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## **Email:** [R.McClelland.MP@aph.gov.au](mailto:R.McClelland.MP@aph.gov.au)

Dear The Hon Robert McClelland MP

Subject: **Australian law promotes disability discrimination**

I write this open letter expressing the concerns and disappointment of people with autism spectrum disorders (ASD), their families and associates about the ongoing refusal of Governments in Australia to protect people with ASD and their associates from discrimination.

In particular, I refer to the recent Federal Court decision in [*Walker v State of Victoria [2011] FCA 258*](http://www.austlii.edu.au/au/cases/cth/FCA/2011/258.html) showing Australian laws, their interpretation and the conduct of the Courts promote discrimination against people with autism spectrum disorders (ASD). Autism Asperger Advocacy Australia (A4) previously expressed concern over Australia’s discrimination law as pronounced by the High Court in Purvis v The State of New South Wales (Department of Education and Training). Our concern is now reality.

The Applicant in *Walker v State of Victoria*, Alex Walker, has Asperger’s Disorder. The decision says …

2 …. It was common ground that he [Alex Walker] suffered and suffers from a number of disabilities including … Asperger’s syndrome.

Students with Asperger’s Disorder/syndrome are students with a disability. Many students need “reasonable adjustments” in their education. The DDA is meant to ensure that schools make “reasonable adjustments” for people with a disability.

The Respondent [representing schools that Alex Walker attended] did not make reasonable adjustments to their behaviour management policy and practice in respect of Alex’s disability; adjustments that are clearly essential in relation to his disability.

The Judge did not expect the Respondent to make “reasonable adjustments” for the Applicant’s disability. The requirement to make “reasonable adjustments” was always part of the *Disability Discrimination Act* and of the associated Education Standards. And HREOC claims (see <http://www.hreoc.gov.au/disability_rights/legislation/2009.htm#adjustment>) the recent changes to the legislation are “intended to remove doubt” on this issue.

The *Walker v State of Victoria* decision shows that the Court and the Respondent have a particularly poor understanding of disability and discrimination … and of the Applicant and his situation.

The Court shows little or no understanding of Alex’s disability … possibly, it shows a strong prejudice against Alex because of his disability. Throughout the decision, the Judge refers to Alex’s disability as “misconduct” and ”misbehaviour”. The Federal Court must do better than this.

A4 has always been concerned about The Comparator as the High Court set it out in Purvis v The State of New South Wales (Department of Education and Training). The decision in *Walker v State of Victoria* says …

118 Alex contended that, in excluding him from the playground and from school during recess and lunch breaks between 2005 and 2006, the Department directly discriminated against him, contrary to the provisions of 22(2) of the DDA. This contention must fail.

119 It must fail because it cannot be said that the Department (or Branxholme) would have treated another student without Alex’s disabilities any differently from the way in which it treated Alex. This is because the relevant comparator is a student displaying the same behaviour as Alex did but without the disability, not a student without the disability and without the behaviour. Furthermore, Alex has not established that, in imposing the relevant regime, the Department subjected him to any detriment.

The decision fails to explain the Comparator that is used: who precisely is this “student displaying the same behaviour as Alex did but without the disability” (paragraph 119)? Apparently, the Court is unaware of or just ignores the fact that by definition any student who displays the same behaviour as Alex over an extended period also has Asperger’s Disorder. Not having a diagnosis does not mean a hypothetical comparator is “without the disability”.

The court cannot regard someone with another disorder, such as Oppositional Defiance Disorder (ODD) or some other behaviour/conduct disorder that is also manifest through what the Court regards as “misconduct” and ”misbehaviour” (see <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Oppositional_defiant_disorder> or <http://www.healthinsite.gov.au/topics/Maladaptive_Behaviours_in_Childhood>), as the comparator. Even if the Court regards such maladaptive behaviour as “the relevant comparator”, the Court has not shown in its decision that the school’s treatment of Alex was appropriate for the “comparator”. But these are not an appropriate “comparator”.

Another “relevant comparator” is needed. Is “the relevant comparator” someone who behaves like Alex to ridicule people with Asperger’s Disorder? Or is “the relevant comparator” someone who does not have a disability yet behaves like a “retard” or a “spasso” with the purpose of avoiding some task or a responsibility?

Is there any other interpretation for the High Court’s *Purvis v NSW* decision?

The Court’s view, that Alex should be mistreated as if his behaviour has malicious or idle intent, is cruel and unjust: it is a detriment to Alex and his family.

Another commentator (see <http://rightnow.org.au/news-article/walker-vs-state-of-victoria-and-disability-discrimination/>) says …

This exclusion from education is contrary to the child’s right to an education under Articles 23, 24 and 28 of the [*Convention on the Rights of the Child*.](http://www2.ohchr.org/english/law/crc.htm)

The evidence that the Court presents in its decision suggests that Alex’s more challenging behaviours emerged relatively quickly, and in the school context. Apparently, it emerged at school after Alex was made “a member of a small group which [the upper primary teacher] called ‘the Treasures’” (see paragraph 73). The school’s “behaviour management” practices then escalated his maladaptive behaviour.

The recent story on the ABC’s 7.30 Report, *Hidden Shame* (see <http://www.abc.net.au/7.30/content/2011/s3219518.htm> and <http://a4.org.au/a4/node/370>), and the parade of stories about students in cages (see <http://a4.org.au/a4/node/279>), shows inappropriate behaviour management is a chronic problem in schools. Many schools routinely exclude students with ASD … which is just a part of how Education Departments in Australia mismanage students with ASD and deny many of them an effective education.

Australia’s disability discrimination law promotes rather than prevent disability discrimination. The consequent injustice denigrates the Government and embarrasses Australians.

We urge you to take immediate action to redress this gross injustice against Alex Walker and his family, and to prevent any similar injustice against anyone else with an autism spectrum disorder.

Yours sincerely

Bob Buckley  
Convenor

*18/6/2011*