School Bullies and Lessons in Anti-Discrimination Law: *Sinnapan & Anor v State of Victoria*

1. *Introduction*

The case of *Sinnapan & Anor v State of Victoria*[1] centred around the closure of a government school in Victoria which had developed a special program to meet the educational needs of Aboriginal students. This note focuses on the decision of the Appeal Division of the Supreme Court of Victoria, where it was held that the closure amounted to race discrimination.

In finding discrimination, the Court adopted a flexible interpretation of the *Equal Opportunity Act* 1984 (Vic), applying the decision of the High Court in *Waters & Ors v Public Transport Corporation*.[2] On a practical level, the decisions in *Sinnapan* and *Waters* have significant implications for service providers, particularly governments, seeking to make cuts in services. Where such cuts have the effect of denying access for groups protected by anti-discrimination law, a claim of discrimination may be possible. The decision in *Sinnapan* also signals some future directions for anti-discrimination law by highlighting the distinction between formal equality and substantive equality, and recognising systemic discrimination. This note explores some of the possibilities within the legislation for addressing issues of systemic discrimination, and considers ways in which we might change our approach to, and understanding of, discrimination. However, if the decision in *Sinnapan* presents some positive possibilities for the development of anti-discrimination law, it is also suggested that the case and its political context reveal some basic limitations in the law, and its ability to achieve equality.

2. *The Decision in* Sinnapan

A. *Findings of Fact Before the Equal Opportunity Board of Victoria*

The complainants were Aboriginal students who attended Northland Secondary College in Victoria. As a part of its attempt to cut costs in providing public education, the Victorian State Government announced in 1992 that the school would be closed from the 1993 school year. A number of factors were considered relevant: the school had low enrolments; the "average recurrent cost" of a student at the College was too high in comparison with students at other schools; buildings and facilities required $1.4 million in repairs; there were a number of schools within a 1 to 2.6 km radius of the college that could accommodate students from Northland; and there were pressing financial reasons in the State economy for rationalising the school system.

1 (1994) EOC 92–611.
2 (1991) 173 CLR 349.

At the time of closure there were between 55 and 67 Aboriginal students, some of whom came from other cities and States within Australia to attend Northland. There were also students from numerous other ethnic backgrounds, many of whom had come to Northland after schooling problems elsewhere. The College was considered to be unique within the Victorian education system, adopting a decentralised model of authority. The aim of this approach was to treat the students as individuals and attempt to involve them in the process of schooling, and thereby develop patterns of education that could be relevant to them. This was described as the "whole school approach", and involved teachers, students and parents in the activities and processes of the school.

The Victorian Equal Opportunity Board[3] found that the different modes of authority and discipline of the "whole school approach" made it particularly compatible with Aboriginal culture and that it had gained acceptance in Aboriginal communities. It was also suggested that the approach appealed to those students who had been considered "difficult" or "lost causes" at other schools. The appointment of two Aboriginal educators to the school also meant that Aboriginal culture became a feature of the College's approach. The Board further found that the Aboriginal program at Northland was integral to the school, and was not one which could be moved: it would take five to ten years to recreate it at another school. Moreover, the evidence universally indicated that the education system in Victoria did not otherwise reflect or take into account the cultural complexities and needs of Aboriginal students.

B. The Basis for the Complaint

The complainants claimed that the closure of the school discriminated against them, and other Aboriginal students at the school, on the basis of their race. Requiring that the students attend other schools, which did not accommodate Aboriginal culture and the special needs of Aboriginal students, effectively denied them an education. The claim was made under sections 17(1), (5), 28 and 29 of the *Equal Opportunity Act* 1984 (Vic), which are set out below.

Section 17(1) defines "direct" discrimination: conduct which, on its face, is discriminatory. It states:

> A person discriminates against another person in any circumstances relevant for the purposes of a provision of this Act if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.

Section 17(5) covers "indirect" discrimination: conduct which is apparently neutral, but has a discriminatory impact.[4] It provides:

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3 *Sinnapan & Ors v State of Victoria* (1994) EOC 92–567.

4 An example of this is height or weight requirements, which may discriminate in their operation against women, people of particular races, and people with disabilities. See *Dao & Anor v Australian Postal Commission* (1987) EOC 92–193.

For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —

(a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;

(b) the other person does not or cannot comply with the requirement or condition; and

(c) the requirement or condition is not reasonable.

Based on these definitions of discrimination, the statute proscribes certain activities in which discrimination is made unlawful. These include the provision of education, and the provision of services in general. Section 28 states:

(1) It is unlawful for an educational authority to discriminate against a person on the ground of status or by reason of the private life of the person —

(a) by refusing, or failing, to accept the person's application for admission as a student; or

(b) in the terms on which it admits the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of status or by reason of the private life of the student —

(a) by denying the student access, or limiting the student's access, to any benefit provided by the authority; or

(b) by expelling the student or subjecting the student to any other detriment.

Section 29 provides that:

(1) It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —

(a) by refusing to supply the goods or perform the services; or

(b) in the terms on which the person supplies the goods or performs the services.

C. *The Decision of the Supreme Court of Victoria, Appeal Division*

The Equal Opportunity Board at first instance held that the closure amounted to discrimination.[5] This was overturned on appeal by Beach J who held that the students were "not prevented from or in any way inhibited in making full use of the public education system provided by the State of Victoria."[6] On a further appeal, the Board's finding of discrimination was affirmed.[7]

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5 Above n3.

6 *State of Victoria v Sinnapan & Anor* (1994) EOC 92–568 at 77,125.

7 Above n1. The Court also considered the extent of the power of the Equal Opportunity Board to make orders under ss44, 46, and 48, but the focus of this note is on the decision concerning discrimination.

The Board had found that the State was an educational institution under section 28, but, following the decision in *Fenn & Anor v State of Victoria*,[8] held that the section did not apply to the closure of schools.[9] The Appeal Division upheld this ruling, holding that the section referred to a specific, continuing educational institution.[10] However, the State was also held to be a service provider for the purposes of section 29. Since the State continued to provide the "service of a public education" to the complainants at other schools, section 29(1)(a) (refusing to provide a service) was not applicable. The issue was therefore whether there was discrimination in the terms on which the service was provided; section 29(1)(b).

In determining discrimination, the Supreme Court rejected the use of section 17(1) (direct discrimination) in this case.[11] The Court accepted the view implicit in the judgments of the majority of the High Court in *Waters & Ors v Public Transport Corporation*[12] that section 17(1) (direct discrimination) and section 17(5) (indirect discrimination) are mutually exclusive provisions, dealing with direct and indirect discrimination respectively. Since the complainants based their argument around section 17(5), the Supreme Court declined to consider the possible applicability of section 17(1).

Having decided that the applicable provisions were sections 29(1) (discrimination in the provision of goods and services) and 17(5) (indirect discrimination), the Court then reformulated the complaint in terms of three things: (i) the goods or services being provided; (ii) the terms on which the goods or services were being provided; and (iii) the requirement or condition, the imposition of which was thought to discriminate unlawfully under section 17(5).[13]

The distinction made between a service and its terms is unsatisfactory, but nevertheless significant. Following *Waters*, the Court held that the terms on which a service is provided can amount to the discriminatory "requirement or condition" under section 17(5). However, features which were a part of the basic nature of a service could not amount to a discriminatory "requirement or condition".[14] The Court recognised the arbitrariness of this position, stating that: "the result in a given case will not uncommonly depend upon the way in which the one (the services) are defined and the other (the terms) are described".[15]

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8 (1993) EOC 92–514

9 Above n3 at 77, 112

10 Above n1 at 77, 264. Having found that this section was inapplicable to the State in this case, the Court declined to consider whether or not s28 was an exclusive code for dealing with education institutions. The Board had found, based on the decision in *Fenn* (above n8), that there was no such code: both ss28 and 29 might therefore apply to an educational institution.

11 Above n1 at 77, 265.

12 Above n2 per Brennan J at 372–3, Dawson and Toohey JJ at 392–3, and McHugh J at 400, affirming the view of Brennan and Dawson JJ in *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 170–1, 184. The alternate view was taken by Mason CJ and Gaudron J, with whom Deane J generally agreed, who suggested that no such distinction needed to be imported into the legislation; at 359.

13 Above n1 at 77, 266–7.

14 Ibid.

15 Ibid.

In the instant case, the State argued that the relevant service was the public education system without the college. Defined in this way, there could be no basis for a claim that the service was provided on discriminatory terms: the absence of Northland was defined into the nature of the service itself. However, this was rejected by the Appeal Division, which held that the relevant service was the public education system in Victoria in general. The closure of Northland was therefore seen as an alteration of the terms on which the service was provided. The Court compared the case with that of *Waters*,[16] where the removal of tram conductors was found to discriminate against people with disabilities, by preventing their access to trams. The majority in *Waters* rejected an attempt by the Transport Corporation to define the service provided by them as "driver only trams".[17] The service was the provision of trams, and the removal of conductors was held to impose a requirement or condition upon users: that they use the service without conductors. The High Court noted the need to give the legislation a "generous construction".[18]

The terms on which the service was offered, and the "requirement or condition" imposed was therefore that the complainants attend a school other than Northland. Put another way, if the complainants wished to access the services of the State, they were required to attend a school which did not offer the "whole school approach". The final issue was whether this requirement or condition was discriminatory for the purposes of section 17(5).

The Court held that the complainants could not comply with the requirement or condition imposed; section 17(5)(b). The State had argued that nothing prevented the students from attending other schools. Furthermore, even if the quality of their education was diminished because of cultural disadvantages, section 17(5)(b) imposed no qualitative assessment of the ability of complainants to comply with a requirement or condition. The Court rejected this, stating that receiving an education involved more than just attending a school. Access to education was the real issue, and a failure to accommodate the cultural differences of the complainants denied this access. The Court declined to consider the extent to which the "degree of compliance" with a requirement or condition was relevant, leaving it for "future consideration".[19]

It was also held that a substantially higher proportion of persons who were not of the complainant's race were able to comply with the requirement or condition; section 17(5)(a). When compared with either the non-Aboriginal students formerly attending Northland, or all students in Victoria in general, the Court felt that the non-Aboriginal group would clearly be better able to gain effective access to education.[20] The fact that other students who benefited from Northland would also suffer disadvantage did not change the fact that it was Aboriginal students that were most likely to suffer.[21]

Finally the Court had to consider the "reasonableness" of the requirement or condition; section 17(5)(c). It was held that "reasonableness" in this case

16 Above n2.
17 Ibid.
18 Id at 394 per Dawson and Toohey JJ.
19 Above n1 at 77, 270.
20 Id at 77, 270–1.
21 Id at 77, 271–2.

referred to both the reasonableness of closing Northland, and the reasonableness of requiring the students to attend school elsewhere, since the two elements were inextricably intertwined. The Court found that the Board had not erred in considering these factors and deciding that the closure was unreasonable. This is in line with the majority of *Waters*, which held that "reasonableness" required a consideration of all the factors of the case, including economic factors, the nature of the disadvantage suffered, and the ability to meet the needs of the group disadvantaged.[22]

The objective nature of the test for "reasonableness" was also upheld. The Equal Opportunity Board had found that advice given to the Minister, that the special programs offered at Northland could be moved to another school, was incorrect advice.[23] However, this did not bear directly upon the reasonableness or otherwise of the decision to close the College.[24] Clearly the question is not whether the decision was reasonable based on the knowledge and perspective of the decision-maker, but whether or not the decision was reasonable based on the evidence presented before the Court.

The complainants therefore succeeded in showing that the State of Victoria, by closing Northland College, discriminated against them on the grounds of race, under sections 29(1)(b) and 17(5) of the *Equal Opportunity Act* 1984 (Vic).

3. *Some Practical Implications*

The decision in *Sinnapan* carries some important practical implications for service providers, particularly governments. It is clear from both *Waters* and *Sinnapan* that any reduction in the provision of a service will constitute a term on which that service is provided, and most likely a "requirement or condition" for the purposes of showing indirect discrimination. While this seems to strain the language of the statute, the courts have indicated that they are prepared to give a "generous construction" to the legislation. Furthermore, it is apparent that the courts are wary of allowing service providers to define the service provided so as to avoid the scope of the legislation. Therefore, cuts to services which have the effect of denying the access of groups protected by anti-discrimination legislation are likely to be unlawful. The Court noted in *Sinnapan* that:

> Such an approach to s29 must necessarily make it difficult for any service provider to reduce the benefits of the service being provided, and if that means in turn that the Act therefore elevates existing benefits into minimum requirements for those coming within the protection of the Act, we simply note that, while that was a result which was foreseen by Brennan J in *Waters*, it was not a consequence which was regarded by the other members of the Court as sufficient to dictate a different approach to s29.[25]

Nevertheless, the perspective of the service provider still remains an issue. In considering the "reasonableness" of indirect discrimination, the majority in *Waters*

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22 Above n2, per Dawson, Toohey, Brennan, Deane, and McHugh JJ. See especially Dawson and Toohey JJ at 395.

23 Above n3 at 77, 112.

24 Above n1 at 77, 272.

25 Id at 77, 268.

held that the whole circumstances of the case, including economic factors, are to be considered.[26] In practice this seems to require the arbitrary balancing of dollar savings with the unquantifiable disadvantage suffered by a particular group.[27] While each case will obviously depend on its individual facts, it is significant that in *Sinnapan* the rights of access to basic services were valued above economic savings. The Court quoted from the Board's decision on this balancing:

> ... we cannot find that the financial and other considerations in removing Northland from the service offered by the Respondent outweigh the basic right of the Aboriginal students to have as effective an access to public education as non Aboriginal students.[28]

It is also interesting to note that in both *Sinnapan*, and the factually similar *Traeger Park* case[29] (discussed below), large repair costs were used to justify closing the schools. In *Sinnapan*, approximately $1.4 million was required to bring the school buildings into a fit state of repair, because maintenance had not been carried out for many years. In *Traeger Park*, repairs were estimated at $331 000 for the five years ahead. While the courts did not examine these costs specifically, it is important that such figures are regarded with caution and cynicism. To allow a school to fall into such a state of disrepair as to require $1.4 million in repairs, and then use this to justify the closure of the school as "reasonable" would allow discrimination through a plan of neglect. And it is to be hoped, in any case, that the denial of basic human rights, such as access to education, will never be held to be "reasonable" because of the economic cost involved in upholding those rights.

4. *Further Implications for Discrimination Law*

A. *Recognising Systemic Discrimination*

A significant feature of *Sinnapan* is the Court's recognition of the fact that giving everybody "the same thing" is not equality. Providing Aboriginal students only with the schooling that non-Aboriginal students need does amount to discrimination. The decision can be contrasted with that of the Human Rights and Equal Opportunity Commission (HREOC) in the *Traeger Park* case.[30] Traeger Park Primary School was also a school which catered especially for Aboriginal students. It had a special curriculum and services, and the student population was almost entirely Aboriginal. Evidence before HREOC revealed that part of the Minister's reason for closing the school was that it was an "Aboriginal enclave", something he regarded as "educational heresy".[31] It was held, however, that the closure of the school did not deny Aboriginal students their right to education under the *Racial Discrimination Act* 1975 (Cth).

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26 Above n2, per Dawson, Toohey, Deane, Brennan and McHugh JJ.

27 See Astor, H, "Indirect Discrimination in the Provision of Government Services", *National HIV/AIDS Legal Link Newsletter*, Vol 3 No 4, December 1992 at 10–12.

28 Above n1 at 77, 272.

29 *Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory* (1992) EOC 92–415.

30 Ibid.

31 Id at 78, 964.

A distinction between the *Traeger Park* case and *Sinnapan*, is that HREOC found that the school curriculum for the Northern Territory (unlike that of Victoria) was designed with knowledge of the high numbers of Aboriginal students. HREOC suggested that the Education Department was aware in general terms of the special needs of Aboriginal children.[32] This might, at least partly, explain why HREOC found that Aboriginal students were not being denied education. On the other hand, the evidence before HREOC clearly indicated that Traeger Park school was unique in the Northern Territory education system in catering for the needs of Aboriginal students. The Education Department might have been generally aware of the needs of Aboriginal students, but there was no suggestion that the role played by Traeger Park school would be replaced. HREOC noted that Aboriginal students would simply adjust to the education provided elsewhere.[33]

A doctrinal explanation of the differing results in *Sinnapan* and the *Traeger Park* case is that in *Sinnapan*, the court shifted focus from simple conceptions of formal equality (equality of opportunity), to the more complex and relevant standard of substantive equality (equality of outcome). This affirms the approach of the High Court in *Waters*,[34] looking beyond whether or not a service is available to a group of people on principle, to consider whether it is accessible as a matter of practice. Therefore in *Sinnapan*, the court rejected the argument that simple attendance at another school amounted to access to the service of public education. Perhaps most importantly, the judgment in *Sinnapan* also reflects an appreciation of systemic discrimination. Fundamental to the decision is the finding that the mainstream public education system cannot provide an education for many Aboriginal students. The Court therefore recognised that the mainstream system is not a racially "neutral" one, but rather is a system that was designed by and for non-Aboriginal people. Providing access to it for Aboriginal students does not necessarily create equality.

That the courts are prepared to adopt a more contextualised approach to discrimination is a positive development. The flexible interpretation of the legislation in cases such as *Sinnapan* and *Waters* is a reflection of this broader understanding — the courts looking to the intention and effect of the legislation as their interpretive guide. This flexibility is also the source of a more sophisticated understanding of discrimination. A more "generous interpretation" of the statute leaves greater room for challenging the understanding of concepts like discrimination and equality, and also makes "doctrinal space" in which differing perspectives can be presented. In *Sinnapan*, the ability to argue over flexible terms such as "compliance" with a requirement or condition, and "reasonableness", allowed for extensive evidence about the specific needs of Aboriginal students, and the failings of the mainstream public education system to reflect Aboriginal values and learning styles.

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32 Id at 78, 966.

33 The Commission acknowledged in the decision that many of the Traeger Park students will be "presented with a different school environment and will be required to learn in a different form and be subject to a different discipline to that which they have become used." Id at 78, 966–7.

34 Above n2.

Nevertheless, the fact that argument still focused on the abstract formal requirements of the statute suggests that the ability of anti-discrimination legislation to deal with systemic discrimination is limited. Thornton argues that:

> Far from addressing systemic discrimination, the complexity of the Australian indirect discrimination provisions constitutes a set of Herculean obstacles to be overcome by intrepid complainants in order to challenge a discriminatory practice in a particular [situation].[35]

Despite the willingness to interpret the legislation "generously", the real issues of discrimination are obscured and distorted by arguments about the distinction between a service and its terms, what "requirement or condition" means, whether or not groups of people are able to comply with such requirements, what groups are to be compared, and whether or not in any case the discrimination is "reasonable". In *Sinnapan*, it is obvious that this was not a case about "requirements and conditions" and the ability of groups of people to comply with those conditions. It was a case about the closure of a school, an act which denied Aboriginal students an education. More generally, it was about the failure of the education system to accommodate the needs of Aboriginal students, and the failure of governments to recognise this problem.

B. Redefining Discrimination

It is possible, however, to reframe the argument in *Sinnapan* so as to attack these issues without the distracting formalism of the indirect discrimination provisions. Equipped with a recognition of systemic discrimination, an argument of direct discrimination under section 17(1) can be made. In *Sinnapan*, the facts before the Court showed clearly that the government made a decision to close the only school that could provide Aboriginal students with an education. How could this not amount to direct discrimination?

To prove discrimination under section 17(1), the decision to close Northland College must be shown to amount to "less favourable treatment", "on the ground of", or "by reason of" the race of the complainants. It is clear that this does not require an intention to discriminate.[36] Rather, it is necessary to show that the race of the complainants had a "proximate bearing" upon the act charged as discrimination, and a "causally operative effect" upon the decision.[37] In *X v McHugh*,[38] a case of disability discrimination in employment, the Human Rights and Equal Opportunities Commission noted:

> The objective of the Act is to *eliminate*, as far as possible, discrimination against persons on the ground of disability in areas of public life; it therefore proscribes, not merely deliberate discrimination, but thoughtless discrimination as well. Employers are required to be vigilant in their regard for circumstances affecting the interest of their employees ... It is not necessary that an

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35 Thornton, M, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) at 192.
36 Above n2 at 359–60 per Mason and Gaudron JJ.
37 *Director General of Education v Breen* (1984) EOC 92–105 at 75–429 per Street CJ.
38 *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92–623 at 77, 312.

> employer know of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability.

The apparent difficulty in this case is showing that the race of the complainants (or a manifestation of their race) had a "causally operative effect" on the decision, which purports to be a decision based on considerations of economic efficiency. However, it is suggested that this causation can be shown in a number of ways.

First, the State based its decision on the comparatively high cost of education per student at Northland. If we acknowledge that the education system is generally unable to provide an education for Aboriginal students, then it is clear that a "manifestation" of the race of Aboriginal students will be that they require special educative programs and facilities.[39] It is to be expected that to develop and operate such alternative programs, additional resources will be required. To refuse to provide these services because of the additional cost they entail is, in effect, to refuse an education to Aboriginal students on the grounds of their special educational requirements. Since these requirements are necessitated by their race (and the "race" of the educational system), there is direct race discrimination.

Alternatively, it can be argued that the State simply failed, as a result of ignorance and misinformation at the best, to take into account the needs of these students. The decision was made "on the grounds of" certain educational and governmental "truths", about things such as the meaning of education and the needs of students. The evidence before the Court demonstrated that these were racially biased truths. The decision was therefore causally determined by the race of the complainants, precisely because these truths excluded their race.

This second approach rejects the view of "race" as a characteristic of the complainant. Rather "race" is seen as a relationship — the race of the decision-maker is inseparable from the race of the complainant.[40] Similarly the racial bias of the decision-making process and its assumptions is about the race of those excluded from this process and its "truths" as much as it is about the race of those upon whom the "truths" are based. This is often obscured in a society in which the straight, white, able-bodied male is the benchmark, and therefore somehow lacks a sexuality, race, level of ability and gender.

It follows that this type of analysis need not be confined to race. Systemic discrimination against women, gay men and lesbians and people with disabilities might be countered in this way. Decisions which perpetuate systemic discrimination, and fail to account for the perspectives and needs of these protected groups, could be argued to be direct discrimination where they cause a disadvantage. This approach therefore makes systemic discrimination, rather than "terms and conditions", the issue. And it gives even more "doctrinal space" in which stories can be told, attitudes challenged and the boundaries of discrimination law questioned.

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39 Indeed the *Equal Opportunity Act* 1984 (Vic) contemplates the need for special services for the education of people of a particular race; s29(3) makes this an exception to discrimination in the provision of goods or services.

40 See Duclos, N, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 *Canadian Journal of Women and the Law* 25.

Objections to this approach are likely from those who insist on a rigid distinction between direct and indirect discrimination, since it seems to recast "indirect" discrimination as "direct". The current position seems to be that sections 17(1) and 17(5) are mutually exclusive: section 17(1) deals with direct discrimination only; section 17(5) only with indirect discrimination.[41] Under this view, to allow a case of apparently indirect discrimination to be argued under section 17(1) would create the anomaly of a "requirement or condition" being found to be discrimination under section 17(1) even if it is reasonable.[42]

In response to this, a number of points should be noted. First, it is unduly restrictive to insist on strict distinctions between direct and indirect discrimination. This requires that if a case is characterised as "indirect", it must fit within the bounds of section 17(5), even if it is not about "requirements and conditions". However, the point with indirect discrimination and systemic discrimination is that we don't necessarily know what it looks like. It is contained in apparently non-discriminatory forms. To insist upon a particular definition of indirect discrimination seems to miss the point and defeat the purpose. Second, if an anomaly is created with respect to reasonableness, the distinction between direct and indirect discrimination seems equally anomalous. If "reasonable" direct discrimination is still discrimination, why should "reasonable" indirect discrimination necessarily be treated differently? The courts have decided that intention is irrelevant in either case,[43] and Mason CJ and Gaudron J note correctly in *Waters* that "there is nothing to indicate that the consequences of direct discrimination are more objectionable and harmful to society than the consequences of indirect discrimination".[44] Each form of discrimination may be as innocent or as insidious as the other.

Furthermore, the fact that this flexible interpretation means that some previously "indirect" discrimination is now "direct", and therefore cannot be justified as "reasonable", should not present a significant hurdle. Cases in which there is a requirement or condition should still be argued under this section. Common sense and ordinary meaning should be the guide. Alternatively, the "reasonableness" anomaly can be resolved by introducing an over-arching requirement of "reasonableness", in cases of direct and indirect discrimination. As noted above, there seems to be no valid reason for distinguishing between direct and indirect discrimination in this way.

Of course, objections about the opening of "the floodgates" might be raised. Allowing acts and decisions which reflect systemic bias to be challenged may well allow for some scrutiny of a huge range of decisions. There is no reason to believe that this is necessarily undesirable, however. It will provide an opportunity to test our commitment to equality with an open political choice. If the conclusion is that some are more equal than others, then at least this will be an honest choice — made through legislative change, or clear judicial decisions which cannot hide behind "requirements and conditions".

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41 Above n12.
42 Above n2 at 392–3 per Dawson and Toohey JJ.
43 Above n2.
44 Id at 364.

C. Equal Opportunity Act *1995 (Vic)*

The *Equal Opportunity Act* 1995 (Vic)[45] makes numerous changes to the 1984 Act. Of particular relevance here are the changes made to the provisions for direct and indirect discrimination. First, the old provisions (sections 17(1),(5)) are replaced with sections that specifically define "direct" and "indirect" discrimination (sections 8(1), 9(1)). This clear distinction between direct and indirect discrimination may seem to be in line with the prevailing view that they are mutually exclusive provisions. However, it is worth noting that nothing requires that a case be argued exclusively under one or other section: an argument may be made under both sections. Second, indirect discrimination is defined to include a "requirement, condition or practice" with which a person is not able to comply.

In terms of dealing with systemic discrimination, these new provisions leave open the option of arguing direct discrimination, as explored above. They also create a new possibility — arguing that there is indirect discrimination as part of a "practice". This potentially avoids the confusion and artificiality of arguing about "requirements and conditions". However, it may only replace this with another series of arguments about "practices" and compliance with them.

5. *Conclusion: Some Lingering Problems*

Despite the advantages of the "direct" approach to systemic discrimination that has been argued above, a number of lingering problems should be considered. As an individualistic, complaint-based system, anti-discrimination law inherently has difficulty in dealing with and understanding systemic discrimination.[46] Obviously, the need to find a particular person against whom action can be brought is problematic, where the discrimination is not necessarily the result of a particular act or decision that can be identified as discriminatory. Where a particular act is recognised as discriminatory, the remedies are necessarily confined to the specific case, and any greater impact must be incremental. In this case, the decision ultimately focuses on Northland College and its students. It does not necessitate broad changes to the education system such that all Aboriginal students in Victoria are able to receive an education. The discriminatory "requirement or condition" is the closure of Northland. For those students without access to Northland College, the situation remains unchanged, and unchallengeable.

Finally, the efficacy of any legal solution must also be questioned. The legal discourse inherently distorts issues by forcing them into artificial legal categories. The approach to discrimination outlined above seeks to minimise this, and make the categories more relevant, but it does not (and cannot) prevent such distortion. Critical legal scholars such as Gabel and Fraser therefore question the use of the "sterile" legal form, which "robs reality" and "denies context".[47] The minority response to this "rights critique" has been to note the

45 Assented 14/6/95. Proclamation is expected in early 1996.

46 See Thornton, above n35, and also Duclos, above n40.

47 See Fraser, D, "It's Alright Ma, I'm Only Bleeding" (1989) 14 *Leg Service Bull* 69; Gabel,

important gains that minorities have been able to achieve by harnessing the legal discourse.[48] This empowerment cannot be denied or dismissed as illusory, but the limitations of operating from within the legal discourse should be remembered. The tenuous nature of such gains is made starkly clear by the political response to the commencement of the *Sinnapan* case. The *Education (Amendment) Act* 1993 (Vic) enacted the following:

> 21A. Closing of State schools — limitation of judicial review
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> (1) A decision or purported decision of the Minister to discontinue or continue any State school is not liable to be challenged, appealed against, reviewed, quashed or called into question on any account in any court or tribunal or before any person acting judicially (within the meaning of the Evidence Act 1958) or before the Ombudsman.
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> (2) Without limiting sub-section (1), proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief do not lie in respect of a decision or purported decision of the Minister to discontinue or continue any State school.

This does not prevent a challenge to a decision under any Federal legislation which binds the States, such as the *Racial Discrimination Act* 1975 (Cth). Nevertheless, it is an important reminder that what the law giveth, the law taketh away.

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P, "The Phenomenology of Rights—Consciousness and the Pact of the Withdrawn Selves" (1984) 62 *Texas LR* 1563.

48 See Goldfarb, P, "From the World of "Others": Minority and Feminist Responses to Critical Legal Studies", (1992) 26 *New England LR* 683 at 689–99; Williams, P, *The Alchemy of Race and Rights* (1991); Matsuda, M, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan LR* 2320.

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