Inclusion: How Far Does A School Have To Go? Ensuring Best Practice: The Case of 'I'

Douglas J. Stewart
School of Learning and Professional Studies, Queensland University of Technology, Brisbane, Australia

Some Initial Comments

At the heart of the anti-discrimination legislation in every Australian jurisdiction is the belief that all persons are of equal worth and should have equal opportunities despite any particular characteristic that sets them apart from others. In schools this requires that the educational needs of students with a particular characteristic, such as a physical or intellectual impairment, be accommodated so that they might be given an education 'equal' to that of other students. It has come to be recognised that this may be achieved in an inclusive education setting or in some other setting best suited to the needs of the student and in accordance with parental wishes as well as, where possible, those of the student. Despite the reality that inclusive practices place pressures on schools, which in many cases they are not structured and resourced to meet, principals, as well as teaching and other staff, have to ensure that they engage in non-discriminatory practices consistent with the requirements of anti-discrimination law.

This article addresses direct and indirect discrimination issues seen against the background of a discrimination case involving a student with physical and intellectual impairments at a Queensland State high school. Issues in relation to unjustifiable hardship are discussed in the light of another case. The article concludes with a discussion of best practice strategies for schools that are based on the decision of the Anti-Discrimination Tribunal.

The Background

'I', who has spastic quadriplegia and severe intellectual disability, was a student at Corinda State High School from 1992 until the end of 1997. She needed assistance for her personal care and required a wheelchair. During her final year at the school 'I' attended the school formal ball and the graduation dinner, but was prevented from attending an official school excursion which was part of a school unit dealing with tourism in which she was enrolled. Her complaints of unlawful discrimination arose out of these three events with the first two giving rise to allegations of indirect discrimination and the excursion to complaints of direct discrimination.

The School Excursion

The excursion to Tangalooma resort involved students travelling via the Tangalooma Flyer, a vessel that had been used by the school on previous occasions when students using wheelchairs were permitted to attend. Early in the year, the complainant's parents contacted the school and were assured by the deputy principal that their daughter would be permitted to attend. On this basis the excursion fee was paid and the parents returned the form giving their permission for 'I' to go on the excursion. However, three days prior to the event the parents were informed that 'I' would not be permitted to attend as the school had concerns for her safety. Despite a letter from the parents being sent to the school principal expressing their concern, they were informed the

day before the outing that 'I' was not able to go and that an alternative excursion to Indooroopilly Shopping Town had been arranged for her and two other students. The principal stated that her reasons for the change were based on her increased awareness of the safety requirements needed for 'I' following the school Formal Ball that had been held earlier in the year, and about which considerable communication had taken place between the 'I's parents and the school.

In her subsequent evidence before the Anti-Discrimination Tribunal, the principal stated that she had established a committee to investigate the travel arrangements to Tangalooma and had been informed that 'I' would have to board the vessel by a forklift and that the management refused to accept any undertaking for her safety both while boarding and during any emergency that might arise while crossing to the island.

The principal stated she had investigated alternative travel arrangements including the use of another vessel but this had the disadvantage of landing some twelve kilometres from the resort. This would have necessitated 'I' travelling by a four-wheel drive vehicle, which would have been difficult to obtain. At best, this would have provided a most uncomfortable passage for her and it would also have caused her to arrive at the resort about half way through the allotted time there. The possibility of conveying 'I' by helicopter was also investigated but this was considered by the school to be too expensive. Neither alternative was discussed with the complainant's parents.

The School Formal Ball

Corinda High School has an enviable reputation for involving a great number of its students in dance and to celebrate their efforts a formal ball is held annually. In past years this had taken place at the school but due to student requests the venue had been shifted to the Brisbane Greek Club. The club, however, had no means for persons in wheelchairs readily accessing the ballroom as the main entrance is via two flights of stairs. Although there is a side entrance it, too, has two flights of stairs to negotiate. However, it is potentially possible for persons to get to the ballroom by means of a goods lift at the rear of the building, although there were signs that the lift was only to be used for carriage of goods.

In addition to their concern over access for students in wheelchairs, 'I's parents believed that the toilet facilities were inadequate for persons with disabilities and these concerns were expressed to the principal along with suggestions for a number of alternative venues. The principal had the sites investigated and assessed against a mix of criteria which she considered necessary for the success of the event as well as the safety of the students. These included: no access to alcohol outlets; toilets that could be readily supervised; a dance floor sufficient to hold a minimum of 300 students; a venue that could not be gate-crashed, nor one from which students could leave without being noticed by school staff; being available on a Saturday evening; and one that cost no more than the Greek Club.

As none of the alternative venues met the criteria, the principal made arrangements for a stair climber to be made available at the Greek Club that would convey 'I' up the stairs in a wheelchair. She also undertook arrangements to ensure 'I' would have the appropriate level of privacy and safety while using the toilets, including the installation of a grab rail and a small ramp into the ladies' toilet. On the night of the formal it took 'I' twenty minutes to get to the ballroom which she did by way of the side door and the stair climber. Despite the wishes of her parents, the school had not permitted the complainant's personal carer to attend 'I' at the function on the grounds that she was not connected with the school and that on a previous occasion had an altercation with school

staff over a decision concerning 'I'. 'I' was attended by experienced school staff all of whom believed she had appeared to enjoy the evening.

The Graduation Dinner

The graduation dinner for students at Corinda High School is traditionally held on 'the Island', a converted barge that travels up and down the Brisbane River. This vessel is a popular venue for such events as it prevents access to alcohol, has controlled access, and importantly, has access for people with disabilities. The complainant's parents however, did not believe the venue to be suited to students in wheelchairs as embarking/disembarking was by means of a narrow ramp and there was a lack of adequate toilet facilities for persons in wheelchairs as well as a lack of privacy.

As a consequence of the parents' concerns regarding the formal, the principal had thirteen alternative venues investigated but none of them was able to match the advantages offered by it. In order to meet the complainant's needs the school undertook to purchase additional ramps and to construct a portable toilet and privacy screens. Moreover, so as to dispel the concerns of the parents over safety, the owner of 'the Island' hired an additional crewmember to assist in the boarding and disembarking of 'I' as well as being available for her should there be any emergency. Again, as with the formal, 'I' attended and there was evidence that she appeared to have a very enjoyable evening.

The Complaints

The complainant's parents lodged a complaint on her behalf with the Queensland Anti-Discrimination Commission in July, 1998. This was accepted by the Commissioner in August and in October, the parents were authorised under s134 of the Act to make a complaint on behalf of their daughter. The relevant section of the Act – s134 (1) (c) - enables a complaint to be made on behalf of 'the person who was subjected to the alleged contravention and who is unable to make or authorise a complaint' themself. Division 3 of the Act makes provision for a complaint to be heard through a conciliation process and where a matter remains unresolved there is a further provision (s166) that enables a complainant to require the Commissioner to refer the complaint to the Anti-Discrimination Tribunal. This the parents successfully accomplished in July, 1999.

Under s145, which provides for anonymity, the President of the Tribunal ordered the complainant's name as well as other identifying information such as parents' name, to be withheld in any publication about the details of the hearing.

The complaints were made on the basis that 'I' suffers from an impairment within the meaning of the Act and:

- Was directly discriminated against by being excluded from the school excursion to Tangalooma resort; and
- Suffered indirect discrimination at the Formal Ball and the Graduation dinner by having to access the venues and facilities in a manner other persons attending these events were not subjected to and that this was not reasonable in the circumstances.

The Respondent's Case

The school argued that if there was discrimination it was not unlawful because of the exemptions contained in the legislation and particularly ss44, 51 and 108. These provisions are discussed below.

The Relevant Provisions of the Act

The complaints were made on the basis of the following provisions of the *Anti-Discrimination Act* 1991 (Qld).

The Act prohibits discrimination on the basis of an attribute (s7) and s7 (1)(h) includes impairment as an attribute and s4 defines impairment as meaning- in part:

(a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or

(b) the malfunction, malformation or disfigurement of a part of the person's body; or

(c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or

(d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or

(f) reliance on a … wheelchair …

This section also provides for the condition having existed from birth, whether it still exists or previously existed but no longer exists.

It was accepted that the complainant was a person with an impairment. It was necessary, however for a complainant to establish the grounds for her complaint. In this regard the Act prohibits both direct (s10) and indirect (s11) discrimination. Further, s8(a) states that discrimination occurs on the basis of a characteristic that a person with any of the attributes generally has …

Direct discrimination includes the treatment of a person who has an attribute less favourably than a person who does not have the attribute in circumstances that are the same or not materially different. Moreover, whether the discriminator considers the treatment to be less favourable or not is irrelevant (s10 (2)) as are the person's motives for the discrimination (s10(3)). Under s10(5) it is also irrelevant that the person requires special services or facilities.

Indirect discrimination occurs when a person imposes on a person with an attribute a term, which includes a condition, requirement or practice:

> s11(4) (a) with which a person with an attribute does not or is not able to comply; and
>
> (b) with which a higher proportion of people without the attribute comply or are able to comply; and
>
> (c) that is not reasonable.

Whether a term is reasonable depends on all the relevant circumstances (s11(2)).

Part 4 of the Act provides for areas of activity where discrimination is prohibited and Division 3 of the Part prohibits discrimination in specified areas of education. The relevant provisions prohibit an educational authority from discriminating:

> s39(b) by denying or limiting access to any benefit arising from the enrolment that is supplied by the authority; or

(d) by treating a student unfavourably in any way in connection with the student's training or instruction.

S46 of the Act provides that a person must not discriminate against another person in the provision of goods and services whether this be by failing to provide them, or the terms and ways by which they are provided as well as treating a person unfavourably in anyway in connection with the supply of goods and services.

The last relevant area of complaint made by 'I' was under s101 of the Act which prohibits discrimination by any person performing – or has any responsibility for - any function or exercising any power under State law or for the purposes of a State Government program. In this section discrimination is prohibited in performing the function, exercising the power or carrying out the responsibility.

The respondent claimed that if it had discriminated against 'I', the relevant acts were not unlawful under the provisions dealing with exemptions for discrimination in the areas of education and goods and services.

In relation to education s44(1) provide that it is not unlawful for an educational authority to discriminate against a person with an impairment if special services or facilities are required and their supply would impose an unjustifiable hardship on the educational authority. In determining whether an unjustifiable hardship would be imposed the Tribunal is required to consider circumstances included in s5 of the Act namely the nature and cost of supplying the goods and services as well as the number of persons who would benefit or be disadvantaged. The financial circumstances of the person receiving the services or goods as well as any disruption that their supply might cause are also to be considered. Finally, in an important provision, s5(e), the nature of any benefit or detriment to all people concerned must be taken into account. Similar prohibitions to do with unjustifiable hardship are provided in s51 to do specifically with the supply of goods and services generally.

The respondents also relied on the workplace, health and safety provision in s108 which provides that 'a person may do an act that is reasonably necessary to protect the health and safety of people at a place of work'.

The Tribunal Hearing

In relation to the excursion, the complainant argued she had suffered direct discrimination in that had she not had an impairment she would have attended and that she had been treated less favourably than students without her impairment who had gone on the excursion. The respondents maintained that 'I' had been excluded because of fears for her safety arising from the difficulty in access to the Tangalooma Flyer as well as their concern that accessing the Vessel by forklift would have been unlawful.

The President of the Tribunal found that 'I' had been treated less favourably than other persons without her impairment. She noted that not only had the students in the complainant's year attended the excursion but that in previous years other students, including some in wheelchairs, had gone to the same venue and used the Tangalooma Flyer for this purpose. It was held that the discrimination against 'I' was both direct and unlawful in terms of s10 of the Act. It is worth noting, moreover, that the President rejected the respondent's argument that for the purposes of workplace health and safety the Tangalooma Flyer was a place of work. Rather the Tribunal saw this as a venue for the purposes of the excursion and, further, there was a lack of expert evidence

that 'I' would have been at risk had she hone on the excursion, particularly as in previous years students with similar disabilities had gone on the outing.

In reaching her decision President Copelin noted that the school had not sought expert advice concerning accessing the Tangalooma Flyer but had relied only on the advice of the Education Department's regional Advisor on Occupational, Health and Safety. She noted also that the principal had not involved the complainant's parents in the decision concerning alternative travel to the Tangalooma Resort. Reliance was placed by the Tribunal on the decision in '*L' v Minister for Education for the State of Queensland* (No2) (1996) 1 QADR 207 where it was held the suspension and exclusion of a student 'had the effect of closing an educational option to her which would not have been closed in the absence of her treatment'.

In respect of the other complaints of indirect discrimination, the complainant alleged she suffered as a result of her attendance at the school formal and the graduation dinner. Her complaint centred on the problems she faced in accessing both the Greek Club and 'the Island' in that she was unable to access them in the same manner as the other students and that her access was more onerous than that of the others. In addition 'I' argued that toilet facilities at both venues were unsuited to persons in wheelchairs. Further 'I' claimed that her access to 'the Island' was unsafe and that there was a lack of adequate emergency evacuation procedures. The respondent, in a rather weak argument, maintained that there is no imposition of a requirement that a disabled person has to enter a venue by a particular entry or by a particular means. It was argued that 'you cannot get past the fact that people with disabilities are going to have to do some things differently'. The respondent asked a question - that implied a lack of appreciation of the underlying tenets of the anti-discrimination legislation – 'What is wrong if you have a disability with using a stair-climber on the steps of the Greek Club?'

The President found that in relation to the prohibition of discrimination in the area of education the complainant had restricted access to the full benefits of the formal/ball and the graduation dinner. She found further that access to the two venues met the requirements of the provisions concerning the supply of services in that 'the respondents failed to supply ['I'] with that service by imposing terms with which she could not comply'. She found also that the respondents were persons included in s101 of the Act in that 'the operation of the [school] would be considered the performance of a function or exercise of a power under State law or for the purposes of a State Government program'.

The Tribunal had to determine also whether the terms (condition) imposed on a complainant are reasonable in all of the circumstances. In this regard the President considered arguments that were centred on access by 'I' to all the facilities at the venues as well as the process of ensuring her privacy. It was found that the 'evidence indicates that any negative consequences from the failure to comply' with the terms 'were significantly diminished by the fact' that there were not many people wanting to use the facilities and who were prevented from doing so by the lack of wheelchair access while only two persons had to use the stair climber. The President held that there were 'reasonable arrangements made by [the school principal] and others to enable the participation of the complainant. The President went on to examine the cost of alternative terms which in essence meant the cost of alternative venues. In this regard the Tribunal accepted the fact that the criteria established to determine the appropriateness of alternative sites were reasonable. It was concluded that 'the terms complained of in relation to the school formal/ball and the graduation dinner were reasonable in the circumstances of the case'. In other words the efforts taken by the school in trying to meet the complainant's concerns in relation to the

selection, access and use of facilities for the school formal and graduation dinner were considered reasonable in all of the circumstances.

In relation to unjustifiable hardship the President noted that the respondents were not the owners of the venues used by the school and, therefore, they were not able to install special facilities for their students. As a consequence, their only alternative would have been to arrange the formal functions at other venues which would have added considerably to the expenses of the students as well as causing disruption to all of them. President Copelin, concluded, after considering all the 'benefits' and 'detriments' to all the parties involved in the school formal/ball and the graduation dinner, that 'I am of the view that the supplying of special services and facilities would impose unjustifiable hardship on the respondents'.

In brief, it was held that, on the balance of probabilities, the respondent had not indirectly discriminated against the complainant and had 'discharged the onus placed on them … in relation to the functions at the Greek Club … and at "the Island"…'

Discussion

As noted in the introduction, a central principle of anti-discrimination legislation in Australia, as elsewhere, is to provide all persons with an equal opportunity in society regardless of any particular characteristic they might have that sets them apart from others. Such characteristics are commonly numerated in legislation in all Australian jurisdictions. One enumerated characteristic is that of impairment, which is frequently referred to as disability. It has been well noted that disability differs from other legislated grounds such as ethnicity or religion in that these are attributes that do not vary, whereas there are many forms of disability.

A major objective of anti-discrimination legislation is to ensure, as far as possible, that the needs of any person with an impairment to access various institutions available in the community are accommodated in a reasonable fashion. In relation to education this is interpreted as permitting access to mainstream schooling where possible. This principle was accepted in the United States over four decades ago in *Pennsylvania Association for Mentally Retarded Children v Pennsylvania* 334F Supp 1257 (1971) in which it was held that segregation of students with a disability from mainstream education was a form of discrimination.

Similarly in Australia, it is recognised that providing equality of opportunity means ensuring that students with disabilities have the opportunity to access the form of education most suited to meet their specific needs – whether this be in an inclusive or other education setting. This point has been emphasised by Professor Alston in *Dalla Costa v ACT Department of Health* (1994) EOC 92-633:

> In the area of disability the principle of 'mainstreaming' is generally accepted. Its premise is that persons with disabilities should, to the greatest extent possible, be enabled to integrate themselves into the mainstream of society and especially in relation to activities such as education and employment. The principle represents a clear rejection of the practice of exclusion…

Notwithstanding contemporary pressures for schools to ensure inclusive practices are followed, the argument is sometimes advanced that ensuring equal opportunity means placing some disabled students in a specialised educational setting. It has been argued, for example by Professor Alston, in *Dalla Costa,* that:

> … while integration should be recognised as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality.

This point is poignantly illustrated in the case of 'L' (*'L' v Minister for Education for the State of Queensland* No H39 of 1995) who at the time of the hearing had an intellectual impairment which was described by the Queensland Anti- Discrimination Tribunal, as having 'a severe impact on her intellectual development, her ability to communicate, her gross motor schools and her capacity to care for herself in matters such as eating and hygiene'. Initially seven year old 'L' had been enrolled part time in a Special Education Development Unit while she also attended kindergarten and preschool. In 1994 'L' attended the Special Unit for two days a week and the other three days at a regular State primary school.

In 1995 'L' was enrolled full time in the state school but was suspended mid way through the year. 'L' had been previously ascertained by experienced staff of the Education Department as requiring the highest level of support – on a 1:6 ascertainment scale. Accordingly, an Individual Education Program was made out for her and funding was approved to provide a teacher's aide. Throughout 1994 staff at the school had expressed their concerns that 'L's behaviour necessitated teachers spending a great deal of time with her and that as a consequence they were unable to devote adequate time to other students.

In 1995 'L' was placed in a class with two teachers who had the assistance of the teacher's aide to help care for 'L' for twenty hours each week. However, the developmental levels between 'L' and the other children increased to such an extent that she was unable to be integrated into activities the other children were engaged in. Disruption to the other children was also a problem as 'L' continually vocalised in such a manner as to disturb their work. As a consequence another assessment of 'L' was initiated by the school principal and carried out by a Departmental Guidance Officer. It was pointed out in this assessment that 'L' would require long term educational support and that the best educational setting for 'L' would be in a Special Education Unit at a nearby school.

In June, 1995, 'L's mother had declined the recommendation that 'L' be transferred to a Special Development unit on the grounds that she believed an inclusive education setting was best for her daughter. 'L' was suspended from the State primary school in early July on the grounds that her presence in the regular classroom was too disruptive to other students as well as the teacher's time. In a subsequent discrimination hearing it was held that although 'L' had been discriminated against it was not unlawful discrimination.

Unjustifiable Hardship

In terms of unjustifiable hardship the Tribunal noted in relation to inclusion that even had it been necessary to determine whether:

> full integration is the best method of teaching intellectually disabled children other considerations, such as the stress placed on teaching staff without specialist training and the disruption to other children are such as to outweigh the benefits … and to constitute unjustifiable hardship…

The cases of 'I' and 'L' demonstrate very clearly that. Tribunals in determining what constitutes unjustifiable hardship are required to consider many matters and not merely the cost

to the institution of ensuring ready access to buildings, grounds and facilities. In both cases the 'cost' to other students was also a central factor in the determination.

In this article the extent to which teachers have to go in order to meet the needs of children with special needs has been noted. In 'I' both teaching and administrative staff were required to spend many hours seeking alternative venues for, as well as ways to facilitate the complainant's attendance at, the formal/ball, the graduation dinner and the excursion. In 'L' two teachers, a teacher's aide and a part-time specialist spent many hours committed to meeting her educational and social learning needs.

The cases also raise the question whether the level of knowledge generally held by teachers concerning students with special needs is sufficient to enable them to meet responsibilities flowing from legal regulation under anti-discrimination statutes. The training given to teachers in their pre-service courses does not always provide anything other than a minimal grounding in specialist areas such as that to do with students with impairments or indeed their legal obligations concerning discrimination. Research in Australia and elsewhere, shows that educators have a low level of knowledge about areas of law that arise in the daily life of the school. Paradoxically, teachers or school administrators are required to implement programs or to follow policies and procedures in their schools that require such knowledge or understanding.

As a consequence of a lack of specialist knowledge, teachers have to rely on part-time specialists who are only able to devote a limited time to any one specific classroom situation. Arguments for and against full inclusion of students with disabilities in regular schools and classrooms have been debated in Australia for several decades and while it is now a more accepted practice, further research into other aspects of inclusion such as the effect on teachers and the learning of other students appears well overdue.

Finally, in relation to both cases, it seems to me inappropriate for expert witnesses, who in many cases have never been a classroom teacher, to argue that regular classroom teachers – regardless of whether they have the slightest training in special needs children – are competent to teach and manage those who need highly specialised care and attention. It might well be that teacher training institutions and education authorities are in breach of their duty of care obligations to both teacher and special needs students. Here the comments of Dr Giorcelli, in 'I' are highly pertinent when she notes that teaching disabled children in educational and social learning requires highly specialised teaching skills. It is her belief that children with special needs are best catered for in regular classrooms with regular teachers but with the addition of specialist teachers working closely alongside them.

Best Practice

It is evident from the discussion contained in this article that school staff and particularly the principal need to have a sound awareness of the anti-discrimination legislation that impacts on their school. Schools must implement policies and procedures that will ensure applicants for admission to the school are not discriminated in their enrolment or in the access to any benefit that enrolment provides. In this regard it would be necessary that, at the very least, schools have in place systems that would identify situations that have the potential to cause direct or indirect discrimination. It is clearly necessary for school staff to be aware of their statutory and common law obligations to special needs students and this may entail their undertaking in-service courses.

It is a useful practice to allocate time at the regular staff meeting to discuss various matters that arise in the school that involve, or have the potential to involve, legal problems. In this way a school staff can be made aware of the wide range of obligations the law imposes on them including their obligations under anti-discrimination legislation.

The cases demonstrate that schools have a duty to ensure students with, wherever possible, must be included in the full life of the school although there will be occasions when, for their and other students' safety, this might not be possible. When planning curricula and extra curricula activities the needs of all students must be considered.

Finally it makes sound practice to establish a school culture that welcomes diversity; a culture that, while accepting the fact that individuals are different concentrates on providing for their different learning needs. School staff must commit to ensuring that appropriate processes are followed in meeting student needs and this may well mean treating some unequally in order for them to have the opportunity to be equal.