

Disability Discrimination, Unjustifiable Hardship and Students with Disability-Induced Problem Behaviour

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The unjustifiable hardship exemption is, perhaps, the most commonly argued exemption in the context of claims of discrimination in education against people with disabilities, and the most controversial. One parent, whose daughter was denied a remedy for discrimination on the basis of the exemption, has dubbed it a 'lucky dip'.¹ The discretionary nature of the balancing process required of hearing tribunals by the unjustifiable hardship enquiry was highlighted by Tamberlin J, of the Federal Court, as involving 'the weighing of indeterminate and largely imponderable factors and the making of value judgments'.² This discretionary element makes it difficult to be specific about the scope of the exemption. Further, each case will turn on an individual set of facts. As the Queensland Anti-Discrimination Tribunal (QADT) has pointed out, 'it is stating the obvious to say that questions of unjustifiable hardship can only be determined by reference to the peculiar features of the case in question. There is such a range of variables, including the type of disability, the characteristics of the school, and the attitudes of the people involved, as to make comparisons pointless'.³ Case analysis does, however, allow some generalisations to be made about when the exemption will be applied. Analysis also reveals several problems with the exemption's application to the situation of students with impairment related problem behaviours. The focus of this paper is on such 'behaviour' cases.

A line of decisions under the *Anti-Discrimination Act 1991* (Qld) (QADA), *L v Minister for Education for the State of Queensland*,⁴ *K v N School*,⁵ and *P v Director General, Department of Education*,⁶ suggests three problems with the applicability of the unjustifiable hardship exemption in the situation where the hardship is alleged in the 'detriment' caused to staff and students who work and study alongside the student with the challenging behaviour. Although in each of the Queensland cases unjustifiable hardship was proved on the basis of such 'detriment', the process of proof was, in principle, flawed. First, anti-discrimination legislation requires that the unjustifiable hardship must arise from the *provision of goods or services* to a student with a disability.⁷ Secondly, hardship must be to the *educational authority*.⁸ Thirdly, the solution posited by schools in each case, and, by implication, regarded as appropriate by the QADT, was to relocate 'problem' students from their mainstream school to a special school, where, presumably, the same problem behaviours would arise and impose the same 'detriment' on staff and students.

Availability of the Unjustifiable Hardship Exemption

The unjustifiable hardship exemption is available to respondents, in one form or another, in most Australian anti-discrimination legislation.⁹ Where it can be demonstrated that the accommodation of a person with a disability would cause unjustifiable hardship to a respondent, a prima facie case of discrimination will be excused as lawful. The exemption is frequently argued on the basis of hardship arising from the financial cost of supplying the extra services and facilities which may be required to accommodate the impairment of a person.¹⁰ In cases involving the provision of

education to a student with an impairment another ground which is repeatedly raised, however, is the 'hardship' created for the school community by problem behaviour caused by a student's impairment.

Proof of Unjustifiable Hardship.

A three-stage process is to be applied in determining whether inclusion of a person with impairment causes an unjustifiable hardship.¹¹ The first step is to establish that special services and facilities are, in fact, required to accommodate the complainant. The second step is to establish the extent of the special services and facilities which are required. The third step involves a balancing of multiple circumstances, specified in the legislation, in order to determine whether any 'hardship', caused to the respondent by the provision of the services and facilities, is 'unjustifiable'.

The Nature of Special Services and Facilities.

In the majority of education cases, the usual variety of special services or facilities made available to students with disabilities encompasses specialist support and environmental modifications. In the *Disability Discrimination Act 1992* (Cth) (DDA) case, *Finney*, for example, the complainant's accommodation at the respondent school, it was argued, would have required some modification to the schools environment to accommodate her wheelchair. In the QADA cases, *L*, *K* and *P*, specialist teacher and aide support were required.

Balancing Relevant Circumstances.

The precise nature of the guidance provided in the legislation as to relevant circumstances in the unjustifiable hardship enquiry varies from jurisdiction to jurisdiction. Generally, the legislation countenances consideration of the financial cost of accommodating a particular student, any benefit and any detriment which would follow from that student's inclusion and the nature or effect of the disability. Further, the legislation authorises consideration of the ramifications of inclusion for 'all concerned', not just the educational institution or authority. The DDA, for example, specifies the following considerations as relevant:¹²

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
- (b) the effect of the disability of a person concerned;
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities – an action plan given to the Commission under section 64.

The QADA provisions differ from the DDA provisions, but it is clear that there are strong similarities between the two sets of relevant circumstances. It is significant, for the purpose of this paper, that both allow consideration of benefit or detriment caused 'to all concerned'. The QADA relevant circumstances are as follows:¹³

- (a) the nature of the special services or facilities;
- (b) the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged;

- (c) the financial circumstances of the person;
- (d) the disruption that supplying the special services or facilities might cause; and
- (e) the nature of any benefit or detriment to all people concerned.

Purvis v State of New South Wales (Department of Education and Training).¹⁴

Under the DDA, the unjustifiable hardship exemption, to date, has only been litigated in the education context in respect of a student with a physical impairment seeking enrolment.¹⁵ The operation of the unjustifiable hardship exemption as created in the DDA has, however, been the recent subject of discussion by the High Court in the disability discrimination in education case, *Purvis*. The DDA differs from other Australian legislation in that, at present, the exemption is only available to educational institutions to resist an allegation of discrimination arising from a refusal to enrol a student with a disability.¹⁶ The exemption is not available to resist allegations of discrimination arising from the treatment of a student after he or she is enrolled. Amendments to the DDA which extend the scope of the exemption to the post-enrolment period are, however, presently before parliament.¹⁷ Once these amendments have been passed, the long anticipated *Disability Standards for Education* will be finalised and implemented.¹⁸ The draft *Standards* make the unjustifiable hardship exemption available both to resist an enrolment and to justify the exclusion of an enrolled student.¹⁹ The object of the *Standards* is to ‘clarify and elaborate... legal obligations in relation to education’²⁰ and the effect of the *Standards* is that compliance with the *Standards* by an education provider will amount to compliance with the DDA.²¹

The facts of *Purvis* are that Daniel Hoggan, a year seven student, was expelled from South Grafton High School in northern New South Wales on account of violent behaviour. On several occasions he had kicked or punched staff or other students at the school. The uncontroversial evidence was that Daniel’s uninhibited and disinhibited behaviour was caused by a brain injury sustained in infancy. The allegation was that, as Daniel’s exclusion was because of his behaviour, and as his behaviour flowed from his disability, his exclusion was, in real terms, because of his disability and, as such, unlawful discrimination. As the complaint was made under the DDA, the State could not argue that including Daniel caused unjustifiable hardship and that, as a result, he was lawfully excluded. Indeed, it could, and has, been suggested that the applicant chose to rely on the direct discrimination provisions of DDA²² precisely because the exemption was not available.²³

The determination of whether discrimination has occurred requires a comparison between the treatment of a person with a disability and the treatment of a person without a disability in ‘circumstances which are the same or not materially different’. Earlier Australian anti-discrimination decisions had held that, for the purpose of that comparison, in cases involving challenging behaviour caused by the disability, the behaviour could not be taken into account in the comparison.²⁴ That is, the treatment of the person with the challenging behaviour was to be compared with the treatment of a person without the challenging behaviour. Such a comparison, of course, made it easier for the applicant to prove that they had been treated less favourably. In Daniel Hoggan’s situation, for example, it was easy to show that a student who had not exhibited violent behaviour would not have been expelled. At first instance, in the *Purvis* case, the Human Rights and Equal Opportunity Commission (HREOC) found that this was the comparison it was required to make and found for Daniel Hoggan.²⁵ Ultimately, however, a majority of the High Court held that, even though Daniel’s behaviour was part of his disability, it was appropriate to

take his behaviour into account for the purpose of the comparison. Thus, the required comparison in Daniel's case, according to the High Court formula, was between the treatment of Daniel with his disability-induced violence and the treatment of another student without disability but who exhibited similar violence. According to this formula, it is clear that applicants with behaviour problems related to disability will have a difficult task proving direct discrimination in the future.

In their minority judgment in *Purvis*, McHugh and Kirby JJ considered how the unjustifiable hardship exemption might assist educational authorities seeking to refuse enrolment to students with problem behaviour such as that displayed by Daniel Hoggan. As noted above, it is a relevant circumstance, for the purpose of proof of unjustifiable hardship, that 'detriment' is likely to be suffered by 'any persons concerned' as a result of the accommodation or inclusion of a person with a disability. McHugh and Kirby JJ expressed the view that such detriment 'would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides' and, further, that it would allow 'consideration of the duty of care owed by the educational authority to the other pupils'.²⁶

The inference to be drawn from the minority judgment of McHugh and Kirby JJ, in *Purvis*, is therefore, that the State would likely have succeeded had it sought to justify a refusal to enrol Daniel Hoggan on the basis of the hardship it would cause. A further inference seems irresistible that, had the unjustifiable hardship exemption been available past enrolment under the DDA, the State may well have proved the exemption to justify Daniel's exclusion. McHugh and Kirby JJ made the explicit finding that 'the limited operation of s 22(4) is anomalous and requires correction by the parliament'.²⁷ Their suggestion was, therefore, that the solution to an educational authority's problem of balancing its competing duties to students with disabilities and to 'normal' students and staff, did not lie in the DDA as it stands, but in amending the DDA to make available the unjustifiable hardship exemption after enrolment. There is little doubt that the amendments to the DDA which make the exemption available after enrolment, which are presently before parliament, were prompted by the analysis of McHugh and Kirby JJ in *Purvis*.

The Queensland 'Behaviour' Cases.

The Queensland 'behaviour' cases, *L*, *K* and *P*, suggest, however, that even if the DDA did make available the unjustifiable hardship exemption after enrolment, there may still be problems with applying it in cases such as the *Purvis* case. The decisions in *L*, *K* and *P* suggest several controversial issues in relation to proof of unjustifiable hardship in behaviour cases.

The QADA does make available the unjustifiable hardship exemption after enrolment. *L*, *P* and *K* all involved the issue of proof of unjustifiable hardship in circumstances similar to that of Daniel Hoggan: that is, where enrolled students proved difficult to accommodate on account of their behaviour. The exemption was successfully raised in each of the three cases which all involved attempts to exclude students with intellectual impairments and related 'impaired' behaviour from 'regular' schools. *L* was a lower primary student at a State primary school. *L*'s teachers complained that they were having 'difficulty managing her behaviour' and, in particular, her 'frequent crying...her lack of ability to concentrate on tasks, her failure to return to class after breaks, her limited vocabulary, and hygiene problems revolving around her propensity to regurgitate and toileting accidents'.²⁸ Staff were also concerned that a 'disproportionate' amount of time was spent on *L*, compromising the attention given to other students.²⁹ *L* was suspended on the grounds of 'behaviours prejudicial to the good order and discipline of the school; and

heightened health and hygiene risks to other students'.³⁰ Her suspension and proposed exclusion gave rise to the claim of unlawful discrimination.

In *K*, a complaint of discrimination was made after *K* was excluded from her small, independent primary school when she was eleven years old. She had attended the school for three years, from the beginning of 1993. The evidence was that, while *K* was not violent nor 'difficult to control', she displayed 'significant problem behaviours', the most pronounced being 'fits of screaming' and hyperventilation.³¹ As in the case of *L*, the respondent was concerned about the amount of time 'spent' on *K*, and claimed that this increased pressure on staff and created anxiety.³² It was interesting in this case that three parents gave evidence that they would remove their children from the respondent school should *K* be allowed to return.

Of the Queensland cases, the facts of *P*, perhaps, are most similar to the facts of *Purvis*. *P* was a primary school student with Down's Syndrome. The evidence was that, like Daniel Hoggan, *P* exhibited behaviour which was potentially of danger to others. *P* was prone to screaming, running away and splashing water. More significantly, however, he had thrown chairs, books, building blocks and other equipment, hitting other children. He had, on occasion, 'head-butted', pushed, shoved or slapped other children and adults. One staff member was caused to take sick leave after *P* ran into her, injuring her back. Teachers claimed that *P*'s inappropriate behaviour occurred 'frequently' throughout each day and complained of increased stress levels as a result of *P*'s inclusion. A complaint of unlawful discrimination was made under the QADA when the Queensland Department of Education proposed to remove *P* from his mainstream school.

There are clear parallels between *P*'s behaviour and that of Daniel Hoggan. It should be noted, however, that while the majority of the High Court emphasised the seriousness of Daniel's behaviour, even suggesting it as having a criminal element,³³ Commissioner Keim, of the QADT, compared *P*'s behaviour with the usual boisterousness of childhood. Commissioner Keim cautioned that one 'must remember that any group of young children impose [sic] dangers for members of that group and for those who seek to control and educate them' in that children may cause injury to each other or teachers 'through impulsive, careless or even reckless behaviour'.³⁴ It is, no doubt, significant, that while Daniel Hoggan was twelve years old at the time of his enrolment at South Grafton High, *P*, at nine years old, was under the age of criminal responsibility at the time of his threatened exclusion. Nevertheless, the risk of harm to others, which proved so persuasive to the courts in the *Purvis* litigation, is suggested by the facts of *P*.

Proof of the Requirement and the Extent of Special Services and Facilities in the Queensland Cases.

In each of the cases it was accepted that special services or special facilities were required by the complainant. In *L* and in *K* the formulation of the nature of the special accommodation required was straightforward. In both cases accommodation involved the provision of specialist teacher and aide support. In *L*, Commissioner Holmes accepted the view of a special education expert who gave evidence for the respondent, that 'a special education presence is necessary on a more or less full-time basis for the intensive program *L* presently needs'.³⁵ In *K*, the Hearing Commissioner again relied on expert evidence, concluding that *K* could be accommodated in a regular classroom with opportunities for withdrawal and with specialist assistance.³⁶ The Commissioner was prepared to put a dollar amount on the cost to the school of the provision of these special services - \$9,000 to \$10,000.³⁷

In *P*, a more elaborate approach was taken to the characterisation of the accommodation required by the complainant. Commissioner Keim accepted expert evidence that special services, in the form of teacher aid and specialist support were required by *P*, but extended the scope of services and facilities beyond quantifiable services, such as teacher aid and specialist teacher hours, and beyond tangible facilities, such as ramps or lifts. He defined special services and facilities widely, finding that ‘the teachers and other employees [of Beta School] supplied special services and facilities by agreeing to teach in the difficult circumstances as they existed during the 1994 year’ and, further, that ‘the other students supplied special services and facilities by agreeing to remain in the classroom with *P* and by attempting to extend to him camaraderie and friendship’.³⁸ It will be argued, below, that this creative construction of the meaning of special services and facilities is a device to cure a fundamental flaw in the intersection of s44 and s5 QADA as they apply in the situation when hardship is alleged in the accommodation of students with problem behaviours.

Balancing Relevant Circumstances in the Queensland Cases.

In all three Queensland cases the focus was on two varieties of hardship with each alleged by the respondent school to be ‘unjustifiable’. First, each respondent argued hardship in the financial cost of providing specialist teaching to the complainant in a mainstream setting. Secondly, each respondent argued hardship in accommodating the difficult behaviour of the complainant.

In both *L* and *P* the Tribunal refused to find hardship in the financial costs attendant on providing an education for the complainant in a State School – suggesting that it will be difficult for the State, with vast resources at its disposal, to prove financial hardship in accommodating a student with an impairment at a regular school. In *K*, the Tribunal did accept that financial hardship was unjustifiable. The respondent school was a small independent school with limited resources and the evidence was that even with support via government grant monies the school could not afford to provide the services and facilities required by *K*. In *L*, *K* and *P*, however, the Tribunal found unjustifiable hardship was caused to the staff and students of the school simply by their presence at the school.

The wording of QADA, as noted above, authorises consideration of the ‘nature of any benefit or detriment to all people concerned’ in determining whether the supply of services and facilities causes unjustifiable hardship. In *L*, *K* and *P*, significant detriment was alleged to the staff and students who were affected by the difficult behaviour of the complainant children. At this point, parallels with the *Purvis* case are clear. The circumstance, ‘detriment to any person concerned’, suggested by McHugh and Kirby JJ as relevant in behaviour cases was the circumstance deemed of special relevance in each of the Queensland cases. In *L* it was found that ‘the demands that would be imposed on the teacher involved, pending resolution of *L*’s present behavioural problems, are of themselves such as to constitute unjustifiable hardship’.³⁹ In *K* it was found that ‘there is another respect [apart from financial hardship] in which hardship would be caused, namely the stress caused to teachers who have inadequate experience and expertise in teaching special needs children, particularly in a context where the school’s attempt to educate *K* so far has been relatively misguided and unsuccessful, and where there has been considerable animus built up between the school and the child’s parents’.⁴⁰ In *P*, Commissioner Keim noted that the situation faced by those staff and students required to associate with *P* was ‘intolerable’.⁴¹

The difficulty is that the wording of the QADA is clear that the hardship must be caused by the supply of the special services or facilities: it is not unlawful to discriminate if ‘the supply

of special services or facilities would impose unjustifiable hardship'.⁴² The difficulty is that the detriment to the students and staff found to exist in each of these cases was not - at least in any conventional sense - caused by the supply of services and facilities to the complainant, but by the simple presence of the complainant in the classroom. A similar disjunction is apparent in the terms of the DDA where although 'detriment likely...to be suffered by any persons concerned' is expressed as a relevant circumstance, the exemption arises when a person 'if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability' and the 'provision' of those services or facilities would impose unjustifiable hardship.⁴³ On the facts of the *Purvis* case, for example, the hardship alleged would be detriment to staff and students in the risk to them posed by Daniel's propensity to violence. This hardship is factually unrelated to the provision of any facilities or services to Daniel. Unfortunately, the problem of this disjunction was not addressed by McHugh and Kirby JJ in their analysis of the exemption.

The detriment to others envisaged by the description of the relevant circumstances provided in both the QADA and the DDA is, perhaps, of the kind canvassed in the *Finney* case. In that case it was alleged that detriment would flow to other members of the school community in that teachers would be forced to work longer hours - perhaps necessitating greater remuneration - to implement curriculum changes necessary to accommodate Scarlett Finney, and that the parent body would be forced to pay higher fees to cover the cost of capital works required to provide access to Scarlett.

In *Finney* there is a clear link between this alleged detriment and the supply of services and facilities.⁴⁴ In *L, K and P*, and by implication, *Purvis*, there is arguably no link. In those cases, therefore, there is arguably no discretion to consider the detriment alleged as relevant to the determination of whether unjustifiable hardship exists.

Commissioner Keim, in *P*, however, was alert to this conceptual gap in the legislation and provided a 'solution'—a tenuous solution based on an artificial definition of services and facilities designed to allow the section to work. As noted above, Commissioner Keim defined services and facilities widely to include the tolerance, camaraderie and friendship shown to P by staff and students at his school. In constructing his definition of services and facilities, Commissioner Keim relied on the cautionary advice relating to statutory interpretation given by Mason CJ and Gaudron J in their judgment in *Waters v Public Transport Corporation*:⁴⁵

...the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose.

In the *Waters* case the court took such an approach to read down the scope of an exemption. Here, Commissioner Keim uses the principle expounded in *Waters* to increase the scope of an exemption:⁴⁶

...the statutory objects of the Act will not be served by a restrictive reading of an exemption provision which results in an unrealistic or illogical application of the Act any more than they are served by a narrow and restrictive reading of the primary provisions of the Act prohibiting discrimination on certain grounds so as to cause the Act to have no more than a residual impact... In the present

case, in my view, s. 44 and s. 5 together need to be given a reasonably broad construction in order to avoid defeating the objects of the Act by producing an unreasonable, illogical or ‘intolerable’ situation.

It is a bold move, perhaps, to claim advice delivered by the High Court in support of statutory interpretation which delivers the statutory object of reducing discrimination, as supporting, in *P*, an interpretation which excuses discrimination. The inference is possible that Commissioner Keim considered the hardship caused by P’s behaviour to be so ‘unjustifiable’ that he simply made the words of the QADA fit the circumstances of the case. Moreover, and somewhat ironically in view of the approach of McHugh and Kirby JJ to the unjustifiable hardship exemption expressed in *Purvis*, it is apparent that to make the exemption fit the facts of *Purvis* would require exactly the same variety of ‘artificial construction’ they condemned in that case.⁴⁷ It is clear that some amendment of the section is necessary, either to allow tribunals to consider the detriment without resort to linguistic gymnastics, or – and the decisions in *L*, *K*, *P* and *Purvis* suggest this is significantly less likely – to exclude detriment caused by the mere presence of a student from the scope of the enquiry.

Is Hardship to Staff and Students Hardship to an ‘Educational Authority’?

There is a further problem with the intersection of the provision creating the unjustifiable hardship exemption for educational institutions and the provision defining unjustifiable hardship apparent in both the QADA and the DDA. The exemption is made available only in respect of unjustifiable hardship proved to an *educational authority*. The QADA and the DDA define ‘educational authority’, in identical terms. It ‘means a person or body administering an educational institution’.⁴⁸ Clearly, hardship to staff and students cannot be characterised as hardship to an ‘educational authority’ without taking significant liberty with the meaning of the words of the statutory definition. This problem is not addressed in any of the Queensland behaviour cases. It is, however, briefly touched on – without satisfactory resolution – in another Queensland education case – *I v O’Rourke and Corinda State High School and Minister for Education for Queensland*.⁴⁹ In that case, the relevant issue was whether the imposition of a financial burden on students at a state high school could be taken to be unjustifiable hardship to Education Queensland, an ‘educational authority’. The complainant had alleged discrimination arising from issues relating to venues selected by Corinda State High School for two functions – the school formal and the school graduation dinner. The formal took place at the Greek Club and the graduation dinner on ‘The Island’, a restaurant barge on the Brisbane River. The complaints arose out of access and toilet arrangements for I at both venues and out of concerns about emergency evacuation procedures on ‘The Island’.

As already noted, QADA provides that the cost of supplying special services or facilities is relevant to the consideration of whether hardship is unjustifiable.⁵⁰ In this case, it was accepted that alternative venues with acceptable access would have imposed an additional cost. The problem was that any additional cost would have been borne by the other students attending the formal and dinner and not by the school. Hardship arising from this additional cost, therefore, would be borne by students and not by an ‘educational authority’.⁵¹ However, proof of unjustifiable hardship requires proof of imposition of unjustifiable hardship on the educational authority or supplier of goods and services.⁵² There was no evidence presented of the financial circumstances of the school and as such of whether the school, rather than the students, could afford to take on the extra costs of a different venue. The QADT acknowledged that the legislative policy is such

that the only ‘person’, for whom cost is relevant, in a consideration of unjustifiable hardship, is the school. The Tribunal attempted to avoid the problems raised by this finding by simply stating that ‘[w]hile there is no evidence that the respondents could not afford to pay for supplying the special services or facilities (by arranging and paying for other venues if they were suitable), I believe it would be highly unusual for a school (rather than the attending students) to pay for events such as school balls or dinners such as the ones the subject of this dispute’.⁵³

In a further attempt to avoid the problem, the Tribunal considered the cost to students as part and parcel of ‘detriment’ which would be caused if the venues were changed. Section 5(e) includes as relevant circumstances in proof of unjustifiable hardship ‘the nature of any benefit or detriment to all people concerned’. The tribunal found that the school was obliged to consider a multiplicity of issues in selecting suitable venues and that detriment to the other students in terms of cost, security, transport, and supervision issues outweighed the benefit which would flow to I. Again, however, this detriment to other students does not mesh easily with a finding of unjustifiable hardship to the school, the educational authority, as contemplated by the legislation. Direct hardship to the school was at best, tangential and minimal, arising out of the ‘disruption’ caused through any relocation of the events.⁵⁴ Nevertheless, the Tribunal found that the unjustifiable hardship exemption was made out.

This issue was also raised, briefly, in argument before the High Court in the *Purvis* case with the Gleeson CJ questioning the applicability of the unjustifiable exemption to the case of a school challenged by the problem behaviour of a student. He asked counsel for the appellant how hardship on an educational authority would ‘pick up danger to students’.⁵⁵ Counsel for the appellant argued that those affected were within the care of the educational authority and that ‘obviously the educational authority runs an institution and has certain obligations, some legal, some moral, some practical, in the way it deals with students, so it is unjustifiable hardship to the educational institution’.⁵⁶ Gleeson CJ was not convinced, saying, ‘I am not sure that that is all there is to it’.⁵⁷ This exchange of views in *Purvis* further emphasises the need for clarification of the scope of the unjustifiable hardship exemption. Plainly, some amendment of both the QADA and the DDA, and similar Australian legislation,⁵⁸ is desirable if hardship to people or bodies other than an educational authority⁵⁹ is unequivocally sufficient to ground a finding of unjustifiable hardship.

Why is Behaviour Considered Detrimental to Others in a Mainstream School Not Considered Detrimental to Others in a ‘Special’ School?

The canvassing, in *L* and *P*, of other exemptions available under the QADA suggests further problems with the applicability of the unjustifiable hardship exemption to behaviour cases. In *L*, the public health exemption⁶⁰ was raised on the basis that L’s problems with toileting and regurgitation required her exclusion as an act ‘reasonably necessary to protect public health’. It was argued, despite evidence that L’s ‘hygiene problems’ had been well managed during her enrolment by ‘strict attention to cleaning procedures’, that the presence of L at her mainstream school created a public health risk. The argument failed with Commissioner Holmes concluding that evidence of the risk provided by the respondent was too imprecise to prove the exemption.⁶¹ Commissioner Holmes also noted a fundamental hypocrisy in the respondent’s argument: ‘the very fact that the Respondent advocates a placement of L in an alternative educational institution suggests that it does not itself consider that L’s removal from contact with other students is necessary to protect public health’.⁶² The respondent sought to relocate L to a different school which it considered better suited to her needs; it was not seeking to exclude L from all schools.

This willingness to relocate L implies that the public health exemption was argued out of expediency rather than out of any genuine fear that the accommodation of L placed teachers and other students at risk.

QADA provides an exemption in circumstances where a respondent's discriminatory act is 'reasonably necessary to protect the health and safety of people at a place of work'.⁶³ This exemption was raised in *P*, though not pursued 'with any great vigour' by the respondent.⁶⁴ Commissioner Keim considered, however, that the wording of the exemption was broad enough to allow him to consider evidence of a safety risk to students as well as to workers at the school and canvassed the evidence which could be relied on for the purpose of establishing the exemption – the throwing of blocks and of a chair, jumping off desks and onto other children. As noted above, Commissioner Keim cautioned against expecting a standard of behaviour from children with impairments that is not expected of 'normal' students and acknowledged that the 'impulsive, careless or even reckless' behaviour of any child poses a risk of injury to others. He found, further, that the amount of 'reckless and silly behaviour', such as that attributed to P, could be 'ameliorated by good teaching methods'.⁶⁵

Commissioner Keim was not prepared to find that the removal of P was 'reasonably necessary' to protect others and found that there were alternative strategies available to manage the risk which would have allowed P to stay at school. Further, he extended the reasoning of Commissioner Holmes in *L*, in relation to the public health exemption, to the workplace health and safety exemption- if a child were to be transferred to another school, it could not be convincingly argued that the child posed a risk to the safety of others.

There is no equivalent of the workplace health and safety exemption available under the DDA. The emphasis placed, by both the Federal Courts and the High Court, on the danger posed to the safety of staff and students at South Grafton High by Daniel Hoggan's behaviour, suggests, however, that had it been available it may well have been litigated in the *Purvis* case. The emphasis on safety in that case also suggests that the workplace health and safety exemption may be looked at afresh should a similar behaviour case come before a tribunal with jurisdiction to consider it.

It is tempting to ask, however, why the argument which proved persuasive against the public health exemption, in *L*, and against the workplace health and safety exemption, in *P*, was not raised against the unjustifiable hardship exemption in either of those cases, or in *K*. That is, if the presence of a student with behaviour difficulties is enough to create an unjustifiable hardship to the staff and students in a regular school, why does it not cause similar hardship to the staff and students at a 'special' school? The answer given to this conundrum, would, perhaps, be that the staff in special schools are specially trained to cope with problem behaviours and that there is a smaller student staff ratio in those schools, 'diluting' the hardship. However it could be argued - and, in fact, was argued in expert evidence in each of the Queensland cases - that specialist teacher training and extra staff would similarly mitigate the problems at a regular school. So, this answer is no good answer at all. This answer also fails to address the situation of fellow students: if 'normal' students cannot be asked to bear the 'hardship' of sharing a classroom with a 'problem' student, why should 'special' students be expected to do so? There is the suggestion here of an educational sub-culture where students with impairment are expected to accommodate the needs and demands of other students with other impairments while 'normal' students are not. It could be argued that this 'two-tiered' system implies more favourable treatment of 'normal' students, and, further, resonates the anachronistic and discriminatory view that students with impairments should be grouped together and removed from public view.

In *P*, Commissioner Keim found that the accommodation of *P* not only caused unjustifiable stress to the staff and students at *P*'s school, it also hindered the educational opportunities of *P*'s classmates because teacher time was deflected from other students by *P*'s needs and because *P*'s behaviour disrupted learning in the classroom. To argue that this educational 'hardship' to other students would justify *P*'s exclusion is also difficult when the proposal was that *P* be relocated to another school where, presumably, he would continue to disrupt the learning of others. Does it matter less if the learning of a student with an impairment is disrupted than if the learning of a 'normal' student is disrupted? Is the education of students with impairments less important than the education of 'normal' students? Again, it could be answered that specialist staff and extra staff mitigate the disruption at a special school. Again this answer is undone by the fact that specialist staff and extra staff could be made available in a regular classroom.

The problem raised by this analysis is not easily cured by legislative amendment. Ironically, it appears that the 'hardship' may be removed by the provision of special services or facilities in the form of more staff and more supervision, not simply by relocation to another school. That there is reluctance to place extra staff at regular schools to support students with impairments can be explained, at a policy level, by funding considerations. Education Queensland, for example, has a policy of the clustering of resources at particular schools to suit particular classes of impairment in order to maximise the efficient use of department resources. However, there is compelling evidence presented in each of the Queensland cases that suggests that, at a cost, the accommodation of any student with any impairment is possible in a regular classroom.

In *P*, for example, Commissioner Keim conceded, 'I am not convinced...that it was impossible or completely impractical to adjust arrangements so that a mix of services could be provided at some non-segregated campus outside the Aitkenvale Special School. It seems to me not unreasonable that, if a dual enrolment was considered for *P* by which he would be taxed from one campus to another, it might also be possible to consider taxiing services including staff resources from one campus to another'.⁶⁶ In *K*, Commissioner Holmes made a similar finding: 'At the end of the day, I formed the impression that *K* could properly be educated in a regular classroom setting with opportunities for withdrawal, provided appropriate specialist assistance of the kind proposed by Dr Giorcelli and Mr Worthington was forthcoming. I accept Dr Sigafoos' evidence that such behavioural problems as *K* evinces can be managed by appropriate intervention'.⁶⁷ In *L*, Commissioner Holmes found that with full-time special education assistance *L* could be accommodated in a regular classroom.⁶⁸

The QADT has not been prepared to rely on this evidence, however, to the extent necessary that it may find for the complainant. It has found, at least where the respondent is the State, that financial hardship is not unjustifiable, but it has not been prepared to impose the financial cost of accommodating students with behavioural difficulties on educational authorities, by making a finding of unlawful discrimination and ordering that the complainant be returned to a mainstream school. It can be seen that to find unjustifiable hardship in the effect on learning and in the 'stress' caused by the behaviour problems of students with impairments, effects which could be mitigated – at a cost – is, perhaps, in reality, to find unjustifiable hardship in a financial sense after all. This link is made explicit in *K*:

...given the evidence as to the financial basis of the school, I am satisfied that provision of the necessary services to *K* would cause hardship. I am also satisfied that there is another respect in which hardship would be caused, namely the stress caused to teachers who have inadequate experience and expertise in teaching special needs children, particularly in a context where

the school's attempt to educate K so far has been relatively misguided and unsuccessful, and where there has been considerable animus built up between the school and the child's parents. The latter is a hardship which could be overcome with appropriate specialist assistance; the difficulty is that one then returns to the problem of how that assistance is to be funded.

In *K*, it was easy to concede that the complainant could be catered for, at a cost, in a 'regular' school, because of the finding that the cost of providing special services and facilities would cause unjustifiable hardship to that small, independent, 'regular' school. The link is not so easy to concede, perhaps, in cases where the defendant is the State and financial hardship is difficult, if not impossible, to prove.

It is interesting to note that in the *Purvis* case, too, HREOC found that more could have been done by South Grafton High School to accommodate Daniel, in terms of specialist support and teacher training. HREOC went a step further than the QADT, however, and found that the failure to accommodate Daniel was unlawful discrimination. HREOC also found that the failure to provide this accommodation was causally related to Daniel's expulsion in that proper accommodation would have mitigated his behaviour problems. These findings were not addressed in the Federal Court hearings. In the High Court, McHugh and Kirby JJ affirmed the HREOC findings that proper accommodation had not been made and, further, that 'if the accommodation had been provided, more probably than not the misbehaviour would not have occurred.'⁶⁹ While, Commissioner Innes, of HREOC, and McHugh and Kirby JJ, unlike QADT, were prepared to make findings which would force the State to take the expensive steps necessary to accommodate Daniel in his mainstream school, their views yielded to the majority finding in the High Court that there had been no discrimination against Daniel Hoggan. Indeed, Callinan J was impressed by the State's 'very great investment of time, resources, energy, expertise, money and compassion' in Daniel.⁷⁰

Conclusion

It is instructive to note the conceptual gap between the policy reasons frequently advanced for not implementing complete inclusion of students with impairments at 'regular' schools and the reasons accepted as just by the QADT. One reason advanced is that many families prefer a segregated setting for their children. The other, more controversial, reason is that the cost of effecting full inclusion is prohibitive: scarce resources are best distributed by the clustering of those resources at regular schools designated for a particular impairment, or at special schools or units. The difficulty is that, in each individual case, the State can afford the cost of the requisite services and facilities but, when the cases are multiplied, the cost becomes prohibitive.

In this context, it is interesting to note the response of the disability sector to the cases of *P* and *L* – they were seen as putting to rest any chance of succeeding against the State in a claim for inclusion at a mainstream school.⁷¹ Unjustifiable hardship on the basis of detriment to others and not of financial hardship was found in those cases, but the denial of a remedy for discrimination in those cases, it can be suggested, must ultimately have saved the State a significant amount of money. By glossing over the construction difficulties raised by applying the unjustifiable hardship exemption to the situation where the behaviour of a student with a disability causes 'detriment' to staff and other students, and by avoiding the policy issue of why problem behaviour is 'detrimental' in a mainstream school but not in a 'special' school, the QADT has not only saved teachers and students in mainstream schools 'hardship', it has saved the State money. Although

the decision of McHugh and Kirby JJ, in the *Purvis* case, apparently confirms the availability of the unjustifiable hardship exemption in behaviour cases brought under the DDA and similar legislation, the problems with the construction of this controversial exemption suggest that it will inevitably attract close judicial scrutiny in the future.

Endnotes

1. Comment made by Ms Michelle O'Flynn, Member, Queensland Parents for People with a Disability, and mother of 'L', in Commonwealth, *Hansard*, Senate: Employment, Workplace Relations and Education References Committee, 6 September, 2002, 412.
2. *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306 ('Finney'), [31].
3. *L v Minister for Education for the State of Queensland (No 2)* (1996) 1 QADR 207 ('L'), 213 (Commissioner Holmes).
4. *L* (1996) 1 QADR 207.
5. *K v N School (No. 3)* (1997) 1 QADR 620 ('K').
6. *P v Director-General, Department of Education* (1997) 1 QADR 755 ('P').
7. See, for example, *Anti-Discrimination Act 1991* (Qld) (QADA) s 44(1)(b); c/f *Disability Discrimination Act 1992* (Cth) (DDA) s 22(4).
8. See, for example, QADA s 44(1)(b); c/f DDA s 22(4).
9. In respect of discrimination in education see *Disability Discrimination Act 1992* (Cth) s22, *Anti-Discrimination Act 1977* (NSW) s49L(5), *Anti-Discrimination Act 1991* (Qld) s44, *Anti-Discrimination Act 1998* (Tas) s48 (The Tasmanian legislation does not provide the exemption directly in respect of education but it is available in respect of the provision of access to premises and the provision of goods and services. It may, therefore, be available to an education provider, in the sense that the provision of education involves the provision of access to premises and the provision of a service); *Equal Opportunity Act 1984* (WA) s66I(4); *Discrimination Act 1991* (ACT) s51. Both the Victorian and the Northern Territory legislation have a different formula in that an exemption is created where the provision of services or facilities is not 'reasonable'. See *Equal Opportunity Act 1995* (Vic) s39; *Anti-Discrimination Act* (NT) s58.
10. See, for example, *Finney* (2000) 100 FCR 306.
11. This process is also recognised in other kinds of discrimination cases as the appropriate methodology for a tribunal to follow. See, for example, *Cocks v The State of Queensland* (1994) 1 QADR 43, a QADA case involving access to a public building, and *Scott and Disabled Peoples International v Telstra* (1995) EOC 92-719 at 78,401, a DDA case involving access to telephone services by people with visual impairment.
12. DDA s 11
13. QADA s 5
14. *Purvis v State of New south Wales (Department of Education and Training)* 78 ALJR 1 ('Purvis').
15. *Finney* (2000) 100 FCR 306.
16. It was comprehensively aired in this context in *Finney* [2000] FCA 658. Note, however, that an educational institution may be able to raise the exemption after enrolment where discrimination is framed in terms of denial of access via DDA s 23(2) – access to premises. See *Sluggett v Flinders University of South Australia* [2000] HREOC H96/7 (Unreported, Commissioner McEvoy, 14 July 2000).
17. Disability Discrimination Amendment (Education Standards) Bill 2004 s3.
18. See Philip Ruddock and Brendan Nelson, 'Improved opportunities for students with disabilities' (Press Release, 15 June 2004). Explanatory memoranda to the DDA amendments suggest that the DDA must be amended to make the exemption available post enrolment to 'support' the operation of the *Standards*. See Explanatory Memorandum, Disability Discrimination Amendment (Education Standards) Bill 2004 (Cth), outline. If the *Standards*, but not the DDA itself, make available the

exemption post-enrolment there is an argument that the *Standards* operate in a manner not authorised by the parent legislation.

19. *Disability Standards for Education* 2004 (Draft Only) S10.2.
20. *Disability Standards for Education* 2004 (Draft Only) Introduction.
21. DDA s34.
22. Rather than on indirect discrimination, where proof that an allegedly discriminatory requirement or condition, such as, for example, compliance with a school discipline code, is 'not reasonable': DDA s 7.
23. See the comments of counsel for the first respondent in *Purvis v State of New South Wales (Department of Education and Training)* HCA S423/2002 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ, 29 April 2003) 49.
24. *X v McHugh, Auditor-General for the state of Tasmania* (1994) EOC 92-263; *P* (1996) 1 QADR 755.
25. *Purvis*, on behalf of Daniel Hoggan v The State of New South Wales (Department of Education and Training) HREOC H 98/127 (unreported, Commissioner Innes, 13 November 2000).
26. *Purvis* 78 ALJR 1, [94].
27. *Ibid* [96].
28. *L* (1996) 1 QADR 207, 209.
29. *Ibid*.
30. *Ibid*, 210.
31. *K* (1997) 1QADR 620, 621.
32. *Ibid* 622.
33. Gummow, Hayne, and Heydon JJ found that 'Daniel's actions constituted assaults' but considered it 'neither necessary nor appropriate to decide whether he could or would have been held criminally responsible for them': *Purvis* 78 ALJR 1, [227]. Callinan J characterised behaviour such as that displayed by Daniel as 'criminal or quasi-criminal conduct': *Purvis* 78 ALJR 1, [271].
34. *P* (1996) 1 QADR 755, 789.
35. *L* (1996) 1 QADR 207, 216.
36. *K* (1997) 1QADR 620, 623.
37. *Ibid*, 624.
38. *P* (1996) QADR 755, 786.
39. *L* (1996) 1 QADR 207, 216.
40. *K* (1997) 1QADR 620, 624. It is especially interesting in this case that the School's own failure to train staff ultimately allows them to rely on the unjustifiable hardship exemption.
41. *P* (1996) QADR 755, 786.
42. QADA s 44(1)(b)
43. DDA s 22(4)
44. It is arguable, however, that even in *Finney*, consideration of such detriment is not relevant to proof of unjustifiable hardship in that the legislation provides that the hardship must be to the educational institution.
45. *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359.
46. *P* (1996) QADR 755, 785.
47. *Purvis* 78 ALJR 1, [96].
48. QADA s4; DDA s4.
49. *I v O'Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 (31 January 2001) ('I').
50. QADA s5 (b).
51. Nor, indeed, would the additional cost be borne by a 'supplier of goods and services'. The same problem arises, therefore, in respect of proof of unjustifiable hardship under other sections, such as QADA s51(1)(b), which is applicable to the goods and services protected area.
52. QADA s44 (b) and s51 (1)(b).

53. *I* [2001] QADT 1 (31 January 2001) [11.2.2.3]
54. Disruption is a relevant consideration: QADA s5 (d).
55. *Purvis v State of New South Wales (Department of Education and Training)* HCA S423/2002 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ, 29 April 2003) 6.
56. *Ibid.*
57. *Ibid* 7.
58. See n 9, above.
59. Or provider of goods and services, or provider of accommodation, or employer, and so on. This problem with the terms of the legislation arises with the operation of the exemption in all protected areas.
60. QADA s107.
61. *L* (1996) 1 QADR 207, 212.
62. *Ibid.*
63. QADA s108
64. *P* (1996) 1 QADR 755, 775.
65. *Ibid*, 789.
66. *Ibid*, 787. Commissioner Keim ultimately decided, however, that Education Queensland was not obliged to deliver such a ‘mix of services at some non-segregated campus’ on the basis that P’s mother did not co-operate with the department to the extent necessary for such a plan to be effected: 787.
67. *K* (1997) 1QADR 620, 623.
68. *L* (1996) 1 QADR 207, 216
69. *Purvis* 78 ALJR 1, [107], [134] – [138].
70. *Ibid* [239].
71. After *L*, Queensland Advocacy Incorporated, which funded the case, made a policy decision ‘not to take on any further inclusive education matters in the near future’. It was decided there were ‘other areas where we should be directing our resources’: Queensland Advocacy Incorporated, *Annual Report* (1995-1996).

