person and then requires
comparison with the treatment of "others to whom that \textit{reason} does not or would not
apply" (emphasis added). That is, it requires identification of why the disabled person
was treated as he or she was, and then asks would another, to whom that reason did
not apply, have been treated in the same way?\textsuperscript{123}

What Gummow, Hayne and Heydon JJ did not make explicit in their judgment,
however, is that the \textit{reason} for the treatment must be a ‘\textit{reason which relates to the
disabled person’s disability}’. The \textit{DDA} (UK) defines discrimination as follows:

\begin{quote}
(1) For the purposes of this Part, an employer discriminates against a disabled person
if
(a) for a reason which relates to the disabled person's disability, he treats him less
favourably than he treats or would treat others to whom that reason does not or would
not apply; and
(b) he cannot show that the treatment in question is justified.\textsuperscript{124}
\end{quote}

It could be argued that the \textit{DDA} (UK) simply teases out what the High Court of
Australia has acknowledged in its reading of the definition of disability – that

\textsuperscript{122} Purvis (2003) 217 CLR 92, 127 [104].
\textsuperscript{123} Purvis (2003) 217 CLR 92, 158 [215].
\textsuperscript{124} \textit{DDA} (UK) s 5.
disability includes its manifestations. In the UK case Clark v Novacold, for example, the plaintiff, Clark, had suffered a back injury at work and medical evidence was that no firm date for his return to work could be provided. Clark was sacked. The reason for his ‘less favourable treatment’ – his sacking – was his continued absence from work. This reason related to his disability – indeed, it was, to adopt a term familiar in the Australian case law context, a ‘manifestation’ of his disability. The comparison was made with the treatment of someone to whom that reason did not apply – a person who was not absent from work. In Australia, Purvis has settled that ‘disability’ includes its manifestations. On this construction, disability would include the inability to attend work from time to time. Therefore to sack someone because they were absent from work because of their disability, would be to sack them because of their disability.125

Gummow, Hayne and Heydon JJ also did not elaborate on the deliberations of the UK Court of Appeal on the issue of whether the comparator had the reason for the discrimination – the absence – but not the disability, or whether they did not exhibit the reason at all – they were not absent from work. This is the same question that perplexed the High Court in Purvis. Gummow, Hayne and Heydon JJ did quote the following passage from Mummery LJ:

The definition of discrimination in the [1995 UK Act] does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the ‘reason’ for the treatment of the disabled employee and the comparison to be made is with the treatment of ‘others to whom that reason does not or would not apply’. The ‘others’ with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons ‘to whom that reason does not or would not apply’.126

125 It is interesting to compare the approach of the UK Court of Appeal in Clark v Novacold with the approach taken in the Australian employment case Power, discussed above. See, particularly, the quotation from Power, above n 57.
126 Clark v Novacold [1999] 2 All ER 977, 987.
Gummow, Hayne and Heydon JJ seize on this paragraph to support their contention that the *DDA* (UK) authorizes a different kind of enquiry from that authorized by the *DDA* (Cth). The meaning of the quoted paragraph, however, takes on a slightly different gloss when read in context. The preceding paragraph is as follows:

In the historical context of discrimination legislation, it is natural to do what the industrial and the appeal tribunal [the hearing tribunal] (though 'without great confidence') did, namely to interpret the expression 'that reason' so as to achieve a situation in which a comparison is made of the case of the disabled person with that of an able-bodied person and the comparison is such that the relevant circumstances in the one case are the same, or not materially different, in the other case. This might be reasonably considered to be the obvious way of determining whether a disabled person has been treated less favourably than a person who is not disabled.\(^{127}\)

This paragraph suggests that the ‘natural’ conclusion, that the required comparison in *Clark v Novacold* is with a person with the absence from work but without the disability, is wrong. In the paragraph following that quoted by Gummow, Hayne and Heydon JJ, Mummery LJ distinguishes disability discrimination legislation from other legislation which requires comparison of ‘like with like’, specifically sex discrimination legislation and victimization legislation:

This is to be contrasted not only with the different approach in the 1975 and the 1976 Acts, but also with the express requirement of comparison with the treatment of other persons ‘whose circumstances are the same’ stipulated in victimisation cases by s 55(1)(a) of the 1995 Act.\(^{128}\)

Mummery LJ also gave examples from the second reading speech in support of the *DDA* (UK) and from the explanatory notes to the *DDA* (UK) to illustrate the detrimental effects should the legislation be read narrowly to allow the reason for the less favourable treatment to be attributed also to the ‘comparator’.\(^{129}\) In one example, a man with vision impairment is asked to leave a restaurant because he is accompanied by a dog. If the restaurant management could show that it would have

---

\(^{127}\) Ibid.

\(^{128}\) Ibid.

\(^{129}\) Ibid 988-9.
asked another patron without impairment, but accompanied by a dog, to leave the 
restaurant, then it would avoid a finding of discrimination. Mummery LJ pointed out 
that such a finding would be in direct conflict with the statement of the Minister for 
Social Security and Disabled People, in his second reading speech, that the removal of 
a person on account of their guide dog would be a prima facie case of 
discrimination.130 This informed his conclusion, therefore, that the required 
comparison is with a patron without a dog, who, of course, would not be asked to 
leave the restaurant.

It is instructive to examine how this scenario could be dealt with according to the 
comparison formula developed by the majority in Purvis. Their approach, to recap, is 
as follows: first, ‘the circumstances attending the treatment given (or to be given) to 
the disabled person must be identified’;131 secondly, an examination must be made of 
‘what would have been done in those circumstances if the person concerned was not 
disabled’.132 Arguably, the dog, though a corollary of the disability, would be a 
‘circumstance’ which could be attributed also to the comparator and taken into 
account in determination of whether the treatment is less favourable. Such an 
analysis, however, would be baldly inconsistent with provisions in the DDA which 
explicitly protect those who use guide dogs from discrimination regardless of, or 
perhaps because of, the discriminator’s ‘practice to treat less favourably any person 
who possesses, or is accompanied by, a dog or any other animal’.133

Mummery LJ, in Clark v Novacold, alluded, however, to the problems with the 
‘comparator approach’ to determining less favourable treatment when he implied that

130 Ibid.
132 Ibid.
133 DDA s 9.
the definition of discrimination in the *DDA* (UK), focusing on the ‘reason’ for treatment, was purpose built to avoid difficult issues of construction surrounding the issue of the characteristics of the comparator which had tormented the UK courts in relation, particularly, to allegations of pregnancy discrimination:

It would avoid the kind of problems which the English (and Scottish) courts and the tribunals encountered in their futile attempts to find and identify the characteristics of a hypothetical non-pregnant male comparator for a pregnant woman in sex discrimination cases.134

The fact that the Court of Appeal grappled with the meaning of ‘the reason’ in *Clark v Novacold* suggests that the purpose built *DDA* (UK) definition is also flawed, but it is, perhaps, misleading of the majority in *Purvis* to seize on that definition, and its application in *Clark v Novacold*, to justify its interpretation of the comparison required by the *DDA* (Cth).

**IV Conclusion**

While the approach of the majority in *Purvis* to the comparator question is problematic, it must be acknowledged that the opposing view is not unproblematic in the context of the *DDA* as a whole. There is little doubt that the majority judges were influenced in their reading of the provisions relating to the comparator by a desire to construct the Act in a way which would legitimise the expulsion of Daniel Hoggan whom they considered a dangerous presence at the South Grafton High School.135 With the unjustifiable hardship exemption not available to schools after the point of enrolment, there was no sign-posted legislative method of authorising Daniel’s exclusion.136 When the comparator question had arisen in the context of other

---

135 See, for example, above nn 12, 36 and 37.
136 For the current position on the unjustifiable hardship exemption in the *DDA* see Chapter 6: Exemptions, n 90.
legislation, most notably in the *QADA* cases, *L*,\(^{137}\) *P*,\(^{138}\) and *K*,\(^{139}\) tribunals could allow a reading which accorded respect to prevailing disability theory, and, arguably, to the object of the anti-discrimination legislation of protecting against ‘unfair’ discrimination,\(^{140}\) because they could rely on the unjustifiable hardship exemption to legitimise the removal of the problem student.\(^{141}\) In the *QADA* cases there was no pressure on the QADT to separate behaviour from impairment for the purpose of making a comparison, as a more direct route to finding no compensable discrimination was available. The QADT could accommodate the arguments of both complainant and respondent in that they could find both that discrimination had occurred and that it was not unlawful. The Queensland legislation, as interpreted by the QADT, allowed the Tribunal to make at least a ‘show’ of understanding the discrimination suffered by the complainant. This understanding is apparent in the implicit recognition of the difference between unwilled and willed violence, in the decision that the required comparison was between the treatment of the complainant and of a person without the complainant’s impairment or impairment related behaviour, and in the finding that a prima facie case of discrimination had been proved. While it must be conceded that it is doubtful that this ‘show’ delivered any more comfort to the complainants in *L*, *K* and *P*, than the outright denial of discrimination delivered by the High Court to Daniel Hoggan, it can be concluded that the *QADA*, as interpreted by the QADT, allows a more honest weighing of competing considerations than the *DDA* as manipulated by the majority in *Purvis*. While the

\(^{137}\) *L* [1995] 1 QADR 207.


\(^{139}\) *K v N School (No 3)* [1996] 1QADR 620.

\(^{140}\) See *QADA* long title.

\(^{141}\) Similarly, when the question arose under the *DDA* but in the context of the protected area of employment, the HREOC in *X v McHugh* (1994) 56 IR 248 could find that the comparison was to be made with the treatment of a person without the problem behaviour knowing that, in many other similar instances, if not on the present facts, both the unjustifiable hardship exemption (*DDA* s 15(4)(b)) and the inherent requirements exemption (*DDA* s 15(4)(a)) may deliver an opportunity to allow the removal of an employee whose behaviour could not be accommodated.
balancing of competing interests is expressly provided for in the *QADA*, there is little doubt that the majority reading of the required comparison in *Purvis* is simply a less direct method of delivering what the court regarded as a ‘fair’ decision.

Many Australians, alongside the majority of the High Court, may well think that the result in *Purvis* is ‘fair’. Arguably, it is ‘fair’ in terms of communitarian theory that the safety and educational opportunity of the community at South Grafton High School should prevail over any right of Daniel Hoggan to a mainstream education. It is a basic tenet of communitarian philosophy that in a competition between what is good for the community and what is good for the individual citizen, the community prevails. It is a corollary of the principles of mutual obligation and of community interdependence expounded in the Responsive Community Platform, that when the ‘hard cases’ arise, when problems of competing rights and obligations arise, these problems are resolved in the manner which will benefit the wider community rather than the individual because ‘neither human existence nor individual liberty can be sustained for long outside the interdependent and overlapping communities to which we all belong’. While communitarians have not expressly considered a ‘rights clash’ such as that posed by the facts of *Purvis*, it is a logical extension of core communitarian philosophy that where the inclusion of a student with a disability in a mainstream education setting compromises the ability to learn of the majority of students, or compromises the safety of the school community, it may be necessary for the exclusion of that student from the mainstream setting. What may challenge communitarian support for the decision in *Purvis*, however, is the acknowledgement

by McHugh and Kirby JJ that more could have been done to support Daniel Hoggan’s inclusion at South Grafton State High School. It has been argued in an earlier chapter that findings of students with impairment creating ‘risk’ in a mainstream education environment are rendered suspect by evidence that, although admittedly expensive, individualised support of the student would mitigate any risk.\textsuperscript{143}

The method used by the majority of the High Court in \textit{Purvis} to deliver its ‘fair’ result, however, has already proved to be a threat to the effectiveness of anti-discrimination legislation Australia-wide and a threat to the achievement of the desirable aim of social inclusion of people with impairment. Although the \textit{DDA} has been amended to make available the unjustifiable hardship exemption after enrolment in the education context,\textsuperscript{144} although the unjustifiable exemption was, from the introduction of the \textit{DDA}, available in the employment context,\textsuperscript{145} the growing list of cases which have applied the comparator approach of the majority in \textit{Purvis} suggests that significant damage has already been done to the remedial scope of the legislation and to the rights of people with disabilities.

\footnotesize
\textsuperscript{143}See Part V E 3, Chapter 6: Exemptions.
\textsuperscript{144} See above n 136.
\textsuperscript{145} \textit{DDA} s 15(4)(b).
CHAPTER 10

CAUSATION

The requirement that there be causal link between the impairment of a complainant and his or her less favourable treatment has proved fruitful ground for those seeking to resist claims of unlawful discrimination. For the purpose of the Anti-Discrimination Act 1991 (Qld) (QADA) direct discrimination must be ‘on the basis of’ a protected attribute, such as impairment, to be prohibited.\(^1\) The Disability Discrimination Act 1992 (Cth) (DDA) uses slightly different language to describe the requisite causal link. Discrimination ‘on the ground of’ disability must be established.\(^2\) It is explained further in the DDA that discrimination ‘on the ground’ of disability will occur if a person is treated less favourably ‘because of’ of their disability.\(^3\)

Both the QADA and the DDA contemplate the situation where less favourable treatment arises from multiple causes. Under the QADA, where there are ‘2 or more reasons’ for discrimination, it will be ‘on the basis’ of impairment if the complainant’s impairment is a ‘substantial reason for the treatment’.\(^4\) Under the DDA, when ‘an act is done for 2 or more reasons’ and disability is ‘one of the reasons’ it will be taken to be done for ‘that reason’ and any discrimination proved will be considered to be ‘because of’ disability.\(^5\) The DDA states explicitly that there is no requirement that the discriminatory reason be a ‘substantial’ or ‘dominant’

---

\(^1\) Anti-Discrimination Act 1991 (Qld) (QADA), s 7, s 8 and s 10.
\(^2\) Disability Discrimination Act 1992 (Cth) (DDA) s 5(1).
\(^3\) DDA s 5(1).
\(^4\) QADA s 10(4).
\(^5\) DDA s 10.
reason. In summary, therefore, the QADA uses the language ‘on the basis of’ and ‘reason’ to address causation. The DDA uses the terms ‘on the ground of’, ‘because of’ and ‘reason’. It will be seen from the cases on point, however, that little has turned on the different language used to describe the requisite causal link – the focus of the courts, instead, has been on determining the nature of the link itself.

Several strategies for exclusion have been constructed from the requirement that there be a causal link between impairment and treatment. It has been argued, for example, and with some success, that whilst the complainant has clearly suffered a detriment, the plaintiff’s impairment, and not any treatment by the alleged discriminator, ‘caused’ the complainant’s detriment. The cases demonstrate that this argument is usually run in conjunction with the argument that there has been no less favourable treatment by the alleged discriminator.

A more controversial strategy for exclusion, which has recently succeeded before the High Court of Australia in Purvis v New South Wales, is to concede that there has been less favourable treatment of the complainant but to argue that the treatment was not on the basis/ground of impairment or disability but on the basis/ground of something else – notably, the ‘behaviour’ of the complainant and its ramifications for

---

6 DDA s 10.
7 See the discussion in Part II, below.
8 See the discussion in Part I, below.
others in the community. This argument, it will be seen, is a different construction of
the comparator issue discussed in the previous chapter.\(^{11}\)

The decision of the majority of the High Court in *Purvis* was that the exclusion of
Daniel Hoggan was not ‘on the ground’ of his disability but ‘on the ground’ of the
threat his inclusion posed to other members of the school community. This is of
added significance because the reasoning which informed it is likely to revitalise
other, previously less successful, strategies for exclusion which focused on the
motivation behind the treatment. It has been argued, without success, for example,
that there must be a discriminatory ‘intention’ for unlawful discrimination to arise.\(^{12}\)

It has also been argued, with only mixed success, that there was no less favourable
treatment caused by impairment because the alleged discriminator was not aware of
the complainant’s impairment.\(^{13}\)

Another causation-related strategy which may be affected by the decision in *Purvis* is
the strategy of arguing that there were multiple reasons for the treatment of the
complainant but that impairment was not, or, was not a ‘substantial’ reason for the
treatment.\(^{14}\) McHugh and Kirby JJ found in *Purvis* that there were multiple reasons
for the exclusion of Daniel Hoggan including the unlawful reason that he could not
cope with the mainstream school because of his disability.\(^{15}\) After the decision in
*Purvis* it could be expected, perhaps, that complainants may attempt to identify

\(^{11}\) See the discussion in Part II, below.
\(^{12}\) See case analysis in Part III, below.
\(^{13}\) See case analysis in Part IV, below.
\(^{14}\) See Part V, below.
\(^{15}\) *Purvis* (2003) 217 CLR 92, 144 [169].
reasons for their treatment which cannot be so easily separated from their disability in order to found successful claims of discrimination.

I DETRIMENT CAUSED BY IMPAIRMENT ITSELF AND NOT DISCRIMINATION

Australian cases reveal some acceptance of the argument, promoted by both proponents of the medical model of disability and by critics of the social model, that the nature of an impairment itself may cause restriction, that not all social restriction on a person with an impairment can be attributed to the acts and attitudes of others, to ‘discrimination’. Further, the cases suggest that there are some forms of disability which cannot be alleviated by social adjustment. In the following cases, the student complainants have clearly suffered a ‘detriment’ but have been denied a remedy because they have been unable to satisfy the court that the detriment flowed from ‘less favourable treatment’ and not from the exigencies of their impairment.

A Cases Involving a Failure to Meet Course Requirements

The Queensland Anti-Discrimination Tribunal (QADT) case of Brackenreg v Queensland University of Technology concerned a student excluded from the Bachelor of Laws degree course at Queensland University of Technology. The complainant enrolled as an external student in 1993 and was excluded in December 1997, as she was ‘in breach of both the double fail rule and the progression rule’. She reapplied for admission in second semester 1999 but the University declined to readmit her to the course.

---

16 See Part II B, Chapter 3: The Meaning of Disability.
17 Brackenreg [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.1.3(vii)].
Brackenreg had syringomyelia and cervical cancer, and, most significantly for her studies, Attention Deficient Hyperactivity Disorder (ADHD). Brackenreg’s case was that her academic difficulties had flowed from her then undiagnosed ADHD, that the ADHD had since been controlled by medication and that, as such, she should be allowed another opportunity to complete her course. She applied to the QADT for an interim order that the University readmit her pending the outcome of her complaint of discrimination.

President Copelin of the QADT ultimately determined that she did not have the power to make the order sought by Brackenreg, which, in effect, was the equivalent of a mandatory injunction. Nevertheless, in light of the possibility that she might be ‘wrong on the question of jurisdiction’, President Copelin considered the issue of whether there was a serious question to be tried and concluded, ‘I do not find that there is a serious issue to be tried’.

President Copelin conducted what amounted to a hearing of the issue of whether or not Brackenreg had been discriminated against by QUT. She found that Brackenreg’s ‘difficulties with her studies’ were not due to less favourable treatment and that Brackenreg was treated more favourably than other students: ‘the complainant’s disability was taken into account and certain adjustments were made’.

---

18 *QADA* s 144 empowers the QADT to grant interim orders to protect complainants’ interests before the referral of a complaint to the QADT. It was held by the Federal Court in *Carson v Minister for Education for Queensland and others* (1989) EOC ¶ 92-269, a race discrimination case, that the equivalent provision in the *Race Discrimination Act 1975* (Cth) empowered a tribunal to make orders equivalent in effect only to a prohibitory injunction, not to a mandatory injunction.


20 Ibid [4.2.2].

21 Ibid [4.2.2.4].
to circumstances in her personal life, and studying as an external student’. There were, perhaps, ‘multiple causes’ for the complainant’s difficulties but none of them was any ‘less favourable treatment’ of her by QUT:

In this case the evaluation by the respondent of the complainant’s academic performance before and at the time of her exclusion from QUT may have reflected a manifestation of the symptoms of the complainant’s disabilities. However, even when consideration was given to the complainant by the respondent for her disabilities, such as giving her extra time to complete exams, extensions of times in handing in assignments, and by giving her conceded passes on numerous occasions after considering her circumstances, she still demonstrated an inability to satisfactorily complete a law degree to the standard required by the respondent.

The Human Rights and Equal Opportunity Commission (HREOC) case *W v Flinders University of South Australia* also concerned a complaint of discrimination by a student excluded from her university course after failing to meet course requirements. W was studying a teaching degree course and had been diagnosed with a psychiatric disorder, the symptoms of which included ‘depression, short term memory loss, poor concentration, withdrawn and racing thoughts, hypermania, confusion, forgetfulness, thought disorder, and anxiety’. The symptoms were ‘erratic and episodic’ and affected her ability to study. Commissioner McEvoy, like President Copelin in *Brackenreg*, attributed W’s difficulties not to her treatment by the university but to her disability:

… I am satisfied that the complainant’s complaints cannot be sustained under the Act. Her circumstances clearly demonstrate many of the difficulties which persons with disabilities may face but I am satisfied that she was not discriminated against either directly or indirectly by the respondent on the basis of her disability … None of those difficulties resulted from discrimination on the basis of her disability, although they may well have resulted from her disability itself.

---

22 Ibid [4.2.1.3].
23 Ibid [2.2.4(iv)].
25 Ibid [4.1].
26 Ibid.
27 Ibid [7].
The case of Chung v University of Sydney\(^{28}\) again concerned a student with a disability excluded for failure to meet course requirements. Chung, who had been diagnosed with depression, enrolled in a physiotherapy degree course and had completed sixty percent of course requirements at the time of his exclusion. Chung made a complaint of disability discrimination and race discrimination to the Human Rights and Equal Opportunities Commission (HREOC). HREOC dismissed his complaint as lacking in substance and Chung appealed the decision to the Federal Magistrates Court. Driver FM found that there was no evidence to support a claim of either disability or race discrimination. Like President Copelin in Brackenreg and Commissioner McEvoy in W, he found that the respondent in this case also took steps to accommodate Chung:

> It is apparent that Mr Chung suffered difficulties in coping with his university studies almost from the outset. It is also apparent that the university made a substantial effort, in fact a very substantial effort, to attempt to assist him with his studies to enable him to complete his course successfully. Ultimately, after seven years the university felt that it was unable to continue with those efforts and took the decision to exclude Mr Chung.\(^{29}\)

Driver FM went so far as to imply, perhaps, that the complainant’s illness not only caused his failure at university, but also explained his difficulty in accepting the fact that no discrimination could be proved. He implied, too, that an order for summary dismissal was appropriate in the case as a ‘means of protecting’ Chung from the distress of further pursuing the claim of discrimination:

> Mr Chung clearly suffers from a disability, be it an anxiety disability or a depression disability, that continues to this time. He has been unable to accept the appropriateness of the way that he has been dealt with by the university and that has led him to this point…In addition to the general principles that I have referred to in relation to the exercise of the discretion of summary dismissal it seems to me that there are cases where it is in the interests of justice that litigants be given some protection from themselves. It seems to me that this is such a case.\(^{30}\)


\(^{29}\) Ibid [22].

\(^{30}\) Ibid [27].
The summary dismissal, however, did not ‘protect’ Chung from appealing, unsuccessfully, from Driver FM’s decision to the Federal Court or, subsequently, from seeking leave to appeal, unsuccessfully, to the High Court. Spender J of the Federal Court also implied a link between Chung’s depressive anxiety and his inability to accept that ‘justice’ had been done\(^{31}\) and cautioned that ‘[b]road and bald accusations which fly in the face of the material are insufficient to establish discrimination on the ground of disability or on the ground of race’.\(^{32}\) After urging an unrepresented Chung to address the issue of whether the lower courts had erred in law in their decisions, Gaudron and McHugh JJ ultimately refused leave to appeal to the High Court of Australia.\(^{33}\)

In the case of *Reyes-Gonzalez v NSW TAFE Commission*\(^{34}\) fourteen separate allegations of discriminatory treatment by the TAFE College attended by the complainant were dismissed by the NSW Administrative Decisions Tribunal on grounds ranging from a deficiency of evidence, to a failure to prove that he had been treated less favourably than others without his impairment would have been treated in the same circumstances, to a failure to prove that his treatment and not his impairment had caused him detriment. Reyes-Gonzalez had been diagnosed with schizophrenia which resulted in problems with meeting schedules and deadlines, problems

\(^{31}\) *Chung v University of Sydney* [2002] FCA 186 (Unreported, Spender J, 21 November 2002) [28]-[29].

\(^{32}\) Ibid [46].

\(^{33}\) *Chung v University of Sydney* [2002] HCA S87/2002 (Unreported, Gaudron, McHugh JJ, 5 November 2002). It is clear from the text of each of the decisions in this case that Chung was disadvantaged by the fact that he did not have legal representation. See *Chung* [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001) [46]; *Chung v University of Sydney* [2002] FCA 186 (Unreported, Spender J, 21 November 2002) [1]-[5]. Mr Chung had indicated to the Federal Court that he did not want legal representation: *Chung v University of Sydney* [2002] FCA 186 (Unreported, Spender J, 21 November 2002) [4].

\(^{34}\) *Reyes-Gonzalez v NSW TAFE Commission* [2003] NSWADT 22 (Unreported, Ireland J, Members Silva and Strickland, 3 February 2003) (‘Reyes-Gonzalez’). Reyes-Gonzalez also alleged, but failed to prove, instances of race discrimination.
interacting in groups, and, as a result, problems with completing his courses. The clear implication of the decision is that the complainant’s disability was fundamental to his failure at TAFE. Medical evidence which detailed the significant impact of his impairment on the complainant’s ability to complete tertiary studies was persuasive:

His illness, as noted by me and others, would affect his capacity to study at TAFE, this would include working in groups. He may be sensitive or over sensitive to peer assessment, particularly if others are not aware of his disabilities and do not take those disabilities into account. It is likely he will have difficulties from time to time attending classes at 9am and equally he is likely to have problems remaining at school for a full day. Noises such as voices, televisions and radios may cause him to become anxious or paranoid and there are times when his anxiety symptoms may cause him to become anxious or paranoid and there are times when his anxiety symptoms may cause him distress if he feels trapped or confined in a building. I would equally expect him to have problems writing examinations, presenting in front of a class, doing group projects and being peer assessed.35

As in the case of Chung, there was also some suggestion that his disability impacted not only the complainant’s difficulties with completing course requirements but also on his dealings with TAFE in relation to his discrimination claims. One doctor, while accepting the respondent may have breached its duty to the complainant, implied paranoia in the complainant’s dealings with TAFE about the discrimination allegations:

…my overall impression is that Mr Reyes-Gonzalez's history of poor educational attainment and conflict with educational institutions may well be largely as a result of his schizophrenic illness. His capacity to effectively study for and pass courses may well be severely affected by his illness. There is a paranoid tinge to his correspondence and interaction with educational institutions which may also be a reflection of his illness, however such situation does not exclude the scenario that there may have been a lack of appropriate accommodation made for him and his disability. 36

The influence of this evidence can be detected in the Tribunal’s finding in relation to several allegations of discrimination that they illustrate ‘the degree of sensitivity of the Applicant in his perception of circumstances which otherwise are neutral but

35 Ibid [16].
36 Ibid.
which, as a consequence of his disability, he either misunderstands or unduly gives greater emphasis than would a person who did not have his disability’.  

B Cases Involving Mobility Impairment and Access to Education

The HREOC decision in Cowell v A School\textsuperscript{38} also concerns a finding that disability itself, not discrimination, causes detriment. Fleur Cowell, a secondary school student rather than a tertiary student, unlike complainants in the majority of similar cases, alleged both direct and indirect discrimination during the term of her enrolment at ‘A School’. She had been diagnosed with Perthe’s Disease which affected her right hip and, consequently, her mobility. She claimed she was unable to attend some classes because of their location, she was ‘prevented from attending school functions and academically and socially disadvantaged by the actions of the school’.\textsuperscript{39} Commissioner M\textsuperscript{E}Evoy accepted the respondent’s case attributing Fleur’s disadvantage to her disability and not to the actions of her school:

> While the matters of which Fleur complains clearly are consequential upon her disability, it does not necessarily follow that the respondent has treated her less favourably on the ground of her disability. It was because of her disability she was not able to be placed in an upstairs classroom. But it was her disability which created these problems, not the school’s response to her disability.\textsuperscript{40}

Commissioner M\textsuperscript{E}Evoy found, further, that the Cowell family’s own actions had exacerbated Fleur’s problems. The school had offered to change Fleur’s ‘house’ which would have had the consequence of her being able to attend classes at a more accessible location. Mrs Cowell and Fleur rejected this option: ‘Many of the matters complained of follow this decision’, said Commissioner M\textsuperscript{E}Evoy.\textsuperscript{41}

\textsuperscript{37}Ibid [46]. See also [43] and [56].
\textsuperscript{38}Cowell v A School [2000] HREOC No97/168 (Unreported, Commissioner McEvoy, 10 October 2000) (‘Cowell’).\textsuperscript{39}Ibid [1].
\textsuperscript{40}Ibid [5.2.3].
\textsuperscript{41}Ibid [5.2.3].
The case of Sluggett v Flinders University of South Australia, like Cowell, concerned a student with mobility impairment, and also like Cowell, demonstrates that the complainant’s own behaviour may be interpreted by a court or tribunal as contributing to, if not causing, relevant detriment. Sluggett, a social work student at Flinders University, had mobility difficulties due to a childhood infection with polio. Her difficulties increased during the course of her studies because she developed post-polio syndrome. The evidence was that she did not consider herself to be ‘disabled’. Further she did not keep the university administration fully informed of her disability, only complaining after she had been excluded from the degree course as a result of failure to meet course requirements. She made complaints of both discrimination in education and discrimination in access to premises to HREOC. HREOC declined to inquire further into the complaints. Upon review by the President of HREOC this decision was confirmed in relation to the education claims but the access claims were referred for hearing. The access complaint, formulated as a complaint of indirect discrimination, was heard by Commissioner McEvoy in 1996. The complaint related to an alleged requirement that Sluggett ‘attend classes’ in the hilly campus and that she attend work placement premises to which she had been allocated and where she needed to negotiate a spiral staircase. The claim in relation to the university campus failed because it was held that she could comply with the requirement as lifts were available as an alternative means of access. That Sluggett did not know of the existence of the lifts could be traced to her own lack of enquiry and to her failure to put the university on notice about her access difficulties. The claim in relation to the work placement failed because there was found to be no requirement ‘imposed’ on Sluggett that she use the stairs at these premises because she had agreed to the work

---

42 Sluggett v Flinders University of South Australia [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000) (‘Sluggett’).
43 Indirect discrimination is considered in detail in Chapter 12: Indirect Discrimination.
placement. The University argued that had Sluggett refused the placement on the basis of her mobility problems an alternative accessible placement could have been arranged. Upon review by the Federal Court, Drummond J declined to interfere with the decision of HREOC on the basis that he could find no reviewable error. Upon appeal to the Full Federal Court, Drummond J’s decision was affirmed.

This case is interesting for the legal modeling of impairment because, in a sense, Sluggett’s claim ‘fell between two stools’. The detriment she had suffered, the core of her complaint, related to her exclusion from the university because of failure to meet course requirements. Yet the discrimination in education claim was not pursued by HREOC on the basis that ‘it had been adequately dealt with’, presumably by review processes initiated by the university in response to complaint from Sluggett. She failed in her access claim because she had not complained about access during her time at university. She had sought ‘adjustment’ to her disability in the sense of extensions and remarking of papers because of difficulties in attending university. These adjustments had been afforded her, though ultimately they were not enough to allow her to pass her course. In the words of the Full Federal Court: ‘The appellant complained to her lecturers that she was having difficulties. They made some accommodations for her in terms of receipt of late papers and such like, but these were insufficient to resolve her problems’. She did not seek any adjustments to

---

46 The HREOC can decline to inquire into an alleged discriminatory act or practice if ‘where some other remedy has been sought in relation to the subject matter of the complaint – the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with': See Human Rights and Equal Opportunity Act 1986 (Cth) s 32(3)(c)(iii).
47 Sluggett v Flinders University of South Australia [2003] FCAFC 27 (Unreported, Spender, Dowsett, Selway JJ, 5 March 2003) [5].
accommodate her disability in the form of improved physical access to the campus or work placement premises. The evidence suggested that, in fact, her academic problems were caused by her worsening health, rather than by her access problems. The Full Federal Court conceded a potential link between tiredness induced by access difficulties and declining academic performance but found that there was not sufficient evidence to establish the link.48 Further, even had the link been established it would not have upset the finding that there had been no discrimination.49

C Detriment resulting from ‘impairment’ not ‘treatment’: ramifications for the meaning of disability and the protective scope of anti-discrimination legislation

The decisions in cases like Brackenreg, W, Sluggett and Cowell have the effect of casting access to education squarely as the ‘problem’ of the excluded student, rather than as the responsibility of the education system. At first glance, the approach adopted by the tribunals in these cases suggests a ‘medical model’ understanding of disability: disability is the problem of the ‘disabled’ person, and to be solved by medical treatment and management; further, if medicine and technology cannot provide a solution the consequent ‘limitations’ must be stoically borne. It can be argued, however, that Brackenreg and W, and the other ‘university’ cases, suggest a problem with the ‘social model’ of disability which is yet to be satisfactorily addressed by the theorists: it is difficult to explain how the social model accounts for all of the ‘disability’ faced by people with impairments.50 It was found in Brackenreg, W, Chung and Reyes-Gonzalez that, even with appropriate accommodation by the respondent universities, the complainants were unable to pass

48 Ibid [15] and [16].
49 Ibid [16].
50 See Part II B, Chapter 3: The Meaning of Disability.
their respective courses. It is, perhaps, a valid challenge to the social model that, in
the case of some types and some degrees of impairment, no amount of social
adjustment or attitudinal change will deliver equality of opportunity.

It seems this is a particular problem in cases where the relevant impairment is
intellectual or otherwise relates to the ability to learn. At the tertiary level of
education the situation is further complicated by the fact that, to a large extent, the
tertiary sector functions to prepare students for the workforce and there is a legitimate
expectation that if a student is accredited with having passed a course, that student has
met all the requirements of the course. Communitarians have acknowledged that
there is a place for selective courses which may involve the exclusion of those who
cannot meet entrance requirements, as a result, perhaps, of impairment. MacIntyre
concedes that it is appropriate, for example, that one of the major aims of modern
education systems is ‘to fit the young person for some particular role and occupation
in the social system’. Walzer is pragmatically prepared to admit not only that some
students are better suited to a more ‘specialised education’, such as that on offer at
tertiary institutions, but also that the community needs ‘leaders’ and that these leaders
are entitled to a ‘specialised education’ to fit them for their role. Walzer sees such
‘specialised education’ as a legitimate ‘monopoly of the talented’. It is easily
inferred from the comments such as these that tertiary institutions which are charged
with the responsibility of fitting citizens as what Walzer describes as ‘future experts’,

---

51 See also Part I, Chapter 7: An Implied Duty of Reasonable Accommodation.
52 Oliver, one of the first to articulate the social model, acknowledges the validity of this criticism and
concedes that ‘most disabled people’ can cite examples of how their impairment has created
restrictions: Mike Oliver, Understanding Disability: From Theory to Practice (1996) Chapter 3.
55 Ibid 208.
56 Ibid 211.
have a concurrent responsibility to ensure that students are not graduated as ‘future experts’ without meeting the requisite standard.

Perhaps, therefore, at least in the tertiary context, there may be a place in the legislation for a ‘legitimate education requirements’ exemption cast in similar terms to the ‘genuine occupational requirements’ exemption.\(^{57}\) The exemption could operate to authorize the exclusion of those students who cannot meet valid entrance requirements for ‘specialised education’ courses or who, once admitted, cannot meet valid benchmarks of achievement within a course. Since 2001, the *Disability Discrimination Act 1995 (UK) (DDA UK)* has provided for such an exemption.\(^{58}\) Under the *DDA (UK)* it is unlawful to discriminate against a higher education student with a disability by refusing admission\(^{59}\) or by exclusion once admitted.\(^{60}\) ‘Less favourable treatment’ of this nature is ‘justified’ however, when it is for the purpose of the maintenance of academic standards.\(^{61}\) Provided academic standards are genuine indicators of the level of achievement required for the award of a qualification, therefore, people with disabilities who cannot meet the standards may be required to accept that there are aspects of their disability which cannot be eliminated or even mitigated by social adjustment and, as such, that there are educational opportunities and outcomes which are closed to them. It should be stressed, however, that this kind of exemption to the protective scope of anti-discrimination legislation should not be allowed to erode any obligation upon education institutions to make purely administrative accommodations, such as

---

\(^{57}\) See ‘genuine occupational requirements’ *QADA* s 25, ‘inherent requirements of the particular employment’ *DDA* s 15(4)(a).

\(^{58}\) The *Disability Discrimination Act 1995 (UK) (DDA (UK))* was amended in this respect by the *Special Needs and Disability Act 2001 (UK)* ss 26 and 27.

\(^{59}\) *DDA (UK)* s 28R(1).

\(^{60}\) *DDA (UK)* s 28R(3).

\(^{61}\) *DDA (UK)* s 28S(6)(a).
extensions of time for assessment, which may allow students flexibility to meet academic standards.

The problem of how to mesh the expectation of equality of opportunity at the tertiary level and the expectation that tertiary institutions will certify only students who have met course requirements has been addressed, at least at the Federal level, in the *Disability Standards for Education 2005 (Cth)*\(^{62}\) which adopt a similar approach to the *DDA* (UK) to the issue of academic standards. As noted in earlier chapters,\(^ {63}\) the *DDA* provides for the drafting of standards to clarify the obligations of service providers, such as education institutions, in relation to people with disabilities.\(^ {64}\) The effect of standards is that if they are complied with by an institution, that institution will be exempted from the relevant unlawful discrimination provisions of the *DDA*.\(^ {65}\)

The intended effect of the *Standards* has been explained as follows:

> to give students and prospective students with disabilities the right to education and training opportunities on the same basis as students without disabilities. This includes the right to comparable access, services and facilities, and the right to participate in education and training unimpeded by discrimination, including on the basis of stereotyped beliefs about the abilities and choices of students with disabilities.\(^ {66}\)

Most significantly, perhaps, the *Standards* purport to extend the scope of the *DDA* by introducing an obligation upon education authorities to make ‘reasonable adjustment’ to student disabilities.\(^ {67}\) There is recognition in the terms of the *Standards*, however, that there are circumstances where an education provider is ‘entitled to maintain the

---

\(^{62}\) *Disability Standards for Education 2005 (Cth)* (‘*Standards’*). The *Standards* came into force on 17 August 2005.

\(^{63}\) See Part V, Chapter 5: The Impact of the Legislation; Part III, Chapter 7: An Implied Duty of Reasonable Accommodation.

\(^{64}\) *DDA* s 31.

\(^{65}\) *DDA* s 33.

\(^{66}\) *Standards* Guidance Notes [3].

\(^{67}\) Obligations to make reasonable adjustment are found in *Standards* ss 4.2, 5.2, 6.2 and 7.2. See also Part III, Chapter 7: An Implied Duty of Reasonable Accommodation.
academic requirements’ of a course and ‘other requirements or components that are
esential to its nature’ even though this may mean that it will not be available to a
student with a disability.68 The obligation to make reasonable adjustment, therefore,
will not require an education institution to pass a student who cannot meet course
requirements because of his or her disability. The rationale for this ‘exemption’ in the
Standards is that also suggested in Brackenreg and W: ‘a provider may continue to
ensure the integrity of its courses or programs and assessment requirements and
processes, so that those on whom it confers an award can present themselves as
having the appropriate knowledge, experience and expertise implicit in the holding of
that particular award’.69

The Standards attempt to cover the field in terms of the experience of education and
set out the rights of students with disabilities and the concomitant legal obligations,
including the obligation of reasonable adjustment, of education providers in the areas
of enrolment, participation, curriculum development, accreditation and delivery,
student support services and harassment and victimisation.70 As such, it is anticipated
that education institutions will not be able to rely on any entitlement to maintain
academic standards in order to avoid making mechanical rather than intellectual
adjustments to the delivery and assessment of course materials. Flexible assessment
arrangements, the provision of course materials in accessible formats, and, indeed, the
provision of physical access to education facilities, it appears, will all still be
‘reasonably’ expected under the Standards regime. This accords with the scope of the

68 Standards s 3.4 (3).
69 Standards s 3.4 (3) note.
70 See Standards ss 4.2, 5.2, 6.2 and 7.2.
tertiary institution’s obligation to its students as expressed by President Copelin of QADT in Brackenreg:

There is no obligation on the respondent to pass a student just because they have a disability. Their obligation is to reasonably make available such special services or facilities which may be necessary to enable a student with disabilities to undertake studies.71

There is some concern, however, that the academic standards limit on the duty to make reasonable adjustment provided for in the Standards under the DDA goes beyond the context which was relevant in Brackenreg, and, indeed, beyond the context in the DDA (UK), in that it is not limited to the tertiary education sphere. It will be interesting to see whether this ‘entitlement’ to ‘maintain the academic requirements of the course or program’ is raised by education providers in order to justify the exclusion of students with disabilities from, say, some secondary school subjects which are relied on as pre-requisites to entry to tertiary courses or employment. This kind of imposition of ‘academic standards’ would be less likely to meet with the approval of communitarian theorists who, while they see the need for ‘specialisation’ and the special advantage which attaches to it, counsel that it should be delayed until as late as possible in the education process. Walzer, for example, explicitly advises that the early identification of future ‘specialists’ and the ‘tracking’ of them through the education system should be avoided.72 The reasoning behind this is twofold. First, the entitlement of all to citizenship education prevails over the need to develop ‘specialists’ in that ‘if the community that one wants to defend is a democracy … no form of recruitment can precede the “recruitment” of citizens’.73 Secondly, to ‘pick out the future specialists early on’ denies others the ‘chance at

71 Brackenreg [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)].
72 Walzer, above n 54, 211.
73 Ibid.
The communitarian position, then, is that the exclusive process of the education of ‘experts’ is to be delayed until the tertiary level of education by which time there has been maximum exposure for all to ‘common work for a common end’.

II Discrimination Not ‘on the Basis’ of Impairment

One causation related strategy that has demonstrated potential to narrow the scope of any right to an inclusive education for people with disabilities is to argue that admitted less favourable treatment of the complainant was not ‘on the basis’ or ‘on the ground’ of his or her impairment but on the basis or ground of some other, unprotected, attribute. Typically, the argument advanced has been that a complainant was not excluded on the basis of their impairment but on the basis of the difficult behaviour caused by their impairment. This argument is, of course, intimately linked with the argument that the appropriate comparator for the purpose of determining whether the complainant has been treated ‘less favourably’ is a person without the complainant’s impairment but with the complainant’s behaviour. If the manifestations of a disability can be separated from the disability itself for the purpose of constructing the appropriate comparator, then they can also be separated from the disability for the purpose of identifying the ‘ground of’ an alleged discriminator’s treatment of a complainant. If the comparator can be vested with the behaviour of the person with a disability then, presumably, the behaviour of the person with a disability can also amount to the ‘ground of’ his or her treatment.

---

74 Ibid 220.
75 Ibid 206.
76 QADA s 7.
77 DDA s 5(1).
78 See, for example, Purvis (2003) 217 CLR 92. The approach of the High Court to the causation issue is discussed later in this part.
79 See Chapter 9: The Comparator.
the separation of the manifestations of a disability from the disability itself is authorised, either or both of the following arguments may well succeed for a respondent: the comparator would have been treated in exactly the same way as the complainant, thus there is no ‘less favourable treatment’ of the complainant and no unlawful discrimination; or, the treatment of the complainant was on the ground of his or her behaviour and not on the ground of the protected attribute of disability and is therefore not unlawful discrimination.

A The High Court Approach to Causation before Purvis

Before Purvis, where the issue of the causal link required between disability and treatment was most recently canvassed by the High Court, the High Court had been invited to consider the issue in IW v The City of Perth.80 That case involved an impairment discrimination claim arising out of the refusal of the City of Perth to grant a planning approval application for a drop-in centre for people affected by the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS). Some councillors who voted against the application claimed to be concerned about the potential health and safety risks posed for the wider community should the centre be established. The substantive discrimination issues were considered by only two of the justices comprising the Court, Toohey and Kirby JJ. The majority, Brennan CJ and McHugh JJ, Dawson and Gaudron JJ, and Gummow J, found that the case failed for the ‘technical’ reason that there had been no refusal to supply a ‘service’, in the form of consideration of the planning application, to the complainant. Therefore, there had been no discrimination in the ‘protected area’ of goods and services.81 Dawson and Gaudron JJ, and Gummow J, also held that the complainant did not have standing in

80 IW v City of Perth (1996) 191 CLR 1 (‘IW’).
81 Ibid 12-17 (Brennan CJ and McHugh J), 22-4 (Dawson and Gaudron JJ) and 41-5 (Gummow J).
that he was not an ‘aggrieved person’ within the meaning of the relevant act, the
Equal Opportunity Act 1984 (WA).82

Toohey J found for the complainant and did address the causation issue. He cited
with approval83 the approach to causation taken by the House of Lords in R v
Birmingham City Council; Ex parte Equal Opportunities Commission84 and in James
v Eastleigh Borough Council.85 On the assessment of Toohey J, ‘the test to be applied
was objective in the sense that it was necessary to show no more than that “but for”
the prohibited ground, the complainant would have been treated differently’.86 Toohey
J also adopted an analysis of the comparator which would not allow the separation of
the ‘characteristics’ of an impairment from the impairment itself.87 There was
argument in IW that discrimination on the basis of ‘characteristics’ imputed to the
HIV status, such as infectiousness, illegal drug use and homosexuality, was not
discrimination on the ground of HIV status. Toohey J found that ‘there may be
wrongful discrimination against the aggrieved person “on the ground of impairment”
where the ground is not the impairment itself but one or other of these characteristics
[imputed to impairment]’.88

82 Ibid 24-5 (Dawson and Gaudron JJ) and 45-6 (Gummow J).
83 Ibid 32.
84 R v Birmingham City Council; Ex parte Equal Opportunities Commission [1989] AC 1155.
86 IW (1996) 191 CLR 1, 32. Note that in IW and the English cases the statutory phrase interpreted was
‘on the ground of’. Toohey J, however, at 31, was of the opinion that ‘[a]s this matter has progressed
through the courts, it has been accepted that “by reason of” is not materially different from “on the
ground of”’. 
87 IW (1996) 191 CLR 1, 33.
88 Ibid. Compare QADA s 8 which clarifies that for the purposes of that Act, a protected attribute will
include ‘characteristics’ related to or imputed to it. Discrimination on the basis of related or imputed
‘characteristics’ will, therefore, be prima facie unlawful.
Kirby reached similar conclusions to Toohey J on both the causation and comparator points. Like Toohey J, he approved the approach to causation taken by the House of Lords. Kirby J elaborated on the point that the relevant enquiry was objective rather than subjective, quoting from *R v Birmingham City Council*:

> Whatever may have been the intention or motive of the alleged discriminator...such subjective considerations were “not a necessary condition of liability” because it was “perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground [complained of]”.

According to Kirby J, it is sufficient proof that an ‘unlawful reason (or ground)’ is the ground of discrimination if ‘it had a real causative effect in the sense that but for its presence the act complained of would not have occurred’. On the comparator point Kirby J, too, did not allow the separation of the imputed ‘characteristics’ of an impairment from the impairment itself, and emphasized that ‘like must be compared with like’.

### B The Approach to Causation since Purvis

The High Court has recently reviewed causation in the context of the *Purvis* case. At first instance, HREOC resolved the causation issue in a similar fashion to the comparator issue, and consistently with the analyses of Toohey J and Kirby J in *IW* and found that discrimination on the ground of manifestations of a disability amounts to discrimination on the ground of the disability itself. Thus, discrimination against Daniel Hoggan ‘on the ground’ of problem behaviour caused by his disability, amounted to unlawful discrimination against Daniel Hoggan ‘on the ground’ of his

---

89 *IW* (1996) 191 CLR 1, 63-4.
90 *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155, 1194.
91 *IW* (1996) 191 CLR 1, 64.
92 Ibid.
93 Ibid 67.
disability. In the Federal Court, Emmett J suggested that discrimination on the ground of behaviour is not necessarily discrimination on the ground of the disability which, in fact, caused it. He said that, while the position might be different where the disability ‘necessarily resulted in the relevant behaviour’, that was not the present case.

The Full Federal Court also refused to find that ‘to discriminate against a person suffering a mental disorder because of that behaviour which directly results from that disorder is to discriminate against that person because of the mental disorder’. Spender, Gyles and Conti JJ explicitly dismissed the reasoning of Toohey J and Kirby J on point as ‘directed to a different issue in a different statutory setting’. The Full Court was clearly influenced by policy in its treatment of the issue, highlighting the difficulty faced by school administrators if compelled both to tolerate ‘antisocial behaviour’ and to protect other staff and students from that ‘antisocial behaviour’:

The consequence of the argument for the appellant ... is that, once enrolled, any treatment of the student by the school authorities as a result of conduct caused by his disorder which restricted or disadvantaged him compared with the ordinary student would be discrimination in breach of the Act, no matter how necessary to preserve the discipline of the school and safety of staff and students. On this argument, any exclusion from ordinary classes, or special physical or other restraints imposed as the price of attendance at ordinary classes, would be a breach of s 22(2)(a) or (c), as the antisocial behaviour caused by the brain damage would be the cause of the special and detrimental treatment.

---

94 Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117, 75167 [6.2].
95 New South Wales (Department of Education) v Human Rights and Equal Opportunities Commission (2001) 186 ALR 69, 77 [36].
96 Ibid.
98 Ibid 246 [24].
99 Ibid 247 [26].
1 The High Court Approach to Causation in Purvis

In *Purvis*, each of the judgments identified causation as an issue relevant to liability. Callinan J accepted that Daniel’s behaviour was the ‘reason’ for his exclusion but did not advance a view as to the appropriate test for causation.\textsuperscript{100} Gleeson, Hayne and Heydon JJ, similarly, addressed the causation issue only briefly, concentrating their analysis and founding their decision, instead, on the comparator issue. They simply stated, in relation to causation, that the question to be asked is ‘why was the aggrieved person treated as he or she was?’\textsuperscript{101} The point must be made, however, that because of their authorisation of the separation of behaviour from disability, in the *Purvis* case, in their view the legitimate answer to the question ‘why was Daniel Hoggan expelled?’ would have been a ‘lawful’ reason: ‘because of his behaviour’. Thus the approach of Gummow, Hayne and Heydon JJ to causation can be impugned on the same basis as their approach to the comparator – it seizes on the protected attribute (which, they had accepted, included its ‘manifestations’) to justify exclusion of the complainant in a manner offensive to the current understanding of the nature of disability as including ‘functional’ disorders. Further, their approach undermines the stated object of the *DDA* ‘to eliminate, as far as possible, discrimination against persons on the ground of disability’.\textsuperscript{102}

McHugh and Kirby JJ reached a similar conclusion to Gummow, Hayne and Heydon JJ on the nature of the test for causation. They stated that the correct focus is on ‘the “real reason” for the alleged discriminator’s act’.\textsuperscript{103} That McHugh and Kirby JJ equated the ‘reason for’ an act with ‘why’ an act was done is clear from their citing

\begin{thebibliography}{100}
\bibitem{} Ibid 173-4 [267]-[270].
\bibitem{} *Purvis* (2003) 217 CLR 92, 163 [236].
\bibitem{} *DDA* s 3.
\bibitem{} *Purvis* (2003) 217 CLR 92, 144 [166].
\end{thebibliography}
with approval the following words of Lockhart J in *Human Rights and Equal Opportunities Commission v Mount Isa Mines*: ‘The plain words of the legislation ... necessarily render relevant the defendant's reason for doing an act, that is the reason why the defendant treated the complainant less favourably’. McHugh and Kirby JJ retreated from earlier authorities, including the judgment of Kirby J himself in *I W*, which supported the view that the appropriate test is the ‘but for’ test: that is, ‘but for’ the disability the complainant would not have been subjected to less favourable treatment. McHugh and Kirby JJ assigned rather more importance, however, than Gummow, Hayne and Heydon JJ, to the reasoning – expressed and unexpressed, conscious and unconscious – of the alleged discriminator. In fact, they dismissed the ‘but for’ test because it focuses on the ‘consequences for the complainant’ rather than on the ‘mental state of the alleged discriminator’. They were, nevertheless, quick to distinguish between what can be described as ‘motivation’ – ‘the reason for the alleged discriminator’s act’ – and ‘motive’. They stressed that a discriminatory motive is not necessary and emphasised that, upon their view, HREOC correctly found that, on the facts of the *Purvis* case, the express, benign motive behind the expulsion of Daniel Hoggan from South Grafton high – to ‘protect’ students and staff from Daniel’s ‘violent’ outbursts – did not prevent Daniel’s expulsion from being motivated by and, therefore, because of a protected attribute – Daniel’s disability.

---

105 See *Purvis* (2003) 217 CLR 92, 143. McHugh and Kirby JJ cite with approval the following words of Ormiston J in *University of Ballarat v Bridges* [1995] 2 VR 418, 428: ‘[N]otwithstanding that it has been said on many occasions that the Act should be given a broad interpretation, the object of the legislature was to look at the reasoning process behind the decision, conscious and unconscious, at least so far as direct discrimination is concerned’.
106 *Purvis* (2003) 217 CLR 92, 144 [166].
107 Ibid 142-3 [160].
108 Ibid 143-4 [166].
Although McHugh and Kirby JJ essentially agreed with Gummow, Hayne and Heydon JJ that ‘why’ the alleged discriminator acted as he or she did is the relevant causal enquiry, they could reach a different conclusion as to the outcome of the *Purvis* case because of their different reading of the relationship between a disability and its manifestations, a reading consistent with an understanding of disability as including any functional limitations attached to it. According to Kirby and McHugh JJ, the manifestations of a disability are part of a disability for the purpose of the definition of disability,\(^{109}\) for the purpose of the construction of the comparator,\(^{110}\) and for the purpose of determining the ‘reason’ for discrimination.\(^{111}\) If the reason for the discrimination, as in the *Purvis* case, is behaviour caused by the disability, the reason is the disability itself.

2 *Gleeson CJ in Purvis: a More Radical Reading of Causation*

Like Gummow, Hayne and Heydon JJ, Gleeson CJ authorised the separation of behaviour from disability for both the purpose of constructing the appropriate comparator and the purpose of determining the ground of discrimination.\(^{112}\) Like Gummow, Hayne and Heydon JJ, he held that Daniel Hoggan had been excluded on the ground of his behaviour: ‘The expressed and genuine basis of the principal's decision was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people’\(^{113}\).

\(^{109}\) Ibid 118 [73].  
\(^{110}\) Ibid 134 [129].  
\(^{111}\) Ibid 144 [167].  
\(^{112}\) *Purvis* (2003) 217 CLR 92, 102-3, [12]-[13].  
\(^{113}\) Ibid 102 [13].
Gleeson CJ paid lip service to the ‘objects of the Act’ but his judgment goes further than any of the other judgments in *Purvis* in its potential to undermine the operative provisions of the *DDA* and thus their effectiveness in achieving the objects of the *DDA*. Gleeson CJ rejected the ‘but for test’ and referred, instead, to the need to establish the ‘true basis’ of a potentially discriminatory decision, such as the decision to exclude Daniel Hoggan from his mainstream school. While his ‘true basis’ test for causation is superficially similar to that expounded by other members of the Court, upon closer reading Gleeson CJ placed much more emphasis on a subjective enquiry into the thought processes of the alleged discriminator and, particularly, into the express reasons for the treatment offered by the alleged discriminator. It is true that the analyses offered by Gummow, Hayne, Heydon, McHugh and Kirby JJ suggest that there is an element of subjectivity involved in the causation enquiry, to the extent, at least, that the reason for the treatment is a question of fact, and that an ‘objective’ ‘but for’ link between the outcome for the complainant and the actions of the discriminator is not enough to demonstrate discrimination. Gleeson CJ, however, went further in his analysis implying that there is no room, on the particular facts of *Purvis* at least, for any objective analysis of the motivation of the alleged discriminator: ‘There is no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members’. 

The judgment of Gleeson CJ suggested that the explanation offered by the alleged discriminator is simply to be accepted as the reason for his actions. Indeed, Gleeson

---

114 Ibid 102 [14].
115 Ibid 102 [13].
116 Ibid.
117 Ibid 102 [14].
CJ stated that it would be ‘unfair’ to the principal of South Grafton State High School to find a discriminatory ‘basis’ for his decision: ‘It is not incompatible with the legislative scheme to identify the basis of the principal's decision as that which he expressed. On the contrary, to identify the pupil's disability as the basis of the decision would be unfair to the principal and to the first respondent [the State of New South Wales]’. While Gleeson CJ conceded that from the point of view of Daniel Hoggan it may be reasonable to believe that he was expelled ‘because of’ his disability, Gleeson CJ stressed that, as it was the lawfulness of the principal’s actions that was in question, it was his point of view which was relevant to the enquiry.

3 Ramifications of the Approach of Gleeson CJ to Causation

It is interesting to note that the approach of Gleeson CJ to causation has already been followed in another DDA education case. In Tyler v Kesser College a student with Down’s syndrome was suspended after he was accused of throwing, from a balcony, an object which hit a teacher. As noted in the previous chapter, there was no clear evidence of a causal link between the complainant’s disability and the throwing. The lack of this evidence was ultimately of little significance, however, in that Driver FM, on the causation point, simply accepted the reason advanced by the principal of the school as the operative reason for the suspension:

Even if I had such evidence [of a casual link between disability and behaviour], it is clear from the evidence of Rabbi Spielman [the principal], which I accept, that he took his action not because of any concern about a behavioural consequence of Joseph’s disability, but rather because of his concern about the College’s duty of care to its teachers and its students (including Joseph). Rabbi Spielman was seriously

118 Ibid 102-3 [14].
119 Ibid 102 [13].
concerned, after the alleged throwing incident, that the College might breach its duty of care if it did not take immediate action. ¹²²

Allowing an exclusively subjective enquiry into the reasons advanced by the alleged discriminator, however, is potentially dangerous in that it encourages the unscrupulous invention of ‘authorised’ reasons for acting. As such, should the Gleeson CJ reading of causation be allowed to prevail as precedent it would inevitably mean less pressure on institutions and individuals to accommodate people with disabilities. The unscrupulous school administration, for example, could escape liability simply by asserting that it was a student’s ‘truancy’, not his or her impairment, that was the ‘basis’ of a decision to exclude. Upon the analysis of Gleeson CJ there is no need to evaluate, objectively, the reasons advanced for the ‘truancy’, no need, even, to enquire whether the ‘truancy’ was an incidence of the student’s impairment. Further, the unscrupulous school could be encouraged to manufacture a misleading document trail which supported the stated reason for exclusion.

In this context, it is interesting to consider the recent QADT case of *I on behalf of BI v State of Queensland*.¹²³ In *BI*, President Dalton applied an approach similar to that advanced by Gleeson CJ but without acknowledging his decision in *Purvis*.¹²⁴ In *BI*,

¹²² See *Tyler v Kesser Torah College* [2006] FMCA 1 (Unreported, Driver FM, 20 January 2006) [105].


¹²⁴ In an interesting and, arguably, unorthodox, judgment, President Dalton relied, instead, on two other controversial and difficult decisions: the decision of the Queensland Court of Appeal in *JM v QFG & GK* [2001] 1 Qd R 373 that a lesbian had been denied fertility treatment not on the basis of the protected attribute of ‘lawful sexual activity’ but on the basis that she ‘did not comply with the clinic’s definition of infertility’; and the decision of the High Court of Australia in *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 that the complainants had been dismissed not the basis of their ‘gender’ but on the basis of their ‘time of employment’. See Ibid [19]-[22].
the stated reason for a student’s exclusion was ‘poor attendance’. The student had
been unable to attend school because of his illness, schizophrenia, and because of the
side effects associated with the medication used to treat his illness. The principal of
the school, however, said in evidence, ‘I did not take his disability into account in any
way in deciding to cancel his enrolment. I was not made aware that his disability had
caused non-attendance. I considered the fact that he was not attending’. Further,
the principal made no enquiries as to the causes for the absences. He presented
apparently damning records of ‘unexplained’ failures to attend not only classes but
also meetings to discuss his education. The picture created by these records was only
corrected by the subpoenaing by the complainant of phone records to demonstrate that
the school had been notified when BI was too sick to attend school. President Dalton
accepted the stated reason for exclusion and held that there was no unlawful direct
discrimination against BI because his treatment was not on the basis of a protected
attribute:

It is clear on the evidence of both the Principal of the school and the Guidance
Officer that the reason for the cancellation of BI’s enrolment was his non-attendance.
It is not therefore necessary to address other arguments as to the applicability of s 10
of the Act because even if the cancellation of enrolment otherwise amounted to direct
discrimination, it was not “on the basis of an attribute” within the meaning of ss 8
and 10 of the Act.126

126 Ibid [19]. President Dalton was, nevertheless, critical of the school’s handling of BI’s illness,
attendance and exclusion. She ultimately found, at [42], that, although there had been no direct
discrimination, BI had been subjected to indirect discrimination. She held, at [28], that an
unreasonable term was imposed that ‘students’ enrolments would be cancelled if they did not attend
school on a regular basis’. She held, at [37]-[42], that the term was unreasonable not only because of
its ‘drastic consequences’ for BI but also because the school knew in advance of BI’s enrolment that he
would be absent for periods of time as a result of his serious illness and had been kept informed by BI’s
mother of his absences. See [37]-[42]. The approach in this case can be compared with the approach
taken on the comparator point by Dalton P in the employment discrimination case Edwards v Hillier
Comparator.
In a further effort to support his position on the causation issue, in Purvis, Gleeson CJ drew an interesting analogy with the facts and his findings in Modbury Triangle Shopping Centre Pty Ltd v Anzil arguing that ‘questions of causation may be affected by normative considerations arising out of the legal context in which they are to be answered’. In Modbury Triangle, the relevant argument dismissed by Gleeson CJ was that the Shopping Centre proprietors had ‘caused’ the injuries suffered by the plaintiff in that their failure to keep the shopping centre car park well lit at night allowed the plaintiff’s attack by three unidentified persons. In that case, Gleeson CJ held that

[t]he finding on causation adverse to the appellant [Modbury Triangle] can only be justified on the basis of an erroneous view of the nature of the appellant's duties as occupier. On an accurate legal appreciation of those duties, the appellant's omission to leave the lights on might have facilitated the crime, as did its decision to provide a car park, and the first respondent's decision to park there. But it was not a cause of the first respondent's injuries.

In Purvis, Gleeson CJ seems to be using the term ‘normative’ in the sense of what is legally acknowledged as the socially acceptable ‘view’ of the scope of a ‘duty’. The implication is that the correct ‘view’ of the scope of the principal’s duty to ‘protect’ the school community excuses his potentially discriminatory expulsion of Daniel Hoggan. The use of ‘normative’ considerations to interpret anti-discrimination legislation is troubling in that anti-discrimination legislation is designed to change ‘norms’ of human behaviour rather than to reflect them. The ‘norm’, arguably, in respect of treatment of people with disabilities has been to discriminate against them. Anti-discrimination legislation is designed in the short term, to ‘prohibit’ discrimination and, in the long term, to change the attitudes and behaviours which

---

127 Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254.
129 Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254, 269 [37]-[40].
130 See Chapter 3, The Meaning of Disability, Part III.
cause it. It is true that the terms of the anti-discrimination legislation concede that some discrimination is inevitable. The DDA, for example, seeks to prevent discrimination only as far as is ‘practicable’ or ‘possible’. But the limit on practicability or possibility is surely not set at the level of the current ‘norm’ for treatment of people with disabilities. ‘Norms’ are, arguably, not even acknowledged at the level of exemptions and defences. Case law demonstrates that respondents must prove unreasonableness or hardship beyond the level of mere discomfort or inconvenience, rather than a forced departure from ‘norms’ of behaviour to escape liability.

The problem that so troubled Gleeson CJ – the uncomfortable intersection of duties in tort and of obligations arising out of anti-discrimination legislation – is one which is not addressed with sufficient clarity in the DDA. Communitarians would concede that there must be a legislative regime which allows due attention to be paid to the burden placed on the majority by the inclusion of a ‘problem’ minority. The Responsive Community Platform, for example, rationalizes the preference for majority ‘rights’ over minority ‘rights’ on the basis that individual rights and freedoms are best protected in a strong community: ‘neither human existence nor individual liberty can be sustained for long outside the interdependent and overlapping communities to which we all belong…The exclusive pursuit of private interest erodes the network of social environments on which we all depend and is destructive to our shared experiment in democratic self-government’. Despite the ‘problem’ created by the

---


132 DDA s 3.

inclusion of Daniel Hoggan, and despite any ‘benefit’ which may be proved to flow to the wider school community from his exclusion, it is dangerous to allow such obvious policy considerations, which would be better addressed in the context of exemption or defence provisions, to erode the effectiveness of the operative provisions of the legislation.

III THE RELEVANCE OF A ‘DISCRIMINATORY MOTIVE’ OR ‘INTENTION TO DISCRIMINATE’

In some cases, where there is an admitted ‘discriminatory motive’ or ‘intention to discriminate’ against a person on the ground of their impairment, discrimination is admitted and liability is resisted on some other basis. In K v N School,134 for example, it was conceded not only that discrimination occurred but that it was deliberately engineered.135 K, an 11 year old at the time of hearing, had attended N School from the age of eight, from the beginning of 1993. N School decided to exclude K and three other ‘special needs’ students from the start of 1996 because of the cost of providing for their ‘special needs’. N school was clearly motivated in its treatment of K by financial considerations. Funding provided to the school to accommodate K was not considered sufficient. Further, the school ‘feared’ they would lose other students because of K’s enrolment.136 Three parents gave evidence via affidavit that they ‘may’ have removed their children if K were allowed to remain at the school. The school, therefore, anticipated a compounded financial imposition –

134 K v N School (No 3) [1996] 1 QADR 620 (‘K’).
135 The issue in this case was whether an exemption on the basis of section 44 QADA ‘unjustifiable hardship’ was available.
if K returned not only would it have to provide for her but it would risk losing enrolments and, thus, income from fees.\textsuperscript{137}

While an intention to discriminate may be identified in cases like \textit{K}, a significant causation issue is whether it is, indeed, necessary to prove such an intention in order to prove discrimination. In some education discrimination cases, it has been argued that the motive informing the actions of the respondent was not to discriminate against the complainant but to ‘do them a favour’ and that, in the absence of an intention to discriminate, there could be no discrimination. In \textit{L}, for example, it was argued that the motive behind the planned relocation of the complainant to a special school was to benefit her by providing her with an environment better suited to her educational needs. The fact that there was no intention to discriminate, however, did not prevent a finding of a prima facie case of discrimination.

\textbf{A The Relevance of Intention before Purvis}

Until \textit{Purvis}, the generally accepted position was that it was not necessary to prove a motive to discriminate in order to prove unlawful impairment discrimination. Indeed the \textit{QADA} states explicitly, in relation to direct discrimination, that the ‘person’s motive for discriminating is irrelevant’.\textsuperscript{138} To require an intention to discriminate for proof of direct discrimination would also be inconsistent with the scheme of anti-discrimination legislation in that indirect discrimination is, invariably, also prohibited. Indirect discrimination provisions address the usually unintended and unanticipated

\textsuperscript{137} It is interesting that in \textit{K} the complainant was able to lead evidence that the impact of K’s enrolment ‘cut both ways’. One parent, a volunteer worker with K, gave evidence that she had decided to terminate her child’s enrolment at ‘N’ School ‘because of what she perceive[d] as its negative attitude towards K and the case before the Tribunal’: \textit{K} [1996] 1 QADR 620, 624.

\textsuperscript{138} \textit{QADA} s 10(3). The \textit{DDA} is silent on the point.
discriminatory effects which are ‘hidden’ in the conditions imposed upon participation in mainstream society. The QADA provides in respect of proof of indirect discrimination that ‘[i]t is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination’.  

In Australian Iron and Steel Pty Ltd v Banovic,140 Deane and Gaudron JJ accepted that the reasons identified by the alleged discriminator as motivating his or her acts may mask the true basis for them and cited with approval the words of Lord Goff in R v Birmingham City Council that:

The intention or motive of the defendant to discriminate…is not a necessary condition to liability as it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the grounds of sex.141

In Waters v Public Transport Corporation, an impairment discrimination case arising out of access restrictions on public transport in Melbourne, Mason CJ and Gaudron J held as follows:

It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations. 142

Banovic was, admittedly, an indirect sex discrimination case arising out of the Anti-Discrimination Act 1977 (NSW) and Waters was, admittedly, an indirect discrimination case arising out of the Equal Opportunity Act 1984 (Vic). But in X v

---

139 QADA s 11(3).
140 Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165, 176.
141 R v Birmingham City Council; Ex parte Equal Opportunities Commission [1989] AC 1155, 1193-4 (Lord Goff).
McHugh,\textsuperscript{143} an early disability discrimination in employment case, the view of Mason CJ and Gaudron J in Waters as to the irrelevance of motive and intention was ‘respectfully adopted’ by President Wilson of HREOC as ‘wholly applicable’ to the context of a direct discrimination case arising under the DDA.\textsuperscript{144}

\textbf{B The Relevance of Intention since Purvis}

The debate as to the relevance of ‘motive’ and ‘intention’ was revived in Purvis as an aspect of the larger issue of the appropriate test for causation. The argument for the State was that the motive behind the exclusion of Daniel Hoggan was not to discriminate against him but to protect ‘the safety and welfare of other students and staff at the school and Mr Hoggan himself’\textsuperscript{145} and that, as such, there had been no discrimination ‘on the ground of’ disability. The counter argument was that even where the motive or intention of the alleged discriminator was ‘benign’ the ‘criteria employed for a decision may be inherently discriminatory’.\textsuperscript{146} Callinan J did not address the issue. Although Gleeson CJ did not address the relevance of intention and motive explicitly, it can be inferred from his emphasis on the ‘expressed and genuine’ basis of the principal’s action as amounting to the ‘true basis’ of his action that he does regard intention and motive as relevant to causation.\textsuperscript{147} Gummow, Hayne and Heydon JJ dealt only briefly with the issue, conceding that motive and intention may be relevant to the determination of the ‘central question’ of ‘why’ a potentially discriminatory act was taken but doubting ‘that distinctions between motive, purpose

\textsuperscript{143} Xv McHugh, Auditor General for Tasmania (1994) 56 IR 248 (‘X’). This case is further considered in Part IV, below. It is worth noting that Wilson P accepted his position on HREOC after retiring from the bench of the High Court of Australia.

\textsuperscript{144} Ibid 256.

\textsuperscript{145} Purvis (2003) 217 CLR 92, 139 [147] (McHugh and Kirby JJ).

\textsuperscript{146} Ibid.

\textsuperscript{147} Ibid 102 [13].
or effect will greatly assist the resolution of any problem about whether treatment
occurred or was proposed ‘because of’ disability’.148

McHugh and Kirby JJ were critical of the failure to distinguish between the meaning
and effect of the words ‘intention’ and ‘motive’. Their judgment suggests that
intention is relevant to the question ‘why’ an act was taken and thus relevant to
causation. This is a separate issue, however, from the issue of whether the actor
intended to discriminate or had a discriminatory motive. McHugh and Kirby JJ found
that while it was causally necessary to determine ‘why’ the principal had excluded
Daniel Hoggan, motive was not relevant to proof of discrimination against him. They
did not see motive as inextricably linked to the enquiry into ‘why’ the alleged
discriminator had acted: ‘…while it is necessary to consider the reason why the
discriminator acted as he or she did, it is not necessary for the discriminator to have
acted with a discriminatory motive’.149 This position on motive was, they claimed,
consistent with the current position in the United Kingdom150 and the position taken
by other courts in Australia.151

The view that it is not necessary to prove a discriminatory motive or an intention to
discriminate is clearly the better view in terms of consistency with the general scheme
of anti-discrimination legislation which recognises both directly discriminatory acts
and social conditions which conceal discriminatory consequences. This view is

148 Ibid 163 [236].
149 Ibid 142 [160].
preferable too in terms of consistency with the nature of disability as a social construct which grows as much from thoughtless acts as from intentional acts of discrimination. To insist that a discriminatory motive must be identified as a prerequisite to liability would simply drive discriminators further ‘underground’, protected from the consequences of their actions by layers of sanitised, neutral reasons for acting. As Goff LJ argued so convincingly in *R v Birmingham*, if motive were relevant to liability then an unscrupulous employer could discriminate against female employers with impunity, rationalising that ‘he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy’.152

### IV IS KNOWLEDGE OF AN IMPAIRMENT A PREREQUISITE TO DISCRIMINATION ON THE BASIS OF THAT IMPAIRMENT?

The case of *Sluggett*, discussed above, illustrates that dire consequences may follow for a student who chooses not to reveal an impairment to the administration of the education institution attended. In that case, the HREOC found that it was Sluggett’s own failure to enquire about alternative access and not the university respondent’s failure to identify alternative access which caused her detriment. While many students are understandably reluctant to identify themselves as ‘impaired’, fearing not only the stigma which, historically, has attached to that status, but also, ironically, a discriminatory response, if they do not reveal the impairment in sufficient detail to allow an education institution to respond to it then it becomes difficult for them to allege discrimination in any failure to accommodate. It is interesting to note that, perhaps as a result of cases such as *Sluggett*, it is current practice for many education

---

152 *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155, 1193-4 (Goff LJ).
institutions, at least at the tertiary level, to encourage disclosure of impairment upon enrolment and to provide the opportunity to do so on enrolment forms, so that equity officers can be notified of that impairment and plan, with the student, appropriate accommodation strategies.\(^{153}\) Such a ‘risk management’ strategy, discreetly managed, it is to be hoped, may improve levels of inclusion for students with impairment. It is also interesting to note that the UK legislature has protected its tertiary institutions from claims by students who have not disclosed their disability by providing that there can be no discrimination on the basis of disability by providing that in the higher education context, when the higher education institution ‘did not know, and could not reasonably have been expected to know, that [a student] was disabled’.\(^{154}\)

In the \textit{QADA}, it is explicitly provided in relation to indirect discrimination that ‘it is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination’.\(^{155}\) While there is no express equivalent provision in relation to direct discrimination, early discrimination cases suggested that there was little doubt that in that situation, too, there need not be awareness that the discriminator’s actions are discriminatory. In \textit{X v McHugh} it was held, for example, that a person’s actions can be directly discriminatory and on the basis of impairment even if that person is not aware of the impairment.

\(^{153}\) See, for example, the University of Queensland, \textit{Do I have to disclose my disability at enrolment?} <http://www.sss.uq.edu.au/index.html?page=22729&pid=1208> at 27 November 2006. Queensland University of Technology encourages ‘[s]tudents with disabilities who may require support services…to disclose their needs at the earliest opportunity’: Queensland University of Technology, \textit{Guide for students with a disability 2005} <http://www.equity.qut.edu.au/programs/forstudents/disability_services/disabgd_2005/part_1.jsp#applying> at 20 November 2006.

\(^{154}\) \textit{DDA} (UK) s 28(4).

\(^{155}\) \textit{QADA} s 11(3). There is no equivalent provision in the \textit{DDA}. 

317
In X the complainant, who had been diagnosed with schizophrenia, was dismissed from his employment because of his ‘lack of interpersonal skills’ and ‘failure to exercise “reasonable judgment” in the conduct of [his] work’. The employer did not know, at the time of X’s dismissal, that he was impaired. The behaviours of X relied upon by the employer as justifying the dismissal were, however, direct manifestations of his illness. The hearing commissioner, Sir Ronald Wilson, president of HREOC, noted the poignancy of the situation, highlighting both the unfortunate consequences for the complainant of the stigma associated with mental illness and the unfortunate consequences for the respondent ignorant of the complainant’s condition:

On the one hand, there is the complainant: caught in the grip of a cruel illness, the effect of which was to interfere with his appreciation of the reality of its impact upon him and whose attitude to it was coloured by the arcane, prejudiced attitude of a society that will not face the reality of mental illness, an attitude which rendered him incapable of acknowledging or divulging its existence. On the other hand, there is the respondent and his officers, denied the knowledge that they might reasonably have been expected to be given, knowledge which could have led them to treat the complainant with greater understanding and without discrimination.

President Wilson was clear in his conclusion, however, that ‘[i]t is not necessary that an employer know of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability’. This finding on the knowledge point is, of course, simply a corollary of his finding that it is not allowable to separate the manifestations of an impairment from the impairment

---

156 X v McHugh (1994) 56 IR 248, 257. It should be noted in this context that the respondent also sought to rely on the exemption to discrimination found in DDA s 15(4), the ‘inherent requirements’ exemption. The respondent argued that the matters identified as the basis for the complainant’s sacking were ‘inherent requirements’ of his job as an auditor and that, as such, he could be dismissed for failing to meet these inherent requirements. President Wilson dismissed this argument, at 258-9, finding that the complainant had not been given a ‘fair chance’ to demonstrate his capacity to carry out the inherent requirements of his job.
157 Ibid 256.
158 Ibid 257.
itself, and of the related finding that discrimination on the ground of ‘manifestations’
of disability is discrimination on the ground of the disability itself:

There is a remarkable correspondence between the problems associated with the
complainant’s work performance and the symptoms of the disability… I find that the
respondents’ evaluation of the complainant’s work performance between May –
November 1992, namely lack of interpersonal skills, failure to exercise reasonable
judgment and refusal to accept counselling reflected a manifestation of the symptoms
of the complainant’s illness. Dismissal, therefore, discriminated against the
complainant on the ground of his disability. 159

It is interesting, however, that the reasoning in X was not followed by the Victorian
Equal Opportunity Tribunal (Victorian EOT) in the disability discrimination in
education case, Lynch v Sacred Heart College and Others.160 In that case, the
complainant, a student at the respondent college, asserted that she suffered from a
temporary psychological impairment resulting from a sexual assault. The
psychological impairment was allegedly manifest in behaviours at school which
caused the respondent to exclude the complainant. The Victorian EOT granted an
application under s 44C of the Equal Opportunity Act 1984 (Vic) to strike out the
claim of discrimination on the ground of impairment.161 The Victorian EOT granted
the application on the basis that ‘there was nothing from which it could conclude that
the respondents’ actions were substantially based on the complainant’s
impairment’.162 Note that under the Equal Opportunity Act 1984 (Vic) there was a
requirement that a protected attribute be a ‘substantial’ reason for discrimination
before it will be held that discrimination occurred ‘on the basis’ of that protected
attribute.163

159 Ibid 258.
161 There is not directly equivalent section of the QADA which allows the respondent to apply for a
complaint to be struck out.
The Victorian EOT decided that ‘at the time of the alleged acts of discrimination, there was nothing to indicate that the respondents were aware that the complainant may have been suffering from an impairment [and] … there was nothing to indicate that a reasonable person in the respondent’s position ought to have been aware of that impairment’. For the reason of this lack of ‘awareness’ the Victorian EOT held ‘there was nothing from which the conclusion could be drawn that the respondent’s actions were substantially based on the complainant’s impairment’. The Victorian EOT expressed the view that ‘it was the complainant’s behavioural problems that prompted the school to refuse to re-enrol the complainant’. That is, the complainant’s exclusion was ‘on the basis’ of her behaviour and not of her impairment.

The Victorian EOT applied in this case a requirement of actual or constructive knowledge of the impairment by the respondent before discrimination could be considered caused by the impairment. It is submitted, however, that such a requirement was not supported by the wording of the Equal Opportunity Act 1982 (Vic). Nor was it supported by precedent – the decision in Lynch is clearly inconsistent with the decision in X. While X was not a ‘binding precedent’ on the EOT it was, nevertheless, a clearly reasoned and persuasive decision delivered by a retired member of the High Court of Australia. It perhaps explains the decision in Lynch that the complainant was represented by her mother while the school was represented by counsel. Indeed there is no indication from the report that the decision in X was even considered by the Tribunal.

165 Ibid.
166 Ibid.
In the QADT case *Brackenreg*, discussed above, the QADT appeared tempted to find that a lack of knowledge of impairment excused potentially discriminatory behaviour. The complainant in that case suffered from multiple disabilities including Attention Deficient Hyperactivity Disorder (ADHD) of which the respondent university was unaware at the time of an alleged discriminatory act. President Copelin of the QADT acknowledged *X* as persuasive precedent but nevertheless seemed close to declining to follow it in making the following statement: ‘at the time of her exclusion in December 1997, the respondent was not aware of the complainant having ADHD. Her exclusion was based on her academic record which was not unreasonable’.167 The Tribunal avoided a conclusion on the point, however, by finding that no ‘less favourable treatment’ had occurred ‘on the basis’ of the complainant’s ADHD and that she had been treated fairly by the university:

> A detailed explanation of the ADHD diagnosis appears only to have been made known to QUT during the course of this hearing … In spite of QUT not being fully appraised of her medical condition, I find it did conduct a fair reassessment of her capacity during the readmission and appeal process.168

The issue of whether it is possible to discriminate on the basis of an undisclosed disability was raised again more recently in the context of a *DDA* case, *Tate v Rafin*.169 Tate was expelled from the Wollongong Cricket Club after an altercation with two other members. Wilcox J, of the Federal Court, was roundly critical of the behaviour of the club executive and accepted that they had inflamed the situation and triggered the discrimination claim through their ‘handling’ of the dispute.170 He found, however, that while Tate had been treated badly, there had been no actionable

---

167 *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.1.3(b)].
168 Ibid 4.2.2.4(a)(vi).
169 *Tate v Rafin* [2000] FCA 1582.
170 Ibid [43]-[50].
discrimination against him. Tate had argued that he was expelled from the club because of his severe physical impairments. Wilcox J, however, found that his expulsion was because of his behaviour towards the other club members. Tate argued, further, that expulsion on the basis of his behaviour was discriminatory because his behaviour was an aspect of the Post Traumatic Stress Disorder which he developed as a result of his service during the Vietnam War. Wilcox J determined that, as the club was unaware of Tate’s psychiatric condition, they could not have treated him less favourably because of it:

…there is no evidence that any member of the committee realised that Mr Tate had a psychological disability…Mr Tate does not claim to have disclosed to the club that he suffered any psychological disability. That being so, it seems impossible to say the club discriminated against Mr Tate on the ground of his psychological disability (emphasis in original).172

Like Lynch, however, this is another case involving a self represented complainant. Like Lynch, there is no indication that Wilcox J was asked to consider the reasoning in X. Indeed, Wilcox J made a number of controversial assertions about the application of discrimination law without backing those assertions with precedent. It is particularly significant that he adopted a comparator without Tate’s behaviour without acknowledging that this was, at that time, a departure from the accepted precedent:

The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability (emphasis in original).173

---

171 Ibid [70].
172 Ibid [65].
173 Ibid [67]. This construction of the comparator by Wilcox J is particularly interesting in that in The Commonwealth v Human Rights Commission (1993) 46 FCR 191, 209 he reiterated the now well known words of the then President of the HREOC, Sir Ronald Wilson, delivered in his decision at first instance in the same case: ‘It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could
Further, Wilcox J raised and dismissed, without identifying it as such, the ‘but for’ test for discrimination:

It may be said…"yes, but a person without a psychological disability would not have behaved in this way, so effectively Mr Tate was excluded from the club and its facilities because of his psychological disability". I accept that may be true, but I do not think that circumstance would bring the case within the purview of the *Disability Discrimination Act*. The focus of that legislation is on the conduct of the alleged discriminator; not the effect on the alleged discriminate (emphasis in original).174

Again, at the time that *Tate v Rafin* was decided, case law suggested the prevalence of the ‘but for’ test as the test for causation in the context of Australian discrimination law but Wilcox J did not consider the treatment of the test by Toohey J and Kirby J in *IW*.175

Despite his somewhat cavalier disregard for the reasoning in earlier, persuasive, if not binding decisions, the analysis by Wilcox J of the comparator point and of the causation point, and perhaps, too, of the knowledge point have proved to be remarkably prescient in view of the majority decision in *Purvis*. In view of the abandonment, in *Purvis*, of the reasoning in *X* on the comparator point, and the understanding of causation promulgated by the majority justices, it is likely that in a post *Purvis* environment, a court or tribunal adjudicating a case involving a person with an undisclosed impairment would be likely to find along the lines of *Lynch* or *Tate* rather than along the lines of *X*. Although the issue was not raised in the High Court, Emmett J had commented, obiter, citing *Tate v Rafin*, that there could be no discrimination on the ground of disability where there was no knowledge of the disability by the alleged discriminator:


174 *Tate v Rafin* [2000] FCA 1582 [68].

175 See discussion at Part II A, above.
Psychological disabilities may constitute a “disability” within the meaning of the Act. Such psychological disabilities may cause a person to behave differently from the way in which a person who does not have that disability would behave. However, where an educational authority is unaware of the disability, but treats a person differently, namely, less favourably, because of that behaviour, it could not be said that the educational authority has treated the person less favourably because of the disability - see Tate v Rafin [2000] FCA 1582 (emphasis in original).  

The decision in X from a post Purvis perspective can be seen, perhaps, as a high water mark in terms of willingness to find discrimination against, and compel acceptance and accommodation of, people with disabilities. The reasoning in X revealed a willingness to accept the nature of disability as a social construct and a willingness to compel social change to mitigate disability – beyond the context, even, of a workplace which included people with acknowledged disabilities. The decision placed a heavy onus on employers not only to second guess an impairment as underpinning every controversial behaviour by an employee, but also to implement workplace procedures which would diminish the effects of unadmitted, or even, perhaps, undiagnosed impairments. President Wilson gave the blunt warning in X that ‘[e]mployers are required to be vigilant in their regard for circumstances affecting the interest of their employees’. By analogy, the decision in X placed a heavy onus on other institutional environments, including schools, proactively to implement procedures which would address and alleviate disability before being compelled to do so by the inclusion of a person with impairment. In this sense, X, while no longer ‘good law’, could, perhaps, be said to have stimulated an institutional response to disability which has culminated in the implementation of disability standards, such as the Disability

---

176 New South Wales (Department of Education) v Human Rights and Equal Opportunities Commission (2001) 186 ALR 69, 77 [35].
177 X v McHugh (1994) 56 IR 248, 257.
V MULTIPLE REASONS FOR TREATMENT OF THE COMPLAINANT

Respondents to claims of discrimination have attempted to avoid liability by arguing that there were multiple reasons for their treatment of the complainant but that impairment was not a significant cause. This argument has usually been run in conjunction with an argument that behaviour should be separated from disability. It was an argument of particular relevance in the Queensland discrimination in education cases because of the requirement under the QADA that a protected attribute must be a ‘substantial’ reason for less favourable treatment before the less favourable treatment will be ‘on the basis’ of the protected attribute. For example, in the QADA case \textit{L v Minister for Education for the State of Queensland},\textsuperscript{179} a case involving a lower primary school student with global development delay, the respondent argued that it was not L’s impairment but her behaviour which was the ‘substantial’ reason it proposed her exclusion from her mainstream primary school. L’s teachers had complained about her ‘frequent crying…her lack of ability to concentrate on tasks, her failure to return after class breaks, her limited vocabulary, and hygiene problems revolving around her propensity to regurgitate and toileting accidents’.\textsuperscript{180}

Commissioner Holmes rejected this argument:

\begin{quote}
I cannot accept that submission. It seems to me that the behaviours…for which L was suspended – regurgitation and toileting problems, lack of concentration, inappropriate noise-making and so on – were characteristic of a child with her impairment, ie global development delay, and cannot be treated as divorced from it… her disruptive behaviours are elemental to her
\end{quote}


\textsuperscript{179} \textit{L v Minister for Education for the State of Queensland (No. 2)} [1995] 1 QADR 207.

\textsuperscript{180} Ibid 209.
impairment and without them she would not have been suspended from school. 181

Commissioner Holmes applied the reasoning of President Wilson in \( X \) and would not allow the separation of L’s behaviour from her impairment for the purpose of identifying it – and not her impairment – as the reason for her proposed exclusion.

A similar argument was run in the HREOC in the \( \text{Purvis} \) case. Under the \( DDA \) it is necessary only to prove that disability is a cause, not a substantial cause, to establish unlawful discrimination. 182 The respondent argued, therefore, that Daniel’s behaviour and not his disability was the sole reason for his exclusion. Commissioner Innes, again relying on \( X \), refused to separate Daniel’s behaviour from the disability which caused it and the defence argument failed. Significantly, however, he also found that Daniel had been excluded for a separate reason, unrelated to his behaviour: his inability to cope with the stresses of high school life because of his disability. In the High Court, McHugh and Kirby JJ also legitimized the finding of discrimination against Daniel Hoggan on this basis which was clearly, in their view, related to his protected attribute of disability. 183 McHugh and Kirby JJ held, therefore, that the HREOC finding of discrimination could be supported ‘without having to consider issues relating to behaviour’. 184 Callinan J was the only other member of the Court to address this ground for Daniel’s treatment. He simply dismissed it, however, as another manifestation of the principal’s ‘stated reason’ for acting – the threat posed to others by Daniel’s inclusion at the school: ‘This…finding is consistent with the principal's stated reason for Daniel's exclusion. To say, as the Commissioner did, that

---

181 Ibid 211.  
182 \( DDA \) s 10.  
183 \( \text{Purvis} \) (2003) 217 CLR 92, 144 [169].  
184 Ibid.
the principal's decision “related to [his] perceptions of Daniel's success socially and educationally” really adds nothing to, or, is to say nothing different from, what the principal said was the reason for his decision’.185

Whereas pre-Purvis the ‘multiple causes’ strategy was one exploited by respondents, post-Purvis it may be of potential interest to complainants. In view of the willingness of McHugh and Kirby JJ to tease out a separate basis for a finding of unlawful discrimination it is possible that complainants may be encouraged to seek to identify causes for their discriminatory treatment which are not so easily divorced, as ‘behaviour’, from their underlying disability.

**VI Conclusion**

That courts have been willing to entertain causation related strategies for exclusion is clear evidence that they tacitly accept, without necessarily acknowledging or understanding that they are doing so, that not all detriment suffered by people with impairments is a social construct flowing from the failure of society to accommodate difference. Early cases such as X did reveal a commitment to compelling a proactive response to disability consistent with the objectives of anti-discrimination legislation and consistent with what Tam has emphasised as a fundamental tenet of communitarianism, that ‘democratic society is inclusive’.186 The decision in X suggested that institutions are required to anticipate and react to the possibility of inclusion of a person with impairment before the situation actually arises and are required to have policies and procedures in place which will facilitate the accommodation of a person with impairment. President Wilson was unequivocal in

185 Ibid 174 [270].
his warning that employers must be ‘vigilant’ in their assessment of circumstances affecting each employee’s performance and lamented the ‘arcane, prejudiced attitude of a society that will not face the reality of mental illness’.

Cases since X, however, have demonstrated a retreat from this position of regarding inclusion as a right rather than as a concession and from the associated emphasis on attitudinal and institutional adjustment. The effect of the decisions in cases like Cowell and Brackenreg is to highlight the point that there are, perhaps, aspects of disability which are not created and cannot be mitigated by social adjustment and to suggest that, as such, the social model of disability is flawed. However, the effect of the decision of the High Court in Purvis goes further to excuse the failure to make adjustments which could, perhaps, be reasonably expected by people with impairments. Indeed, at first instance, Commissioner Innes of HREOC found that Daniel Hoggan’s exclusion was traceable to the failures and inflexibilities of the school system. The effect of the decision of the High Court in Purvis will be, arguably, to allow institutions such as schools to avoid taking steps – even reasonable steps – to accommodate difference because the case strengthens the causal link between impairment and discrimination which must be proved before there will be a remedy. Since the case allows the separation of manifestations of impairment from the impairment itself, it seems the causal link must be between the treatment by the alleged discriminator and the underlying impairment before the treatment will be prohibited. Thus, future direct discrimination cases may demonstrate that it will be only the most stark examples of discrimination that will be remedied – those cases

---

188 Ibid 256.
189 Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117, 75172-5 [6.4].
where the actions of the alleged discriminator are clearly informed by prejudice against or primal fear of the impairment of the complainant. This is because where the alleged discriminator acts ‘because of’ the complainant’s ‘abnormal’ behaviour, or tardiness, or clumsiness or absenteeism, his or her actions will be held to be on that ‘basis’ or ‘ground’ and not on the ‘basis’ or ‘ground’ of the impairment which, in fact, triggers the behaviour, tardiness, clumsiness, absenteeism. It will, as such, be difficult to prove discrimination ‘on the basis’ of what Gleeson CJ calls ‘functional disability’, but which is really disability in the ‘purest’ sense of the word – that is, the social restriction flowing from the impairment and society’s failure to accommodate it.

---

191 See Chapter 3: The Meaning of Disability.
CHAPTER 11

LESS FAVOURABLE TREATMENT

Proof of direct discrimination requires proof that the complainant has been treated ‘less favourably’ than others without his or her protected attribute of impairment.\(^1\) In many education discrimination cases, the existence of less favourable treatment is obvious from the facts – exclusion from an excursion,\(^2\) for example, or the deliberate obstruction of wheelchair access.\(^3\) In cases involving a complaint of discrimination arising from an education provider’s decision to refuse or to terminate a mainstream enrolment to a student with intellectual or behavioural impairment, however, the issue of what amounts to ‘less favourable treatment’ has been contentious. This chapter will consider a variety of approaches taken by respondents in education discrimination cases to the characterisation of treatment of such students as something other than ‘less favourable’ and, therefore, as lawful.

Respondent schools have attempted to resist allegations of discrimination by arguing that their treatment of student complainants is not ‘less favourable’ but, rather, ‘more favourable’ treatment than that given ‘regular’ students.\(^4\) They have argued that the treatment is ‘individualised’ treatment mandated by legislation,\(^5\) or the ‘best treatment’ suited to a student’s needs.\(^6\) It will be seen, however, that tribunals have

---


\(^3\) \textit{Murphy and Grahl v The State of New South Wales (NSW Department of Education) and Wayne Houston [2000]} HREOC NoH98/73 (Unreported, Commissioner Carter, 27 March 2000).

\(^4\) See Part I B, below.

\(^5\) See Part I C, below.

\(^6\) See Part I D, below.
decided that what is ‘less favourable’ is determined largely subjectively, and from the point of view of the complainant. 7 The fact that respondents adopt a strategy of colouring less favourable treatment as something else in order to avoid any duty of inclusion suggests a fundamental misunderstanding of the nature of disability as a social construct which can be alleviated by social adjustment. An understanding of disability as a social construct, it has been argued, underpins the terms of disability discrimination legislation. 8

I THE MEANING OF ‘LESS FAVOURABLE TREATMENT’ IN THE CONTEXT OF STUDENTS WITH INTELLECTUAL OR BEHAVIOURAL IMPAIRMENTS

The Anti-Discrimination Act 1991 (Qld) (QADA) case P v Director-General, Department of Education 9 represents, perhaps, the most closely reasoned analysis of what amounts to ‘less favourable’ treatment in education discrimination cases involving students with intellectual and behavioural impairment. It also demonstrates a particularly agile approach to construction of the term by the respondent as part of its campaign to justify its treatment of P, a student with Down’s syndrome manifesting not only as intellectual impairment but also as inappropriate behaviour. A ‘proposed’ exclusion from a ‘mainstream’ school and transfer to a ‘special’ school was the source of the complaint in P.

A No Treatment

The first relevant argument mounted by the respondent in P was that, as legal action was commenced by the complainant before his suspension or exclusion could be effected, there had, in fact, been no ‘less favourable treatment’ in that there had been,

---

7 See Part II, below.
8 See Part III, Chapter 3: The Meaning of Disability.
9 P v Director-General, Department of Education [1995] 1 QADR 755 (‘P’).
in fact, no relevant ‘treatment’ of P. Commissioner Keim was not ‘convinced’ by
this argument and dispatched it with some alacrity. QADA s 10(1) clearly states that
direct discrimination occurs when a person ‘treats or proposes to treat’ a person with
an attribute less favourably. It is apparent from the terms of that section that
‘proposed’ treatment, such as that planned by the respondent in P and anticipated by
the complainant, is potentially discriminatory and within the reach of the legislation.

B ‘More Favourable’ Treatment

A more forcefully presented argument advanced by the respondent, was that P had
been treated ‘more favourably’ than a person without his impairment, on the basis that
a person without his impairment but who ‘exhibited his behaviour’ would have been
‘asked to leave the Rasmussen School and, perhaps, subjected to more formal
disciplinary procedures’. This argument carries an implication offensive to the
principles of communitarianism, that inclusion is not a right of citizenship shared by
people with disabilities but, a concession granted out of generosity rather than
acknowledged obligation. Commissioner Keim expressly rejected the more
favourable argument, not on any ‘rights’ basis, however, but on the ground that it
relied on an unacceptable separation of impairment and behaviour: ‘P’s behavioural
and communication problems are inherently part of his particular impairment’. Commissioner Keim, in P, had adopted the comparator analysis promulgated in X v
McHugh and applied in the earlier Queensland education discrimination case of L v
Minister for Education for the State of Queensland – the appropriate comparator for

11 Ibid 778.
12 Ibid.
13 Ibid 782.
15 L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207 (‘L’).
the determination of less favourable treatment is a person, real or hypothetical, without the impairment and without the behaviour of the complainant. Regardless of the seismic shift in the comparator approach now endorsed by the High Court in *Purvis v State of New South Wales (Department of Education and Training)*, a ‘more favourable’ argument such as that mounted by the respondent would still be unlikely to succeed in that the relevant enquiry is, surely, into the lawfulness of the proposed suspension and exclusion, not into the ‘generosity’ of the school’s ‘tolerance’ of P’s behaviour before the decision to suspend had been reached.

It is interesting to note that a different ‘more favourable’ argument was raised in *Purvis*. In that case, the respondent sought to prove that the student complainant, a child with a complex array of impairments manifesting as problem behaviour, had been treated more favourably in terms of the resources expended on his welfare. In teacher aide hours, special curriculum development and support, Daniel Hoggan received more time, effort and money and thus, the argument went, ‘more favourable’ treatment than most students in New South Wales. Commissioner Innes, at the original Human Rights and Equal Opportunity Commission (HREOC) hearing, accepted that Daniel was ‘receiving one of the highest amounts of Departmental funding for a child with a disability in the State’. He was not satisfied, however, that such ‘generosity’ in the resourcing of Daniel equated with more favourable treatment. Indeed, he had little difficulty in finding that Daniel had been subjected to less favourable treatment: ‘Exclusion is clearly less favourable treatment, as Daniel is prevented from attending the School, and denied access to the benefits provided by

---

the School’. In the High Court, McHugh and Kirby JJ, in a minority judgment, agreed with the HREOC finding of less favourable treatment:

That less favourable treatment consisted of the school denying him benefits available to other students and subjecting him to detriments not suffered by other students. That the High School denied Mr Hoggan those benefits and subjected him to those detriments is not open to doubt. The educational authority denied, and continues to deny, him access to the benefits of an education at the High School, suspended him from the school on several occasions and ultimately expelled him (or excluded him, if you like) from the school and its facilities.

While the focus of the majority judges in the High Court in *Purvis* was firmly on the comparator aspect of direct discrimination, it is interesting to note some sympathy, perhaps, for the respondent’s ‘more favourable’ argument in the separate judgment of Callinan J, who was clearly impressed by the respondent’s treatment of Daniel Hoggan:

After a very great investment of time, resources, energy, expertise, money and compassion, on 3 December 1997, the first respondent determined that it could no longer provide a place for Daniel Hoggan within its mainstream classes at the South Grafton High School which it funded and conducted.

It could be argued, however, that to postulate the provision of resources to accommodate a student with disability as ‘more favourable treatment’ is inconsistent with an understanding of disability as a social construct which can be mitigated by social adjustment. Indeed, the ‘more favourable’ treatment assertion in *Purvis*, like that made in *P*, resonates an outmoded ‘charity’ model of disability which positions people with disabilities as the ‘fortunate recipients’ of the largesse of others rather than as citizens entitled to inclusion. Further, to argue that the allocation of special resources is more favourable treatment is not consistent with the clear policy of anti-discrimination legislation which anticipates that such resources may be required to

---

18 Ibid 75172 [6.4].
remove a discriminatory disadvantage. *QADA* for example explicitly provides that ‘[i]n determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant’.\(^{21}\)

Communitarian theory, by contrast, acknowledges that people with disabilities are entitled to a ‘distribution of goods’ as a corollary of their position as citizens in an inclusive society.\(^{22}\) Tam issues the blunt reminder that people with disabilities ‘should have confidence that society as a whole is on their side, and should not be made to feel isolated as troublemakers who refuse to accept their lot’.\(^{23}\)

### C ‘Individualized’ Treatment

In *P* it was further argued that P’s treatment was not less favourable because ‘it was the form of education which was most suited to P’s needs’.\(^{24}\) The respondent’s case, on this point, focused on s 12 of the *Education (General Provisions) Act 1989* (Qld):

> (1) For every student attending a State educational institution established pursuant to ss. 13, 14 or 15(1)(c), there shall be provided a program of instruction in such subjects of such duration as the Minister approves that:

> a) has regard to the age, ability, aptitude and development of the student concerned;

> b) is an integral element within the total range of educational services offered with the approval of the Minister first had and obtained;

> c) takes account and promotes continuity of the student’s learning experiences;

> d) recognizes and takes account of the nature of knowledge;

> e) has regard to whether enrolment is compulsory or non-compulsory.

---

\(^{21}\) *QADA* s 10 (5).


\(^{24}\) *P* [1995] 1 QADR 755, 777.
Relying on s 12, the position of the respondent was that ‘P was not treated differently, but was simply provided a program of instruction in subjects and of a duration that had regard to his age, ability, aptitude and development and the other matters dealt with in s 12 of the Education Act’. At the time P was enrolled at Rasmussen State School, as a matter of policy, each Queensland school student with a disability was provided with an individualized education program or plan (IEP):

An IEP is simply a written statement of the target curriculum areas and intended learning outcomes for an individual, and usually involves input from the student, teacher, parents and other personnel such as counsellors and speech pathologists … The curriculum priorities and long term goals for a student with special needs may be very similar to those planned for the majority of students in the class … or they may involve modified or alternative curricula.

According to the respondent, P’s treatment was not different because certainly each student with a disability and, at least notionally, on the basis of the Education (General Provisions) Act s 12, each student without a disability is required to be treated ‘individually’. Further, it was argued P’s treatment was not ‘less favourable’ but particularly suited to his needs. Commissioner Keim acknowledged that the proposed transfer of P ‘did involve the exercise of powers and duties of providing a program of instruction comprehended by Section 12 of the Act’. Nevertheless, he found that P had been subjected to less favourable treatment. The less favourable treatment lay, according to Commissioner Keim, in the fact that P’s choice of school had been curtailed.

25 Ibid 774.
Commissioner Keim identified three aspects of the proposed transfer of P as less favourable:

- ‘… it was less favourable because … his mother desired that the education he receive be provided at his local school’.

- ‘… there was necessarily a disadvantage in being forced to change from a school where one had a certain familiarity and various levels of attachment to existing teachers and students and other staff to one where one was a new enrolee’.

- ‘… whereas other students without the impairment were able to receive an education suitable to their needs at their local school and at a local school of their choice, P was placed in a position where he could only received education adjudged suitable to him which neither he nor his parents chose and which was not his local school’.

These three aspects all derive, it could be argued, from the denial by the respondent of a ‘right’ of P’s family to send P to a school of their choice. Essentially, P’s treatment was less favourable because while the notional child without P’s impairment could choose freely, P was to be ‘placed’ at a school ‘adjudged suitable to him’.

Commissioner Keim provided, perhaps, a more elaborate version of the finding by Commissioner Holmes of less favourable treatment in L which also concerned a child who had been excluded from her mainstream school pending relocation to a special education facility:

That [L’s] treatment, and proposed treatment, by way of suspension and exclusion, was ‘less favourable’ I have no doubt; it had the effect of closing an educational option to her which would not have been closed in the absence of her impairment. 29

While Commissioner Keim considered a reference by P’s counsel to the closing of an educational option as of ‘only limited assistance’, 30 the findings in L and P both focus on the curtailment of choice. In L, less favourable treatment was found in the closing of an option, in P, in the imposition of a placement.

---

28 Ibid 783.
29 L [1995] 1 QADR 207, 211.
It is interesting to note, in this context, that since \(P\), two members of the High Court of Australia appear to have accepted curtailment of choice as amounting to ‘less favourable treatment’. The minority judges in \textit{Purvis}, McHugh and Kirby JJ, acknowledged that Daniel Hoggan had experienced ‘less favourable treatment’ in that he had ‘been denied a valuable choice, that is, to be enrolled in a mainstream school’.

\textbf{D ‘Best’ Treatment}

In the HREOC hearing of the \textit{Purvis} case it was also argued by the respondent that it was in the ‘best interests’ of Daniel Hoggan that he be transferred to a special school. Daniel’s parents, however, were of the view that ‘a fully integrated education would be the best course for Daniel’. Commissioner Innes, like Commissioner Keim in \(P\), suggested less favourable treatment in the curtailment of choice, referring to Article 26 (3) of the Universal Declaration of Human Rights: ‘Parents have a prior right to choose the kind of education that shall be given to their children’. Commissioner Keim, and Commissioner Innes, both implied a presumption that a mainstream education is, in fact, in the ‘best interests’ of the child, citing with approval the finding of Professor Alston, ACT Discrimination Commissioner, in \textit{Dalla Costa v the ACT Department of Health}. In \textit{Dalla Costa} the complainant child had been transferred to a special school which had the effect that he could no longer access speech pathology services provided by the ‘mainstream’ ACT Child Health Department, but was permitted access only to the services provided by the

\begin{footnotes}
\item{31} \textit{Purvis} (2003) 217 CLR 92, 137 [141].
\item{32} \textit{Purvis obo Hoggan v New South Wales (Department of Education)} [2001] EOC ¶93-117, 75163 [5.21].
\item{33} \textit{P} [1995] 1 QADR 755, 780.
\item{34} \textit{Dalla Costa v the ACT Department of Health} (1994) EOC ¶92-633 (‘Dalla Costa’).
\end{footnotes}
Community Disability Service of the Housing and Community Services Bureau. The complaintant argued that discrimination had occurred in that the ‘mainstream’ option was no longer available. The respondent argued that the treatment provided by the Community Disability Service was more suited to the complaintant’s needs and therefore not less favourable – the same argument used in relation to both P and Daniel Hoggan. Professor Alston criticized the ACT policy as ‘exclusionary’:

[The decision] was justified on the grounds that the Department could not afford to permit parents to choose an option which it believed to be clearly inferior for that child under the circumstances.

But this goes to the heart of the philosophy of mainstreaming and, of more direct relevance, for the determination of this complaint, the requirements of the Discrimination Act and the concepts of equal opportunity and equal citizenship which underlie this act and other Australian discrimination legislation… The question is whether the mainstreaming option is so unthinkable as to justify an exclusionary policy which simply does not countenance the option. Unless absolute discretion is to be vested in the relevant Department officials it would seem essential that some room be left for parents, and, where appropriate, the child, to choose an option that the experts consider to be inferior. 35

Inclusion is regarded by communitarians as a fundamental right of people with disability. Further, it is an important tenet of communitarian education that it is delivered to each child in his or her own community. In Queensland, when students are denied access to their local mainstream school they may face further curtailment of choice in respect of which schools are available to them. They may be referred to special education units or schools which ‘cluster’ resources appropriate to a class of impairment. 36 The unit or school considered appropriate for a particular child’s needs, unfortunately, may not be located in the student’s own community. If the student chooses a special school within their community but not set up for their

particular impairment there is no guarantee that they will receive the special services and facilities required to address their impairment.37

II LESS FAVOURABLE TREATMENT: A SUBJECTIVE ENQUIRY

It is clear from P and from the HREOC hearing in Purvis that whether treatment in education is less favourable is to be determined subjectively with preference given to the view of the complainant.38 In both cases an almost overwhelming amount of expert evidence was tendered as to what was ‘best’ for each complainant in terms of their schooling. In neither case was this evidence considered relevant to the determination of whether treatment was less favourable. In Daniel Hoggan’s case, there was even evidence that suggested that if the complainant had remained at his preferred school his health could have suffered. Yet this evidence was not held relevant to the determination that his treatment was less favourable:

Where the respondent…may see attendance by Daniel at the Support Unit as more beneficial for him this is not a relevant consideration when assessing his exclusion from SGHS as this view was not held by Mr Purvis. Irrespective of whether the respondent is of the view that it would be more beneficial for Daniel, it could still constitute less favourable treatment for the purposes of the Act.39

While anti-discrimination legislation prohibits discrimination in the ‘education area’, the bitter disputes in cases like L, P and Purvis prompt the question ‘what is

38 The approach in these cases accords with the approach taken in employment cases. See, for example Commonwealth v Human Rights And Equal Opportunity Commission (1993) 119 ALR 133, 152 (Wilcox J): ‘I do not think it is legitimate to deny that a person is treated less favourably simply because someone else might prefer the treatment offered by the alleged discriminator than that provided to persons of a different marital status. Where there are both advantages and disadvantages of each course of treatment, whether one alternative is more or less favourable than the other will usually be a matter of personal preference. Where there is a mixture of advantages and disadvantages it is not for the employer or the Commission to impose a preference’. This passage was cited with approval by Commissioner Innes in his decision in the Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117, 75171-2 [6.3].
39 Ibid 75172 [6.3].
education?’ In cases such as L, P and Purvis, the complainants and the respondents are clearly arguing from fundamentally different understandings of the nature and purpose of education. For the complainants, school is as much, if not more, about social interaction and acceptance as about academic achievement. This view is clearly in close accord with the understanding of education postulated by communitarians. Communitarians emphasise both the explicit and the implicit curriculum and argue that valuable lessons are learned through both.40 The parent advocates in P and Purvis, like communitarians, see a mainstream education as both an indicator of and preparation for citizenship. For the respondents, however, the focus is clearly on educational ‘attainment’. Their assessment of what is ‘best’ for the complainant child is based squarely on the explicit curriculum despite policy protestations about the importance of inclusion as a benchmark of civil society.41 For the complainants the ‘best education’ is the one they choose – and that, the cases suggest, is inclusive. For the respondents the ‘best’ education is the one most suited to the complainants’ objectively assessed needs.

While a detailed enquiry is beyond the scope of the present research, it is interesting to speculate also about the educational philosophies held by the various members of courts and tribunals called upon to adjudicate these mainstreaming disputes, and the influence such philosophies may – subconsciously – exert on their deliberations. Only Commissioner Innes in Purvis has explicitly supported a ‘broader’ definition of education, consistent with a communitarian position, stating ‘I am satisfied that learning is a primary function of schools, but that social activity and interaction also

40 See Part I, Chapter 2: Communitarian Education.
41 See Part III, Chapter 4: Queensland Education Policy.
play an important part in the overall learning process’. Commissioner Innes is bluntly a strong supporter of ‘inclusion’: ‘I am not prepared to consider what amounts to “separate but equal” or segregated education. I am satisfied that such education is, by its nature, discriminatory’. Further, Commissioner Innes has criticised the ‘negative views about teaching children with disabilities held by some teachers’ and found a compensable detriment to Daniel Hoggan in the fact that there was a failure on the part of the respondent to ‘provide teachers with training or awareness programs’ which impacted on the discriminatory treatment which Daniel received.

Some Justices of the Federal Court and High Court hearing the Purvis case, however, were clearly alarmed by the formal educational detriment which Daniel Hoggan’s inclusion may have continued to cause to other students, implying, perhaps, an understanding of education as involving predominantly scholastic attainment rather than social involvement. Spender, Gyles and Conti JJ, for example, were alarmed not only by the potential impact of Daniel Hoggan’s behaviour on the safety of others but also on the ‘function of education’ and ‘educational endeavours’ of others:

It must steadily be borne in mind that the expulsion ... followed repetitive anti-social and violent conduct towards other students and staff which was plainly unacceptable in a primary school. It was disturbing to the function of education and threatened the safety of other students and staff.

Most importantly, what is the position of the school and those at the school while the availability of an exemption is being decided? The staff and other students will live with the threat of injury or abuse, may suffer actual injury or abuse, and classes and other educational endeavours will be disrupted.

---

42 Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117, 75150 [5.8].
43 Ibid 75178 [7.2].
44 Ibid 75175 [6.6.6].
45 Ibid 75170 [7.4].
47 Ibid 247-8 [27].
Callinan J, in the High Court, expressed concern that to construct the *Disability Discrimination Act 1992 (Cth) (DDA)* as meaning that an education institution was compelled to include a potentially violent student, such as Daniel Hoggan, may offend the *Constitution* by taking the legislation beyond the scope of the heads of legislative power allocated to the Commonwealth in the *Constitution* to interfere with the States’ performance of their legitimate functions of provision of education and the criminal law.\(^\text{48}\) The argument of Callinan J implies, however, not only concern about a breach of the *Constitution* but a view of education as a formal process constructed around the ‘delivery of services’ and the ‘maintenance of standards’:

Disruption of a class, violence towards other students and teachers, and departures from the standards which the staff of a school seek to maintain clearly have a capacity to interfere with the provision of education by the State. It is arguable that federal legislation imposing upon a State educational authority the adoption of measures which would appear to require it to tolerate behaviour which is otherwise proscribed as criminal, or is detrimental to the education of the general body of students, or which requires the State to alter the manner in which it ordinarily provides educational services, may have a capacity to burden or affect a State government in the performance of its functions, or unduly interfere with them.\(^\text{49}\)

**III LESS FAVOURABLE TREATMENT: FUTURE TRENDS**

To date, the most contentious, perhaps, of the decided Australian education discrimination cases have been stimulated by the exclusion of students for whom inclusion in a mainstream environment has been demanded. These cases have suggested that the complainants’ right to choose – even if their choice is arguably, objectively, ‘inferior’ to other options – is of paramount importance. However, whether limits to freedom of choice of an objectively ‘inferior’ education will be set, or should be set, by courts and tribunals remains unclear. The implications of one issue raised in Professor Alston’s decision in *Dalla Costa* have, perhaps, not been

\(^{48}\) *Purvis* (2003) 217 CLR 92, 172-5 [266]-[271].

\(^{49}\) Ibid 172.
explored in subsequent cases: ‘The question is whether the mainstreaming option is so unthinkable as to justify an exclusionary policy which simply does not countenance the option’. 50 The answer in *Dalla Costa*, of course, was that inclusion was not ‘unthinkable’ even though it may, ‘objectively’, have been considered an ‘inferior’ option. Will a future tribunal, however, find on the facts of a particular case that inclusion is ‘so unthinkable’ that to deny it is not discriminatory? Certainly communitarians have postulated a justifiable limit on inclusion where ‘there is a total incapacity to learn’51 – whatever that may mean. It is true that, to date, tribunals have often relied on the unjustifiable hardship exemption to render exclusion lawful on the basis that inclusion is ‘unthinkable’ for others affected by it.52 As yet, however, no tribunal has been prepared to decide that inclusion is ‘unthinkable’ for the complainant.

The Canadian Supreme Court, however, has acknowledged in *Eaton v Bryant County Board of Education*,53 that ‘while integration should be recognised as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling could work to the disadvantage of pupils who require special education to achieve equality’.54 This suggests contemplation of a situation where the accommodation of a student’s impairments can only be achieved in a special education setting. In the abstract, it is difficult to contemplate a situation where accommodation in the form of special services and facilities cannot, at a cost, be delivered in mainstream setting. Perhaps the judgment in *Eaton* contemplates a

---


53 *Eaton v Bryant County Board of Education* (1997) 1 SCR 241.

54 Ibid [66].
different set of parental and student expectations of education. For some parents and students, like those in P and *Purvis*, the indicator of equality is experience-based and represented by student inclusion. For, others, perhaps, the indicator of equality is outcome-based and represented by student achievement. While the former view of education is consistent with the communitarian position that education is not so much an instrument of opportunity as of inclusion, there is certainly evidence that some parents and students prefer a special education to the mainstream experience. The fact that special education units still exist in Australia and are populated by students who do not complain that they have been refused inclusion in a mainstream school must suggest that there are many who prefer measurable ‘achievement’ to inclusion.

There has been no Australian case where discrimination has been found in the denial of a segregated education, but the reasoning in *Eaton* suggests that such a case could succeed. The closest Australian case examples are, perhaps, *Hashish v Minister for Education for Queensland* and *State of Victoria v Bacon*. In *Hashish*, the complainant sought to continue his enrolment at the Narbethong School for the Visually Handicapped beyond his eighteenth birthday. Ultimately the complainant failed, the Queensland Court of Appeal holding, in a majority decision, that the Queensland Education Minister did not have the statutory power to make a place available to Dean Hashish once he turned eighteen. In the Court of Appeal the complaint proceeded on the basis of age rather than impairment discrimination, because Dean, upon turning eighteen, had ceased to be ‘disabled’ for the purposes of the *Education Act* which sets the parameters of the powers of the Minister to provide

55 Senate Report, above n 37, 37-8, [3.28]-[3.30].
56 *Hashish v Minister for Education for Queensland* [1998] 2 Qd R 18 (‘Hashish’).
57 *State of Victoria v Bacon & Ors* [1998] 4 VR 269.
education services to students. In *Bacon*, a similar case, several students with mild intellectual impairment complained of discrimination when a policy was implemented restricting the availability of a state-funded education beyond the age of 18 to only those students enrolled for the Victorian Certificate of Education (VCE). The complainants were not enrolled for the VCE and, as a result, lost their places in a State funded special education facility. The Victorian Court of Appeal found that the complainants had proved indirect discrimination in that an unreasonable term had been imposed that they must be enrolled in the VCE to receive state funding and they could not, on account of their intellectual impairment, comply with the term.

New Zealand, however, has had a case turning on parental demand for a special education rather than a mainstream education for their children: *Daniels v Attorney-General*. In 1998, a policy decision, informed by a review of special education services and a strong policy preference for inclusion, was made that all special education facilities in New Zealand would be disestablished and resources and students would be reallocated to mainstream schools. A group of concerned parents of students with disabilities, including Shirleen Daniels, was alarmed by the decision that their children would be denied the opportunity to be educated in a facility designed to meet their special educational needs. They sought judicial review of the decision and also claimed that it was discriminatory and, thus, in breach of the *Bill of Rights Act 1990 (NZ)* and the *Human Rights Act 1993 (NZ)*. They succeeded in

---

58 See Part II, Chapter 4: Queensland Education Policy.

59 Proof of indirect discrimination does not require proof of less favourable treatment. The mechanics of indirect discrimination are analysed in Chapter 12: Indirect Discrimination.

60 *Daniels v Attorney-General* [2002] HC AK M1516/SW99 (Unreported, Baragwanath J, 3 April 2002); *Attorney-General v Daniels* [2003] 2 NZLR 742.

61 *New Zealand Bill of Rights Act 1990 (NZ)* s 19(1): Everyone has the right to freedom from discrimination on the grounds of discrimination in the *Human Rights Act 1993*. 
the New Zealand High Court and, following an appeal by the respondent, in the New Zealand Court of Appeal. Ultimately the decision to disestablish the schools was impugned on the basis of illegality – the Secretary for Education had failed to observe statutory notification procedures required by the Education Act before shutting the schools. Although the content and nature of the ‘right’ to education in New Zealand was discussed at length in both the High Court and the Court of Appeal the question posed by the complainants of whether the closures amounted to discrimination was ultimately not addressed. The *Daniels* case, therefore, serves as a warning that discrimination could be alleged in the failure to provide education in a special education facility to a student with a disability but it gives little insight into how such a claim of discrimination would be dealt with by an Australian court.

**IV Conclusion**

The argument that a student with impairment who has been excluded from a mainstream school has not been subjected to less favourable treatment is perhaps the respondent’s argument most overtly influenced by a ‘medical’ rather than a ‘social’ model of disability. To construe the provision of extra services or facilities as ‘benefits’ rather than as measures designed to mitigate the effect of impairment and to optimise opportunities for inclusion is clearly reflective of an understanding of disability as an individual rather than a social ‘problem’, and of people with disabilities as recipients of charitable support rather than as citizens with a right to inclusion. This approach to disability is not consistent with the policy of anti-discrimination legislation which recognises the paradox that ‘different’ treatment may

---

62 *Human Rights Act 1993 (NZ) s 21(1)(h): For the purposes of this Act, the prohibited grounds of discrimination are...disability. Discrimination in access to educational establishments is prohibited in *Human Rights Act 1993 (NZ) s 57. Such discrimination includes, at s 57(1)(c), ‘to deny or restrict access to any benefits or services provided by the [educational] establishment’.*
be required to deliver equality by providing that ‘[i]n determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant’. Nor is this approach consistent with the communitarian view that the right to an inclusive education is a corollary of citizenship. Inclusion of people with impairment in mainstream schools not only acknowledges their entitlement to education on the same basis as other citizens, it provides access to the essential lessons which allow them to operate as citizens within society. Further, by replicating the broader structural objective of an inclusive society beyond the school room, the inclusive school prepares citizens without impairment to be accepting of citizens who are ‘different’. Communitarians do acknowledge that the right to an inclusive education may be denied when it interferes with majority rights. It is clearly a rejection of communitarian principles, however, to construct exclusion as preferential rather than discriminatory treatment by arguing that a ‘special’ education is a superior education for a person with impairment.

It must be conceded that there are people with impairments who do not wish to access an inclusive education. There are people with impairments, as well as education authorities, who believe that a ‘special’ education outside a mainstream setting is their best education option. The answer to accommodating the preferences of both those who do and those who do not seek a mainstream placement lies, perhaps, in the approach taken by Commissioner Keim in *P* and by the minority in *Purvis* – an aspect

---

63 QADA s 10 (5).
64 See Part III, Chapter 2: Communitarian Education for a detailed discussion of the rationale of inclusive education.
65 See Part III A, Chapter 2: Communitarian Education for a detailed discussion of the limits to the right to an inclusive education.
of the right to education is the right to enrol in one’s school of choice. To refuse to enrol a student with an impairment in a mainstream school is to deny that student an alternative available to those without the impairment. This closing of an option is of itself ‘less favourable treatment’.

---

66 See Part I C above and, particularly, nn 28-31. It is, to my knowledge, an untested paradox that students without impairments are unlikely to be accepted as students as special schools. The effect of the new Education (General Provisions) Act 2006 (Qld) ss 165-7 is, however, that only people with a disability, as defined in s 165, can be enrolled in a school which provides special education as defined in Schedule 4. It should also be acknowledged that there are limits which curtail the choice of school of all students. Certain schools, for example, have enrolment management plans which limit access to students living within a specified geographical area. These plans are legitimatised by legislation. For the current Queensland regime see Education (General Provisions) Act 2006 (Qld) Part 3. Certain independent schools are accessible only to students who have the means to pay the tuition fees. A close examination of these and other limits on the right to school of choice is beyond the scope of the present project.
CHAPTER 12

INDIRECT DISCRIMINATION

Indirect discrimination provisions in anti-discrimination legislation address discriminatory terms and conditions embedded in the policies and practices of institutions. Such policies and practices may be ‘facially neutral’ but they operate to exclude people with disabilities who cannot conform to them. Dawson and Toohey JJ compared the operation of direct discrimination and indirect discrimination in the important High Court indirect disability discrimination case, Waters v Public Transport Corporation:

Both direct and indirect discrimination ... entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.

It appears that in many situations the complainant can choose to formulate his or her case as either one of direct or indirect discrimination. In respect of claims brought under the Disability Discrimination Act 1992 (Cth) (DDA), there has, until recently, been an advantage in formulating claims in the student area as direct discrimination claims because the unjustifiable hardship exemption was not available to respondents once a student is enrolled. There was suggestion, for example, that the high profile

---

1 See, for example, Anti-Discrimination Act 1991 (Qld) (QADA) ss 9(b) and 11, Disability Discrimination Act 1991 (Cth) (DDA) s 6.
3 See, for example, Minns v State of New South Wales [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) (‘Minns’)[245].
4 After the decision of the High Court in Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92 (‘Purvis’) the DDA was amended to make the exemption available after enrolment. See Disability Discrimination Amendment (Education Standards) Act 2005 s 3 and DDA s 22(4). See also Part V, Chapter 6: Exemptions.
Purvis case, an exclusion case, would have been more appropriately pressed as an indirect discrimination case.

It appears, also, that complainants can argue ‘alternative’ cases. That is, they can present the same fact scenario as supporting a claim of direct discrimination, or in the alternative, of indirect discrimination. Raphael FM, in the disability discrimination in education case, Minns v State of New South Wales rejected the argument that a complainant must make an election whether to proceed on the basis of direct or indirect discrimination. Raphael FM cited, in support of this conclusion, the reasoning of Emmett J in the Federal Court hearing of Purvis and of Wilcox J in Tate v Rafin. Some cases involve a combination of allegations of direct and indirect discrimination. In I v O’Rourke and Corinda State High School and Minister for Education for Queensland, for example, the complainant succeeded in an action based on direct discrimination but failed to prove that the respondent had indirectly discriminated against her. The complainants in Cowell, S on behalf of M&C v Director General, Department of Education and Training and Minns all brought unsuccessful combination claims.

---

6 See, for example, ibid [3] (Gleeson CJ); Transcript of Proceedings, Alexander Purvis on behalf of Daniel Hoggan v State of New South Wales (Department of Education and Training) and Another (High Court of Australia, Gleeson CJ, 11 November 2003) [3]; New South Wales (Department of education) v Human Rights and Equal Opportunity Commission (2001) 186 ALR 69, 78 [40].
7 Minns [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [245].
8 New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission (2001) 186 ALR 69, 78 [40], 81[59] and [60].
9 Tate v Rafin [2000] FCA 1582 (Unreported, Wilcox J, 8 November 2000) [60].
10 I v O’Rourke and Corinda State High School and Minister for Education for Queensland [2001] QADT 1 (31 January 2001) (‘Corinda’).
12 S on behalf of M & C v Director General, Department of Education & Training [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) (‘M&C’).
The classic example of indirect discrimination is the building accessible only by steps.\textsuperscript{13} This limited form of entering or exiting the building places a condition upon entry which cannot be met by many people with physical impairments – a condition that one must be able to negotiate steps in order to access to the building. The link between indirect discrimination and the nature of disability as a social construct is clear – the way society is ‘built’ causes, or, at least, exacerbates the disability endured by people who are impaired.\textsuperscript{14} Under the \textit{Anti-Discrimination Act 1991} (Qld) (\textit{QADA}) indirect discrimination ‘happens’ if a ‘term’ is imposed, with which a person with a protected attribute, such as impairment, does not or is not able to comply, but with which a higher proportion of people without the attribute comply or are able to comply. Further, the term must be ‘not reasonable’.\textsuperscript{15} ‘Term’ is defined to include ‘condition, requirement or practice, whether or not written’.\textsuperscript{16} Typically, discriminatory terms are not ‘written’ but inferred from the circumstances of the treatment of a complainant. It is not necessary that the person imposing the term is aware of the indirect discrimination.\textsuperscript{17} This reflects the fact that discriminatory terms are frequently embedded in the culture of an institution rather than consciously constructed to discriminate.

There are fewer strategies for exclusion extrapolated from indirect discrimination provisions of Australian anti-discrimination legislation than from direct discrimination provisions and associated exemptions. This is to be explained, perhaps, by the requirement that a discriminatory term be ‘not reasonable’ before it will be unlawful. This requirement is an express limit on the remedial scope of the

\begin{flushleft}
\textsuperscript{13} See \textit{Cocks v State of Queensland} (1994) 1 QADR 43.
\textsuperscript{14} See Part II B, Chapter 3: the Meaning of Disability.
\textsuperscript{15} \textit{QADA} s 11(1).
\textsuperscript{16} \textit{QADA} s 11(4).
\textsuperscript{17} \textit{QADA} s 11(3).
\end{flushleft}
indirect discrimination provisions and operates to protect discriminatory terms which it is not ‘reasonable’ to impugn. There have, however, been some attempts to avoid liability constructed from each of the elements of indirect discrimination. First it has been argued that no ‘term’ has been imposed on a complainant. Secondly it has been argued that the complainant, or, in a refinement, a ‘base group’ to which he or she belongs, can comply with a prima facie discriminatory term. Each of these strategies will be examined in addition to the factors deemed relevant to the reasonableness enquiry.

I IMPOSITION OF A TERM

A Formulating the Discriminatory ‘Term or Requirement’

Indirect discrimination in the education context arises when a ‘term’ or ‘requirement’, a ‘rule’, perhaps, is imposed on a student with an impairment. Education institutions are, of course, institutions which are renowned for running according to ‘rules’. Compliance with ‘rules’ is expected and accepted as a ‘term’ of a student’s enrolment. As the New South Wales Equal Opportunity Board has brusquely stated, ‘[n]o sensible student would dispute that it is reasonable for a community, an organisation or a school to set rules and standards of conduct for its members/students. The point is so trite it needs no further discussion’. The basic rule is, of course, that if the institution’s rules are not obeyed there will be sanctions. It is also fundamental that the rules are to be applied ‘equally’ to all. Education institutions have traditionally been places where all are treated the ‘same’ in order to achieve ‘fairness’.

---

18 See Part I, below.
19 See Part II, below.
20 See Part III, below.
education setting, however, there has been some delay in recognition of the truth that ‘fairness’, and ‘equality of opportunity’, may require different treatment. As McHugh J explained in Waters v. Public Transport Corporation, ‘discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different’.22 Therefore, there is inevitable potential for a clash of imperatives when a student with a disability is enrolled in an education institution – the fundamental rule that rules apply ‘equally’ to all clashes with the tenet of discrimination law that rules must be varied to accommodate individual difference. Minns and M&C, for example, are cases where the inflexible application of school rules has given rise to allegations of indirect discrimination.

Potentially offensive ‘terms’ are not, however, limited to the ‘school rules’ overtly stated to students and their families. The cases demonstrate that there are myriad terms implicit in the structure and organisation of an educational institution. In Travers v State of New South Wales,23 for example, a student with incontinence caused by spina bifida was denied access to the nearest toilet to her classroom. The evidence was that, to avoid toileting accidents, the student needed to access a toilet within 12 seconds. The relevant requirement inferred from the facts was that the student ‘use the toilets which were more than 12 seconds away’.24 In Kinsela v Queensland University of Technology,25 the complainant used a wheelchair. The plans for his graduation ceremony, at the Concert Hall in the Queensland Performing Arts complex, were that instead of entering the stage from the auditorium with all other

---

24 Ibid [60].
graduands, he would enter from the side of the stage to receive his degree. The term imposed in that case was that ‘to take part in the degree ceremony fully with the other students, Mr Kinsela would have to be able to use steps’. In *Clarke*, the complainant, Jacob Clarke, was profoundly deaf and reliant on the assistance of an Auslan interpreter in class, yet Auslan assistance was not made available. Here, the relevant requirement or condition was accepted by the Court as one that required Jacob ‘to participate in and receive classroom instruction without the assistance of an interpreter’. In *Bishop v Sports Massage Training School Pty Ltd* the complainant, who had dyslexia, narrowly failed a written examination causing him ‘a delay in his career and a significant loss of self-esteem’. The Human Rights and Equal Opportunity Commission (HREOC) found that the respondent ‘required [Bishop] to complete the examination in the same two-hour period as the other, able-bodied students’.

### B Strategy for Exclusion – No Term Imposed

It can be seen that a ‘term’ may be applicable only to the complainant in a particular case and be derived from the specific circumstances of their particular disability. It can also be seen that a degree of creativity and flexibility is tolerated in the drafting of terms. Respondents have, nevertheless, argued that there has been no indirect discrimination in that no ‘term’ has been imposed on the complainant.

---

26 Ibid [14].
28 Ibid [45].
30 Ibid [1].
31 Ibid.
In the DDA case, *Ferguson v Department of Further Education*,\(^{32}\) for example, the ‘no term’ strategy was successfully employed. The complainant, a Technical and Further Education (TAFE), student was profoundly deaf and relied on the assistance of Auslan interpreters to access course materials. The substance of his complaint was that TAFE had limited his access to educational benefits in that he took seven years to complete a course which most students completed in two and a half years. The evidence was that during his studies the amount of Auslan assistance he received varied from semester to semester. He received a minimum of six hours a week, increasing at times to fifteen hours per week. The complainant alleged indirect discrimination arising from a requirement that he ‘undertake his learning’ with only ‘limited assistance from an Auslan interpreter’.\(^{33}\) Raphael FM found, however, that no such condition was imposed in that the complainant had ‘received all the interpreting assistance which he could usefully handle’.\(^{34}\) The *Ferguson* decision resonates cases like *Brackenreg*,\(^{35}\) *W*\(^{36}\) and *Chung*\(^{37}\) where it was found, when applying a direct discrimination matrix, that any detriment to the complainant was caused by the complainant’s disability and not by any ‘less favourable treatment’.\(^{38}\) In *Ferguson*, Raphael FM found that ‘[t]he reason that Mr Ferguson did not complete the course within three and a half years was not because he did not have sufficient Auslan interpreting time but because the course was simply too demanding for him’.\(^{39}\)

---

\(^{32}\) *Ferguson v Department of Further Education* [2005] FMCA 954 (Unreported, Raphael FM, 21 July 2005) (‘*Ferguson*’).

\(^{33}\) Ibid [1].

\(^{34}\) Ibid [34].

\(^{35}\) *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999).


\(^{38}\) See Part I A, Chapter 10: Causation.

\(^{39}\) *Ferguson* [2005] FMCA 954 (Unreported, Raphael FM, 21 July 2005) [32].
The no term argument was also mounted, and, perhaps, more controversially, in the *QADA* case, *Corinda*. In *Corinda*, the complainant alleged indirect discrimination arising from the access restrictions she would face at venues chosen for a school formal and dinner. Arguing that other, similar cases were wrongly decided, counsel for the respondent went so far as to allege that ‘[y]ou cannot get past the fact that people with disabilities are going to have to do some things differently. What is wrong if you have a disability with using a stair-climber on the steps of the Greek Club?’ The Queensland Anti-Discrimination Tribunal (QADT) rejected the respondent’s arguments and held that the word ‘term’ should be construed liberally ‘in an effort to ensure that the objects of the legislation are achieved’. The QADT accepted that the following terms, idiosyncratic to the circumstances of the complainant, were imposed:

The respondents in selecting the Greek Club proposed terms that:
- Persons wishing to access the Greek Club by its front entrance must be able to use steps without assistance;
- Persons wishing to access the ballroom on the first floor must be able to use steps without assistance; and
- Persons wishing to use the toilets in comfort, and with safety must not be in a wheelchair.

And in selecting “the Island” [a floating restaurant barge] imposed terms that:
- Persons wishing to access the vessel with minimum risk must be able to be accessed without assistance; and
- Persons wishing to use toilet facilities that were part of the vessel must not be using a wheel-chair; and
- Persons wishing to use the vessel in the knowledge that arrangements were made for safe evacuation in the event of a fire or other emergency such as the vessel sinking must not be in a wheelchair.

---

41 *Corinda* [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [8.2.2.1].
42 Ibid [8.2.2.2.a].
43 Ibid [8.2.2.2].
In the case of *Demmery v Department of School Education*, however, the New South Wales Equal Opportunity Commission found that the terms postulated from the context of that case were ‘curious’ and was sympathetic to the argument that no terms had been imposed on the complainant. Luke Demmery was born profoundly deaf. He was enrolled in a mainstream class at the Kendall Central School in NSW. He received a cochlear implant during his first year at school. The discrimination complaints related to his disrupted fourth year at the school when, owing to staffing problems, a succession of some six teachers had charge of his class from the beginning of the school year until he left the school in May. The allegation was that a series of requirements was embedded in the school environment during the course of Luke’s placement in the disrupted class: that Luke be capable of hearing unaided, that Luke not be delayed in his development of speech, language and communication skills; that Luke not have a cochlear implant; that Luke be able to cope well with unexpected changes in routine; that Luke be able to learn when other children in the class behave disruptively; that Luke be able to learn in spite of experiencing 10 changes in class teacher involving six different teachers over a period of two months; and that Luke be confident and self-reliant.

The Tribunal criticised the ‘subjective’ approach taken by the complainant which involved having regard to ‘the potential for indirect discrimination in a situation’ and then looking at the situation ‘in reverse’ in order to ‘determine what requirements or conditions would give effect to that potential’. The Tribunal found that a more ‘objective’ approach is required ‘to support the reality of the imposition of a

---

44 *Demmery v Department of School Education* [1997] NSWEOT (Unreported, Judicial Member Ireland, Members Mooney and MacDonald, 26 November, 1997) (‘*Demmery*’).
46 Ibid.
requirement or condition’. 48 Despite this criticism, the Tribunal examined the evidence relevant to each of the alleged requirements. Ultimately, however, it was persuaded that only one ‘term’ had been imposed – that Luke be able to cope well with unexpected change.49

In the Cowell case, too, an argument that no term had been imposed on the complainant was successful. In that case, the complainant, Fleur Cowell, could not access the upstairs classroom where many of her classes were scheduled because of her mobility impairment. The condition allegedly imposed was that Fleur ‘regularly attend classes which were located upstairs’. 50 The President of the HREOC, Sir Ronald Wilson, found that no such condition had been imposed in that the school had offered to change Fleur’s ‘house’ to one which had its classes scheduled downstairs. 51 The Cowell family rejected this option and contended that Fleur’s existing house should, instead, be relocated downstairs.

On account of the finding that no condition was imposed, Wilson P was not required to decide the ‘reasonableness’ of the alleged term. The case suggests, however, that the ‘reasonableness’ of the complainant’s attitude to his or her ‘treatment’ may influence a tribunal’s decision on the point of whether a term has been imposed. The strong implication was that the Cowell family had been ‘unreasonable’ to reject the change of house and that, as such, the Cowell family, and not the school, had subjected Fleur to any discriminatory term attaching to her ability to access upstairs classes. Wilson P repeated the evidence of the Head of Fleur’s house that it would

48 Ibid.
49 Ibid 25.
51 Ibid.
have been very difficult to relocate the house ‘because it would have meant disrupting
the existing arrangements applicable to 200 students’ and ‘the teachers go to
considerable pains to create an appropriate learning environment in their allocated
classrooms and are reluctant to move to different classrooms’.

It is interesting to reconsider, at this point, the comment of counsel for the respondent
in the *Corinda* case that ‘[y]ou cannot get past the fact that people with disabilities are
going to have to do some things differently. What is wrong if you have a disability
with using a stair-climber on the steps of the Greek Club?’ While his argument that
no term was imposed on the complainant in that case was rejected, cases such as
*Cowell* suggest that there is perhaps some persuasive power in the implication that
there is ‘nothing wrong’ with expecting people with disabilities to make concessions
to facilitate their own inclusion. The ambit claim of the proponents of the social
model of disability is that disability is a social construct which can be removed by the
remodelling of society to remove obstacles to inclusion. Even the proponents of this
model accept, however, that there are some obstacles to inclusion which cannot be
mitigated by social adjustment. As noted in other chapters, this is a particular issue
for people with intellectual impairments. Social adjustment cannot completely
correct, for example, an impaired ability to process information and pass exams.
Counsel’s argument in *Corinda* and the approach of Wilson P in *Cowell* however,
suggests a further limit on the social model of disability may be operative. Did the
complainants in those cases impose their own exclusionary ‘term’ by insisting on a
‘major’ social change when they could have achieved the same degree of inclusion by

---

52 Ibid. Note that the influence on the reasonableness enquiry of the ability of a complainant to take
steps mitigate their own disability is discussed in some detail, below. See Part III D 1.
53 *Corinda* [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [8.2.2.1].
54 See Part II B, Chapter 3: The Meaning of Disability.
55 See Part I, Chapter 10: Causation.
making a ‘minor’ individual concession? There are, of course, ideological imperatives at work in terms of constructing what actions are ‘major’ and what are ‘minor’, but it appears that even tribunals and courts prepared to acknowledge that social change is necessary to allow the inclusion of people with disabilities, may require individuals to accept at least some individual responsibility for the mitigation of their own ‘limitations’. Indeed, it is arguable that a disability model of this nature could be reconciled with the communitarian emphasis on mutual responsibility – on give and take. Citizens must expect that in order to maintain a strong community it will, from time to time, be necessary for their individual objectives to be sublimated to what is best for the community. The Responsive Community Platform, Etzioni’s statement of the core principles of communitarianism, warns that ‘[t]he exclusive pursuit of private interest erodes the network of social environments on which we all depend and is destructive to our shared experiment in democratic self-government’.57

II COMPLIANCE WITH A TERM

A Strategy for Exclusion: Compliance of the Complainant’s ‘Base Group’

Under the QADA, proof of indirect discrimination requires proof that ‘a person with an attribute’ cannot comply with the term imposed while ‘a higher proportion of people without the attribute’ can comply.58 The test is more generous than that stipulated in the DDA which requires that a ‘substantially higher proportion of persons without the disability’ must be able to comply before there is a remedy.59

56 See the discussion of the impact of ideology on decision making at Part III D 1, below.
58 QADA s 11(1).
59 DDA s 6(a).
Although the only **QADA** cases on point did not address the controversy, two recent cases from other Australian jurisdictions, **M&C** and **Minns**, suggest that the required comparison may not be as straightforward as comparing the ability to comply of the complainant with the ability to comply of the majority of people. The High Court case **Banovic** comprehensively, but somewhat confusingly, surveyed this comparison issue. Different judges applied different formulae, but all agreed that it was necessary to identify a ‘base group’ for both the complainants in that case and a ‘base group’ for the ‘substantially higher proportion of people’ with whom the ability to comply was to be compared. **Banovic** was a case brought under the **Sex Discrimination Act 1984** (Cth) involving the discriminatory dismissal of women workers from a Newcastle steel mill on the basis of a ‘last on first off policy’. It was ultimately held that this policy indirectly discriminated against women workers in that the respondents had only recently commenced hiring women in any significant numbers to redress the fact that, historically, the hiring practice had been skewed in favour of men. Base groups were determined according to the timing of the change of hiring practice. The complainants’ base group comprised those hired after the change in practice. Their compliance ability was compared with that of a base group comprised of those hired before the change. As such, the ‘last on first off’ policy affected women more than men in that a higher percentage of the female workforce than the male workforce had been hired in the period after the change in hiring practice.

---

60 See *I on behalf of BI v State of Queensland* [2005] QADT 37 (Unreported, Dalton P, 14 December 2005) [28] and **Corinda** [2001] QADT 1 (Unreported, Copelin P, 31 January 2001). In **Corinda**, President Copelin simply considered that the evidence supported the conclusion that ‘these issues of access…constituted a term with which the complainant was not able to comply and with which persons without a mobility impairment would be able to comply’: 8.2.2.2.c. It did count against the complainant, however, in the reasonableness enquiry, that there was no evidence called from other students with disabilities at Corinda High who may have been affected by the access arrangements: at 10.1.1.D.a. See n 167 below.

61 **Australian Iron and Steel Pty Ltd v Banovic** (1989) 168 CLR 165.
The *Anti-Discrimination Act 1977* (NSW) (‘NSWADA’) case *M&C* involved multiple claims of discrimination by two sisters. It was alleged that one of the sisters, M, had been subject to indirect discrimination in that she was not able to comply with the discipline code imposed by her school. She had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) which affected her behaviour. The New South Wales Administrative Decisions Tribunal (NSWADT) accepted, without question or discussion, that it was necessary for the complainant, M, to establish the base group to which she belonged as a necessary element of her case:

To establish whether or not a group (or individuals within the group) is/are subject to indirect discrimination, it is first necessary to identify the pool of persons or group concerned. In this case it appears to us that the relevant group is made up of those students suffering from ADD or ADHD who attend School 1. Obviously the wider group against whom the treatment of the subject group must be compared is the body of school students at this particular school.62

The Tribunal assumed that it is necessary for the complainant to be part of a ‘group’ for the requisite comparison to take place, and, further, that it is the compliance ability of the group, rather than the complainant individually, which is to be examined. The *NSWADA*, like the *DDA*, and the *QADA*, however, simply states that it must be shown that the ‘aggrieved person does not or cannot comply’ with the requirement or condition imposed upon them.63

M’s case of indirect discrimination failed because she failed to adduce evidence, which would have allowed the Tribunal to ‘define and quantify the status group with which M can be said to belong’64 and which would have enabled it ‘to estimate the

---

63 *NSWADA* s 49B(1)(b).
64 *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [128].
degree of compliance with the code practices by members of that group’. The Tribunal considered that it was ‘false logic’ to say ‘M suffers from ADD. She has difficulty complying with the Code. Therefore all ADD sufferers are unable substantially to comply with the code’. We cannot extrapolate from the particular to the general in this sense. While there is some general evidence before us that some ADD students demonstrate behavioural problems in the school environment this does necessarily mean that they cannot or do not substantially comply with the Code. It may be that all ADD sufferers at the school do in fact have difficulty complying with the Code. On the other hand, M may be the only one of her sub-group who cannot substantially comply with it. We do not know, and any conclusions on this score we purported to make would be merely speculative.

The NSWADA plainly requires, however, only that the ‘aggrieved person’ be unable to comply with a discriminatory term. The reasoning of the Tribunal was, therefore, plainly wrong. It was, nevertheless, fatal to M’s case.

The comparison issue is more thoroughly discussed in the DDA case, Minns. Like M&C, Minns concerned the ability of a teenager with ADHD to comply with a school discipline code. The applicant submitted that his ability to comply should be compared with the ability of other students in his cohort to comply. The respondent argued that such an approach was simplistic and that the approach preferred by the High Court in Banovic was for the ‘base groups’ of both applicant and comparator group to be identified. The respondent submitted, in an argument similar to that which succeeded in M&C, that as no attempt was made to identify a ‘base group’ to which Ryan Minns belonged the claim must fail. Raphael FM was impressed by

---

65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid [129]: ‘[I]t seems to us that, as a matter of law, the Department is entitled to succeed on this basis’.
these submissions, but ultimately found for the respondent on another basis – that is, that the allegedly discriminatory term was ‘reasonable’.

As Raphael FM noted, there were no disability discrimination cases available to assist on this complex issue. Notably, the issue was not raised in the important High Court case of *Waters*, an indirect disability discrimination case. There are strong arguments, however, to suggest that the identification of Ryan Minns’ ‘base group’ was not prerequisite to proof of his case. *Banovic*, the case relied on by the respondent in *Minns*, involved different legislation, a different ground of discrimination and a completely different set of facts. In *Banovic* it was necessary to identify the base group of the applicants for reasons of fact peculiar to that case. The respondent’s hiring policies had changed incrementally over time to allow more women job applicants to be employed. Before the required comparison could be undertaken, it was necessary for the court to determine the date of commencement of employment which would determine the composition of the group of women allegedly affected by the discriminatory term. This group of women constituted the ‘base group’ whose ability to comply with the term was tested. The applicants belonged to this group but were not the whole group. There were no such complexities involved in determining who was potentially entitled to claim in *Minns*, and none should have been manufactured. Raphael FM noted that there was no evidence in this case that anyone else at his school suffered Ryan’s disabilities. Further, there was no evidence that any members of Ryan’s school class could not comply, apart from Ryan.

---

70 Ibid [253]: ‘The respondent’s submissions are well taken’.
72 Ibid [254].
73 Ibid.
It should be noted that this ‘base group’ point was not raised in the more recent DDA case, *Clarke*. The Clarke family enrolled their son Jacob, who is profoundly deaf, at The MacKillop Catholic College in Canberra. Jacob had completed his primary education with the assistance of an ‘Auslan’ interpreter. Auslan is a discrete language whereby perceptions, ideas and facts are communicated through signs. It is in no sense a ‘translation’ of the English language. Although its usage is controversial, its advocates claim that it is a superior method of communication for deaf people. MacKillop College accepted Jacob’s application for enrolment but refused to provide an Auslan interpreter for Jacob. The relevant requirement or condition imposed on Jacob was accepted by the Court as one that required Jacob ‘to participate in and receive classroom instruction without the assistance of an interpreter’. Madgwick J referred to *Banovic*, but only as authority for the proposition that a base group comparator must be established. The comparator adopted in *Clarke* was either ‘those students attending year seven at the college in 2000’ or ‘all students enrolling in classes at the college in 2000’. No mention was made of any legal requirement that Jacob be placed in a base group of people similarly impaired. Madgwick J was, however, clearly of the view that the case was about the ability to comply of Jacob Clarke and ‘no other’:

---

74 Note that several cases concerning the availability of instruction in Auslan have been heard in Australia. Ferguson was discussed at Part I B, above. Hurst and Devlin *v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) (‘Hurst and Devlin’) is discussed in detail at Part II B, below. Beasley *v Department of Education and Training* [2006] VCAT 187 (Unreported, McKenzie DP, 17 February 2006) is a case with clear similarities of fact to both *Clarke* and *Hurst and Devlin*. In Beasley, the Victorian Civil and Administrative Tribunal (VCAT) dismissed several claims of direct discrimination but found that a student whose first language was Auslan had been indirectly discriminated against in that he was required to receive instruction in the spoken word, not only without an Auslan interpreter, but without any sign interpreter. By contrast, in Zygorodimos *v State of Victoria, Department of Education and Training* [2004] VCAT 128 (Unreported, McKenzie DP, 3 February 2004) it was held by VCAT that there had been no discrimination against a student who could hear with the assistance of a hearing aide but who was required to receive his instruction in Auslan as well as spoken English.

75 *Clarke v Catholic Education Office & Anor* [2003]202 ALR 340, 350 [42].

76 Ibid 352 [46]-[48].

---
It is important to bear in mind that the issue is the reasonableness of the requirement or condition attached in the case of Jacob Clarke and of no other person, by the respondents. This is not a test case about the merits of Auslan compared with other means of communication between deaf and hearing people. Neither is it a case about the respondent’s or any other authority’s practices generally in relation to all deaf or even profoundly deaf and Auslan dependant pupils. 77

The comparison effected in this case was between the compliance ability of Jacob Clarke, and the compliance ability of MacKillop College students who were not deaf. Unquestioning acceptance of the appropriateness of this simple comparison was, doubtless, facilitated by the fact that Jacob was the only student at the College at that time who was profoundly deaf. On the facts of this case, however, there may have been a real difficulty for Jacob if Madgwick J had widened the scope of enquiry and held that the required comparison was, as suggested in M&C and Minns, between the compliance ability of some wider group to which Jacob belonged – say, secondary school students who are profoundly deaf – and the compliance ability of secondary school students who are not profoundly deaf. Proof that a base group of secondary school students who are profoundly deaf could not comply may well have been problematic because of the wide variety of alternative methods of support made available to and relied on by people who are profoundly deaf. Indeed, the suggestion in the evidence was that Auslan is a controversial method of communication. 78 Consequently, the request for Auslan assistance from the school was unusual and not easily met. 79 Most significant for this compliance point, however, was the evidence produced by the respondent that twenty-four of the twenty-five hearing impaired

77 Ibid 355 [56].
78 Ibid 355-6 [59]-[63].
79 Ibid 357 [66].
students enrolled in Catholic Education Office schools in the ACT in 1999 used methods other than signing or Auslan.\textsuperscript{80}

In disability discrimination cases it is appropriate that each complainant forms his or her own ‘base group’. It is the nature of impairment that its effects vary from person to person and from time to time and from situation to situation. As the Canadian Supreme Court has commented, ‘this ground means vastly different things depending on the individual and the context’.\textsuperscript{81} Each person’s experience of impairment is unique. While there are many people who are profoundly deaf, for example, Jacob Clarke’s experience of deafness is unique. As Madgwick J acknowledged, in Clarke, the focal point for the Court was Jacob and his particular disability and the reasonableness of the social response to that disability.\textsuperscript{82} This ‘uniqueness’ of experience distinguishes impairment from other protected attributes such as sex, race and religion. The ‘uniqueness’ of each individual’s impairment and disability does not mean that group claims, such as those advanced in Waters are not possible. It simply means that one does not have to be part of an identifiable group to bring an action. That disability discrimination cases are to be treated differently from other discrimination cases is also clear from the terms of the legislation. The QADA and the DDA, and all other Australian anti-discrimination statutes define disability widely,\textsuperscript{83} reflecting the diverse incidence and experience of disability in the community. A claimant must simply bring him or herself within the scope of this broad definition to have standing to sue.

\textsuperscript{80} Ibid.
\textsuperscript{81} Eaton v Brant County Board of Education (1997) 1 SCR 241 [69].
\textsuperscript{82} See above n 77.
\textsuperscript{83} Se Part IV, Chapter 3: The Meaning of Disability; Part II, Chapter 8: the Definition of Impairment.
B Strategy for Exclusion: the Complainant Complies with a Discriminatory Term

In the more recent Auslan case, *Hurst and Devlin v Education Queensland*, a different ‘compliance’ strategy for exclusion defeated, at trial, the claim of the complainant, Tiahna Hurst. The successful argument was that Tiahna could comply with the discriminatory term. Tiahna Hurst was 7 years old at the time of hearing. She was born profoundly deaf into an extended family whose first language was Auslan. The respondent had failed to provide an education to Tiahna in Auslan. Although not spelled out clearly in the judgment, the claim appeared to be made that, because the State did not provide an appropriate education for Tiahna, her family was forced to provide for her needs, through private schooling and therapy, at their own expense. The respondent’s case was that Tiahna, a bright student with good oral communication ability, was not at any disadvantage compared with her hearing peers. Tiahna’s academic progress was good and there was evidence that she could communicate effectively with others. Lander J found that a term had been imposed on Tiahna that she ‘undergo…education in English and without the assistance of an Auslan teacher or an Auslan interpreter’. He also found that the term was ‘not reasonable’.

Tiahna’s case, however, stumbled on proof that she could not comply with the requirement or condition. Ironically, her family’s efforts to redress, through private tuition and their own assistance, what they perceived as deficiencies in what was

---


85 Ibid [380]-[381].

86 Ibid [797].
offered to Tiahna by the State system, may ultimately have cost them their case. Lander J accepted expert evidence that Tiahna could receive her tuition in English and signed English, the alternatives offered by Education Queensland.

Upon appeal, the Full Court of the Federal Court held that the decision of Lander J on the point was affected by his belief that Tiahna could ‘cope’. The Court highlighted the reliance on expert evidence that Tiahna was sufficiently academically advanced that she could manage in a regular class room without Auslan assistance. The Full Court held, however, that the relevant test in respect of the ability to comply was not whether the complainant could ‘cope’ but whether the complainant would suffer ‘serious disadvantage’ if required to comply. The Court held, further, that it was clear from a ‘substantial body of evidence’ that Tiahna had suffered and would continue to suffer ‘serious disadvantage’ in that, if denied Auslan assistance, ‘she could not reach her full educational potential’.

While acknowledging that Lander J had been ‘distracted by the somewhat unsatisfactory manner in which Tiahna’s case was presented below’, the Full Court pointed out that he had not considered the relevance of the earlier Auslan case, Clarke, on the compliance point. The Full Court considered that the ‘issues raised in Clarke were essentially the same as those raised by Tiahna’ yet the complainant in Clarke had won at trial and Tiahna had lost. Madgwick J in Clarke, at first instance,

---

87 See Ibid [819]: ‘It might be that she [Tiahna] has not fallen behind her hearing peers because of the attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan’.
88 Ibid [817].
89 Hurst [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [134].
90 Ibid [108].
91 Ibid [113].
92 Ibid [117].
found that Jacob Clarke could not ‘meaningfully participate’ in class without Auslan assistance despite evidence suggesting that he, like Tiahna, could, theoretically, ‘cope’:

… compliance must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group. In my opinion, it is not realistic to say that Jacob could have complied with the model. In purportedly doing so, he would have faced serious disadvantages that his hearing classmates would not. These include: contemporaneous incomprehension of the teacher’s words; substantially impaired ability to grasp the context of, or to appreciate the ambience within which, the teacher’s remarks are made; learning in a written language without the additional richness which, for hearers, spoken and "body" language provides and which, for the deaf, Auslan (and for all I know, other sign languages) can provide, and the likely frustration of knowing, from his past experience in primary school, that there is a better and easier way of understanding the lesson, which is not being used. In substance, Jacob could not meaningfully "participate" in classroom instruction without Auslan interpreting support. He would have "received" confusion and frustration along with some handwritten notes. That is not meaningfully to receive classroom education.93

While the decision in Clarke was appealed, the Full Federal Court did not interfere with the reasoning of Madgwick J on this point or, indeed, on any other. In Hurst, the Full Court considered that the reasoning of Lander J at first instance could not be reconciled with the reasoning in Clarke.94

It is interesting to note that in Clarke the approach of Madgwick J to the compliance point was clearly influenced by what he described as the ‘impressive’ evidence of Dr Komesaroff, ‘a highly qualified educationalist and qualified Auslan interpreter’.95 By contrast, Lander J, in Hurst and Devlin, was not ‘assisted’ by the evidence of Dr

94 Hurst [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [125]. Although the Full Court conceded that the denial of Auslan assistance in her early years of formal education would ‘implicitly’ have long-term ramifications in terms of her educational achievement there was no award of damages to Tiahna: see [130]. Her remedy was a declaration that Education Queensland had contravened the indirect discrimination provisions of the DDA by failing to provide Tiahna with Auslan assistance: see [136]. Upon appeal, Tiahna did not challenge the decision of Lander J that, even had she been able to prove discrimination, she had suffered no compensable loss (Hurst and Devlin [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [825]-[827]). This seems unfortunate in view of the suggestion of the Full Court of the Federal Court that she ‘would be further disadvantaged in years to come, as a result of having been denied that assistance during the claim period’: see [130].
Komesaroff, or that of another witness for the applicants, Ms Pardo: ‘They acted as advocates for Auslan and, in doing so, surrendered their academic detachment and objectivity’.96

The criticism by Lander J of Dr Komesaroff as ‘partisan’ stems, perhaps, from a deep-seated discomfort with the political agenda evident in the expert evidence in this case. The applicants’ actions were supported by the lobby group, Deaf Children Australia, which has an unashamed objective of compelling the introduction of Auslan in the education of children with hearing impairments.97 Lander J was stern in his criticism of the use of legal proceedings such as the present to promote a ‘cause’:

In my opinion, it is a misconception to think that legal proceedings of this kind are the appropriate vehicle to introduce changes into the education system and, in particular, into that part of the education system which impacts upon persons with disabilities.98

In my opinion, proceedings under the HREOC Act are not the appropriate medium for advancing educational theory in the hope and expectation that educational institutions will have to respond to a decision of this Court.99

Decisions about the education of children with disabilities, according to Lander J, are best made ‘by educators in the best interests of the children’100 and not by courts in the context of ‘adversarial’ proceedings.101 This view, it could be argued, puts rather too much faith in the expertise and impartiality of educators, at the expense of the wishes and knowledge of parents and students themselves, and discounts the very real function of anti-discrimination legislation of providing a remedy when those

96 *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [148].
97 Ibid [421].
98 Ibid [424].
99 Ibid [431].
100 Ibid [429].
providing services, intentionally or otherwise, impose a discriminatory regime. Indeed, it was only in the context of the present ‘adversarial’ proceedings that it was determined that Education Queensland ‘educators’ had not acted ‘reasonably’ in their treatment of Ben Devlin and Tiahna Hurst.102

The respondent had also invited Lander J to hold that Ms Gail Smith, mother of Tiahna, and main proponent of Tiahna’s case, had ‘behaved grossly improperly leading up to and since the complaint to HREOC’.103 The allegation was that Ms Smith had ‘used these proceedings and the media as a two-pronged assault on Education Queensland to obtain what she believes Tiahna is entitled to, namely, an Auslan education’.104 Lander J, while critical of Ms Smith’s conduct during the proceedings,105 ‘declined’ to make any adverse finding of abuse of process.106 Allegations of this kind, again, reflect ideological differences between the parties, different understandings of the nature of disability and of who bears the responsibility for its mitigation. The fact that similar allegations of ‘pushy parents’, and cross-allegations of ‘intransigent educators’, have been made in many other Australian disability discrimination in education cases,107 however, also suggests not only an unacceptable level of frustration generated by the parental ‘interface’ with education bureaucracy, but also a reluctance on the part of education administrators to acknowledge the legitimacy of the complaints of discrimination leveled against them.

102 See above n 86.
104 Ibid.
105 Ibid [388] and [390].
106 Ibid [391]-[392].
Further, their rejection of such claims as nothing more than aggressive parenting, suggests a failure to accept what communitarians would postulate as a prima facie right to an inclusive education. Tam, for example, says that citizens vulnerable to discrimination because of impairment ‘should have confidence that society as a whole is on their side, and should not be made to feel isolated as troublemakers who refuse to accept their lot’.\(^{108}\) Tam’s words are particularly poignant in terms of the experience of Tiahna Hurst and her family who ultimately left their home state of Queensland to move to Western Australia to secure Auslan support for Tiahna.\(^ {109}\) It could be argued that they were excluded not only from their community school, but from their community as a result of the inflexibility of Education Queensland.

### III Reasonableness

Reasonableness is an explicit limit on the scope of indirect discrimination and it is not surprising, therefore, that it is routinely raised as a strategy to avoid liability for indirect discrimination. This limit is, arguably, consistent with a communitarian approach to the balancing of competing rights in the community. It will be seen, below, that a ‘reasonableness’ enquiry allows a balancing consistent with a communitarian emphasis on the weighing of the impact of the assertion of individual rights against resulting detriment to the majority rights of the community at large. Provided the majority rights are genuinely compromised by the assertion of an individual right it is just that the individual right must yield.\(^ {110}\)

---


\(^{110}\) See Part III A, Chapter 2: Communitarian Education.
Tam, however, issues a warning that, sometimes, what is asserted by the majority as in their best interests is not, in fact, in the best interests of the community as a whole. Majority preference, therefore, should not be allowed to dictate what is good for the community. Tam is wary of parents, for example, who, wanting the ‘best’ for their own children, selfishly insist on segregating from the mainstream those students whose needs are perceived as ‘interfering’ with the schooling of their peers. The ‘best’ course for some individuals may have as its corollary the ‘worst’ course for other individuals, and for the community as a whole: ‘the admission policy of schools must ultimately help to meet the needs of the community as a whole and not just some parents who do not care about the needs of others’.

Communitarians are of the view that it is in the best interests of society if inclusivity is promoted in schools, in order both to educate all citizens for their role as citizens and to model the tolerance which is a feature of a civilised society. Analysis of influences on the reasonableness enquiry will demonstrate that it is a subtle process which is influenced by a variety of factors appertaining to what courts and tribunals consider is ‘best’ for the community.

There is a significant difference between the QADA and the DDA in respect of the burden of proof of reasonableness. Under the QADA the onus of proof of reasonableness falls to the respondent. Thus the reasonableness inquiry is treated similarly to the ‘unjustifiable hardship’ enquiry raised in respect of claims of direct discrimination. The DDA is silent on the question of which party bears the burden of proof of unreasonableness/reasonableness but the issue was settled in

---

111 Tam, above n 108, 74.
112 See Part III, Chapter 2: Communitarian Education.
113 See Part III D below.
114 QADA s 205.
115 QADA s 206 provides that the burden of proof of unjustifiable hardship falls to the respondent.
Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission. The applicant bears the burden of proving that a potentially discriminatory condition is not reasonable. There is, therefore, some benefit to the complainant under the QADA where, it can be argued, a ‘prima facie’ case of discrimination arises once the complainant proves the imposition of a discriminatory term and reasonableness must be proved in the nature of a defence. It is also more consistent with the communitarian view that the citizen’s expectation of inclusion in mainstream society should only be displaced when that inclusion is proved to impinge on majority rights. The Productivity Commission has found that it is ‘neither appropriate nor efficient’ for the burden of proof to fall on the complainant and has recommended amending the DDA to place the burden of proof of reasonableness upon the respondent. It must be conceded, however, that even though the complainant bears the burden of proof under the DDA, respondents have a clear interest in seeking to convince a court that the impugned condition is reasonable and the cases indicate that they are eager to so.

A The Nature of the Reasonableness Enquiry

While the DDA is silent as to the nature of the reasonableness enquiry, the QADA provides that whether or not a term is reasonable depends on ‘all the relevant circumstances of the case’. The following examples of relevant circumstances are set out: consequences of the failure to comply with the term; the cost of alternative terms; and the financial circumstances of the person who imposes or proposes to

---


117 See Part III A, Chapter 2: Communitarian Education.


119 Ibid recommendation 11.3, LI.

120 QADA s 11(2).
impose the term. Case law, however, has shed further light on the nature of the balancing act required in determining whether or not a term is reasonable, which was characterised by Madgwick J of the Federal Court, in Clarke v Catholic Education Office, as ‘the most difficult question’. He applied the test articulated in the Styles case and approved by Dawson and Toohey JJ of the High Court in Waters and Others v Public Transport Corporation, a case brought under the Equal Opportunity Act 1984 (Vic): reasonableness as a test is ‘less demanding than one of necessity, but more demanding than a test of convenience’. In Waters, a case concerning access to public transport by people with disabilities, Dawson and Toohey JJ suggested that relevant factors in the reasonableness inquiry will vary from case to case and considered as relevant in that particular case, ‘the ability of the respondent to meet the cost, both in financial terms and in terms of efficiency, of accommodating the needs of the impaired persons’, ‘the availability of alternative methods’, ‘the maintenance of good industrial relations’ and ‘the observance of health and safety requirements’.

In Clarke, Madgwick J considered the following generic list of relevant considerations as spelled out in Styles:

- the nature and extent of the effect of the discriminatory requirement or condition;
- the reasons advanced in favour of it;
- the possibility of alternative action: and
- matters of ‘effectiveness, efficiency and convenience’.

---

121 QADA s 11(2).
123 Ibid 353 [50].
124 Secretary, Department of Foreign Affairs and Trade v Styles and Anor (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J) (‘Styles’).
In the most recent indirect disability discrimination in education case decided under the *DDA, Hurst and Devlin*, Lander J adopted Madgwick J’s summary of the relevant law on reasonableness but added that it will also be necessary to take into account the objects of the Act:

> The question of reasonableness will always be considered in the light of the objects of the Act which are to eliminate, as far as possible, discrimination against persons on the ground of disability, to ensure as far as practicable that persons with disabilities have the same rights to equality before the law, and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.¹²⁹

The cases analysed in this chapter, however, illustrate the considerable latitude available to courts and tribunals to consider, within a generic framework such as this, factors peculiar to the facts of the particular case.

Madgwick J also acknowledged in *Clarke*,¹³⁰ that the delicate nature of the reasonableness inquiry is further complicated, first, by the fact that judges and tribunal members generally have limited expertise in the area in which they are required to impose a decision, and secondly by the fact that there will frequently be considerable divergence in expert opinion. He cited the words of Harper J in *State of Victoria v Schou*:

> …when considering in any particular case whether the burden has been discharged courts and tribunals must act with an appropriate degree of diffidence. The expertise of judges and tribunal members does not generally extend to the management of a business enterprise…and just as the courts, in proper recognition of the lack of relevant expertise, will not in general issue to company directors instructions about how they should manage the business under their control, so courts and tribunals concerned with equal opportunity legislation should resist the temptation unnecessarily to dictate to persons who manage and work on the shop floor. At the same time, any discrimination legislation should be liberally construed. Getting the balance right will often be difficult.¹³¹

---

¹²⁹ *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [75].
¹³⁰ *Clarke v Catholic Education Office & Anor* [2003]202 ALR 340, 354 [53]-[54].
B Indirect Discrimination and Behaviour Impairment and Reasonableness

As noted above, it was suggested by Gleeson CJ in Purvis that Daniel Hoggan’s case was not framed as one of indirect discrimination in order to avoid the requirement of proving that a discriminatory term was ‘not reasonable’.132 It is instructive to compare how the reasonableness issue has been dealt with in cases similar to that of Daniel Hoggan, but formulated as indirect discrimination claims. The NSWADT case of M&C and the DDA case Minns both involved allegations of indirect discrimination against students with Attention Deficit Hyperactivity Disorder (ADHD). In M&C the following definition of ADHD, contained in a publication produced by the New South Wales Education Department, was cited:

…a mixed group of disruptive behaviours. These behaviours can have many causes and effects and their characteristics merge with normal behaviour. ADHD is a medically diagnostic label given when these behaviours cause difficulty with the child’s development; behaviour and performance; family relations and social interactions. Individuals with the disorder may be distractible, inattentive, impulsive and sometimes hyperactive.133

Both M, of M&C, and Ryan Minns were frequently disciplined for breaches of the school rules. In Minns, Raphael FM explicitly drew attention to the similarities between that case and the Purvis case commenting that the consequence of Daniel Hoggan’s disability was ‘violent and anti-social behaviour very similar to that exhibited by Ryan Minns’.134

In both Minns and M&C the condition imposed was framed as compliance with the conduct required by the school discipline policy.135 As discussed, above, in both

---

132 See above n 6.
133 M&C [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [20].
these cases it was argued by the respondent that the complainant’s case should fail because the complainant had not proved that a ‘base group’ to which they belonged could not comply with the condition which had allegedly been imposed. This argument was successful in *M&C*. Nevertheless, the NSWADT went on to comment on the reasonableness of the respondent’s expectation that M comply with the discipline code. The complainant’s case failed in *Minns* because the condition imposed was held to be ‘reasonable’.  

Both the NSWADT and Raphael FM emphasised that it was reasonable that schools have and enforce codes of conduct. As noted above, the NSWADT found the point so ‘trite’ that it required ‘no further discussion’.  

Raphael FM determined that such codes were necessary to enable ‘all students to benefit from the educational opportunities offered and the requirement to allow this to happen in a safe environment’. The issue in both cases, however, was not the reasonableness of the *code*, per se, but the reasonableness of the required *compliance* with the code imposed on the complainants who alleged that their impairment prevented such compliance. The evidence of M’s mother, in *M&C*, was that M ‘simply was not capable of controlling her behaviour’.  

The complainant’s case in *Minns*, disputed by the respondent, was that Ryan’s impairment made it ‘impossible for him to behave in a manner compliant with the discipline policy’.  

The respondent argued that Ryan did, in fact, comply with the policy because the policy stipulated ‘if you do x this will

---

137 See above n 21.
139 *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [117].
140 *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [250].
happen to you’ and Ryan ‘did x and that happened to him, so he could comply and did comply’.\textsuperscript{141} Raphael FM was unimpressed with this ‘ingenious’ argument.\textsuperscript{142}

The NSWADT was critical of the inflexible administration of discipline policy at both schools which M attended. Whilst there was considerable discretion as to which penalty was meted out, there was no discretion to give no penalty at all. The Tribunal characterised the slavish adherence to the discipline policy as ‘unreasonable’:

> While such behaviour [physical aggression] is clearly unacceptable, and it is reasonable to require that such children [children with ADHD] respect others and their property, it seems to us that it is unreasonable to apply a disciplinary regime in blanket fashion to all children regardless of their subjective features.\textsuperscript{143}

The Tribunal compared the inflexible application of the discipline code with a mandatory sentencing regime, ‘a form of punishment and social control, which has been shown to be largely ineffective in modifying the conduct of people with significant psychiatric or psychological difficulties’.\textsuperscript{144}

The Tribunal also emphasised that it was not reasonable to expect a child such as M to comply with the policy unless she had ‘special support to enable...her to do so’.\textsuperscript{145}

The facts, here, were that M did not have this ‘special support’. Thus, the Tribunal found a clear causal link between the lack of support and M’s failure to comply with the discipline code:

> Not only was M an ADD sufferer, she was well behind her colleagues academically...In those circumstances, it was unreasonable to expect that she could significantly modify her behaviour as a result of being frequently disciplined in the absence of that attention, support and special care. It was in our view therefore

\textsuperscript{141} Ibid [248].
\textsuperscript{142} Ibid [249].
\textsuperscript{143} Ibid [131].
\textsuperscript{144} Ibid [135].
\textsuperscript{145} Ibid [131].
unreasonable to punish her in the same fashion as any other member of the student body if she failed to comply with the requirements of the Code. 146

The Tribunal’s reasoning here is similar to the reasoning of Commissioner Innes in the HREOC hearing of the *Purvis* case. Commissioner Innes found that the South Grafton High School had not taken reasonable steps to accommodate Daniel Hoggan’s impairment and that this failure had contributed to his behaviour problems. Ultimately the *Purvis* case failed, as did M’s case. It is interesting to speculate, however, on what the outcome of M’s case would have been if she alleged direct discrimination on the basis of the school’s failure to provide the ‘special support’ that the NSWADT held that she needed. The cynical view is, perhaps, that M still would have failed. The cynical view is that the Tribunal only made its pointed criticism of the respondent because M failed. Having found against M, on the compliance point, the Tribunal could safely admonish the respondent without actually having to enforce, controversially, any improvement in the respondent’s treatment of its students.

The facts of the *Minns* case differed from the facts of *M&C* in that there was not the same weight of evidence of lack of specialist support for Ryan. In addition, there was evidence that the school had administered the discipline policy flexibly to accommodate Ryan’s impairment. It should also be noted that Ryan and his mother objected to Ryan’s taking prescribed medication which may have modified his behaviour. Nevertheless, the complainant argued, along the lines of *M&C* that the respondent had failed to take reasonable steps to deal with Ryan. The complainant suggested alternative methods of management of Ryan’s behaviour. The court was

146 Ibid [133].
not convinced, however, that this line of argument was relevant and found that the complainant had not proved that the requirement that Ryan comply with the code was ‘not reasonable’:

I am of the view that the requirement that was placed upon Ryan to comply with each of the school’s disciplinary policies as modified was reasonable in all the circumstances. The classes in which Ryan was placed would be unable to function if he could not be removed for disruptive behaviour. The students could not achieve their potential if most of the teachers’ time was taken up with handling Ryan. The playgrounds would not be safe if Ryan was allowed free rein for his aggressive actions. Therefore the claim for indirect discrimination must fail in the manner in which it is put.

Thus, in determining the reasonableness issue against Ryan Minns, Raphael FM balanced the benefit to Ryan in allowing him ‘free rein’ against the potential detriment to others in the school community and Ryan’s interests yielded to the interests of the majority. His language is clearly reminiscent of the language of Gleeson CJ and Callinan in the High Court in Purvis who were so concerned about the detriment to others in the South Grafton State High School community should Daniel Hoggan’s enrolment be maintained. There seems little doubt that, had the Purvis claim been framed as one of indirect discrimination, alleging that Daniel could not comply with a condition that he comply with the school’s discipline code, it would have stumbled upon proof that the condition was not reasonable.

**C. The Corinda Case: Reasonableness and Unjustifiable Hardship**

Although the better view is that whether there is unjustifiable hardship is the relevant question in respect of direct discrimination claims, and that whether the term is reasonable is the comparable relevant question in respect of claims of indirect

---

147 Minns [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [256].
148 Ibid [263].
149 Ibid.
151 Ibid [266].
discrimination,\textsuperscript{152} there are some Queensland cases where respondents have convinced the tribunal to consider whether it would impose unjustifiable hardship on an educational institution to change a discriminatory term.\textsuperscript{153} The \textit{Corinda} case is a case in point. The case informs a useful comparison of the operation of unjustifiable hardship and ‘reasonableness’.

In the \textit{Corinda} case, the complainant, ‘I’, used a wheelchair and had some intellectual impairment. She completed her secondary education at Corinda State High School, in Brisbane. ‘I’ succeeded in proving one complaint of direct discrimination by the respondents arising out of her exclusion from a school excursion to the Tangalooma resort on Moreton Island.\textsuperscript{154}

In respect of her two claims of indirect discrimination, the Tribunal considered both unjustifiable hardship and reasonableness as excusing the respondent’s discrimination. These two claims were linked to the venues selected for the school formal and the school graduation dinner. As noted above, the formal took place at the Greek Club and the graduation dinner on ‘The Island’, a restaurant barge on the Brisbane River. The complaints arose out of access and toilet arrangements for ‘I’ at both venues and out of concerns in relation to emergency evacuation procedures on ‘The Island’. The complainant argued that appropriate access was available at other venues rejected by the school.\textsuperscript{155}


\textsuperscript{153}See, for example, \textit{Corinda} [2001] QADT 1 (Unreported, Copelin P, 31 January 2001); \textit{Cocks v State of Queensland} (1994) 1 QADR 43.

\textsuperscript{154}See the discussion of the direct discrimination case in \textit{Corinda} in Part V A, Chapter 6: Exemptions, n 76.

\textsuperscript{155}See additional discussion of the unjustifiable hardship claim at Part V E 2, Chapter 6: Exemptions.
Although QADT President Copelin preferred the view, expressed by counsel for the complainant, that unjustifiable hardship was not available as an exemption in cases of alleged indirect discrimination and that, in such cases, consideration of the reasonableness of a discriminatory term covers the same ground as the unjustifiable hardship exemption, she nevertheless considered both ‘in the event that I am found to be wrong on this point’.\textsuperscript{156} As noted earlier,\textsuperscript{157} it is a prerequisite to consideration of unjustifiable hardship that there be proof that special services or facilities are required by the student with a disability. This process is not required by the legislation for proof of indirect discrimination. For such an allegation, instead, as explained above,\textsuperscript{158} proof is required of the existence of a discriminatory term. Thus, unjustifiable hardship is paired in the legislation with the provision of services and facilities and reasonableness is paired with the existence of a discriminatory term. In respect of the indirect discrimination claims, however, the Tribunal rejected the argument of the complainant that, had appropriate venues been selected for both functions, no special services or facilities would have been required because they would have already been in place at both venues.\textsuperscript{159} As such, the argument went, there be no consideration of the unjustifiable hardship exemption. The Tribunal nevertheless accepted the argument of the respondent that the special access and toilet requirements of the complainant did amount to ‘special services and facilities’.\textsuperscript{160}

It was also accepted that there would be additional costs should alternative venues be imposed on the school community and that these costs would be borne by the other

\footnotesize
\begin{enumerate}
\item \textsuperscript{156} \textit{Corinda [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [11]}. \\
\item \textsuperscript{157} See Part V A, Chapter 6: Exemptions. \\
\item \textsuperscript{158} See Part I, above. \\
\item \textsuperscript{159} A similar argument succeeded in respect of the direct discrimination claim: see Part V A, Chapter 6: Exemptions. \\
\item \textsuperscript{160} \textit{Corinda [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [11.2]}. \\
\end{enumerate}
students attending the formal and dinner and not by the school authority. The Tribunal found that ‘[w]hile there is no evidence that the respondents [the school authority] could not afford to pay for supplying the special services or facilities (by arranging and paying for other venues if they were suitable), I believe it would be highly unusual for a school (rather than the attending students) to pay for events such as school balls or dinners such as the ones the subject of this dispute’. 161 In addressing the issue of whether unjustifiable hardship would arise should the functions be relocated, the Tribunal took into account the ‘relevant circumstances’ of ‘cost’ 162 and ‘the nature of any benefit or detriment to all people concerned’ 163 and concluded that ‘the additional costs for the formal functions would be most disadvantageous to a large proportion of the students, whilst the evidence before me is that only the complainant may have benefited from a change in venue for the formal function’. 164

The Tribunal found, further, that the school was obliged to consider a multiplicity of issues in selecting suitable venues and that detriment to the other students in terms of security, transport, and supervision issues outweighed the benefit which would flow to ‘I’. 165

In the Tribunal’s consideration of the ‘reasonableness’ of the terms imposed on ‘I’, it appears to have been influenced by the fact that ‘I’ was presented, and accepted, 166 as the only student who could not comply with the terms when other students with

161 Corinda [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [11.2.2.3]. The argument is advanced in Chapter 6 that proof of unjustifiable hardship requires proof of unjustifiable hardship to the respondent not to others, such as students, as is the case here. See Part V E 2, Chapter 6: Exemptions.
162 See QADA s 5(b) and (c).
163 See QADA s 5(e).
165 ‘Disruption’ is a relevant consideration: QADA s 5 (d). See also the analysis of the Corinda case at Part V A, Chapter 6: Exemptions.
166 Corinda [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [8.2.2.2.a].
similar impairments were to attend both celebrations.\textsuperscript{167} However, the cost to other students of alternative arrangements was again the principal relevant consideration. The Tribunal was ultimately persuaded that the cost of an alternative venue for the formal was too high and that ‘The Island’ was the ‘best value’ for the graduation: ‘I consider it would be unreasonable for the students, many of whom on the evidence are not from wealthy backgrounds, to have to pay any increase in costs ….’\textsuperscript{168} Ultimately President Copelin concluded that the alternative access arrangements were ‘reasonable’\textsuperscript{169} and, as such, the discriminatory terms extrapolated from the circumstances were ‘reasonable’.\textsuperscript{170}

1 \textit{Unjustifiable Hardship Compared with Reasonableness}

As explained above,\textsuperscript{171} for the purposes of \textit{QADA}, whether a term is reasonable depends upon ‘all the relevant circumstances’ including the consequences of failure to comply with the term, the cost of alternative terms and the financial circumstances of the person who imposes the term.\textsuperscript{172} Whether unjustifiable hardship exists is determined by reference to ‘all the relevant circumstances’ including the nature of the special services or facilities, the cost of suppling the special services or facilities and the number of people who would benefit or be disadvantaged, the financial circumstances of the person supplying the services or facilities, the disruption that

\textsuperscript{167} While other students with similar impairments attended Corinda State High School and were to have attended the functions none was called to give evidence: see \textit{Corinda} [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [7.4], [10.1.D.a]. See above n 60.

\textsuperscript{168} \textit{Corinda} [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) [10.1.3.c].

\textsuperscript{169} Ibid [10.1.2.C].

\textsuperscript{170} Ibid [10.1.4].

\textsuperscript{171} See Part V, Chapter 6: Exemptions.

\textsuperscript{172} See \textit{QADA} s 11(2)(a)-(c).
supplying the services or facilities might cause, and the nature of any benefit or
detriment to all people concerned.173

While both terms are inclusively defined, the definition of unjustifiable hardship gives
more specific guidance as to what will be relevant. Reasonableness is left as a more
general enquiry and, because there is no stipulation that the enquiry is limited to the
circumstances of the parties to the case, it is, potentially, a more generous enquiry. It
is immediately obvious, for example, that in the Corinda case, cost to other students
is of relevance to the reasonableness of the term, imposed on ‘I’, whereas it could
only be made relevant to unjustifiable hardship by doubtful manipulation of the
legislation.174 It is notable that the legislative provisions in relation to unjustifiable
hardship directly contemplate a balancing of the interests of ‘all concerned’.175 This is
somewhat ironic in that hardship to the educational institution must be proved to
prove the exemption.176 Hardship to any other group, person or institution is not, at
least on the face of the legislation, enough. In relation to reasonableness, attention is
directed towards ‘the consequences of failure to comply with the term’.177 The
unjustifiable hardship provision is more specific in directing a balancing of competing
interests by making relevant ‘the nature of any benefit or detriment to all people
concerned’178 and ‘the number of people who would benefit or be disadvantaged’.179

173 See QADA s 5(a)-(e).
175 QADA s 5(e).
176 QADA s 44(1)(b).
177 QADA s 11(a).
178 QADA s 5(e).
179 QADA s 5(b).
Further, although ‘the financial circumstances’ of the respondent are relevant for both unjustifiable hardship and reasonableness, on the issue of cost there is a more specific linking of cost to a cost benefit analysis in the unjustifiable hardship provisions. In relation to reasonableness, it is simply the cost of alternative terms which is to be considered. In relation to unjustifiable hardship, however, consideration of the cost of supplying the special services or facilities is linked to consideration of the number of people who would benefit or be disadvantaged.

President Copelin, in Corinda, clearly acknowledges that a ‘balancing act’ is required by the legislation: ‘I am at all times conscious of the purposes of the Act as set out in Section 6 and the provision of equal protection and equal benefit for everyone’. In Corinda the enquiry extended to ramifications for the state-wide community if the term imposed on ‘I’ were struck down. President Copelin did not accept that it was ‘reasonable’ for the school, having behind it the resources of the State of Queensland, to pay the extra cost imposed, a few hundred dollars, by relocating to a more suitable venue. She held that this would not be appropriate in that it was common practice across Queensland schools for the students to ‘pay their own way’ and for the State to pay here would unfairly advantage Corinda students:

The fact that the respondents would be able to meet the additional costs of any alternative venues is not the end of the matter in that in practical terms it would be unrealistic to consider that the students of CHS Grade 12 would or in fact should (above all other students in Queensland) have their end of year functions paid for when the normal practice is (as indicated in the evidence of Ms O'Rourke) that these extra-curricular activities are on the whole paid for by the students.

---

180 QADA ss 5(c) and 11(2)(c).
181 See QADA s 5(b).
183 Ibid [10.1.3.c].
The dubious reasoning that it is not ‘fair’ to other Queensland students if the State pays for Corinda students may be made relevant to the reasonableness enquiry in a claim of indirect discrimination. It would, however, be difficult to sustain in relation to a claim of direct discrimination as the legislation expressly contemplates that extra facilities may have to be provided to accommodate the student with an impairment.\(^{184}\)

It is the clear policy of the legislation that it is ‘fair’ for the State to spend money, which might otherwise be used to the benefit of the majority, to deliver substantial equality to students with disabilities.

Although analysis of the wording of the provisions suggests that a wider enquiry is contemplated for unjustifiable hardship, the inevitable conclusion is that the assessment of reasonableness allows a more far-ranging consideration of costs and benefits than the assessment of unjustifiable hardship. Although courts and tribunals have manipulated the unjustifiable hardship provision to allow consideration of the effects on others, that provision is restricted in its application by the fact that the only hardship which will justify an exemption is hardship to the provider of the service or facility required by the person with impairment.\(^{185}\) Reasonableness, by contrast, allows consideration of the reasonableness of the term for the complainant, the respondent and any other group or person affected. It allows a balancing consistent with a communitarian emphasis on the weighing of the impact of the assertion of individual rights against resulting detriment to the majority rights of the community at large. So long as the majority rights are genuinely compromised by the assertion of an individual right, that right must yield.\(^{186}\)

\(^{184}\) See *QADA* s 10(5) and Part II B, Chapter 9: The Comparator n 63.

\(^{185}\) See Part V E 2, Chapter 6: Strategies for Exclusion: Exemptions.

\(^{186}\) See Part III A, Chapter 2: Communitarian Education.
D Influences on the Reasonableness Enquiry

Indirect discrimination cases involve different disabilities, different circumstances and different educational institutions. It can seem difficult to pinpoint why some cases succeed while others fail. It must be acknowledged that what is ‘reasonable’ will depend on the peculiar facts of each case. However, case analysis does suggest some indicia of a successful claim.

1 The Attitude towards Disability of the Tribunal

As discussed earlier, how the tribunal hearing a case conceives of the concepts of inclusion and disability may influence the outcome of the case. The indirect discrimination cases suggest that the intrinsic beliefs and attitudes held by a tribunal may influence its conclusions about what is and is not ‘reasonable’.

While it is a basic tenet of communitarianism that democratic society is inclusive, this attitude is not always evident in the reasoning of courts and tribunals called upon to decide education discrimination cases. Similarly, not all courts and tribunals have revealed a strong commitment to implementation of the policy of anti-discrimination legislation or an appreciation of disability as a social construct. The stand against ‘political posturing’ taken by Lander J in Hurst and Devlin, for example, has already been discussed in this chapter. In his criticism of the ferocity of Tiaha Hurst’s mother in defending what she saw as her daughter’s ‘right’ to be educated in Auslan, Lander J was out of step with Tam’s communitarian remonstration, for example, that citizens vulnerable to discrimination because of disability ‘should have

---

187 See Part II B, above. See also Part II B 1, Chapter 4: Queensland Education Policy.
188 See, for example, Tam, above n 108, 8.
189 See Part II B, above.
190 Hurst and Devlin [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [387]-[392].
confidence that society as a whole is on their side, and should not be made to feel isolated as troublemakers who refuse to accept their lot’. It is the role of the community not merely to care for people with disabilities, but to empower them to play an active part in the determination of their futures and to preserve their dignity and responsibility. Using language suggestive of a ‘medical model’ of disability, Lander J was seemingly of the view that ‘experts’ and not courts, and certainly not the complainants, are best placed to make decisions about the ‘appropriate’ education for individual children. It is ironic, therefore, that his decision was that the ‘experts’ were wrong in the case of Tiahna Hurst whom, he held, would have been ‘better taught’ in her chosen language of Auslan and not in the manner proposed by Education Queensland experts. Lander J may have found in Hurst and Devlin that the discriminatory term imposed on the complainants was ‘not reasonable’ but he was nevertheless clearly uncomfortable with the use of anti-discrimination legislation as a tool towards enforcing social change in order to mitigate entrenched disability.

In Demmery the words of the New South Wales Equal Opportunity Tribunal treated inclusion as a privilege rather than a right and revealed a misapprehension of the fundamental tenet of anti-discrimination law and policy that equal opportunity for a student with an impairment may require different treatment of that student. In that case, a term that the complainant child, who was deaf and who had been allocated six different teachers in a two month period, ‘be able to cope well with unexpected change’ was found to be ‘reasonable’. The attitude of the Tribunal seemed to be

191 Tam, above n 108, 137.
192 Ibid 134.
193 See Part II A, Chapter 3: The Meaning of Disability.
194 Hurst and Devlin [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [798].
that ‘adjustment’ is required by the student rather than by the school. The onus is placed on the included student to adapt to the environment, rather than the reverse. The included student must take the bad along with the good: ‘The integration of a disabled child including a profoundly deaf child into a normal class setting of a school, must require a degree of acceptance that the child will be subjected to the usual exigencies that flow from the school setting’. The Tribunal inferred from the evidence that the goal of inclusion is ‘normalisation’ of the student with the impairment: ‘a disabled child, such as Luke, as a part of the normalisation process of integration, may reasonably have to expect to be involved in a situation where a temporary teacher has to take over his class pending the appointment of a permanent teacher’. The tribunal referred to ‘the normal school setting’ and ‘a normalised integration program’. The Tribunal did acknowledge that, if Luke’s parents ‘required’ that he be educated in a mainstream setting, the choice was ‘open to them’, and they could expect that ‘established policies of integrating a child would be implemented’. The clear implication was, however, that by choosing a school in a more remote part of New South Wales, they could expect only what ‘was reasonable and appropriate’ having regard to that location.

In the Minns case, another ‘lost’ case, there was clear evidence that the system had tried to help the complainant to ‘assimilate’ to his school environment. There was also apparent in the Tribunal’s decision, however, a strong assumption that ‘normal’ is desirable, that the aim of ‘inclusion’ is for the ‘disabled’ student to be ‘normalised’

---

196 Ibid 24.
197 Ibid.
198 Ibid 2.
199 Ibid 25.
201 Ibid 25.
and assimilated. There are repeated references to Ryan’s ‘non-compliant behaviour’ and consideration of appropriate methods of ‘normalising’ Ryan’s behaviour.\textsuperscript{202} The underlying assumption seems to be, therefore, that the child must fit the system and not that the system must fit the child. As in \textit{Demmery}, the implication is that the onus is on the student to adapt to the environment. Such an attitude is simply not in keeping with an understanding of disability as a social construct.

Commissioner Atkinson, in \textit{Kinsela}, and Madgwick J, in \textit{Clarke}, do demonstrate a commitment to the reform policy of anti-discrimination legislation and an understanding that disability is a social construct which can be mitigated by an appropriate social response. In both \textit{Kinsela} and \textit{Clarke} the complainant won – but not without controversy. Kinsela had completed the degree Bachelor of Science (Human Services) at Queensland University of Technology (QUT). One focus of the degree was disability services and the course materials indicated a strong commitment to ‘civil, political, economic, social and cultural rights’ for all people.\textsuperscript{203} In \textit{Kinsela}, Commissioner Atkinson noted the policy inconsistency between these course materials issued by QUT and Mr Kinsela’s exclusion by QUT from the graduation ceremony.\textsuperscript{204} Further, Commissioner Atkinson emphasised ‘the undoubted goals of the Act of inclusiveness, accessibility and availability’\textsuperscript{205} and cautioned that as anti-discrimination legislation has introduced change, so the university must change.\textsuperscript{206}

\textsuperscript{202} \textit{Minns} [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [206].  
\textsuperscript{203} \textit{Kinsela v Queensland University of Technology} [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997) [5].  
\textsuperscript{204} Ibid [30].  
\textsuperscript{205} Ibid.  
\textsuperscript{206} Ibid [26].
Unlike Commissioner Atkinson, Madgwick J showed considerable respect for the commitment to inclusivity of the respondents in Clarke, commenting that ‘there is no doubt that the CEO and the College, due to the religious and ethical convictions of those who manage and control them, welcome all pupils, including profoundly deaf pupils’.207 He also found that ‘the respondent’s witnesses and others concerned in the running of the CEO hold as moral convictions what the relevant legislation seeks to accomplish as a matter of legal requirement’.208 He conceded that the case was ‘unusual’ and that, given the commitment to inclusivity of the respondents, his decision in Clarke would be ‘surprising’.209 He noted that, in relation to other cases, accusations have been made that legislation has been interpreted strictly to deny a remedy for conduct ‘that would be regarded as discriminatory in its ordinary meaning’.210 Nevertheless, he saw his role as to apply the legislation to the facts and cited the caution of Brennan and McHugh JJ in IW v City of Perth211 that ‘courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope’.212 While many cases may have been lost because of such a ‘strict’ approach, he contended, this case showed the ‘the other side of the coin’: ‘conduct which is not discriminatory in its ordinary meaning may be caught by the statutory prohibition’.213 Madgwick J found that the good intentions and the good record of the respondent could not save a finding that they had discriminated against Jacob Clarke and wryly commented that ‘[t]he road to infraction

208 Ibid.
209 Ibid 360 [82].
210 Ibid.
211 IW v City of Perth (1996) 191 CLR 1, 15.
213 Ibid.
of discrimination law, as to other places to be avoided, may be paved with good intentions’.  

2 Failure of the Complainant to ‘Mitigate’ Disability

The cases demonstrate that a tribunal will not be inclined to find a complainant ‘reasonable’ and a school’s action or inaction ‘not reasonable’ when a complainant has the opportunity to mitigate his or her own disability and fails to do so. This attitude suggests some recognition that there is a limit on the notion of disability as a social construct.

In Cowell, for example, although the reasonableness issue was not expressly considered, the attitude of Commissioner Wilson was clearly that the Cowell family could have avoided much of the disadvantage which flowed to Fleur if they had acted on the School’s offer to change Fleur’s house. Wilson P accepted the evidence of school staff that this offer was first made only weeks after Fleur had been allocated to her house. The implication was that an early change could have been made at that time without unreasonable disruption to Fleur. Instead, Fleur persisted with the house and its inaccessible classrooms for over two years. Wilson P was also critical of the Cowell family’s failure to communicate with the school. Here the implication was that a lack of feedback from the family affected the school’s ability to accommodate Fleur’s needs. Wilson P even suggested that ‘[i]t may sound a strange thing to say, but I believe it would have been easier for the school if both Mrs J and AJ (Mrs Cowell and Fleur) had complained more’.

---

214 Ibid 355 [57].
216 Ibid [6].
In *Minns* there was some implication that the Minns family had unreasonably failed to mitigate Ryan’s disability by not following medical advice that Ryan’s ADHD should be treated with the drug, Ritalin. The Minns family objected to the fact that the school insisted that Ryan take the drug as a condition of his enrolment. Raphael FM said, ‘[r]equiring Ryan to take medication so that he could obtain the optimum benefit from the education that was being offered to him cannot be held up as a failure to provide him with educational services’.217 The ‘unreasonableness’ of the Minns family, therefore, infected their case.

In *Clarke*, by contrast, the Clarke family, while insisting that Jacob needed Auslan support, demonstrated their reasonableness by going to great lengths to facilitate the provision of that support. It could be argued that they took positive steps to mitigate both Jacob’s disability and any potential inconvenience to MacKillop College in accommodating him. The Clarkes had offered the College a cash grant of $15,000 to pay for a teacher aide, assistance with applications for government grants, to arrange volunteer Auslan support, to attend excursions and camps as Jacob’s interpreter and to teach Auslan to the teachers at the school. The Clarkes’ commitment to easing the impact of Jacob’s inclusion on the College undoubtedly helped them to prove that the College’s failure to provide Auslan support was not reasonable.

### 3 The Availability of a Financial Solution

A complainant is more likely to succeed in proof of indirect discrimination if a reasonable alternative to the discriminatory term can be paid for.218 In *Clarke* there

---

217 *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [236].
218 An exception is the *Corinda* case where QADT held that it was not reasonable to impose the cost of relocating the functions in question upon other students at the school.
were government and private funds available to pay for Auslan support for Jacob. In *Travers*, the building of a small cupboard, at little expense, to house the catheter equipment of the other student who would use the ‘disabled’ toilet would mean that the toilet could be shared with minimum risk to that other student. In *Kinsela*, the cost of relocating the graduation ceremony, it was argued, could be recouped in increased ticket sales.\(^\text{219}\)

In most of the failed cases however, changing the discriminatory requirement or condition would involve attitudinal and not just financial adjustment by the educational institution respondents and their students. In *Demmery*, the implication was that Luke’s general unhappiness would not be solved by providing him with teacher consistency in the classroom, that the true cause of his unhappiness was the perception that others excluded him. In *Cowell* the solution preferred by the Cowell family may have benefited Fleur but would have involved disruption to over 200 people, including teachers who had taken pains ‘to create an appropriate learning environment in their classrooms’ and would be ‘reluctant to move’.\(^\text{220}\) The behaviour cases, *Minns* and *M&C* in particular, demonstrate the point that interference with the comfort and convenience of other students will be significant in the reasonableness enquiry. While extra funds, in terms of extra support, may have assisted the complainants in those two cases, there would still be unreasonable disruption if their breaches of discipline were tolerated. Further, while it is, perhaps, easy for a school community to accept that it is fair to provide extra facilities to a student with a

\(^{219}\) Ultimately, however, QUT graduation ceremonies were not relocated. Instead the format of the ceremonies was altered so that no graduand was required to climb stairs onto the stage to receive his or her award. Instead, graduands are seated on stage for the duration of the graduation ceremony.

disability, it is more difficult to accept that it is fair that such students should be allowed to ‘flout’ school rules.

IV Conclusion

The case law suggests, therefore, that a discriminatory term, which can be removed through mere application of money, may well be struck down. Most cases, however, require more than a money solution. They require the increased cooperation, understanding and tolerance of other students and school staff if the discriminatory term is to be removed. The cases demonstrate that courts and tribunals will rarely find it a ‘reasonable’ alternative to attempt to enforce attitudinal change – to attempt to override majority perceptions of what is good for the community. This reluctance to ‘interfere’ is driven by a related reluctance, perhaps, to allow the law to intrude upon the hearts and minds of the community, by a perception, perhaps, that attitudinal change can not be compelled. The undoubted irony, however, is that anti-discrimination legislation has been introduced as an instrument of such attitudinal change.221

CHAPTER 13

CONCLUSION

The question which stimulated this thesis was whether the Anti-Discrimination Act 1991 (Qld) (QADA) has been an effective tool for the delivery of equality of opportunity in education to people with impairments. The case law which has developed since the implementation of anti-discrimination legislation in Queensland and other Australian jurisdictions suggests that many educational opportunities are contentious, from the opportunity to attend excursions\(^1\) to the opportunity to receive education in a student’s first language.\(^2\) The most problematic opportunity, however, is clearly the opportunity to attend a mainstream school. The inclusion of students with impairments in mainstream schools continues to be a problem which vexes educators, lawyers and the community at large. The thesis has demonstrated that the mainstream inclusion of people with disabilities is the policy of anti-discrimination legislation\(^3\) and the policy of Queensland education providers.\(^4\) The thesis has also demonstrated, however, that many and varied strategies, developed from the terms of the legislation, have been employed by education institutions intent on excluding students with impairments from mainstream schools and from certain activities.

---

\(^1\) See, for example, *I v O’Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) The complainant succeeded in a claim of direct discrimination arising out of her exclusion from a school excursion because of concerns that her wheelchair could not be accommodated on transport arranged for the excursion. For further detail see Part II, Chapter 5: The Impact of the Legislation.

\(^2\) See, for example, *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) and *Hurst v State of Queensland* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006). Hurst and Devlin succeeded in claims of indirect discrimination arising out of the refusal of Education Queensland to provide them with instruction in Auslan, the indigenous Australian language of people with profound hearing impairments. For further detail see Part II B, Chapter 12: Indirect Discrimination.

\(^3\) See Parts III, IV and V, Chapter 3: The Meaning of Disability and Part II B, Chapter 4: Queensland Education Policy.

\(^4\) See Part III, Chapter 4: Queensland Education Policy.
available at mainstream schools. While there is some judicial comment to suggest that there is a prima facie ‘right’ to be educated at one’s school of choice, including the local mainstream school,\(^5\) QADA, it appears from the case law, does not guarantee such a right.\(^6\) Indeed, even though the Act acknowledges a ‘right to equal protection and equal benefit of the law without discrimination’\(^7\) and intends to promote ‘equality of opportunity for everyone by protecting them from unfair discrimination’\(^8\) it also anticipates that there will be limits to the situations where equality of opportunity will be available. The Act promises only to protect against ‘unfair’ discrimination.\(^9\) The inference, therefore, is that some discrimination will be ‘fair’.

\section{Limits on equality of opportunity in education}

\subsection{Overt limits}

The thesis has demonstrated that several overt limits on any ‘right’ to inclusion have been recognised in the case law. The first limit arises when the inclusion of a student puts the health and safety of others at risk. A health and safety limit was clearly the most significant issue influencing the majority of the High Court in the \textit{Purvis} case.\(^{10}\) In that case the complainant child had exhibited a pattern of violence against staff, students and property at his mainstream high school. The majority was obviously concerned about the ramifications of the violence for others’ safety.\(^{11}\)

\begin{thebibliography}{9}
\bibitem{5} See Part I C, Chapter 11: Less Favouorable Treatment.
\bibitem{6} Ibid.
\bibitem{7} \textit{Anti-Discrimination Act 1991} (Qld) (\textit{QADA}) Parliament's reasons for enacting this Act clause 6.
\bibitem{8} \textit{QADA} Long Title, Parliament's reasons for enacting this Act clause 7.
\bibitem{9} \textit{QADA} Long Title.
\bibitem{10} \textit{Purvis v State of New South Wales (Department of Education and Training)} (2003) 217 CLR 92 (‘\textit{Purvis}’).
\bibitem{11} Ibid 102 [13]-[14] per Gleeson CJ; 161-2 [227]-[228] per Gummow, Hayne and Heydon JJ; 174 [271] per Callinan J.
\end{thebibliography}
While, in *Purvis*, the issue was how best to protect the physical safety of the school community, in other cases the ‘emotional safety’ of the community was of relevance. In the Queensland cases *L*,12 *K*,13 and *P*,14 for example, stress caused to teachers responsible for student complainants with behavioural difficulties was enough to persuade the Anti-Discrimination Tribunal (QADT) that the complainants should be removed from their mainstream schools. It is significant that safety arguments have only succeeded to exclude students with behavioural and intellectual impairments.

A second limit arises when the inclusion has a detrimental effect on the learning environment of others. A detriment to the learning environment limit may operate in conjunction with the health and safety limit, outlined above. The disruption caused to the teaching and learning environment by the inclusion of students who may call out, run off or ‘play up’ has sufficiently concerned courts and tribunals that they have acknowledged that students who interfere with the core business of teaching and learning may be excluded from mainstream schools. Again, the *Purvis* case15 and the Queensland cases *L*,16 *K*,17 and *P*,18 are relevant. The cases of *Minns* and *M&C*, however, perhaps best make the point that the conduct of a student must be compatible with the school’s mandated code of conduct if that student is to keep his or her place at a mainstream school.19

---

12 *L v Minister for Education for the State of Queensland (No. 2)* [1995] 1 QADR 207, 216 (‘L’).
13 *K v N School (No 3)* [1996] 1 QADR 620, 622 (‘K’).
14 *P v Director-General, Department of Education* [1995] 1 QADR 755, 786 (‘P’).
19 See *Minns v State of New South Wales* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [247] (‘Minns’); *S on behalf of M & C v Director General, Department of Education & Training* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [123].
A third limit arises when a student cannot meet legitimate requirements of the course in which they are enrolled. To date, this limit has only operated at the tertiary level of education. Courts and tribunals have recognised the special responsibility of tertiary education institutions of warranting to the world at large that their graduates have met the requirements of the course from which they have graduated. A growing list of cases, including *Brackenreg*[^20] *, W[^21] *, *Reyes-Gonzalez*[^22] and *Chung*[^23] demonstrates that tertiary institutions will not be required to continue to accommodate those students whose impairments mean that they do not have the capacity to ‘pass’ their course.[^24] While there is no case, as yet, which suggests that students in the compulsory stages of education face a similar limit on their inclusion, it should be noted that the recent *Disability Standards for Education 2005* (Cth) recognise a limit to the notion of ‘reasonable adjustment’ in respect of students who cannot meet legitimate course requirements and that this limit potentially applies across the spectrum of educational enrolment.[^25]

A fourth limit arises when the cost of inclusion is prohibitive for the education provider. This limit appears to apply, however, only in the narrow circumstance of the small independent school. In *K*, for example, the respondent school, a small independent school, adduced evidence that the financial viability of the school was put at risk by the cost of continuing to include a group of students with intellectual

[^24]: See *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)]. See also Part I A, Chapter 10: Causation.
[^25]: *Disability Standards for Education 2005* (Cth) s 3.4(3). See also Part I C, Chapter 10: Causation.
and behavioural impairments. Although some government funding is available to support inclusion, it was not sufficient, in that case, to provide for all the special needs of the complainant or of other students like her.\textsuperscript{26} Financial hardship was not sufficient, however, to prove hardship to the State in either \( L \) or \( P \) or to an independent school in the controversial \textit{Disability Discrimination Act 1992} (Cth) (\textit{DDA}) case, \textit{Finney},\textsuperscript{27} suggesting that courts and tribunals will expect state schools and wealthy independent schools to have the resources to accommodate the individual needs of a student with impairments.

A fifth limit arises when the cost of inclusion causes financial detriment to other members of the school community. Again, this limit appears to apply only in limited circumstances. In the \textit{Corinda} case,\textsuperscript{28} the QADT was concerned that the cost of relocating the school formal to a venue more accommodating of the complainant’s impairment would be passed on to other students and that this was not fair to them.\textsuperscript{29} It should be noted, however, that a similar argument, that the cost of accommodating students with impairment would be passed on to the school community in terms of extra fees, did not succeed in the \textit{Finney} case.\textsuperscript{30}

\textbf{B Covert Limits}

A significant finding of the thesis is that it is possible to extrapolate, in addition to the overt limits outlined above, a series of more covert limits at work in the cases. It can be argued that courts and tribunals have been less inclined to protect a student’s

\textsuperscript{26} \textit{K} (1997) 1QADR 620, 624.
\textsuperscript{27} \textit{Finney v Hills Grammar School} (2000) EOC 93-087 (HREOC) (‘\textit{Finney}’).
\textsuperscript{28} \textit{I v O’Rourke and Corinda State High School and Minister for Education for Queensland} [2001] QADT 1 (Unreported, Copelin P, 31 January 2001) (‘\textit{Corinda}’).
\textsuperscript{29} See ibid [11.2.2.3]. See also Part \textit{V} E 2, Chapter 6: Exemptions.
\textsuperscript{30} \textit{Finney} (2000) EOC 93-087 (HREOC) [7.5].
educational opportunities when the cost of inclusion is prohibitive for the education institution. This statement appears to contradict the statement made, above, that such a limit applies only in narrow circumstances. While tribunals have been reluctant, openly, to identify excessive cost of inclusion as justifying exclusion, close analysis of many failed cases reveals that the outcomes are consistent with the suggestion that cost is nevertheless a factor impacting on the actions of respondents, and a factor that is being avoided in courts’ and tribunals’ express reasoning. It can be argued, for example, that the overt health and safety limit and detriment to the educational environment limit are really all about money. It can be argued that if enough support – support which may well be expensive – were made available many more students could be placed in mainstream schools. In the Purvis case, for example, the Human Rights and Equal Opportunity Commission (HREOC) found at first instance that more could have been done to support the inclusion of the complainant, Daniel Hoggan.31 Commissioner Innes was of the clear view that if more support were provided, in the form of staff training in particular, Daniel’s behaviour would have been appropriately managed within the school environment and he would not have been excluded.32 This view of the facts was supported by the minority of the High Court in Purvis33 but not addressed by the majority judges. In cases such as L34 and P35 it was also clear from the facts that more teacher aide and specialist teacher support would have reduced both the stress to staff and the disruption to the learning environment which accompanied the inclusion of the complainants.

32 Ibid.
The link between the spending of money on resources, on the one hand, and the avoidance of threats to safety and of disruption of the learning environment, on the other, is made plain, however, in the case of K. In that case Commissioner Holmes conceded that K ‘could be properly educated in a regular classroom setting’ but that the provision of resources by the school needed to facilitate her inclusion would have caused unjustifiable financial hardship to the school. It is also relevant to this argument that there is good evidence that it is more cost effective for Education Queensland, the largest provider of education services in Queensland, to ‘cluster’ students with particular disabilities at particular, often special, schools or units. If, therefore, ‘problem’ students are relocated from a mainstream school to a special school or unit it may relieve the stress and disruption faced by other students and staff in mainstream classes, but it is also more cost effective for the State. In this context it is useful to reiterate the point that stress and disruption caused by ‘problem’ students to other students and staff in special school settings has not motivated Education Queensland to seek a legal remedy. One inference is that staff and students in special schools are expected to tolerate a stressful and disruptive learning environment, while staff and students in mainstream schools are not. Alternatively, the inference may be drawn that arguments relating to stress and disruption are a convenient and successful strategy for convincing a tribunal of unjustifiable hardship when cost arguments will not succeed.

37 Ibid.
39 See Part V E 3 and Part VI, Chapter 6: Exemptions.
There has also been a reluctance to find discrimination when the student, or the student’s family, has been uncooperative. It is fair to say that many complainants in cases involving disability discrimination in education are regarded as ‘troublemakers’ by the respondents.\(^{40}\) In some cases the acrimony between the complainant family and the respondent education institution has escalated to the extent that formal complaints of harassment have been made.\(^{41}\) In some cases the ‘troublemaking’ has been defended by tribunals as amounting, simply, to a legitimate assertion of a legitimate complaint.\(^{42}\) Other cases suggest, however, that ‘troublemaking’ may damage a complainant’s claim of discrimination. In *Hurst and Devlin*,\(^{43}\) for example, the respondent invited Lander J, of the Federal Court, to hold that Tiahna Hurst’s mother had abused the complaint and court processes to secure an Auslan education for her daughter.\(^{44}\) Lander J, found that there had been no abuse of process but was nevertheless critical of the use of anti-discrimination law as a ‘vehicle to introduce changes into the education system and, in particular, into that part of the education system which impacts upon persons with disabilities’.\(^{45}\) Lander J also found that Tiahna had not been the victim of any unlawful discrimination, a decision that was later overturned on appeal. Other cases suggest that ‘troublemaking’ in the form of a refusal, or even a failure, to take what the court sees as reasonable steps to mitigate disability may cost a complainant his or her case. In *Cowell*,\(^{46}\) the complainant refused to change her school ‘house’ to one which was located in a more accessible

\(^{40}\) In *Travers v New South Wales* (2001) 163 FLR 99 (Federal Magistrates Court), for example, after hearing disputed evidence of altercations between the parties, Raphael FM found, at [52], ‘that the school felt that Mr and Mrs Travers were “high maintenance”’.

\(^{41}\) See, for example, *Murphy and Grahl v The State of New South Wales* [2000] HREOC NoH98/73 (‘Grahl’).

\(^{42}\) The facts of and findings in the *Grahl* case, ibid, are a good example.

\(^{43}\) *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) (*Hurst and Devlin*).

\(^{44}\) Ibid [389].

\(^{45}\) Ibid [424].

part of her school. In *Minns*, the complainant refused to take medication which may have allowed him better to control his own behaviour. In *Sluggett*, the complainant failed to alert the respondent to her mobility impairment and of potential access problems it would create. All of these cases were lost; *Cowell* and *Sluggett* expressly on the basis that their own actions had caused their detriment.

Finally, there is some suggestion that it may be more difficult to prove discrimination when there is no objective ‘benefit’ for the complainant in the inclusion. Such a limit is implicit, perhaps, in the argument, raised in cases like *Purvis*, *L* and *P*, that a mainstream school is not the ‘best’ school for the complainant students and that a ‘special school’ environment will deliver better educational outcomes for the complainant. This argument is related, of course, to a view which values the ‘benefit’ of a student’s intellectual development over and above his or her social development. Such an argument would, perhaps, strike a chord with many of the parents of students with impairments who presumably choose to send their children to special schools because they believe the programs at those schools are better structured to meet the particular educational needs of their children. It has been argued in the thesis, however, that views on the appropriate education of students with impairment are highly contested and that, in some of the more bitterly fought cases, those views have shaped the legal argument of the parties. In some cases the views of the tribunal or court on the appropriate education of students with impairment may

---


48 *Sluggett v Flinders University of South Australia* [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000).

49 See Part I D, Chapter 11: Less Favourable Treatment.

50 See Part III B, Chapter 4: Queensland Education Policy.
also be inferred from the text of their decisions.\textsuperscript{51} Arguments that ‘special’ education was ‘more favourable’ and the ‘best’ treatment for students with impairment were rejected by QADT in \textit{P},\textsuperscript{52} and by HREOC in \textit{Purvis},\textsuperscript{53} and a prima facie right to attend a mainstream school suggested in those cases,\textsuperscript{54} It may nevertheless be speculated that this kind of argument – whether expressly made or merely implied by the circumstances of the case – is still influential for some judges and tribunal members.

\section*{II \ LEGITIMACY OF THE LIMITS ON EQUALITY OF OPPORTUNITY}

\subsection*{A Communitarian Education}

A communitarian framework has been adopted against which to test the legitimacy of the limits on equality of opportunity in education for people with impairments which are apparent from the developing case law in the area. The communitarian school is inclusive. It is an ‘enclosure within a neighbourhood, a special environment within a known world where children are brought together as students exactly as they will one day come together as citizens’.\textsuperscript{55} The communitarian school is inclusive, not just because democratic society is inclusive, but for practical reasons. It is inclusive so as to ensure that all students have access to the lessons they need to prepare them for citizenship in the wider community. It is inclusive so as to model the tolerance which must underpin an inclusive society. Moreover, the inclusive school, by providing the opportunity for others to learn the key value of tolerance, allows even students with

\begin{footnotesize}
\textsuperscript{51} See Part II B, Chapter 4: Queensland Education Policy, and Part I B, Chapter 11: Less Favourable Treatment.
\textsuperscript{52} \textit{P} [1995] 1 QADR 755, 782.
\textsuperscript{53} \textit{Purvis obo Hoggan v New South Wales (Department of Education)} [2001] EOC ¶ 93-117, 75154 [5.14], 75163 [5.21], 75172-5 [6.4].
\end{footnotesize}
severe impairments to contribute to the good of the community and, as such, to earn
an entitlement to the respect of the community. It is not going too far, therefore, to
state that communitarians would acknowledge a prima facie right for all citizens to
education in a mainstream community school.

Communitarians are, however, suspicious of ‘rights talk’ when such talk jeopardises
the wellbeing of the community as a whole.\textsuperscript{56} Individual rights survive and thrive only
when they are compatible with a strong community. As Etzioni has declared,
‘individual rights are limited by the rights of others and the needs of the
community’.\textsuperscript{57} Individual rights are tied also to the notion of individual
responsibility. Those who take from the community must also give and sometimes
what must be given up is an individual choice or opportunity. To take without giving
is ‘an amoral, self-centred predisposition that ultimately no society can tolerate’.\textsuperscript{58} It
may be accepted, therefore, that communitarians would be comfortable with a ‘thick’
set of limits on the education opportunities of people with impairments. The thesis
sets out a set of limits that are consistent with communitarian theory, and which it is
appropriate, at this point, to summarise and reiterate.\textsuperscript{59}

First, as the community needs ‘experts’, there is a place for specialised education for
the production of experts. There is, as a corollary, a limited place for the provision of
classes ‘streamed’ according to ability within mainstream education institutions. It
may be appropriate, for example, to exclude students with intellectual impairments

\textsuperscript{56} See, for example, Mary Ann Glendon, \textit{Rights Talk: The Impoverishment of Political Discourse}

\textsuperscript{57} Amitai Etzioni, \textit{The Spirit of Community} (1993) 7.

\textsuperscript{58} Ibid 10.

\textsuperscript{59} For a more detailed explanation of these limits and specific reference to the communitarian theory
which underpins them see Parts III and IV, Chapter 2: Communitarian Education.
from classes which require advanced intellectual ability. Generally speaking, however, the ‘streaming’ of classes, should not justify the complete exclusion from a mainstream institution of students with impairments. An exception, however, arises in respect of tertiary institutions which have the responsibility of certifying to the community that students have met the legitimate requirements of their courses.

Secondly, where the inclusion of a student with an impairment in a mainstream education setting compromises the ability of the majority of students to learn, it may be necessary for that student to be excluded from the mainstream setting. This is consistent with the basic tenet of communitarian philosophy that, in a competition between what is good for the community and what is good for the individual citizen, community prevails.

Thirdly, and similarly, where the inclusion of a student with an impairment compromises the safety of other members of the school community the exclusion of that student is warranted.

Fourthly, and more controversially, at least one writer, Walzer, has suggested that the exclusion from a school altogether may be allowable where a student, by reason of impairment, demonstrates a ‘total incapacity to learn’.60

B Communitarian Limits Compared with the Legal Limits

A review of the communitarian limits on the right to an inclusive education suggests that there is a high degree of correlation between those limits and the overt limits to a

60 Michael Walzer, above n 50, 221.
‘right’ to education developed in Australian anti-discrimination case law and described above. Both communitarians and courts accept that failure to meet course requirements may warrant exclusion from a tertiary institution.\textsuperscript{61} Indeed, communitarians may even be prepared to accept such ‘streaming’ out of opportunities, but not the mainstream environment, even at the compulsory levels of education.\textsuperscript{62} Further, it may be speculated that communitarians, like the courts, would accept that a student may be excluded where their impairment related problem behaviour damages the learning environment or compromises the safety of others.\textsuperscript{63}

There is even some correlation between the more covert limits developed in the cases and communitarian theory. Walzer’s suggestion that exclusion may be justified when a student displays a ‘total incapacity to learn’\textsuperscript{64} echoes the rhetoric of those respondents who have argued that it is objectively the ‘best’ course for some students to complete their education out of the mainstream setting. Walzer’s view is, however, at odds with the more dominant communitarian position that an inclusive school models the democratic nature of society, teaches tolerance and gives students with impairments the opportunity to give through the teaching of others. Communitarians would encourage the inclusion of all students with impairments unless some detriment to the community flows from the inclusion. Communitarians, perhaps, have not given up on achieving the attitudinal change that courts appear reluctant to impose on the community.

\textsuperscript{61} See Part I C, Chapter 2: Communitarian Education.
\textsuperscript{63} See Part IV, Chapter 2: Communitarian Education.
\textsuperscript{64} See above n 60.
The notion of mutual responsibility, which is the cornerstone of the communitarian society, may, however, be sufficient to justify some of the other covert limits detected in the case law. Communitarians are critical of citizens who expect the bald assertion of a right to trump all competing claims.65 Thus, communitarians may have some sympathy for the view that citizens must be prepared to compromise to achieve inclusion. Citizens who fail to take ‘reasonable’ steps to mitigate their own disability are likely to lose the sympathy and support of communitarian theorists.

Whether mutual responsibility and the preference for community over individual good are enough to justify exclusion where inclusion imposes a financial burden on the education provider is, however, less clear.66 Courts and tribunals have refused to extrapolate from the legislation a general limit on educational opportunities where their provision is costly. It has been argued, above, however, that cost concerns are nevertheless implicit in the fact that courts have refused to compel the inclusion of ‘problem’ students even where there is expert evidence that the problems could be solved by extra staff training and support. Perhaps it is not possible to articulate a firm communitarian position on whether or when the expenditure of money on inclusion will compromise community. Perhaps the communitarian view would be that whether the expenditure should be mandated would depend on the circumstances of the individual community. At present, such an approach would appear to accord with the flexible approach to the issue taken by courts and tribunals. While courts and tribunals have been coy about acknowledging the relevance of financial pressures, however, communitarians, with a plain preference for community over individual,

65 See above nn 56-8.
66 See Part II, Chapter 2: Communitarian Education.
would tolerate an open acknowledgment that excessive cost to the community is sufficient to justify exclusion.

### III Legitimacy of the Methods Employed to Deliver the Limits on Equality of Opportunity

An issue separate from the legitimacy of the limits on equality of opportunity in education for people with impairments is the legitimacy of the methods employed by courts and tribunals to deliver those limits. An assessment of the legitimacy of these methods requires consideration of how each method aligns with the social model of disability which underpins the policy of anti-discrimination legislation such as the QADA. The thesis has analysed a variety of successful and unsuccessful strategies for exclusion developed by respondents from the terms of anti-discrimination legislation. Among the successful strategies the comparator approach adopted by the majority of the High Court of Australia in Purvis stands out as particularly problematic in terms both of disability theory and preservation of the protective scope of the legislation.

#### A The Comparator

Since the decision in Purvis, in determining whether direct discrimination is proved, a court is authorised to look at whether the complainant was treated less favourably than a comparator with the complainant’s behaviour but without the complainant’s impairment. This is despite the fact that the complainant’s behaviour is caused by or, even, part of his or her impairment. This comparison plainly offends the aim of the legislation to prohibit discrimination on the basis of a protected attribute. It is plainly inconsistent with the definition of direct discrimination as ‘less favourable treatment’ on the basis of a protected attribute. It is, moreover, plainly offensive to people with
impairments in that it does not distinguish between their unwilled and involuntary behaviour and the deliberate behaviour of a person without impairment. As Gleeson CJ, somewhat disingenuously, admitted of Daniel Hoggan, the complainant in the Purvis case, ‘[w]hat, for him, was disturbed behaviour, might be, for another pupil, bad behaviour’. 67

Although detailed analysis is beyond the scope of the present study, the thesis has canvassed a variety of employment cases which have attempted to tease out the comparator approach in Purvis to encompass a wider variety of ‘problem’ behaviours in the workplace and to authorise termination on the basis of those behaviours. While, to date, no employment discrimination case has failed directly on the comparator point, a threat to the protective scope of the legislation is dormant in the following chilling sample of statements of employment discrimination law since Purvis:

If the employer would treat any employee the same who was absent from work for some weeks (whether or not the employee had a disability or not) then this would not constitute discrimination under the DDA. 68

Even if a preference for part-time work and a practical inability to work full-time could be regarded as so bound up in the attributes of parental status and family responsibilities as to be part of them, the complainant’s direct discrimination claim would still not succeed because the appropriate comparison is with another person who prefers not to, and practically cannot, meet the respondents’ requirement to work full time, but who is not a parent with family responsibilities. This was the reasoning of the majority in Purvis v New South Wales. 69

Several past and present Justices of the High Court\textsuperscript{70} have warned that allowing a comparator with the complainant’s impairment induced behaviour would undermine the function of anti-discrimination legislation, but the words of Sir Ronald Wilson are most often quoted and, perhaps, most powerful and most prescient:

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment … could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.\textsuperscript{71}

\textbf{B Exemptions}

The approach of the majority in \textit{Purvis} was doubtless affected by what the Justices saw as the desirable outcome of the case. Each majority judgment made it plain that an interpretation of the \textit{DDA} which mandated the inclusion of Daniel Hoggan and his ‘very violent behaviour’\textsuperscript{72} could not be tolerated.\textsuperscript{73} The Court was, perhaps understandably, concerned about potential problems with the intersection of discrimination law and tort law, workplace health and safety law and criminal law. How could a school forced by its obligations under anti-discrimination law to include a ‘violent’ student also discharge its obligation to protect its staff and students against the actions of that ‘violent’ student? There is little doubt that the majority of the High Court felt forced to construct a ‘radical’ solution to this problem because they

\textsuperscript{70} See below nn 73.


\textsuperscript{72} \textit{Purvis} (2003) 217 CLR 92, 97 [2], (Gleeson CJ), quoting the principal of South Grafton State High School.

believed no appropriate exemption was available under the *DDA* at that time.\textsuperscript{74} An unjustifiable hardship exemption or, perhaps, even a workplace health and safety exemption would have allowed the Court to keep an interpretation of the comparator consistent with disability theory and sensitive to the warnings of other justices of the High Court and still authorise the exclusion of Daniel Hoggan. The Queensland cases, *L*, *K* and *P* showed how the unjustifiable hardship exemption could be relied upon in similar circumstances.\textsuperscript{75}

Thus the *Purvis* case also illustrates the importance of a properly considered and drafted scheme of exemptions which explicitly acknowledges the situations where discrimination will not be ‘unfair’ and will be tolerated. It has been argued in the thesis that such a scheme of exemptions is consistent with communitarian theory in that it is consistent with a fundamental entitlement to inclusion which yields only when there is an irreconcilable contest between community interests and individual interests. It is, however, also reflective of a problem identified with the social model of disability in that the facts of many discrimination cases demonstrate that not all of the disadvantage flowing from impairment can be removed or even mitigated by social adjustment to accommodate the impairment. There will be cases, such as those involving intellectual impairment, where no amount of adjustment will neutralise all disability attaching to the impairment. There will be cases, such as those where the good of a community is jeopardised by the inclusion of a person with impairment, where adjustment should not be required.

\textsuperscript{74} But note that the minority did not exclude the availability of an exemption under *Disability Discrimination Act 1992 (Cth)* (*DDA*) s 55. See *Purvis* (2003) 217 CLR 92, 129 [111] (McHugh and Kirby JJ). See Part IV, Chapter 6: Exemptions.

\textsuperscript{75} See Part V D, Chapter 6: Exemptions.
To this end, the thesis has suggested the reworking of the unjustifiable hardship exemption, and the creation of a new exemption in relation to the inability to meet the legitimate course requirements of tertiary education institutions. A scheme of exemptions which allows the weighing of competing community and individual interests enhances the fair application of the legislation to the education of people with impairments.

C Changing the Comparator

With a scheme of appropriate exemptions there is, arguably, no need for the problematic reading of the comparator mandated in Purvis to be maintained. As noted above, under the QADA similar cases to the Purvis case were resolved without manipulation of the characteristics of the comparator. In L, K and P, for example, it was held by the QADT that the inclusion of students with behaviour problems related to their impairment would impose unjustifiable hardship on the respondent education institution. Similarly, United Kingdom courts interpreting the Disability Discrimination Act 1995 (UK) have, in contrast to the High Court of Australia, concluded that the comparator should not have the disability or behaviour of the complainant. This ‘generous’ reading of the comparator was, no doubt, facilitated by the existence in the UK legislation of an overarching obligation to take ‘reasonable steps’ to facilitate the inclusion of people with disabilities in the protected areas recognised in the legislation, including education and employment. As discussed

---

76 See Part V E, Chapter 6: Exemptions.
77 See Part I C, Chapter 10: Causation.
78 Please note that consideration of whether further exemptions are needed in respect of protected attributes other than impairment and protected areas other than education is beyond the scope of the present study.
79 See Part V D, Chapter 6: Exemptions.
80 See Part III C, Chapter 9: The Comparator.
81 Disability Discrimination Act 1995 (UK) ss 6 and 28C.
earlier in the thesis, a duty of reasonable accommodation, like a scheme of exemptions, allows for the weighing of competing interests in order to determine whether appropriate limits should be placed on a prima facie duty not to discriminate.  

Since Purvis, however, the QADT has acknowledged that the majority decision in that case now represents the current state of the law in Queensland on the comparator point. It would, however, reinforce the stated policy and purpose of the QADA if it were amended to clarify that the comparator for the purpose of determining less favourable treatment does not have the complainant’s protected attribute or behaviour caused by or part of that protected attribute. Amendments should also clarify that behaviour related to the protected attribute may not be considered as a relevant circumstance for the purpose of determining whether the complainant has been treated less favourably than a comparator. The introduction of such amendments would set the example for other Australian jurisdictions and would be an important step towards reinvigoration of the protective scope of anti-discrimination legislation for people with impairments.

III  EQUALITY OF OPPORTUNITY IN EDUCATION?

The thesis has demonstrated that there are some complainants with impairments who will continue to have difficulty claiming equality of opportunity in education in Queensland. It is clear from the Queensland cases, and from cases in other Australian cases.
jurisdictions, that many students with behavioural and intellectual impairments are
guaranteed fewer educational opportunities than students with other impairments or
without impairments.⁸⁵ To this extent, it appears that a hierarchy of impairments may
be postulated with students with physical and sensory impairment having a greater
range of options than students with intellectual and behavioural problems.⁸⁶

Students with behavioural and intellectual impairments have fewer opportunities
principally because their inclusion in the mainstream class room is perceived to
interfere with majority rights. Some commentators have suggested that the problem is
community ‘intolerance’ rather than individual ‘interference’ and that all that is
required to effect full inclusion of students with impairments is a change of ‘attitude’
on the part of staff and students.⁸⁷ The courts, however, have been concerned by what
they regard as tangible threats to community safety and to the viability of the learning
environment posed by students who cannot, because of impairment, conform to
school rules and standards of behaviour. Moreover, objective analysis suggests that
there are some aspects of disability, and particularly of disability related to intellectual
and behavioural impairment, that the most liberal and accepting of attitudes cannot
mitigate or remove. Community attitude cannot neutralise the effects of

NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March
2001).

⁸⁶ Education Queensland statistical data also support the conclusion that there is such a hierarchy. See
Part III B, Chapter 4: The Impact of the Legislation.

⁸⁷ See, for example, Carol Christensen, ‘Disabled, handicapped or disordered: “What’s in a name?”’ in
Carol Christensen and Fazal Rizvi (eds), Disability and the Dilemmas of Justice and Education (1996)
63 and Roger Slee, ‘Special education and human rights in Australia: how do we know about
disablement and what does it mean for educators?’ in Felicity Armstrong and Len Barton (eds)
uncontrollable violence. Community attitude cannot deliver a valid university degree to a student with profound intellectual impairment.

It has been reiterated throughout the thesis that communitarians will tolerate a thick set of limitations on what they acknowledge as each citizen’s right to inclusion. It is to be hoped, however, that the similarly thick regime of limitations acknowledged and constructed by Australian courts and tribunals does not permit education institutions in Queensland and other parts of Australia to avoid making adjustments that would allow schools and universities to operate more inclusively. While uncontrollable violence cannot be neutralised, that situation should be distinguished from the situation where a student reacts ‘violently’ to an inflexible and unsympathetic environment. While a valid university degree should not be awarded to a student without the intellectual capacity to achieve it, that situation should be distinguished from the situation where a student fails because of an inflexible and unsympathetic environment. The QADA aims to eliminate ‘unfair’ discrimination. Care must be taken that discrimination which is not ‘fair’, but which is ‘convenient’ or ‘expedient’ or ‘cost effective’, is not allowed to flourish under an inflexible and unsympathetic regime which accords more respect to the letter of the law than to the interests of people with impairments.
BIBLIOGRAPHY

Advisory Council for Special Educational Needs (Queensland), Supporting Students with Special Educational Needs in Regular Schools (1990)

Ainscow, M, ‘Would it work in theory?: arguments for practitioner research and theorising in the special needs field’ in Clark, C, Dyson, A and Millward, A (eds), Theorising Special Education (1998) 7


Armstrong, Felicity and Barton, Len (eds), Disability, Human Rights and Education: Cross-Cultural Perspectives (1999)


Ashman, A and Elkins, J (eds), Educating students with diverse abilities (2002)
Atkins, Denis, ‘A Question of Hardship’, The Courier Mail (Brisbane), 15 December 1995, 15

Atkins, Denis, ‘Commonsense Win or Rights Setback?’, The Courier Mail (Brisbane) 19 January 1996, 2


Ballard, Keith and McDonald, Trevor ‘Disability, Inclusion and Exclusion: Some Insider Accounts and Interpretations’ in Ballard, Keith (ed), Inclusive Education: International Voices on Disability and Justice (1999) 97

Barkman, Jennifer, Daring to Dream...Stories of Parent Advocacy in Queensland (2002)

Barnes, Colin, Disabled People in Britain and Discrimination: a case for anti-discrimination legislation (1991)


Barton, Len and Oliver, Mike (eds), Disability Studies: Past, Present and Future (1997)


Board of Teacher Registration, Queensland, *Meeting the Diversity of Students’ Needs in the Inclusive School* (1995)

Board of Teacher Registration, Queensland, *Students with Special Educational Needs in Local Schools: Implications for Teacher Education and Development* (1992)


Brisbane Catholic Education, *Special Education: Policy*

Butler, Genevieve, ‘QC Defends All Pupils’ Rights’, *The Courier Mail* (Brisbane), 16 December 1995, 6

Butler, Genevieve, ‘Row over Disabled Students’, *The Courier Mail* (Brisbane) 23 January 1996, 3


Campbell, Jane and Oliver, Mike, *Disability Politics: Understanding our Past, Changing our Future* (1996)


Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996)

Christensen, Carol, ‘Disabled, handicapped or disordered: “What’s in a name?”’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 63


Clear, Mike, ‘The Forms of Promise: Policy and Service Developments’ in Mike Clear (ed), Promises Promises: Disability and Terms of Inclusion (2000) 58

Commonwealth, Parliamentary Debates, House of Representatives, 26 May 1992, 2750, Brian Howe (Deputy Prime Minister)

Commonwealth, Parliamentary Debates, House of Representatives, 19 August 1992, 144 (Bruce Scott)

Commonwealth, Parliamentary Debates, House of Representatives, 19 August 1992, 150 (CG Miles)

Commonwealth, Parliamentary Debates, Senate, 7 October 1992, 1309 (GEJ Tambling)

Conroy, Marcia and Jackson, Jim, ‘Disability and School Education: Law and Policy in the UK and Australia’ in Harris, Neville and Meredith, Paul (eds), Children, Education and Health (2005) 199

Corker, Mairian and French, Sally (eds), Disability Discourse (Disability, Human Rights and Society) (1998)


Daly, M (ed), Communitarianism: A New Public Ethics (1994)

Demaine, J and Entwistle, H (eds), Beyond Communitarianism: Citizenship, Politics and Education (1996)

Department of Education, Queensland, State Education in Queensland: A Brief History (1984)

Dewey, John and Sikorsky, David (ed), The Essential Writings (1977)


Dickson, Elizabeth, ‘Disability Discrimination, the Unjustifiable Hardship Exemption and Students with Disability Related Problem Behaviour’ (2004) 9(2) Australia and New Zealand Journal of Law and Education 37

Dickson, Elizabeth, ‘Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in its Interpretation and Application’ (2003) 8 *Australia and New Zealand Journal of Law and Education* 45

Dickson, Elizabeth, ‘The Instruction of Students with Hearing Impairments in Auslan: *Hurst and Devlin v Education Queensland*’ (2005) 10(1) *Australia and New Zealand Journal of Law and Education* 95


Dyson, Alan and Millward, Alan, ‘Falling Down the Interfaces: From Inclusive Schools to an Exclusive Society’ in Ballard, Keith (ed), *Inclusive Education: International Voices on Disability and Justice* (1999) 152


Education Queensland, *Defining students with Disabilities in Queensland State Schools: Discussion stimulus paper* (2001)


Education Queensland, *Strategic Plan 2000-2004*


Evidence to Senate Employment, Workplace Relations and Education Committee, Brisbane, 6 September 2002, 409 (Phillip Tomkinson, Vice-president, Queensland Parents for People with a Disability)

Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September, 2002, 443 (Dr John Enchelmaier, Vice-President of the Australian Federation of Special Education Administrators)

Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September 2002, 483 (Michael John Walsh, Acting Director, Inclusive Education Branch, Curriculum Directorate, Education Queensland)

Evidence to Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, Brisbane, 6 September 2002, 412 (Dr Krista Van Krayennoord, Director of the Schonell Special Education Research Centre)

Fleischer, D and Zames, F, *The Disability Rights Movement: From Charity to Confrontation* (2001)


Foreman, Philip (ed), *Integration and Inclusion in Australia* (2001)


Green, Glenis, ‘Taylah’s mum just wants a fare go’, *The Courier Mail* (Brisbane), 22 August 2000, 8
Gutman, Amy, ‘Education about Democratic Values’ in Brody, Baruch A and Sher, George (eds), Social and Political Philosophy: Contemporary Readings (1999) 746


Harris, Neville and Meredith, Paul (eds), Children, Education and Health (2005)


Hauritz, Marge, Sampford, Charles and Blencowe, Sophie (eds), Justice for People with Disabilities (1998)

Haynes, Bruce, Australian Education Policy: An Introduction to Critical Thinking for Teachers and Parents (1997)

Howe, K, ‘Educational ethics, social justice and children with disabilities’ in Christensen, Carol and Rizvi, Fazal (eds), Disability and the Dilemmas of Justice and Education (1996) 46


Isaacs, P ‘Disability and the education of persons’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 27


Keefe-Martin, Mary and Lindsay, Kate, ‘Issues in Australian disability discrimination case law and strategic approaches for the lawful management of inclusion’ (2002) 7(2) *Australia and New Zealand Journal of Law and Education* 161


Lawler, Peter and McConkey, Dale (eds), *Community and Political Thought Today* (1998)


Lindsay, Katherine, 'Asking for the moon'? a critical assessment of Australian disability discrimination laws in promoting inclusion for students with disabilities’ (2004) 8(4) *International Journal of Inclusive Education* 373

Lipsky, D and Gartner, A, ‘Equity requires inclusion: the future for all students with disabilities’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 145

Lloyd, Graham, ‘Class Rights’, *The Courier Mail* (Brisbane), 11 August 1995, 11


MacIntyre, Alasdair, ‘I’m not a communitarian but…’ (1991) 1(3) *The Responsive Community*, 91


Marks, Deborah, *Disability: Controversial Debates and Psychological Perspectives* (1999)


Meekosha, Helen and Jakubowicz, Andrew, ‘Disability, participation, representation and social justice’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 79


Minister for Education and the Arts (Queensland), *The Ministerial Taskforce on Inclusive Education (students with disabilities): Government Response*, June 2004

Ministerial Taskforce on Inclusive Education (students with disabilities) (Queensland), *Report*, June 2004


Murray-Smith, S, ‘Education in the Year 2000’ in Tronc, Keith and Cullen, Phil (eds), *School and Community* (1976) 58

National Children’s and Youth Law Centre, *Disability Discrimination in Schools: Students and Parents Speak Out* (1997)


National Council on Intellectual Disability, ‘Human Rights Legislation Fails People with Disability and their Families: We need a better way of supporting a fair society’ (Press Release, 4 September 2001)

Nelson, Brendan, ‘Most State and Territory Education Ministers Vote against Disability Standards’ (Press Release, 11 July 2003)


Oliver, Mike, The Politics of Disablement (1990)

Oliver, Mike, Understanding Disability: From Theory to Practice (1996)

Oliver, Mike and Barnes, Colin, Disabled People and Social Policy: From Exclusion to Inclusion (1998)


Queensland Advocacy Incorporated, Newsletter, March, 1996


Queensland, Parliamentary Debates, Legislative Assembly, 26 November 1991, 3195 (Dean Wells, Attorney- General)

Queensland, Parliamentary Debates, Legislative Assembly, 3 December 1991, 3575 (Judy Spence)

Queensland, Parliamentary Debates, Legislative Assembly, 3 December 1991, 3584 (Molly Robson)

Queensland, Parliamentary Debates, Legislative Assembly, 19 February 2002, 14 (Anna Bligh, Minister for Education and the Arts)


Rizvi, Fazal and Lingard, Bob, ‘Disability and the Discourses of Education and Justice’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 9

Rothwell, Nicholas, ‘Remote Control’, *The Australian* (Sydney), September 30, 2006


Scotch, Richard, ‘Foreword’ in Barton, Len, Ballard, Keith and Fulcher, Gillian (eds) *Disability and the Necessity for a Socio-Political Perspective* (1992) vii


Slee, Roger, ‘Disability, class and poverty: school structures and policing identities’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 96


Smart, Julie, *Disability, Society, and the Individual* (2001)

Smith, Wayne, ‘Good intentions not enough’, *The Courier Mail* (Brisbane), 11 August 1995, 11


Taylor, Charles, ‘Atomism’ in Avineri, Shlomo and De-Shalit, Avner (eds), *Communitarianism and Individualism* (1992) 29


Thomas, Gary and Loxley, Andrew, *Deconstructing Special Education and Constructing Inclusion* (2001)


Tregaskis, Claire, ‘Social Model Theory: the story so far…’ (2002) 17 (4) *Disability and Society* 457

Tronc, Kevin and Cullen, Phil (eds), *School and Community* (1976)


Walzer, Michael, *Thick and Thin: Moral Argument at Home and Abroad* (1994)

Wendell, Susan, ‘Who is Disabled: Defining Disability’ in Christensen, Carol and Rizvi, Fazal (eds), *Disability and the Dilemmas of Justice and Education* (1996) 11

Wenham, Margaret, ‘Landmark fund for mentally ill’, *The Courier Mail* (Brisbane), 18 April 2007, 28


Young, Iris, *Justice and the Politics of Difference* (1990)
TABLE OF CASES

A v Governing Body of Hob Moor School and the SENDIST [2004] EWHC 2165


Applicant N v Respondent C [2006] FMCA 1936 (Unreported, McInnis FM, 22 December 2006)

Attorney-General v Daniels [2003] 2 NZLR 742

Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165


Carson v Minister for Education for Queensland and Others (1989) EOC ¶92,269

CD on behalf of SD v JK and Anor (1994) EOC ¶ 92-558

Chinchen v NSW Department of Education and Training [2006] NSWADT 180 (Unreported, Judicial Member Goode, Members Nemeth de Bikal and Weule, 15 June 2006)

Chung v University of Sydney [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001)


Clark v TDG Ltd (t/a Novacold) [1999] 2 All ER 977


Cockin v P N Beverages Aust Pty Ltd Ors [2006] QADT 42 (Unreported, Member Rangiah, 13 December 2006)

Cocks v. State of Queensland (1994) 1 QADR 43

Colvin v Lowndes County, Mississippi School District, 147 Educ L Rep 601 (ND Miss 1999)


Commonwealth v Introvigne (1981) 150 CLR 258


Community Consolidated School District No 9 v John F, 33 IDELR ¶ 40 (ND Ill 2000)

Cowell, Mrs and Fleur Cowell v A School [2000] HREOC No H97/168 (Unreported, Commissioner McEvoy, 10 October 2000)

Dalla Costa v The ACT Department of Health (1994) EOC 92,633


Dare v Hurley [2005] FMCA 844 (Unreported, Driver FM, 12 August 2005)

Demmery v Department of School Education [1997] NSWEOT (Unreported, Judicial Member Ireland, Members Mooney and MacDonald, 26 November, 1997)

Eaton v Bryant County Board of Education (1997) 1 SCR 241


Exemption application re: Beach House Group P/L [2006] QADT 30 (Unreported, Commissioner Murphy, 19 July 2006)


Exemption application re: Golden Casket [2002] QADT 16 (Unreported, Member Tahmindjis, 26 August 2002)

Exemption Application re: Grey Army Gold Coast [2003] QADT 1 (Unreported, President Sofronoff, 11 February 2003)

Exemption Application re: Zig Zag Young Women's Resource Centre Inc [2004] QADT 41 (Unreported, Member Rangiah, 21 December 2004)

Farrin v Maine School Administrative District No 59, 170 Educ L Rep 565 (D Me 2001)


Finney v Hills Grammar School (2000) EOC ¶.93-087 (HREOC)


GL v Legal Aid Queensland [2006] QADT 25 (Unreported, Member Rangiah, 13 June 2006)

Goodwin v Patent Office [1999] ICR 302


H v R School and the SENDIST [2004] EWHC 981

Hashish v Minister for Education for Queensland [1998] 2 Qd R 18


Honig v Doe, 484 US 305 (1988)


I on behalf of BI v State of Queensland [2006] QADT 19 (Unreported, Dalton P, 11 May)

IW v City of Perth (1996) 191 CLR 1

Jamal v Secretary, Department of Health (1988) 14 NSWLR 452

James v Eastleigh Borough Council [1990] 2 AC 751

JC v Regional School District No 10, 147 Educ L Rep 935 (D Conn 2000)

JM v QFG & GK [2000] 1 Qd R 373

K v N School (No 3) [1996] 1 QADR 620


Krenske-Carter v Minister for Education (2003) EOC ¶93-256

L v Minister for Education for the State of Queensland (No. 2) [1995] 1 QADR 207

Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19


McAuley Catholic High School v C [2004] 2 All ER 436

McDonald v Queensland Rail [1998] QADT 8 (Unreported, Commissioner Keim, 1 May 1998)


M v SW School and the SENDIST [2004] EWHC 2586


Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254

Murphy and Grahl v The State of New South Wales (NSW Department of Education) and Wayne Houston [2000] HREOC NoH98/73 (Unreported, Commissioner Carter, 27 March 2000)

Nagarajan v London Regional Transport [2000] 1 AC 501

Nesci v TAFE Commission of NSW (No 2) [2005] NSWADT 183 (Unreported, Britton J, Members Weule and Lowe, 8 August 2005)

New South Wales (Department of Education) v Human Rights and Equal Opportunities Commission (2001) 186 ALR 69

Notice of HREOC exemption decision re: Lutheran Church of Australia Queensland District (Unreported, President Wilson, 10 June 1997)


P v Director-General, Department of Education [1995] 1 QADR 755

Pagura-Inglis v Minister for Education [2003] QADT 18 (Unreported, Member Roney, 23 October 2003)

Pagura-Inglis v State of Queensland [2004] QADT 42 (Unreported, Member Roney, 7 December 2004)

PARC, 343 F. Supp. 279 (1972)


Pham v University of Queensland [2001] FCA 1044 (Unreported, Heerey J, 30 July 2001)


Power v Aboriginal Hostels Limited (2003) 133 FCR 254

Proudfoot v Australian Capital Territory Board of Health (1992) EOC ¶92-417

Purvis obo Hoggan v New South Wales (Department of Education) [2001] EOC ¶ 93-117


R v Birmingham City Council; Ex parte Equal Opportunities Commission [1989] AC 1155

Randell v Consolidated Bearing Co (SA) Pty Ltd [2002] EOC ¶93-216

Re Opinion J & L Hutton (QADT, Unreported, Member Keim, 9 February 1999)

Re Opinion on Public Transport Union (QADT, Unreported, Member Keim, 12 October 1998)

Rocca v St Columba's College Ltd and Rogers [2003] VCAT 774 (Unreported, Bowman J, 23 June 2003)

Son behalf of M & C v Director General, Department of Education & Training [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001)

Schaffer v Weast, 546 US 49 (2005)

Secretary, Department of Foreign Affairs and Trade v Styles and Anor (1989) 23 FCR 251

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26

Sluggett v Flinders University of South Australia [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000)

Sluggett v Flinders University of South Australia [2003] FCAFC 27 (Unreported, Spender, Dowsett, Selway JJ 5 March 2003)


Southern Community College v Davis, 442 US 397 (1979)


State of Victoria v Bacon & Ors [1998] 4 VR 269

Sullivan v Department of Defence [1992] EOC ¶92-421, 79005


T v Governing Body of OL [2005] All ER 213

Tate v Rafin [2000] FCA 1582 (Unreported, Wilcox J, 8 November 2000)

Travers v New South Wales (2001) 163 FLR 99 (Federal Magistrates Court)

Treloggen v Department of Education [2003] TASADT 4 (Unreported, Member Kohl, 11 July 2003)
Trindall v NSW Commissioner for Police [2005] FMCA 2 (Unreported, Driver FM, 7 February 2005)


University of Ballarat v Bridges [1995] 2 VR 418


Ware v OAMPS Insurance Brokers Ltd [2005] FMCA 664 (Unreported, Driver FM, 29 July 2005)

Waters and Others v Public Transport Corporation (1991) 173 CLR 349

Wensley v Director-General, Department of Education and Training [2000] NSWADT 142 (Unreported, Judicial Member Goode, Members Nemeth de Bikal and Luger, 13 October 2000)

Wensley v Technical and further Education Commission (No 2) [2002] NSWADT 68 (Unreported, Judicial Member Goode, Members Nemeth de Bikal and Clayton, 2 May 2002)

X v McHugh (1994) 56 IR 248

X and Others (Minors) v Bedfordshire County Council [1995] 3 All ER 353


## TABLE OF LEGISLATION

### Commonwealth

*Administrative Decisions (Judicial Review) Act 1977*

*Age Discrimination Act 2004*

*Commonwealth of Australia Constitution Act 1900*

*Disability Discrimination Act 1992*

*Disability Discrimination Amendment (Education Standards) Act 2005*

*Disability Standards for Accessible Public Transport 2002*

*Disability Standards for Education 2005*

*Human Rights and Equal Opportunity Act 1986*

*Productivity Commission Act 1998*

*Race Discrimination Act 1975*

*Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Act 2004*

*Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Regulation 2005*

*Sex Discrimination Act 1984*

### Australian Capital Territory

*Discrimination Act 1991*

### New South Wales

*Administrative Decisions Tribunal Act 1997*

*Anti-Discrimination Act 1977*
Northern Territory

Anti-Discrimination Act 1992

Queensland

Anti-Discrimination Act 1991

Disability Services Act 1992

Education and Other Legislation Amendment Act 1997

Education (Accreditation of Non-State Schools) Regulation 2001

Education (General Provisions) Act 1986

Education (General Provisions) Act 2006

South Australia

Equal Opportunity Act 1984

Tasmania

Anti-Discrimination Act 1998

Victoria

Equal Opportunity Act 1984

Equal Opportunity Act 1995

Western Australia

Equal Opportunity Act 1984

European Community

New Zealand

Bill of Rights Act 1990

Human Rights Act 1993

United Kingdom

Disability Discrimination Act 1995

Education Act 1996

Special Education Needs and Disabilities Act 2001

United States of America

Americans with Disabilities Act of 1990 42 USC §12101

Individuals with Disabilities Education Act 1990 20 USC § 1400

Individuals with Disabilities Education Act 2004 20 USC § 1400