



CARNARVON
CHRISTIAN SCHOOL

“Walk as Children of Light”

Policy and
Procedure
Guidelines

DISABILITY DISCRIMINATION POLICY

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DISABILITY DISCRIMINATION POLICY

1 Legislation for Disability Discrimination

There is both Federal and State legislation that deals with disability discrimination. The relevant legislation is:

1.1 Federal

- Human Rights and Equal Opportunity Commission Act 1986
- Disability Discrimination Act 1992
- Workplace Relations Act 1996

1.2 State

- Equal Opportunity Act WA 1984
- Occupational Safety and Health Act 1997

2 Aim of the Legislation

Federal Acts are not intended to limit or exclude the State laws. Where provisions of the Federal and State Acts are similar, and can operate together, both will apply. In the event of an inconsistency, the Federal Act will take precedence.

As employers have to comply with both Federal and State legislation, sound employment and compliance practices will ensure employers avoid potential breaches.

If both Federal and State laws seem to apply, the employee must choose the forum in which they will make their complaint. It is important to realise that a person cannot make a complaint to different forums about the same matter. This is called “double dipping”. If a person initially complains under State law, they cannot later complain under Federal law. However, if a person initiates the complaint under Federal law, they can move to State law.

Both the Federal and Western Australian legislation prescribe:

- Grounds of discrimination covered by the legislation;
- Areas in which discrimination on those grounds may be unlawful (eg: employment, education, access to premises and/or vehicles, or provision of goods and services); and
- Exceptions, which may be either specific (ie: it relates to a particular area of unlawful discrimination), or general.

An act of discrimination constitutes unlawful discrimination only if there is discrimination on a prescribed ground in a prescribed area that is not covered by an exception.

This Policy will examine disability (impairment) discrimination and particularly the admission of students and the employment of staff with a disability or impairment. However, it is beyond the scope of this Policy to deal with every aspect of unlawful discrimination that might apply to this School in its day-to-day operation in Western Australia.

3 What is Disability (Impairment) Discrimination?

It is unlawful to discriminate against a person because of a disability. This discrimination can be either direct or indirect discrimination as described in sections 5 and 6 of the Disability Discrimination Act and section 66A of the Equal Opportunity Act WA.

3.1 Section 5 of the Disability Discrimination Act

Disability Discrimination

- 3.1.1 *For the purposes of the Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of the disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in the circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.*
- 3.1.2 *For the purposes of subsection 3.1.1, 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*

3.2 Section 6 of the Disability Discrimination Act

Indirect Disability Discrimination

- 3.2.1 *For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:*
- (a) *With which a substantially higher proportion of persons without the disability comply or are able to comply; and*
 - (b) *Which is not reasonable having regard to the circumstances of the case; and*
 - (c) *With which the aggrieved person does not, or is not able to comply.*

3.3 Section 66A of the Equal Opportunity Act (WA)

Discrimination on Ground of Impairment

- 3.3.1 *For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of impairment if, on the ground of –*
- (a) *The impairment of the aggrieved person;*
 - (b) *A characteristic that appertains generally to persons having the same impairment as the aggrieved person;*
 - (c) *A characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or*
 - (d) *A requirement that the aggrieved person be accompanied by, or in possession of, any palliative device in respect of that person's impairment,*
- the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment.*

- 3.3.2 *For the purposes of this Act, a person (In this subsection referred to as the “discriminator”) discriminates against another person (in this subsection referred to as the “aggrieved person”) on the ground of impairment if, on the ground of –*
- (a) The impairment of;*
 - (b) A characteristic that appertains generally to persons having the same impairment as; or*
 - (c) A characteristic that is generally imputed to persons having the same impairment as,*
any relative or associate of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats, or would treat, a person who does not have such an impairment.
- 3.3.3 *For the purposes of subsection 3.3.1 or 3.3.2, circumstances in which a person treats, or would treat, another person who has, or has a relative or associate who has, an impairment are not materially different by reason of the fact that different accommodations or services may be required by the person who has an impairment.*
- 3.3.4 *For the purposes of this Act, a person (in this subsection referred to as the “discriminator”) discriminates against another person (in this subsection referred to as the “aggrieved person”) on the ground of impairment, if the discriminator requires the aggrieved person to comply with a requirement or condition;*
- (a) With which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply;*
 - (b) Which is not reasonable having regard to the circumstances of the case; and*
 - (c) With which the aggrieved person does not, or is not able to comply.*
- 3.3.5 *For the purposes of this Act, a person (in this subsection referred to as the “discriminator”) discriminates against another person who is blind, deaf, partially blind or partially deaf (in this subsection referred to as the “aggrieved person”) if the discriminator treats the aggrieved person less favourably on the ground of the fact that the aggrieved person possesses, or is accompanied by, a guide dog or hearing dog, or on the ground of any matter related to that fact, whether or not it is the discriminator’s practice to treat less favourably any person who possesses, or is accompanied by, a dog, but nothing in this Act affects the liability of the aggrieved person for any injury, loss or damage caused by the guide dog or hearing dog.*

Direct Discrimination

Direct discrimination occurs when a person treats a person less favourably than they would treat a person without a disability.

Example 1: Susan's class is going on a weekend camp. Susan has been told that she is not allowed to attend as she has diabetes and could require medication.

Susan has been treated less favourably than her classmates. She has been discriminated against because of the diabetes.

Example 2: An applicant is asked whether they have, or have had a disability, and are excluded or disadvantaged if they answer yes.

The applicant is treated less favourably because of the disability.

Indirect Discrimination

Indirect discrimination occurs when a disabled person is required to comply with a requirement or condition that:

- (d) *Those without a disability would be able to comply; and*
- (e) *It is not reasonable for the person to have to comply given the circumstances of the case; and*
- (f) *The person cannot comply.*

A requirement or condition could include policies, physical barriers, selection criteria, admission criteria or rules.

Example: David and all children at his primary school use the local public swimming pool for all swimming lessons. The only access into the pool is through a turnstile at the main entrance. David uses crutches or a wheelchair because of his disability and is unable to get through the turnstile.

David, and others who use wheelchairs or crutches, are discriminated against because of the physical barrier of the turnstile. Those without a disability would be able to get through the turnstile and it is not reasonable for David and others with similar needs to be excluded from the pool.

In some cases, a rule, requirement, condition or other treatment is considered reasonable. This will depend on the circumstances. To determine what is reasonable, many things need to be considered, including the reason for the rule, the nature and extent of the disadvantage resulting from a rule. For example, one that totally excludes people with a disability may require stronger justification than a rule that a person with a disability could overcome with some disadvantage.

4 Disability Discrimination Act 1992 and Equal Opportunity Act 1984

The Disability Discrimination Act and the Equal Opportunity Act WA are the two main pieces of legislation in Western Australia concerning disability discrimination. This section will examine these Acts and their relevance to independent schools.

The relevant Federal legislation is the *Disability Discrimination Act 1992*. The State provisions are contained in the *Equal Opportunity Act WA 1984*. The provisions of each Act are very similar, insofar as they deal with discrimination by employers. While the *Equal Opportunity Act WA 1984* also covers discrimination by educational bodies, the *Disability Discrimination Act 1992* has extended its provisions to include the *Disability Standards for Education 2005*.

The Disability Discrimination Act 1992 can be accessed through www.hreoc.gov.au and selecting the Disability Rights section. This website will also provide a wide range of additional material on the Act. The Disability Standards for Education 2005 can be accessed as a separate document, but must be read in conjunction to the Act. It can be found at www.hreoc.gov.au/disability_rights/education/education.html#standards and then select 'Education standards tabled 17 March 2005'.

The Equal Opportunity Act WA 1984 can be accessed through www.slp.wa.gov.au by selecting "Online publications" then "Statutes – Acts and Regulations" then "Statutes A – Z Browse" then selecting the Act under 'E'. Information on the Equal Opportunity Act can also be accessed through www.equalopportunity.wa.gov.au

4.1 What is a Disability (impairment)?

Under the Federal legislation 'disability' is defined in Section 4 to mean:

- a) total or partial loss of a person's bodily or mental functions; or
- b) total or partial loss of a part of a body; or
- c) the presence in the body of organisms causing disease or illness; or
- d) the presence in the body of organisms capable of causing disease or illness; or
- e) the malfunction, malformation or disfigurement of a part of a person's body; or
- f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour; **and includes a disability that:**
- h) presently exists; or
- i) previously existed but no longer exists; or
- j) may exist in the future; or
- k) is imputed to a person.

Under the State Act, 'impairment' is defined in Section 4 to mean:

- a) any defect or disturbance in the normal structure or functioning of a person's body;
- b) any defect or disturbance in the normal structure or functioning of a person's brain; or
- c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour, **whether arising from a condition subsisting at birth or from an illness or injury, and includes an impairment**
- d) which presently exists or existed in the past but has now ceased to exist; or
- e) is imputed to the person.

Both are very wide definitions that will include people with learning, intellectual, physical and sensory disabilities, genetic conditions, mental and physical illnesses and also people with AIDS, HIV and ADHD.

4.2 Discrimination in Employment

It is unlawful to discriminate against a person because of a disability in certain areas including education, employment, sport and access to public places and vehicles. Section 15 of the Disability Discrimination Act covers discrimination in employment.

Discrimination in Employment

- (1) *It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability or a disability of any of that other person's associates:*
 - (a) *in the arrangements made for the purpose of determining who should be offered employment; of*
 - (b) *in determining who should be offered employment; or*
 - (c) *in the terms or conditions on which employment is offered.*
- (2) *It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employer on the ground of the employee's disability or a disability of any of that employee's associates:*
 - (a) *in the terms or conditions of employment that the employer affords the employee; or*
 - (b) *by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or*
 - (c) *by dismissing the employee; or*
 - (d) *by subjecting the employee to any other detriment.*
- (3) *Neither paragraph (1)(a) nor (1)(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.*
- (4) *Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the persons because of his or her disability:*
 - (a) *would be unable to carry out the inherent requirements of the particular employment; or*
 - (b) *would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provisions of which would impose an unjustifiable hardship on the employer.*

The *Equal Opportunity Act WA* discusses impairment discrimination in Section 66B:

Discrimination Against Applicants and Employees

- (1) *It is unlawful for an employer to discriminate against a person on the ground of the person's impairment:*
 - (a) *in the arrangements made for the purpose of determining who should be offered employment;*
 - (b) *in determining who should be offered employment; or*
 - (c) *in the terms or conditions on which employment is offered.*

- (2) *It is unlawful for an employer to discriminate against an employee on the ground of the employee's impairment:*
- (a) *in the terms or conditions of employment that the employer affords the employee;*
 - (b) *by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;*
 - (c) *by dismissing the employee; or*
 - (d) *by subjecting the employee to any other detriment.*
- (3) *Nothing in subsection (1) renders it unlawful for a person to discriminate against another person, on the ground of the other person's impairment, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.*

The *Equal Opportunity Act WA* covers the exceptions to discrimination in employment in section 66Q. as this section refers to various other sections of the Act, it can be read by accessing the Act directly.

The Disability Discrimination Act covers disability discrimination involving harassment in employment in sections 35 and 36, stating that it is unlawful to harass a person in relation to their disability.

When Can a School Ask Questions Regarding a Person's Disability?

The 'Exemptions' section of this paper discusses which questions regarding a person's disability are permitted under the exemptions stated in the Acts. These questions are necessary for a number of reasons, including:

- To determine any reasonable adjustments required in order for the person to perform at work or in the classroom;
- To determine if the person can perform the inherent job requirements;
- To determine the requirements regarding insurance, workers' compensation and superannuation.

Reasonable adjustments are discussed in section 4.5 of this document.

Inherent Job Requirements are not defined in the Act. They are not all the requirements of the job, but what is necessary to get the basic job done.

See www.deakin.edu.au/mis/dda/sectn06.htm for examples.

However, not every question regarding a person's disability is permitted, and as such, could be inappropriate and discriminatory. Examples of where questions could lead to discrimination include:

- personal information about a person's disability could be disclosed to others, or unofficially accessed;
- discriminatory decisions could be made based on disability-related information (eg: application forms), without the person with the disability and the employer having adequate discussion to deal with specific issues relating to the disability;
- questions about a person's disability when the disability will have no impact on the person's ability to do the job, or their attending the workplace.

4.3 Discrimination in Education

In addition to prohibiting discrimination in other areas (eg: employment), both Federal (section 22) and State (section 661) legislations contain specific prohibitions relating to educational authorities. In addition to section 22, the Standards clarify and elaborate the legal obligations in relation to education. The Standards are covered later in this document.

Disability Discrimination Act 1992

Section 22. Education

- (1) *It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:*
 - (a) *by refusing or failing to accept the person's application for admission as a student; or*
 - (b) *in the terms or conditions on which it is prepared to admit the person as a student.*
- (2) *It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates;*
 - (a) *by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or*
 - (b) *by expelling the student; or*
 - (c) *by subjecting the student to any other detriment.*
- (3) *This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.*
- (4) *This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the 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 which would impose unjustifiable hardship on the educational authority.*

The Federal Act makes it unlawful for any member of staff of an educational institution to harass a student or person seeking admission in relation to any disability of that student or person through sections 37 and 38.

It also allows for a school to put together an action plan in relation to disability discrimination in sections 59 – 64. While it is not compulsory for a school to have an action plan in place if a disability discrimination complaint is made against the school, it assists to show that the school has looked at the issue. The school would also have to show that the action plan not only exists but is also implemented and assessed regularly.

Equal Opportunity Act WA 1984

66I. Education

- (1) *It is unlawful for an educational authority to discriminate against a person on the ground of the person's impairment:*
 - (a) *by refusing or failing to accept the person's application for admission as a student; or*
 - (b) *in the terms or conditions on which it is prepared to admit the person as a student.*
- (2) *It is unlawful for an educational authority to discriminate against a student on the ground of the student's impairment:*
 - (a) *by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;*
 - (b) *by expelling the student; or*
 - (c) *by subjecting the student to any other detriment.*
- (3) *Nothing in this section applies to, or in respect of, a refusal or failure to accept the person's application for admission as a student at an educational institution that is conducted solely for students who have an impairment which the applicant does not have.*
- (4) *Nothing in this section applies to, or in respect of, a refusal or failure to accept a person's application for admission as a student at an educational institution where the 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 an impairment and the provision of which would impose unjustifiable hardship on the educational authority.*

4.4 Exemptions

Both Acts allow for exemptions where it is not considered unlawful to do an act that would otherwise be considered discriminatory.

The *Disability Discrimination Act* covers the specific exceptions to employment of not being able to fulfil the inherent requirements of the job and unjustifiable hardship in section 15, and unjustifiable hardship in education in section 22. These are explained in other sections of this document.

The general exceptions are covered in ss45-48 of the *Disability Discrimination Act* and also in Part 10 of the *Disability standards for Education 2005*.

Section 45. Special Measures

This Part does not render it unlawful to do an act that is reasonably intended to:

- (a) *ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act:*
or
- (b) *afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:*
 - (i) *employment, education, accommodation, clubs or sport; and*
 - (ii) *the provision of goods, services, facilities or land; or*
 - (iii) *the making available of facilities; or*
 - (iv) *the administration of Commonwealth laws and programs; or*
 - (v) *their capacity to live independently; or*

- (c) *afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:*
- (vi) *employment, education, accommodation, clubs or sport; and*
 - (vii) *the provision of goods, services, facilities or land; or*
 - (viii) *the making available of facilities; or*
 - (ix) *the administration of Commonwealth laws and programs; or*
 - (x) *their capacity to live independently.*

The Human Rights Equal Opportunity Commission states on its website that an employer does not need to wait until a job offer is made to ask these questions. It is more appropriate to discuss these questions at the interview stage.

Exemptions to discrimination are also made in a number of other areas including:

Section 46 – Offering of superannuation and insurance.

Section 47 – Other Acts done under Statutory Authority – for example, an Australian Workplace Agreement provision on payment of rates of salary or wages where salary or wage is determined by the capacity of the person and the person would receive a Disability Support Pension if not working.

Section 48 – Infectious diseases – where it is not unlawful to discriminate against a person if the person’s disability is an infectious disease and the discrimination is reasonably necessary to protect public health (for example: people are excluded from school due to the risk of Hepatitis B).

The *Equal Opportunity Act WA* also covers the specific exceptions to employment of not being able to fulfil the inherent requirements of the job and unjustifiable hardship. There are in section 66B and unjustifiable hardship in education in section 66I. These are explained in other sections of this document.

The *Equal Opportunity Act WA* covers its exceptions to disability ‘impairment’ discrimination in ss66Q – 66U. These exceptions cover the same subjects as the exemptions in the *Disability Discrimination Act* discussed above. For a full explanation, read these sections of the Act in full.

4.5 On the Same Basis, Reasonable Adjustments and Unjustifiable Hardship

In some cases, it is not considered unlawful to discriminate against a disabled person. One of the times this occurs is when ‘unjustifiable hardship’ can be shown. Before a school can claim ‘unjustifiable hardship’ they must look at what the concepts of ‘on the same basis’ and ‘reasonable adjustments’.

For employment of staff, only ‘reasonable adjustment’ and unjustifiable hardship’ apply. For the education of students, the Standards include the term ‘on the same basis’ and have widened the scope of ‘unjustifiable hardship’.

Part 2 of the Standards explains ‘on the same basis’. The Regulation Impact Statement explains it as such:

“A student with a disability is treated by the education provider ‘on the same basis’ as a student without a disability if the student has opportunities and choices, which are comparable with those offered to other students without disabilities, to enable:

- *Admission or enrolment in an institution; and*
- *Participation in courses or programs and use of facilities and services.*

This concept interacts with the concept of 'reasonable adjustment'. An education provider is required to make any decisions about admission, enrolment or participation on the basis that reasonable adjustments will be made where necessary so that the student with a disability is treated on the same basis as a student without a disability.

Before a school can claim 'unjustifiable hardship' they must look at what adjustments would need to be made to help a person with a disability be afforded the same service or opportunity as a person without the disability.

The Regulation Impact Statement explains this concept for education providers:

"An adjustment is a measure or action taken to assist a student with a disability to participate in education and training on the same basis as other students. An adjustment is reasonable if it takes into account the student's learning needs and balances the interests of all parties affected, including the student with the disability, the education provider, staff and other students. Factors to take into account in assessing whether a particular adjustment is reasonable include:

- *the nature of the disability;*
- *the effect of adjustment on the student, including the student's ability to participate in courses or programs, achieve learning outcomes and operate independently; and*
- *the costs and benefits of making the adjustment.*

A key aspect of the process for making an adjustment is that the education provider is required to consult the student or their associate on the appropriateness of the adjustment. The decision must include consideration of whether there is any other adjustment that would be no less beneficial for the student but less disruptive and intrusive for the student and for others. It may be necessary to seek professional expertise on an adjustment.

The provider must take reasonable steps to ensure that any required adjustment is made within a reasonable time. In making a reasonable adjustment, the provider is entitled to ensure that the integrity of the course of program and assessment requirements and processes are maintained."

Examples of **adjustments** include:

- making adjustments for sensory impairments (eg: a modified telephone for a person with a hearing impairment);
- removing physical barriers (eg: ramps for wheelchair access);
- giving information or training to other people about disability (eg: train teachers in dealing with students in their class who have autism or a medical condition).

'Unjustifiable Hardship' is a specific exception in both the Federal and State legislation applying to both employers and education providers. The exception provides that it is not unlawful to refuse or fail to accept a person's application for a job where the person, if the successful applicant, would require services or facilities that are not required by other staff who do not have a disability and the provision of which would impose unjustifiable hardship on the employer.

The same exception applies for an education provider employer when assessing a person's application for admission as a student. However, the introduction of the Standards expands the scope of the defence of unjustifiable hardship from the point of enrolment, as it is covered under the Act, to apply to other areas of the Standards – participation; curriculum development; accreditation and delivery; student support services; and elimination of harassment and victimisation – over the total period of a student's enrolment in an institution. The Standards are explained in Appendix B of this document.

The Regulation Impact Statement explains that:

“the Standards require providers only to ‘take reasonable steps’ to ‘make reasonable adjustments’ to enable students with disabilities to participate on the same basis as students without disabilities. The concepts of reasonable adjustment and unjustifiable hardship seek to provide a balance between the interests of providers and the interests of students with disabilities. The expansion of the unjustifiable hardship exception and the clear delineation of the obligation to make ‘reasonable adjustments’ are changes effected by the Standards that are advantageous for providers.”

Section 11 of the Federal Act states:

‘For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and*
- (b) the effect of the disability of a person concerned; and*
- (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.’*

Section 4(4) of the State Act similarly provides:

‘In determining what constitutes ‘unjustifiable hardship’ for the purposes of Part IVA, all relevant circumstances of the particular case shall be taken into account including the nature of the benefit or detriment likely to accrue or be suffered by all persons concerned, the nature of the impairment of the person concerned and the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.’

An unjustifiable hardship does not, therefore, cover the full range of adjustments required to accommodate the person with the disability. Expense or inconvenience do not necessarily demonstrate unjustifiable hardship. What could be unjustifiable hardship to a small community school may be manageable to a large school.

In a school, it is important to consider the whole school community when determining the impact any adjustments for a person with a disability will have. This includes:

- the advantages of the adjustments (ramps for wheelchair users can be useful for those with trolleys),
- the disadvantages of the adjustments (one less toilet for general use if one has to be modified for disabled use only),
- the effect of the disability (some students with spina bifida require minimal assistance, others require significantly more),

- the costs involved in making the adjustments which also takes into account the financial situation of the person (school) claiming unjustifiable hardship (eg: the relative costs to a school of installing wheelchair ramps, altering toilets, employing additional staff etc),
- the availability of funding to assist in making the adjustments,
- the impact on the students/employees.

No easy guidelines can be developed from these provisions. Rather, each matter will be dealt with on its own merits and with reference to the specific circumstances.

What we do know from the cases (K v N 1996 and L v Minister for Education 1995 – both cases in Queensland) is that the provisions do cover a case where a child has severe physical, intellectual and behavioural problems that are likely to significantly interfere with the learning of the other students and cause great stress to staff. In other words, the rights of the other children may outweigh the individual right of the child with disabilities.

However, pure financial considerations are much harder to deal with. What is clear is that it is prudent for a school to undertake a full assessment of the needs of the applicant and those who will be affected, including consulting with the prospective student and his or her parents, consulting with the teaching staff and seeking expert assessment of the nature and extent of any additional services or facilities that the pupil will require. It is important to assess the actual needs of the pupil concerned and not anticipate the needs based on general information concerning the disability. Once the full extent of the additional services or facilities are known, the school will be able to assess whether their provision will involve unjustifiable hardship.

In this regard, see the case of Hills Grammar School, discussed in Appendix A below.

There is no definition of what will constitute a reasonable requirement or condition in the case of indirect discrimination. Each case will depend upon its own circumstances and again, it will be important to establish the actual requirements of the pupil or staff member concerned.

4.6 Vicarious Liability

Employers can be held liable for an employee's actions, even if there is no personal fault lying with the employer. This is known as the principle of **vicarious liability**.

Both the *Disability Discrimination Act* and the *Equal Opportunity Act WA* cover vicarious liability. If an employee, during the course of their employment, discriminates against students or other staff regarding their disability, the employer can be held legally liable for the acts of the employee. This liability may be reduced or avoided if the employer can show "all reasonable steps" were taken to prevent the discrimination.

It is the employer's responsibility to ensure that the "*reasonable steps*" are active and preventive measures. Lack of awareness that the discrimination was occurring is not a defense for employers.

While the Acts do not define "*all reasonable steps*", the Human Rights and Equal Opportunity Commission has compiled a minimum level of action required.

- Issue and distribute a disability discrimination policy;
- Establish fair and effective disability discrimination grievance procedures;
- Raise awareness of all employees;

- Train those responsible for dealing with complaints or enquiries (including managers and supervisors);
- Monitor the working and learning environment;
- Continuing education on disability discrimination.

Schools can also be held liable for disability discrimination committed by its agents. The discriminator has to be performing duties on behalf of the School and could include people such as:

- Volunteers (eg: parents in classroom assistance, volunteer coaches, fund-raisers, etc.);
- Office-bearers (eg: School prefects)
- Holders of unpaid honorary positions (eg: Committee or Board members);
- Boards of Directors;
- Contractors and consultants.

While sections 123 and 161 respectively of the two Acts require a legal relationship between the parties (employer/employee or principal/agent), for the School to be liable, s160 of the Equal Opportunity Act only requires that the School has in some way been involved. That is, a school may be held liable if it “caused, instructed, aided or permitted” an individual to commit an unlawful act.

4.7 Disability Standards

Section 31 of the Federal Act provides for the establishment of Disability Standards in certain areas, including education and employment. Where a standard is established, it is unlawful to act in breach of the standard. Conversely, any act taken in compliance with a standard will not constitute discrimination under the Act.

In August 2005, the *Disability Standards for Education 2005* were introduced. The objects of these Standards are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the area of education and training; and*
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law in the area of education and training as the rest of the community; and*
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.*

The Standards apply to education provicers, including ‘schools registered through school registration authorities in the private sector’. A full list of the education providers is listed in section 1.5 of the Standards.

Parts 4 to 8 of the Standards specify how education and training are to be made accessible to students with disabilities. They cover:

- enrolment;
- participation;
- curriculum development, accreditation and delivery;
- student support services; and
- elimination of harassment and victimisation.

For each area listed above, the Standards also include a statement of the rights of the students, a description of the legal obligations of the education provider, and descriptions of the measures that, if implemented, will be evidence of compliance with the legal obligation.

A full copy of the *Disability Standards for Education 2005* and the *Disability Standards for Education 2005 – Guidance Notes* can be accessed through: www.hreoc.gov.au/disability_rights/education/education.html#standards

Currently, no Disability Standard for Employment has been established either.

5 Industrial Relations and Occupational Safety and Health laws

It is important to remember that anti-discrimination laws are only one part of the legal framework covering disability discrimination and work. Employers and employees also need to understand industrial relations laws, occupational health and safety laws, awards and agreements dealing with disability discrimination issues.

The obligation on Employers under the Occupational Health and Safety laws is to ensure a safe place of work for all employees. This requirement must be implemented in a non-discriminatory manner.

To assist the School to meet its obligations to provide a safe place of work, the School should obtain information on the individual student or staff member's needs in order to identify and control risks around the School.

As mentioned previously, a person who cannot perform the inherent requirements of a job may be dismissed without unlawful discrimination occurring. One of the inherent job requirements would be meeting reasonable occupational health and safety standards. For example, in a case in 1996, an employee complained that he couldn't wear a safety helmet because of his disability. The employer was found not to have discriminated in requiring an employee to wear a safety helmet as it was an occupational health and safety requirement.

Industrial relations laws at both Federal and State level regulate the workplace and the employment relationship. Anti-discrimination law at both Federal and State level prohibits discriminatory behaviour. The *Workplace Relations Act 1996* (Cth) has a number of provisions concerning discrimination.

For example:

- Section 93 of the *Workplace Relations Act 1996* provides that the Australian Industrial Relations Commission will take into account the principles of the *Disability Discrimination Act 1992* (Cth).
- Section 170CE and 170CK of the *Workplace Relations Act 1996* can be used if an employee has been terminated due to disability.
- Discrimination complaints arising from the discriminatory nature of awards or agreements can be dealt with under section 111A of the *Workplace relations Act 1996*.

It is important to remember that there are numerous other Acts in addition to the main Acts discussed, that deal with discrimination. The *Workplace Relations Act* and the sections discussed are only examples of where disability discrimination is discussed.

The issue of 'double dipping', as already explained in section 2 of this document, also relates to choosing whether to use anti-discrimination laws or industrial relations laws when making a complaint.

6 Common Law Duty of Care

Teachers and schools have a special duty of care to ensure that students are provided a safe and secure environment. Teachers are responsible for ensuring the safety of students against reasonably foreseeable risks and schools can be held vicariously liable for a breach of this duty. This common law duty of care would extend to implementing procedures to prevent disability discrimination in the workplace and if it does occur, taking steps to stop it occurring.

The Carnarvon Christian School Policy and Procedures Manual discusses 'Duty of Care' separately. This section discusses how to ensure that the duty of care obligation is fulfilled. This is partly achieved through an assessment of risks involved in particular activities taking into account factors such as the age of the children, ability of the children, amount of supervision.

The duty of care owed to a child with a disability may, therefore, be greater depending on the nature of the activity.

The School as an employer also owes a level of duty of care to all employees, especially those with a disability.

7 Implications for Schools in Employment and Education

The implications of these provisions for schools includes:

Education

The Act and the Standards deal with the following areas:

➤ Enrolment

The rights given by Part 4 of the Standards are to give prospective students with disabilities the right to enrol in an educational institution on the same basis as prospective students without disabilities, including the right to reasonable adjustments that are necessary to ensure that they are able to so enrol on the same basis as prospective students without disabilities.

It is illegal for an educational authority to discriminate on the grounds of a child's disability by refusing or failing to accept the person's application as a student, or in the terms or conditions on which it is prepared to admit the person as a student (Section 22) (eg: charging higher fees).

➤ Access and Expulsion of Students

Denying or limiting a student's access, expelling a student because of his/her disability or subjecting a student to any other detriment is unlawful (eg: not allowing the student to attend an excursion, join in school sports or access to student facilities).

➤ Participation

The rights given by Part 5 of the Standards are to give students with disabilities the right to participate in the courses or programs, and to use services and facilities, provided by an educational institution, on the same basis as students without disabilities, including the right to reasonable adjustments, where necessary, to ensure they are able to participate in education and training, on the same basis as students without disabilities.

➤ Curriculum Development, Accreditation and Delivery

The rights given by Part 6 of the Standards are to give students with disabilities the right to participate in educational courses or programs that are designed to develop their skills, knowledge and understanding, including relevant supplementary programs, on the same basis as students without disabilities.

➤ Student Support Services

The effect of the rights given by Part 7 of the Standards are to give students with disabilities rights in relation to student support services provided by educational authorities and institutions, on the same basis as students without disabilities.

The Standards also give students with disabilities rights in relation to specialised services needed for them to participate in the educational activities for which they are enrolled. These services include specialist expertise, personal educational support or support for personal and medical care, without which some students with disabilities would not be able to access education and training.

➤ Elimination of Harassment and Victimization

The effect of the rights given by Part 8 of the Standards are to require strategies and programs to support the right of students with disabilities to education or training in an environment that is free from discrimination caused by harassment or victimisation on the basis of their disability.

The Standards also support the right of students who have associates with disabilities to an educational environment free from discrimination, harassment or victimisation in relation to those disabilities.

Student records are required to be kept for 7 years after the child leaves the School. The Privacy Act allows students access to those records. It is advisable that schools keep detailed records of any reasonable adjustment considered or made. For example, individual education plan, individual behaviour plan, structural changes to the School's property and all correspondence.

➤ Application for Employment

It is also illegal to discriminate on the grounds of an applicant's disability by not offering them the job, or setting terms or conditions, because of their disability (Section 15).

➤ Promotion, Training, Dismissal of Staff

Not offering promotion or training to staff or dismissing them because of his/her disability is unlawful.

➤ Harassment

Comments or actions made about a child's or employee's disability, insults or humiliating jokes, actions that create a hostile environment, are acts of discrimination.

8 What Steps Can Schools Take?

It is impossible to set out any firm general guidelines that will ensure that every school complies with its obligations with regard to pupils and staff with disabilities. However, the following are some steps that Carnarvon Christian School will consider:

8.1 Enrolment

Establish an enrolment policy that includes:

- Asking parents to provide as much information as possible (eg: paediatric reports, professional assessments, previous school's reports.) *NB: The Western Australian School Education Act 1999 makes it compulsory for parents to provide this information.*
- Consulting with parents and the prospective pupil as they will have a wealth of knowledge about the needs of the pupil. The School will need written permission from the parents if it wants to investigate the student's educational needs.

- Consulting experts to meet with the parents, prospective pupil, relevant staff and other carers involved with the pupil, and to advise the School on the steps it will need to take in order to meet the needs of the prospective pupil, including physical access to buildings, health issues, curriculum issues, use of external specialists.
- Establish whether a psychology report is required for a mentally disabled child, or an occupational therapy report for a physically disabled child.
- Finding out what external funding is available to assist the School to meet the needs of the prospective pupil.
- Establishing what services the School will be able to access to assist (eg: Therapy Focus, WA Department of Health, EDWA, visiting teachers, vision/hearing).
- Establish whether an aide will be needed to assist in the class.
- Visiting the prospective pupil[’s current school to evaluate how it is meeting the needs of the pupil.
- Drawing on the knowledge of external advisers (eg: Association of Independent Schools Western Australia (AISWA)’s Inclusive Education Consultants).
- Once enrolment is offered, it is important there is a written agreement between the School and the parents regarding the program the School is offering.
- All relevant staff should be informed and trained on the needs of the student.

8.2 Employment

- Ensure that the interview panel for any new positions at the School are aware of the Equal Employment opportunities issues of the School..
- Train the interview panel to focus on the applicant’s job skills rather than any limitations they may have from their disability.
- Check all job descriptions with the School to ensure that any unnecessary physical requirements to perform the job are removed.
- If a position does have particular physical requirements, make sure they are included in the job description, selection criteria and advertisement.
- The selection criteria should focus on the skills, knowledge, relevant experience and minimum qualification levels necessary to perform the job.
- Ask the applicant/staff member to provide as much information as possible about their disability, as this will determine whether the person can perform the inherent job requirements; and to identify any reasonable adjustments required, in the selection of employment, or in the performance of work.
- Consider what impact the adjustments required would have on the workplace and students.

8.3 Generally

- As the Community Education Officer from WA Equal Opportunity Commission to address the staff or conduct a workshop.
- Prepare a disability awareness program with the involvement of students, staff, parents and community members.
- Ensure that any staff professional development program includes continuing education on discrimination issues.

- Review the School's policies to ensure that they do not discriminate against people with disabilities (students, staff or community members).
- Establish a written complaints procedure with the School that encourages any person who is subjected to unlawful discrimination or harassment to make a complaint and which prescribes the steps the School will take when it receives a complaint. This procedure should be well publicised, preferably by way of specific training seminars.
- Check the School's personnel practices to identify and remove any sources of direct or indirect discrimination.
- Where classes include pupils with disabilities, introduce and implement inclusive practices. For assistance, there is a range of excellent resources available (eg: *Inclusion: 450 Strategies for Success* by Peggy A Hammeken, Peytral Publications 1997 Minnesota).
- Involve the parents of the child with a disability in the School – keep them informed, genuinely respect their wishes and help them achieve their goals for their child in Individual Education Plan meetings.
- Be positive. Do not let financial costs impact negatively on your desire to help all children reach their potential, and remember that the whole School community has much to learn from interacting with children with disabilities.

9 Developing a School Policy on Disability Discrimination

As discussed previously, the law states that the employer must take 'reasonable steps' to fulfil their legal obligation to prevent disability discrimination. It is, therefore, essential that the School has a functional disability discrimination policy which is periodically reviewed.

9.1 Policy Content

It is important the School's enrolment policy is checked to see that it is inclusive. Priority may, however, be given to certain groups such as siblings, religious affiliation, old scholars' children, date of enrolment application.

The School should also periodically:

- Check that the School's grievance procedures cover staff and students who have been discriminated against;
- Check personnel practices to identify and remove any sources of direct or indirect discrimination'
- Identify the actions the School will be taking to promote equal employment opportunities to employees and students;
- Allocate resources, assign responsibilities, and set a time frame to carry out the implementation and/or review of the policy.

The policy must maintain the following:

- A strong opening statement on the School's attitude to Disability discrimination and its commitment to a non-discriminatory environment;
- An outline of the Schools' objectives regarding disability discrimination' the rights and obligations of the employer and employee under the award or workplace agreement;
- A plain English definition of disability discrimination;
- Examples which are relevant to the particular audience and environment;
- At statement that disability discrimination is against the law;

- Clarification of recruitment and selection procedures, including:
 - ⇒ Ensuring the interview panel is aware of the equal employment opportunity issues in the School;
 - ⇒ Reminding the interview panel to focus on the applicant's job skills;
 - ⇒ Checking job descriptions to remove outdated requirements not required to perform the job.
- The circumstances in which disability discrimination can occur;
- Specific Occupational Health and Safety issues relating to employees and students with disabilities;
- A list of possible consequences if the School policy is breached;
- A brief explanation of the options available for dealing with disability discrimination;
- Information on where individuals can get help, advice or make a complaint;
- Identify the actions the School will be taking to promote the School's policy on disability discrimination to staff and students.

9.2 Implementing the Policy

Implementation of any disability discrimination policy is as important as the development of the policy. A policy that is written but not implemented in a meaningful way is unlikely to protect an employer from liability. An example of this is a policy left on the shelf in a file or placed on the intranet.

Implementation of the disability discrimination policy requires direct action, such as:

- Allocating resources and assigning responsibilities within the staff to assist with the continuing review and implementation of the policy;
- A copy of the policy to be given to all new and current staff;
- Education to staff on the various forms of discrimination, anti-discrimination laws and this School's policies on discrimination;
- Regular monitoring of the School environment to ensure no discriminatory behaviour is occurring and to ensure that any discrimination complaints are followed up correctly;
- Evaluating the effectiveness of the policy after a period of time and making any changes necessary;
- Ongoing general reinforcement of the general principles of the policy.

9.3 Grievance Procedures

The best way to ensure the quick resolution of any grievance or complaint is to set up internal complaints procedures.

Carnarvon Christian School has an adopted policy titled "Dispute Resolution Procedure" which covers such topics as General Grievances and Workplace Grievances, Mediation, and Arbitration in General Disputes and Workplace Disputes.

Relying on external resolution can often be a lengthy and expensive exercise. A school can incur legal costs, damages costs incurred by the court, cost of time out of school, bad publicity, lowered staff morale, and so on.

Due to the sensitive nature of discrimination complaints, it is advised that the School ensures that the person dealing with grievances has some specialist training. The School may wish to consider using an external adviser who specialises in this area. It is important that all complaints are clearly documented and dealt with in a timely and confidential manner.

While it is important that a school has an internal complaints procedure in place, employees must be informed that they always have a right to complain to an external body such as the Human Rights and Equal Opportunity Commission and the various other tribunals. A school policy cannot insist that the employee uses the internal procedure initially.

The booklet produced by the Human Rights and Equal Opportunity Commission entitled "Sexual Harassment and Educational Institutions" covers Grievance Procedures in detail in Chapter 7. It includes information on:

- Dealing with formal complaints;
- Dealing with informal complaints;
- Descriptions of various grievance procedures models'
- Basic requirements of grievance procedures;
- Suggested guidelines when investigating a formal complaint;
- Record keeping;
- Defamation;
- Termination of employment.

This information can also be used for establishing the grievance processes for other forms of discrimination, including disability discrimination. This booklet is available on loan from the AISWA library.

10 Where To Go For Help

WA Equal Opportunity Commission
Level 2, 141 St George's Terrace
PERTH WA 6000
Phone: 08 9216 3900 or 08 9216 3934
Education Officer: 08 9216 3937
Website: <http://www.equalopportunity.wa.gov.au>
Email: eoc@equalopportunity.wa.gov.au
Will send information and talk to schools for a fee.

Equal Opportunity Act 1984
Website: <http://www.slp.wa.gov.au>
Select 'Online Publications' then 'Statutes – Acts and Regulations' then 'Statutes A-Z Browse' and select under 'E'.

Human Rights and Equal Opportunity Commission Act 1986
Website: <http://www.hreoc.gov.au>
Available under the 'Human Rights' heading on the front page.

Disability Discrimination Act 1992
Website: <http://www.hreoc.gov.au>
Available under 'Disability Rights' heading on the front page.
Also available under 'Disability Rights' is a wide range of information on disability discrimination, including the rights and obligations of disabled people and employers and how to make a complaint.
The site also details a wide range of court decisions in the area of disability discrimination, including:

- Clarke v Catholic Education Office & Anor (2003): a child who is profoundly deaf was found to have been discriminated against as the school did not provide the Australian Sign Language (Auslan) interpreting assistance, but instead relied on note-taking as the main tool to support the student in the classroom.
- Purvis v State of NSW (2002): a child who exhibited anti-social and violent behaviour as a result of brain damage was found not to have been discriminated against by the school.
- Travers v State of NSW (2000): a student with spina bifida, including bowel and bladder problems, was discriminated against by a school as she was not provided access to the nearest disabled toilet.

FAIR and REASONABLE: Disability Discrimination Act Implementation Kit
Curriculum Corporation
PO Box 177
Carlton South VIC 3053
Phone: 03 9207 9600 or 1800 887 991
Fax: 03 9639 1616
Email: sales@curriculum.edu.au
Website: www.curriculum.edu.au

This kit is a self-paced kit for leaders in schools to assist in understanding and complying with the Disability Discrimination Act 1992 within the context of our School. The various worksheets include legislation, partnership with families, carers and school communities, mediation in special education, and management issues under the Act.
The kit is available for purchase through the above address, or is available on loan through the AISWA library.

Workplace Relations Act 1996
Website: <http://www.workplace.gov.au>

Occupational Safety and Health Act 1997

Website: <http://www.slp.wa.gov.au>

Special Education Consultants

Association Of Independent Schools of Western Australia (AISWA)

3/41 Walters Drive

OSBORNE PARK WA 6017

Phone: 08 9244 2788

The Special Education Consultant has a range of material available to schools, including:

- “Breaking New Ground: Employing People with Disabilities”, an information kit containing material on developing the school’s Equal Employment Opportunity Program, Resource Information, and Awareness Raising; and
- “Students with Disabilities – Enrolment Guidelines for Independent Schools”, a resource folder put together by the Independent Schools Targeted Programs Authority Inc (ISA), and includes an outline of the essential components of the DDA legislation for schools, a suggested enrolment process for students with disabilities, planning documents to support students with disabilities, and an overview of key Occupational, Health, Safety and Welfare issues.

APPENDIX A

Catholic Education Office v Clarke [2004]

The decision of the Full Bench of the Federal Court in the case of Catholic Education Office v Clarke [2004] FCAFC, 197 has highlighted the issues confronting service providers and particularly educational institutions, when providing services for disabled persons.

The case concerned a student who was born with profound congenital deafness. The student attended from 1992 to 1999 a primary school (operated by the Catholic Education Office [CEO]) and like many other students at the primary school, planned to enter into a Catholic College at high school level. Throughout his time at primary school, the student had help from an Auslan teacher's aide and volunteers who interpreted the voiced words of the teachers and classmates. Funding was also provided for his year 4 and 5 teachers to undertake courses in Auslan.

When the student applied for a position at the high school in 1999, a series of meetings occurred between the parents and representatives of the CEO and College about his further education. In July 1999, the CEO and College developed a 'model of learning support' for the student to assist him in participating in, and receiving, classroom instruction. This model made it clear that the use of signing support would only be made available if a staff member were to have these skills and be in a position to input into the student's learning.

The student's parents, in a detailed letter, set out their view that the student required signing support so he could develop his English language skills and be able to participate fully in the core subjects at the College.

The parents of the student advised that they were prepared to make a grant to the school for the provision of a part-time teacher's aide who could provide signing support for the student. They also offered, amongst other things, to help to prepare any application for appropriate government grants and arrange for volunteers to provide support for the student.

In August 1999, an offer of enrolment was sent to the parents together with a proposed model of learning support. The model again only offered, in effect, teacher assistants trained in 'note-taking for students' and use of signing support, 'if a staff member were to have these skills and be in a position to input into the learning support program'.

The Court at first instance found that the assistance to be provided to the student would not include the provision of Auslan, and that instead the College required the student to rely on the use of note-taking as the primary communication tool to support him in the classroom. The Court found that indirect discrimination was made out on the basis that an unreasonable condition had been imposed on the student for admission to the College.

When determining whether a requirement or condition is not reasonable, the Full Court summarised the principles as follows:

The person aggrieved bears the onus of establishing that the condition of requirement is not reasonable in the circumstances.

The test of reasonableness is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect on the one hand, against the reasons advanced in favour of the condition or requirements on the other. Since the test is objective, the subjective preferences of the aggrieved person are not determinative, but may be relevant in assessing whether the requirement or condition is unreasonable.

The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. The question is not whether the decision to impose the requirement or condition is correct, but whether it has been shown that the decision is not objectively reasonable, having regard to the circumstances of the case.

The Court must weigh all relevant factors. While these may differ according to the circumstance of each case, they will usually include the reasons advanced in favour of the requirements or condition, the nature and effect of the requirement or condition, and the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement of condition. However, the fact that there is a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that a requirement or condition is unreasonable.

In applying the principles to the facts, the following considerations contributed to the finding of the unreasonableness in not providing Auslan:

The student was Auslan dependent and there was no prospect of him being able to communicate without Auslan, either quickly or without difficulty.

In the absence of an Auslan interpreter, the student would not have received an effective education at all, although over time it may have been possible to reduce his dependency on an in-class interpreter.

The terms and conditions of the offer of enrolment had not been modified by the College, and thus there was 'scant prospect' of the College actually providing Auslan support for the student.

A sudden withdrawal of Auslan support would cause the student distress, confusion and frustration.

An alternative was available that would have been acceptable to the student's parents and, in the light of the primary school experience, 'would have had no net ill effects'.

While there would have been difficulties in finding Auslan interpreters, it was far from impossible to do so. In any event, the alternative provided for reversion to note-taking if interpreting assistance proved not to be available.

Financial considerations did not play a major part in the equation. The reasonable possible equity concerns of the College were outweighed by the fact that the student was the only profoundly deaf student expected to attend the College in 2000.

In the light of the assistance provided to the student at primary school and the parents' repeated and sincere offers of assistance, the College could have made provision for the student to be given Auslan support in the classroom.

The Full Court affirmed that indirect discrimination had occurred, and upheld the primary Judge's award of \$20,000 in damages to the student, plus interest of \$6,000.

The Full Court added an important message in its decision – that its determination does not mean that educational authorities risk being penalised for endeavouring to assist disabled children.

The decision nevertheless is a salutary reminder to educational authorities of their obligations under, and the intricacies of, the legislation which applies to disabled persons. Where a disabled student is to be admitted to, and provided services at, an educational establishment, care should be taken to ensure that the disability is appropriately supported in accordance with legal requirements.

The summary of this case was provided by Phillips Fox Lawyers.

Hills Grammar School v Human Rights & Equal Opportunity Commission and Mr & Mrs Finney

In 1997, Hills Grammar School, an independent school in Sydney, refused enrolment to Scarlett Finney, a six year-old girl with spina bifida. This school has quite a few children with disabilities, but when the registrar investigated Scarlett's needs by contacting the Spina Bifida Association, an architect, the Department of Education and Association of Independent Schools, he was advised:

- It would cost \$1 million to make the school wheelchair accessible.
- It would cost \$2,500 each to train the teachers.
- A teacher assistant would be required at a cost of \$30,000-\$35,000 per year.
- The level of recurrent funding was not going to meet Scarlett's needs.
- Other nearby schools had appropriate facilities.

There were 100 applicants for the 44 positions in the Kindergarten.

The Principal sent a letter to Scarlett's parents:

"Thank you for your application for Scarlett to enrol at the Hills Grammar School in Kindergarten 1998.

An important factor in the consideration of each applicant is the nature of available resources. Following a thorough examination of Scarlett's special needs and the School's ability to meet them, we do not believe that we have adequate resources to look after her in the manner that she requires and in a way that is suitable for her. It is with great regret that we have reached this conclusion."

The parents complained to the Human Rights and Equal Opportunity Commission.

They said that:

- The school received \$1.5 million in government funding, plus fees of \$9,200 per child.
- Scarlett's disability was mild.
- She could walk short distances and use a wheelchair independently.
- Changes needed to buildings, toilets and the curriculum were minimal.

The case went before Commissioner Graeme Innes who found that:

- Kindergarten teachers were happy to teach Scarlett.
- Minimal training was needed for teachers.
- Scarlett could walk short distances.
- The school had 2 teacher assistants who could have been called if Scarlett needed to move long distances.
- Little curriculum modification was necessary because Scarlett did not have an intellectual disability.
- Minimal toilet modifications were needed.
- The school had grossly over-estimated the cost to building modifications because it had used the worst-case scenario. Only a few areas needed to be wheelchair accessible immediately.
- Mr & Mrs Finney had provided plenty of information about their daughter and offered for the school to meet all key medical or therapy staff involved in her support.

- The school had investigated the requirements of spina bifida in general, not the specific requirements of Scarlett Finney.
- Scarlett had been accepted by the Education Department school and had been successfully included with very little cost or difficulty.
- If the school had difficulty meeting costs, it could increase school fees by an amount that would constitute a very minor detriment to each individual or family.

The school was found to have discriminated against Scarlett Finney in circumstances where the exception of *'unjustifiable hardship'* was not established.

The school took the decision to the Supreme Court on review but the Honourable Justice Tamberlin upheld the Commissioner's decision.

Compensation was \$42,628 and costs were awarded against the school.

The legal costs would have been sizable and the school received a lot of negative publicity across Australia.

Independent Schools were reminded of their obligations and the rights of students with disabilities.

Carnarvon Christian Parent Controlled School Association (Inc)

REVISIONS AND ADDENDA

Revision Date	Clauses Affected	Page Number	Operative Date
2014	Whole document review	Whole document	2014