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## Equity in Assessment: Discrimination and Disability Issues from an Australian Legal Perspective

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### Abstract

Assessment equity concerns all educational authorities and practitioners. When educators consider issues of equity, their predominant concern is accommodation of students with special needs, cultural issues, and creating alternative assessment activities that have equivalence to standard activities, so as not to advantage or disadvantage any student in their demonstration of knowledge. This paper examines equity issues in assessment from a legal perspective, drawing on case history from Australia, and based in discrimination and disability law. The paper is intended to assist authorities and practitioners to understand legal implications of educational assessment in order to promote practices that reduce the likelihood of legal claims and the resultant use of financial and human resources away from educational activities. However, the discussion of cases and judgements is also intended to raise issues of whether educational providers and authorities should be more conscientious in their consideration of educational equity and assessment.

### Introduction

The natural meaning of 'equity', as defined by the Shorter Oxford English Dictionary,<sup>1</sup> is: the quality of being equal or fair; impartiality; even-handed dealing.

For educators, equity in assessment is necessary to ensure students are not advantaged or disadvantaged in demonstrating their achievement, whether on the basis of meeting established achievement standards, or in comparison to other students. Advantage or disadvantage is posited to occur if, for the assessment purpose or context, assessment requirements inappropriately favour, or are biased towards, specific cultural knowledge, including gendered knowledge.

Fundamental to equity in assessment is the recognition that the construction of the knowledge and skills to be assessed should involve a critical evaluation of the extent to which the choice of a particular set of knowledge and skills is likely to privilege certain groups of students and exclude others by virtue of gender, socioeconomic, cultural or linguistic background. A concern with equity also leads to adopting a proactive stance on the appropriate representation in the curriculum of different kinds of cultural knowledge and experience as valued knowledge and skills.<sup>2</sup>

Advantage or disadvantage also occurs when standard assessment conditions and administration prevent students with a special learning need or disability from being able to demonstrate their learning achievement, where students without such needs or disabilities will not be so hampered. It is established educational practice that alternative forms of assessment, accommodations or access should be provided for students who would be disadvantaged if required to demonstrate their achievement by standard forms of assessment. In most nations, classifications have been developed to guide such amendments to assessment type, form or administration. For example, special assessment adjustments may need to be provided for:

students with impairments that have a physiological basis, such as those involving sensory, motor or neurological factors;

students with educational needs arising primarily from socio-economic, cultural and/or linguistic factors where there may be some form of educational disadvantage including students:

- of Aboriginal and/or Torres Strait Islander backgrounds
- with language backgrounds other than English
- who are migrants or refugees
- from rural and remote locations
- in low socioeconomic circumstances;

students with difficulties in accessing learning which do not appear to be directly or primarily attributable to educational disadvantage arising from impairment or to socioeconomic, cultural and/or linguistic factors;

students with identifiably different patterns of educational development and orientation, influenced by factors such as:

- gender
- special talents (including giftedness).[3](#)

In England, guidelines for appropriate assessment forms for the Key Stage Assessments use a more constructive term, from the student's perspective, of 'access arrangements', rather than the deficit-defined term used in Australia and the United States of America (United States) of 'accommodations'. The English guidelines indicate that such assessments are intended to assess 'children's ability in a fair and comparable way'.

It is not possible to provide specific rules governing the use of adaptations because of the wide range of children's needs and circumstances. Teachers should use their knowledge of individual children in deciding which adaptations to make, bearing in mind the nature and level of support that these children receive as part of the normal classroom practice.[4](#)

Children who may need access arrangements include those with special needs, children whose learning difficulty or disability 'significantly affects access to the tests', children unable to sit and work for a sustained period because 'of a disability or behavioural, emotional or social difficulties', and children with limited fluency in English.[5](#) Recent policy developments in Australia have similarly moved to a consideration of equity that addresses diversity in student backgrounds and conditions as a continuous variable, including the need to recognise diversity *within* and among groups (emphasis added), rather than as a categorical and labelled student condition.[6](#)

While the above statements draw on educational policy, provision of forms of assessment appropriate to student circumstances has also been written into law. In Australia, recently established federal law, the *Disability Standards for Education*, states very clearly that, in respect of students with disabilities:

[m]easures that the education provider may implement to enable the student to participate in the learning experiences (including the assessment and certification requirements) of the course or program, and any relevant supplementary course or program, on the same basis as a student without a disability, include measures ensuring that:

... the assessment and certification requirements for the course or program are appropriate to the needs of the student and accessible to him or her; and ...

the assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed.[7](#)

In the United States, a major purpose of the national educational accountability legislation *No Child Left Behind* [8](#) was to ensure that all students, including students with disabilities, would be included in educational goal-setting and reporting—leading to substantial and

ongoing reconsideration of the meaning of 'equivalence' in terms of assessment. More generally in the United States, s.504 of the *Rehabilitation Act of 1973* prohibits discrimination on the basis of disability in programmes that receive federal financial support. Determination of eligibility under s.504 is to be established by initial and continuing evaluations, where test and other evaluation materials:

are selected and administered so as to best ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).<sup>9</sup>

Legal challenges in the United States regarding the adequacy of educational provision for students with disabilities are plentiful, and often successful for the student plaintiffs. More generally, worldwide, students and their families, or schools,<sup>10</sup> who believe that an inequity in assessment has occurred to the disadvantage of a student or school, are resorting to the courts to seek an equitable outcome, when internal administrative procedures have been exhausted. Indeed, the dictionary definition of equity previously cited includes:

the recourse to general principles of justice to correct or supplement the ordinary law.

However, the law provides recourse to challenges of equity in educational assessment on the basis of more considerations of equity than the disability and discrimination grounds established by the various legislation and the guidelines discussed above. Challenges on these other grounds and sources of law, including challenges relating to discrimination but argued on different principles, are discussed elsewhere.<sup>11</sup> The focus of this paper is legal challenges regarding equity in assessment that have occurred on the basis of discrimination, in many cases due to student disability. Such challenges are usually mounted on the basis of the failure of an authority or educational institution to provide appropriate access to educational opportunity, particularly the opportunity to demonstrate achievement to the extent available to others who are not so disabled.

The following discussion draws on Australian caselaw, where equity claims are usually mounted under anti-discrimination acts or via the mechanism of judicial review of decisions where it is claimed educational authorities have failed to take into account relevant considerations relating to a student's special needs. Grounds for consideration of discrimination in England are similar to the grounds in Australia, due both to the evolution of our legal contexts from English models, and the establishment of such statutory governance. In the United States, the Constitutional Amendments provide a legal framework for discrimination challenges not available in England and Australia. The Equal Protection Clause (14th Amendment) has been used successfully in the US to mount equity cases in education, particularly in areas such as race and religion, and most notably in *Brown v Board of Education* (*Brown I*, 347 U.S. 483; *Brown II* 349 U.S. 294), while cases are also

raised under subsequent legislation such as the *Individuals with Disabilities Education Act* (IDEA) addressing more specifically issues of provision for students with special needs.<sup>12</sup>

The discussion here examines a number of cases in Australian law that involve, directly or indirectly, matters of student assessment. Each case considers a different aspect of assessment practice that may be challenged to exemplify the range of assessment matters that authorities, schools and teachers need to monitor in order to ensure equitable practice. Cases involving discrimination are usually addressed first through administrative processes and then through Courts or Anti-Discrimination Tribunals. In most of the cases below, the matters have escalated to the appeal stage, as the plaintiffs have not been satisfied with the response of the primary Tribunals, or have wished to challenge the Tribunal rulings.

### **Discrimination, disability in assessment in Australian law**

Australia has a two-tiered system of legislative prohibition of discriminatory conduct. At the federal level there are four stand alone acts, each of which prohibits discrimination on the basis of a particular protected attribute: The *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). Each of these acts prohibits discrimination in the area of education. In addition, each State and Territory has a multi-purpose act prohibiting discrimination on the grounds of a variety of protected attributes in a variety of protected areas. Each State and Territory act prohibits discrimination in the area of education.<sup>13</sup> While educational policy may be moving to recognition of the continuous nature of student diversity, rather than categorical attributes, the law has yet to follow. In general, to succeed in a legal challenge on the basis of discrimination in Australia (and most nations including England and the United States), an individual must be able to identify that they are a member of a specific group or class. The protected attributes always include race, sex, disability or impairment and age but may also include a diverse range of other attributes including, for example, religion, parental status, appearance, sexuality and political activity.

#### **The legal burden for proof of discrimination**

The common interpretation of discrimination will not necessarily be congruent with a legal interpretation and the level of proof needed for a case to succeed in court. Two kinds of discrimination are recognised in Australian legislation—direct discrimination and indirect discrimination. Direct discrimination generally requires proof that the complainant was treated ‘less favourably’ than a student without the student's protected attribute ‘in circumstances which are the same or not materially different’.<sup>14</sup> Indirect discrimination addresses ‘hidden’ institutional discrimination where practices applicable to all have a discriminatory effect upon people with a protected attribute. Proof of indirect discrimination generally requires proof of the existence of a discriminatory term, requirement or condition with which the person with a protected attribute cannot comply

but with which those without the same protected attribute can comply. It is also necessary to prove that the term imposed is 'not reasonable'.<sup>15</sup>

Simple examples illustrate how discrimination might arise in an assessment context. Direct discrimination in the administering of a test might happen, for example, if a marker marks a student of a particular race, sex or religion 'harder' than students not of that race, sex or religion. Indirect discrimination might arise in the administering of a test if there were, for example, a requirement that all students must complete the test in a set time. Students with a disability may not be able to comply with this requirement—they may not be able to write quickly, or they may have a processing disorder. Students without disability can comply. The term is not reasonable.

Each Australian legislative scheme recognises that there will be instances where discrimination will not be unlawful. This is clear in the definition of indirect discrimination in that it is necessary to show that the term or requirement imposed is 'not reasonable' before it will be held to cause unlawful discrimination. A scheme of exemptions is also created within the legislation to recognise circumstances where it is inappropriate to prohibit a *prima facie* discriminatory activity.

#### **Equity, assessment and accommodations for special needs**

The provision of accommodations for assessments and examinations is clearly an example to ensure that indirect discrimination does not occur. However, the authorities and teachers usually determine the nature of the accommodation that will be provided.

A student may challenge the validity of examination results affected by a failure to make appropriate accommodation and seek compensation. In perhaps the most straightforward Australian case on point, *Bishop v Sports Massage Training School* ([2000] HREOC No H99/55), for example, the complainant, a tertiary student who had dyslexia, narrowly failed a written examination causing him 'a delay in his career and a significant loss of self-esteem' (*Bishop* [1]). The Human Rights and Equal Opportunity Commission (HREOC) found that the complainant had been the victim of indirect discrimination in that the respondent 'required [him] to complete the examination in the same two-hour period as the other, able-bodied students'. HREOC found further that '[t]here [was] a real chance that had [the complainant] been given an extra half-hour, or had the examination been conducted orally in his case, he would have passed' (*Bishop* [1]). The complainant was awarded \$3,000 damages to compensate him for losses including the cost of relocating to another massage school where his disability was properly accommodated (*Bishop* [1]).

A more complex case, *BI v Board of Studies (BI)* ([2000] NSWSC 921),<sup>16</sup> demonstrates that a student with special needs who believes the accommodation is not sufficient or appropriate may seek court intervention to make different conditions available. In *BI*, a student with Attention Deficit Hyperactivity Disorder (ADHD) brought an application for judicial review of the decisions of the New South Wales Board of Studies which related to the provisions

made for him to complete his Higher School Certificate (HSC) examinations. His medical expert advised that 'he ha[d] great difficulty starting to work and that he work[ed] at a very slow pace' (*BI* [34]), while the medical certification submitted for special considerations for the examinations indicated that his circumstances meant 'poor concentration and poor sequencing skills; impair(ed) ability to read questions in examinations; impair(ed) ability to plan answers to questions; impair(ed) ability to check answers'. It was indicated that he required extra time to compensate for his difficulties, and that without extra time 'he would be unable to demonstrate his knowledge' (*BI* [5]).

Guidelines for schools and students on applying for special arrangements for the HSC are clearly stated by the NSW Board of Studies.<sup>17</sup> Rest breaks and extra time were two categories of special provisions available in the system, and had been incorporated into policy in response to the practice that had developed over time of providing this accommodation to such students. In accordance with this recently developed policy, BI was granted rest breaks but not extra time. The student requested a review of this provision, arguing, with medical support, that taking such breaks worsened his condition as he took a long time to get restarted on such activities. He eventually sought court injunctions that he should be allowed extra time, with the hearings accelerated so that judgement could occur prior to the examinations. The arguments made on his behalf were that the conditions had been applied inflexibly and did not take appropriate consideration of his condition. However, as part of the policy, the student had been required to complete some pretests that showed that he could write at an acceptable speed and had an appropriate reading level. The student challenged the policy and its development, and, in the alternative, argued that it had been inflexibly applied in his case.

On the basis of the information provided on reading and writing skill assessments, evidence was presented that to give the student extra time 'would potentially advantage him' against his peers (*BI* [52]). The court noted:

The evidence disclosed that the Board approves the provision of extra time to students whose ability to read or to write is functionally affected. Students with severe physical disabilities such as cerebral palsy or juvenile arthritis may be eligible for extra time. Students who use the services of a writer may be granted extra time to take into account the dictation process. ... The provision of rest breaks is granted to students who have demonstrated difficulties with concentration and focusing. (*BI* [8]-[9])

and found:

To my mind the submission that the Board's policy was applied inflexibly with respect to the plaintiff is not made out. I consider the evidence shows that the Board, through its delegate Ms Speers, demonstrated a willingness to reconsider the plaintiff's application (described as a 're-appeal') on its merits. ... I find that Ms Speers had regard to the individual merits of the application in making her determination. (*BI* [56])



In other words, when a policy is in place, an organisation can show that it has applied due and thoughtful consideration to issues of accommodation, and the nature of accommodation is made on the basis of the policy, reasonable judgement, and not the convenience of the examiner; legal challenges are unlikely to succeed. In this case, the plaintiff, BI, was required to pay most of the costs of the defendant as well as his own costs. Two interesting aspects of this assessment challenge emerge from an educational consideration of equity. Firstly, prior to the development of the policy regarding arrangements for students with attention-deficit disorders, it appeared that each case was considered on its merits, with the usual accommodation offered to students being rest breaks, hence the development of the policy. If a policy guideline regarding specific treatment of a student with ADD/ADHD had not existed, BI may have prevailed in his request, given his medical support.

The second issue is that the student's claim for a special accommodation was disallowed as the functional reading and writing tests used to consider the extent of his disability, as guided by the policy on accommodations, indicated that he could perform within a 'normal range' (BI [32]). The plaintiff indicated that these results indicated his 'intellectual capacity' to perform at such a level given his condition (BI [41]). The defendant considered that to offer extra time would potentially advantage the plaintiff in comparison to his peers (BI [52]). Thus it would appear that through the use of such policy guidelines to determine what is fair, students with disabilities may only receive accommodations that allow them to achieve a 'normal' standard, not accommodations that could allow them to fully demonstrate superior achievement. As a later case demonstrates, both educators and the courts are not comfortable with a duality of impairment and academic excellence, preferring models of dealing with educational equity and disability that focus on bridging a deficit gap to apparent normality.

### **Assessment equity and student social and emotional needs**

One of the arguments made in *BI*, when considering availability of accommodations and equity principles, was that the HSC 'tests ability on the day of the examination to complete the examination. It is essential that as far as practicable the same criteria and requirements are provided to all candidates' (BI [28]). Principles of quality assessment indicate that a variety of assessment activities should be undertaken to inform high stakes assessments. Most national assessment systems now incorporate information gained through multiple pieces of assessment over time, not just a result from a single examination.

Principles of good assessments also advocate that a range of assessment formats should be used, including group work and self and peer assessments, to promote quality and engaged learning.<sup>18</sup> However, such approaches will not necessarily provide equity in assessment, given the issues of their suitability for students with social-emotional disability as raised in *BI*, even when such forms of assessment are being used for assessments that are not high-stakes certification.

Although case authority on student challenges to such approaches does not exist in school education, it is worth considering one challenge that occurred in the Technical and Further Education sector (TAFE) in Australia, a case that reinforces the care needed not just for consideration of equitable assessment for students with physical or neurological disorders, but also for assessment of students with social and emotional disorders.[19](#)

In *Reyes-Gonzalez v NSW TAFE Commission* ([2003] NSWADT 22),[20](#) the student alleged 14 acts of discriminatory treatment by the TAFE College he attended, under the *Anti-Discrimination Act 1977* (NSW). The complaints were dismissed by the New South Wales (NSW) Administrative Decisions Tribunal on grounds ranging from a deficiency of evidence, to a failure to prove that he had been treated less favourably than others without his impairment would have been treated in the same circumstances (direct discrimination), to a failure to prove that his treatment and not his impairment had caused him detriment. The student, Reyes-Gonzalez, had been diagnosed with schizophrenia which resulted in problems with meeting schedules and deadlines, problems interacting in groups, and, as a result, problems with completing his courses. Medical evidence which detailed the significant impact of his impairment on his ability to complete tertiary studies and undertake assessments was persuasive:

His illness, as noted by me and others, would affect his capacity to study at TAFE, this would include working in groups. He may be sensitive or over sensitive to peer assessment, particularly if others are not aware of his disabilities and do not take those disabilities into account. ... I would equally expect him to have problems writing examinations, presenting in front of a class, doing group projects and being peer assessed. (*Reyes-Gonzalez* [16])

There was also some suggestion that the disability not only impacted his difficulties with completing course requirements but also affected his capacity to deal with TAFE personnel in relation to his discrimination claims. A major component of his schizophrenia was a problem with sleep that impacted on his attendance and behaviour at the TAFE. The student did not inform his teachers about the cause of his sleep problem.

While many of the matters in the dispute could not be established by the student, and considerable support appears to have been offered or provided by the TAFE college personnel, some of the assessment findings are of interest:

In some cases teachers allowed him to work alone and on those occasions he would pass the subject. There are only a few of the subjects in which this occurred. In the other subjects the teachers insisted that the group participation was so essential to the educational requirements of the marketing subject that they could not allow the Applicant to work alone. In most of those subjects where he was required to work in a group, the Applicant either withdrew or he failed. (*Reyes-Gonzalez* [110])

While further assistance was made available on the basis of this, advice also was that such forms of assessment addressed valued learning outcomes:

In the case of marketing, we look for the interactive and interpersonal component as learning outcomes of group work. We believe that in marketing they are very important attributes that our graduates should have, the capacity to interact and to have interpersonal relationships. We think they are critical elements of a successful graduate of marketing and that is why there is so much emphasis on group work within the marketing area. (Reyes-Gonzalez [114])

The Tribunal found that considerable assistance had been provided by the TAFE college, where appropriate, and that the various claims were unfounded or unproven. The clear implication of the decision is that although the complainant's disability appeared fundamental to his failure at TAFE, from a legal perspective he had not established grounds for discriminatory practice and remedy, and the response of the institution to his situation, to the extent to which they were able, was sufficient.

### **Student placement**

Assessment outcomes, and diagnosis of student learning needs, including gifted children, are a common area of challenge in the United States, and, more recently, in England.<sup>21</sup> The number of such challenges appears to be increasing in Australia. The challenges can involve failure to place a student in an appropriate programme or failure to undertake appropriate assessments. In an unusual placement case in Australia, lack of full assessments of student learning outcomes and failure to use the latest and fullest information were argued as sources of discrimination preventing a young girl's access to an accelerated programme. In *Malaxetxebarria v Queensland (M1)* ([2006] QADT 14), the failure to allow an advanced young learner to attend high school was challenged as discrimination on the basis of age, under the *Anti-Discrimination Act 1991* (Qld) and damages of \$500,000 were sought. The complainant argued both direct discrimination, in that she had been treated 'less favourably' on the basis of age, and indirect discrimination by the imposition of a term on her entitlement to education with which she could not comply. The term allegedly imposed was 'the requirement that in order to progress to Year 8, the complainant attain a requisite level of social and/or emotional maturity as determined in part by her age' (M1 [1]).

Although a specialist assessment indicated the child's reasoning abilities were in the 'superior' to 'very superior' range (M1 [11]), the educational authorities in the state government department of education considered that M lacked the social maturity to be placed with much older students in high school. One aspect of the original case was that the mother indicated that M had completed Year 7 learning outcomes successfully at home and was suited to accelerated placement in high school. However, the primary school indicated that she had only been assessed on Year 6 learning outcomes at school and M's teacher suggested that she did not have the social precociousness that would enable her to succeed high school (M1 [17]). M's teacher conceded in evidence, however, that he did not 'have the

expertise to assess gifted and talented students' (M1 [16]). At no stage in the Tribunal's consideration was it suggested that further academic assessments should have been undertaken by the school to prove or disprove the child's preparedness academically for the public high school, nor was substantial evidence about the social maturity of the girl provided. In this context it is interesting to note that during the course of the Tribunal challenge, M commenced at a private high school and completed one semester with good grades.

The original application to the Anti-Discrimination Tribunal was dismissed. The initial considerations of the Tribunal focused on the decision made by the respondent regarding preferable educational options for the nine-year-old M:

In the circumstances, I consider it was reasonable for the respondent to have taken a cautious approach to the acceleration of the complainant. The complainant had only attended a State school for three months leading up to the decision. Prior to that time, she had been educated at home through the Distance Education program.

... [T]he Department did not have an extensive dossier of information available on the complainant to assist in the determination of whether it was appropriate for her to progress further to a full attendance at Year 8 at Rosewood State High School. The only sources of information available to them were the complainant's mother (and family), her teachers at the Mutdapilly State School and the independent assessment carried out by Mr Gosschalk. Although Mr Griffin (the complainant's teacher) acknowledged he had no specific expertise in the area of gifted and talented children, I consider that he gave his assessment of the complainant in good faith and with her interests in mind. Similarly, I find that the respondent weighed its options with the complainant's best interests in mind.

Whether the decision is ultimately proved right or wrong, I consider that the respondent made its decision based upon the evidence available and with the complainant's best interests at the forefront of its considerations. (M1 [2006] [49]-[51])

The Tribunal found that M had not been the subject of direct discrimination on the basis of age because the fact that she had not completed all the Year 7 Key Learning Outcomes in her time in the primary school was considered a valid reason for non-admittance to the high school. This successful completion of learning outcomes was indicated by implication as a requirement for all students. However, as Queensland, like other Australian States, does not retain students on the basis of academic performance, but follows the educational principle of 'social promotion', this in itself is a challengeable statement and assumption.

The challenge by the plaintiff of indirect discrimination, that M was being expected to conform to a requirement of demonstration of social and emotional maturity, was also dismissed, as part of the case that M and her mother presented was that she was sufficiently emotionally mature to attend secondary school.

The case was appealed to the Supreme Court in Queensland. After the complainant had successfully completed a semester at her independent high school, the education department was again approached to consider enrolling her at her local State high school and again refused. The allegation of the complainant before the Supreme Court was that the failure of the department to take the complainant's high school report into account in its continued refusal to offer her a full time high school placement was evidence of direct discrimination which had not been considered by the Tribunal at first instance. The appeal was allowed on this point and the complaint remitted to the Tribunal for further hearing and consideration of the evidence provided in the high school results and report that was indicative of M's capacity to study successfully in high school.

Upon further appeal by Education Queensland to the Court of Appeal, however, the original Tribunal finding that there had been no discrimination was restored:

[T]he Tribunal rejected the respondent's case on the basis of the Tribunal's view of the facts of the case. The respondent's case was that she had achieved the social and emotional maturity of a child in year 8. The Tribunal was correct to conclude that the respondent had not been required to comply with a term with which she was not able to comply: the respondent's own case was that she was indeed able to comply with this term. Accordingly, the case of indirect discrimination advanced by the respondent was bound to fail. In short, the respondent's only arguable case of discrimination was her case of direct discrimination, and that case failed because Mr Griffin's evidence of the respondent's educational attainments was preferred to the evidence of the respondent's mother. (*MalaxEtxebarria v State of Queensland (M2)* [2007] QCA 132 [34])

The Court of Appeal held that Helman J, of the Supreme Court, had been influenced in his decision by a mistaken belief that the education department had been made aware of the high school report and had nevertheless persisted in adhering to the view that the complainant was not sufficiently mature to be enrolled at high school. The facts were, rather, that the department had not been made aware of the reports. As such, their failure to act upon them could not be construed as potentially discriminatory against the plaintiff:

[T]he Department's response cannot be characterised as discriminatory by reference to the effect of information with which they had not been provided. His Honour erred in thinking that the appellant's officers response to the respondent's request for acceleration, in fact, included an arguably erroneous rejection of relevant information provided by the report. There was no other basis on which to think that a decision by the Department not to reconsider its earlier decision was unlawfully discriminatory. As a result, his Honour was in error in holding that there was an arguable case of discrimination post June 2004 with which the Tribunal had failed to deal. (*M2* [49], Williams JA)

Although it is interesting to speculate on whether the outcome of the case would had differed had the report been provided to the education department, it is likely that it would

still have failed in that the Court of Appeal was impressed by the argument that the department was 'authorised, and, indeed obliged' ([53] (Williams JA), see also [121] (Lyons J)) to treat the complainant as it did by the terms of s.12 of the *Education (General Provisions) Act 1986* (Qld) which required it to 'take the respondent's age into account in their decision making'. Section 106 of the *Anti-Discrimination Act 1991* (Qld) creates an exemption in respect of acts done in compliance with legislation existing prior to its enactment.

The *Education (General Provisions) Act 1986* (Qld) has, however, recently been replaced by the *Education General Provisions Act 2006* (Qld). As the new act postdates the *Anti-Discrimination Act 1991* (Qld), there will be no facility in the future to rely on the exemption in s.106. As such, it can be argued that the failure to accelerate a student may once again be raised as potentially discriminatory.

Moreover, the complainant's case in *Malaxetxebarria* was compromised by the failure to prove sufficient knowledge of the educational attainment of the complainant by the respondent. The complainant was represented by her mother and the Court of Appeal acknowledged that she may have had 'difficulties' in formulating the claim (M2 [51]). Williams JA cautioned, however, that the role of a court on appeal is not that of a 'roving inquisitor under a duty to advise and report to complainants in relation to possible grounds of complaint'. The implication of this caution is, perhaps, that a skillfully formulated claim may have had better prospects of success.

In the more usual type of challenge regarding assessment of learning needs, *T v Department of Education (T)* ([2003] TASADT 4), T's mother appealed a decision by the Anti-Discrimination Officer who dismissed her complaint under the *Anti-Discrimination Act 1998* (Tas) that the Department of Education had not provided equal opportunity and adequate educational support for her son, and had suspended him from school over behavioural matters without due regard to his special educational needs. The child had been diagnosed as having ADD. The original claim was heard on the basis that it might provide evidence of both direct and indirect discrimination, the latter requirements by the educational provider that could be met by other students without ADD but not by T, because of his condition. Among the claims was a failure of the Department of Education to provide an adequate diagnosis of her son's disabilities:

Following the line of reasoning set forth in the above authorities, the claim that the child was discriminated against by reason of his suspension could only succeed if another child without the disability would have been treated more favourably. (*T* [40])

The Tribunal found that the evidence was that T had been treated more leniently than other children. The documentation also showed that T had been assessed eight times by a range of specialists and an educational psychologist over a period of eight years. In addition to ADD, a nonverbal learning disorder was diagnosed. The quantity of assessment and support

provided satisfied the Tribunal that diagnostic assessment had been provided and that the Commissioner's finding had been appropriate (T [43]). The adequacy of the assessment for guiding instructional intervention was not discussed. Again, as the above discussions of discrimination cases show, in some cases there is considerable engagement with the educational issues and a judgement of what is seen as reasonable support and provision by the authority or school. While the cases suggest it is not particularly difficult for an educational authority to defeat a claim of discrimination, the courts and tribunals do make judgements about how much action on the part of an authority might be enough. Apparent limited efforts to gain appropriate assessments, or to consider all assessment information as in *M*, could attract censure.

The extent of appropriate diagnosis and assessment, and school and teacher responsibility, have been further raised in an *Anti-Discrimination Act 1977* (NSW) case, *Chinchen v NSW Department of Education and Training (Chinchen)* ([2006] NSWADT 180), where discrimination was alleged against a 'gifted' child, Rhys, on the basis of an undisclosed and, at the time, undiagnosed disability. While initial findings of discrimination were subsequently impugned,<sup>22</sup> the facts of the case nevertheless set out a cautionary tale for educators.

Rhys had a specific disability, affecting planning and fine motor skills (motor dyspraxia), but was also a gifted student. Upon enrolment at Seaforth Public School in 1999, before his learning disability had been diagnosed and on the basis of his 'exceptional' ability, Rhys was placed in an extension class. The school's principal 'observed [Rhys] to be a bright student who appeared to lack motivation. He considered that the stimulating program of the class and the diligence and competency of the class teacher might act as a catalyst to increase what he perceived as Rhys's lack of motivation towards his schoolwork'. Owing to a failure to keep pace with the demands of the class, at the end of 1999 Rhys was reassigned to a mainstream class. The compelling inference to be drawn from the facts is that the school continued to see Rhys as 'unmotivated' and did not suspect or arrange tests for an underlying learning disability which might account for his problems with keeping pace with the work in the extension class. The school was not aware of an external expert's assessment of Rhys as both very abled *and* learning disabled. State policy identified that 'sound mechanisms for assessment within the school' for students with learning difficulties are the responsibility of the Principal (*Chinchen* [34]). Nevertheless, and despite the evidence of his learning difficulties, the school had not had him assessed by a school counsellor, which may or may not have uncovered a learning disorder but, in any event, should have led to the seeking of more expert assistance. Staff at the school recognised with the 'benefit of hindsight' that such an assessment was appropriate in the circumstances:

Ms Hawkes (Rhys's teacher in 1999) conceded that with the benefit of hindsight, she should have involved the school counsellor. She said that the counsellor would have guided her in what to do by suggesting the kinds of strategies that needed to be put in place for his

disability. She said that she would not have perceived him as being lazy and unmotivated if she had known that he had a disability. She conceded in cross-examination that the expert in assessing learning difficulties was the school counsellor. (*Chinchen* [48])

After agitation by his parents, Rhys rejoined the extension class at the end of 2000. However, his parents, on behalf of Rhys, made several claims of discrimination arising out of Rhys's treatment and class placement at Seaforth Public School.

At first instance the New South Wales Administrative Decisions Tribunal (NSWADT) noted that:

[i]t is clear that teachers do not have the expertise and training to diagnose motor dyspraxia. Nonetheless, in accordance with the Respondent's policies, they have a responsibility to ensure that students are educated to their full potential and to be alert to any learning difficulties which might inhibit this. Ms Hawkes agreed with the proposition suggested to her in cross-examination that she expected parents to 'place faith in the school's ability to identify, assess and manage difficulties in learning'.

We are satisfied that in 1999 the characteristics of Rhys's disability ... were evident to Ms Hawkes and Mr Ogilvie. The characteristic, difficulty completing tasks under a time constraint, is of particular significance. It was clear to the School that although Rhys was experiencing difficulty completing tasks in class, none of the strategies introduced by Ms Hawkes had proved effective. In these circumstances, the School had a responsibility to investigate the matter further by seeking the intervention of the school counsellor. If this could not have been done within a reasonable timeframe, steps should have been taken to advise the Chinchens of the need to seek appropriate expert assistance outside the School. (*Chinchen* [193]–[194])

While the NSWADT dismissed several allegations of discrimination or victimisation, three counts of discrimination and detriment were upheld. Most notably, regarding educational assessment, the Tribunal found that the school failed to provide access to the school counsellor for a full assessment, and that this was denial of a benefit to the detriment of the child (*Chinchen* [303]).[23](#)

The findings of the NSWADT were appealed and the discrimination claim was subsequently abandoned by the Chinchen family and the matter settled before the appeal could be heard. Upon consenting to the settlement, the appeal Tribunal noted that the parties had agreed that the hearing Tribunal had erred in the comparison made for the purpose of determining whether there had been less favourable treatment. It had:

failed to determine the proper circumstances in which to compare the treatment accorded to Rhys and the treatment accorded to a hypothetical student without motor dyspraxia and thereby failed to determine that Rhys Chinchen was treated less favourably than another student without motor dyspraxia in the same or similar circumstances. (*Chinchen* [5])



It is controversial but, nonetheless, settled law in Australia that the 'proper circumstances in which to compare the treatment' must be ascertained according to the approach articulated by the High Court of Australia in *Purvis v State of New South Wales (Department of Education and Training)* ([2003] 217 CLR 92). On this approach, the comparator used for determining whether there has been less favourable treatment must be given the same 'manifestations' of disability as the complainant. Although the reasoning is not fully developed in the appeal decision, a proper application of the *Purvis* approach to the facts of *Chinchen* would suggest that the treatment of Rhys should have been compared with the treatment of another student without his learning disorder but with his difficulty in keeping up with the tasks in class. Such a difficulty might arise, for example, not only from a learning disorder but also from inattention or wilful misbehaviour or, as suspected in Rhys's case, 'lack of motivation'. If the State could then have shown that an under-performing comparator without a learning disorder would also not have been tested, then there would be no less favourable treatment. Upon this analysis, the *Purvis* approach can be seen to have significantly eroded the opportunities available to students with disabilities. It could be argued, and the hearing Tribunal has been noted as accepting such an argument, that educators are in a position to recognise the symptoms of a learning disorder such as that displayed by Rhys Chinchen, and, further, may reasonably be expected in such a case to seek expert guidance and intervention so as to minimise any detriment to the learning opportunities of the affected student (*Chinchen* [193]). Indeed, evidence was presented to the hearing Tribunal that it was acknowledged in NSW Education Department policy documents that 'government schools have a responsibility to identify their gifted students' and to be alert to and prepared to intervene in respect of learning disorders which 'may inhibit the expression of giftedness' (*Chinchen* [36]).

Like the *Malaxetxebarria* case, the *Chinchen* case too was carried by the parents without the benefit of expert legal representation. It would be overstating the effect, perhaps, of the ultimate demise of their case to argue that such a case could never succeed. Although there is no education case on point, recent employment discrimination law suggests that complainants may succeed in indirect discrimination claims when direct discrimination claims fail because of the problematic comparison authorised by the *Purvis* case.<sup>24</sup> It is interesting to speculate about whether the failure to assess aspects of the *Chinchen* case may have succeeded if re-formulated as an indirect discrimination case.<sup>25</sup> It could have been argued that a 'term' was imposed on Rhys that he 'keep up' in the extension class. He could not comply with this term because of his learning disability. Others without his disability could comply. The contentious issue to be resolved would be whether such a term is 'reasonable'. In the context of the Tribunal's criticism of the failure of the school to test Rhys, it is, perhaps, likely that the term would not be found to be reasonable.

## Equity and the setting of assessment standards

Recently, policy developments in Australia and internationally have created school improvement reforms led through accountability agendas, usually based on student achievement targets and standards. Two areas of legal challenge have been mounted in the area of standards that concern equitable assessment: the setting of appropriate standards for all students, and the setting of standards for individual students.

### Appropriate standards for all students

Two Australian cases demonstrate challenges that may occur when standards are not appropriate for all students. In *State of Victoria v Bacon & Ors (Bacon)* ([1998] VICSC 58) and *Bolton v State of Victoria (Bolton)* ([1997] VADT 12), two groups of special needs students challenged age-based legislation introduced in Victoria in 1996. In *Bacon* the Victorian Supreme Court of Appeal unanimously rejected an appeal by the State of Victoria, following a single judge hearing in the Supreme Court on referral from the Anti-Discrimination Tribunal.

The basis for the original challenge was the introduction of a requirement by the Victorian government that funding would be withdrawn from schools for children over 18 years of age 'unless the student was formally enrolled in the Victorian Certificate of Education course (the VCE)'. This course, and its attendant assessment requirements, was unsuited to students with mild intellectual impairment who were participating in an 18+ Transition Programme at a school. The challenge was that the introduced requirement of enrolment in such a course to remain in school past 18 years of age was indirect discrimination under s 9(1) of the *Equal Opportunity Act 1995* (Vic),<sup>26</sup> as such students would not be able to comply with the requirement on the basis of their learning impairment and therefore would not be able to continue in their present schooling, and that, further, the new requirement based on age had both a direct and indirect discriminatory effect in contravention of the Act.

To satisfy the legal requirements for such a challenge, the applicants had to satisfy the Court that 'a higher proportion of people without that attribute do or can comply with the requirement or condition' and that such a condition was not reasonable on the part of the authority. The original hearing found that such a case had been established, and orders made were that the students should be able to return to school and that the 18+ Transition Programme in which they had been enrolled should continue to be offered. The Victorian Department of Education appealed on the basis of 'six errors of law', including the failure of the Court to consider the policy surrounding the introduced requirement, and that such policy made the requirement reasonable. The Court of Appeal dismissed the appeal by the Department of Education, finding no error on the part of the trial judge, although not supporting the finding of direct discrimination on the basis of age, as all those over 18 years of age were not affected in the same way. The findings of indirect discrimination that the requirement was not reasonable were held.

*Bolton* was conducted on a similar basis and the same discrimination grounds while *Bacon* was still under appeal, and was expedited, as *Bacon* had been, by the Victorian Equal Opportunity Commission to the Anti-Discrimination Tribunal for hearing. The main difference was that by the time of the *Bolton* challenge (and nine others), the Victorian government had altered the age-based act with a new series of regulations. Regulation 2.4 provided that:

[a]ny person who is aged 18 years or over on 1 January in a particular year is not entitled in that year to be enrolled at or attend a Special State School or to attend or participate in any course of study offered, conducted or provided by a Special State School. (*Bolton*)

However,

[t]he new s.25(C) inserted into the Education Act confers discretion on a principal or a head teacher to refuse to enrol a student in the school or to allow a student to attend or to participate in a program or to continue to attend or participate if the student is over a relevant age requirement specified in the regulations ... S.25(C)(1) and the regulations combined authorise in my view the exclusion of students who are over the age requirements but there is a discretion granted, this is not a prohibition. (*Bolton*)

The President of the Tribunal noted of this new insertion that ‘... while it might be exercised to exclude people on the ground of age *simpliciter*, (it) does not seem to me that it ought be exercised to exclude persons where the exclusion would also amount to discrimination on the ground of impairment’. Therefore, the new inclusion would remove the class discrimination based on impairment of the previous act. However, as the *Bolton* challenge was brought in time before enactment of the legislative changes, similar orders to those in *Bacon* were made. Thus, however, can the courts consider the same circumstances under different statutory obligations and find that equity matters have not been compromised.

## **Conclusion**

This paper has examined issues in assessment equity from the perspective of law. While these cases are Australian cases that have been considered under discrimination and disability law, and statutory obligations of education providers, the cases show that such law can still encompass a range of applications—beyond the provision of appropriate accommodations for students in formal or high-stakes assessments—to include diagnosis and placement and the provision of education at appropriate levels. The cases also show that the legal bar to prove discrimination, either direct or indirect, is high. The burden is definitely on the student to establish the complaint while, in some circumstances, a defending educational provider may argue that even a practice discriminatory on the face is reasonable on policy grounds.

The courts in Australia demonstrate the same reluctance as courts around the world to engage in policy matters in education. Further, authorities, despite creating the policies that

endorse equitable principles in education, will always challenge a student's complaint, often vigorously, and usually appeal a finding against them. The authorities often have far greater financial resources than the individual.

However, the courts do require that education providers adhere to the requirements of legislation such as the various anti-discrimination policies. Hence, those putting in place policy developments or dealing directly with students should be aware of all such legislation and seek guidance as to their responsibilities in various circumstances. Schools, training institutions and teachers should be careful in their day-to-day dealings with students to ensure that assessment requirements are not inadvertently, even if not of sufficiently high stakes to be legally challenged, discriminatory to students.<sup>27</sup> Care should be taken when diagnosing student learning and placement needs, using specialist support available. As the cases show, it is better to err on the side of caution when assessing an individual student's learning needs than to assume that matters can be handled within a school and by a classroom teacher. The diversity of student circumstances, including social and emotional factors, as well as more obvious physical factors, need to be considered when planning programmes of assessment.

As we have noted, at present most legal consideration under statute law is of challenges by those with protected attributes or classes identified under the laws. We have yet to reach an educational state that is equitable for all, reflecting the principle that 'all young people ... have a right to gain an education that meets their needs',<sup>28</sup> and, we add, to learn and to demonstrate their achievements in the most positive and enabling manner. Students in the United States with special needs have access to a free, *appropriate*, public education in a least restrictive environment. This perhaps is the goal for equity in education and educational assessment for all.

## Notes

1. C.T. Onions (Ed.), 1977, *The Shorter Oxford English Dictionary On Historical Principles*, 3rd edn., 2 vols (Oxford, Clarendon Press).
2. Australasian Curriculum, Assessment and Certification Authorities (ACACA), 1995, Guidelines for assessment quality and equity, from [http://www.qsa.qld.edu.au/publications/yrs11\\_12/assessment/acaca-qu.pdf](http://www.qsa.qld.edu.au/publications/yrs11_12/assessment/acaca-qu.pdf).
3. Queensland Studies Authority (QSA), 2006, Policy on special consideration for school-based assessments in Senior certification, from <http://www.qsa.qld.edu.au/yourqsa/policy/special-c/>.
4. Qualifications and Curriculum Authority (QCA), Assessment and reporting arrangements (ARAs) (Key Stage 1) [5.9], [5.8], from <http://www.qca.org.uk/eara/21.asp>.

5. Qualifications and Curriculum Authority (QCA), Assessment and reporting arrangements (ARAs) (Key Stage 1) [5.9], from <http://www.qca.org.uk/eara/21.asp>. Considerable discretion regarding the nature of the arrangements appears to lie with schools. Details include 'some children may sign their answers or respond by pointing'. Arrangements for concentration or fatigue disorders include prompters for children with severe attention problems or schools determining to give rest breaks, although additional time with rest breaks requires permission. Up to 25 per cent additional time can be allowed at the school's discretion for students with a statement of special needs. For other students, permission must be requested by the school. Circumstances allowed include students with a low reading comprehension who can demonstrate significantly better outcomes if allowed more time, (for example, nine months or more on an age-normed test), students with a slow free writing speed, or students with slow processing speeds or gaps between cognitive ability and performance. Additional time is not appropriate if more appropriate access arrangements should be provided for the student such as rest breaks.

6. Queensland Studies Authority (QSA), 2006, Equity, from [www.qsa.qld.edu.au/yourqsa/policy/equity/](http://www.qsa.qld.edu.au/yourqsa/policy/equity/).

7. *Disability Standards for Education 2005* (Commonwealth of Australia), formulated under the *Disability Discrimination Act 1992* (Cth).

8. *No Child Left Behind Act of 2001* (Public Law 107–110) (US).

9. *Rehabilitation Act of 1973* (US) s.504 [84.35(3)].

10. Implications for schools of student achievement, under accountability regimes, are serious. See, e.g., the *Education Act 2005* (UK) that allows school closure, as does legislation in the US. The question that arises is equity in the assessment of students and the management of identification of school performance.

11. Additional matters considered elsewhere by the authors include issues of equal opportunity to learn and be assessed fairly, and consideration of whether educational malpractice/negligence claims on the basis of educational assessment, that is other than discrimination law challenges, may eventually succeed for an individual student.

12. The *Individuals with Disabilities Education Act* (IDEA) 20 USC § 1412(a)(5)(A) creates a right to a 'free and appropriate education in the least restrictive environment', once more providing a positive right through legislation rather than the negative anti-discriminatory basis for a claim. As might be expected, the term 'least restrictive environment' has provided considerable discussion in US legal contexts.

13. *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1991* (Qld), *Discrimination Act 1991* (ACT), *Anti-*

*Discrimination Act 1992* (NT), *Equal Opportunity Act 1995* (Vic), *Anti-Discrimination Act 1998* (Tas).

14. See, e.g., the formula in the *Anti-Discrimination Act 1991 (Qld)* s.10: 'Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different'.

15. See, e.g., the formula in the *Anti-Discrimination Act 1991 (Qld)* s.11: 'Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term (a) with which a person with an attribute does not or is not able to comply; and (b) with which a higher proportion of people without the attribute comply or are able to comply; and (c) that is not reasonable'.

16. See also, for a discussion of what might be 'reasonable' under the new Australian Disability Standards, E. Dickson, 2006, Disability standards for education and the obligation of reasonable adjustment, *Australia and New Zealand Journal of Law and Education*, 11(2): 23–42.

17. See New South Wales Board of Studies, Special examination provisions for the School Certificate tests and Higher School Certificate examinations, from <http://www.boardofstudies.nsw.edu.au/manuals/specialexamprovisions.html>.

18. See J.J. Cumming & G.S. Maxwell, 2004, Assessment in Australian schools: Current practices and trends, *Assessment in Education: Principles, Policy and Practice*, 11(1): 89–108.

19. See, e.g., reference to this issue of assessment in Queensland Studies Authority–Queensland School Curriculum Council (QSA–QSCC), 2001, from [www.qsa.qld.edu.au/yourqsa/policy/equity/](http://www.qsa.qld.edu.au/yourqsa/policy/equity/) and [www.qsa.qld.edu.au/yrs1to10/special-needs/index.html#info](http://www.qsa.qld.edu.au/yrs1to10/special-needs/index.html#info).

20. Unreported, Ireland J., Members Silva and Strickland, 3 February 2003 ('*Reyes-Gonzalez*'). Reyes-Gonzalez also alleged, but failed to prove, instances of race discrimination.

21. These cases are discussed in the other papers by the authors previously mentioned.

22. The respondent appealed against the original findings of discrimination but before the appeal could be heard the parties agreed that the original decision would be set aside, that there had been no unlawful discrimination and that each party would carry its own costs: *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180 (unreported, Goode P., Nemeth de Bikal J.M. and Weule M., 15 June 2006).

23. An important component of this decision is an expectation that observation of Chinchen's difficulty in interacting with school work in some contexts should have led a

'reasonable' teacher to consider that there was a problem; c.f. *Sluggett v Flinders University of South Australia* [2003] FCAFC 27, where in a university context, it was found the university had not acted discriminatorily in addressing a student's difficulties, as the student had not made the difficulties known to the university, and it would not be a reasonable expectation that an observer would know the nature of the disabilities.

24. See, for example, *Edwards v Hillier and Educang* [2006] QADT 34 (unreported, Dalton P., 11 August 2006). See also *I on behalf of BI v State of Queensland* [2005] QADT 37 (unreported, Dalton P, 14 December 2005) where the Queensland Anti-Discrimination Tribunal found that the exclusion of a child with schizophrenia for non-attendance was indirect discrimination but not direct discrimination.

25. Note that some specific allegations of unfair treatment were considered through an indirect discrimination matrix and held not to be discriminatory: see *Chinchen* [366] (allegation of discrimination arising from a failure to bring books to school); [378] (allegation of discrimination arising from a refusal to complete class work).

26. *Equal Opportunity Act 1995* (Vic) s.9: Indirect discrimination (1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice-(a) that someone with an attribute does not or cannot comply with; and (b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and (c) that is not reasonable.

27. Consider, for example, the effect on the demonstration of writing achievement of indigenous students in central Australia of the provided stimulus 'should birds be kept in cages?' Commonwealth of Australia, 1997, Assessment methods, in *Mapping literacy achievement: Results of the 1996 National School English Literacy Survey*, from <http://www.dest.gov.au/mla/index.htm>.

28. Queensland Studies Authority (QSA), 2006, Equity, from [www.qsa.qld.edu.au/yourqsa/policy/equity/](http://www.qsa.qld.edu.au/yourqsa/policy/equity/).