



## Ensuring equality in education: How Australian laws are leaving students with print disabilities behind

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*University studies require students to read a large number of textbooks. This paper will build upon an earlier paper in this **Review** to report on primary research and analyse recent reforms to the Disability Discrimination Act 1992 (Cth), which gained royal assent in July 2009. These reforms have repealed and replaced the definition of direct and indirect discrimination. This paper will analyse how the reform of the definition of indirect discrimination has failed to address case law which creates substantial barriers for students with print disabilities. Finally, this paper analyses problems caused when the approach of indirect discrimination from the High Court in **State of New South Wales v Amery** interacts with the Copyright Act 1968 (Cth) Pt VB Div 3.*

### Introduction

Twenty years ago, people with print disabilities had extremely limited access to educational materials. A person who could not see a textbook to read it, had problems holding textbooks due to motor disabilities, or had disabilities which prevented the processing of words, would have had limited educational and career opportunities. The technology of the day meant that there were very few, if any, computers, and scanners were unheard of. Computers, scanners and the internet have created a world where people with print disabilities can become leading lawyers, politicians and business people. For example: one of Australia's leading academics and former Dean of the University of Sydney Law Faculty, Professor Ron McCullum OA, is totally blind; the Governor of New York, David Paterson, is legally blind; and the billionaire chairman of the Virgin Group Ltd, Sir Richard Branson, is dyslexic.

With the introduction of the Disability Discrimination Act 1992 (Cth) (DDA), universities in Australia have been required to take reasonable steps to ensure that students with disabilities are not discriminated against. In July 2009, the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) (DDOHLA) received royal assent. These amendments, inter alia, repealed and replaced the tests for direct and indirect discrimination. This paper will analyse whether these reforms have improved the ability of students with print disabilities to access education. In particular, this paper will ask whether the reforms have increased the ability of students with print disabilities to obtain accessible textbooks.

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## How do students with print disabilities study at university?

People with print disabilities can use a range of technologies to turn the text on computer screens into audio; for example, people with vision loss or dyslexia can use screen readers. The two main commercial screen reader programs used internationally are Window Eyes and Job Access with Speech (Jaws), and the most popular shareware screen reader is Non-Visual Desktop Access (NVDA).<sup>1</sup> These screen readers will turn text on computer screens into audio, enabling a person who cannot read the screen to hear the content. There are different adaptive programs which enable people with poor vision or other print disabilities to function.

Recognising the advances in technology, in 2004 the Australian Council of Vice-Chancellors developed Guidelines on Information Access for Students with Print Disabilities.<sup>2</sup> These guidelines were developed following a Human Rights and Equal Opportunity Commission study in 2002, and represent best practice for universities in Australia. These guidelines require university websites to be accessible with World-Wide Web Consortium Guidelines on Web Accessibility and to provide students with print disability support to develop independent research skills.<sup>3</sup>

University courses generally have a list of prescribed readings and recommended readings (being readings that students may wish to consult for greater understanding). The guidelines do not require universities to provide students with print disabilities equal access to books. At cl 4.1, the guidelines require universities to develop policies for ‘deciding in which formats materials will be provided (guidelines to provide for a range of relevant factors including student need, material complexity and subject matter)’. Under cl 4.1, some universities could decide to provide students limited access to prescribed readings, or even no access to recommended readings.

## The reforms to the DDA

The current reforms to the DDA passed the house of representatives in December 2008 and were referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report. In February 2009, the Senate Standing Committee handed down a report which unanimously supported the

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1 WebAIM, *Screen Reader Survey Results: Expanding the Web's Potential for People with Disabilities*; GW Micro, *Window Eyes* <<http://www.gwmicro.com/Window-Eyes/Beta/f/>> (accessed 26 March 2010); Freedom Scientific, *JAWS* <<http://www.freedomscientific.com/jaws-hq.asp>> (accessed 26 March 2010); Non-Visual Desktop Access <<http://www.nvda-project.org/>> (accessed 26 March 2010). Even though this software is free, in some areas it is superior to the commercial screen readers: for example, in an experiment a Portable Document Format file was read using both JAWS and NVDA and NVDA was able to read the document with fewer delays in rendering the text to audio; The author is totally blind and uses both JAWS and NVDA.

2 Australian Council of Vice-Chancellors, *Guidelines on Information Access for Students with Print Disabilities* <<http://www.universitiesaustralia.edu.au/documents/publications/GuidelineOnInfoAccessForStudentsWithDisabilities.doc>> (accessed 26 March 2010).

3 *Ibid.*, 3.2, 3.3.

Bill.<sup>4</sup> In June 2009, the senate passed the Bill with minor amendments, which the house of representatives agreed to later in June. A few weeks later, in July 2009, the DDOHRLA received assent.

Following the reforms, the DDA continues to provide support to people in the community who are regarded as 'disabled'. The definition of disability in s 4 has been expanded. Under this broad definition, 'disability' is defined to include the malfunction, malformation or disfigurement of a part of a person's body, or a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction. This definition would certainly include any student who was unable to read standard print textbooks and required those textbooks rendered into an accessible format.

The DDA imposes obligations upon parties in specific relationships. One such relationship is that of educational institution and student. In relation to the provision of accessible textbooks, s 22(2) relevantly provides:

It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability . . .

- (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
- (b) by subjecting the student to any other detriment.

Prior to the reforms, s 4 of the DDA defined 'educational authority' to expressly include schools and universities. While the express reference to universities was removed by cl 12 of the DDOHRLA, the explanatory memorandum explained that expressly including universities was 'redundant' as the term 'educational authority' already included universities.

Within the educational relationship, the DDA prohibits direct or indirect discrimination. Direct discrimination is where a person is treated less favourably because of a symptom or manifestation of their disability. It would be hard to foresee a situation where a university refused to provide a student with a textbook because they were disabled. Far more likely to occur is the scenario where a university will have a policy on providing textbooks that results in an unfavorable outcome for people with print disabilities. This form of discrimination is called indirect discrimination and will be the focus of this paper.

The definition of indirect discrimination has recently been repealed and replaced by cl 17 of the DDOHRLA. A university policy will be held to constitute indirect discrimination under the new s 6 of the DDA where:

- (a) the university requires, or proposes to require, a student to comply with a requirement or condition; and
- (b) because of the student's disability they do not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
- (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

Where the requirement will disadvantage the student because the university proposes not to make adjustments or provide them textbooks in accessible

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<sup>4</sup> Standing Committee on Legal and Constitutional Affairs, 'Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008' (Final report, 2009).

formats, a student could also bring an action under the new s 6(2). Section 6(2) provides that a university would also discriminate if:

- (a) the university requires, or proposes to require, the student to comply with a requirement or condition; and
- (b) because of the disability, the student would comply, or would be able to comply, with the requirement or condition only if the university made reasonable adjustments for the person, but the university does not do so or proposes not to do so; and
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

On its face, the requirement upon universities to make adjustments appears to impose a duty upon universities to ensure that students are not disadvantaged. The problem with the new s 6 of the DDA is that the amendments have failed to address substantial problems with the pre-reform DDA. In particular, this paper will discuss the problems in determining when a condition is imposed and the application of the compliance test.

### **In the provision of textbooks to students with print disabilities: Do universities impose a condition?**

Even if students can demonstrate they are suffering unfavorable treatment, this will only give rise to a claim under DDA s 6 if that condition is imposed by their university. In *New South Wales v Amery*,<sup>5</sup> Gummow, Hayne and Crennan JJ explained that indirect discrimination has four elements. The first element is that the ‘alleged discriminator “requires the aggrieved person to comply with a requirement or condition”’.<sup>6</sup> Therefore, even if a student with a print disability cannot comply with their university’s policies, the university’s conduct will only be impugned under s 6 of the DDA if the university has imposed the requirement or condition. Logic may indicate that a university has imposed a condition if it decides to reduce expenses and adopt a policy which results in students with print disabilities not being provided with their textbooks in accessible formats. Despite this apparent logic, the majority decision of the High Court of Australia in *Amery* indicates that it is not axiomatic that a university which has adopted a textbook policy has imposed a condition.

The policy which was alleged to be discriminatory in *Amery* flowed from the alleged discriminatory pay differences between male and female teachers. The Teaching Services Act 1980 (NSW) divided teachers into permanent and casual teachers. When the Crown Employment (Teachers and Related Employees) Salaries and Contributions Award was made under the Industrial Relations Act 1991 (NSW), the award posited a 5-level scale for casual teachers and a 13-level scale for permanent teachers. The increments between these pay scales differed. Significantly, the top of the casual teacher scale was the equivalent to level 8 on the permanent teacher scale. This meant permanent teachers had substantially more earning potential than casual teachers.

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<sup>5</sup> (2006) 230 CLR 174; 226 ALR 196; [2006] HCA 14; BC200603095 (*Amery*).

<sup>6</sup> *Ibid*, at 193.

The discriminatory outcome to the facially neutral pay scales was alleged to arise due to the disproportionately high number of female teachers who were casual due to their family responsibilities. It emerged that, even though both male and female teachers were performing substantially the same work, a large number of female teachers were being paid less than their male counterparts because the female teachers were forced to work as casuals due to their family responsibilities.

It is important at this point to understand the role of awards. Awards operate as a safety net below which employees protected by the award cannot be remunerated.<sup>7</sup> There is nothing in awards which prevent employers from deciding to pay their employees higher than the rate in the award. In *Amery*, the female teachers argued that the education department's decision to pay all teachers at the lowest possible rate of pay meant that the education department was imposing a policy which had a discriminatory outcome.

Before the New South Wales Administrative Decisions Tribunal, the female teachers successfully argued they had suffered indirect discrimination by the education department's policy not to ensure pay equity between male and female teachers.<sup>8</sup> This decision was reversed by the Appeal Panel of the Tribunal.<sup>9</sup> The original decision was restored by a majority decision of the New South Wales Court of Appeal.<sup>10</sup> Finally, special leave was granted and the case was appealed to the High Court of Australia.

Gummow, Hayne and Crennan JJ held that the education department was not imposing a condition by deciding not to pay over the award to ensure pay equity. The judges explained:

The distinction between permanent and non-permanent teachers in the Education Teaching Service is a feature of the structure of the workforce employed in that Service. That structure was not adopted by decision or practice of the Department. It was imposed by the Teaching Services Act. The pay scales set by the Award and the practice, adopted by the Department, of not extending to its supply casual teaching staff over-award payments were an incident of the management of that structure.<sup>11</sup>

In effect, the High Court held that because there was a statutory scheme, the decision by the education department to simply follow that scheme meant that the statutory scheme, not the education department, imposed the condition. The fact that the education department decided not to take positive action to ensure a non-discriminatory outcome was immaterial. As a consequence, the female teachers were prevented from prosecuting their indirect discrimination claim under s 6 of the DDA.

The approach adopted by the majority in *Amery* has negative consequences for students with print disabilities who seek to prosecute their universities for failing to provide them textbooks in accessible formats in a timely manner.

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<sup>7</sup> A Stewart, *Stewart's Guide to Employment Law*, 2nd ed, Federation Press, Sydney, 2009, Ch 6.

<sup>8</sup> *Amery v New South Wales* [2001] NSWADT 37; (2001) EOC 93-130.

<sup>9</sup> *New South Wales v Amery* [2003] NSWADTAP 16; (2003) 129 IR 300.

<sup>10</sup> *Amery v New South Wales* (2004) EOC 93-352; [2004] NSWCA 404; BC200407669, Beazley JA, with Cripps A-JA agreeing, Hodgson JA dissenting.

<sup>11</sup> *Ibid*, at 199, 174, 182 per Gleeson CJ, 174, 211 per Kirby J (dissenting), with Heydon J offering no opinion.

The problems confronting students prosecuting indirect discrimination flow from the existence of a statutory scheme for the provision of textbooks to students with print disabilities. As there is a statutory scheme requiring universities to take certain acts, if universities simply perform those acts then the university will not have imposed any conditions upon the students. Even if the statutory scheme is flawed, under the *Amery* principle a student cannot impugn their university's decision not to take any proactive action under s 6. As a consequence, it is crucial for the statutory scheme to ensure that students with print disabilities are provided textbooks in accessible formats in a timely manner, as the existence of this scheme will likely prevent a student from prosecuting a claim for indirect discrimination.

The problem with the scheme which permits universities to provide students textbooks in accessible formats was analysed by Nic Suzor, Dilan Thampapillai and myself, in an earlier edition of this *Review*.<sup>12</sup> In that article, the authors analysed the operation of Pt VB Div 3 of the Copyright Act 1968 (Cth) and the exception which authorises universities to provide students with print disabilities copyright-protected textbooks in accessible formats. Since the publication of that paper, there have been no relevant amendments to the Copyright Act or case law.<sup>13</sup>

There are two ways in which universities can obtain books in accessible formats. The first comes within a statutory license regulated by the Copyright Agency Limited (CAL). Pt VB Div 3 of the Copyright Act contains an exception to copyright which enables universities to convert copyrighted material into accessible formats for the sole use of students with print disabilities. To fall within this exception, a university must first obtain a statutory licence for institutions assisting people with a print disability.<sup>14</sup> The breach of copyright must be solely for the use of people with print disabilities, the copies must be marked in the manner prescribed by the Copyright Act, and the university must ensure that record-keeping requirements are met. In addition, the university must give a remuneration notice to CAL.<sup>15</sup>

Under this statutory exception, CAL has developed a Masters Catalogue. This Masters Catalogue contains a list of every publication that universities have scanned for students. CAL's Print Disability Copyright Guidelines, Pt 4(b) explains that the Masters Catalogue entitles universities to re-use

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12 N Suzor, P Harpur and D Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 *MALR* 17.

13 There have been two important cases on Pt VB, but arguably these cases were more procedural and do not impact on the continuing existence of the exemption. The cases are: *CAL v Queensland Dept of Education* (2007) 160 FCR 271; 73 IPR 229; [2007] FCAFC 124; BC200706468; *CAL v New South Wales* (2008) 233 CLR 279; 248 ALR 590; [2008] HCA 35; BC200806975.

14 The application is available at: <[http://www.copyright.com.au/Copyright\\_Users/Other/Institutions\\_assisting\\_people\\_with\\_disabilities/Statutory\\_licence\\_for\\_institutions\\_assisting\\_peopl\\_1.aspx](http://www.copyright.com.au/Copyright_Users/Other/Institutions_assisting_people_with_disabilities/Statutory_licence_for_institutions_assisting_peopl_1.aspx)> (accessed 26 March 2010).

15 CAL has been accepted as a collecting society by the Minister under s 135ZZB of the Copyright Act 1968 (Cth). CAL is an Australian copyright management company whose role is to provide a bridge between creators and users of copyright material. CAL represents authors, journalists, visual artists, photographers and publishers as their non-exclusive agent to license the copying of their works to the general community: CAL, *Who is Copyright Agency Limited* <<http://www.copyright.com.au>>.

material that they have scanned for students with print disabilities with other students within the scanning university, or to provide copies of the scanned master copies to other universities on the following conditions:

If another print disability organization has made a master, you can ask it to make a copy and communicate it to you (for example, by email). Similarly, if another organization asks for a copy of one of your masters, you can make and communicate it to that organization. This is subject to the following conditions:

1. the copy must be made solely for the purpose of assisting people with a print disability (by being supplied to individuals with a print disability, used as a master, or used in creating a new master);
2. the copy must not be sold for a profit; and
3. if the organization receiving the copy makes a new master copy, it must notify CAL within three months.<sup>16</sup>

The Masters Catalogue is aimed at increasing the ability of CAL to regulate the creation and distribution of material created under the statutory license, and to increase the ability of universities and other statutory license holders to freely exchange accessible documents. The problem is that details of a large number of textbooks are not recorded on the Masters Catalogue, and textbooks which are not obtained under Pt VB Div 3 are not included on this database.

The second way universities can obtain accessible books for their students is through approaching publishers directly. If publishers agree to provide the books in an electronic format to universities, then this substantially reduces the costs of providing accessible textbooks to students with print disabilities. If publishers provide the books to universities directly, then universities do not need to manually scan and spend hours editing the textbooks. As universities have not scanned the textbooks, the accessible copy is not subject to the Masters Catalogue but is regulated by the contract with the publisher. When I asked about the status of these accessible books, CAL explained:

Where a university has obtained a copy of a publication directly from the publisher, it is operating outside the statutory license scheme, and is obliged to comply with the licensing terms under which the publisher has provided that work to them (this may involve no downstream use or further copying). The university is not therefore required to report that copy under the Masters Catalogue as it is only for copies made under the Pt VB Div 3 statutory license for the print disabled.

As a consequence, where universities obtain books directly from publishers, that university should not include that textbook on the Masters Catalogue or exchange that textbook in a way contrary to the university's agreement with the publisher. This provides publishers substantially more control over how their copyright protected material is covered.

The operation of DDA s 6 as interpreted by *Amery* and the Copyright Act Pt VB Div 3 creates a curious situation where a university that decides to scan textbooks internally and to participate in the Masters Catalogue to provide their students with print disabilities textbooks will not be imposing a condition. As such, where universities are simply following a statutory

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<sup>16</sup> Australian Copyright Council, *Print Disability Copyright Guidelines: Part 4* <<http://www.copyright.org.au/information/cit004/cit097/wp0287/?searchterm=Print>> (accessed 26 March 2010).

scheme, any claim under s 6 of the DDA will fail. However, if a university identified that the Copyright Act Pt VB Div 3 scheme has serious limitations, and that textbooks maybe able to be obtained cheaper and quicker directly from publishers, then this policy is not regulated by a statutory scheme and thus the university will be held to have imposed a condition for the purposes of the DDA s 6. As a consequence of the operation of these laws, a university which takes proactive action will increase their exposure to aggrieved students prosecuting indirect discrimination claims. It is doubtful if the drafters of the DDA or of the DDOHRLA intended an outcome which effectively encourages universities to simply comply with the statutory scheme and avoid taking any proactive action due to the fear of increasing their litigation risk.

### **Problems with the compliance test: When does a barrier to education mean a student cannot comply with a condition?**

If a student can successfully demonstrate that their university has imposed a condition upon them, then that student must impugn the condition which has been imposed. A student can only prosecute an indirect discrimination claim when they cannot comply with a condition or requirement. In effect if a student can comply with the requirement, then they have not been indirectly discriminated against. The problem is establishing when a student can 'comply' with a requirement. The use of the word 'comply' is unfortunate, as it does not reflect the potential difficulties associated with compliance. The *Macquarie Dictionary Online* defines 'comply' to mean:

1. to do as required or requested;
2. comply with, to act in accordance with (wishes, commands, requirements, conditions, etc.<sup>17</sup>

If a strict interpretation of 'comply' is used, then a person can comply with a requirement or condition even it creates extreme hardship. Under this approach, a person is only unable to comply if they physically have no way to meet the requirement or condition.

The submissions to the Standing Committee were scathing about the continued use of the compliance test.<sup>18</sup> The submissions noted how the compliance test had created hardship for people with disabilities, did not further the aims of the *DDA* and called for its removal. Despite the problems with the compliance test the Standing Committee found:

While the compliance test is clearly unpopular with some submitters, the committee does not consider that it received sufficient evidence from a wide variety of stakeholders of the likely effect of its removal on the way discrimination cases are heard and decided. The matter requires deeper consideration, and as a result the committee makes no recommendation on the removal of the compliance test at this stage.<sup>19</sup>

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<sup>17</sup> *Macquarie Dictionary Online* <<http://www.macquariedictionary.com.au>>.

<sup>18</sup> Standing Committee on Legal and Constitutional Affairs, 'Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008', Final report, 2009, pp 22–4.

<sup>19</sup> *Ibid*, p 24.



Despite the significant problems with the compliance test it remains in the *DDA*.

### The operation of the pre-reform compliance test

As the compliance test has been re-introduced by the DDOHRLA, it is useful to analyse the pre-reform s 6 to ascertain the difficulties this test created for students with print disabilities. The pre-reform s 6 provides that indirect discrimination will occur where a university requires a student to comply with a requirement or condition:

- (a) with which a substantially higher proportion of students without the disability comply or are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the student does not or is not able to comply.<sup>20</sup>

When courts have considered s 6 in relation to students with disabilities, the issue in contention is almost always paras (b) and (c) above. What constitutes a reasonable policy or an ability to comply has been subjected to judicial disagreement.

*Hinchliffe v University of Sydney*<sup>21</sup> is one of the only judgments concerning a university's duty to provide a student with a print disability access to materials in an accessible format. Unfortunately, this judgment was not appealed from the Magistrates Court, and so has limited precedent value. In *Hinchliffe*, the University of Sydney provided a student with a vision disability audio recording of some of her material, photocopied other material onto green paper, gave access to a disability-specific room and offered her university materials on a CD. The student preferred her materials on cassette tape or photocopied onto green paper as this reduced the glare. There was a substantial breakdown of communication within the university and the student did not receive most of her materials in accessible format before it was required for class.

When applying the *DDA* s 6(1)(b), Driver FM held that the university had imposed a reasonable requirement. The university had provided the student her materials, either on enlarged green paper as requested or on CD, and had provided her access to a printer with green paper.<sup>22</sup>

If the student desired the material printed on large green paper then, Driver FM held, it was reasonable for the university to expect the student to attend the university campus and use the printer provided to her. Driver FM's approach to s 6(1)(c) seems to expect students with print disabilities to take additional time to be able to access textbooks that the rest of the student cohort can access without any effort. This approach is concerning for students who require textbooks to be converted into different formats, as they may be expected to spend hours each week before they can even start studying the material.

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<sup>20</sup> For discussion of the distinction between direct and indirect discrimination, see *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392; 103 ALR 513; [1991] HCA 49; BC9102598; per Dawson and Toohey JJ.

<sup>21</sup> [2004] FMCA 85; (2004) 186 FLR 376 (*Hinchliffe*).

<sup>22</sup> *Ibid*, at 118, 122.

It could be argued that Driver FM's approach is contrary to a line of authorities. Driver FM held that the student could comply with a requirement or condition which required the student to convert educational material from the standard documents provided to all students. In this case, the student scanned papers and obtained assistance from her mother and grandmother to read documents onto tape. Driver FM held:

Generally, it was possible for the applicant to comply with the university's requirement. She could make use of course material provided to her in a standard format by converting it to a different format.<sup>23</sup>

As the student had some eyesight, had a strong support network, and was prepared to work exceptionally hard, Driver FM arguably indicated the university had a lower duty. It is submitted that Driver FM adopted an extremely narrow reading of s 6 of the DDA, which went beyond what the university suggested or what the practice of the university in question had been for years.<sup>24</sup> Subsequent judgments have applied a far broader reading of universities' obligations under s 6(1)(c).

In a subsequent case, *Hurst v Queensland*,<sup>25</sup> Ryan, Finn and Weinberg JJ held that a student could not comply with a requirement or condition for the purposes of s 6(1)(c) of the DDA if they could merely cope with a requirement. In this case, a student was fluent in one form of sign language but was required to receive education in another form that she was less familiar with. Even though the student received reasonable grades, she was not able to function to her full potential. Ryan, Finn and Weinberg JJ held:

A hearing impaired child may well be able to keep up with the rest of the class, or 'cope', without Auslan. However, that child may still be seriously disadvantaged if deprived of the opportunity to reach his or her full potential and, perhaps, to excel.<sup>26</sup>

In *Clarke v Catholic Education Office*,<sup>27</sup> Madgwick J arguably read the term 'comply' in a way which maximised students' ability to receive an inclusive education. Madgwick J held that an inability to comply required a 'serious disadvantage' with the result that the student could not 'meaningfully participate in classroom instruction without' the accommodation.<sup>28</sup> On appeal, Tamberlin J adopted a similar approach in holding that the question of whether or not a student could comply should be decided by asking whether the student was 'able to receive the full benefit of [their] education.'<sup>29</sup>

What is required to enable a student to function to their full potential will differ in each case. A student who requires their texts in large print could read image files which have not had optical character recognition software used on

<sup>23</sup> Ibid, at 118, 115.

<sup>24</sup> On the University of Sydney's policy on assisting students with print disabilities, see: University of Sydney, *Students with a Vision Disability: Disability Services*: <[http://www.usyd.edu.au/stuserv/disability/staff\\_vision.shtml](http://www.usyd.edu.au/stuserv/disability/staff_vision.shtml)> (accessed 26 March 2010).

<sup>25</sup> (2006) 151 FCR 562; 235 ALR 53; [2006] FCAFC 100; BC200605714.

<sup>26</sup> Ibid, at [125].

<sup>27</sup> (2003) 202 ALR 340; 76 ALD 84; [2003] FCA 1085; BC200305857.

<sup>28</sup> Ibid, at 340. This decision was affirmed on appeal in the Federal Court: see below n 29.

<sup>29</sup> *Catholic Education Office v Clarke* (2004) 138 FCR 121; 81 ALD 66 at 69; [2004] FCAFC 197; BC200404916 per Tamberlin J, concurring with the joint judgment of Sackville and Stone JJ.

them. A student without any eyesight uses screen readers which will only read files that are able to be modified in a word processor. The quickest way to turn a printed work into an electronic file is to remove the spine from a textbook and feed it through an auto feed scanner. This process will scan written prose moderately well, but it may not identify italics or bolded texts. It may fail to correctly include footnotes, page numbers often are not easily identifiable on pages of flowing texts and tables, and graphs or other graphical representations will not be rendered into an accessible format through using optical character recognition software. If a textbook is simply scanned without editing, this would create a substantial barrier for students who attempt to use the converted file.

Students do not just read textbooks from cover to cover. Students are required to navigate the textbook so that they can identify footnotes or endnotes, read prescribed pages or pinpoint pages within the text. The latter requirement is especially important, as all faculties instruct students to use pinpoint referencing in assignments, which requires students to be able to identify what page a quote comes from. For example, the Australian Guide to Legal Citation (AGLC) is the main legal citation guide in Australia.<sup>30</sup> The AGLC requires pinpoint page references in all citations (where page numbers are available).<sup>31</sup> This means that even though a case is available free online, a person is not able to use the paragraph number, but is required to access the reported version and cite the relevant page in the reported version. If students do not comply with this requirement, they will be marked down in their assessment and be unable to publish their works in journals. Accordingly, it is submitted that students cannot comply with a requirement which does not enable them to navigate around their textbooks to identify page references.

While students cannot comply with the requirement, this does not mean universities are forced by the DDA to ensure students are provided textbooks of a high quality. Applying the reasoning of Ryan, Finn, Weinberg, Madgwick and Tanberlin JJ, educators are required to provide students accessible textbooks in a format which will enable them to operate to their full potential. This does not mean students will always get the textbook in their preferred format. A student may desire their textbook be carefully edited and every table and graph in the textbook explained so that a students screen reader can turn

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30 The AGLC provides Australia with a uniform system of legal citation. The AGLC is published by the Melbourne University Law Review Association. The first edition of the AGLC was published in 1998 and a second edition was published in 2002. The AGLC has been adopted by the following journals and their associated law schools: *Adelaide Law Review*; *Alternative Law Journal*; *Australasian Journal of Natural Resource Law and Policy*; *Australian Journal of Asian Law*; *Australian Law Librarian*; *Bond Law Review*; *Canberra Law Review*; *Corporate and Business Law Journal*; *Deakin Law Review*; *Elder Law Review*; *Federal Law Review*; *Flinders Journal of Law Reform*; *Indigenous Law Bulletin*; *International Trade and Business Law Review*; *James Cook University Law Review*; *Melbourne Journal of International Law*; *Melbourne University Law Review*; *Monash University Law Review*; *Newcastle Law Review*; *New Zealand Armed Forces Law Review*; *Queensland University of Technology Law and Justice Journal*; *Revenue Law Journal*; *Sydney Law Review*; *University of New South Wales Law Journal*; *University of Notre Dame Australia Law Review*; and *University of Western Sydney Law Review*.

31 The requirement for pinpoint referencing can be found in the AGLC, 2nd ed, Melbourne University Law Association, Melbourne, 2002, [2.5], [3.1.4], [3.2.4], [4.7], [5.4], [6.1.4], [7.1.5], [8.2.6], [10.4], [11.3.3] and [11.3.6].

the prose into audio. If a textbook was unedited, then a student could potentially still access the majority of the content. If a student lodged a complaint under anti-discrimination laws because the textbooks they were provided were of poor scanning quality or unedited, then a court would need to determine whether the student was seriously disadvantaged. While some judgments have read the compliance test widely, it is possible that subsequent courts may apply a more narrow reading of this term. Kirby J observed that the High Court has a history of narrowly interpreting anti-discrimination laws:

[The *Amery*] case joins a series, unbroken in the past decade, in which this court has decided appeals unfavorably to claimants for relief under anti-discrimination and equal opportunity legislation.<sup>32</sup>

With a history of conflicting judicial interpretation of the compliance test combined with the propensity of the High Court of Australia to narrowly read anti-discrimination laws, it is arguable that the DDOHRLA should have provided a definition to clarify how the compliance test should be interpreted.

## Conclusion

On 8 July 2009, the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) received royal assent. This Act repealed and replaced provisions of the DDA, which require universities to provide students with print disabilities textbooks in accessible formats. This paper has analysed how these reforms have failed to address two substantial problems confronting students with print disabilities receiving textbooks in accessible formats in a timely manner.

After exploring how students with print disabilities can operate at university, this paper analysed substantial problems with the operation of indirect discrimination in DDA s 6 in ensuring students with print disabilities obtain their textbooks in a timely manner. In *Amery*, the majority of the High Court held that a respondent was not imposing a condition if they followed a flawed statutory scheme which resulted in pay inequities between males and females. When this principle is applied to students with print disabilities, universities can avoid liability for failing to provide textbooks in accessible formats to their students, providing the university complies with the scheme in Pt VB Div 3 of the Copyright Act. Even though this scheme potentially increases universities' costs and reduces publishers control over their copyright material, the operation of the DDA effectively encourages universities not to take proactive action and work with publishers to maximise students' educational opportunities.

The final part of this paper analysed the operation of the compliance test. A condition imposed by a university will only be discriminatory where it imposes a condition that a student cannot comply with. In *Hinchliffe*, the court held that a student could comply with a condition even when this imposed a substantial burden upon them which students without a disability were not forced to surmount. While other judgments seemed to question this approach

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<sup>32</sup> *Amery*, above n 5, at 201; on the narrow reading of anti-discrimination statutes see also: M Thornton, 'Disabling discrimination legislation: The High Court and judicial activism' (2009) 15 *AJHR* 1.

to the compliance test, based upon comments of Kirby J it is probable that the High Court could adopt a narrow approach to the compliance test. Following the accession of the DDOHRLA, significant concerns remain surrounding the ability of the indirect disability provisions of the DDA to ensure that students with print disabilities receive textbooks in accessible formats in a timely manner. If parliament desires s 6 of the DDA to ensure substantive equality and protect students with print disabilities, further reforms are essential.