

# Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the *Anti-Discrimination Act 1991 (Qld)* and in its Interpretation and Application

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## Abstract

The rhetoric of the *Anti-Discrimination Act 1991 (Qld)* suggests that it is an important tool towards delivery of equality of opportunity in education to people with disabilities. The reality, however, is that its effectiveness has been eroded by the restrictive manner in which it, and other similar legislation, have been interpreted and applied by Australian courts and tribunals. Case law suggests that, while anti-discrimination legislation is premised on an understanding of disability as a social construct which can be mitigated by social change, some courts and tribunals have misconstrued the cause and nature of disability and have been reluctant to require the reform necessary to deliver an unfettered right to education to people with disabilities.

## Introduction

It can be argued that the underlying premise of anti-discrimination legislation is that disability is a social construct rather than a 'personal tragedy'. Anti-discrimination legislation makes discrimination against people with impairments unlawful. Therefore, it is arguable that the legislation acknowledges that the attitudes and actions of others can infringe upon the rights of people with disabilities, that 'limitations' faced by people with disabilities flow from their treatment and not merely from their impairment, that disability is a social and not merely an individual problem and that 'solutions' to disability must come from society as a whole and not only from the individual with the medical 'problem'. The scope of the protected areas in anti-discrimination legislation – education, employment, accommodation, goods and services - reveals acceptance that discrimination and, by implication, disablement, exist as institutional and not merely individual phenomena. Anti-discrimination legislation reflects and reinforces a cultural and political shift towards viewing provision for people with disabilities as 'rights' rather than 'needs'<sup>1</sup> and is public acknowledgement that discrimination against people with disabilities is unacceptable, indeed, unlawful<sup>2</sup>. It is disappointing, therefore, that such seemingly enlightened legislation has proved unsuccessful in delivering an unfettered right to education to people with disabilities.

This article will, first, consider the evidence of the influence of the social model<sup>3</sup> of disability in the drafting of the *Anti-Discrimination Act 1991 (Qld)* (QADA).<sup>4</sup> Secondly, the article will consider how the decisions of Australian courts and tribunals have eroded the effectiveness of the QADA, and similar anti-discrimination statutes, as a tool for social reform, in the area of education, this has occurred as a result of findings that the social exclusion of a complainant with a disability is attributable to impairment and not to institutional failure to accommodate difference, through statutory construction which limits 'reasonableness' of the response required by education institutions to the accommodation of difference, and through interpreting narrowly the meaning of 'disability'. The rhetoric of the various courts and tribunals which have considered complaints

of discrimination in education reveals evidence of both a recalcitrant ‘medical model’<sup>5</sup> approach to the understanding of disability, and a reluctance to require the social response necessary to deliver ‘equality of opportunity’ in education to people with disabilities.

### **Evidence of the Social Model Of Disability in the Drafting of the *Anti-Discrimination Act 1991 (Qld)***

Under the scheme of the QADA, discrimination, on the basis of impairment, is prohibited by s 7(1)(h). ‘Impairment’ is defined as follows in s 4:

- (a) the total or partial loss of the person’s bodily functions, including the loss of a part of the person’s body; or
- (b) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
- (d) a condition, illness or disease that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
- (e) the presence in the body of organisms capable of causing illness or disease; or
- (f) reliance on a guide dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that –
- (g) presently exists; or
- (h) previously existed but no longer exists.

It is noteworthy that Queensland’s legislators chose the term ‘impairment’ rather than the term ‘disability’ to describe this protected attribute. The terms ‘impairment’ and ‘disability’ have been subject to a variety of readings.<sup>6</sup> It is important to be careful in the use of these terms as language is ‘political’ and the way these terms are employed can reveal and reinforce stereotypical ideas of disability.<sup>7</sup>

The readings which have come to be preferred by people with disabilities,<sup>8</sup> and by organisations associated with them, restrict ‘impairment’ to meaning the physical, intellectual or psychiatric condition which affects a person. ‘Disability’ refers to the social restriction experienced by a person with an impairment. With heightened awareness of disability as a human rights issue, and not merely as a medical issue, there is a need to distinguish between the meanings of the words ‘impairment’ and ‘disability’, in order to reinforce the fact that a ‘medical’ condition could and should be distinguished from its social ramifications.<sup>9</sup> It must be acknowledged, however, that common usage is such that the terms ‘impairment’ and ‘disability’ are used almost interchangeably with little appreciation of conceptual differences between the two. It is notable, for example that although the QADA prohibits discrimination on the ground of ‘impairment’, in the DDA, the protected attribute is ‘disability’.<sup>10</sup> The definition of ‘impairment’ in s 4 QADA is, however, essentially the same as the definition of ‘disability’ in s 4 DDA.<sup>11</sup> There is further potential for confusion in the failure of those involved in the making, interpreting

and applying of anti-discrimination law to make their understanding of the words explicit, or to use them in a consistent manner. Although, for example, it is implicit in the decision to chose 'impairment' rather than 'disability' to describe the protected attribute in the *Anti-Discrimination Bill 1991* (Qld), that those responsible for its drafting were informed about these definitional differences and their significance, the Second Reading Speech in support of the bill, and the debate following do not explicitly acknowledge that different readings may be attached to the terms impairment and disability and there is no apparent consistency in the way the terms are employed in the debate.<sup>12</sup>

If the meaning of impairment explained above is accepted, then it must also be accepted that the legislation prohibits discrimination on the basis of a medical condition. The definition of impairment provided in s 4 QADA supports this interpretation. The definition is 'medical', recognising impairment that is physical, intellectual, psychiatric and biological. The definition recognises that impairment can be caused by a number of factors – illness, disease, injury, malfunction, malformation, disfigurement and infection. In the context of what has come to be the widely accepted meanings of impairment and disability, it is appropriate that the term impairment rather than disability is attached to such a definition.

Not only does the QADA create impairment as a protected attribute, its operation is such that it recognises that *disability* flows from the social response to impairment. Thus, it can be argued that Queensland legislation recognises that disability is, or, at least, can be a social construct. Discrimination – differential treatment on the ground of impairment – is the disabling agent. Equal opportunity to enjoy 'rights' such as education and employment is curtailed for the impaired person by the actions or failures of others and not only by the impairment and its physical, intellectual or psychiatric effects. The QADA prohibits not only direct discrimination – differential treatment – however, in s 11 it also prohibits indirect discrimination – the imposition of a term with which a person with an impairment cannot comply but with which a higher proportion of people without the impairment can comply, and which is not 'reasonable'. Through this prohibition on indirect discrimination, the QADA also recognises that institutions and programmes designed for 'normal' citizens can have a disabling effect for those with an impairment.

Further evidence of recognition of the social model can be found in s8 QADA. That section prohibits discrimination not only on the basis of characteristics the person with an impairment actually has, but also on the basis of characteristics which are presumed of or imputed to him or her. Thus the Act is alive to the fact that socially-entrenched stereotypes of an impairment can influence how a person with that impairment is treated by others<sup>13</sup>. Similarly, the definition in s 4 prohibits discrimination on the basis of past as well as present impairment, reflecting awareness that any stigma associated with an impairment can linger even after the physical or psychiatric effects of that impairment no longer exist.<sup>14</sup>

Still further evidence of recognition of the social model is found in s 10(5). In relation to direct discrimination, the Act provides as follows: 'in determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant'. This provision recognises that the elimination of discrimination may require positive action by others to accommodate the needs of the person with the impairment. Thus the Act suggests that managing impairment is not the responsibility solely of the person with that impairment but also of society at large.<sup>15</sup>

Another example of the influence of the social model of disability is found in the express provision, in s 11(3), that, in relation to indirect discrimination, 'it is not necessary that the person imposing, or proposing to impose the term is aware of the indirect discrimination'. It is the very nature of indirect discrimination that it follows from policies and practices which are geared to mainstream society. Thus, indirect discrimination is the product of a 'disabling' society which does not accommodate difference. While there is no express equivalent provision in relation to direct discrimination, there is little doubt that in that situation, too, there need not be awareness by the discriminator that the treatment complained of is discriminatory. It is expressly provided in s 10(2) QADA that 'it is not necessary that the person who discriminates considers the treatment less favourable'.<sup>16</sup> Section 10(3) QADA also provides in relation to direct discrimination that the discriminator's 'motive for discriminating is irrelevant'. This provision suggests that there is no need to prove an intention to treat the complainant 'less favourably' on the ground of disability. Collectively, these sections address the fact that disabling attitudes and policies exist at a subconscious level among members of society and within social institutions. The approach intrinsic in these provisions is, therefore, consistent with the attribution of disability to the social response to impairment.

### **Legislative Limits on the Social Response To Disability**

The QADA does provide for limits on the responsibility of society to remove discrimination and, therefore, to diminish disability. Most significantly, the Act creates the 'unjustifiable hardship' exemption<sup>17</sup> applicable only to cases of alleged unlawful discrimination on the ground of impairment.<sup>18</sup> It is stated in the Second Reading Speech, delivered by Attorney General, Dean Wells, in support of the *Anti-Discrimination Bill* 1991 (Qld), that one of the function of exemptions in the proposed Act is 'to balance the complex needs of society'<sup>19</sup>. It is, therefore, explicitly contemplated that there will be occasions when the rights of people who are impaired will be required to yield to the rights of others. The unjustifiable hardship exemption is raised when special services or facilities are required in order to avoid discrimination against a person with an impairment, and the provision of those services or facilities imposes, or would impose, unjustifiable hardship on the person or institution who would be responsible for their provision. The exemption, as such, is linked to the definition of direct discrimination in s 10(5). As noted above, s 10(5) expressly contemplates that special services or facilities may be required to be provided in order to avoid discrimination. Some of the circumstances relevant to a determination of whether unjustifiable hardship is established are set out in s5:

- (a) the nature of the special services or facilities; and
- (b) the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged; and
- (c) the financial circumstances of the person; and
- (d) the nature of any benefit or detriment to all people concerned

The list is not closed, leaving a tribunal or court the discretion to consider other factors presented as relevant by the parties to a particular case.

The definition of indirect discrimination is similarly qualified by the rider, in s (1)(c), that, for the discriminatory term to be unlawful, it must be 'not reasonable'. Section 11(2) states that whether a term is reasonable depends on all the circumstances of the case. It specifies some relevant circumstances, but the list is not closed:

- (a) the consequences of failure to comply with the term; and
- (b) the cost of alternative terms; and
- (c) the financial circumstances of the person who imposes, or proposes to impose, the term

There is some overlap between the relevant circumstances for establishing unjustifiable hardship and the relevant circumstances for determining whether a discriminatory term is reasonable. Cost to the alleged discriminator and their financial circumstances are specified as relevant for both determinations.<sup>20</sup> In relation to unjustifiable hardship, s 5(e) explicitly requires consideration of ‘the nature of any benefit or detriment to all people concerned’; that is, a balancing of the competing interests of the person with the disability and of others affected by his or her accommodation.

The unjustifiable hardship exemption and the requirement that an indirectly discriminatory term be not reasonable have the clear potential to erode the right of a person with an impairment to ‘equality of opportunity’. It will be seen that the case law demonstrates that, in many instances, the potency of the demands made, by the QADA, of citizens and institutions, in order that people with impairments are not to be disabled by discriminatory social responses, is diluted by the effect of these two exculpatory provisions. Thus, although the Act creates a scheme which implies that disability is a social construct, it will not guarantee modification of society to remove disability. The existence of the unjustifiable hardship exemption is evidence that government either cannot, or, is not prepared to afford the cost of every social adjustment necessary to accommodate difference. Nor is government prepared to impose this cost on individuals or on private institutions<sup>21</sup>.

While proof of impairment, and indeed of a prima facie case of discrimination, has proved unproblematic for complainants under the QADA, tribunals have, nevertheless, been reluctant to find unlawful discrimination on the ground of impairment. In the cases of *P*, *L* and *K*<sup>22</sup> the unjustifiable hardship exemption was accepted. In *I*<sup>23</sup> the complainant had limited success: it was established that a decision by Corinda State High School to exclude her from an excursion, because of perceived problems with providing safe wheelchair access, was discriminatory and \$3000 damages were awarded. Claims of indirect discrimination were, however, dismissed on the basis that the allegedly discriminatory terms with which I could not comply were reasonable. Thus, the case law demonstrates that the unjustifiable hardship exemption in relation to direct discrimination and the requirement that a term be ‘not reasonable’ in relation to indirect discrimination have been applied in Queensland to limit the required social response to impairment. Indeed, apart from the limited success in *I*, every education case which has proceeded to final hearing, under the QADA, has failed. Despite the fulsome rhetoric of the legislation, therefore, the Queensland complainants have, largely, been denied a remedy. It will be seen, below, that the unjustifiable hardship exemption is of only limited utility for respondents to claims brought under the DDA. This has not meant, however, that complainants under the DDA have met with much more success than complainants under the QADA. Rather, it can be demonstrated that tribunals and courts have creatively construed the terms of the DDA to defeat complaints.

## Case Law Controversies

Several unresolved controversies relevant to the issues of the meaning of disability and of the solution to disability have emerged in Australian cases. First, in some cases there has been a

demonstrated readiness by tribunal members or judges to find that the complainant's impairment, and not the respondent's treatment, has caused the complainant's disability. Secondly, some tribunals and courts have attempted to construct a positive duty of 'reasonable accommodation' from the terms of anti-discrimination legislation. Finally, there is a divergence between Queensland tribunal decisions and Federal case law on the issue of whether an impairment/disability includes the behaviour it causes.

### **'Discrimination on the Ground of Impairment': Impairment Not Discrimination as the Cause of Disability**

The cases reveal some acceptance of the argument, promoted by both proponents of the medical model of disability and by critics of the social model, that the nature of an impairment itself may cause restriction – that is, that not all social restriction on a person with an impairment can be attributed to the acts and attitudes of others, to 'discrimination'. Further, the cases suggest that there are some forms of disability which cannot be alleviated by social adjustment. The scheme of anti-discrimination legislation is such that unless discrimination is on the 'ground' of impairment/disability, that is, unless there is a proved causal nexus between the impairment/disability and the discriminatory behaviour which is alleged, there is no legal remedy available to a complainant.

The QADT case of *Brackenreg v Queensland University of Technology*<sup>24</sup> concerned a student excluded from the Bachelor of Laws degree course at Queensland University of Technology. The complainant enrolled as an external student in 1993 and was excluded in December 1997, as she was 'in breach of both the double fail rule and the progression rule'<sup>25</sup>. She reapplied for admission in second semester 1999 but the University declined to readmit her to the course.

Brackenreg had syringomyelia and cervical cancer, and, most significantly for her studies, Attention Deficient Hyperactivity Disorder (ADHD). Brackenreg's case was that her academic difficulties had flowed from her then undiagnosed ADHD, that the ADHD had been controlled by medication and that, as such, she should be allowed another opportunity to complete her course. She applied to the QADT for an interim order that the University readmit her pending the outcome of her complaint of discrimination.

President Copelin of the QADT ultimately determined that she did not have the power to make the order sought by Brackenreg, which, in effect, was the equivalent of a mandatory injunction<sup>26</sup>. Nevertheless, in light of the possibility that she might be 'wrong on the question of jurisdiction'<sup>27</sup>, President Copelin considered the issue of whether there was a serious question to be tried and concluded 'I do not find that there is a serious issue to be tried'<sup>28</sup>.

President Copelin conducted what amounted to a hearing of the issue of whether or not Brackenreg had been discriminated against by QUT. She found that Brackenreg's 'difficulties with her studies' were not due to less favourable treatment and that Brackenreg was treated more favourably than other students: 'the complainant's disability was taken into account and certain adjustments were made'<sup>29</sup>. President Copelin found that Brackenreg's difficulties 'were attributable ... to her disabilities, to circumstances in her personal life, and studying as an external student'<sup>30</sup>. There were, perhaps, 'multiple causes' for the complainant's difficulties but none of them was the treatment of her by QUT<sup>31</sup>:

In this case the evaluation by the respondent of the complainant's academic performance before and at the time of her exclusion from QUT may have reflected a manifestation of the symptoms of the complainant's disabilities. However, even when consideration was given to the complainant by the

respondent for her disabilities, such as giving her extra time to complete exams, extensions of times in handing in assignments, and by giving her conceded passes on numerous occasions after considering her circumstances, she still demonstrated an inability to satisfactorily complete a law degree to the standard required by the respondent.

The HREOC case *W v Flinders University of South Australia*<sup>32</sup> also concerns a complaint of discrimination by a student excluded from her university course after failing to meet course requirements. W was studying a teaching degree course. W had been diagnosed with a psychiatric disorder, the symptoms of which included ‘depression, short term memory loss, poor concentration, withdrawn and racing thoughts, hypermania, confusion, forgetfulness, thought disorder, and anxiety’<sup>33</sup>. The symptoms were ‘erratic and episodic’ and affected her ability to study<sup>34</sup>. Commissioner M<sup>c</sup>Evoy, like President Copelin in *Brackenreg*, attributed W’s difficulties not to her treatment by the university but to her disability<sup>35</sup>:

... I am satisfied that the complainant’s complaints cannot be sustained under *the Act*. Her circumstances clearly demonstrate many of the difficulties which persons with disabilities may face but I am satisfied that she was not discriminated against either directly or indirectly by the respondent on the basis of her disability ... None of those difficulties resulted from discrimination on the basis of her disability, although they may well have resulted from her disability itself.

The HREOC decision in *Mrs Cowell and Fleur Cowell v A School*<sup>36</sup> also concerns a finding that disability itself, not discrimination, causes detriment. Fleur Cowell, a secondary school student, alleged both direct and indirect discrimination during the term of her enrolment at A School. She had been diagnosed with Perthes Disease which affected her right hip and, consequently, her mobility. She claimed she was unable to attend some classes because of their location, she was ‘prevented from attending school functions and academically and socially disadvantaged by the actions of the school’<sup>37</sup>. Commissioner M<sup>c</sup>Evoy accepted the respondent’s case attributing Fleur’s disadvantage to her disability and not to the actions of her school<sup>38</sup>:

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

Commissioner M<sup>c</sup>Evoy found, further, than the Cowell family’s own actions had exacerbated Fleur’s problems. The school had offered to change Fleur’s ‘house’ which would have had the consequence of her being able to attend classes at a more accessible location. Mrs Cowell and Fleur rejected this option: ‘Many of the matters complained of follow this decision’, said Commissioner M<sup>c</sup>Evoy<sup>39</sup>.

The decisions in *Brackenreg*, *W*, and *Cowell* have the effect of casting access to education squarely as the ‘problem’ of the excluded student, rather than as the responsibility of the education system. At first glance, the approach adopted by the tribunals in these cases suggests a ‘medical model’ understanding of disability: disability is the problem of the ‘disabled’ person, and to be solved by medical treatment and management; further, if medicine cannot provide a solution the consequent ‘limitations’ must be stoically borne. It can be argued, however, that *Brackenreg*

and *W*, in particular, suggest a problem with the social model of disability which is yet to be satisfactorily addressed by the theorists: it is difficult to explain how the social model accounts for all of the ‘disability’ faced by people with impairments. It was found in *Brackenreg* and in *W* that, even with appropriate accommodation by the respondent universities, the complainants were unable to pass their respective courses.<sup>40</sup> It is, perhaps, a valid challenge to the social model that, in the case of some types and some degrees of impairment, no amount of social adjustment or attitudinal change will deliver equality of opportunity.<sup>41</sup> This is, it seems, particularly the case where the relevant impairment is intellectual or otherwise relates to the ability to learn. At the tertiary level of education the situation is complicated by the fact that, to a large extent, the tertiary sector functions to prepare students for the workforce and there is a legitimate expectation that if a student is accredited with having passed a course, that student has met all the requirements of the course. Perhaps, at least, in the tertiary context, there may be a place in the legislation for a ‘legitimate education requirement’ exemption cast in similar terms to the ‘legitimate work requirement’ exemption.

### **A ‘Reasonably Proportionate Response’**

Some cases have suggested that anti-discrimination legislation requires not only that educational institutions not treat students less favourably on the ground of disability, but also that they take positive steps to accommodate a student’s impairment. This willingness to impose positive duties on education providers suggests recognition that disability is a social construct and that disability can be controlled, limited, reduced or even removed by institutional and environmental adaptation. Any duty imposed by courts and tribunals to date, however, has been to make a ‘reasonable adjustment’ or to take a ‘reasonably proportionate response’. As such, the limit of ‘reasonableness’ has been placed on the social response to impairment which will be imposed.

Section 10(5) QADA provides that for the purposes of s 10(1), which defines direct discrimination, ‘the fact that the person with the impairment may require special services or facilities is irrelevant’ in the determination of whether the circumstances of the person with the impairment are the same or not materially different from the circumstances of a person without an impairment. Prima facie, the effect of this subsection is that a respondent cannot argue that the circumstances of X and the circumstances of Y are materially different because, for example, X needs a ramp for wheelchair access, an aide, a guide dog or extra time for an exam and Y does not. To allow these environmental ramifications of a disability to make the circumstances of X and Y different would in many instances make it impossible to prove a discrimination claim. Further, it is obvious that one, if not the only, reason people discriminate against others with disabilities is because they fear or resent the need to accommodate that disability.

The reasoning of QADT President Copelin in *Brackenreg* seems to take the effect of s 10(5) one step further, to imposing a responsibility on respondents to make ‘reasonable adjustment’<sup>42</sup> for people with disabilities. President Copelin describes the scope of QUT’s duty to students with disabilities thus:<sup>43</sup>

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

The reasoning behind this statement of obligation is not clearly stated but may nevertheless be inferred: if an educational institution discriminates because it fails or refuses to make a



reasonable adjustment, then it necessarily follows that for an educational institution not to discriminate it must make reasonable adjustment. President Copelin found in *Brackenreg* that there was no discrimination because QUT had made ‘reasonable adjustment to allow the complainant to compete on a level playing field’.<sup>44</sup>

The decision in *Brackenreg* echoes a trend evident in several decisions in cases brought under the DDA. Justice Mansfield in *A School v Human Rights and Equal Opportunity Commission and Another*<sup>45</sup> cautiously canvassed the idea that there may be an ‘obligation to take positive action’<sup>46</sup> to accommodate a person with a disability. Justice Mansfield recognised that three aspects of the DDA suggest such a positive obligation. First, the DDA stipulates that less favourable treatment of a person because they need support from, for example, a therapeutic device,<sup>47</sup> an assistant<sup>48</sup> or a guide dog<sup>49</sup> is discriminatory. It is thereby acknowledged in the DDA that special devices or aids may be necessary for a person with a disability. Secondly, the possible proof of the unjustifiable hardship exemption<sup>50</sup> is necessarily predicated on the fact that ‘services or facilities’ must be provided for a person with a disability. Thirdly, the DDA expressly provides that ‘circumstances ... are not materially different because of the fact that different accommodation or services may be required by the person with a disability’.<sup>51</sup> Justice Mansfield tentatively concluded<sup>52</sup>:

Thus it is not necessarily the case that where the DD Act applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services.

Various commissioners of the HREOC have embraced the view that there is a requirement to make ‘reasonable accommodation’. Commissioner Nettlefold in *Garity v Commonwealth Bank of Australia*<sup>53</sup> considered that the principle of reasonable accommodation ‘should be regarded as a central principle of disability discrimination law. The proper construction of the [DDA] shows that the principle of reasonable accommodation is contained in it’<sup>54</sup> Commissioner Nettlefold considered that the word ‘favourably’ as used in s 5 DDA ‘adverted to the notion of giving aid or help’.<sup>55</sup>

Commissioner McEvoy in her decision in *Mrs Cowell and Fleur Cowell v A School*,<sup>56</sup> remitted to the HREOC following the decision of Justice Mansfield in the Federal Court, outlined above, unequivocally accepted that action amounting to ‘appropriate accommodation’ of a student’s disabilities is required’:<sup>57</sup>

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

Despite argument from the New South Wales Education Department that there was no statutory basis for the existence of a reasonable accommodation test, ‘apart from the limited terms of s 5(2)’ and that educational institutions were motivated by ‘other statutory and policy reasons’ and not by any requirement of reasonable accommodation in their treatment of students with disabilities, Commissioner Innes, in *Hoggan*, concluded that ‘the accepted approach of the courts is that the respondent has an obligation to make a reasonably proportionate response to the person’s disability’<sup>58</sup>.

Both Commissioner McEvoy in *Cowell* and Commissioner Innes in *Hoggan* were influenced by the decision of the United States Court of Appeal in *Southern Community College v Davis*<sup>59</sup> and the decision of the New South Wales Court of Appeal in *Jamal v Secretary, Department of Health*<sup>60</sup>. The courts in both these cases grappled with the distinction between adjustments for disability that are ‘reasonable’, and therefore required of a respondent, and those which are ‘substantial’ and therefore not required. The courts in both *Davis* and *Jamal* did not acknowledge a ‘positive obligation’ or a duty of ‘affirmative action’ on a respondent’s part, preferring the more subtle terminology adopted by both Commissioners McEvoy and Innes: the requirement of a reasonably proportionate response.

The findings of Commissioner Innes in *Hoggan* suggest that the ‘reasonable accommodation’ concept could operate as both a sword and a shield in discrimination cases. Whereas in *Brackenreg* and *Cowell* it worked to defend claims of discrimination, in *Hoggan*, at least in the HREOC, it worked to prove a failure to provide for the complainant’s needs which was sufficient to amount to discrimination. While in *Brackenreg* and *Cowell* no discrimination was found in that the respondents’ actions were found to have been ‘reasonably proportionate’, in *Hoggan*, Commissioner Innes identified ‘three actions’ which the respondent should have taken to make its actions reasonably proportionate. Commissioner Innes was satisfied that if the following three actions had been taken, the respondent’s ‘actions would have been reasonably proportionate in the circumstances, and discrimination would not have taken place’<sup>61</sup>:

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

It could be argued that the actions specified are vague in their formulation: ‘more broadly consulted’, ‘more prepared to be flexible’, ‘taken more generally’. As such, the findings of Commissioner Innes in *Hoggan* were clearly likely to cause a measure of discomfort for educational institutions more used to more specific determinations that, for example, not providing wheelchair ramps, or extra time on exams or access to excursions is discriminatory. Still it must be noted that even in this decision, which could be seen as pushing the boundaries of the operation of anti-discrimination law in Australia, there is implicit acknowledgement that only a ‘reasonable’ response will be demanded of education providers and that, as such, there is no legislative guarantee that a student with an impairment will be accommodated in his or her school of choice.

Application for review by the Federal Court of the decision in *Hoggan* was made by the respondent pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Justice Emmett found for the Appellant, reversing the finding of the HREOC that Daniel Hoggan had been discriminated against in his treatment at the South Grafton High School. Justice Emmett found that the school’s treatment of Daniel was not discriminatory because it was on the ground of his behaviour and not on the ground of his disability, and that the Hearing Commissioner had erred in his interpretation of the definition of disability in s 4 DDA. The ‘behaviour’ controversy is discussed below. Justice Emmett’s decision was, subsequently, affirmed by the Full Federal Court.

The Full Federal Court, in its consideration of the circumstances of the *Hoggan* case seems to back away from imposing a requirement that a ‘reasonably proportionate response’ be made to an impaired student. Indeed, they back away from imposing any positive obligation on an alleged discriminator. They are particularly critical of Commissioner Innes’ findings of discrimination by the respondent school in their management of Daniel Hoggan. Commissioner Innes made these findings of discrimination in addition to finding that Daniel’s exclusion had breached the DDA<sup>62</sup>:

The findings of discrimination which were made by the HREOC in relation to acts or omissions other than expulsion go further and impose positive duties on the school to manage the conduct of the student, presumably regardless of cost or impact upon other school activities, without explaining why such measures would not involve a breach of s 22(2)(a) or (c). The critical points are that there is no criterion of reasonableness in s 22(2) and no equivalent of s 22(4) in relation to a student once enrolled. (para 26)

The reasoning of the Full Court is not transparent here. It could be argued that the Court is suggesting that to take positive measures to accommodate a student with a disability amounts to discrimination against students without disability. The implication appears to be that the ‘cost and impact’ of taking positive measures for the student with the disability will, to adapt the terminology of s 22(2)(a), ‘limit’ or ‘deny’ the ‘access’ of other students to ‘benefits’ provided by the school. Alternatively, to adapt the terminology of s 22(2)(c), the cost and impact will ‘subject’ other students to ‘detriment’. There are problems with this line of reasoning. Firstly, it is difficult to reconcile with s 5 DDA or with the terms of the unjustifiable hardship exemption in s 22(4). Section 5(1) spells out that discrimination occurs when a person with a disability is accorded less favourable treatment than a person without a disability in ‘circumstances that are the same or not materially different’. Section 5(2) stipulates that ‘circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability’. If this interpretation of the reasoning of the Full Court is accepted, then it must also be accepted that the provision of ‘different accommodation or services’ must be cost and impact neutral or risk ‘discriminating’ against persons who do not have a disability. Such a narrow reading of S 5 is surely against the spirit and purpose of the legislation. Further, while the unjustifiable hardship exemption is not available to an educational institution once a student is enrolled, its terms clearly indicate that parliament anticipated that the accommodation of a student with a disability would ‘cost’ in terms of money and resources because qualification for the exemption follows from such a cost being proved ‘unjustifiable’. Finally, it goes, perhaps, without saying, that discrimination, to contravene the DDA, must be on the ground of disability. Therefore ‘discrimination’, as contemplated by the Full Federal Court, against what the justices call ‘ordinary’ students<sup>63</sup> would not offend the DDA. This is surely a very clear explanation of ‘why such measures would not involve a breach of s 22(2)(a) or (c)’.

Alternatively, it could be argued that the Full Court is suggesting that the taking of ‘special measures’ by the school in their treatment of Daniel himself may offend 22(2)(a) or (c). The implication of this reading is that different treatment on the ground of disability is, prima facie, discriminatory. This reading, too, seems out of step with the intention and terms of the DDA. Again, the wording of s 5(2) DDA explicitly contemplates that special measures may be necessary to accommodate disability and, further, that a failure to provide such special measures may amount

to discrimination. Queensland case law suggests that different treatment is not automatically discriminatory treatment. In *P*, for example, Commissioner Keim postulates a two-stage test: first, it must be established that the complainant's treatment was different; secondly, it must be determined whether that different treatment is less favourable. Further the case law suggests that what constitutes less favourable treatment cannot be determined solely by objective measures; the subjective view of the complainant of their treatment is also influential in the decision making process. For example, in *L, P* and The HREOC finding in *Hoggan*, the complainants' subjective view of their treatment was important in proof of discrimination. Each of those complainants was found to have been discriminated against in that they were denied access to the school of their choice, even though expert evidence was that the school of choice may not have been the 'best' school for their particular educational needs. This reading also suggests a failure to understand the social model of disability and that disability, for an impaired person, may flow from institutions, such as schools, which cater for and aim to reproduce norms of behaviour. Finally, this reading suggests a failure to understand that equality amounts to 'treatment as equals' and not to 'equal treatment'<sup>64</sup>.

The Full Court, by its own analysis, is influenced in its reasoning on the 'positive duties' issue by the fact that 'there is no criterion of reasonableness in s 22(2) and no equivalent of s 22(4) [the unjustifiable hardship exemption] in relation to a student once enrolled'.<sup>65</sup> That is, the legislation does not explicitly envisage a limit on any obligation to accommodate a student with a disability once that student is enrolled, nor does it explicitly empower a court to balance competing demands for scarce resources according to what is 'reasonable' on the facts of any case. While earlier courts and tribunals have been able to parlay from the terms of anti-discrimination legislation, and its intent, a requirement - or, perhaps, a 'defence' - of 'reasonable accommodation' of, or, 'proportionate response' to a student with a disability, the Full Court in *Hoggan* does not. It could be argued, therefore, that the status of such a 'defence' is now in doubt. It could equally be argued, however, that such a defence is no longer necessary, at least for cases brought under the DDA, if the decision in *Hoggan* is extrapolated as authority for the proposition that the DDA places no positive duties on an education provider except those which cost nothing and have no impact on others.

The decision in the *Hoggan* case was appealed to the High Court. The appeal was heard on 29 and 30 April, 2003. Whilst it is, of course, difficult to predict the outcome of the appeal, it is nevertheless interesting to note, in relation to the concept of 'reasonable accommodation', the comments of Justice McHugh about the findings made by Commissioner Innes.<sup>66</sup> Justice McHugh speculated that 'It may be that nobody has looked at this case properly except perhaps the commissioner' and pointed to the fact that one of the original grounds of complaint, failure 'to provide special services and/or facilities to enable Daniel to attend school' was not comprehensively addressed by either the Federal Court or the Full Federal Court where the focus of the argument and of the findings related to the issue of the lawfulness of Daniel's suspensions and exclusion. Justice Mc Hugh queried whether, as a result, Commissioner Innes' decision stands in respect of damages awarded because 'the department failed to provide proper accommodation'. Justice McHugh characterised his query as 'a grenade in the ring'.<sup>67</sup> Certainly his oblique reference to the concept of 'proper accommodation' hints that the 'reasonable accommodation' issue is still a live issue.

## The Definition of Impairment: Impairment and Behaviour

Perhaps the main focus of the High Court hearing of the appeal in the *Hoggan* case was the issue of whether impairment includes the behaviour caused by that impairment. This issue was raised first, in Australia, in the context of Australia's first education discrimination case, the QADA case of *L*. In *L*, the respondent argued that the appropriate comparison, for deciding the question of whether *L* had been treated 'less favourably' than a person without *L*'s impairment, was between *L* and another student without *L*'s impairment but who exhibited *L*'s disruptive behaviours. The respondent contended that it was clear that *L* had not been discriminated against because she had been treated 'precisely as a student without her impairment but displaying similar disruptive behaviour would have been'.<sup>68</sup>

Commissioner Holmes rejected this argument, adopting the decision of the HREOC in *X v McHugh*,<sup>69</sup> and finding that aspects of behaviour that are manifestations of a person's disability are not to be 'treated as divorced from it'.<sup>70</sup> While Commissioner Holmes did not explicitly identify an appropriate comparator, the implication is that the treatment of *L* was to be compared with the treatment of a student without *L*'s impairment and the consequent disruptive behaviour. Thus, the comparator selected in *L* was, by implication, any other student at Beta school: *L* was suspended because of her impairment; other students without an impairment were not suspended; therefore, *L* was the victim of discrimination.

This issue was raised again in *P*. It was argued for the respondent in that case 'that a person without *P*'s impairment who exhibited such behaviour would be asked to leave Rasmussen School and, perhaps, subjected to more formal disciplinary procedures'.<sup>71</sup> The 'logic' of the argument extended to the claim that *P* had, therefore, been treated 'the same, or not materially different from, or even more favourably than a person without his impairment'.<sup>72</sup> Commissioner Keim, citing with approval the decisions in both *L* and *X v McHugh*, accepted the complainant's argument that 'those aspects of *P*'s behaviour which arise from his impairment must not be relied upon for the purposes of comparison'.<sup>73</sup> Commissioner Keim did identify the appropriate comparator for *P*:<sup>74</sup>

Section 10 requires a comparison of the way in which *P* has been treated with, say, another person of his age attending a state primary school in Townsville. In considering the circumstances of the notional other child, one assumes that that child is not displaying any of the behavioural and communication problems experienced and displayed by *P* ...

The High Court was invited to consider the comparator issue in *IW v The City of Perth*.<sup>75</sup> In that case, the complainant's contention was that he, and other people with AIDS, had been discriminated against by the City of Perth on the basis of characteristics generally imputed to people with AIDS. The respondent contended that while the notional person with whom the impaired person is to be compared is not impaired, he or she retains the characteristics imputed to the impaired person. Chief Justice Brennan and Justices McHugh, Dawson and Gaudron did not find it necessary to address this issue, rejecting the complainant's appeal on the grounds that he lacked standing and that the City had not failed to provide a service on the ground of impairment. Justices Toohey,<sup>76</sup> Gummow<sup>77</sup> and Kirby,<sup>78</sup> however, all considered the issue and all concluded that characteristics which, in the words of the relevant legislation, 'appertain generally, or are generally imputed to persons having the same impairment as the aggrieved person'<sup>79</sup> must be ignored for the purpose of the comparison. To do otherwise, would 'fatally frustrate'<sup>80</sup> the objects of anti-discrimination legislation.

In *IW* the characteristics sought to be separated, and not allowed to be separated, from the impairment were ‘imputed’, rather than actual. It could be argued that the case for not allowing the separation of actual characteristics from the impairment which causes them is surely even stronger and consistent with the approach taken by the QADT in *L* and *P*<sup>81</sup>.

The behaviour issue was raised for the first time in an education context under the DDA in *Hoggan*, and the issue has now been considered by the HREOC, the Federal Court, the Full Federal Court and the High Court. The High Court is, however, yet to deliver its judgment. Commissioner Innes, of the HREOC, found that the New South Wales Department of Education had discriminated against Daniel Hoggan and awarded him damages in the amount of \$25 000. Daniel was a thirteen-year-old boy affected by multiple medical conditions stemming from a brain infection in infancy. Significantly, the evidence was that this infection damaged the frontal lobes of Daniel’s brain, the part of the brain responsible for regulating behaviour. In his expert evidence, Dr Wise, explained: ‘the major part of his difficult behaviour would be disinhibited and uninhibited behaviour’. It was not in dispute that Daniel’s difficult behaviour was caused by his medical conditions. The complainant’s argument, therefore, was that Daniel’s disability, within the meaning of the Act, included his behaviour. As such, treatment of Daniel on the ground of his behaviour was, in effect, less favourable treatment of Daniel on the ground of his disability. Commissioner Innes accepted this argument.

In the Federal Court Justice Emmett held that the finding that Daniel’s disability included his behaviour was premised on an erroneous interpretation of the definition of disability in s 4 DDA. Justice Emmett concluded that the Hearing Commissioner had treated Daniel’s disability as falling within the parameters of paragraphs (f) and (g) of the definition:

- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction...
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour...

Justice Emmett held that the language of each of those paragraphs distinguished disability from its ‘symptoms’ and that it is only the ‘disorder, or malfunction’ (para (f)) or the ‘disorder, illness or disease’ (para (g)) which causes the symptoms, which ‘constitutes’ the disability for the purpose of the DDA, and not the symptoms.<sup>82</sup> Justice Emmett was of the view that it ‘would have been possible for the Parliament to define disability by reference to symptoms that have a particular cause. For example, it would have been possible to define disability as “disturbed behaviour that results from a disorder, illness or disease”<sup>83</sup>. Justice Emmett concluded that it was evidence of the Parliament’s intention that disability did not include its symptoms that the Parliament had not taken such an approach to the definition.<sup>84</sup>

Justice Emmett constructed a very technical line of reasoning in criticising the HREOC for treating the behaviour of Daniel as ‘necessarily being the manifestation of his disability’. Justice Emmett held that while Daniel’s behaviour ‘was in fact the result of or caused by his disability, that behaviour is not necessarily caused by or the result of a disability such as the disability of the complainant’<sup>85</sup>. Justice Emmett indicated that, ‘The position might have been different in a case where the disability necessarily resulted in the relevant behaviour’<sup>86</sup>. The implication of this difficult line of reasoning appears to be that where the symptom of a disability – such as challenging behaviour, for example – can be caused by something other than disability – such as wilfulness, or boredom, for example – then that symptom can never be regarded as part of

the disability for the purpose of attracting the protection of the DDA. The ramifications of this reasoning have the clear potential to erode the protective scope of the DDA. Could an education provider argue that because learning slowly can be caused by factors other than disability – laziness, for example – that a person with an intellectual impairment affecting their ability to learn does not have a disability within the meaning of the Act?<sup>87</sup> Could it be argued that because seizures – a form of ‘disturbed behaviour’ – can be caused by factors other than impairment – blood sugar irregularities, high temperature, drug reactions, shock, physical trauma, for example – that a person with epilepsy does not have a disability for the purposes of the Act? It is disappointing that the Full Federal Court did not consider the soundness of this line of reasoning in its judgment in the *Hoggan* case.

Justice Emmett’s narrow interpretation of disability allowed him to conclude that that relevant comparator for the purpose of determining whether Daniel Hoggan had been treated less favourably than a person without his disability would have been in the same circumstances, was a person who exhibited Daniel’s ‘challenging behaviour’, but who did not have Daniel’s ‘disability’: ‘If such a hypothetical student would not have been suspended and would not have been exclude from the School, it would follow that the Complainant was treated less favourably than such a hypothetical student. However, if such a hypothetical student would have been treated in the same way, there was no discrimination’<sup>88</sup>. The School was able to demonstrate that the ‘hypothetical student’ would have been treated in the same manner as Daniel Hoggan, and, therefore, that there had been no discrimination.

The Full Federal Court essentially adopted the reasoning of Justice Emmett on the disability definition and affirmed his decision that there had been no actionable discrimination against Daniel Hoggan<sup>89</sup>:

In our opinion...Justice Emmett was correct in holding that HREOC had misdirected itself as to the proper construction of s 4 of the Act in regarding the conduct of the complainant which occasioned the actions of those in charge of the school as part of the disability of the complainant. In our opinion, that conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes. The same may be said of subs (f). The other subsections do not involve conduct.

The Court also affirmed the decision of Justice Emmett that the appropriate comparator is a hypothetical person exhibiting Daniel’s behaviour but without his ‘disability’: ‘like conduct is to be assumed in both cases’<sup>90</sup>. The Full Court characterised the approach of the HREOC to the comparator question as ‘capricious’ and expressed the view that, even if conduct is separated from the disability which causes it, it is still ‘at least possible that enquiry may show that the complainant was treated more harshly than another exhibiting similar conduct at school, but without disability would have been’<sup>91</sup>. The court also held that, by contrast, the consequence of the argument that disability includes conduct would be that a lawful exclusion of a student with a disability would not be possible: ‘any exclusion from ordinary classes, or special physical or other restraints imposed as a price of attendance at ordinary classes, would be a breach of s 22(a) or (c), as the anti-social behaviour caused by the brain damage would be the cause of the special and detrimental treatment’<sup>92</sup>.

In reaching its decision, the Court was not inclined to follow case law referred to on behalf of the appellant, on the basis that there was no decision available which would ‘satisfactorily resolve the issue’<sup>93</sup>. The Court distinguished the decision in *X v McHugh* as ‘it arose in an employment setting under a previous statute and [asserted] the result without setting out any satisfactory comparative analysis such as is required by s 5 or its equivalent’<sup>94</sup>. The court also declined to follow the view expressed by some members of the High Court in *IW*, that ‘characteristics’ which attach to a disability must be ignored for the purpose of determining the relevant comparator: ‘the dicta of Toohey J and Kirby J’ was ‘directed to a different issue in a different statutory context’<sup>95</sup>.

The Full Court stated, in reference to line of cases in which ‘the issue of what constitutes the proper construction called for by discrimination legislation has been much discussed’, that ‘it is difficult not to conclude that some of the reasoning has been affected by a view as to outcome’<sup>96</sup>. It could be argued that the reasoning of the Full Court in *Hoggan* has been similarly affected. The Court was clearly concerned about the impact of Daniel’s inclusion on other students and on staff at the South Grafton High School<sup>97</sup>:

It must be steadily borne in mind that the expulsion of the complainant followed repetitive anti-social and violent conduct towards other students and staff which was plainly unacceptable in a primary [sic] school. It was disturbing to the function of education and threatened the safety of other students and staff. Those responsible for administration of the school owed a duty of care to the other students in the school, the teachers and the teacher’s aides, with potential liability for any breach of that duty (*Commonwealth v Introvigne* (1981) 150 CLR 258).

Later in the judgment the Court suggested that if the law were applied so as to recognise a right to inclusion for Daniel Hoggan, and others like him, then staff and students ‘injured’ by this inclusion would be without redress – that is, they could not remove the source of their harm, as ‘the school authorities are hamstrung by the law in adopting normal measures of control’<sup>98</sup>.

While the Court implied a very strong policy argument for finding that the exclusion of Daniel Hoggan was not unlawful, ultimately it relied on a dry and technical statutory interpretation argument to deliver what it clearly regarded as the just ‘outcome’. Somewhat ironically, the Court concluded that, rather than deliver a judgment ‘affected by a view as to outcome’, it is preferable to adopt ‘the safest course [which] is to be guided by the ordinary meaning of the words of ss 4 and 5 of the Act as they apply to the facts of this case.’<sup>99</sup>

It is, perhaps, a fair assessment of the Full Court decision in *Hoggan*, that a practical distinction is implied for the complainant, between disability caused by society and disability caused by his particular medical condition. The outcome for the complainant is that he has no recognised right to attend the school of his choice. The finding of the Full Court that there was no discrimination on the ground of disability effectively means that the inability to attend the school of choice is not on account of the education department’s response to complainant’s behaviour but on account of the impairment-induced behaviour itself. While Commissioner Innes in the HREOC hearing of Daniel’s case had squarely located the cause of Daniel’s inability to attend the South Grafton High School, in the failure of the school to prepare for and to adapt to Daniel’s educational and behaviour management needs, The Full Court attributed causation to Daniel’s (impairment induced) behaviour. While the enquiry in the HREOC concentrated not only on the effects of Daniel’s inclusion on others, but also on the demonstrated failure of the school to adapt



to Daniel's needs, the enquiry in the Full court concentrated only on what the court characterised as the 'draconian consequences'<sup>100</sup> of the inclusion of Daniel for the school community. Thus, the Full Federal Court has not even entertained the possibility that Daniel's disability, as expressed in his inability to attend his chosen school, could be even partly the result of an inflexible society.

In his submissions to the High Court, the Solicitor-General for the State of New South Wales maintained the same argument for the separation of disability from its consequences as was run before the Federal Court. The Commonwealth Solicitor-General suggested a refinement of the argument – that the disability, contemplated by paragraph (g) of the definition of disability, is not the 'underlying condition' which causes the behaviour, rather it is the 'inability to control the behaviour'. The relevant comparator, on this construction, becomes the student who does have the ability to control his or her behaviour but nevertheless does not. This argument reflects an extraordinarily bald understanding of the politics of disability, in that it focuses the definition process on what is, perhaps, the most sensitive aspect of the issue – the fact that the child with the disability 'misbehaves' involuntarily while the behaviour of the child without the disability is wilful. The ramification of this construction, even more clearly than with the construction advanced in the lower courts, is that the child, in fact, if not in law, is excluded because of their disability. Justice Kirby responded to counsel's argument with a lament that, 'It is a lawyer's fetish to cut things up into little bits but that is not the way the statute is intended to operate'.<sup>101</sup> Justice Gummow, however, stated that he regarded as 'vital the matters which the Court has been debating with the Solicitor-General for the Commonwealth'.<sup>102</sup>

It is difficult to predict the definitional approach which will prevail in the High Court. It can be inferred, however, that the understanding of disability displayed in the Federal Court and Full Federal Court judgments, is based on stereotypical assumptions about the nature of disability and about the place of people with disabilities within society. Further, their failure to consider the evidence of further efforts which the state could have made to accommodate Daniel suggests a denial of the policy of anti-discrimination legislation to remove barriers to inclusion which confront people with disabilities. After Justice Emmett's judgment in the Federal Court, peak disability action body, NCID, lamented the demonstrated 'lack of understanding' of the nature of disability<sup>103</sup>:

It appears that the court has reversed the HREOC decision based on a legal interpretation of 'disability' which separates disability from the effects of that disability on daily life tasks and behaviour. Such a separation has simply provided institutions set on continuing discriminatory practices with a technical loophole that will make complaints of disability discrimination increasingly difficult'.

Further still, the Hoggan case is evidence of the State's willingness to allocate substantial resources to legal actions designed to exclude people with disabilities from mainstream society, at a time when urgent claims for financial assistance to facilitate inclusion are pressed, and in the context of a worldwide policy trend towards inclusion. The application for costs against Hoggan, and the willingness of the Federal Court to award costs against Hoggan, is a further disincentive to pursue a 'right' to inclusion and a further indication of exclusion practice which is dissonant with inclusion policy and of institutional resistance to the accommodation of disability.

## The Ramifications of the *Hoggan* Case for Queensland Law

The ramifications of the *Hoggan* case for Queensland law remain unclear. While Paragraphs (f) and (g) of the DDA definition of disability are very similar to paragraphs (c) and (d) of the QADA definition of impairment, there is not the same imperative to narrow the definition under the QADA that there is under the DDA. This is because under the QADA the unjustifiable hardship exemption is available to educational institutions after the point of enrolment.<sup>104</sup> Under the DDA this exemption is only available at the point of enrolment<sup>105</sup>. It is interesting to note that both counsel for the appellant and counsel for the HREOC argued, before the recent High Court hearing of the appeal in *Hoggan*, that the omission of the exemption, post enrolment, amounted to a ‘deficiency’ in the drafting of the DDA.<sup>106</sup> Because of the availability of the unjustifiable hardship exemption, it is not necessary in claims brought under the QADA, to separate behaviour from disability in that the QADT has a more direct route to finding no compensable discrimination by the respondent. The decisions in *L*, *KvN School* and *P* reveal that, in Queensland, tribunals have been able to accommodate the arguments of both parties in that they can find both that discrimination does exist and that it is not unlawful. The Queensland scheme allows the tribunal to make a ‘show’ of understanding and accepting the discrimination faced by a complainant, in finding that discrimination has occurred. Nevertheless, it must be conceded, it is doubtful that such a ‘show’ delivered any more comfort to the complainants in *L*, *K* and *P* than the outright denial of discrimination delivered by the Full Federal Court to Daniel Hoggan. It can be concluded, however, that the Queensland scheme, as it has been applied to date, is more ‘honest’ than the dry definitional approach adopted by the Full Federal Court: while the balancing of competing rights is expressly provided for in the Queensland legislation, there is little doubt that the Full Federal Court’s reading down of the definition of disability was a circuitous method of achieving the result that the court regarded as ‘fair’. Without any express statutory power to do so, the Court balanced the competing rights and reached a conclusion as to the just outcome; the Court then manipulated the legislation to allow that outcome to be delivered. It is significant that the Full Court expressly contemplated that the availability of the unjustifiable hardship exemption might be relevant to the definition of disability when considering, briefly, the issue of whether it would have been unlawful to refuse to enrol Daniel Hoggan on the basis of his problem behaviour:

The disorder as such [of Daniel Hoggan] was ultimately not relied upon by the school in order to prevent enrolment (cf s 22(1)), notwithstanding the potential for anti-social conduct which it involved. If it had been, then it may be that there would have been discrimination subject to the operation of s 22(4). We do not need to decide that question.

The extraordinary implication of this statement by the Full Court seems to be that there may be two legitimate meanings of disability, as defined in paragraphs (g) and (h) – one which includes behaviour caused by the disability and one which does not - and that the meaning may change according to the point in the legislation at which it becomes relevant. This implication is surely inconsistent with the recognised principles of statutory interpretation.

## Conclusion

The present state of the law in relation to discrimination against people with disabilities suggests that the promise of equal opportunity in access to, and experience of, education has proved illusory. The key object of the Queensland legislation is to protect Queenslanders from ‘unfair’ discrimination.<sup>107</sup> Case law suggests that discrimination will not be ‘unfair’ where the respondent

can prove that accommodating a student would impose ‘unjustifiable hardship’, where the student’s impairment and not the school’s response to that impairment is demonstrated as the ‘cause’ of a student’s ‘restriction’ and where a school has shown a ‘reasonably proportionate response’ to a student’s impairment. While the legislation is premised on an understanding of disability as the by-product of prejudice and inflexibility, it will not, it seems, compel social change to accommodate difference where to do so is ‘unreasonable’.

The recent case of *Hoggan* has created a climate of uncertainty, and even, perhaps, hostility, in relation to the issue of inclusive education. The case is particularly controversial, firstly, for the misunderstanding of disability demonstrated by the Federal Court and the implicit denial of any broad social obligation to mitigate disability. Secondly, the case is controversial for the Federal Court’s dry dissection of the definition of disability to deliver what the Justices perceived as a ‘just’ outcome for all concerned.

It appears from the argument before the High Court in the *Hoggan* case that the Court has been handed an opportunity to determine not only the scope of the definition of ‘disability’, at least for the purposes of the DDA, but also to give a clearer idea of the extent to which education providers, and by implication, society, must act to accommodate the particular needs of students – that is, a clearer idea of what is and is not ‘unfair’ discrimination. To this extent, the decision in *Hoggan* can be expected to have important ramifications for the operation of anti-discrimination law in every Australian jurisdiction.

## Keywords

Anti-Discrimination Law – Education Law - *Anti-Discrimination Act 1991* (Qld) –*Disability Discrimination Act 1992* (Cth) - discrimination in education against people with disabilities – definition of disability - definition of impairment – models of disability – rights of people with disabilities – reasonable accommodation – unjustifiable hardship

## Endnotes

1. Barnes, C. (1991) *Disabled People in Great Britain: A Case for Anti-Discrimination Legislation*. London: Hurst & Co, p 232.
2. Barton, L. (1996) *Sociology and disability; some emerging issues*. Barton, L. ed. *Disability and Society: Emerging Issues and Insights*. London: Longman, p13
3. The social model of disability rejects the view that disability is caused by the failure or the inability of a person with an impairment to adapt to their surroundings. Thus, under the social model, the cause of disability is not an individual person’s deficiency or difference, but society’s failure to be flexible, tolerant and inclusive. Strategies for the management of disability are not so much medical and technical as social and political. Resources such as health care, accommodation and education are allocated not according to objectively ascertained need but as rights. A recent assessment of the current status of the social model as disability theory is provided by Tregaskis, C. (2002) *Social Model Theory: the story so far...* *Disability and Society*, 17(4): 457-470
4. The QADA serves the purpose of exemplar of Australian anti-discrimination legislation. All states and Territories and the Commonwealth have enacted anti-discrimination legislation to protect people with disabilities from unlawful discrimination: insert. Where, in respect of the issues raised in this article, the QADA differs significantly from

- legislation in other Australian jurisdictions, the difference will be noted.
5. Under the medical model, impairment, whether physical, intellectual or psychiatric, imposes limitations on those it 'afflicts'. Impairment is equated with inferiority and abnormality. Not only the treatment of the impairment, but also the management of the resultant disability, are the domain of medical doctors and other 'experts'. The medical model casts people with impairments as dependant rather than independent, and views the allocation of resources to people with impairments as determined by needs rather than rights. Thus, the model is associated with a 'charity' rather than with a 'rights' approach to the provision of health, educational and care facilities for people with impairments. The medical model has attracted criticism as perpetuating the myth – or, some may claim, the unfortunate reality - of 'normal' society where difference justifies marginalisation, if not exclusion. It has been further criticised as creating a culture of dependency among people with disabilities, denying both the right to and the skills to demand self-determination. Perhaps the most seminal criticism of the medical model is that it fails to acknowledge the disabling effect on people with impairments of a society built to cater for norms of ability and behaviour. Thus, the solutions to disability posited under the medical model are medical and technical, not social and political. See Marks, D. (1999) *Disability: Controversial Debates and Psychological Perspectives*. London: Routledge, chapter 3 for a comprehensive discussion of the scope and impact of the medical model.
  6. See Oliver, M and Barnes, C (1998) *Disabled People and Social Policy: From Exclusion to Inclusion*. London: Longman, p 13 ff. Barnes and Oliver provide a thorough summary of the meanings attributed to the terms impairment and disability by a variety of institutions including the UN and various organisations 'controlled and run by disabled people'.
  7. Barton (1996) p 8; Oliver and Barnes (1998) p 13
  8. See Barnes and Oliver at pp 16-19
  9. These are the definitions preferred for the present article. The phrases, 'person with an impairment' and 'person with a disability', will also be used instead of the phrases, 'impaired person' and 'disabled person'. This usage is consistent with that of Queensland Government departments, such as Disability Services and Education Queensland, and with a widespread preference for emphasising that people with disabilities are 'people first'.
  10. The definition of impairment in the QADA is considered below.
  11. The differences between the QADA and the DDA definitions are considered below.
  12. Queensland Hansard, 26 November 1991. Contrast, for example, the speeches of the member for Condamine, at p3365, and of the member for Tablelands, at p3586. The former reveals some appreciation of the difference between impairment and disability, while the latter uses the term 'disability' more indiscriminately.
  13. That discrimination can arise out of attitudes is acknowledged in the second reading speech by the Attorney General, Dean Wells, supporting the Anti-Discrimination Bill (1991) (Qld). Queensland Hansard, 26 November 1991, p 3195.
  14. It is noted, that in one respect the Queensland definition (And that of SA, WA, ACT and NT) is less generous than that in the Disability Discrimination Act 1992 (Cth) (DDA), the Anti-Discrimination Act 1998 (Tas) and the Anti-Discrimination Act 1977

(NSW) (NSWADA). Both the Commonwealth and the Tasmanian legislation prohibit discrimination on the basis not only of present or past disability but also on the basis of a disability that may exist in the future. NSW legislation prohibits discrimination on the basis of a disability that a person will have, or that it is thought a person will have in the future (NSWADA s 49A(c)). The DDA definition was tested in *Greg Beattie* (on behalf of *Kiro and Lewis Beattie*) v *Maroochy Shire Council* [1996] HREOCA 40 (20 December 1996).

15. How this section has been parlayed into a positive duty to make ‘reasonable accommodation’ of a person who is impaired will be considered below.
16. The meaning of the term ‘less favourable’ was considered in the QADA context in *L v Minister for Education for the State of Queensland* (No. 2) [No. H39 of 1995] QADR Vol 1 207, and in *P v Director-General, Department of Education* [No. H53 of 1995] QADR Vol 1 755.
17. Although ‘unjustifiable hardship’ is often characterised as a defence, technically, it is created as an exemption in the QADA, and in other Australian anti-discrimination legislation. Consideration of ‘unjustifiable hardship’ arises only after a determination that a prima facie case of unlawful discrimination is made out. Proof that special services or facilities are required by the complainant, and that the provision of those services or facilities would impose ‘unjustifiable hardship’ on the respondent, then has the effect of exempting the respondent from the operation of the Act in the case under consideration. This sequence is spelt out in the case of *P*.
18. In relation to educational institutions, the unjustifiable hardship exemption is created in s 44 QADA. Unjustifiable hardship is defined in s5.
19. *Queensland Hansard*, 26 November 1991, p 3195. Part 5 of the QADA contains several general exemptions for discrimination. Some of these also have the potential to limit the circumstances when impairments must be accommodated. Both the public health (s107 QADA) and workplace health and safety (s108 QADA) exemptions have been advanced by respondents in cases of alleged impairment discrimination. Both these exemptions apply in situations where the accommodation of people with disabilities may impinge on the safety of others, requiring the law to provide for a balancing of competing rights and freedoms. See, for example, *I, P*, and the DDA case, *Beattie*.
20. Re unjustifiable hardship see s 5(b) and (c); re indirect discrimination see s 11(2)(b) and (c).
21. It is notable that in New South Wales, unlike other Australian jurisdictions, ‘private’ educational authorities are saved from the operation of the Anti-Discrimination Act 1977 (NSW). See s 49L(3)(a) and the definition of ‘private educational authority’ in s 4. The legislation, including its broad based exemption for ‘private’ educational institutions, is currently under review. See Law Reform Commission of New South Wales (1999) Report 92-Review of the Anti-discrimination Act 1977(NSW).
22. *L v minister for Education for the State of Queensland* (No. 2) [No. H39 of 1995] QADR Vol 1 207; *P v Director-General, Department of Education* [No. H53 of 1995] QADR Vol 1 755; *K v N School* (No. 3) [No. H54 of 1996] QADR Vol 1 207
23. *I v O’Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 (31 January 2001).
24. [1999] QADT 1 (20 December 1999)

25. Brackenreg at 4.2.1.3(vii)
26. s 144 QADA empowers the QADT to grant interim orders to protect complainants' interests before the referral of a complaint to the QADT. It was held by the Federal Court in *Carson v Minister for Education for Queensland and others* (1989) EOC 92-269, per Spender J, a race discrimination case, that the equivalent provision in the Race Discrimination Act empowered a tribunal to make orders equivalent in effect only to a prohibitory injunction, not to a mandatory injunction.
27. Brackenreg at 4.2
28. Brackenreg at 4.2.2
29. Brackenreg at 4.2.2.4
30. Brackenreg at 4.2.1.3
31. Brackenreg at 4.2.2.4.iv
32. [1998] HREOCA 19 (24 June 1998)
33. W at 4.1
34. W at 4.1
35. W at 7
36. [2000] HREOC No97/168 (10 October 2000)
37. Cowell at 1
38. Cowell at 5.2.3
39. Cowell at 5.2.3
40. See below: A 'reasonably proportionate response'.
41. Oliver, one of the first to articulate the social model, acknowledges the validity of this criticism and concedes that 'most disabled people' can cite examples of how their impairment has created restrictions: Oliver, M. (1996) *Understanding Disability: From Theory to Practice*. London: Macmillan, chapter 3.
42. Brackenreg at 4.2.2.4(v)
43. Brackenreg at 4.2.2.4(v)
44. Brackenreg at 4.2.2.4(v)
45. [1998] 1437 FCA (11 November 1998)
46. A School at 12
47. s 7 DDA
48. s 8 DDA
49. s 10 DDA
50. s 22(4) DDA
51. s 5(2) DDA; compare with S10(5) QADA
52. A School at 13
53. HREOC No H97/191 (25 January 1999)
54. Garity at 6.4
55. Garity at 6.4
56. [2000] HREOC H97/168 (10 October 2000); also known as *AJ v A School*

57. Cowell at 5.2.2
58. Hoggan at 6.3. This case was subsequently the subject of judicial review in the Federal Court. The Federal Court decision was then appealed to the Full Federal Court and, ultimately, the High Court. The High Court heard the appeal on 29-30 April 2003.
59. 442 US 397 (1979)
60. (1988) 14 NSWLR 452
61. Hoggan at 6.4.
62. Full Court decision in Hoggan at para 26
63. At para 26
64. Dworkin, R. (1978) *Taking Rights Seriously*. 2<sup>nd</sup> edition. London: Duckworth
65. At para 26
66. *Purvis v State of NSW (Department of Education) & Anor S423/2002* (30 April 2003) <http://www.austlii.edu.au/au/other/hca/traanscripts/2002/s423/2.html> (accessed 02/06/2002) per McHugh, J, at p 4
67. Counsel for the HREOC argued, before the court, a different version of the accommodation obligation. His argument was that while there is a positive obligation on educational institutions created by s 5(2) DDA, the limit on that obligation is not reasonableness, which is an issue to be raised in the context only of the unjustifiable hardship exemption, rather the limit is reached when ‘somebody who is incapable, for whatever reason, of enjoying or benefiting from the education provided and requires a totally qualitatively different form of education cannot be accommodated and will therefore be outside the operation of section 5(2)’ (HCA 29 April 2003, at p37). The enquiry becomes a factual one into ‘whether or not the child can be accommodated within the normal range of behaviour acceptable in the mainstream school’ (at p 38) The implication of ‘acceptable’ norms of behaviour in this spin on the legislation is surely antithetical to the social model of disability.
68. L at 211
69. *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92-263.
70. L at 211
71. P at 778
72. P at 778
73. P at 778
74. P at 782
75. (1997) 146 ALR 696
76. IW at 719
77. IW at 725
78. IW at 745-748
79. Equal Opportunity Act 1984 (WA)
80. Words of Sir Ronald Wilson quoted in IW at 719 per Toohey J, at 748 per Kirby J
81. The decision in IW was, however, distinguished by the Full Federal Court in Hoggan.
82. Federal Court decision in Hoggan at para 37.

83. At para 38
84. At para 38
85. At para 45
86. At para 36
87. It should be remembered, on this point, that the paragraph of the definition of disability, in s 4 DDA, which relates to learning difficulties, paragraph (g), is considered By Justice Emmett and, subsequently, by the Full Federal Court, to demonstrate a statutory intention to separate disability from its consequences: thus 'learning differently' is not a protected disability, only the 'disorder or malfunction' which causes it.
88. At para 52
89. At para 28
90. At para 29
91. At para 29. See also para 34
92. At para 26
93. At para 24
94. At para 24.
95. At para 24. See also paras 31-33.
96. At para 35
97. At para 25
98. At para 27
99. At para 35
100. At para 27
101. *Purvis v State of NSW (Dept of Education and Training) and Anor S423/2002 (30 April 2003)* at 13.
102. At 20.
103. NCID (2001) Human Rights Legislation fails People with Disability and their Families: We need a better way of supporting a fair society. NCID Media Release, 4 September
104. It is also interesting to note that the exemption is available past the point of enrolment under the Anti Discrimination Act 1977(NSW). See s 49L(5).
105. In the Hoggan case, the only available exemption was that created by s 55 DDA: that is a special exemption granted after application to the HREOC. While the Appellant argued that s 55 could be available to provide relief should the inclusion of a student with behaviour problems create special difficulties, the Full Court rejected this argument, finding s55 'ill-designed to deal with such an issue'. The Court pointed out that the delay which would be involved in making the application would leave the applicant school vulnerable to continuing problems created by the behaviour in issue, and that the ultimate decision maker would 'not have the responsibility for managing the student'. Counsel for the appellant again asserted the availability of the s 55 exemption before the High Court.
106. 29 April 2003, at 7 and at 40.
107. See preamble to QADA.