

d) Recommendations for Australia from a US Perspective

Given the nature of Australian law and politics and the differences between Australia and the US, the following recommendations are offered:

1. A standard for inclusion must be developed. The standards that are used in the US appear to be applicable to Australian circumstances. The standards should provide a strong affirmation of preference for inclusion.

2. Regular education teachers must receive training in inclusive practices. Special education teachers must receive training in collaboration with regular education teachers.

3. All of the applicable research in the US demonstrates clearly that inclusion works when the school building principal wants it to work and communicates that expectation to teachers. (Likewise, when the building principal is reluctant or opposed inclusion will fail). Thus, education administrators must be required to embrace the principals of inclusion and learn how to develop inclusive schools.

4. Disputes about inclusive placements must be subject to independent review of at least one level. This review should be conducted by a panel of at least three individuals who do not have an interest in the outcome except to ensure appropriate application of the substantive principles. These individuals must not be employees of the ministry of education or an agency with a direct financial link to the ministry. Independence of their decisions is the most critical aspect if parents and educators are to have faith in the system. At least one of the individuals should be an educator and one a lawyer. Decisions should be written and carry the weight of law.

5. Compliance monitoring must be conducted routinely and randomly. Compliance monitors (i.e., those professionals who ensure that inclusion decisions are implemented) should be employees of the Ministry of Education. They should have the power to order specific remedies for violation of decisions. Individuals who fail to execute the orders should be subject to disciplinary action.

Given the history of education departments and discrimination, the last recommendation is probably not appropriate. That is, while there are clearly advantages from having a group of people who can build up expertise in both the legal requirements and things to look for in relation to discrimination, their employment by the departments of education would have strong conflict of interest problems and the probability of them having the necessary independence highly unlikely. Given the differences in the US and Australian education systems (that is, local boards controlling education in the US, state-wide control in Australia), it would be more appropriate if any monitoring team was employed totally outside of the education department, but with a clear speciality in discrimination in education so that expertise could be developed. Given our history, the appropriate auspicing body would probably be the Auditor General. Employees covering the area would need to have a good representation of lawyers as well as educators.

3. Outline of possible models

a) Preventative Methods to Minimise Discrimination

i.) At legislative level

It is apparent that the discrimination law as it stands is ineffective at discrimination against people with a disability, particularly people with an intellectual disability. While it is clear that the law will continue to be a method of last resort due to the emotional and financial costs involved in pursuing this approach, it can provide a solid background to other approaches for ensuring discrimination does not occur. Some amendments to the law that could help to redress the balance would be along the lines of the American law such as:

- Stay put provisions. If a decision of the education authority was disputed, the child would stay where s/he was until the dispute is resolved. This would force the

education authorities to act with some urgency whereas without this provision they can delay proceedings at considerable emotional and financial cost to families and detriment to the child's education.

- The onus of proof in justifying a placement other than full time in a regular classroom rests with the education authorities. This reverses the current onus where the family has to prove that segregation was discriminatory.
- A clear delineation of “undue hardship” or deletion of this clause. From the two cases that have been determined in Queensland, in one case the undue hardship was stress on teachers from having a child with multiple disabilities in the classroom, and in the other, the hardship of having to transition the child back into school after two years of absence through the litigation process. In both of these cases, a department with a budget of over one billion dollars and access to the full range of expertise in education in the State was not obliged to carry out a function readily accomplished around the world and even in their own state. One possible way of countering the undue hardship definition difficulties would be to define appropriate education along the lines of Wills and Jackson set out above. This provides a basis for normal expected education for all students with or without a disability. The requirement of the education authority then is to provide the necessary supports and modifications to allow this to occur for people with a disability. Then arguments could be about the reasonableness of the costs of specific supports be they translation, access, behaviour control or direct support. It almost certainly would reduce the ‘muddying of the water’ where there is no concept at all of what is reasonable for any student, let alone one with a disability.

- Where it is found appropriate to temporarily segregate a child, there must be a plan for the child's re-integration into full time normal education with a time line for accomplishment.
- Educational authorities must be able to demonstrate educational benefit to the child through the education provided. This would be to counter the possibility of leaving the child in the back of the classroom and ignoring him/her. However, given the problems with literacy with many children and the apparent lack of accountability of education authorities for this, they are likely to strongly oppose such a measure.
- Education authorities must provide the necessary supports to ensure that the child achieves educational benefit from school. It is normal when an Act is promulgated, there is an expectation on the government to provide the funding to ensure that its own departments meet the requirements of the Act. This does not seem to have been enforced in the case of the DDA.

ii) Standards

Under the State and Federal Disability Services Acts, standards for services have been set

against which services are monitored. Ultimately the threat is that funding will be withdrawn if standards are not complied with. There is no doubt that the application of standards has resulted in some improvement in service quality, particularly in the private sector. As such they may well provide one of a number of strategies to ensure educational inclusion.

However, the changes in other areas due to the application of standards are less than might have been expected for several reasons:

- The minimum Standards have tended to become the ideal so that as long as the standard is met no further action is seen to be necessary.
- Standards do not guarantee compliance. Compliance to an objectified measure does not guarantee that the situations actually changes. For example, the fact that a

nursing home has a grievance committee to air complaints may have no impact on abuse if the residents of the service are too scared to complain because of potential repercussions.

- It is normally difficult to apply such standards to government facilities such as education systems. For example, applying the standards to government controlled sheltered workshops seems to be much less enthusiastically followed up than applying the standards to non-government or private services.
- Standards tend to be set around issues that can be measured. Issues such as subjectively perceived service quality, openness to outside comment or critique and similar central issues are very difficult to monitor through standards.
- Standards may reduce all States to a “lowest common denominator”. At the moment there is some difference between individual States. Victoria appears to have the most supportive law although the funding is inadequate. On performance comparisons in inclusion, South Australia appears to perform well and generally seems to want to accommodate families who dispute their rulings -- albeit at the courtroom door. In rural WA and Queensland, some excellent examples of inclusion can be found. While Standards may pressure the worst performing States to improve, they could reduce the pressure on others.

iii) Policy

This is probably the most commonly applied method throughout the world to achieve inclusion, and clearly is not sufficient by itself. Every State in Australia has educational policy that allows inclusion and is written to fall in line with the DDA. Despite this however, there are still very significant problems with discrimination so policy by itself is clearly

inadequate. On the other hand, policy is almost certainly a necessary condition to counteract discrimination. Policy is required in the following areas for example:

- Enrolment procedures.
- Acceptance of the normal classroom/lecture theatre being the expected full time placement for the person.
- Support for the person in the regular classroom/lecture theatre.
- Involvement of parents in decisions for children.
- Design of educational programs.
- Monitoring of progress.
- Support for the teaching staff.
- Dispute resolution procedures.
- Appropriateness of a parent or person with a disability to be supported by an advocate or friend.
- Confidentiality of assessment reports.
- Independent external review of disputed decisions.

iv) *Internal performance audits*

In most government instrumentalities there is some process of performance review of individual staff members. It would be possible to build in a process where effectiveness in the area of discrimination was added as an area to be assessed. For example, teaching staff could be assessed on their effectiveness at including a person with a disability in their class. Principals or Vice Chancellors could be assessed on the number of people fully included; the number of discrimination complaints; procedures to support teaching staff and adjustments made to the organisation of the system to facilitate the inclusion of people with disabilities. Educational administrative staff could be held accountable for the levels of inclusion, the supports provided to teaching staff and institutions, the willingness to negotiate solutions to

problems, and support to the teaching establishments for additional services such as therapy, translation, access or transport. These performance audits would need to be built in at the level of human resource policy. It would be difficult to directly monitor their implementation as it falls clearly into the areas of industrial relations and personal confidentiality. However it could be required at a ministerial level that such staff accountability measures were implemented, and then combined with other approaches such as external performance monitoring of schools and departments.

v) *External reporting of performance*

In the US an external group publishes a report of the comparative rate of inclusion across the States of the US (see appendix). While there are likely to be problems with the quality of the data when collected over such a large area, it nevertheless gives a direct comparison of the success with inclusion across the States. In the Australian context, if such a process was implemented (similar to the 'Good Universities Guide') then there would be a process for individual State departments --and individual institutions in the case of tertiary institutions -- to be held publicly accountable. It would also have the advantage of giving individual State Departments and institutions a positive incentive to improve their rate of inclusion rather than the negatively biased character of many of the alternative safeguards. The survey would have to be done independently of the State Departments or institutions. It could be done through funding of the HREOC to carry out the task or through a tender made available to universities.

vi) *Action plans*

Mandatory action plans do appear to have had an impact under some legislation such as the WA Disability Services Act. Individual Councils and similar public bodies have to submit

plans on how they are going to meet standards under the Act. This process has advantages in allowing individual bodies the opportunity to develop their own strategies to meet the requirements and so allows some flexibility; allows time to comply and so takes in the realities of systems having to adjust to changing demands, while still having a mandatory component. Some of the difficulties are the same as those mentioned under the Standards. That is, they have a tendency to become minimum standards; once completed the issue of discrimination may be considered effectively solved; they can be used to give the impression of action while accomplishing nothing; and they are only as good as the monitoring and compliance enforcement processes. Also, the level of bureaucracy involved tends to be quite high and as a result can be complex and unfriendly to families or community groups who wish to monitor the progress of implementation. Overall, they do seem to be a viable method of enhancing the likelihood of compliance despite their limitations. When considering mandatory action plans (MAPS) the safeguards framework needs to be employed. That is, MAPS need to be incorporated in at least three levels:

- Systems level.
- At the level of individual schools/providers
- For each case of adjustment sought (similar to but leap frogging the notion of IEP).

In particular, it is absolutely essential that there is an external and independent body overseeing the process of MAP development and implementation, with the ability to apply meaningful sanctions for noncompliance. The model in the American system is highly relevant here. In short, if the current procedure is continued where MAPS are lodged with the HREOC without comment, oversight or sanction, then the system will just be adding a layer of paper over the problem in an attempt to cover the issue of discrimination.

vii) Mandatory audits by the Auditor General.

The process used by the Auditor General in relation to financial matters has a long history in society and is widely respected by the public and taken seriously by government departments. Over time the Auditor General has been reporting on departments' setting and meeting goals in areas beyond the purely financial. It would seem that there is a possibility of this procedure being applied to force compliance with the DDA. That is, if departments and institutions were required to set goals in relation to a clearly defined set of parameters of discrimination and then were required to have their performance audited by the Auditor General's department and reported to parliament, it is highly likely that the performance in this area would be likely to improve. Obviously the Auditor General could monitor and oversee the implementation of Mandatory Action Plans, with the advantages outlined above likely to accrue.

b) Methods to Correct Discrimination that is occurring

i.) Due process

It is clear that one of the greatest spurs to inclusion in the US has been litigation by parents. The process was started by the Pennsylvania Association of Retarded Citizens and the area has been increasingly defined by court cases that have spelt out the boundaries of what is and is not allowable. This process has in turn had a considerable effect on legislators who have adapted the law in response to judgements or public pressure when the case law was moving away from what the community wished.

Using the law is an essential part of the process to force compliance. It allow individuals to take up issues that might well be left by governments who do not see any votes in an issue. It brings public attention to abuses of rights and allows the common person an opportunity to question immensely powerful systems. However, in taking up a case, in most instances the

individual's education is jeopardised while the case is fought. Often the child is left out of school, families are put under enormous emotional pressure by the process of litigation and family life tends to be badly disrupted. For students in higher education relationships with teaching staff and peers can be very difficult and study a difficult issue while court cases are pending. In addition there have been major cuts in legal aid, the Human relations and Equal Opportunity Commission is seen by many families to sometimes indicate lukewarm support for the rights of people with a disability to attend a regular school and is often seen to be part of the problem of delay. For higher education there seems to be a more positive perception of HREOC by people with disabilities although no survey data are available to indicate whether this perception is true.

Education systems seem to be willing to expend huge amounts of taxpayer funds to defend discrimination actions. If a family is expending their own funds on such an action they need to have considerable financial resources, particularly as costs can be found against them. The issue seems to be one of supporting families to take legal action financially and in other ways. Families always see legal action as a last resort and only take it on when all other strategies for achieving justice have been exhausted. It is also apparent that the HREOC needs to review its handling of such cases. With such widespread disappointment from families at the performance of the HREOC in this area it would appear that the operations of the Commission need to be reviewed along with the Act.

ii) Independent appeal processes

At the moment there is nothing in between sorting out a discrimination problem with the education system or institution and taking legal action. In the case of a dispute, families or people themselves can only appeal to someone in the system -- appeal to Caesar against

Caesar. If this does not work then they have to either accept a decision which they believe to be contrary to their or their child's best interests or take on a mediation/litigation process through the HREOC that can be drawn out for years, quite literally. This inevitably leads to resignation and bitterness from those people who do decide to give in or an enormous burden for those who decide to take the issue further.

The independent panels in the US are a means to bridge this gap. With the panel comprising a member of the community, a lawyer and someone with expertise in special education, disputes can be reviewed without the expense and pressure of our current mediation/litigation process. Of course the process is critically assisted by the "stay put" provisions of the law, the onus of proof being on the education system and the centrality of inclusion as a focus of the legislation. Also, MOST important, the panels are independent and TENURED. That is, members are appointed for a five year term by the government and cannot be removed during that period. This means that they are able to give unbiased decisions without the fear of being removed from the tribunal for making the 'wrong' decision. The information from the USA indicating that a two tier independent appeal process was cheaper than a single tier approach needs to be borne in mind here. Another element of the approach that seemed to be very important was the use of educational consultants to try to assist the school to resolve the discrimination issue before it proceeded further. This combination of expert help by an independent group with the knowledge that failure to work cooperatively would be used against them in the appeal process was a very powerful combination. Carrot and stick.

These tribunals are also open to having their decisions challenged in the court system. That is, they are open to appeal in the same way as any other court which means that they have to ensure that they follow the letter and spirit of the law to avoid being overturned.

There would be some costs in setting up such a system of independent review panels although it should not be excessive as the panels would only need to sit when a case was brought before them. In comparison to the financial costs of the current system as well as the costs to goodwill and family harmony, the cost may be small indeed and strongly outweighed by the benefits.

iii) *Financial penalties to systems that fail to conform.*

At the moment there is little cost to an educational system that refuses to conform to the DDA. They may receive adverse publicity and incur some costs in defending cases, but the costs in comparison to the financial and emotional costs on people with disabilities and families are minimal. In other areas of law such as competition policy firms can incur very substantial fines for ignoring the law or being in breach of it. If similar penalties were in the Act for departments or institutions who treated the DDA with disregard, it is likely that there would be a much greater interest in complying. In the case of fining government departments it would be a case of the government fining itself so the impact might be limited, but if the fines were substantial enough it could make a dent in a departmental budget. Added to the costs to image it could be a powerful option.

c) *Developmental measures that may have longer term impacts.*

i) *Training*

If discrimination is to be effectively countered over the longer term, it is essential that both current and future teachers and administrators are fully conversant with the issues involved, current research and relevant strategies for the system, institutions, schools and classroom. It is unlikely that this is going to occur unless it is mandated. For example, teacher accreditation

could depend on undergraduate or in-service training on the issue, principals and administrators could be required to attend training on ways to organise schools to maximise successful inclusion. Teacher aides could be required to undergo training and training could also be required on the requirements of the DDA. Higher education institutions could encourage a similar range of training in the same way that they make training available to staff on occupational health and safety. It is this level of commitment that is necessary. Most government departments including education have installed a wide network of training and procedures around occupational health and safety and there is no reason why a similar focus would not have major benefit in reducing discrimination.

It would seem essential that moves are made in this area. In higher education some institutions have little or no awareness of the DDA and concern with discrimination issues is peripheral in almost all. School inclusion depends on the goodwill of individual principals and staff; training is minimal; and visiting support staff are normally experienced in segregated education but have little or no experience or knowledge in how to include a child in the regular class. Strategies to work with families are not normally covered in any training. Similarly, university teacher programs still have a strong 'special education' versus 'regular education' split as that has been their tradition. Training of teachers for inclusion may not be addressed unless it is forced onto them by demand from the system for appropriately trained staff.

ii) *Centres of excellence*

For a teacher learning that a child with a disability is coming, the common reaction is to find out from someone what is likely to be involved. At the moment the most likely source on information is the special education area, who normally have little experience with inclusion but considerable experience with segregation. It is likely that the information gained may be

biased against inclusion and not strongly based on experience. An alternative would be to provide funds for individual schools to implement demonstration projects on inclusion to demonstrate how it can be done as a resource for other teachers. This could be supported by universities and community groups. Funding of a similar nature is currently being made available for literacy development. There is no reason why a similar program could not be implemented for inclusion. In higher education there is enormous potential for demonstration projects -- in fact this could be considered one of their key roles in society. If universities or other higher education institutions had access to funds to set up model programs to fully comply with the DDA and provide research information on the impact, costs etc, then it would have the effect of providing a positive incentive for other institutions; demonstrate that it could be done to undermine the 'unreasonable hardship' let out clause; and provide new and creative ways of overcoming problems that occur.

4. Some key issues for decision

1. Should standards be supported as a concept or are they likely to produce a minimalist outcome?
2. If standards are supported, should this support be only under specific conditions? For example multiple levels of action plans; independent tiered review panel; changes to the onus of proof; inserting 'stay put' provisions in case of dispute; etc.
3. Should a whole range of processes be supported on the basis that multiple processes are more likely to be effective than single approaches such as standards?
4. Should some/any of the alternatives be dropped?
5. What is the priority of the alternative approaches suggested?
6. Given the priorities, what could be incorporated directly in the current review?

For other priorities that do not fit under the current review, what action should be taken? For example, if changes are needed to legislation, what is our strategy for bringing this to fruition?