

# DISABILITY STANDARDS FOR EDUCATION AND THE OBLIGATION OF REASONABLE ADJUSTMENT

ELIZABETH DICKSON<sup>†</sup>

QUEENSLAND UNIVERSITY OF TECHNOLOGY, BRISBANE, AUSTRALIA

*Under the Disability Discrimination Act 1992 (Cth) disability standards may be formulated. Standards set benchmarks which must be met by institutions which operate in a particular protected area. The Disability Standards for Education 2005 came into force in August 2005. An important ramification of the Education Standards is that education institutions are now obliged to make 'reasonable adjustments' to the way they operate in order that students with disabilities may be accommodated. These adjustments must be made in the areas of enrolment, participation, curriculum development, accreditation and delivery, student support services and harassment and victimisation. Education authorities and providers and students with disabilities are legitimately interested in how the 'reasonableness' of proposed adjustment will be determined. The scope of the adjustment required will affect the scope of the right to inclusion in mainstream education institutions of students with disabilities. This paper examines existing case law in order to give some insight into how courts and tribunals may handle this reasonableness enquiry. The paper examines existing decisions where reasonableness has been in issue: cases where an implied duty of reasonable accommodation was applied to the facts; and cases involving indirect discrimination where the reasonableness of the discrimination was to be determined.*

## I INTRODUCTION

The *Disability Discrimination Act 1992 (Cth) (DDA)* provides that the relevant minister may formulate standards in relation to a range of service areas including the education of persons with a disability.<sup>1</sup> Standards for education were first mooted in 1995 with a taskforce of representatives from the Commonwealth and each State and Territory established to formulate draft standards. Draft standards were finalised in 2002. Even though implementation of standards came to be regarded almost as inevitable, however, disagreement between the members of the taskforce, particularly in relation to the cost of implementation, meant that the process effectively stalled.<sup>2</sup> A frustrated Commonwealth Minister for Education, Science and Training, Brendan Nelson, announced, in July 2003, that the Commonwealth would act unilaterally to implement standards.<sup>3</sup> The *Disability Standards for Education* ('Standards') were tabled in March 2005 and came into force in August 2005 without substantial change to the draft form.

The *Standards* cover the areas of enrolment, participation, curriculum development, accreditation and delivery, student support services and harassment and victimisation. They set out the rights of students with disabilities in each area and the concomitant legal obligations of education authorities and providers. They give examples of steps that must be taken by education authorities to amount to compliance. Most significantly, perhaps, the *Education Standards* purport

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<sup>†</sup>*Address for correspondence:* Elizabeth Dickson, Law School, Queensland University of Technology, Gardens Point Campus, GPO Box 2434, Brisbane, Queensland 4001, Australia. Email: e.dickson@qut.edu.au

to extend the scope of the *DDA* by introducing an obligation upon education authorities to make 'reasonable adjustment' to student disabilities.<sup>4</sup> In order to address concerns that this extension may have been 'beyond power',<sup>5</sup> the *DDA* was amended, in February 2005, to provide it with clear legislative support.<sup>6</sup> The *DDA* now provides that '[f]or the avoidance of doubt, disability standards may require a person or body dealing with persons with disabilities to put in place reasonable adjustments to eliminate, as far as possible, discrimination against those persons'.<sup>7</sup>

It is likely that the *Education Standards* will create a new battlefield in respect of claims of disability discrimination in education<sup>8</sup> in that compliance with the *Education Standards* excuses education providers from the scope of the unlawful discrimination provisions of the *DDA*.<sup>9</sup> The principal question for future courts hearing future education complaints made under the *DDA* may well be whether the respondent has complied with the *Education Standards* by making a reasonable adjustment to the disability of a student complainant. Only if non-compliance can be demonstrated will the issue of unlawful discrimination be revived.

The *Standards* provide some generic guidance on what is to be taken into account in determining whether reasonable adjustment has been made:

- (1) For these Standards, an adjustment is *reasonable* in relation to a student with a disability if it balances the interests of all parties affected...
- (2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:
  - (a) the student's disability;
  - (b) the views of the student or the student's associate...
  - (c) the effect of the adjustment on the student, including the effect on the student's:
    - (i) ability to achieve learning outcomes; and
    - (ii) ability to participate in courses or programs; and
    - (iii) independence;
  - (d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;
  - (e) the costs and benefits of making the adjustment.<sup>10</sup>

The broad scope and discretionary nature of the contemplated enquiry suggests, however, that it will be necessary to make the long wait for case law to emerge in this area before confident comment can be made on how the reasonable adjustment provisions of the *Standards* will be interpreted and applied. At this stage it is only possible to look at how the concept of 'reasonableness' has been addressed in decided education discrimination cases to inform speculation about the kind of matters that will influence the reasonableness enquiry under the *Education Standards*. Reasonableness has, to date, been addressed in two contexts. First, some courts and tribunals have implied a duty of reasonable adjustment from the conditions of the *DDA*, and similar Australian anti-discrimination legislation, and have been influenced in their decision making by this implied duty. Secondly, proof of indirect discrimination under the *DDA* requires proof that a prima facie discriminatory condition or condition is 'not reasonable'.

## II REASONABLE ADJUSTMENT AND UNJUSTIFIABLE HARDSHIP

Before looking more closely at the concept of reasonableness, it should be noted that the cases which have articulated an implied duty of reasonable adjustment demonstrate that this duty may operate as a shield as well as a sword in the prosecution of disability discrimination cases.<sup>11</sup>

The Productivity Commission has argued that the imposition of a positive duty of accommodation or adjustment is an essential element of effective anti-discrimination legislation:

The Commission considers that the task of eliminating discrimination cannot be adequately addressed in the absence of a duty to make reasonable adjustments. If disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages.<sup>12</sup>

The Commission argued that adjustment is necessary to deliver substantive equality ‘because it addresses the environmental barriers that are so disabling to people with impairments’.<sup>13</sup> The *Education Standards*, by creating a positive duty of reasonable adjustment, are trumpeted as an important advance in the delivery of justice to students with disabilities,<sup>14</sup> but it is inevitable that the duty of reasonable adjustment will also work to authorise, and even to entrench, exclusionary practices in some mainstream education institutions, particularly in respect of students with disability related problem behaviour.<sup>15</sup>

The *DDA* itself places explicit limits on the response to student disability required of education institutions, most notably in the form of the controversial unjustifiable hardship exemption.<sup>16</sup> Where it can be demonstrated that the accommodation of a person with a disability would cause unjustifiable hardship to a respondent, a prima facie case of discrimination will be excused as lawful. The conditions of the exemption suggest that this hardship must flow to the respondent from the supply of ‘special services or facilities’ but the exemption has been interpreted widely by tribunals and courts and granted in situations where the hardship has flowed not from any supply of services or facilities but from the inclusion in mainstream classes of students with disability related problem behaviour.<sup>17</sup> It is significant that the *Standards* explicitly divorce the concept of unjustifiable hardship from the concept of reasonable adjustment. Both concepts are retained by the *Standards* - ‘to provide a balance between the interests of providers and others, and the interests of students with disabilities’<sup>18</sup> - but they have independent operation:

The Standards generally require providers to make reasonable adjustments where necessary. There is no requirement to make unreasonable adjustments. In addition, section 10.2 provides that it is not unlawful for an education provider to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the provider. The concept of unreasonable adjustment is different to the concept of unjustifiable hardship on the provider. In determining whether an adjustment is reasonable the factors in subsection 3.4 (2) are considered, including any effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students, and the costs and benefits of making the adjustment. The specific concept of unjustifiable hardship is not considered. It is only when it has been determined that the adjustment is reasonable that it is necessary to go on and consider, if relevant, whether this would none-the-less impose the specific concept of unjustifiable hardship on the provider.<sup>19</sup>

The availability of the unjustifiable hardship ‘exception’ to the obligations imposed by the *Standards* is confirmed<sup>20</sup> and the *DDA* definition is adopted.<sup>21</sup> Under the *Standards* regime, therefore, there will be two tiers of limits to the adjustment required. First, an adjustment will not be required if it is ‘unreasonable’, and secondly, a reasonable adjustment will not be required if it imposes ‘unjustifiable hardship’.

This ‘two tier’ system of defences aligns with the controversial approach adopted by the US Supreme Court in *U.S. Airways, Inc. v Barnett*<sup>22</sup> but is a novelty and an unknown quantity in the Australian context and will, no doubt, increase the complexity of cases in this area. In the

United States, the concepts of reasonable adjustment and undue hardship are explicitly linked. The *Americans with Disabilities Act of 1990* contains an obligation of ‘reasonable adjustment’<sup>23</sup> which is limited by a defence of ‘undue hardship’.<sup>24</sup> In other words, reasonable adjustment becomes unreasonable adjustment when it causes undue hardship. In *Barnett*, however, the US Supreme court implied from the conditions of the *Americans with Disabilities Act* a limit upon the duty of reasonable adjustment which arises even when undue hardship cannot be proved. The court has re-invigorated the meaning of ‘reasonableness’ finding in that word a limit separate from the limit of undue hardship. Since *Barnett*, the situation in the US is now similar to the situation contemplated by the *Education Standards* – undue or unjustifiable hardship and reasonableness are separate enquiries which thicken the protection available to institutions accused of discriminatory practices.<sup>25</sup> The US National Council on Disability has described the decision in *Barnett* as ‘troubling because it allows employers to evade providing accommodations that do not cause an “undue hardship”, by endorsing a separate “reasonableness” standard into the law’s requirement for reasonable adjustment’.<sup>26</sup> It is likely that when Australian jurisprudence develops on the point similar criticism of the *Education Standards* will be advanced by disability interest groups. Indeed there has already been some concern expressed that the combined impact of the reasonable adjustment and unjustifiable hardship enquiries may mean a reduction in opportunities for people with disabilities.<sup>27</sup>

In the context of the *Education Standards*, confusion will, no doubt, also arise from the fact that many of the factors to be taken into account when determining ‘reasonable adjustment’ overlap with those to be taken into account when determining ‘unjustifiable hardship’. These include the effect of the disability concerned,<sup>28</sup> financial cost to the education provider<sup>29</sup> and the benefits of making an adjustment.<sup>30</sup> Further, criteria such as these are formulated with sufficient vagueness to allow courts extensive discretion in determining the correct ‘balance of interests’ in each case. One parent, whose daughter was denied a remedy for discrimination on the basis of the unjustifiable hardship exemption, for example, has dubbed it a ‘lucky dip’.<sup>31</sup> The discretionary nature of the balancing process required of hearing tribunals by the unjustifiable hardship enquiry was highlighted by Tamberlin J, of the Federal Court, as involving ‘the weighing of indeterminate and largely imponderable factors and the making of value judgments’.<sup>32</sup> Whether the addition of another layer of discretionary intervention in the form of the duty of reasonable adjustment works to deliver greater equality of opportunity to students with disabilities or greater scope to exclude them remains to be seen.

### III AN ‘IMPLIED’ DUTY OF REASONABLE ADJUSTMENT

There is no express over-arching duty of reasonable adjustment contained in any Australian anti-discrimination statute. A handful of Australian disability discrimination in education cases have suggested, however, that a duty of reasonable adjustment could be implied from the terms of anti-discrimination legislation.<sup>33</sup> *Brackenreg v Queensland University of Technology*,<sup>34</sup> for example, concerned a complaint under the *Anti-Discrimination Act 1992 (Qld) (QADA)*. *Cowell v A School*<sup>35</sup> and *Purvis, Alex on behalf of Daniel Hoggan v The State of New South Wales (Department of Education)*<sup>36</sup> concerned complaints made under the *DDA*. While it was settled by the High Court in *Purvis v New south Wales*<sup>37</sup> that there is no such implied duty in the *DDA*, or by analogy, in other similar Australian legislation, it is useful to consider the contexts in which the duty was considered in *Brackenreg*, *Cowell* and *Purvis* itself, in order to gain some insight into how the *Education Standards* based duty may be interpreted and applied.

*Brackenreg* concerned a student excluded from the Bachelor of Laws degree course at Queensland University of Technology (QUT). The complainant enrolled as an external student in 1993 and was excluded in December 1997, as she was ‘in breach of both the double fail rule and the progression rule’.<sup>38</sup> She reapplied for admission in second semester 1999 but the University declined to readmit her to the course. Brackenreg had syringomyelia and cervical cancer, and, most significantly for her studies, Attention Deficient Hyperactivity Disorder (ADHD). Brackenreg’s case was that her academic difficulties had flowed from her then undiagnosed ADHD, that the ADHD had been controlled by medication and that, as such, she should be allowed another opportunity to complete her course. She applied to the QADT for an interim order that the University readmit her pending the outcome of her complaint of discrimination.<sup>39</sup>

President Copelin found that Brackenreg’s ‘difficulties with her studies’ were not due to less favourable treatment and that Brackenreg was treated more favourably than other students: ‘the complainant’s disability was taken into account and certain adjustments were made’.<sup>40</sup> President Copelin found, further, that QUT had made ‘reasonable adjustment to allow the complainant to compete on a level playing field’.<sup>41</sup> The implication of the reasoning in this case is that ‘reasonable adjustment’ may require the making of special arrangements for student assessment but will not extend to conferring a degree upon a student who has not met course requirements:

... even when consideration was given to the complainant by the respondent for her disabilities, such as giving her extra time to complete exams, extensions of times in handing in assignments, and by giving her conceded passes on numerous occasions after considering her circumstances, she still demonstrated an inability to satisfactorily complete a law degree to the standard required by the respondent.<sup>42</sup>

President Copelin described the scope of QUT’s duty to students with disabilities thus:

There is no obligation on the respondent to pass a student just because they have a disability. Their obligation is to reasonably make available such special services or facilities which may be necessary to enable a student with disabilities to undertake studies.<sup>43</sup>

President Copelin found that Brackenreg’s difficulties ‘were attributable ... to her disabilities, to circumstances in her personal life, and studying as an external student’<sup>44</sup> but not to any failure to accommodate her disability.

It is interesting to note that the *Education Standards* expressly address the issue of the maintenance of academic standards which seems, perhaps, to be at the core of the decision in *Brackenreg*. There is recognition in the *Standards* that

[i]n assessing whether an adjustment to the course of the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.<sup>45</sup>

What is particularly significant about this acknowledged limit on the duty to make reasonable adjustment is that it goes beyond the context which was relevant in *Brackenreg* in that it is not limited to the tertiary education sphere. It will be interesting to see whether this ‘entitlement’ to ‘maintain the academic requirements of the course or program’ is raised by education providers in order to justify the exclusion of students with disabilities from, say, some secondary school subjects which are relied on as pre-requisites to entry to tertiary courses or employment.

The Human Rights and Equal Opportunity Commission (HREOC) decision of Commissioner McEvoy in *Cowell* concerned a secondary school student, Fleur Cowell, who had been diagnosed

with Perthe's Disease which affected her right hip and, consequently, her mobility. She claimed that she was unable to attend some classes because of their location and that she was 'prevented from attending school functions and academically and socially disadvantaged by the actions of the school'.<sup>46</sup> She claimed both direct and indirect discrimination.<sup>47</sup> Commissioner McEvoy unequivocally accepted that action amounting to 'appropriate accommodation' of a student's disabilities is required:

It is my view that the substantial effect of S 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing in the provision of appropriate accommodation or other support as may be required as a consequence of the disability, so that in truly, the person with the disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances.<sup>48</sup>

Commissioner McEvoy accepted the respondent's case, however, and attributed Fleur's disadvantage to her disability and not to any failure to make 'appropriate accommodation' by the respondent school:

While the matters of which Fleur complains clearly are consequential upon her disability, it does not necessarily follow that the respondent has treated her less favourably on the ground of her disability. It was because of her disability she was not able to be placed in an upstairs classroom. But it was her disability which created these problems, not the school's response to her disability.<sup>49</sup>

Commissioner McEvoy found, further, than the Cowell family's own actions had exacerbated Fleur's problems. The school had offered to change Fleur's 'house' which would have had the consequence of her being able to attend classes at a more accessible location. Mrs Cowell and Fleur rejected this option: 'Many of the matters complained of follow this decision', said Commissioner McEvoy.<sup>50</sup> In this case, it appears, the 'unreasonable' attitudes of the complainant's family influenced the decision that the school's 'adjustment' was 'reasonable'. Thus, it can be speculated that courts and tribunals may require complainants to take reasonable steps themselves to mitigate their disability and that any failure to do so may be factored into a balancing of considerations relevant to the determination of whether reasonable adjustment has been made by an education institution.<sup>51</sup>

Whereas in *Brackenreg* and *Cowell* an implied duty of reasonable adjustment worked to defend claims of discrimination, in *Purvis*, at least at first instance, it worked to prove a failure to provide for the complainant's needs which was sufficient to amount to discrimination. *Purvis* concerned a twelve year old student who was excluded from his mainstream high school after a series of incidents involving violence against staff, students and property. Because of a brain injury sustained in infancy, the student in question, Daniel Hoggan, was not able to control his behaviour. While in *Brackenreg* and *Cowell* no discrimination was found in that the respondents' actions were found to have been 'reasonably proportionate' in the context of the complainant's disability, in *Purvis*, Commissioner Innes, of HREOC, identified 'three actions' which the respondent should have taken to make its actions reasonably proportionate:

- [the respondent] should have more broadly consulted in the development of Daniel's discipline and welfare policy;
- ... once the policy was in place and being followed the respondent should have been more prepared to be flexible in allowing changes; and
- ... the advice of special education experts should have been taken more generally.<sup>52</sup>

Commissioner Innes was satisfied that if these three actions had been taken, the respondent's 'actions would have been reasonably proportionate in the circumstances, and discrimination would not have taken place'.<sup>53</sup> Daniel Hoggan's treatment would not have been 'less favourable'<sup>54</sup> than the treatment of students without his disability. Moreover, Commissioner Innes suggested, that had a 'reasonably proportionate' response been made by the school, Daniel Hoggan's difficult behaviour would have been more effectively managed within a mainstream environment and his exclusion avoided.

It must be noted, however, that this decision, which could be seen as pushing the boundaries of the operation of anti-discrimination law in Australia, was ultimately rejected by a majority of the High Court.<sup>55</sup> The High Court not only rejected the HREOC finding of an implied duty of 'reasonable adjustment', they implicitly rejected the HREOC finding that the School could have done more to facilitate Daniel Hoggan's inclusion. Only the minority judges, McHugh and Kirby JJ, accepted that, had more been done, Daniel's exclusion could have been avoided. Callinan J, by contrast, was unequivocal in his praise for the School:

After a very great investment of time, resources, energy, expertise, money and compassion, on 3 December 1997, the first respondent determined that it could no longer provide a place for Daniel Hoggan within its mainstream classes at the South Grafton High School which it funded and conducted.

Perhaps the lesson to be taken from *Purvis* on the potential scope of reasonable adjustment is the discretionary nature of the reasonableness enquiry which will inevitably be influenced both by individual judicial values and beliefs and by individual judicial readings of the prevailing values and beliefs of the Australian people.<sup>56</sup>

#### IV INDIRECT DISCRIMINATION AND REASONABLENESS

While the precise formula for indirect discrimination varies from jurisdiction to jurisdiction, generally speaking, proof of indirect discrimination requires proof of the following elements:

- The imposition of a 'condition' on a person with disability;
- The person with a disability cannot comply with the condition;
- Others without the disability can comply; and
- The condition is not reasonable.<sup>57</sup>

The condition imposed is rarely express. Instead, it is inferred from the circumstances of the treatment of the person with disability. The classic example of indirect discrimination is, perhaps, the building without steps. The absence of steps means that a condition can be inferred from the circumstances that a person must be able to use steps to enter the building. A person with, say, a mobility impairment cannot comply with this condition. People without mobility impairment can comply. Case law suggests that, at least for public buildings, such a condition will be unreasonable.<sup>58</sup> Reasonable adjustment for a person with a mobility disability in these circumstances, therefore, would require the provision of an accessible entrance such as a ramp.

If a *prima facie* discriminatory condition is found to be 'reasonable', then its removal will not be required to effect reasonable adjustment for a person with a disability. Indirect discrimination cases, therefore, give some insight into the potential scope of the duty of reasonable adjustment in that they give some insight into the types of changes to policy and practice and to the learning environment that education institutions will and will not be expected to make in order to facilitate the inclusion of students with disabilities. It is useful to examine the nature of the reasonableness

enquiry in respect of indirect discrimination, how this enquiry has played out in the controversial situation of the inclusion of students with disability related problem behaviours, and general influences on the ‘reasonableness’ enquiry which may be extrapolated from the case law.

### *A The Nature of the Reasonableness Enquiry in Relation to Indirect Discrimination*

While the *DDA* is silent as to the nature of the reasonableness enquiry, some State Acts do provide guidance on relevant considerations. The *Anti-Discrimination Act 1991 (Qld) (QADA)*, for example, provides that whether or not a condition is reasonable depends on ‘all the relevant circumstances of the case’<sup>59</sup> and the following examples of relevant circumstances are set out: consequences of the failure to comply with the condition; the cost of alternative conditions; and the financial circumstances of the person who imposes or proposes to impose the condition. Case law, however, has shed further light on the nature of the ‘balancing act’ required in determining whether or not a condition is reasonable. In the *DDA* disability discrimination in education case, *Clarke v Education Office*,<sup>60</sup> Madgwick J, of the Federal Court, applied the test articulated in the *Styles*<sup>61</sup> case and approved by Dawson and Toohey JJ of the High Court in *Waters and Others v Public Transport Corporation*,<sup>62</sup> a case brought under the *Equal Opportunity Act 1984 (Vic)*: reasonableness as a test is ‘less demanding than one of necessity, but more demanding than a test of convenience’. Madgwick J considered the following generic list of relevant considerations as spelled out in *Styles*:

- the nature and extent of the effect of the discriminatory requirement or condition;
- the reasons advanced in favour of it;
- the possibility of alternative action: and
- matters of ‘effectiveness, efficiency and convenience’.<sup>63</sup>

In the most recent indirect disability discrimination in education case tried under the *DDA*, *Hurst and Devlin*,<sup>64</sup> Lander J adopted Madgwick J’s summary of the relevant law on reasonableness but added, consistent with the purposive approach to statutory interpretation, that it will also be necessary to take into account the objects of the Act:

The question of reasonableness will always be considered in the light of the objects of the Act which are to eliminate, as far as possible, discrimination against persons on the ground of disability, to ensure as far as practicable that persons with disabilities have the same rights to equality before the law, and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.<sup>65</sup>

### *1 Relevant Considerations in the Reasonableness Enquiry for Indirect Discrimination Compared with Relevant Considerations Under the Education Standards*

The *Education Standards* suggest, perhaps, a closer focus on the interests of the student with disability than the ‘tests’ articulated in the indirect discrimination cases.<sup>66</sup> They mandate consideration, for example, of the ‘views of the student’<sup>67</sup> as to what adjustments are appropriate, and of the effect of any adjustment on the student,<sup>68</sup> and particularly on his or her ‘ability to achieve learning outcomes’,<sup>69</sup> ‘ability to participate in courses or programs’<sup>70</sup> and ‘independence’.<sup>71</sup> As with indirect discrimination, however, there is also scope for the effect on others if adjustments are made<sup>72</sup> and the financial impact of adjustments to be considered.<sup>73</sup>

Moreover, with the *Standards* as with indirect discrimination, the overarching task is expressed to be a balancing of ‘the interests of the parties affected’ taking into account ‘all the

relevant circumstances and interests'.<sup>74</sup> As with indirect discrimination, therefore, it is likely that there will be considerable latitude to consider factors peculiar to individual cases.

### B *Indirect Discrimination, Behaviour Impairment and Reasonableness*

It is highly probable that, had Daniel Hoggan's controversial claim in *Purvis* been framed as one of indirect discrimination, it would have failed at the point of the reasonableness enquiry. Indeed it has been suggested that the claim was not formulated as indirect discrimination precisely for this reason.<sup>75</sup> The scope of any 'right' to inclusion in mainstream classes of students with problem behaviours has long challenged both the education systems and the legal system.<sup>76</sup> Schools are legitimately interested in knowing the parameters of 'reasonable adjustment' in this situation. One relevant, and potentially discriminatory, 'condition' which has been found 'reasonable' in the education context is the condition that a student with a disability must comply with the school rules with respect to conduct.<sup>77</sup> It will be seen below, however, that there has been some suggestion by courts and tribunals, that it may be necessary for schools to tailor individual behaviour codes for students with disabilities, which account for the effects of their particular impairment, in order to avoid discrimination.

It is instructive to compare how the reasonableness issue has been dealt with in cases similar to that of Daniel Hoggan, but formulated as indirect discrimination claims. The NSWADT case of *M&C* and the *DDA* case *Minns* both involved allegations of indirect discrimination against students with Attention Deficit Hyperactivity Disorder (ADHD). In *M&C* the following definition of ADHD, contained in a publication produced by the New South Wales Education Department, was cited:

...a mixed group of disruptive behaviours. These behaviours can have many causes and effects and their characteristics merge with normal behaviour. ADHD is a medically diagnostic label given when these behaviours cause difficulty with the child's development; behaviour and performance; family relations and social interactions. Individuals with the disorder may be distractible, inattentive, impulsive and sometimes hyperactive.<sup>78</sup>

Both M, of *M&C*, and Ryan Minns were frequently disciplined for breaches of the school rules. In *Minns*, Raphael FM explicitly drew attention to the similarities between that case and the *Purvis* case commenting that the consequence of Daniel Hoggan's disability was 'violent and anti-social behaviour very similar to that exhibited by Ryan Minns'.<sup>79</sup>

In both *Minns* and *M&C* the condition imposed was framed as compliance with the conduct required by the school discipline policy.<sup>80</sup> As discussed, above, in both these cases it was argued by the respondent that the complainant's case should fail because the complainant had not proved that a 'base group' to which they belonged could not comply with the condition which had allegedly been imposed. This argument was successful in *M&C*. Nevertheless, the NSWADT went on to comment on the reasonableness of the respondent's expectation that M comply with the discipline code. The complainant's case failed in *Minns* because the condition imposed was held to be 'reasonable'.

Both the NSWADT and Raphael FM emphasised that it was reasonable that schools have and enforce codes of conduct. The NSWADT was unequivocal:

No sensible person would dispute that it is reasonable for a community, an organisation or a school to set rules and standards of conduct for its members/students. The point is so trite it needs no further discussion.<sup>81</sup>

Raphael FM determined that such codes were necessary to enable ‘all students to benefit from the educational opportunities offered and the requirement to allow this to happen in a safe environment’.<sup>82</sup> The issue in both cases, however, was not the reasonableness of the *code*, per se, but the reasonableness of the required *compliance* with the code imposed on the complainants who alleged that their impairment prevented such compliance. The evidence of M’s Mother, in M&C, was that M ‘simply was not capable of controlling her behaviour’.<sup>83</sup> The complainant’s case in *Minns*, disputed by the respondent, was that Ryan’s impairment made it ‘impossible for him to behave in a manner compliant with the discipline policy’. The respondent argued that Ryan did, in fact, comply with the policy because the policy stipulated ‘if you do x this will happen to you’ and Ryan ‘did x and that happened to him, so he could comply and did comply’. Raphael FM was unimpressed with this ‘ingenious’ argument.

The NSWADT were critical of the inflexible administration of discipline policy at both schools which M attended. Whilst there was considerable discretion as to which penalty was meted out, there was no discretion to give no penalty at all. The Tribunal characterised the slavish adherence to the discipline policy as ‘unreasonable’:

While such behaviour [physical aggression] is clearly unacceptable, and it is reasonable to require that such children [children with ADHD] respect others and their property, it seems to us that it is unreasonable to apply a disciplinary regime in blanket fashion to all children regardless of their subjective features.<sup>84</sup>

The Tribunal compared the inflexible application of the discipline code with a mandatory sentencing regime, ‘a form of punishment and social control, which has been shown to be largely ineffective in modifying the conduct of people with significant psychiatric or psychological difficulties’.<sup>85</sup>

The Tribunal also emphasised that it was not reasonable to expect a child such as M to comply with the policy unless she had ‘special support to enable...her to do so’.<sup>86</sup> The facts, here, were that M did not have this ‘special support’. Thus, the Tribunal found a clear causal link between the lack of support and M’s failure to comply with the discipline code:

Not only was M an ADD sufferer, she was well behind her colleagues academically...In those circumstances, it was unreasonable to expect that she could significantly modify her behaviour as a result of being frequently disciplined in the absence of that attention, support and special care. It was in our view therefore unreasonable to punish her in the same fashion as any other member of the student body if she failed to comply with the requirements of the Code.<sup>87</sup>

The Tribunal’s reasoning here is similar to the reasoning of Commissioner Innes in the HREOC hearing of the *Purvis* case. Commissioner Innes found that the South Grafton High School had not taken reasonable steps to accommodate Daniel Hoggan’s impairment and that this failure had contributed to his behaviour problems. Ultimately the *Purvis* case failed, as did M’s case. It is interesting to speculate, however, on what the outcome of M’s case would have been if she alleged direct discrimination on the basis of the school’s failure to provide the ‘special support’ that the NSWADT held that she needed. The cynical view is, perhaps, that M still would have failed. The cynical view is that the Tribunal only made its pointed criticism of the respondent because M failed. Having found against M, on the compliance point, the Tribunal could safely admonish the respondent without actually having to enforce, controversially, any improvement in the respondent’s treatment of its students.

The facts of the *Minns* case differed from the facts of *M&C* in that there was not the same weight of evidence of lack of specialist support for Ryan. In addition, there was evidence that the school had administered the discipline policy flexibly to accommodate Ryan's impairment. It should also be noted that Ryan and his mother objected to Ryan's taking prescribed medication which may have modified his behaviour. Nevertheless, the complainant argued, along the lines of *M&C* that the respondent had failed to take reasonable steps to deal with Ryan. The complainant suggested alternative methods of management of Ryan's behaviour. The court was not convinced, however, that this line of argument was relevant<sup>88</sup> and found that the complainant had not proved that the requirement that Ryan comply with the code was 'not reasonable':

I am of the view that the requirement that was placed upon Ryan to comply with each of the school's disciplinary policies as modified was reasonable in all the circumstances. The classes in which Ryan was placed would be unable to function if he could not be removed for disruptive behaviour. The students could not achieve their potential if most of the teachers' time was taken up with handling Ryan. The playgrounds would not be safe if Ryan was allowed free rein for his aggressive actions. Therefore the claim for indirect discrimination must fail in the manner in which it is put'.<sup>89</sup>

Thus, in determining the reasonableness issue against Ryan Minns, Raphael FM balanced the benefit to Ryan in allowing him 'free rein'<sup>90</sup> against the potential detriment to others in the school community and Ryan's interests yielded to the interests of the majority. His language is clearly reminiscent of the language of Gleeson CJ<sup>91</sup> and Callinan J<sup>92</sup> in the High Court in *Purvis* who were so concerned about the detriment to others in the South Grafton State High School community should Daniel Hoggan's enrolment be maintained.

### *C Influences on the Reasonableness Enquiry for Indirect Discrimination*

Indirect discrimination cases involve different disabilities, different circumstances and different educational institutions. It can seem difficult to pinpoint why some cases succeed while others fail. It must be acknowledged that what is 'reasonable' will depend on the peculiar facts of each case. However, case analysis does suggest some indicia of a successful claim. These indicia, it may be speculated, will also be significant in the context of determining the scope of reasonable adjustments which will be required under the *Education Standards*.

#### *1 The Attitudes Towards Disability of the Tribunal*

As suggested above, in the context of the *Purvis* litigation, how a court or tribunal hearing a case understands the concepts of inclusion and disability may influence the outcome of the case. The indirect discrimination cases suggest that the intrinsic beliefs and attitudes held by a tribunal may influence its conclusions about what is and is not 'reasonable'. It could be argued that the theoretical underpinning of a duty of 'reasonable adjustment' is recognition that social institutions, such as schools, are obliged to modify their practices and procedures to accommodate people with disability and thus to reduce the limitations which attach to that disability. Indeed there is persuasive evidence that much of the disadvantage which is experienced by people with disabilities is caused not by their underlying impairment but by a society which is not structured to accommodate disability and which is unwilling and unprepared to make the changes necessary to effect that accommodation.<sup>93</sup> The cases do reveal some judges and tribunal members who understand and are committed to the goal of inclusivity, as reflected, for example, in the object of the *DDA* 'to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community'. Many

anti-discrimination decisions continue, however, to resonate outmoded understandings of people with disabilities as having ‘needs’ rather than ‘rights’. They resonate a belief that people with disabilities should be stoically grateful for what they are given instead of agitating for more. They resonate a belief that the goal of inclusion is not to reduce the functional limitations of disability but to reduce ‘difference’ by ‘normalising’ the behaviour of people with disability. Their different attitudes and beliefs are clearly reflected in their findings as to what is, and what is not, ‘reasonable’ treatment of people with disabilities.

A clear contrast in attitude and approach is evident in the decisions of two courts involved in the recent series of Auslan cases.<sup>94</sup> In *Clarke* the reasoning of Madgwick J was clearly influenced by what he described as the ‘impressive’ evidence of a Dr Komesaroff, ‘a highly qualified educationalist and qualified Auslan interpreter’.<sup>95</sup> By contrast, Lander J, in *Hurst and Devlin* was not ‘assisted’ by the evidence of Dr Komesaroff, or that of another witness for the applicants, Ms Pardo: ‘They acted as advocates for Auslan and, in doing so, surrendered their academic detachment and objectivity’.<sup>96</sup>

The criticism by Lander J of Dr Komesaroff as ‘partisan’ stems, perhaps, from a deep-seated discomfort with the political agenda evident in the expert evidence in this case. The applicants’ actions were supported by the lobby group Deaf Children Australia which has an unashamed objective of compelling the introduction of Auslan in the education of children with hearing impairments.<sup>97</sup> Lander J was stern in his criticism of the use of legal proceedings such as the present to promote a ‘cause’:

In my opinion, it is a misconception to think that legal proceedings of this kind are the appropriate vehicle to introduce changes into the education system and, in particular, into that part of the education system which impacts upon persons with disabilities.<sup>98</sup>

In my opinion, proceedings under the HREOC Act are not the appropriate medium for advancing educational theory in the hope and expectation that educational institutions will have to respond to a decision of this Court.<sup>99</sup>

Decisions about the education of children with disabilities, according to Lander J, are best made ‘by educators in the best interests of the children’<sup>100</sup> and not by courts in the context of ‘adversarial’ proceedings.<sup>101</sup> This view, it could be argued, puts rather too much faith in the expertise and impartiality of educators, at the expense of the wishes and knowledge of parents and students themselves, and discounts the very real function of anti-discrimination legislation of providing a remedy when those providing services, intentionally or otherwise, impose a discriminatory regime. Indeed, it was only in the context of ‘adversarial’ proceedings that it was determined that Education Queensland ‘educators’ had not acted ‘reasonably’ in their treatment of Ben Devlin and Tiahna Hurst.

In *Demmery v Department of School Education*<sup>102</sup> the words of the New South Wales Equal Opportunity Tribunal reveal a particularly conservative view of the nature of disability and of the ‘rights’ of people with disabilities. The tribunal treated inclusion as a privilege rather than a right and appeared to ignore the fundamental tenet of anti-discrimination law and policy that equal opportunity for a student with an impairment may require different treatment of that student.<sup>103</sup> In *Demmery*, a condition that the complainant child, Luke, who was deaf and who had been allocated six different teachers in a two month period, ‘be able to cope well with unexpected change’ was found to be ‘reasonable’.<sup>104</sup> The attitude of the Tribunal appears antithetical to any notion of a duty of reasonable adjustment in that it implied that ‘adjustment’ is required to be made by the student rather than by the school. The onus is placed on the included student to adapt

to the environment, rather than the reverse. The included student must take the bad along with the good: 'The integration of a disabled child including a profoundly deaf child into a normal class setting of a school, must require a degree of acceptance that the child will be subjected to the usual exigencies that flow from the school setting'.<sup>105</sup> The Tribunal suggested that the goal of inclusion is 'normalisation' of the student with the impairment: 'a disabled child, such as Luke, as a part of the normalisation process of integration, may reasonably have to expect to be involved in a situation where a temporary teacher has to take over his class pending the appointment of a permanent teacher'. The Tribunal referred to 'the normal school setting' and 'a normalised integration program'. The Tribunal did acknowledge that, if Luke's parents 'required' that he be educated in a mainstream setting, that choice was 'open to them', and they could expect that 'established policies of integrating a child would be implemented'. The clear implication was, however, that by choosing a school in a more remote part of New South Wales, they could expect only what 'was reasonable and appropriate having regard to that location'.

In the *Minns* case, another 'lost' case, there was clear evidence that the system had tried to help the complainant to 'assimilate' to his school environment. There was also apparent in the Tribunal's decision, however, a strong assumption that 'normal' is desirable, that the aim of 'inclusion' is for the 'disabled' student to be 'normalised' and assimilated. There are repeated references to Ryan's 'non-compliant behaviour' and consideration of appropriate methods of 'normalising' Ryan's behaviour.<sup>106</sup> The underlying assumption is, therefore, that the child must fit the system and not that the system must fit the child. As in *Demmery*, the implication is that the onus is on the student to adapt to the environment. Such an attitude is simply not in keeping with the current understanding of disability as a social construct which can and should be mitigated by social adjustment.

Commissioner Atkinson in *Kinsela*<sup>107</sup> and Madgwick J, in *Clarke* do demonstrate a commitment to the reform policy of anti-discrimination legislation and an understanding that disability is a social construct which can be mitigated by an appropriate social response. In both *Kinsela* and *Clarke* the complainant won – but not without controversy. *Kinsela* had completed the degree Bachelor of Science (Human Services) at Queensland University of Technology (QUT). One focus of the degree was disability services and the course materials indicated a strong commitment to 'civil, political, economic, social and cultural rights' for all people.<sup>108</sup> In *Kinsela*, Commissioner Atkinson noted the policy inconsistency between these course materials issued by QUT and Mr *Kinsela*'s exclusion by QUT from the graduation ceremony. Further, Commissioner Atkinson emphasised 'the undoubted goals of the Act of inclusiveness, accessibility and availability'<sup>109</sup> and cautioned that as anti-discrimination legislation has introduced change, so the university must change.<sup>110</sup>

Unlike Commissioner Atkinson, Madgwick J showed considerable respect for the commitment to inclusivity of the respondents in *Clarke*, commenting that 'there is no doubt that the CEO and the College, due to the religious and ethical convictions of those who manage and control them, welcome all pupils, including profoundly deaf pupils'.<sup>111</sup> He also found that 'the respondent's witnesses and others concerned in the running of the CEO hold as moral convictions what the relevant legislation seeks to accomplish as a matter of legal requirement'.<sup>112</sup> He conceded that the case was 'unusual' and that, given the commitment to inclusivity of the respondents, his decision in *Clarke* would be 'surprising'.<sup>113</sup> He noted that in relation to other cases, accusations have been made that legislation has been interpreted strictly to deny a remedy for conduct 'that would be regarded as discriminatory in its ordinary meaning'.<sup>114</sup> Nevertheless, he saw his role as to faithfully apply the legislation to the facts and cited the caution of Brennan and McHugh

JJ in *IW v city of Perth*<sup>115</sup> that ‘...courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope’.<sup>116</sup> While many cases may have been lost because of such a ‘strict’ approach, he contended, this case showed ‘the other side of the coin’: ‘conduct which is not discriminatory in its ordinary meaning may be caught by the statutory prohibition’.<sup>117</sup> Madgwick J found that the good intentions and the good record of the respondent could not save a finding that they had discriminated against Jacob Clarke and wryly commented that ‘[t]he road to infraction of discrimination law, as to other places to be avoided, may be paved with good intentions’.<sup>118</sup>

## 2 *Failure of the Complainant to ‘Mitigate’ Disability*

The cases demonstrate that a court or tribunal will not be inclined to find a complainant ‘reasonable’ and a schools action or inaction ‘not reasonable’ when a complainant has the opportunity to take reasonable steps to mitigate his or her own disability and fails to do so.

In *Cowell*, for example, although the reasonableness issue was not expressly considered in the context of indirect discrimination, the attitude of Commissioner Wilson was clearly that the Cowell family could have avoided much of the disadvantage which flowed to Fleur, if they had acted on the School’s offer to change Fleur’s house. Commissioner Wilson accepted the evidence of school staff that this offer was first made only weeks after Fleur had been allocated to her house.<sup>119</sup> The implication was that an early change could have been made at that time without unreasonable disruption to Fleur. Instead, Fleur persisted with the house and its inaccessible classrooms for over two years. Commissioner Wilson was also critical of the Cowell family’s failure to communicate with the school. Here the implication was that a lack of feedback from the family affected the school’s ability to accommodate Fleur’s needs. Commissioner Wilson even suggested that ‘[i]t may sound a strange thing to say, but I believe it would have been easier for the school if both Mrs J and AJ (Mrs Cowell and Fleur) had complained more’.<sup>120</sup>

In *Minns* there was some implication that the Minns family had unreasonably failed to mitigate Ryan’s disability by not following medical advice that Ryan’s ADHD should be treated with the drug, Ritalin. The Minns family objected to the fact that the school insisted that Ryan take the drug as a condition of his enrolment. Raphael FM said, ‘[r]equiring Ryan to take medication so that he could obtain the optimum benefit from the education that was being offered to him cannot be held up as a failure to provide him with educational services’.<sup>121</sup> The ‘unreasonableness’ of the Minns family, therefore, infected their case.

In *Clarke*, by contrast, the Clarke family, while insisting that Jacob needed Auslan support, demonstrated their reasonableness by going to great lengths to facilitate the provision of that support. It could be argued that they took positive steps to mitigate both Jacob’s disability and any potential inconvenience to MacKillop College in accommodating him. The Clarks had offered the College a cash grant of \$15,000 to pay for a teacher aide, assistance with applications for government grants, to arrange volunteer Auslan support, to attend excursions and camps as Jacob’s interpreter and to teach Auslan to the teachers at the school. The Clarke’s commitment to easing the impact of Jacob’s inclusion on the College undoubtedly helped them to prove that the college’s failure to provide Auslan support was not reasonable.

## 3 *The Availability of a Financial Solution*

A complainant is more likely to succeed in proof of indirect discrimination if a reasonable alternative to the discriminatory condition can be paid for.<sup>122</sup> In *Clarke* there were government and private funds available to pay for Auslan support for Jacob. In *Travers*,<sup>123</sup> the building of a

small cupboard, at little expense, to house the catheter equipment of another student who would use the 'disabled' toilet would mean that the toilet could be shared with minimum risk to that other student. In *Kinsela*, the cost of relocating the graduation ceremony, it was argued, could be recouped in increased ticket sales.<sup>124</sup>

In most of the failed cases, however, changing the discriminatory requirement or condition would involve attitudinal and not just financial adjustment by the educational institution respondents and their students. In *Demmery*, the implication was that Luke's general unhappiness would not be solved by providing him with teacher consistency in the classroom, that the true cause of his unhappiness was the perception that others excluded him. In *Cowell* the solution preferred by the Cowell family may have benefited Fleur but would have involved disruption to over 200 people, including teachers who had taken pains 'to create an appropriate learning environment in their classrooms' and would be 'reluctant to move'.<sup>125</sup> The behaviour cases, *Minns* and *M&C*, in particular, demonstrate the point that interference with the comfort and convenience of other students will be significant in the reasonableness enquiry. While extra funds, in conditions of extra support, may have assisted the complainants in those two cases, there would still be unreasonable disruption if their breaches of discipline were tolerated. Further, while it is, perhaps, easy for a school community to accept that it is fair to provide extra facilities to a student with a disability it is more difficult to accept that it is fair that such students should be allowed to 'flout' school rules.

The case law suggests, therefore, that a discriminatory condition, which can be removed through mere application of money, may well be struck down. Similarly, it may be speculated that, for the purposes of the *Standards*, an adjustment that can be paid for may be required. Many cases involving students with disabilities, however, require more than money to effect accommodation. They require the increased cooperation, understanding and tolerance of other students and school staff if the student is to be accommodated. The cases demonstrate that courts and tribunals will rarely find it a 'reasonable' alternative to attempt to enforce attitudinal change. This reluctance to 'interfere' is driven, perhaps, by a perception that attitudinal change can not be compelled, or by reluctance, perhaps, to allow the law to intrude upon the hearts and minds of the community. The undoubted irony, however, is that anti-discrimination legislation has been introduced as an instrument of such change.<sup>126</sup>

## V CONCLUSION

The *Standards* initiative was designed to 'strengthen' the *DDA* and was intended, generally, as a positive step towards delivery of educational 'justice' to people with disabilities.<sup>127</sup> The 2002 report of the Senate Employment, Workplace Relations and Education Committee, *Education of Students with Disabilities*, for example, found that standards were a 'necessary step'<sup>128</sup> and likely to be a more successful means than legislation alone, of delivering education opportunity to people with disabilities:

The formulation of education standards is an essential part of the overall legislative scheme developed to reduce discrimination in education. While existing law will be able to deal with matters contained in the standards, the committee has learnt that the Act by itself is not necessarily the most effective or efficient means of achieving this aim.<sup>129</sup>

The 2004 report of the Productivity Commission's review of the *DDA* also clearly implied that the introduction of disability standards for education would improve educational opportunities for students with disabilities.<sup>130</sup> The imposition upon education providers of a duty to make

reasonable adjustment is regarded as central to the power of the *Standards* to bring about improved experiences and outcomes for people with disabilities. The Productivity Commission saw such a duty as ‘means’ to the ‘end’ of the delivery of ‘substantive equality’ and recommended that it be ‘included explicitly in the [DDA] as a stand alone duty’.<sup>131</sup> When the existing case law is examined, however, and the approaches of courts and tribunals to consideration of what is reasonable in the treatment of students with disabilities deconstructed, it is clear that the *Education Standards* may not deliver much, if anything, extra by way of ‘substantive equality’. The moderating factor of ‘reasonableness’ on the duty of adjustment will allow courts and tribunals to balance a range of competing considerations and the balance may or may not favour the inclusion of students with disabilities. As Madgwick J surmised in the *Clarke* case, the balancing act authorised by enquiries into reasonableness of treatment is the ‘most difficult’ issue to be addressed in the context of disability discrimination.<sup>132</sup>

## ENDNOTES

1. *DDA* s 31(1)(b).
2. See Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, *Education of students with disabilities* (2002) (*‘Senate Report’*) 114, [7.17-7.18]
3. See Brendan Nelson, *Most State and Territory Education Ministers Vote Against Disability Standards*, Media Release, 11 July 2003.
4. Obligations to make reasonable adjustment in the areas outlined above are found in *Disability Standards for Education 2005* (Cth) (*‘Education Standards’*) in ss 4.2, 5.2, 6.2 and 7.2.
5. McHugh and Kirby JJ, in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 125 [99] suggested that this obligation to make reasonable adjustment was inconsistent with the terms of the *Standards’* parent legislation, the *DDA* and as such, by implication, unenforceable.
6. Disability Discrimination amendment (Education Standards) Bill 2004 (Cth). *Disability Discrimination (Education Standards) Act 2005* (Cth) Schedule 1 s 4. See Brendan Nelson and Philip Ruddock, ‘Government Acts on Discrimination against Students with Disabilities’ (Press Release, 12 August 2004). *Disability Discrimination (Education Standards) Act 2005* (Cth) Schedule 1 s 4. See Brendan Nelson and Philip Ruddock, ‘Government Acts on Discrimination against Students with Disabilities’ (Press Release, 12 August 2004).
7. *DDA* s 31(1A)
8. At least in respect of claims brought under the *DDA*. How the *Standards* will affect claims brought under state anti-discrimination legislation is unclear. See Australian Government Solicitor, Letter of Advice re Productivity Commission’s Inquiry into the Disability Discrimination Act (1992), 10 February 2004 <<http://www.pc.gov.au/inquiry/DDA/advice/ags1/ags1.pdf>> at 25 June 2005, 4-5. The advice suggests that further amendment to the *DDA* may be necessary if the Commonwealth intends that compliance with the *Standards* should displace obligations arising under State legislation.
9. *DDA* s 34.
10. *Standards* Part 3. See particularly s 3.4(2).
11. Contrast, for example, *Purvis, Alex on behalf of Daniel Hoggan v The State of New South Wales (Department of Education and Training)* [2000] HREOC No 98/127 (Unreported, Commissioner Innes, 13 November 2000), where the Human Rights and Equal Opportunity Commission found that the respondent had failed in its duty to make reasonable adjustments to the disability of the complainant [sword], with *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) where the Queensland Anti-Discrimination Tribunal found that the respondent had made reasonable adjustments to the complainant’s impairment [shield].
12. Productivity Commission, Australian Government, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004) 193.
13. *Ibid.*

14. See above n 4.
15. See discussion, below, of the following cases: *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92; *Minns v State of New South Wales* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002); *S on behalf of M & C -v- Director General, Department of Education & Training* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001).
16. For a detailed analysis of the operation of the unjustifiable hardship exemption see Elizabeth Dickson, 'Disability Discrimination, the Unjustifiable Hardship Exemption and Students with Disability Related Problem Behaviour' (2004) 9(2) *Australia and New Zealand Journal of Law and Education* 37.
17. See *ibid.*
18. *Standards* s 10.2(3) note.
19. *Standards* s 3.4 note.
20. *Standards* Part 10.
21. *Standards* s 10(2) note.
22. *U.S. Airways, Inc. v Barnett* 535 US 391 (2002). See above n 5.
23. *Americans with Disabilities Act of 1990* 42 USC §§12101-12213. See, for example, in relation to employment discrimination § 12111(9) and § 12112 (b) (5)(a)
24. *Americans with Disabilities Act of 1990* 42 USC §§12101-12213. See, for example, in relation to employment discrimination § 12111(10) (B).
25. In Australia, the correct sequence of enquiries seems to be: is the adjustment reasonable? If, yes - does the reasonable adjustment cause unjustifiable hardship? In the US, however, the sequence of enquiries seems to be reversed: does the adjustment cause undue hardship? If no, is the adjustment unreasonable?
26. See National Council on disability, *Reasonable Accommodation after Barnett* (2003) < <http://www.ncd.gov/newsroom/publications/2003/accommodation.htm>> at 27 July 2005.
27. See Senate Legal and Constitutional Legislation Committee, *Disability Discrimination Amendment (Disability Standards) Bill 2004* 15-17.
28. *DDA* s 11(b); *Standards* s 3.4(2)(c) and (d).
29. *DDA* s 11(c); *Standards* s 3.4(2)(e).
30. *DDA* s 11 (a); *Standards* s 3.4(2)(e).
31. Evidence to Senate Employment, Workplace Relations and Education References Committee, Parliament of Australia, Brisbane, 6 September 2002, 412 (Michelle O'Flynn). Michelle O'Flynn is a member of the disability lobby group, Queensland Parents for People with a Disability, and the mother of the complainant in *L* [1995] 1 QADR 207.
32. *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306, 314 [31].
33. For an explanation of the reasoning of the various courts and tribunals on the point see Elizabeth Dickson, 'Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in its Interpretation and Application' (2003) 8 *Australia and New Zealand Journal of Law and Education* 45.
34. *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) ('*Brackenreg*').
35. *Cowell v A School* [2000] HREOC No97/168 (unreported, Commissioner McEvoy, 10 October 2000) ('*Cowell*').
36. *Purvis, Alex on behalf of Daniel Hoggan v The State of New South Wales (Department of Education and Training)* [2000] HREOC No 98/127 (Unreported, Commissioner Innes, 13 November 2000).
37. *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92.
38. *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) 4.2.1.3(vii).
39. President Copelin of the QADT ultimately determined that she did not have the power to make the order sought by *Brackenreg*, which, in effect, was the equivalent of a mandatory injunction. Nevertheless, in light of the possibility that she might be wrong on the question of jurisdiction [4.2] President Copelin conducted what amounted to a hearing of the issue of whether or not *Brackenreg* had been discriminated against by QUT in order to determine whether there was a 'serious issue to be tried'.

40. *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) 4.2.2.4.
41. *Ibid* 4.2.2.4(v).
42. *Ibid* 4.2.2.4(iv).
43. *Ibid* 4.2.2.4(v).
44. *Ibid* 4.2.1.3.
45. *Disability Standards for Education 2005* (Cth) s 3.4 (3).
46. *Cowell* [2000] HREOC No97/168 (unreported, Commissioner McEvoy, 10 October 2000) 1.
47. Commissioner McEvoy reheard the direct discrimination claim after it was remitted to HREOC for rehearing by the Federal Court after a review of the original decision of President Wilson in *AJ v A School* [1998] HREOC No. H97/168 (Unreported, Wilson P, 23 March 1998). The Federal Court decision is *A School v Human Rights and Equal Opportunity Commission* (1998) 55 ALD 93. The decision on the indirect discrimination claim, undisturbed by the Federal Court review, will be discussed further, below.
48. *Cowell* [2000] HREOC No97/168 (unreported, Commissioner McEvoy, 10 October 2000) 5.2.2.  
The reasoning of Commissioner McEvoy was likely influenced by the reasoning of Mansfield J in that review on the reasonable accommodation point. Mansfield J cautiously said ‘I do not wish to be taken as accepting that the obligation not to discriminate against a person with a disability under the DD Act does not involve some obligation to take positive action with respect to a disabled person’: *A School v Human Rights and Equal Opportunity Commission* (1998) 55 ALD 93.
49. *Cowell* [2000] HREOC No97/168 (Unreported, Commissioner McEvoy, 10 October 2000) 5.2.3.
50. *Ibid*.
51. This theme will be discussed in more detail, below.
52. *Purvis, Alex on behalf of Daniel Hoggan v The State of New South Wales (Department of Education)* [2000] HREOC No 98/127 (Unreported, Commissioner Innes, 13 November 2000) 6.4.
53. *Ibid*.
54. For the purpose of most Australian anti-discrimination legislation proof of direct discrimination requires proof of ‘less favourable treatment’. See, for example, *DDA* s 5(1).
55. *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 per Gleeson CJ, Gummow, Hayne and Heydon and Callinan JJ.
56. This theme will be further considered, below.
57. See, for example, *DDA* s 6.
58. See, for example, *Cocks v. State of Queensland* (1994) 1 QADR 43 and *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997). But contrast *I v O’Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 (Unreported, Copelin P, 31 January 2001).
59. *QADA* s 11(2).
60. *Clarke v Catholic Education Office & Anor* [2003] 202 ALR 340, 353 [50] (‘Clarke’).
61. *Secretary, Department of Foreign Affairs and Trade v Styles and Anor* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J) (‘Styles’).
62. *Waters and Others v Public Transport Corporation* (1991) 173 CLR 349, 395 (Dawson and Toohey JJ).
63. *Secretary, Department of Foreign Affairs and Trade v Styles and Anor* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J).
64. *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) (‘Hurst and Devlin’).
65. *Hurst and Devlin* [2005] FCA 405 ((Unreported, Lander J, 15 April 2005) [75].
66. See *Standards* s 3.4(2)(a) (b) and (c).
67. *Standards* s 3.4(2)(b).
68. *Standards* s 3.4(2)(c).
69. *Standards* s 3.4(2)(c)(i).
70. *Standards* s 3.4(2)(c)(ii).
71. *Standards* s 3.4(2)(c)(iii).
72. *Standards* s 3.4(2)(d).
73. *Standards* s 3.4(2)(e).

74. See *Standards* s 3.4(1) and (2).
75. See, for example, *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 98 [3] (Gleeson CJ); Transcript of Proceedings, *Alexander Purvis on behalf of Daniel Hoggan v State of New South Wales (Department of Education and Training) and Another* (High Court of Australia, Gleeson CJ, 11 November 2003) [3]; *New South Wales (Department of education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 78 [40].
76. The first Australian disability discrimination in education case was a ‘problem behaviour’ case: L.
77. See *Minns v State of New South Wales* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) (‘*Minns*’) and *S on behalf of M & C -v- Director General, Department of Education & Training* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) (‘*M&C*’).
78. *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001)[20].
79. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [191].
80. See *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [117] and *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [247].
81. *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [123].
82. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [247].
83. *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [117].
84. *Ibid* [131].
85. *Ibid* [135].
86. *Ibid* [131].
87. *Ibid* [133].
88. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [256].
89. *Ibid* [263].
90. *Ibid*.
91. *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 101-103 [11]-[14].
92. *Ibid* [266].
93. For a more detailed treatment of the nature of disability and of the role of legislation in mitigating disability see Elizabeth Dickson, ‘Understanding disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the *Anti-Discrimination Act 1991* (Qld) and in its Interpretation and Application’ (2003) 8 *Australia and New Zealand Journal of Law and Education* 45.
94. *Clarke* [2003]202 ALR 340; *Catholic Education Office v Clarke* (2004) 81 ALD 66 [120]; *Zygorodimos v Department of Education and Training* [2004] VCAT 128 (Unreported, McKenzie DP, 3 February 2004); *Beasley v State of Victoria, Department of Education and Training* [2005] VCAT (Unreported, Coghlan DP, 5 April 2005); *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005); *Ferguson v Department of Further Education* [2005] FMCA 954 (Unreported, Raphael FM, 21 July 2005); *Hurst v State of Queensland* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006).
95. *Ibid* [62]; *Catholic Education Office v Clarke* (2004) 81 ALD 66 [120].
96. *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [148].
97. *Ibid* [421].
98. *Ibid* [424].
99. *Ibid* [431].
100. *Ibid* [429].
101. *Ibid* [425].
102. *Demmery v Department of School Education* [1997] NSWEOOT (26 November, 1997) (‘*Demmery*’).
103. See, on this point, Dworkin’s exposition of the difference between ‘equal treatment’ and ‘treatment as equals’: R Dworkin, *Taking Rights Seriously* (1978).
104. *Demmery* [1997] NSWEOOT (Unreported, Judicial Member Ireland, Members Mooney and MacDonald,

- 26 November, 1997) 25.
105. Ibid 27.
  106. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [206].
  107. *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997).
  108. Ibid [5].
  109. Ibid [30].
  110. Ibid [26].
  111. *Clarke v Catholic Education Office & Anor* [2003]202 ALR 340, 343 [10].
  112. Ibid 355 [57].
  113. Ibid 360 [82].
  114. Ibid.
  115. *IW v City of Perth* (1996) 191 CLR 1, 15.
  116. *Clarke v Catholic Education Office & Anor* [2003]202 ALR 340, 355.
  117. Ibid.
  118. Ibid 355 [57].
  119. *AJ v A School* [1998] HREOC No. H97/168 (Unreported, Wilson P, 23 March 1998) [4.2].
  120. Ibid [6].
  121. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [236].
  122. An exception, perhaps, is the *Corinda* case where the tribunal held that it was not reasonable to impose the cost of relocating the functions in question upon other students at the school: *I v O'Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 (Unreported, Copelin P, 31 January 2001).
  123. *Travers v New South Wales* (2001) 163 FLR 99 (Unreported, Raphael FM, 21 March 2001).
  124. Ultimately, however, QUT graduation ceremonies were not relocated. Instead the format of the ceremonies was altered so that no graduand was required to climb stairs onto the stage to receive his or her award. Instead, graduands are seated on stage for the duration of the graduation ceremony.
  125. *Cowell* [1998] HREOC No. H97/168 (Unreported, Wilson P, 23 March 1998) [4.2].
  126. See, for example, the debate of the Anti-Discrimination Bill 1991 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 1991, 3575, (Judy Spence), 3584 (Molly Robson).
  127. Philip Ruddock and Brendan Nelson, 'Improved Opportunities for Students with Disabilities' (Press Release, 15 June 2004).
  128. See *Senate Report*, above n 2, 114 [7.18].
  129. Ibid [7.19].
  130. See Productivity Commission, Australian Government, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004) ('*PC Review*') finding 14.2. The *PC Review* summarises the findings of a cost-benefit analysis of the Standards commissioned by the Ministerial Council on Employment, Education, Training and Youth Affairs (MCEETYA) as part of the mandatory Regulation Impact Statement (RIS) process. The review concluded that the net impact of the Standards would be positive. See also The Allen Consulting Group, *The Net Impact of the Introduction of the Disability Standards for Education*, Report to the Department of Education, Science and Training (Australia), (2003), p 60.
  131. Productivity Commission, Australian Government, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004) XL.
  132. *Clarke* [2003]202 ALR 340, 353 [50].