CHILDREN WITH SPECIAL NEEDS AND THE RIGHT TO EDUCATION

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Contents

For further information:

Much of the material in this report has been published in three scholarly journals:

- Tamara Walsh, 'Negligence and special needs education: The case for recognising a duty to provide special education services in Australian schools' (2015) 18(1) *Education Law Journal* 32-50.
- Tamara Walsh, 'Children with special needs and the right to education' (2012) 18(1) *Australian Journal of Human Rights* 27-56.
- Tamara Walsh, 'Adjustments, accommodation and inclusion: Children with disabilities in Australian primary schools' (2012) 17(2) *International Journal of Law and Education* 23-38.

All the cases and legislation cited in this report can be found on the Austlii website:

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You can also view legislation at the following websites:

- www.comlaw.gov.au (federal legislation)
- www.legislation.act.gov.au
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Executive summary

All Australian children are required by law to attend school, including children with disabilities and other special needs. For children with special needs, inadequate special education services can have significant impacts on their lifelong learning capacity. The Education Acts in the States and Territories outline the kinds of services that can be made available to children with special needs in schools, but they stop short of providing a right to accessible or appropriate education for children.

Absent this right, this report presents findings on the (lack of) redress available to children with special needs when they are not provided with the educational services they require. It examines discrimination claims against primary schools on behalf of children with disabilities in Australia between 2003-2014. It presents the results of a survey of primary school educators in Brisbane, which explored the effectiveness of adjustments in promoting inclusion of students with disabilities and the impact this has on conciliation. Lastly, it examines the potential for negligence claims to hold education providers accountable for the harm that can, and does, result when the educational requirements of children with special needs are not adequately met.

The results of these findings demonstrate a number of things:

1. Relevant legislation and policy goals need to be more closely aligned. There may be inconsistencies between discrimination legislation, which calls for reasonable adjustments to be made, and policy documents, which emphasise the importance of inclusion.
2. Children might be able to frame their claim as a discrimination matter in some cases, but this is often something of a legal fiction since most children with special needs are met with a surprising amount of goodwill in schools. The problem is generally one of resources, and the way resources are allocated amongst schools and children in need of support, rather than discriminatory attitudes.
3. The vast majority of special needs discrimination cases that proceed to tribunals or courts go against the complainant.
4. In contrast, conciliation can produce positive results for students with disabilities. Schools and educators are willing to include students with disabilities in their programs, and they are willing to take steps towards successful inclusion. However, educators generally agree that they require more resources, particularly staff and training, to support them in their inclusion endeavours.
5. A failure to provide students whose needs have been assessed, identified and documented with the special education services they require may breach an education provider's duty of care to the student.

A child's access to education is considered to be a universal right, extending even to those with severe disabilities. As it stands, the current protections and courses of redress in Australia are ineffective in ensuring the adequate provision of education to children with special needs. Reforms are necessary in a number of areas. However, it is significant that prejudicial attitudes are rare in these cases. Rather, it is ineffective policies and cost pressures that stand in the way of adequate service provision.

List of recommendations

Recommendation 1: That children's right to special education services be recognised in all Australian States' and Territories' Education Acts. Model provisions may be found in Australian Capital Territory legislation, where it is stated that:

- Everyone involved in the administration of this Act or in the school education of children in the ACT is to apply the principle that school education: (a) recognises the individual needs of children with disabilities; and (b) should make appropriate provision for those needs, unless it would pose unjustifiable hardship on the provider of the school education (*Education Act 2004* (ACT) s 7(3)).
- Every child has the right to have access to free, school education appropriate to his or her needs (*Human Rights Act 2004* (ACT) section 27A(1)).

Recommendation 2: That persons with disabilities, their families, their advocates and their educators, be consulted on what the policy goals for special needs education should be, and that existing goals be rethought if necessary.

Recommendation 3: That the *Disability Discrimination Act 1992* (Cth) be amended to explicitly reverse the *Purvis* precedent. For example, a section 10A could be added which states:

(1) If a discriminator discriminates against a person on the basis of functional limitations caused by a disability, for the purpose of this Act, the discriminator is taken to have discriminated against the person on the basis of their disability.
(2) Subsection (1) does not apply if the discriminator has made reasonable adjustments for the person.

Recommendation 4: That complaints or appeal mechanisms be established within all Education Departments so that parents may seek a remedy in situations where they believe their child has been unable to access adequate and appropriate special education services. These mechanisms should promote discussion and negotiation between the family and education providers, rather than being adversarial in nature.

Recommendation 5: That Education Queensland review its use of set 'impairment categories' for the purpose of its Educational Adjustment Program. If the impairment categories are retained, it is recommended that an 'other' category be added so that children with impairments that are not otherwise recognised have improved access special education funding.

Recommendation 6: That Education Departments in Australian States and Territories reconsider their commitment to special needs education in mainstream schools, bearing in mind that they may be under a legal duty of care to provide adequate and appropriate educational supports to children with special needs.

1. The right to education

1.1 Introduction

All Australian children are required by law to attend school, including children with disabilities and other special needs. In 2010, there were around 172,300 students that met State and Territory eligibility criteria for receiving disability funding, equating to 4.9% of all enrolments (Gonski et al 2011, 119).

The most common disabilities among school-aged children are intellectual and learning disabilities, physical disabilities, sensory and speech disabilities and psychiatric disabilities (Australian Institute of Health and Welfare 2006, 22). The Australian Institute of Health and Welfare has found that a significant proportion of children with disabilities experience difficulties related to their learning (43%), fitting in socially (30%), communicating (23%), participating in sports (13%), sitting (8%) and hearing or seeing (5%) (Australian Institute of Health and Welfare 2006, 19). These children require significant levels of support to function effectively in a mainstream school environment.

Yet, the vast majority of these children attend mainstream or 'regular' schools. Only 9 per cent of children with disabilities who attend school are in 'special schools'. The remaining 91% attend mainstream schools, and are reliant on the special education services they have on offer, either in a dedicated special education unit, or a more ad hoc fashion (Dempsey, Foreman and Jenkinson 2002; Forlin and Forlin 1996; Ward et al 1987).

'Special education services' are educational programs and services that are designed specifically for children with special needs. This can include the allocation of staff to support the student within a mainstream classroom, the delivery of 'catch-up' programs outside the classroom, the provision and supervised use of special equipment, the use of special assessment procedures, and the delivery of allied health services such as physiotherapy, occupational therapy and speech pathology.

Special education services for primary school aged children are particularly important because at this stage of children's education, basic literacy and numeracy skills are learned and developed. If appropriate and effective special education services are not delivered to children in these early years, there can be significant impacts on their lifelong learning capacity (van Kraayenoord et al 2001).

Yet, in most Australian States and Territories, there is no avenue for redress if children with special needs are not provided with the educational services they require.

Following an overview of the right to education internationally and in Australia, and a brief discussion of definitions, this report presents findings from four separate investigations. One examines the legal outcomes of discrimination proceedings between 2003 and 2014 (see Chapter 2). The second examines the outcomes of conciliation proceedings over the same

period (see Chapter 3). The third examines the practice of educators in making adjustments in the classroom and school environment (see Chapter 4). The results of these studies suggest that current avenues of redress available to children with special needs are inadequate in most cases. In light of this, Chapter 5 of this report cautions that a claim in negligence may be available against education providers that fail to provide appropriate support for their special needs students in some circumstances.

1.2 Right to Education

1.2.1 International framework

A child's access to education is considered to be a universal right, extending even to those with severe disabilities (Convention on the Rights of the Child, arts 23, 28, 29; Convention on the Rights of Persons with Disabilities (CRPD), art 24; Bradley 1999).

Under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), everyone is stated to have a right to education, which is 'directed to the full development of the human personality and the sense of its dignity', and which 'strengthens the respect for human rights and fundamental freedoms'. With a view to realising this right, State parties are directed that primary education should be compulsory and available free to all (art 13(2)(a)).

The CRPD which Australia has ratified, enshrines the right to an 'inclusive' education system (art 24(1)). State parties are directed to ensure that children with disabilities are not excluded from free and compulsory primary education, and that they can access such education on an equal basis with others in the communities in which they live (art 24(2)(a)). State parties are also required to ensure that reasonable accommodation of individuals' requirements is provided, that they receive the support they require to facilitate their effective education, and that these support measures be individualised to maximise their academic and social development (art 24(2)(d), (e)).

1.2.2 How Australia compares

Consistent with this, attendance at school is compulsory for all Australian children.[1] Education is an area of State responsibility. Each State and Territory has an Education Act, but each one of them is different from the others.

None of the Education Acts provide children with a legal right to receive special education services, or to receive an appropriate or inclusive education. The Australian Capital Territory may provide an exception. In 2012, a new provision was added to the *Human Rights Act 2004* (ACT) which states that 'Every child has the right to have access to free, school

[1] See *Education Act 2004* (ACT) s 10; *Education Act 1990* (NSW) s 22; *Education Act* (NT) ss 20A, 20C; *Education (General Provisions) Act 2006* (Qld) s 176; *Education Act 1972* (SA) ss 75, 76; *Education Act 1994* (Tas) ss 4, 6; *Education and Training Reform Act 2006* (Vic) s 2.1.1; *School Education Act 1999* (WA) s 9. Some children may be exempt from this requirement: *Education Act 2004* (ACT) s 10(6); *Education Act 1990* (NSW) s 25; *Education Act (NT)* ss 20E, 20F; *Education (General Provisions) Act 2006* (Qld) s 185; *Education Act 1972* (SA) s 81A; *Education Act 1994* (Tas) ss 6, 8-10; *Education and Training Reform Act 2006* (Vic) s 2.1.5; *School Education Act 1999* (WA) s 11.

education appropriate to his or her needs.' This section has not yet been tested in the courts, but it certainly has the capacity to result in a legally enforceable right to special needs education for children.

In some States and Territories, legislation states that a child should ordinarily be enrolled at their local school, however this is not framed as an enforceable right of a child to attend their local school.[2]

Education legislation in most States and Territories states that education *should* be made available to all children.[3] Some Acts further state that education should be of the highest possible quality, and this may include a reference to meeting the needs of all children, or a recognition that some children may need to be provided with special services.[4] However, these provisions do not provide a legislative requirement that schooling be accessible to, or inclusive of, children with special needs.

In contrast, legislation in the United Kingdom imposes a duty on education providers to educate children with special needs in mainstream schools unless this is incompatible with the wishes of the parent or the provision of efficient education for other children (*Special Educational Needs and Disability Act 2001* (UK) c10). Similarly, the *Education Act 1996* (UK) c56 states that in exercising its powers and duties, the Secretary shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as this is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

Similarly, the United States' *Individuals with Disabilities Education Improvement Act 2004* says that States must ensure that a free appropriate public education is available to all school-aged children with disabilities and that, 'to the maximum extent appropriate, children with disabilities ... [should be] educated with children who are not disabled [sic]' (s 612 (5)(A)). It is well-established in United States case law that, regardless of the severity of a child's disabilities, all children are entitled to appropriate education services in accordance with an individualised education plan (*Parks v Pavkovic* 753 F.2d 1397 (7th Cir, 1985); *Timothy W v Rochester N.IL School District* 875 F.2d 954 (1st Cir, 1989)).

While most of the Australian Education Acts make reference to children with special needs, or 'special education', the only jurisdiction which comes close to providing an entitlement to appropriate education for children with special needs is the Australian Capital Territory (ACT). The ACT *Education Act 2004*, in its principles provision, recognises the individual needs of children with disabilities and states that appropriate provision for those needs should be made unless this would cause unjustifiable hardship to the provider. The principles of the Victorian *Education and Training Reform Act 2006* include the right of parents to choose an appropriate education for their child; however it is also stated that these principles do not give rise to any civil cause of action.

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[2] *Education and Training Reform Act 2006* (Vic) s 1.2.2(2)(c); but then see s 1.2.3; *Education Act 1994* (Tas) s 19; *Education Act 2004* (ACT) s 21(3).

[3] *Education Act 2004* (ACT) s 18(b), (d),(i); *Education Act 1990* (NSW) s 4; *Education Act (NT)* s 6(1)(b), (2); *Education (General Provisions) Act 2006* (Qld) s 5(1)(b).

[4] See for example *Education Act 1990* (NSW) ss 4(a), (c), 6(1)(k); *School Education Act 1999* (WA) s 3(1)(c); *Education Act (NT)* s 6(1)(a), (b); *Education Act 2004* (ACT) ss 7(1), 18(c); *Education (General Provisions) Act 2006* (Qld) ss 5(1)(a), 7(b), 12(1).

In Queensland, New South Wales, Victoria and the Northern Territory, legislation states that the relevant public authority 'may' provide special education services or programs to children with special needs, but there is no obligation upon them to do so.[5] In the South Australian *Education Act 1972*, the only mention of children with special needs relates to the Director-General's power to direct that a child be enrolled at a special school. If such a direction is made, the child cannot be enrolled at another school, although there is provision for consultation with parents, and this decision may be appealed to the District Court. The Tasmanian *Education Act 1994* makes only a fleeting reference to special education, directing that the Secretary may determine whether or not a child is entitled to be enrolled at a special school.

Furthermore, decisions about the provision of special education services made by officials under Education Acts are generally not reviewable.[6] The exception is the system in the Northern Territory where parents of children with special needs may lodge a complaint in the Supreme Court if they cannot reach an agreement with the Minister regarding special arrangements for their child (*Education Act* (NT), Part 5).

Thus, even though educational policy and practice in the Australian States and Territories may support the principle of inclusive education (see Part 1.3.3 below), **the vast majority of Australian children do not have a legally enforceable right to be educated in a mainstream environment, or to receive special education services.**

Recommendation 1: That children's right to special education services be recognised in all Australian States' and Territories' Education Acts. Model provisions may be found in Australian Capital Territory legislation, where it is stated that:

- Everyone involved in the administration of this Act or in the school education of children in the ACT is to apply the principle that school education: (a) recognises the individual needs of children with disabilities; and (b) should make appropriate provision for those needs, unless it would pose unjustifiable hardship on the provider of the school education (*Education Act 2004* (ACT) s 7(3)).
- Every child has the right to have access to free, school education appropriate to his or her needs (*Human Rights Act 2004* (ACT) section 27A(1)).

[5] *Education (General Provisions) Act 2006* (Qld) s 420; *Education Act 1990* (NSW) s 20; *Education and Training Reform Act 2006* (Vic) s 2.2.20; *Education Act (NT)* s 36(1).

[6] See for example *Education (General Provisions) Act 2006* (Qld) s 401 and *Education Act 1990* (NSW) s 107 for a list of reviewable decisions under those Acts.

1.3 Definition of terms

1.3.1 Accommodating people with disabilities

The CRPD recognises that people with disabilities experience various barriers to their full and effective participation in society on an equal basis with others (art 1). It states that the denial of 'reasonable accommodation' for persons with disabilities can amount to discrimination (art 2).

'Reasonable accommodation' is defined in the Convention as a necessary and appropriate modification or adjustment not imposing a disproportionate or undue burden, that is needed in a particular case to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms (art 2). With respect to education, state parties are required to ensure that children with disabilities can access primary school education within the general education system, and that reasonable accommodation of individuals' requirements is provided (art 24(2)).

1.3.2 Making adjustments

Australia has ratified the CRPD, however Commonwealth legislation and the *Disability Standards for Education 2005* (Cth) ('the Disability Standards') both require 'reasonable *adjustments*' to be made, rather than 'reasonable *accommodation*'.

The Disability Standards were enacted in 2005 pursuant to the Commonwealth *Disability Discrimination Act 1992.* According to the Standards, education providers must make 'reasonable *adjustments*' to their programs to enable students with disabilities to participate, and access their facilities and services, on the same basis as a student without a disability. 'Adjustments' are defined as measures or actions taken by education providers that assist a student with a disability to enrol or participate in courses or programs, or use the facilities or services, of an educational institution on the same basis as a student without a disability. The Standards state that, in assessing whether a particular adjustment is reasonable, regard should be had to the views of the student or the student's parents or associate, the effect of the adjustment on the student and others, and the costs and benefits of making the adjustment.

Consistent with this, recent amendments to the *Disability Discrimination Act 1992* (Cth) have changed the prevailing terminology in Australia from 'accommodation' to 'adjustment' (*Disability Discrimination Amendment (Education Standards) Act 2005* (Cth)). The *Disability Discrimination Act 1992* (Cth) defines 'reasonable adjustment' as an adjustment that would not pose an unjustifiable hardship on the person (s 4). Yet, there is no indication as to what sort of 'adjustment' might be made, or what it should aim to achieve.

The implications of this difference in terminology are difficult to evaluate. It could be argued that 'accommodation' is broader than 'adjustment', encapsulating more than a mere attempt to make life easier for a person with disabilities. Accommodation implies that any adjustment made meets the goals set for it – if a person is 'accommodated' then the implication is that

they are satisfied. As McHugh and Kirby JJ remarked in *Purvis v NSW* (2003) 217 CLR 92 at [86], this is the sense in which a banker would use the term when 'accommodating a customer's application for a loan.'

In short, **the mere making of an adjustment might not necessarily lead to the successful accommodation of a student.**

1.3.3 Inclusion

'Inclusion' may be broader still. It may encompass more than adjustment or accommodation, or it may be something different altogether.

Inclusion has been described as the 'central organising concept for special needs education' (Hegarty 2001, 247) and the literature on inclusion is vast. In some settings, 'inclusion' is used simply to denote the concept of 'mainstreaming'; that is, enrolling children with disabilities in regular schools so they can be educated alongside their 'able-bodied' peers. But it is generally considered to represent something more normative than this.

To define it in the negative sense, inclusion is the opposite of feeling marginalised, left out or cut off (Wilson 2000, 299; Kavale and Forness 2000; Keefe-Martin and Lindsay 2002, 141-142; Lindsay 2004; Wedell 2008). Inclusion incorporates notions of equality, fraternity, human rights and democracy. Of course, treating people equally does not guarantee inclusion, and one may have 'all the political rights in the world' and still feel excluded (Wilson 2000, 302). Some commentators have argued that there is no single accepted definition of inclusion (Wilson 2000). Others refute this, saying that even small children know whether they are 'included' or not in any given situation (Hegarty 2001). Certainly it is difficult to measure, because so many variables contribute to its success, including academic outcomes, social outcomes, personal satisfaction and attitudes (Foreman and Arthur-Kelly 2008).

In all Australian States and Territories, Education Departments have committed to a policy of 'inclusive' education (Berlach and Chambers 2011; Dempsey et al 2002; ACTDET (2008); NSWDEC (2011); NTDET (2008); Education Queensland (2008); Education Queensland (2005); SADECS (2006); TasDE (2000); VicDEECD (2013); WADE (2012)), and there is a general perception that inclusion is the most ethical and moral approach to educating children with special needs (Curtin and Clarke 2005, 195). This is reflective of a rights-based perspective on the issue, and is consistent with the relevant international human rights instruments (ICESCR, art 13; CRPD, art 24).

At first glance, inclusion appears to be a laudable policy goal. However, a number of concerns have been raised regarding the inclusive approach to education, and there has been something of a backlash against it in recent years. It has been said that, in practice, mainstream schools are not always able to deliver a program that successfully meets the diverse needs of children with disabilities (Frankel 2004; Hyde et al 2005/06; Curtin and Clarke 2005; Kavale 2000; Hegarty 2001). Being 'included' in a regular school may not always possible or desirable, particularly where a child's personal care needs, or cognitive delays, make their presence in a regular classroom unworkable.

The fact is that inclusion may not always work out, for the child or the school.

1.4 Are adjustments, accommodation and inclusion equivalent goals?

There appears to be an assumption that the making of 'reasonable adjustments' to the curriculum, program and facilities will bring about 'inclusion'. But an examination of past research indicates that this is not always so. Inclusion is multifaceted and complex, and the making of certain adjustments to assist a child may limit other aspects of their inclusion. Even if physical and academic barriers to 'inclusion' are removed, social barriers may remain, and there may be tensions between maximising educational achievement and social integration (Kavale 2000).

As John Wilson (2000, 301) has said, to the extent that inclusion incorporates a sense of being loved and valued for ourselves, it is not something that can be fostered by 'any set of administrative or political arrangements'. The making of 'reasonable adjustments' alone will not meet the normative goals of inclusion, but it may well result in the 'accommodation' of the child. With current law and policy referencing all three of these concepts at different times, it is hard to know just what is being aimed for, or indeed what is most desirable from the point of view of children, parents and teachers.

Recommendation 2: That persons with disabilities, their families, their advocates and their educators, be consulted on what the policy goals for special needs education should be, and that existing goals be rethought if necessary.

2. Special needs education and discrimination law

2.1 Rights, duties and discrimination

It was explained in Part 1 that there is no right to a mainstream education for most Australian children, and most children with disabilities have no entitlement to an appropriate education that meets their special needs. Where appropriate services and facilities are not provided, making a discrimination complaint is one of the few options available to children and their parents seeking redress. However, it will be seen that discrimination law represents an imperfect response to the problem for various reasons.

Commonwealth, State and Territory anti-discrimination legislation makes it unlawful for an educational authority or provider to discriminate against a person on the grounds of his or her disability.[7] There are two kinds of discrimination recognised in the legislation: direct and indirect. 'Direct disability discrimination' is where, because of a person's disability, the discriminator treats the person less favourably than the discriminator would treat a person without the disability in circumstances that are the same or not materially different. This requires consideration as to whether a person without the disability would, in the same or similar circumstances, have been treated differently by the discriminator.

'Indirect disability discrimination' is where the discriminator requires a person to comply with a condition or requirement and, because of their disability, the person does not or cannot comply, where the requirement is likely to have the effect of disadvantaging people with the disability, and is not reasonable. However, the legislation adds that a person does not discriminate against a person with a disability if avoiding the discrimination would have imposed an unjustifiable hardship on the discriminator.[8]

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[7] The relevant legislative provisions are: *Disability Discrimination Act 1992* (Cth) s 22; *Discrimination Act 1991* (ACT) ss 7(1)(j), 9, 18; *Anti-Discrimination Act 1977* (NSW) ss 49A-49B, 49L (private educational authorities are exempt: s 49L(3)(a)); *Anti-Discrimination Act 1992* (NT) ss 19(1)(j), 29; *Anti-Discrimination Act 1991* (Qld) ss 7(h), 38-39; *Equal Opportunity Act 1984* (SA) ss 66, 74; *Anti-Discrimination Act 1998* (Tas) ss 16(k), 22(1)(b) (note, however, the exemption at s 46 which states 'A person may discriminate against another person on the ground of disability in relation to the provision of special educational facilities for the use of persons with disabilities); *Equal Opportunity Act 2010* (Vic) ss 6(e), 38, 40 (note, however, s 42(1) which states that schools are permitted to set and enforce 'reasonable standards of … behaviour'); *Equal Opportunity Act 1984* (WA) ss 66A, 66I.

[8] *Disability Discrimination Act 1992* (Cth) ss 11, 29A; *Discrimination Act 1991* (ACT) ss 47, 51(2); *Anti-Discrimination Act 1977* (NSW) ss 49C, 49L(4), (5); *Anti-Discrimination Act 1992* (NT) s 58 (a person does not discriminate if it is 'unreasonable' to require the person to accommodate the special need); *Anti-Discrimination Act 1991* (Qld) ss 5, 44; *Equal*

Further to this, since 2009, the *Disability Discrimination Act 1992* (Cth) has required education providers to make 'reasonable adjustments' to their programs, facilities and services, to avoid a finding of discrimination against them (ss 5, 6). Direct discrimination will occur where a discriminator does not make reasonable adjustments for a person with a disability, and this failure has the effect that the person is treated less favourably than a person without the disability. Indirect discrimination will occur when the discriminator requires a person to comply with a condition or requirement, which the person could have complied with if the discriminator had made reasonable adjustments for the person, but the discriminator did not make reasonable adjustments.

2.2. The *Purvis* decision

The High Court case of *Purvis v State of NSW*, decided in 2003, concerned a boy, Daniel, with acquired brain injury who was excluded from his state high school because of his challenging behaviour, which included violence towards staff and students. Behaviour management plans were devised for him, but the school concluded that it was unable to accommodate his disabilities. The defence of unjustifiable hardship was, at that time, not available to schools once they had enrolled a student.[9] This meant that the school had to argue that there was no discrimination if it was to avoid a finding against it. It also meant that, if the court wanted to find that the school acted appropriately, it would have to conclude that there was no discrimination.

The High Court was split in its views on just what was required of the school in these circumstances. The majority held that Daniel had not been treated less favourably on the basis of his disability, but rather on the basis of his behaviour (at [13] (Gleeson CJ); [225] (Gummow, Hayne and Heydon JJ)). They found that any student displaying behaviour like Daniel's would have been excluded from school due to the safety threat posed to the school community, and that the school was not required to tolerate 'criminal' behaviour just because the perpetrator had a disability (at [227-8] (Gummow, Hayne and Heydon JJ); [266], [271] (Callinan J)). Thus, even though the evidence suggested that it was Daniel's disability that caused him to behave the way he did, the majority of the court concluded that he was treated less favourably on the basis of the way he behaved, not the disability itself. Therefore, they concluded that there was no discrimination under the *Disability Discrimination Act 1992* (Cth).

The minority in *Purvis* noted that this creates an absurd situation in which disability is divorced from the functional limitations it causes. Kirby and McHugh JJ stated (at [130]):

> …the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and

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Opportunity Act 1984 (SA) s 84; *Anti-Discrimination Act 1998* (Tas) s 48; *Equal Opportunity Act 2010* (Vic) s 41 (an educational authority does not discriminate against a person if it is not reasonable for them to make adjustments); *Equal Opportunity Act 1984* (WA) s 66I(4). Note that recent amendments to the *Disability Discrimination Act 1992* (Cth) have increased the protection that the Act offers.

[9] The defence of unjustifiable hardship would now be available in these circumstances, following amendments in 2005 and 2009: see *Disability Discrimination Act 1992* (Cth) ss 11, 29A.

> consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations. They would certainly lose it in any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment.

Kirby and McHugh JJ recognised that equality of treatment does not eliminate discrimination on the grounds of disability (unlike sex and race discrimination) and that affirmative action may be required to place people with disabilities on the same footing as those without disabilities (at [86]). They cited Sopinka J of the Supreme Court of Canada in the case of *Eaton v Brant County* with approval where he said (at [272-273]):

> … it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

The approach of the majority in *Purvis* has had a profound effect on the outcomes of subsequent disability discrimination cases. This is because *Purvis* enables a court to conclude that a person was treated less favourably because of their functional limitations, and not because of their disability, even when there is evidence to indicate that the functional limitations resulted from the disability.

If the court concludes that the discrimination was not *on the basis of the disability*, there is no discrimination under the *Disability Discrimination Act 1992* (Cth), and the complainant loses the case.

Recommendation 3: That the *Disability Discrimination Act 1992* (Cth) be amended to explicitly reverse the *Purvis* precedent. For example, a section 10A could be added which states:

(1) If a discriminator discriminates against a person on the basis of functional limitations caused by a disability, for the purpose of this Act, the discriminator is taken to have discriminated against the person on the basis of their disability.

(2) Subsection (1) does not apply if the discriminator has made reasonable adjustments for the person.

2.3 'Reasonable adjustments' and post-*Purvis* reforms

The *Purvis* decision has been criticised for being outcome-oriented. As Kirby and McHugh JJ said at [96], it would have been more appropriate for the court to conclude that reform of the law was required to extend the application of the unjustifiable hardship defence, rather than 'to impose on the definitional provisions an artificial construction in an attempt to resolve the anomaly'.

Changes to the law were subsequently made. The Disability Standards were passed, clarifying the obligations upon education providers to ensure that education is made accessible to people with disabilities, and requiring them to make reasonable adjustments to their programs to enable students with disabilities to participate on the same basis as a student without a disability.

The *Disability Discrimination Act 1992* (Cth) makes it unlawful to contravene the Disability Standards. However, the Disability Standards also provide protection for potential discriminators because, if a person acts in accordance with a Disability Standard, the person cannot be taken to have discriminated against another person on the ground of their disability.

Changes were also made to the *Disability Discrimination Act 1992* (Cth). In 2005, the defence of unjustifiable hardship in the area of education was extended beyond admission decisions, so education providers can now argue that unjustifiable hardship prevented them from making adjustments for an enrolled student (*Disability Discrimination Amendment (Education Standards) Act 2005* (Cth)). This removed the difficulty faced by the school in *Purvis*, which at that time was unable to claim unjustifiable hardship once they had accepted a student's enrolment.

Further to this, in 2009 the *Disability Discrimination Act 1992* (Cth) was amended to require the making of 'reasonable adjustments' to avoid a finding of discrimination (see the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth)).

It might be assumed that these changes would have reversed the *Purvis* precedent, and thereby provided greater scope for disability discrimination complaints to be made out. Yet, since *Purvis,* disability discrimination has proved difficult to establish. Between 1996 and 2007, not one discrimination case succeeded in the High Court (*NSW v Amery* (2006) 226 ALR 196, [86-89] (Kirby J); Thornton 2009, 6).

The practical reality of the majority's approach in *Purvis* is that it is almost impossible to successfully establish disability discrimination. Cases subsequent to the *Purvis* decision have demonstrated that in disability discrimination cases, it is invariably the functional limitations caused by a disability that are the basis for discrimination, rather than the actual disability or diagnosis of the individual concerned. Further to this, there is evidence of *Purvis* reasoning in discrimination cases that do not concern disability (see eg *Forozandeh v Sky City Adelaide* [2006] FMCA 222, [11]-[12]; *Kowalski v Domestic Violence Crisis Service* [2005] FCA 12, [59]-[60]).

2.4 Primary school disability discrimination matters 2003-2014

2.4.1 Rationale for the study

In order to determine the impact of the *Purvis* decision and subsequent legal developments on primary school disability discrimination matters, a search for all such cases heard by courts and tribunals throughout Australia between 2003 (the year *Purvis* was decided) and 2014 was conducted.

Between 2003 and 2014, only 28 complaints of disability discrimination in primary schools were heard by tribunals and courts in Australia. Of these cases, 18 were dismissed outright.[10] In four cases, the matter was not finally determined.[11] There were only four cases in which a finding of discrimination was ultimately made and the complainant obtained a remedy,[12] and in other two cases, applications for approval of settlement were granted.[13]

The question is, to what extent was *Purvis* to blame for this low success rate? It will be seen that the *Purvis* precedent is one reason why disability discrimination complaints against primary schools tend to be unsuccessful, but there are other factors at play.

2.4.2 The direct disability discrimination cases

A. Cases involving antisocial behaviour

Purvis reasoning was evident, or explicit, in many of the direct discrimination cases in this sample. The case most clearly influenced by *Purvis* was the Federal Court case of *Walker v Victoria* [2011] FCA 258. The facts of this case were similar to the facts in *Purvis:* in *Walker*, the aggressive and violent behaviour of a child with ADHD, Asperger's syndrome and other difficulties had led to the child's exclusion from school activities. Relying on *Purvis,* the Federal Court held that the school's principals had acted to protect the welfare of other

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[10] These 18 complaints were: *Walker v Victoria (No. 2)* [2012] FCAFC 38; *Sievwright v Victoria* [2012] FCA 118; *ALI on behalf of ALJ and ALK v Department of Education and Communities (NSW)* [2012] NSWADT 174; *Kiefel v Victoria* [2013] FCA 1398; *Abela v Victoria* [2013] FCA 832; *AB v Ballarat Christian College* [2013] VCAT 1790; *USL obo her son v Ballarat Christian College* [2014] VCAT 623; *Zhong v Department of Education and Communities (NSW)* [2014] NSWCATAD 209; *Oakes v Department of Education (Vic)* [2013] VCAT 1725; *Walker v Victoria (No. 1)* [2011] FCA 258; *Phu v Department of Education and Training (NSW) (No. 3)* [2009] NSWADT 282*; Loch v Director Genera*l [2007] NSWADT 281; *Sutherland v Department of Education and Training (Vic)* [2007] VCAT 63; *Woodbury v Australian Capital Territory* [2007] ACTDT 4;*Tyler v Kesser Torah College* [2006] FMCA 1; *Zygorodimos v Department of Education and Training (Vic)* [2004] VCAT 128; *Zygorodimos v Victoria* [2004] VSC 143; *Mr and Mrs A v Department of Education and Training (NSW)* [2003] NSWADT 71.

[11] These four cases were *Bowyer v Department of Education and Training (NSW)* [2010] NSWADT 152; *McCabe v Department of Education and Training (Vic)* [2006] VCAT 1224; *N (on behalf of N) v Department of Education and the Arts (QLD)* (*No 2)* [2007] QSC 208; *Corderoy v Queensland* [2005] QADT 2.

[12] These four cases were: *Turner v Department of Education and Training* [2006] VCAT 2661; *Chinchen v Department of Education and Training (NSW)* [2006] NSWADT 180*; Beasley v Department of Education and Training* (*Vic*) [2005] VCAT 619 (see also *Beasley v Department of Education and Training* (*Vic*) [2006] VCAT 187; *Beasley v Department of Education and Training* (*Vic*) [2006] VCAT 1050); *Hurst and Devlin v Education Queensland (No 2)* [2005] FCA 405 (to the extent that the case related to Ben Devlin's primary school education).

[13] These two cases were *A on behalf of B v State of NSW (Department of Education and Training) (No. 2)* [2013] FCA 551 and *Sievwright v Victoria (No. 3)* [2014] FCA 75.

students, and that they had dealt with him in the same way as they would have dealt with any other student who acted in the same manner. Therefore, there was no discrimination.

Similarly, in *Tyler v Kesser Torah College* [2006] FMCA 1, heard by the Federal Magistrates Court, a boy with Downs Syndrome was excluded from school after an incident where a teacher was hit by a thrown object. It was common ground that the boy presented with behavioural difficulties. Consistent with *Purvis*, the court held that the principal of the school excluded the boy 'in order to ensure compliance by the College with its duty of care and for no other reason'. It should be noted, however, that in that case (unlike in *Purvis*), there was no medical evidence that the boy's behaviour was the result of his disability.

McCabe v Department of Education and Training (Vic) [2006] VCAT 1224 was another case in which a child with ADHD was suspended as a result of his challenging behaviour. In this case, it was accepted that his behaviour was the result of his impairment. The Victorian Civil and Administrative Tribunal (VCAT) held that there was no evidence that this child was treated less favourably than a student who behaved in a similar way under similar circumstances, without the impairment, would have been. This aspect of the complaint was struck out, with *Purvis* being invoked to support the determination. Notably, the aspect of the complaint that did not relate to the student's behaviour – the failure of the school to provide special assistance to cater for his learning needs – was considered to have sufficient merit to proceed to trial (however, the outcome of this case has not been reported).

Each of these three cases involve factual circumstances that are remarkably similar to those of *Purvis.* They all involved children with disabilities who were acting in an antisocial manner at school and this behaviour was considered to pose a threat of danger to those around them. Predictably, these cases were ultimately determined in the same way *Purvis* was: a finding of non-discrimination.

B. Cases not involving antisocial behaviour

In a number of other cases, the court or tribunal held there was no discrimination because there was no 'less favourable treatment'. This finding was most often made in situations where the evidence suggested that the school had gone to great lengths to attempt to cater for the child's special needs.

For example, in *Zygorodimos v Department of Education and Training (Vic)* [2004] VCAT 128*,* the case of a nine year old boy with hearing impairment was heard by VCAT. The boy was a student at the Victorian College of the Deaf, a bilingual government school catering primarily for hearing impaired students, which utilises both Auslan and spoken English in its teaching. The applicant complained that he had been treated less favourably than his peers, in the form of receiving less tuition, because he preferred to communicate using spoken English rather than Auslan. The Tribunal found there was no less favourable treatment, but this was not based on considerations related to the comparator – indeed, the Tribunal struggled to determine the circumstances that should be ascribed to the comparator in this case. Rather, the Tribunal held that since the boy received a significant amount of one-on-one support, the school had done all it could to cater for his needs. The Supreme Court of Victoria refused leave to appeal this decision (*Zygorodimos v Victoria* [2004] VSC 143).

In *Sutherland v Department of Education and Training (Vic)* [2007] VCAT 63, a profoundly disabled child had been placed in mainstream schools, but had not achieved educationally to the level the mother expected. VCAT held that the school had done what it could to

accommodate the child's special needs, including drafting education plans and utilising teacher aide support and, thus, the allegations of less favourable treatment were not made out.

Therefore, while *Purvis* reasoning is evident in some cases, the 'stinging' influence of *Purvis* may actually be restricted to those matters that factually resemble Daniel's case, at least in the context of primary school disability discrimination matters.

2.4.3 Resource allocation: The politics of indirect discrimination

It has long been said that discrimination law should not be used to bring about certain reform outcomes. For example, in *Hurst and Devlin v Education Queensland (No. 2*) [2005] FCA 793, Lander J said at [424]:

> 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.

Further, judicial officers have sometimes been reluctant to make determinations that have substantial fiscal implications. As Gleeson CJ said in a different context in *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [6]:

> Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political… When courts are invited to pass judgement on the reasonableness of government action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process… Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature.

Yet, in disability discrimination matters, all the circumstances of the case must be considered. When determining whether the condition imposed on the person was reasonable or not, economic, financial and policy factors are all relevant to this investigation (see *Waters v Public Transport Corporation* (1992) 105 ALR 289).

In the primary school disability discrimination cases examined for this research, the resources available to the educational authority were regularly raised in argument by complainants and respondents. In the VCAT case of *Turner v Department of Education and Training (Vic)* 2007] VCAT 873, indirect discrimination was argued on behalf of a child with a severe language/learning disorder and psychological disorder, on the basis that she was unable to comply with the requirement that she access her education without full-time assistance from a teacher aide. It was held that this requirement was unreasonable in the circumstances, because the evidence did not show that the Department lacked the resources to assist the child. This finding was affirmed on appeal.

However, in two other matters, resource implications resulted in an adverse finding for the complainant. In *Woodbury v Australian Capital Territory* [2007] ACTDT 4, the ACT Discrimination Tribunal heard a case concerning two boys with Autism Spectrum Disorder (ASD) and cognitive impairment. The parents of these boys had a strong preference for a

particular early intervention methodology, Applied Behavioural Analysis (ABA). Their advocacy and contribution of resources led to the establishment of a special unit within their school, set up especially for the boys. The total cost of the unit was more than $82,000 per year. When some of the external funding supporting the unit was withdrawn, the school was forced to close the unit, and the boys were required to undertake the alternative programs provided by the Department to children with ASD.

The Tribunal expressed support and praise for the parents, and agreed that ABA may well be the most effective form of early intervention for children with ASD. However, the complaint failed. The Tribunal concluded in relation to indirect discrimination that the extent of service provision to the boys could be considered unreasonable, and that financial considerations alone allowed for a finding that the Department was not obliged to provide ABA to the boys. Indeed, the evidence demonstrated that the cost of delivering ABA amounted to 10 times the amount required to educate an ordinary student and that, if all ASD children received ABA, the cost would amount to 2% of the entire ACT disability services budget. The Tribunal member concluded at [110]:

> I am satisfied on the evidence that appropriate medical and educational services were provided to the Complainants by the Respondent. These services undoubtedly fall short of meeting every exigency of every citizen and, in this case, certainly fall short of the hopes and expectations of the parents. However, the allocation of budget resources to fund programs and services is a matter for government.

Similarly, the complaint of indirect discrimination in *Phu v Department of Education and Training (NSW) (No. 3)* [2009] NSWADT 282 fell down on the question of reasonableness. The case concerned a girl with autism and severe global developmental delay. She was non-verbal and had a propensity to self-harm. She attended a special school catering for students with moderate to severe disabilities. Her class had between four and six students, and was staffed by one teacher and a full time teacher aide. Her parents argued that she required the assistance of a one-on-one teacher aide to physically prevent her from harming herself. The school argued that they did allocate additional teacher aide support to the class generally, and that, in their view, one-on-one support was not in the child's best interests because this had the potential to create 'unnecessary dependence' on the part of the student.[14] The NSW Administrative Decisions Tribunal agreed that the girl could not comply with the requirement that she access her education without one-on-one support, however it was not satisfied that the requirement was not reasonable, 'taking into account the steps that were taken' (at [113]).

The Tribunal in *Phu* made special note of the respondent's submissions regarding resources. The respondent had argued that if a full-time teacher aide was allocated to this student, similar demands could be made on behalf of other students with disabilities, and that this would impose unreasonable burdens on the Department.

However, an empty claim along floodgates lines is not usually sufficient to support a finding of unreasonableness. Indeed, this was noted in *Victoria v Turner* [2009] VSC 66 where the Victorian Supreme Court commented (at [104]):

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[14] Notably, similar arguments based on the risk of learned helplessness in the context of full-time teacher aide support were rejected by VCAT in *Turner v Department of Education and Training* [2006] VCAT 2661, [580], [582]. At [582], the Tribunal stated 'there is no reason why an appropriately trained and supervised aide could not encourage Becky to learn independently.'

> Where the evidence before the Tribunal establishes that a decision by the Tribunal in favour of the complainant will have flow-on effects for the respondent in relation to other persons in a similar position to the complainant (for example, where the proceeding is a test case), the flow-on effects are a relevant consideration for the Tribunal. However, it is not for the Tribunal to speculate whether its decision will have flow-on effects for the respondent and what those effects might be. If the respondent wishes the Tribunal to take into account not only the direct but also the flow-on costs to it of a finding in favour of the complainant, it should present evidence of these costs and make it clear to the Tribunal in its submissions how the evidence is said to impact on the issues the Tribunal is required to determine.

2.4.4 The inadequacies of the Disability Standards

In the 2009 case of *Mason v Methodist Ladies College* [2009] FMCA 570*,* the Federal Magistrates Court noted that there had, at that time, been no cases which went to the application of the Disability Standards. Prior to 2011, there were very few reported decisions in which the Standards were mentioned at all (see *Price v Department of Education and Training (NSW)* [2008] FMCA 1018; *McKenna-Reid v Rigo* [2011] FCA 883; *Denton v Victoria* [2011] FMCA 334). This is in part attributable to the fact that the Disability Standards did not come into operation until 2005 and many of the complaints heard in these years concerned events that occurred prior to 2005. However, even in the cases where the Disability Standards did apply, they were only fleetingly referred to in the judgements. Contraventions may have been alleged, but they did not seem to influence the outcome.

Since 2011, the Disability Standards have been referred to more often in the reported cases, however they are still rarely discussed in detail. In all of the recent cases, the courts have first examined in detail the applicants' complaints of direct and indirect discrimination. Then, at the very end of the judgement, the courts may briefly turn their mind to, and quickly reject, the applicant's complaints of contraventions of the Standards (see for example *Walker v Victoria* [2011] FCA 258; *Sievwright v Victoria* [2012] FCA 118; *Kiefel v Victoria* [2013] FCA 1398).

Further, complaints are never upheld on the basis of the requirements outlined within the Disability Standards. Indeed, the Federal Court has repeatedly stated that there can actually be no breach of Part 3 of the Disability Standards because these provisions do not impose any obligations (*Walker v Victoria* [2011] FCA 258, [276]; *Sievwright v Victoria* [2012] FCA 118, [228]; *Kiefel v Victoria* [2013] FCA 1398, [237].). Part 3 of the Disability Standards is entitled 'Making reasonable adjustments'. It outlines the meaning of 'reasonable adjustments' and provides guidance on how reasonable adjustments should be made. If these Standards are not enforceable, then the capacity of the Disability Standards to influence the behaviour of education providers is very limited.

The courts have found other ways of marginalising the Disability Standards. For example, in *AB v Ballarat Christian College* [2013] VCAT 1790, VCAT dismissed the applicant's complaints regarding the lack of consultation with the student regarding proposed adjustments saying that while 'The Standards require the education provider to consult with the student, or an associate of the student before making an adjustment' they 'do not specify

any formal process for doing so' (at [185]). Also, in the same case, VCAT remarked that non-compliance with the Disability Standards is 'not a cause of action available' under the Victorian *Equal Opportunity Act 2010*. Although compliance with the Standards is a defence to a claim of disability discrimination in education settings under the Victorian Act, VCAT said that non-compliance with the Standards is not a 'specified breach' (at [195]).

2.5 Why are disability discrimination complaints against schools unsuccessful?

There has been no reconsideration of *Purvis* by the High Court in light of the expansion of the unjustifiable hardship defence in the *Disability Discrimination Act 1992* (Cth). As noted above, at the time *Purvis* was heard, the unjustifiable hardship defence did not extend to cases where the student was already enrolled. Amendments in 2005 extended the unjustifiable hardship defence to educational providers in all situations (*Disability Discrimination Act 1992* (Cth) s 22(4)). Amendments in 2009 extended the defence of unjustifiable hardship to all instances of disability discrimination (*Disability Discrimination Act 1992* (Cth) s 29A). Had the school been able to raise this defence in 2003, the *Purvis* case could have been decided on this basis rather than by the manipulation of the comparator principle. Today, there is no reason for that precedent to stand.

From an analysis of the case, there appears to have been no change in the arguments raised, or the reasoning of the court, in primary school disability discrimination cases in the eleven years between 2003 and 2014. This is despite the fact that many developments occurred in that time aimed at mitigating the *Purvis* precedent. One of these developments was the introduction of the Disability Standards, yet the Standards have not brought about significant changes to the way disability discrimination claims against schools are dealt with by courts and tribunals.

Regardless, it seems that the *Purvis* precedent is only one reason for the low success rate of these cases. Another reason is the reluctance of the courts to make findings that force governments to allocate additional resources to special needs education. This issue will be revisited again in Chapter 5 in respect of the discussion of negligence.

Certainly, the fact that children have no right to special education services influences the court's approach to their complaints of discrimination. As Gray J of the Federal Court said in *Walker v Victoria (No. 2)* [2012] FCAFC 38 at [72]:

> The trial judge could not put aside the Disability Discrimination Act and deal with the appellant purely on the basis that he was needy. There was no foundation provided for the submissions made that an Australian Court dealing with a child, especially a child with disabilities, is "legally required to be aware of the best interests of the child", or of a requirement that the Court be "mindful of the child's vulnerabilities."

Thus, discrimination law may be an inappropriate vehicle to deal with complaints of this nature.

3. Conciliation of disability discrimination cases

3.1 The conciliation process

It has been explained that disability discrimination complaints made by students with special needs rarely result in a positive result if they proceed to courts or tribunals. However, a different picture is painted when this is compared with conciliation outcomes. It will be seen in this Chapter that parents, children educators, and education authorities do engage productively in conciliation proceedings, and positive outcomes are often achieved.

Before a discrimination matter can progress to a court or tribunal, it must first go to conciliation.[15] Anti-discrimination or equal opportunity commissions exist in all States and Territories, in addition to the federal Australian Human Rights Commission, to deal with discrimination complaints.[16]

The Australian Human Rights Commission receives and finalises around 1000 complaints under the *Disability Discrimination Act 1992* (Cth) each year. In 2013, 6% of these were in the area of education, however the statistics do not reveal how many of these relate to schools as opposed to universities (Australian Human Rights Commission 2013, 139).

The State and Territory Commissions receive a handful of disability discrimination complaints in the area of education each year. For example, in 2013/14, the Victorian Equal Opportunity and Human Rights Commission received 73 such complaints, the NSW Anti-Discrimination Board received 30 and the Queensland Anti-Discrimination Commission received 13 (Anti-Discrimination Board of New South Wales 2014, 14; Anti-Discrimination Commission Queensland 2014, 26; Victorian Equal Opportunity and Human Rights

[15] *Australian Human Rights Commission Act 1986* (Cth) ss 11, 46PJ; *Human Rights Commission Act 2005* (ACT) ss 14, 51; *Anti-Discrimination Act 1977* (NSW) s 91A; *Anti-Discrimination Act 1996* (NT) ss 13, 78; *Anti-Discrimination Act 1991* (Qld) ss 158, 235; *Equal Opportunity Act 1984* (SA) s 95; *Anti-Discrimination Act 1998* (Tas) s 6, 74; *Equal Opportunity Act 2010* (Vic) ss 111, 155; *Equal Opportunity Act 1984* (WA) s 91.

[16] They are the Australian Human Rights Commission (*Australian Human Rights Commission 1986* (Cth) Pt II); the Australian Capital Territory Human Rights Commission (*Human Rights Commission Act 2005* (ACT) Pt 3); the Anti-Discrimination Board of New South Wales (*Anti-Discrimination Act 1977* (NSW) Pt 8); the Northern Territory Anti-Discrimination Commission (*Anti-Discrimination Act 1996* (NT) Pt 2); the Anti-Discrimination Commission Queensland (*Anti-Discrimination Act 1991* (Qld) Ch 7, Pt 1); the South Australia Equal Opportunity Commission (*Equal Opportunity Act 1984* (SA) Pt 2, Div 1); the Office of the Anti-Discrimination Commissioner (*Anti-Discrimination Act 1998* (Tas) Pt 2); the Victorian Equal Opportunity and Human Rights Commission (*Equal Opportunity Act 2010* (Vic) Pt 11); Equal Opportunity Commission of Western Australia (*Equal Opportunity Act 1984* (WA) Pt VII).

Commission 2014, 22).[17] These complaints would all be in relation to schools (or pre-schools), since complaints against universities come under the Commonwealth system.

3.2 Reported conciliated matters 2003-2014

Details related to conciliated matters are not uniformly released to the public, and the various commissions throughout Australia differ in their practices in this regard.

The Australian Human Rights Commission and the South Australian Equal Opportunity Commission post (de-identified) details of conciliated matters on their website, while other Commissions include a selection of cases in their annual reports.

Between 2003 and 2014, the Australian Human Rights Commission published details relating to 16 disability discrimination matters where complaints were made against primary schools.[18] Over the same period, there were only seven conciliated matters concerning disability discrimination in primary schools where case information was made publicly available by State and Territory Commissions: four by the Victorian Equal Opportunity and Human Rights Commission, two by the South Australian Equal Opportunities Commission, and one by the Western Australian Equal Opportunities Commission.[19]

In 22 of these 23 reported cases, the complainant obtained at least one remedy. The most common remedies obtained were written apologies, financial compensation, review of the school's decisions or policies, and the provision of further support in the classroom (see further Table 1). In only one case was the complaint withdrawn – none of the reported complaints were dismissed.

[17] Complaints of disability discrimination in schools equate to 1-2% of all discrimination complaints coming before State and Territory Commissions.

[18] In fact, it is likely there were more than 16 such cases. For many of the cases that are outlined in the Australian Human Rights Commission's Conciliation Register, information is not available on whether the complaint was made against a high school or a primary school. Only the cases in which it is known the complaint was made against a primary school are included in this analysis.

[19] More than seven cases of disability discrimination in education are reported by the States and Territories. The complaints included in this analysis are those that were made against primary schools. Whether each complaint was made against a primary school or a high school was ascertained through personal correspondence with each of the Commissions.

Table 1: Number of primary school disability discrimination conciliation matters in which the complainant received a given remedy 2003-2011

Apology	8
Compensation (financial)	7
Review of school policies (eg. policies related to making adjustments)	7
Development of action plan or IEP	6
Agreement to periodically review child's progress	4
Agreed to provide additional teacher aide support	4
Provision of other modifications or assistance	4
Increased educational funds for assistance	2
Reversed decision to prevent attendance at excursion/trip	2
Review of enrolment procedures	2
Agreement to provide additional training to staff	2
Review/improvement of communication processes	1
Agreed to undertake assessments	1
Provision of special equipment	1
Recommend implementation of discrimination awareness policies to Minister	1

Of course, the fact that so many of these reported complaints were successfully conciliated does not in itself prove that conciliation is more effective for complainants than court or tribunal proceedings. These reported cases are a very small sub-set of matters conciliated by the relevant commissions. It is predictable that the commissions would want to include success stories in their corporate documents.

However, two things are notable. First, a wide range of remedies was obtained by complainants in these reported decisions. The remedy was tailored to the circumstances of the case, and action was taken that could have the effect of improving the educational experience of both the subject child, and other children with special needs coming after them. This may be contrasted with court and tribunal proceedings where financial compensation is what tends to be sought and, in rare cases, ordered (see *Beasley v Victoria* [2006] VCAT 1050; *Hurst and Devlin v Education Queensland* [2005] FCA 405).

Second, whilst individual breakdowns by area of activity are not available, close to 50% of disability discrimination complaints are successfully conciliated by the Australian Human Rights Commission.[20] The Anti-Discrimination Commission of Queensland reports that it successfully conciliates over half of all discrimination complaints that come before it, so the rate of successful conciliation for disability discrimination matters is likely to be comparable (Anti-Discrimination Commission Queensland 2014, 9). This is a high success rate, particularly when compared with the rate of success experienced by disability discrimination complainants whose cases proceed to court or the tribunals, as outlined in the last chapter.

[20] In 2012/2013, 44% of disability discrimination complaints were successfully conciliated (Australian Human Rights Commission 2013, 140).

3.3 Conclusions

The only reason school disability discrimination complaints are brought under discrimination law is because there is no other avenue for redress. If education legislation included an obligation upon schools to make reasonable adjustments to their facilities and programs to support children with special needs, there would be no need to disguise the issues as discrimination. The issues could be addressed for what they are, rather than being confused and confounded in discussions about comparators and causation. Ultimately, the issue is one of reasonableness. If an assessment has been made that a child should be educated in a mainstream school, and if there is no other, more appropriate, place for the child to be educated, there should be an obligation upon the educational authority to provide the supports that the child needs to 'maximise their academic and social potential' (CPRD, art 24(3)(c)).

The Disability Standards embody this practical, realistic approach, but their residence within the area of anti-discrimination law is not necessarily a good fit. Indeed, discrimination law was never intended to be used to 'force a hearing to query the implementation of programs'. As the Tribunal said in *Woodbury v Australian Capital Territory* [2007] ACTDT 4, [119]:

> The question of budgetary allocations for individual service packages and for general levels of service ultimately remains a political decision to be made by government. It is only in a narrow class of cases that discrimination will be made out under the legal requirements of the ACT Discrimination Legislation.

It was acknowledged in that case that this demonstrates the need for an alternative complaints mechanism.

In many conciliation cases, the outcome for children is a positive one, with schools and educational authorities agreeing to increase support for the child in various forms, provide training to staff, and review their policies for the future. Disability discrimination matters relating to young children and their education are, by virtue of their subject matter, not appropriately dealt with using conservative, formalistic approaches. 'Best interests' considerations should be employed.

An approach that promotes discussion, rather than adversarialism, will likely be more effective in bringing about positive outcomes for children. As the next section demonstrates, there is sufficient goodwill amongst educators to support this form of engagement.

Recommendation 4: That complaints or appeal mechanisms be established within Education Departments so that parents may seek a remedy in situations where they believe their child has been unable to access adequate and appropriate special education services. These mechanisms should promote discussion and negotiation between the family and education providers, rather than being adversarial in nature.

4. The practice of inclusion

4.1 Making adjustments

It has been established that, whilst cases that proceed to courts or tribunals rarely produce positive results for children with disabilities seeking increased special education services, conciliation may lead to positive outcomes for children. This demonstrates that when families, educators and education authorities sit down to discuss the needs of a student, they are often able to successfully negotiate.

Consistent with this, studies into the practices of educators indicate generally a positive attitude to making adjustments for students with special needs. When children do not receive the special education services they require, most often the underlying problem is that educators' efforts to provide support for students with special needs are not adequately resourced.

In Queensland, schools must apply to Education Queensland for special funding for children with special needs. Education Queensland recognises six impairment categories: Autism Spectrum Disorders (ASD), hearing impairment (HI), intellectual impairment (II), physical impairment (PI), speech-language impairment (SLI) and vision impairment (VI). Children with disabilities must be 'verified' as coming within one of these impairment categories in order to be eligible for inclusion in the 'Educational Adjustment Program'.

Schools are required to make reasonable adjustments for all students who come within the broad definition of disability under the *Disability Discrimination Act 1992* (Cth), however the application process for special education funding is less straightforward in situations where a student does not come within one of the recognised impairment categories. It could be argued that this, in itself, is discriminatory as this policy treats children with disabilities who do not fit into these impairment categories less favourably than those who do. This line of argument has not been submitted to the court in any reported decision, however it did come up in the course of this research.

4.2 A survey of educators

4.2.1 Methods and respondent characteristics

In late 2011, Walsh surveyed educators in Brisbane's public primary schools to examine the practice of inclusion and adjustment (see Walsh 2012b).

Information was collected about the nature of the school, the number of children with disabilities it had accommodated, and the kinds of adjustments it had made to its programs. Educators were asked to comment on how effective their adjustments had been in terms of meeting the goals of inclusion and addressing discrimination. The survey also asked educators to reflect on the appropriateness of mainstream education for children with disabilities, and to comment on whether sufficient resources were available to schools to make inclusion successful.

All of the State primary schools in the Brisbane metropolitan area (n=208) received a copy of the survey by ordinary mail, as well as an electronic copy via email. The hardcopy and e-copy formats of the survey were identical, and schools were invited to select between the two forms of survey submission. Seventeen schools completed the survey online, and 43 returned their surveys by ordinary mail, so a total of 60 surveys were completed, which is a response rate of 29%.

Most of the individuals who responded were principals (n=20), special education teachers (n=13) or special education coordinators (n=14). Only 11 respondents identified as classroom teachers, and only one teacher aide responded. Eight listed their role as 'other'. Some respondents checked more than one box, indicating that they had more than one role within the school. Five of the respondents said they worked at Special Schools, while the remainder worked at mainstream local schools. Twenty-five of the respondents from mainstream schools said their school had a designated Special Education Unit.[21]

The most common disabilities that respondents had encountered within their school community were Autistic Spectrum Disorders (ASD) (98%) and intellectual impairments (95%). However, a significant number had also accommodated children with speech and language impairments (78%), hearing impairment (59%) and physical impairments (48%). Fewer had come across children with vision impairment (29%). All of these disabilities come within Education Queensland's recognised impairment categories.

Thirty-two respondents (53%) said they had accommodated students with special needs that did not come within one of these impairment categories. These respondents indicated that children with serious medical conditions (eg. epilepsy and diabetes), mental health problems and dyslexia, also required adjustments within the school environment, although they did not come within one of the Department's impairment categories. Respondents noted that it was more difficult to secure funding for children who did not come

[21] In the Brisbane metropolitan area, there are 20 special schools. 'Special schools' deliver educational programs and services that are designed specifically for children with special needs. Classes are small and well-supported by teaching and support staff. Such schools also provide and supervise the use of special equipment, the use of special assessment procedures, and the delivery of allied health services such as physiotherapy, occupational therapy and speech pathology. 'Special Education Units' exist in some mainstream schools. They are comprised of designated staff who deliver educational support services to children identified as having special needs.

within an impairment category, even though their needs could be just as high as children with 'recognised' disabilities.

Respondents made comments including the following:

> *'Serious medical conditions require access to qualified and trained teacher aides and teachers.'*
>
> *'Mental health diagnoses that don't fit the [impairment categories] are not catered for and often [more] demanding on schools and staff than students in the defined categories.'*
>
> *'Dyslexia is not yet a recognised disability in Queensland. These children are very common and receive no or minimal support determined by their results.'*
>
> *'The various disabilities that students have are all individually assessed. They may have a label but it's where they are functioning on the disability range that affects inclusion.'*

Recommendation 5: That Education Queensland review its use of set 'impairment categories' for the purpose of its Educational Adjustment Program. If the impairment categories are retained, it is recommended that an 'other' category, or a category for 'medical conditions', be added so that children with diabetes, epilepsy and other serious medical conditions (and the schools that support them) have improved access special education funding.

4.2.2 Adjustments and inclusion findings

All of the respondents said their school had made adjustments for children with special needs. Indeed, at the time they were surveyed, the schools were dealing with a large number of students with special needs. Most respondents (79%) said they had more than 10 students with special needs enrolled at their school. Indeed, 28 respondents said that their school currently catered for more than 20 students with special needs.

The schools had implemented a number of strategies to accommodate children with special needs, including the provision of additional teacher aide time, special support from classroom staff, alterations to lessons and classroom materials, and the provision of toileting assistance (see Table 2).

Table 2: Adjustments made at respondents' schools for children with special needs

Adjustment made	% respondents
Allocation of teacher aide time	98%
Allocation of an additional teacher aide to the classroom to support a specific child	90%
Increased supervision/support from the classroom teacher	97%
Increased supervision/support from the classroom teacher aide	84%
Alterations to lessons or classroom materials with a particular student in mind	95%
Changing placement of objects or equipment in the classroom or school grounds with a particular student in mind	76%
Placement of children with mobility difficulties in specific classrooms to facilitate access	50%
Physical alterations to school grounds such as the installation of ramps or railings for a particular child	37%
Administration of drugs or the provision of low-level nursing support	64%
Toileting assistance	71%

Predictably, a majority of respondents (64%) either agreed or strongly agreed that children with special needs place a burden on their classroom teacher. A majority (67%) also agreed or strongly agreed that children with special needs increased their own workload. Just under half of the respondents (43%) agreed or strongly agreed that children with special needs imposed a financial burden on the school, and 57% agreed or strongly agreed that their school was not sufficiently resourced to include children with special needs.

Respondents made the following comments:

> '*Having taught children with special needs, it is very stressful for the teacher. It makes your workload much heavier.'*
>
> *'The challenges to teachers and their personal mental health when working within a standard classroom situation with high end challenging behaviours needs to be considered also.'*
>
> *'The State funding bucket remains the same but the number of children [with special needs] continues to grow.'*

Despite this, respondents were generally supportive of children with special needs being educated in mainstream settings. **Most agreed that it was either very appropriate or mostly appropriate for students with the full range of disabilities to attend, and be accommodated by, regular schools** (See Table 3). Also, 91% of respondents agreed or strongly agreed with the statement 'I think it is good for regular children to have children with special needs in their classes' and only eight per cent of respondents agreed or strongly

agreed with the statement 'I believe that children with special needs should go to special schools'.

Table 3: Appropriateness of educating children with disabilities in mainstream school settings, according to educators

	Very appropriate	Mostly appropriate	Not sure	Mostly in-appropriate	Very in-appropriate
ASD	31%	56%	11%	2%	0
Intellectual impairment	26%	52%	13%	9%	0
Speech/language impairment	51%	44%	5%	0	0
Hearing impairment	49%	42%	8%	2%	0
Physical impairment	40%	49%	59%	2%	0
Visual impairment	30%	42%	24%	4%	0

Respondents commented:

> *'Any child that presents a danger to the mainstream school environment needs to be at a special school.'*
>
> *'Class teachers do a fabulous job most of the time but classes are more complex than ever before and teachers often feel overwhelmed – most want to support students but struggle with how and if there is also behaviour issues which often occur due to frustration etc. it makes it very difficult to manage a learning classroom to meet the needs of ALL students.'*

The respondents generally believed that the adjustments that had been made for children with disabilities at their school had been successful in meeting the goals of inclusion. The vast majority of respondents (94%) stated they believed the adjustments they had made for children with special needs facilitated their inclusion, and 92% believed that the adjustments they had made had been 'effective'. Most agreed that children with special needs were part of the school community, for example 94% agreed that children with special needs at their school felt included and 94% believed that children with special needs enjoyed coming to school.

The results indicated that, socially, children with special needs integrate well into school life: 98% of respondents agreed that children with special needs felt included by the other children at the school, 90% of the respondents agreed that children with special needs at their school had friends and 88% agreed that children with special needs at their school were friends with children that did not have special needs. The only marker of inclusion that was met with some ambivalence was the question of whether children with special needs met their literacy and numeracy benchmarks: only 43% agreed that they did.

Respondents to this survey did not believe children with disabilities were discriminated against in mainstream school settings. Only 16% of respondents agreed with the statement 'Children with special needs will be discriminated against in mainstream school settings' and 92% said that children with special needs were not discriminated against at their school.

Notably, the vast majority of respondents (96%) believed they were aware of the legal requirements relating to the inclusion of special needs children in mainstream schools.

4.3 The goodwill of educators

Despite the difficulties faced by schools in including children with disabilities into their programs, there appears to be a significant degree of goodwill on the part of educators towards these children. It is commonly said in the literature that teachers are supportive of inclusion policies, but do not necessarily want children with special needs in their own classrooms (e.g. Scruggs and Mastropieri 1996; Baker and Zigmond 1990). The results of this survey do not refute this – there was general agreement that children with special needs impose a burden on the classroom teacher, and the school generally. However, most still believed that children with special needs should be educated in mainstream settings. As one respondent said:

> *'Most teachers I know will work hard with special needs children but don't welcome the prospect of having them in the class.'*

Most of the respondents to the survey were school principals, who are slightly removed from the day-to-day operations, and stresses, of the classroom. This may explain the high level of support for mainstreaming (see also Center and Ward 1989). The literature strongly suggests that the attitude of the teacher has a significant influence on the extent to which children with special needs are valued as members of the class (Schnorr 1990, 239; Curtin and Clarke 2005, 205; Meyer 2001). The attitudes of parents are also important (Leyser and Kirk 2004).

The findings here related to the friendships and social integration of children with disabilities in primary schools are more positive than previous research. Laws and Kelly (2005) found that 30% of primary school children aged 9 to 12 years had negative attitudes or negative friendship intentions towards children with disabilities in their school.

It was interesting that educators generally believed that the numerous adjustments they made to their programs and facilities to support children with special needs were indeed successful in meeting the goals of inclusion. It seems the general attitude is that adjustments are worth the effort. As discussed in Part 1.4, this raises the question as to whether adjustment, accommodation and inclusion are separate or equivalent goals. Yet, it seems that the definition of terms, and the applicable legal tests, are less relevant at the conciliation level than in the courts and tribunals.

It is possible that a reason why conciliations are often successful has to do with the genuine commitment made by educators to the inclusion of children with special needs into their programs. The school, and the educational authority, may be willing to negotiate with parents at the conciliation stage to bring about the best outcomes for the child. It is possible that if the matter proceeds to a tribunal or court, the relationship between the parents and the school will have broken down to such an extent that this goodwill may have been exhausted. The relationships brokered between the State and Territory commissions on one

hand, and the educational departments on the other, may also assist to make the conciliation process a success.

4.4 Resourcing inclusion efforts

Having said this, there is no doubt that schools struggle to resource their inclusion efforts. The majority of the respondents to this survey agreed that children with special needs place a financial burden on the school, and a resource burden on teachers. Respondents made comments such as:

> *'Although we are getting more students with disabilities, the staff time to support students is dropping.'*
>
> *'The teachers need a lot more funding for additional teacher aide hours. The teachers need quicker help from visiting assisting teachers, eg. speech, occupational therapies, etc.'*

As explained above, in Queensland, not all children that meet the definition of disability in the *Disability Discrimination Act 1992* (Cth) will be eligible for additional support funding through the Educational Adjustment Program (QDET 2011).

Indeed, the statistics indicate that, nationwide, not all children with disabilities receive funding support from their education department. If 8.8% of children have a disability, and 91% of children with disabilities attend mainstream schools, this means that around 8% of all mainstream enrolments will be children with disabilities. Yet, according to the Gonski Review, only 4.9% of total enrolments have been deemed eligible for additional support (Gonski et al 2011, 119). A substantial proportion of children with disabilities in mainstream schools, therefore, do not receive any additional support funding. This puts significant pressure on schools to support these students using existing funds and, as one respondent to the survey said, this means that 'often non-special needs students miss out.'

4.5 Conclusions

Schools and educators are willing to include students with disabilities in their programs, and they are willing to go to some lengths to successfully bring about inclusion by making adjustments. However, educators generally agree that they require more resources, particularly staff, to support them in their inclusion endeavours.

This is supported by the findings of the Gonski Review which concluded that resourcing should be targeted towards supporting the most disadvantaged students (Gonski et al 2011, 127). If inclusion is to succeed as a policy goal, it must be appropriately resourced. As one respondent to this survey said:

> *'It should not matter where you go to school or who you are, it should be the department's job to make sure everyone is well-resourced enough to do a great job.'*

5. Duties of care in special needs education

5.1 Introduction

It has been seen that current laws and policies fail to ensure the appropriate provision of services to children with special needs. This makes alternative avenues of redress, such as an action in negligence, potentially relevant.

In this section, it will be demonstrated that Australian education departments could arguably be held liable in negligence in situations where children with special needs fail to receive the educational supports they require at school.

5.2 Duty to prevent harm in education settings

Under Australian law, educators have a duty of care to protect students from harm and Australian educational authorities have been held vicariously liable in cases where students have sustained injuries at school.[22]

The extent or scope of the duty will be influenced by the facts of each individual case, so that if a child is at greater risk of injury as a result of his or her age, level of maturity or intellectual or physical capacity, the duty will be more expansive. This means that a higher duty of care might be imposed upon teachers of children with special needs to protect them from personal injury (*Kretschmar v Queensland* [1989] Aust Torts Reports 80-272).

Very few attempts have been made in Australia to argue that teachers have a duty to exercise their professional skills in *teaching* with due care.[23] Of course, in some cases the

[22] See the following cases: *Commonwealth v Introvigne* (1982) 150 CLR 258*; Duncan by her next friend Duncan v Trustees of the Roman Catholic Church for the Archdiocese of Canberra* [1998] ACTSC 109*; Ramsay v Larsen* (1964) 111 CLR 16; *Geyer v Downs* (1977) 138 CLR 91; *The Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] NSWSC 346; *ACT Schools Authority v Raczkowski* [2001] ACTSC 61; *Parkin v ACT Schools Authority* [2005] ACTSC 3; *Abraham bht Abraham v St Mark's Orthodox Coptic College* [2006] NSWSC 1107; *AMA v Victoria* [2012] VCC 1453.

[23] The closest Australian case to an 'educational malpractice' type suit was brought against an independent school in contract: *Weir v Geelong Grammar School* [2012] VCAT 1736. The plaintiff and her mother argued that they incurred

distinction between teaching and supervision may be blurred. For example, in one case, a student suffered an injury to his hand in an industrial design class. The class was being taught by a relief teacher with minimal experience in the use of the machinery. The ACT Supreme Court held that the education department was under a duty of care to ensure that the relief teacher was sufficiently experienced to teach the class (*Parkin v ACT Schools* [2005] ACTSC 3). This tends to suggest that incompetent instruction may form the basis for a negligence claim in some circumstances (in the United States see Jerry 1980/81).

Although 'educational malpractice' has never been claimed in Australia, the general principle in Australian law is that professionals must exercise reasonable care in the exercise of their professional activities (*Mutual Life and Citizen's Insurance Co Ltd v Evatt* (1970) 122 CLR 628; *Hedley Byrne v Heller* [1964] AC 465; *Rogers v Whitaker* (1992) 175 CLR 479; *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). Education departments are public authorities that exercise a variety of statutory powers, meaning they may be subject to a common law duty of care.

None of the Australian Education Acts explicitly impose a duty of care in relation to the education of children with special needs, but many do impose general statutory powers that are relevant.

For example, the Queensland *Education (General Provisions) Act 2006* states at section 12(a)(i) that 'For each student attending a State instructional institution, there *must be provided* an educational program approved by the Minister that has regard to the age, ability, aptitude and development of the student.'

In relation specifically to special needs children, the Western Australian *School Education Act 1999* (WA) states that where a child with a disability is enrolled at a government school, the principal *is to consult* with the child's parents, teachers and if appropriate the child, and take into account the wishes of the parents for the purpose of addressing the child's educational requirements (*School Education Act 1999* (WA) s 73).[24]

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economic loss because the plaintiff's education was inadequate to enable her to get into Sydney Law School. The case could never succeed because there was evidence that the school had gone to considerable lengths to support the plaintiff educationally and personally. The Tribunal said (at [150]) 'the allegation of Jane and Rose that Rose failed because of the School would appear to be an outrageous turning of the tables – to allege that a school is obliged to cause the student to achieve a result, as distinct from providing the student with the opportunity and resources to attempt to achieve a result.' Note, however that some other cases have settled out of court (Teh 2013, 208).

[24]These provisions may be contrasted with provisions in other jurisdictions that are similar but use discretionary rather than proscriptive language. For example, the ACT *Education Act 2004* states at section 7(3) that 'Everyone involved in the administration of this Act… is to apply the principle that school education should (a) recognise the individual needs of children with disabilities; and (b) should make appropriate provision for those needs, unless it would impose unjustifiable hardship on the provider of the school education.' This is more aspirational than binding. In the WA *School Education Act 1999*, recognition of the right of every child to receive an education and meeting the educational needs of all children are objects of the Act, but persons with functions under the Act are only directed to '*seek* to ensure' that these object is achieved (ss 3(1)(a), (c), (2)). Two of the 'objects' of the NSW *Education Act 1990* are to assist each child to achieve their potential, and to provide special education assistance to children with disabilities, and under Part 5, the Minister *may* provide special or additional assistance to children with special needs, but none of this is proscribed. Similarly, the Northern Territory *Education Act* (s 6(1)(a)) states that the Minister *may* take all measures to 'assist parents of children in the Territory in fulfilling their responsibility to educate their children according to the individual needs and abilities of those children.' Note also relevant provisions in the Victorian *Education and Training Reform Act 2006*. There it is expressly stated that 'all Victorians… should have access to a high quality education that realises their learning potential and maximizes their education and training achievement' but in a separate provision, it is said that this does not establish a legally enforceable entitlement (see ss 1.2.1, 1.2.3).

These sections do not expressly impose a duty of care, or specify a remedy. But they do seem to impose obligations on educational departments in the provision of special education services.

In other States and Territories, the provisions are more aspirational in nature. For example, the ACT *Education Act 2004* states at section 7(3) that 'Everyone involved in the administration of this Act… is to apply the principle that school education should (a) recognise the individual needs of children with disabilities; and (b) should make appropriate provision for those needs, unless it would impose unjustifiable hardship on the provider of the school education.'

In the Western Australian *School Education Act 1999*, recognition of the right of every child to receive an education and meeting the educational needs of all children are objects of the Act, but persons with functions under the Act are only directed to 'seek to ensure' that these objects are achieved (ss 3(1)(a), (c), (2)).

Two of the 'objects' of the NSW *Education Act 1990* are to assist each child to achieve their potential, and to provide special education assistance to children with disabilities. Under Part 5 of that Act, the Minister may provide special or additional assistance to children with special needs, but there are no legislative requirements to this effect. Similarly, the Northern Territory *Education Act* states at section 6(1)(a) that the Minister may take all measures to 'assist parents of children in the Territory in fulfilling their responsibility to educate their children according to the individual needs and abilities of those children.'

The Victorian *Education and Training Reform Act 2006* expressly states that 'all Victorians… should have access to a high quality education that realises their learning potential and maximizes their education and training achievement' but in a separate provision, it says that this does not establish a legally enforceable entitlement (ss 1.2.1, 1.2.3).

Regardless of the words used in the legislation, it is open to the court to find that a school is under a common law duty of care to protect a student from harm. This chapter is aimed at explaining how a cause of action in negligence might be framed in situations where a child has not received adequate special education services at school.

5.3 Is there a duty of care?

To establish that a public authority, such as a State education provider, has acted negligently, a variety of considerations will be relevant, including: reasonable foreseeability; the subject of the powers; the vulnerability of the recipient of the powers; the knowledge of the risk; whether the decision made should be characterised as operational or policy in nature; and 'other' relevant factors. This is known as the 'salient features' approach to determining whether a duty of care exists (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, [39] (McHugh J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597-598 (McHugh J); *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, [103]). Each novel case must be decided on its own facts (Stubbs 2003), but the court will take the following considerations into account:

A. Was the risk of harm reasonably foreseeable?

In every Australian jurisdiction, a school, teacher or parent may request a certain level or kind of support for a child with special needs; the education department then makes a determination about how much, and what kind, of assistance it will fund or provide for that child (ACTDET (2010); NSWDET (undated); NTDET (2012); QDETE (2014); SADECS (2007); TasDE (2013); VicDEECD (2014); WADET (2005)). An educational authority necessarily has the risk of damage to the child in contemplation when it makes this decision – it will have before it all the available evidence relating to the child's difficulties, and the reasons why the school feels it cannot educate that child in the ordinary way. It is certainly arguable that it is reasonably foreseeable by the Department that a child with special needs will suffer harm if appropriate educational support services are not provided to them at school.

B. Who is the subject or beneficiary of the powers?

In Australia, statutory powers that are exercised for the public generally cannot be the subject of a duty of care; rather the powers must be exercised for the benefit of a particular class of persons only (*Pyrenees Shire Council v Day* (1998) 192 CLR 330, 347 (Brennan J); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 557 (Gaudron, McHugh, and Gummow JJ)). The powers exercised by educational departments in relation to the provision of special education services are directed at a very specific class of people: school students with special educational needs. Therefore, this element is satisfied.

C. How vulnerable was the subject of the powers and how much control did the public authority have over them?

The High Court has said that the powers vested in an authority by statute may give it such a measure of control over the safety of the person to oblige it to exercise its powers to avert danger. While the existence of such powers, alone, might not give rise to a duty of care, 'if the authority has used its powers to intervene in a field of activity' and so increased the risk of harm to a person, it may come under a duty of care (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; 61 (Gummow J); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 558 (Gaudron, McHUgh and Gummow JJ); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 551-2; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 576, 580 (McHugh J)).

There is no doubt that students with special needs are vulnerable to education departments, and that parents rely heavily upon them in relation to the education of their children. The parents of children with special needs send them to school, in accordance with the law, under the assumption that they will be educated there. They rely on the teachers, the school and ultimately the education department to ensure that their child's educational needs are met so that they can participate in school activities (Gallagher 2001, 379; Hay-Mackenzie 2002, 96). As the House of Lords has noted, 'the education of the pupil is the very purpose for which the child goes to school' (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 766). Of course, it may not be possible for a child with special needs to access the whole curriculum, but parents rely on educators to set realistic educational goals for their child, and to work towards them with appropriate support services in place.

D. Did the public authority know there was a risk of harm to the person?

Another 'salient feature' is that the defendant knew, or ought to have known of the risk of harm to the specific class including the plaintiff if it did not exercise its powers (*Sullivan v Moody* (2001) 207 CLR 562, 577; *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 371 (McHugh J)). Obviously, education departments are in a position to avert the risks to students with special needs that arise from not being appropriately supported in the school environment. The educational authority ultimately makes the decision as to whether, and to what degree, a child will receive funding for educational supports. It also determines how much funding is allocated to special education services in general. In theory, it is within the power of the department to increase this amount in order to avert the risk of harm to a particular student.

However, in practice, decisions regarding the allocation of funds to specific children are complex. Officers that are charged with decision-making may be required to balance the needs of students against one another to decide how the funds should be allocated. The reality may be that funds are insufficient to ensure that adequate support is available to every child that needs it. This leads into the next point.

E. Was the public authority exercising a policy making power, or just making an operational decision?

Public authorities will not owe a duty of care in relation to matters that involve an exercise of 'core policy-making' powers' (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 499 (Deane J), 424 (Mason J); *Anns v Merton London Borough Council* [1978] AC 728, 754). Budgetary allocations are often put in this category, and thus considered exempt from negligence claims.[25] However, it would be open to a judge to conclude that decisions regarding the allocation of funds to special needs services should not be exempt from a finding of negligence merely because they are of a policy nature. It could also be argued that allocation of funds to a particular student is an operational decision, because the funds required by that student would not 'distort' the department's 'priorities in the discharge of its statutory functions.'[26]

F. Are there any other reasons to deny the existence of a duty of care?

It has been argued that one policy reason against imposing a duty of care in the exercise of statutory powers is that imposing a duty might change the practice of public authorities so that they act in a defensive manner, with a view to avoiding liability (*Stovin v Wise* [1996] AC 923, 955; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 50 (McHugh J); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 653). Yet, in the context of the education of children with special needs, defensive practice might actually be beneficial in a broader sense (Ryan 2004, 758). While it might mean that more resources are allocated to special education services at the expense of able-bodied students, the alternative is that the classroom teacher is obliged to meet the needs of students with special needs. Teachers confirm that they are better able to meet the needs of all students if

[25] Note, however that the distinction between policy and operational decisions has not been universally supported in Australia: see *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 560 (Gaudron, McHugh and Gummow JJ); *Pyrenees Shire Council v Day* (1998) 192 CLR 330 (Gummow and Toohey JJ). The policy/operational distinction was rejected by the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

[26] This argument was suggested by Gummow J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 392.

children with special needs are adequately and appropriately supported (Scruggs and Mastropieri 1996; Baker and Zigmond 1990).

5.4 Proving breach of duty

5.4.1 The breach question

Let us assume educators and education authorities do have a duty of care to prevent harm to children with special needs through the provision of special education services. The next legal question would be whether the educational authority has taken reasonable steps to prevent students with special needs from suffering harm as a result of a failure to provide them with adequate, appropriate educational supports.

A complainant would need to show that it was more probable than not that the harm would not have occurred if the appropriate special education services were provided (*Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 442). It would certainly be possible to argue this. Sufficient research and expert knowledge is available to evaluate claims that inadequate educational support has resulted in avoidable deficits (Culhane 1992). In the UK case of *Phelps v London Borough of Hillingdon Anderton and Clwyd County Council* [2001] 2 AC 619, for example, the House of Lords was able to find that if the child had received teaching appropriate to her needs, she would be 'somewhat, perhaps substantially, more literate than she is now' and would likely be more employable (at 656).

5.4.2 The relevance of resource allocation

The problem a complainant would have is that, in Australia, civil liability legislation dictates the manner in which the issue of resource allocation must be dealt with. This is relevant here because an education authority could argue that they did not provide the child with all the required supports because they could not afford to do so.

Most of the civil liability Acts state that, for the purpose of determining whether a public authority has a duty, or has breached its duty, it is relevant to consider that the authority has limited resources.[27] Indeed, the Acts explicitly state that the general allocation of resources by public authorities is not open to challenge.[28] This means that, if the evidence suggested that a department's special education budget was inadequate to meet demand, it could not be argued that the special education budget should have been increased to minimise the risk of harm to students in need.

The civil liability Acts also state that, when deciding how a public authority should have exercised its functions, the broad range of activities of the authority must be considered, and the authority may rely on evidence of compliance with its own procedures and standards to

[27] See generally *Civil Law (Wrongs) Act 2002* (ACT) s 110(a); *Civil Liability Act 2002* (NSW) s 42(a); *Civil Liability Act 2003* (Qld) s 35(a); *Civil Liability Act 2002* (Tas) s 38(a); *Wrongs Act 1958* (Vic) s 83(a); *Civil Liability Act 2002* (WA) s 5W(a).
[28] See generally *Civil Law (Wrongs) Act 2002* (ACT) s 110(b); *Civil Liability Act 2002* (NSW) s 42(b); *Civil Liability Act 2003* (Qld) s 35(b); *Civil Liability Act 2002* (Tas) s 38(b); *Civil Liability Act 2002* (WA) s 5W(b).

establish that its functions were properly exercised.[29] This provides education departments with broad protection against negligence claims for failure to provide special education services.

As such, the civil liability Acts do tend to tip the scales in favour of public authorities. However, they do not preclude the possibility of recovery by children with special needs who have not received adequate special education services. A complainant might argue that the amount of resources that would be required to provide appropriate support was not significant enough to affect budgetary allocations, for example.

5.5 Is there actionable damage?

5.5.1 Economic loss and 'mental harm'

For a claim to succeed, it must also be concluded that the defendant's negligence has caused actionable damage (*Overseas Tankship (UK) Ltd v Morts Dock and Engineering Company Ltd (NSW)* (Wagon Mound No. 1) [1961] AC 388, 425). There are many kinds of harm that can arise if a child fails to acquire basic literacy and numeracy skills. It is well-known that children will struggle to succeed in life as adults if they are denied a basic education. Failure to acquire skills in literacy and numeracy can result in unemployability, or reduced employability, and thus lost wages (Fairgrieve 2000, 39). In the short-term, it can result in substantial costs for parents if they access private special education services (such as employing their own teacher's aide), or they engage private tutors and therapists to make up for the lack of state-provided support.

Failure to provide appropriate educational support to children with special needs can also result in psychological harm. In Australia, psychological impairment has been recognised as actionable damage in personal injury cases occurring within school premises (*Oyston v St Patrick's College* [2011] NSWSC 269; *Cox v NSW* [2007] NSWSC 471; *Tame v NSW* (2002) 211 CLR 317). However, under the civil liability Acts, a defendant does not owe a duty to a plaintiff to take care not to cause mental harm unless a reasonable person ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care were not taken.[30] If the defendant knows that the plaintiff is a person of 'less than normal fortitude', this cannot be disregarded.[31] Children with special needs would, in some circumstances, be persons of less than normal fortitude, and the legislation affirms that they should be taken as they are found in this regard.

In five Australian jurisdictions, a court cannot make an award of damages for mental harm unless the harm consists of a 'recognised psychiatric illness'.[32] Whilst this might mean that

[29] See generally *Civil Law (Wrongs) Act 2002* (ACT) s 110(c),(d); *Civil Liability Act 2002* (NSW) s 42(c),(d); *Civil Liability Act 2003* (Qld) s 35(c),(d); *Civil Liability Act 2002* (Tas) s 38(c),(d); *Wrongs Act 1958* (Vic) s 83(b),(c); *Civil Liability Act 2002* (WA) s 5W(c),(d).
[30] *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 2002* (NSW) s 32(1); *Civil Liability Act 1936* (SA) s 33(1); *Civil Liability Act 2002* (Tas) s 34(1); *Wrongs Act 1958* (Vic) s 72(1); *Civil Liability Act 2002* (WA) s 5S(1).
[31] *Civil Law (Wrongs) Act 2002* (ACT) s 34(4); *Civil Liability Act 2002* (NSW) s 32(4); *Civil Liability Act 1936* (SA) s 33(4); *Civil Liability Act 2002* (Tas) s 34(4); *Wrongs Act 1958* (Vic) s 72(4); *Civil Liability Act 2002* (WA) s 5S(4).
[32] *Civil Law (Wrongs) Act 2002* (ACT) s 35; *Civil Liability Act 2002* (NSW) s 31; *Civil Liability Act 1936* (SA) s 53; *Civil Liability Act 2002* (Tas) s 33; *Wrongs Act 1958* (Vic) s 75.

damages for certain forms of mental harm, such as loss of self-esteem, would not be recoverable, children with special needs could claim relief for recognised illnesses such as depression and anxiety.

5.5.2 Loss of chance

Another type of harm that might be alleged is loss of chance. This could be particularised as loss of a chance of economically productive employment, loss of a chance of better employment, or loss of some other specific opportunity based on the facts of the case.

Loss of promised opportunity is recognised in contract cases and in some cases, even a loss of economic chance will satisfy the requirement of damage (*Chaplin v Hicks* [1911] 2 KB 786; *Johnson v Perez* (1988) 166 CLR 351). The NSW Court of Appeal has also left open the possibility of applying the loss of chance principle to cases involving negligent medical diagnosis or treatment, that is, where there is loss of a chance of recovery or treatment (*Saroukas v Sutherland Shire Council* [1992] NSWCA 192). It must be noted that the High Court has expressed some trepidation in accepting loss of chance as actionable damage in tort, however it has not yet ruled it out (*Tabet v Gett* (2010) 240 CLR 537).

5.6 Conclusions

It may be open to a court to conclude that that education departments have a duty to protect children with special needs from harm, and that this duty is breached if special education services are not provided. The damage that results might include economic loss, 'mental harm' if this amounts to a recognised psychiatric illness, and possibly loss of chance. Civil liability legislation does present some additional challenges for plaintiffs seeking relief, particularly the Acts render the allocation of resources to government programs virtually unreviewable, however these provisions may not preclude the possibility of relief altogether. In short, a test case on this issue would not be vexatious.

Recommendation 6: That Education Departments in Australian States and Territories reconsider their commitment to special needs education in mainstream schools, bearing in mind that they may be under a legal duty of care to provide adequate and appropriate educational supports to children with special needs.

Conclusions

State and Territory policy and practice supports the principle of inclusive education. Each State and Territory has an inclusive education policy, the vast majority of children with disabilities are enrolled in mainstream schools, and fewer places are available to children in special schools. It necessarily follows that a larger number of children will require special education services to support their inclusion in mainstream schools. If the principle of inclusion is to be effectively implemented, it is important that the right of children with disabilities to be accommodated in mainstream school settings is enforced. Yet in Australia, not only is the legal framework of discrimination inadequate and, in many cases, artificial as an avenue of redress, but the actual practices of inclusion exhibited by educators emphasise that complaints are generally with resources rather than educators. This arguably leaves negligence as a potential course of action; however avenues of redress need to more appropriately focus on the administration of resources.

It has been said that inclusion may be looked back upon as an ideology that appeared desirable but fell short in its practical implementation (Kavale 2002, 209; Barrow 2000, 306). But this does not have to occur. Schools and educators are willing to include students with disabilities in their programs, and they are willing to go to some lengths to successfully bring about inclusion. However, they require more resources to support them in their inclusion endeavours. And appropriate complaints mechanisms are required to ensure this support is provided.

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