DISABILITY DISCRIMINATION AND HIGHER EDUCATION IN ENGLAND AND WALES AND AUSTRALIA COMPARED

KIM MARSHALL*

University of Westminster, UK

ABSTRACT

In its original form the provisions of the UK Disability Discrimination Act 1995 (DDA) contained little of practical help to students with disabilities. This situation was rectified when the Special Educational Needs and Disabilities Act (SENDA) was passed in 2001 becoming the new Part 4 of the DDA. From 2002 legal duties not to discriminate against students with disabilities came into effect. In the Commonwealth of Australia a very different attitude towards disability discrimination has been demonstrated by having legislation to combat disability discrimination in place since 1992, which included specific provisions on education from the outset.

The purpose of this article is to examine the approach taken in both jurisdictions towards the use of the anti-discrimination statutes and consider the effectiveness of the legislation in preventing discrimination on the ground of disability in higher education. The paper will examine points of similarity and divergence in the respective systems regarding the application of anti-disability discrimination laws to higher education as well as look to the longer established jurisprudence of the Australian courts for potential guidance that may be helpful to the nascent Part 4 of the DDA and the types of issues that may arise.

INTRODUCTION

Prior to the implementation of the Special Educational Needs and Disabilities Act (SENDA) 2001, there was little legislation that applied to disability discrimination in higher education in the UK. The Disability Discrimination Act (DDA) 1995,1 in its original form, specifically excluded education.2 Following the report of the Disability Rights Task Force in 1999,3 a recommendation was made to extend the protection given against disability discrimination to education. This became Part 4 of the DDA and is intended to offer protection from discrimination on the grounds of disability at all levels of education.4 Understandably, the structure of the new legislation mirrored that already in use under the DDA by offering protection from direct discrimination and requiring institutions to
make reasonable adjustments to accommodate disabled students. However, the legislation had already proved complex and difficult in its application to other areas. Additionally, the definition of who was disabled for the purposes of the Act was left unchanged, despite the criticism of the lack of clarity made in many cases.

Institutions were, however, expected to comply with section 3 of the Quality Assurance Agency (QAA) Code of Practice for the assurance of academic quality and standards in higher education which applies to disabled students. This Code contains twenty-four precepts which should have been followed since October 2000 and are now suggested as good guidance towards meeting the standards of Part 4 DDA. However, it should be noted that they are not the same as Part 4 and are pitched at a much lower level of compliance. The approach to legislation and the rationale for that legislation was very different in Australia. Whereas the legislation in England and Wales is a product of piecemeal adaptation due to political expediency, the aim of the Australian legislation is to outlaw discrimination. In many speeches Elizabeth Hastings frequently referred to being ‘included’, to ‘have the right to belong’ and described the Commonwealth Act as ‘an Act to belong’ (Hastings 1997.) It was on that basis that education was covered by the Act generally as well as specific provisions directed towards enabling inclusion to take place in the field of education.

There are similarities in structure between the DDA and the Commonwealth Act as both Acts can trace their descent from pre-existing anti-discrimination statutes in the respective jurisdictions, but in both jurisdictions the disability discrimination legislation moved away from the existing anti-discrimination framework.

DEFINITIONS OF DISABILITY

England and Wales

The definition of disability used for Part 4 DDA is that which is at present found in section 1 of the DDA 1995. This has four elements. To prove that a person is disabled they must have (1) a physical or mental impairment that has an effect that is (2) substantial, (3) adverse and (4) long term (lasting or expected to last for at least a year) on his or her ability to carry out ‘normal day to day activities’. Despite a sustained campaign from disability rights activists promoting the merits of using a definition based on the social model of disability, a definition based on a predominantly medical model of disability, similar to that used in the Americans with Disabilities Act 1990 (ADA), was decided to be more
appropriate.\textsuperscript{14} There is one derogation from this in Schedule 1 to the DDA 1995 where the provisions on disfigurement can be found.\textsuperscript{15}

\textbf{Australia}

The position under the Australian Disability Discrimination Act 1992\textsuperscript{16} (hereafter Commonwealth Act) is very different. The definition of disability is recognised as the widest currently in force.\textsuperscript{17} It is found in section 4 of the Commonwealth Act and is as follows:

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

This definition is a compromise as it falls between the medical and social models of disability.\textsuperscript{18} It contains references to the individual, thus following the medical model, but also explicitly acknowledges the social context. It is surprising, however, that the definition is not more definitively rooted in a social model of disability given that the authors of the Act spent much time analysing the successes and failures of the ADA and adjusted other areas of the legislation in response to their findings.\textsuperscript{19} The medical basis was also due to the evolution of the Commonwealth Act from pre-existing Australian legislation.\textsuperscript{20} Note too, that unlike the definition in the DDA there are no qualifications attached to the definition.\textsuperscript{21} The breadth of the definition and lack of qualification in the Commonwealth Act was a deliberate choice\textsuperscript{22} (Burdekin 1991). This was also as a consequence of the experience with the ADA, where much time had been taken up with debating whether a person was disabled within the terms of the legislation rather than deciding whether the
individual has been discriminated against. The Australian view was that the legislation was intended to protect against discrimination and that is why the focus has been placed on determining whether discrimination has occurred rather than determining whether an individual qualified. On the temporal basis the Australian approach is to be commended because it covers past, present and future disability rather than just the current long-term illness/disablement situation envisaged under the DDA. Further, the legislation extends to protect those who although not disabled themselves but who are affected by the disability of another. This brings family, friends and helpers of the disabled student under the protection of the Commonwealth Act. However, despite the attempts of the drafters to produce a sufficiently capacious and workable definition of disability that would enable the focus of any complaint to be on whether or not an individual had been discriminated against, in the case of *Purvis v. New South Wales (Department of Education and Training)* the High Court of Australia was asked to consider whether the definition of disability included ‘the behavioural manifestations of a disorder.’ It was held that there should be no distinction between the ‘condition and its manifestations’ and thus any behavioural manifestations of a disorder, illness or disease are to be treated as a disability. This is a conclusion that sits four square with the legislative intent of the drafters and corrects the pedantic approach taken by the Federal Court when asked to consider the definition of disability.

**SCOPE OF THE LEGISLATION**

**England and Wales**

Part 4 DDA applies to higher and further education sector institutions and what are described as ‘other designated institutions’. The new duties under Part 4 DDA have been instituted in three phases. From 1 September 2002 it became unlawful to discriminate against disabled people or students by treating them less favourably than others. Also, responsible bodies were required to provide some reasonable adjustments in situations where disabled students or other disabled people might otherwise be substantially disadvantaged. From 1 September 2003 institutions were also required to provide auxiliary aids and services. The remaining duties to introduce reasonable adjustments will come into effect from 1 September 2005 and will cover adjustments to physical features of premises. The body responsible for compliance with Part 4 in England and Wales is the governing body of the institution.
The responsibility extends to cover employees and agents working for the institution.

**Australia**

The Commonwealth Act covers all public and private educational institutions, primary and secondary schools, tertiary and further education institutions, private colleges and universities. The Commonwealth Act has been in force since 1993, immediately applying to education. The Act makes it unlawful for an educational authority to discriminate against someone because that person has a disability in combination with one of the grounds of discrimination outlined in sections 5–10 of the Commonwealth Act 1992. Under the Commonwealth Act responsibility for compliance falls on the relevant ‘education authority’. ‘Education authority’ covers all those bodies mentioned above. An argument was raised regarding the necessity of training of staff to comply with the requirements of section 22 of the Commonwealth Act in the case of *W v. Flinders University of South Australia*, but it was unsuccessful as the Commissioner felt that this was not a ground covered by the Act. As with the DDA the issue of vicarious liability is covered.

**LESS FAVOURABLE TREATMENT – DIRECT DISCRIMINATION**

**England and Wales**

Although both acts have provisions on direct discrimination, the Commonwealth Act is not framed in identical terms to the DDA. The provisions relating to higher education in England and Wales are to be found in sections 28R–28X of the DDA 1995. Discrimination will occur under section 28S if

"... a responsible body discriminates against a disabled person if

(a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and

(b) it cannot show that treatment in question is justified."  

This is the equivalent provision to those on direct discrimination under the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA). However, as with the definition of direct discrimination generally under the DDA the formulation of the definition is different to that used in the SDA and the RRA. It has to be shown that the treatment ‘relates to’ the disability, even if
other people are also treated unfavourably for a broadly similar reason. This is a broader formulation than that of ‘grounds’ used in the SDA and the RRA. For example, if dyslexic applicants were required to take an entrance test, but no other students are required to take the test, then this is would probably be unlawful.

It should also be noted in contrast to direct discrimination under the SDA and the RRA where there is no defence to direct discrimination once it has been proved, there is the defence of justification under the DDA. Although the less favourable treatment has to be material and substantial in a particular case when applied to discrimination in higher education, the defence of justification is broader than normal under the DDA. In this context it is permissible to treat a person less favourably if the less favourable treatment can be sustained on academic grounds, in relation to prescribed standards, or occurs in prescribed circumstances. As usual, the question of knowledge is important. It appears to be the case that if an institution is not aware or could have not reasonably have known that a person is disabled, then that is a defence to a claim of unlawful discrimination. However, the responsible body must have taken reasonable steps to find out about the person’s disability.

It is acknowledged that it is possible under the DDA to offer more favourable treatment to disabled people and students as long as this does not take the form of positive discrimination. This is due to the nature of the DDA which, unlike other pieces of anti-discrimination legislation in the UK, is not symmetrical. Therefore, the DDA protects only those with disabilities from discrimination. However, any positive action taken must not contravene any of the other anti-discrimination Acts.

Australia

The Commonwealth Act also makes it unlawful to discriminate against a person by treating them less favourably than another person in the same or similar circumstances, but the differences in the detail of the legislation lead to a markedly different approach in Australia.

Under section 5(1) of the Commonwealth Act 1992 it states that ‘for the purposes of this Act, a person discriminates against another person on the ground of a disability of the aggrieved person if, because of the aggrieved person’s disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.’ But the section consists of two parts and the second
has given rise to legal discussion of the extent of the duties created under this part of the section.\textsuperscript{46} ‘(2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability’.\textsuperscript{47}

The knowledge question under the Commonwealth Act is far less convoluted than the present situation in the UK\textsuperscript{48} in that if the educational authority is unaware of the disability, then it is not possible for it to discriminate on the grounds of disability.\textsuperscript{49}

\section*{THE COMPARATOR UNDER THE DIRECT DISCRIMINATION PROVISIONS}

\textbf{England and Wales}

The institution will have to find an appropriate comparator and assess whether there is a substantial disadvantage. Although the comparator may be able-bodied, the comparison may also be made with the way people with different types of disabilities are treated. The comparator may be actual or hypothetical under both systems.\textsuperscript{50} There is a divergence in the process of finding an appropriate comparator however. Under the DDA, it is the reason for the treatment which is the key to the section. Any comparator therefore is looked at from the perspective of whether that reason would apply to them.\textsuperscript{51} Once reason for the treatment has been determined, then the question of whether the reason related to the disability will be looked at and then finally a consideration of whether another person to whom the reason did not apply would be treated in the same way should be made. Recent case law is unequivocal that this same process has to be applied to education claims in the same way that it has been applied to Part II employment claims.\textsuperscript{52}

\textbf{Australia}

The Australian approach is to look at the treatment meted out in the prevailing circumstances and then try to ascertain whether the issue of disability made a difference. The selection of a comparator has been described as a ‘complicated and vexed process’.\textsuperscript{53} The latest statement of law in \textit{Purvis} stated that that correct approach towards identifying the appropriate comparator should be to consider the following. ‘In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a
person without the disability, section 5(1) of the Commonwealth Act 1992 requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in those circumstances if the person concerned was not disabled. Purvis, however, has been criticised because of the limitations that the interpretation employed places on the selection of a comparator.

Frequently the point has been made that a student’s disability does not preclude them from being subject to the university’s disciplinary procedures if they behave in a manner that would not be deemed acceptable from a non-disabled student. The student in *H v. S* had a personality disorder and argued that his exclusion from certain campus buildings and from approaching members of staff was on the grounds of his disability. The university did not dispute the fact that they had placed restrictions on the student’s movements but claimed that it was not due to the disability, but as a result of complaints made by staff in relation to threatening behaviour exhibited by the student. The Commissioner held that under section 5 of the Commonwealth Act 1992 that there was no discrimination due to student’s behaviour. Any student who behaved in the manner demonstrated in this case would have been treated in the same manner regardless of whether or not they had a disability. The position under the DDA would be the same as long as the reason for the treatment was not due to the student’s disability.

**JUSTIFICATION**

**England and Wales**

Once it has been established that less favourable treatment has occurred under the DDA then the onus shifts to the responsible body to show that it was justified. Less favourable treatment may only be justified on the following grounds: academic standards set internally, standards of a prescribed kind set by external bodies, it (the treatment) is of a prescribed type or it occurs in prescribed circumstances. Under section 28S(8) of the DDA 1995 the reasons for the discrimination have to be both material and substantial. The problem lies in the inexactitude of the definition of the terms ‘material’ and ‘substantial’ in the context of disability discrimination. ‘Material’ has usually been interpreted as meaning something important or essential, but not necessarily relevant. ‘Substantial’ has been defined as ‘more than minor’. There have been several attempts to propound a test that will assist the courts in determining whether the justification argued by an employer meets
the standard of material and substantial. In Jones v. Post Office Arden LJ stated that the standard that the employer's reason has to meet is an objective one. Further Arden suggested that 'a tribunal faced with a claim of justification may well find it helpful to proceed by asking the following questions:

1 What was the employee's disability?
2 What was the discrimination by the employer in respect of the employee's disability?
3 What was the employer's reason for treating the employee in this way?
4 Is there a sufficient connection between the employer's reason for discrimination and the circumstances of the particular case (including those of the employer)?
5 Is that reason on examination a substantial reason? 

Given the similarities in drafting of the justification provisions in Part II and Part 4, it is submitted that this formula is good guidance for determining whether the justification defence has been made out in education cases. However, any future development of the methodology in dealing with the justification defence will have be left to education cases due to the amendment of the employment provisions and the removal of the justification defence in employment cases.

A consideration of the external regulation exception demonstrates the problems that may arise with the grounds of justification. For example, various types of medical training are subject to external control that prevent the providers from offering places to students with certain types of disabilities. The only case that has been brought under the DDA at the time of writing that relates to the defence of external regulation is that of General Medical Council v. Cox. This was, however, heard under section 13 of the DDA as education was specifically excluded from the ambit of the DDA at the time of the case. Following an accident Heidi Cox was left wheelchair bound. As a consequence she was not permitted to complete her medical training to become a doctor. Cox had commenced her training in 1992. She had to leave her course. Subsequently she completed a MSc and took a first class degree in Pathobiology. Cox still wished to become a doctor and in 1999 applied to Oxford University to study medicine. Her case was referred to the General Medical Council (GMC), who have overall responsibility for the registration of doctors. The GMC turned her application down on the grounds that it was not possible to approve specially adapted medical training for someone who was disabled from the outset. The tribunal ruled that the provisions of the DDA covered the GMC. However, the GMC appealed that they fell
outside the scope of legislation because they were a qualifying body and the Employment Appeal Tribunal (EAT) agreed.\textsuperscript{66}

This position was amended in relation to vocational training by the introduction of the Disability Discriminating Act (Amendment) Regulations 2003.\textsuperscript{67} Any criterion imposed by the external regulating body with reference to a competence standard will have to be ‘justified’ and ‘proportionate’ in relation to the achievement of its aim rather than using the reasonable adjustment approach.

\textbf{Australia}

Under the Commonwealth Act there is no equivalent to the defence of justification but in relation to education there is the exception of ‘unjustifiable hardship’ in section 22(4). However, the Australian courts have been willing to consider the question of motive, actual or inferred, despite the legislation itself not requiring an examination of any subjective element. The part of the definition of discrimination on the grounds of disability that has raised the issue of motive is the phrase ‘because of’ in section 5(1) of the Commonwealth Act 1992. It is the view of the Australian Human Rights and Equal Opportunity Commission (HREOC) that although ‘because of’ ‘requires a causal connection between the disability and any less favourably treatment accorded to the aggrieved person. It does not, however, require an intention or motive to discriminate’.\textsuperscript{68} The current position appears to be that the courts are embracing a test which uncovers the ‘real reason’ or ‘true basis’ of the discrimination as abstracted from the case of \textit{IW v. City of Perth}\textsuperscript{69} where it was said that ‘it is enough that it be shown that the doing of the act was “by reason” or “on the ground” of the particular matter in the senses that the unlawful consideration was included in the alleged discriminator’s reason or grounds. It must be the real “reason” or “ground”’.\textsuperscript{70} In \textit{Purvis} the court again looked at the problems raised by ‘because of’. It was said that it was doubted whether ‘distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed “because of” disability. Rather, the central questions will always be – why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it “because of”, “by reason of”, that person’s disability. Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression “because of”’.\textsuperscript{71} However, it is submitted that attempting to define the ‘real reason’ in order to satisfy the ‘because of test’ becomes an exercise in semantics. Reference to a thesaurus shows that a synonym for motive is
reason. Additionally, the necessity of some consideration of motive to determine whether discrimination has occurred is highlighted by section 10 of the Commonwealth Act which provides that the disability does not have to be the sole, dominant or even a substantial reason for a decision. The court will therefore need to ascertain which of the reasons put forward in a claim of discrimination is the true one.

As in England and Wales a continuing source of complaints is that of access to professional training. This is problematic in that the rules are made externally by the qualifications body and the education institutions offer programmes on the basis of compliance with the qualifying requirements. A complaint was made that the failure to provide a special program to permit disabled people to follow a course leading to a degree as Bachelor of Medicine was discriminatory. The President confirmed that this was not the case.\(^\text{72}\)

OTHER METHODS OF DISCRIMINATION

The main area of divergence between the Acts is in the non-direct types of discrimination that are outlawed. Under the DDA the chief alternative is the requirement to make reasonable adjustments, whereas under the Commonwealth Act there are provisions on indirect discrimination. However, this does not mean that there is no scope for reasonable adjustments under the Commonwealth Act. They are covered by sections 5 and 22, the education specific provisions.

England and Wales

The second type of disability discrimination under the DDA occurs in relation to the provisions against disabled students suffering a substantial disadvantage under section 28T of the DDA 1995. It is for the responsible body to ensure that:

"(a) in relation to the arrangements it makes for determining admission to the institution, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and

(b) in relation to students services provided for, or offered to, students by it, disabled students are not placed at a substantial disadvantage in comparison with students who are not disabled."\(^\text{73}\)

This is, effectively, the duty of reasonable adjustment. This is a major difference to the other UK discrimination acts, which have
provisions on indirect discrimination. Indirect discrimination affects a group because of the imposition of a condition or requirement. It has been suggested that a duty to make reasonable adjustments is a fairer method of persuading institutions to adapt and it is a far easier ground of complaint to establish than indirect discrimination. For example, if teaching a deaf student who lipreads, then a reasonable adjustment would be to stop speaking when facing the whiteboard so that the student can follow the class and not be at a substantial disadvantage. This duty is owed to all students on an anticipatory basis. For an action to be successful, the claimant would have to show that as well as the general duty being breached, that a detriment had also been suffered. This section on reasonable adjustments is likely to be most problematic in implementation for an institution because the duty is owed on a general basis. The provisions which an institution makes for disabled students should be assessed to ensure that reasonable steps are taken to accommodate any students with disabilities. For example, there is a case pending concerning the failure of an institution to make reasonable adjustments for a student with mental health problems with regard to the type of accommodation and noise levels within that accommodation, which were provided for the student. Additionally, the outcome of a claim by an applicant to be admitted to a nursing degree who was turned down due to dyslexia is awaited. The refusal was despite occupational health advice that the student would be able to take the course if reasonable adjustments were made.

It should be noted that the duty is owed to disabled people and students at large, not simply to individuals. The consequence of this being, that it is irrelevant if an institution believes that it does not have any disabled students. Systems and processes should be evaluated to ensure that potentially discriminatory practices are removed. Additionally, institutions should be aware that the duty to make reasonable adjustments is ongoing and thus subject to review.

Thus, when it comes to deciding what is reasonable there are a variety of factors that can be taken into account. Responsible bodies must have regard to relevant provisions of the Code of Practice. The institution will not be expected to lower its academic standards or other prescribed standards. Consideration will be given to financial resources, the availability of grants or loans, the cost of making the adjustment and whether it is practical. For example, alternative methods of assessing students may be a cost-effective way of making an adjustment. Institutions should also take into account other aids or services available and whether the student is already in receipt of the Disabled Students Allowance to fund services. If confidentiality is a priority then this should be considered
in making the adjustment. A point of contention is that health and safety is a ground on which adjustments may be refused and it is feared that this could become a safety screen for institutions to evade their responsibilities. Finally, the institution should consider the relevant interests of other people, which includes other students. For example, moving classes could be beneficial in terms of accessibility for a wheelchair user, but detrimental to other students who are placed in a more crowded lecture theatre.

**Australia**

There is no directly equivalent provision under the Commonwealth Act. Section 5(2) makes reference to the potential provision of a ‘different accommodation’, which looks superficially similar to the DDA. However, this section is part of the overall duty not to directly discriminate contained in section 5 and is used for the purpose of comparison. It has been argued that 5(2) may create a ‘positive obligation’ to accommodate a student with disabilities but the line of caselaw suggests that the courts are not willing to read this obligation into the Act.

It is more likely that if there is a duty under the Commonwealth Act to make reasonable adjustments in relation to education that it arises in a very limited form under section 22(4).

The duty to make reasonable adjustments is far wider than just to course delivery. Examples of areas that are subject to review and possible change are course content, including work placements, teaching arrangements, additional teaching, communication support or services, materials and information in alternative formats, staff training, policies and the employment of support workers. Some guidance as to the types of reasonable adjustments that may have to make in UK institutions can be gained from the outcomes of Australian cases. One of the issues that arises from the cases is lack of staff awareness of their obligations under the legislation. Most higher education institutions in Australia have filed Action Plans with the HREOC, but it appears that staff training has been inadequate. For example, a common reasonable adjustment that should be made is in the provision of lecture notes. However, the extent to which these should be provided can be a source of disagreement between the student and the institution as exactly what should be made available. A recent Australian conciliation examined the case of a student who is colour-blind and was unable to read the lecture notes provided on red paper in 10-point format. Although the notes were available in electronic format, the student claimed that there were problems in downloading them. Also, although the
notes were available in hard copy on white paper in larger font from the lecturer, the student did not come to collect them. He claimed that he did not take advantage of this because he was embarrassed about having to collect the notes and argued that the university should have made reasonable adjustments to avoid students with disabilities drawing attention to themselves. The conciliation resulted in the university agreeing to adjust the student's record to give him a pass in the subject. However, it could be asked why the lecturer was providing notes on red paper as it would have affected students with other disabilities such as dyslexia.

A usual method of providing lecture materials is in electronic format which should allow the student to manipulate them to their satisfaction. However, not all materials in this format are suitable for use with screen reader software. A visually impaired student studying by distance learning wished to have his course materials supplied in a format that would be compatible with JAWS software. He was assured that this could be done. Unfortunately there were difficulties in translating the materials which the university had not foreseen. It was accepted that assurances had been given which the university could not uphold and on that basis the student was awarded $15,000 compensation in settlement. The problem of the non-binding precedent approach is shown by similar fact cases recurring. In 2001 another visually impaired student could not access course materials at the same time as non-disabled students because they were not compatible with the screen reader used by the student. The university accepted that it could have done more to make the materials accessible while the student accepted that there were technical problems to be overcome. On conciliation the university agreed to implement changes which included the drawing up of an action plan on web materials, the use of enhanced conversion software and to develop the role of the Disability Liaison Officer.

Frequently, although an institution may have implemented good practice, as has been noted above, the problem arises with an individual member of staff who does not understand the needs of students with disabilities but because of vicarious liability the responsibility ultimately resides with the institution. A student with a visual impairment made a complaint that he was being treated in a discriminatory fashion due to the actions of one of his lecturers. The lecturer failed to provide lecture notes or class materials in an accessible format. The exam for the module was multiple choice, which it was claimed would disadvantage the student. Additionally, the lecturer singled the student out in class by stating that it getting through the material would be time consuming as everything had to be read out for the student’s benefit. The university agreed to examine the complainant’s concerns and provide the exam in a
different format. This was acceptable to the student. It would be interesting to know whether the university asked the lecturer concerned to undertake some diversity training as the provision of materials in an accessible format prior to classes would have enabled the student to pre-read and thus avoided the necessity of going through everything by reading it aloud.

As stated earlier, the obligation to make reasonable adjustments goes far wider than just to course delivery. The provision of auxiliary services should be equally accessible. Many institutions in Australia provide ‘late buses’ as a safety measure for their students who are on campus after dark. In 1998 a wheelchair user brought a complaint that he could not access the shuttle provided by the university. The university recognised that it had duties towards its disabled students but had not made reasonable accommodations of adapting or purchasing larger buses that could carry wheelchairs on grounds of cost. The outcome of conciliation was that the university would not only provide taxi vouchers to the complainant but also any other student who was unable to access the shuttle until such time as the accessibility of the service was more permanently resolved. The university also agreed to publicise the service and upgrade it to meet the standard outlined in Commission’s Advisory Note on public transport.

It is has been recognised that deaf students should be provided with an interpreter for all lectures and tutorials throughout the duration of their course and this has been confirmed by cases that have been through the conciliation process.

The area of reasonable adjustments remains problematic in both jurisdictions as there is no single solution that will benefit all students with disabilities e.g. in the provision of lecture notes if the notes are put into bullet points to assist a British Sign Language or Auslan user to read them more easily, then this makes it more difficult for a visually impaired student using screenreader software. This contradictory outcome exemplifies the problems facing an institution which is trying to make reasonable adjustments and employ practice that works and reflects the duty it is under to keep its systems and processes under review.

**DISCLOSURE AND CONFIDENTIALITY**

**England and Wales**

The most problematic areas of the DDA appear to be those related to the issues of disclosure and confidentiality. It should be remembered that the offence of discriminating on the grounds of disability can only be committed if the institution is deemed to be aware of the disability. If
a student with a disability fails to disclose that they have a disability and is subject to less favourable treatment, there is no guarantee that the institution will be liable. However, the institution is placed under a duty to take reasonable steps to find out if an individual has a disability. A failure to make an adjustment and the lack of knowledge must be connected. The problem is that the Act is framed in terms of reasonableness, and any lawyer knows what an imprecise science it is to define reasonableness. Thus, an institution needs to take reasonable steps to ascertain whether a student is disabled. There are the obvious methods that are used such as the declaration on the UCAS or university application form, but a student may be unwilling to disclose fearing that it may prejudice their application. A group that frequently cite the fear of a prejudicial reaction to disclosure are those with mental health problems. Students could also be invited to declare at enrolment, but it should be considered whether the environment or timing is conducive to disclosure. It may also be appropriate to allow students the opportunity to disclose when applying for accommodation, when starting a new module or when meeting their personal tutor. It is further suggested that the phraseology of disclosure is examined. The ends to which the information, if given, should be made clear so that students understand that they will not be disadvantaged by informing the institution that they have a disability.

There is also a question of interpretation. One of the more obvious ways for a student to disclose is to tell a tutor, but there is some argument as to whether the knowledge of the tutor is the same as the institution knowing.

The position on disclosure is potentially highly complex and doubtless there will be several cases taken to conciliation before the extent of the duty is fully articulated. What can be said with confidence is that all staff will need to be aware that it is possible that a student may mention a disability to them and this could be sufficient to amount to disclosure. It would be advisable that staff are made aware that they need to pass the information on. This would be to one of the institution’s designated contacts so that the information can be circulated to the relevant people. Issues of confidentiality may arise, but the easiest thing to do is check with the student as to on what basis the information has been given.

The alternative position may be that there is a ‘confidentiality request’ rather than disclosure being made in confidence. Unlike the grey area of ‘in confidence’, the attitude towards confidentiality requests is that they must be complied with. A confidentiality request will arise in relation to the duty to make reasonable adjustments. Either the nature or the existence of a disability is kept confidential. The problem comes when it is impossible to make the adjustment without breaching the confidentiality request. Then the institution will be
required to do what is possible. Remember the adjustment only has to meet the criteria of being reasonable. However, there does not appear to be any remedy for a breach of confidentiality request under Part 4. Skill further posit the scenario of what to do if only the disability adviser is told. Their advice is to make the adjustments but do not explain fully why. With respect, most tutors would be able to work out why a disability advisor was asking for an adjustment for a student, but hopefully they would trust their colleague and accede to the request. As with disclosure, this does not appear to be dealt with explicitly under the Commonwealth Act.

A further difficult area is that of evidence. It may be that a student discloses a disability but does not supply evidence. In many cases, however, evidence will not be necessary, but when dealing with a hidden disability the situation becomes more complicated. It is the job of the court to determine whether a student is disabled, not the institution, but it seems that the university will be within its rights to ask the student to undertake testing. For example, if the student claims dyslexia but does not supply evidence, then the institution will be entitled to ask the student to be screened or be evaluated by an educational psychologist – at the institution’s expense. If the student refuses and there was no other evidence, then the institution would be able to argue that it was not bound to make adjustments. However, there is a dichotomy in the treatment of home students and overseas students. Overseas students may be required to pay for testing.

Australia

Previously the case of Purvis was discussed in which it was held that if the educational authority was not aware of the disability, then there could be no discrimination. However, disclosure is not covered explicitly in the Commonwealth Act. HREOC’s view is that even if specific disclosure has not been made that an educational authority should make provision for disabled students. For example, it is reasonable to expect a proportion of applicants to a university to be wheelchair users and make adjustments accordingly without ‘a specific request or without detailed independent evidence of this need’. The onus, following HREOC’s guidance, appears to be placed on students to disclose. It is further stated on the website that they ‘may need to take the initiative in providing information and evidence, rather than expecting an education provider automatically to be aware of a disability and any needs arising from this, or to accept an assertion of the existence of a disability or disability-related needs.’
The provision of evidence is covered by section 45 of the Commonwealth Act 1995, which relates to ‘actions which are reasonably intended to provide equal opportunity to people with a disability or to persons with a particular disability are permitted by the (Commonwealth Act)’. In the Commission’s view this provision clearly applies to ‘inquiries, examinations or actions which are reasonably intended for the purpose of determining need and eligibility for, nature of and possibility of making any reasonable adjustment required’. However, this is tempered by section 30 of the Commonwealth Act 1992 which concerns requests for information. Section 30 limits the use to which evidence and inquiries of this nature can be put by making it unlawful to require evidence for discriminatory purposes. HREOC has identified problems with the potential misuse of information which may be contrary to section 30 such as discriminatory decisions based on disclosure made on the application forms or the incorrect further disclosure of information. Additionally, contrary to the approach suggested under the DDA, overseas students are fully covered by the Commonwealth Act and therefore it would be discriminatory to make them pay for testing.

As in the UK the Australian approach taken seems to be generally that for specific disabilities an institution is under a duty to make reasonable adjustment but only in the light of the knowledge available at the time. However, again mirroring the attitude in the UK adjustment should also be anticipatory as it would be reasonable for an institution to expect that a proportion of its students will have disabilities eg dyslexia. Reasonable requests for information should be complied with.

INDIRECT DISCRIMINATION

Australia

Under section 6 of the Commonwealth Act 1995 it is possible to indirectly discriminate against a person with a disability. This occurs if there is the imposition of a condition or requirement that the disabled person cannot comply with but a substantially higher proportion of people without that disability can comply with. Also, it must be shown that the condition or requirement is not reasonable in the circumstances. In the case of W v. Flinders University of South Australia a student with psychiatric disabilities complained of the University’s imposition of a requirement that she could not comply with. The requirements in question was a four-day practical teaching component, which she was unable to undertake due to her disability. The Commission held that although there were problems in meeting
the course requirements because of the student’s disability, this did not automatically lead to a finding that there had been discrimination. The requirement to complete the teaching component of the course was found to be reasonable in the circumstances and therefore not discriminatory under the Commonwealth Act. Sluggett v. Flinders University of South Australia\textsuperscript{99} illustrates the problematic nature of using the legislation. A student with polio-related disabilities complained that she was unable to access university facilities under section 6 and section 23 of the Commonwealth Act 1992, the access to premises provisions. Although she had disclosed her disability, she only asked the university for accommodations in relation to the submission of coursework once she had received fail grades and, additionally, she failed to draw the attention of any person at the University to the deterioration of her condition. The university countered that there were accessible facilities and information available to the student about the facilities. It was not the university’s responsibility if the student failed to take advantage of either. The complaint was dismissed.

Although it appeared that there may have been grounds for complaint, it is evident under the Commonwealth Act that the university’s responsibility is in making reasonable accommodations on the basis of the information that it has received. If the student fails to inform the institution that their situation has changed it is unreasonable to expect the university to second guess what the student’s needs may have changed to. It is likely that if the case had been heard under the DDA the outcome may have been different as it would have fallen under the separate provisions on reasonable adjustments. As reasonable adjustments in England and Wales should be made on an anticipatory basis, many of the problems should have been ameliorated or avoided. For example, the problems regarding access would have been addressed as part of the duty placed on educational institutions to provide accessibility buildings. Also, as Sluggett had disclosed her disability, it is likely that she would have been encouraged to have a needs assessment undertaken to establish first whether she was eligible for DSA and then to enable the institution to put any recommendations for assistance into place.\textsuperscript{100}

OTHER GROUNDS OF DISCRIMINATION

England and Wales

In addition to the grounds of direct discrimination and failure to make reasonable adjustments section 28R of the DDA 1995 makes it unlawful for there to be discrimination against a disabled person
in regard to the arrangements for admissions to an institution, the terms on which admission is offered or by refusing or omitting to accept an application for admission. Institutions are also prevented from discriminating against disabled students in the services that are provided to students, or by excluding a disabled student from the institution. ‘Services’ has been given a very wide remit and should be read as including not just those provisions related to teaching and learning, but other services such as accommodation and leisure facilities.

Australia

The equivalent provisions to section 28R of the DDA 1995 are to be found in section 22 of the Commonwealth Act 1992. This states that:

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

Although appearing superficially similar to section 28R of the DDA 1995, section 22 of the Commonwealth Act 1992 goes much further than the domestic legislation. In addition to protecting the disabled student from being discriminated against in terms of their
admissions, access or exclusion, it also provides protection for those who associate with disabled students. However, unlike the domestic legislation it permits institutions that have been established to cater for those with specific types of disability to limit their intake to students with that type of disability. It should also be noted that the defence of unjustifiable hardship only applies to section 22(4). Once an applicant has become a student, then an educational provider cannot rely on the defence. This suggests that, unlike the position in England and Wales where defences can be raised to claims of discrimination, that once the discrimination has been established then there is no defence. However, it has been noted that it is possible that issues more pertinent to indirect discrimination may be raised in connection with the parts of section 22 and an educational provider may seek to rely on the reasonableness requirement of any condition imposed.  

UNJUSTIFIABLE HARDSHIP

In limited circumstances the institution may be able to plead the defence of ‘unjustifiable hardship’. In addition to taking all relevant circumstances into account, the Commonwealth Act directs that

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

are considered.

The types of issues that may well be brought forward under include cases such as Bradley John Kinsella v. Queensland University of Technology. Kinsella, a wheelchair user, wished to participate in the graduation ceremony on completion of his degree on the same basis as his peers. However, the ceremony was held at a venue that was not fully accessible. The result was that although Kinsella would be able to receive his degree on stage he could not be a part of the ceremony in the same way as the other graduands. The Commissioner found that the holding of the ceremony in an inaccessible venue was discriminator and that the defence of ‘unjustifiable hardship’ was not available to the university. It was ordered that the ceremony be moved to a place that could accommodate Kinsella.
HARASSMENT

Under the DDA there are currently no provisions to protect students from harassment by either staff or other students.\textsuperscript{107} In contrast, sections 37 and 38 of the Commonwealth Act 1992 make it illegal for there to be harassment of students or potential students by staff on the grounds of disability. The sections are broadly drafted to cover all staff, not just academics and again extend to cover associates of disabled students.\textsuperscript{108} However, there is no explicit provision to cover the harassment of a disabled student by other students. If this scenario occurred then the relevant section in this context under the Commonwealth Act would be section 22, the general provisions on discrimination. Although this does not expressly cover harassment by other students, it has been suggested by HREOC on their website that section 22 of the Commonwealth Act 1992 might be used in limited circumstances to protect a disabled student from harassment by their peers.\textsuperscript{109}

ADJUSTMENTS TO PHYSICAL FEATURES

Adjustments to physical features of an educational institution becomes a legal requirement from 2005,\textsuperscript{110} but it is suggested that providers start to address the question of alteration of premises in advance. Reasonable adjustments are to be made on an anticipatory basis. This may be more difficult in relation to buildings which maybe owned, rented or leased. The problem of obtaining consent needs to be considered as it is not guaranteed that consent will be forthcoming. A responsible body should make provision for provision of a service via alternative means while consent is awaited or if consent is refused.

If the situation is that the premises are leased and the terms of the lease do not permit the responsible body to make the reasonable adjustment, then DDA Part 4 allows the terms of the lease to be overridden so that the alteration may be made with the consent of the lessor.\textsuperscript{111} The lessor’s permission must be asked before any alteration can be made, but it can not be unreasonably withheld. It is possible for the landlord to attach conditions to the consent. Failing to ask permission because the terms of the lease prevent alterations to the property will not be a defence to a failure to make reasonable adjustments.\textsuperscript{112}

The relevant section of the Commonwealth Act has been mentioned previously. Under section 23 of the Commonwealth Act 1992 there are duties to allow a disabled person or their associates access to premises as previously discussed in \textit{Sluggett} above.
SUPPLEMENTING THE ACTS

England and Wales

The DDA is supplemented by a Code of Practice.\textsuperscript{113} Despite the extensive work done by Skill in attempting to cover as many scenarios in different types of higher and further education institutions as feasible, the Code is still inadequate in the terms of the guidance that it offers to institutions that run predominantly skills based courses. For example, at a conference jointly organised by the Law Society and the Bar Council in 2003 on the implementation of the Part 4, the response of the providers was that there was nothing for them in the Code. One solution to this is to submit suggestions for inclusion in the next revised version, but also to look for appropriate solutions from other jurisdictions that require similar types of skills based assessment.

Australia

There is no current Australian equivalent to the Code of Practice. There is provision under section 31 of the Commonwealth Act for the Attorney-General to make Standards on education. They are intended to “to specify rights and responsibilities about equal access and opportunity for people with a disability, in more detail and with more certainty than the DDA itself provides.”\textsuperscript{114} At the time of writing the education standard were still in draft form, but once these standards are approved then compliance with them will become mandatory under section 12 of the Commonwealth Act 1992.

Under Part 3 of the Commonwealth Act there is provision for an education provider to submit to the HREOC a Disability Action Plan. This is a voluntary process which outlines how the institution intends to show compliance with the Commonwealth Act.

REMEDIES

England and Wales

If a claim is made under Part 4 DDA, then the first stage may be conciliation via the DRC’s Conciliation Service.\textsuperscript{115} If this does not achieve a satisfactory outcome, then the claim will be heard in the county court.\textsuperscript{116} Claims must be brought within six months of the alleged discrimination or within six months of the last discriminatory
If conciliation has been undertaken then the time limit is extended by two months. Remedies available to successful claimants include compensation, injunction or a declaration of rights and or responsibilities.

The problem of conciliation is that although it achieves a result for those involved, the extent of guidance from that decision may be limited if it is not published. Obviously the decision is not binding on other institutions, but it may be helpful in setting guidelines.

With declarations of responsibilities there is potential for this to work both ways. Many students are fond of quoting their rights, but few recognise that they too have responsibilities, and it would be interesting if a court made a ruling that required an adjustment in the behaviour of both parties.

**Australia**

The Commonwealth Act generally affords a remedy of damages on a tortious basis. However, it is possible to include damages for hurt, humiliation or distress as in *Clarke v. Catholic Education Office* or aggravated or exemplary damages. In Clarke the court awarded $20,000 in compensation because of the hurt caused to the student but his appears to be generous in comparison with many of the cases decided under the Commonwealth Act.

As with the DDA there are provisions by which cases brought under the Commonwealth Act are referred to conciliation, it does not particularly help lawyers who are looking for precedents.

The types of issues that have come before the Commission for conciliation include the provision of lecture notes in an appropriate format, the adaptation of materials to be compatible with assistive technology, clarification of course requirements, adjustment of course loadings, access to university transport, provision of interpreters. Until 2000 the Commission had the role of hearing and deciding on complaints referred to it by the Disability Discrimination Commissioner. Complaints were referred either because they could not be settled by conciliation or because of the nature of the subject matter. Although this procedure was changed to hearing by the Federal Court or Federal Magistrates Service in 2000 by the Human Rights Legislation Amendment Act 1999, the decisions handed down by the Commission are still useful in terms of the application and interpretation of the Commonwealth Act.

Australian court decisions on education under the Commonwealth Act have covered matters such as the standard of behaviour of students, access to premises, reasonable adjustments to allow students to participate in the course to the same extent as their peers.
Establishing precedent remains a problem because there is a wealth of actions that were started and that raise issues that institutions should be considering when they decide on their provision for disabled students but many of the cases have been either terminated on the grounds of ‘no case to answer’ or have been successfully conciliated. In both situations although there is no precedent, HREOC has made summaries of the cases available so that they can be referred to as good guidance.

A further source of guidance to the interpretation of the Commonwealth Act can be gained from complaints that have been terminated by the President of the Commission under s.46PH of the Human Rights and Equal Opportunity Commission Act 1986 on a variety of grounds such as there was no discrimination, that there was no substance to the complaint, that the complaint was misconceived or that there is another available remedy.

Examples of complaints that have been terminated include the following: The failure of an institution to ask applicants to declare their disability on the application form thus placing the onus on the students to declare their disability was decided not to be unlawful.123

In the case of a university requiring a student with a disability to undergo counselling and rehabilitating before being re-admitted to study, the President decided to terminate the complaint on the ground that there was no direct discrimination. In relation to the possibility of indirect discrimination, the President found that the condition was not one that the student could not comply with but had simply refused to do so. Also, the President found that the condition was reasonable when all the circumstances of the student’s previous behaviour had been taken into consideration.124

INTERACTION WITH OTHER LEGISLATION

It should be noted that interaction with other legislation should be taken into account when assessing duties e.g. the impact of disability rights may conflict with health and safety or building regulations. In 2002 in the UK many institutions were faced with a conflict of duties during the firefighters’ strikes with regard to the use of lifts. Because the contractors that are on call during the day tend not to offer a 24 hour service, after hours it falls to the emergency services to rescue those who have become trapped by faulty lifts. To prevent the situation of any students, not just those with disabilities from spending the night in a broken down lift, many institutions chose to shut their lifts down when there was no cover. This action disproportionately affected disabled students with mobility impairments who then
could not access their classes, libraries or even disabled toilets and was widely complained about for the adverse impact. It was arguably direct discrimination, on the ground of disability but justifiable. However, the duty to comply with the demands of health and safety was taken as seriously and assessed as being the greater risk to the greater number of users.125

CONCLUSIONS

It is obvious that there are fundamental differences in the intent and drafting of the respective Acts. Despite this, there is much commonality that means that the outcomes under the Commonwealth Act provide a reservoir of experience that can be drawn on in adherence to the DDA. This is needed as the level of ignorance about the depth and breadth of duties owed under Part 4 has resulted in a culture of fear of the consequences of the Act with some disabled students receiving treatment that would not be accorded to an able-bodied student.126 Following consideration of the issues that cases have covered in Australia, two main areas emerge as ones that institutions in the UK should focus their efforts on to ensure compliance with the legislation. The first is the problem of staff awareness of their obligations under both pieces of legislation. Many of the Australian cases on reasonable adjustments have involved either the refusal of an individual to provide materials in a suitable format or a lack of forethought on the part of a member of staff. Many of the adaptations to be made in terms of teaching practice tend to the type of practice that is recommended as good practice on teaching and learning courses for higher education. There is no requirement in either jurisdiction for lecturing staff to have a teaching qualification so not all lecturers are aware of what is good practice. This can be remedied by compulsory staff training in disability awareness. Although many academics may be resistant to change on the basis of they have always worked in a particular way, simple changes to assist students with disabilities usually benefit the whole cohort e.g. the timely provision of powerpoint slides via the Internet or a virtual learning environment which allows all students to prepare before a class and listen to what is being said. The training should also extend to non-teaching staff as well to ensure that the institution has complied with its obligations, as employers are responsible for actions by their employees in the course of their employment.127 It is not permissible to claim that any discrimination took place without its knowledge or approval unless the responsible body took ‘such steps as were reasonably practicable’ to prevent such actions.128 To this end, in both jurisdictions it means that educational institutions have to
think about more than merely persuading teaching staff to provide copies of their notes in appropriate formats. For example, administrative staff should consider their procedures for accepting coursework, library staff as to whether they have sufficient screenreader software on accessible computers, technical staff as to what assistance is provided to a disabled student, house staff should consider whether leaving furniture in corridors, even for a short period, of time is acceptable.

The second area is that of communication. Many institutions seem not to understand how to comply with either of the Acts. Non-discrimination goes beyond treating all students the same. The easiest solution is usually to ask the student what they need to enable them to pursue their studies and make provision – as long as it does not cause undue hardship in Australia or refusal is justified as in England and Wales.

Additionally, both Acts suffer from a lack of clarity. The Commonwealth Act was legislated in such a way that gaps were left to be filled in due course by the drawing up of standards. It is hoped that the standards will add clarity and certainty. It is to the discredit of the Australian legislators that the education standards are still not in force. The DDA has frequently been criticised for the complexity and obfuscation that it brought to the area of disability discrimination. It is the supplementary Code of Practice that provides more assistance in interpretation and application, but it is not comprehensive.

At the time of writing Part 4 remains unproven as to its efficacy but there is a foundation of knowledge available as consequence of the operation of the Commonwealth Act. It is to be hoped that with the wider dissemination of not just the outcomes of litigated cases, but also the publication of the conciliated outcomes in both jurisdictions, that educational providers will take advantage of that experience and endeavour to make education as inclusive as possible. The Australian experience has shown that disability can be successfully accommodated in higher education. Hopefully the DDA will do the same.

NOTES

* Senior Lecturer in Law and Law School Disability Tutor, University of Westminster. I am grateful to Kate Eastman of St. James Hall Chambers, Sydney, Tony Askham of Bond Pearce, Southampton and Bristol, and Jim Marshall for their help. I am also indebted to the anonymous referee for further comments on this paper. Any errors remain my own. The law is stated as I understand it to be at 24th February 2005.
1 As both Acts share the same title of the Disability Discrimination Act the UK legislation will be referred to subsequently as the DDA and the Australian Act will be referred to as the Commonwealth Act to avoid confusion.


4 For a discussion of the duties introduced in relation to mainstream education and amended as regards the provision for special educational needs, please see Marshall, Disability and Mainstream Education and The Reform of the Special Educational Needs Process (forthcoming).

5 These are available at http://www.qaa.ac.uk/public/COP/COPswd/contents.htm (accessed 22nd February 2005).

6 The paper refers only to the implementation of Part 4 DDA in England and Wales in higher education.


8 See endnote 16 further for information on prior disability discrimination legislation.


10 There is much case law on the definition as applied to employment scenarios which has highlighted some of the deficiencies in the drafting. Under the Disability Discrimination Bill 2005 clause 17 the definition of disability is to be amended to include HIV, Cancer and Multiple Sclerosis from the point of diagnosis, rather than the current situation that day to day activities are affected. At the time of writing, no case under Part 4 had reached the court system.

11 The anomaly remains that a student may be eligible for Disabled Students Allowance, but not be covered by Part 4 DDA and vice versa. This can also be demonstrated by the use of different definitions used by other pieces of legislation e.g. the Further and Higher Education (Scotland) Act 1992 and the Learning and Skills Act 2000 use a definition of ‘learning difficulty’, whereas the DDA looks at the ability to carry out normal day-to-day activities. Thus, it is important to ensure that institutions are providing appropriate support under relevant legislation.
12 The medical model of disability focuses on the ‘impairment’ of the person. The social model of disability bases the disabling of an individual within the environment rather than focusing on the person e.g. a wheelchair user can participate in activities if they are allowed access by use of ramps and lifts and adjustments are made to lower desks/shelves to height that they can use. Most buildings are still designed with access via stairs and an optimal height employed for the design of counters, desks etc. For further information about the social model of disability, see the work of academics such as Vic Finkelstein (Attitudes and Disabled People 1980, New York: World Rehabilitation Fund), Colin Barnes (Disabled People in Britain and Discrimination 1991, London: Hurst and Co) and Mike Oliver (The Politics of Disablement 1990, Macmillan: Basingstoke).

13 The definition of disability in the ADA is complex. ‘The term “disability” means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment’.

14 The UK government proposed what was described as a ‘workable definition of disability.’ Hague, Hansard, HC Deb vol 255 Col 629 10th February 1995.

15 DDA 1995, Sched 1 and DDA 1995, s 3(1). This is pure social model of disability as it is based on the perception of an individual by others and the potential discrimination that may follow due to that perception.

16 There is pre-existing legislation on anti-disability discrimination at state level prior to 1992, e.g. South Australian Equal Opportunity Act 1984. The Commonwealth Act attempts to include best practice from those earlier acts to provide federal protection.


18 See note 12 above.


20 See note 16 above. Anti-disability discrimination legislation already existed in New South Wales, Victoria and South Australia.

21 There is no mention of the length of time for which a disability needs to have existed, no worries about what substantial means, or the problem of adverse impact.

In addition to the general protection offered to individuals with disability from discrimination, the coverage of associates of a person with a disability in education who are affected by discriminatory treatment is detailed in ss 37 and 38 Commonwealth Act 1992. See 107 below.

Purvis v. New South Wales Department of Education and Training [2003] HCA 62. The case concerns a school pupil but the sections of the Commonwealth Act involved are the same as for a student in higher education.

Emmett, J. and the Full Court at Federal level opined that there was a difference between a disability and the conduct it causes. It is submitted, and supported by the decision of the High Court, that this is a fallacious and unnecessary interpretation of s 4 because the conduct is already covered in Commonwealth Act, s 4(1) para (g) under “disturbed behaviour”.

One of the implications of the way that designated institution is defined is that not all providers of higher education will be covered under Part 4 as some of them are wholly private, but they will still have duties under Part III of the DDA, which relate to goods, facilities and services.

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DDA 1995, s 28R(6). One of the implications of the way that designated institution is defined is that not all providers of higher education will be covered under Part 4 as some of them are wholly private, but they will still have duties under Part III of the DDA, which relate to goods, facilities and services.

Commonwealth Act 1992, s 22. The author is aware of the existence and potential impact of the draft disability standards for education but at the time of writing the Disability Discrimination Amendment (Education Standards) Bill 2004 had yet to complete all stages.

The position in relation to direct discrimination in employment on the grounds of disability in the UK was amended by the Disability Discrimination (Amendment) Regulations 2003 SI 1673/2003 as from 1st October 2004.
40 DDA 1995, s 28S(6)(a).
41 DDA 1995, s 28S(6)(b).
42 DDA 1995, s 28S(7).
43 DDA 1995, s 28S(3) and (4). This is the suggestion in the guidance offered by Skill on the question of disclosure by a student but it is difficult to square this with the objective test of knowledge as outlined in *Heinz v. Kendrick* [2000] IRLR 144, which places an extremely onerous duty on an employer to consider whether a disability may be connected with the employee’s performance in their work, even if the employee has not declared a disability or is not aware that they have a disability.
44 At the time of writing, although several cases were pending, no precedents had been reported.
45 Commonwealth Act 1992 s 5.
46 See section on reasonable adjustments for further discussion.
48 The question of knowledge is difficult enough if the lead from the employment case of *Heinz v. Kendrick* (above) is followed. However, if any of the various arguments suggested by Skill (see http://www.skill.org.uk/info/dda_myths.asp) are taken into account as to when the institution becomes aware of a student’s disability then the approach by the Commonwealth Act is more straightforward and therefore preferable.
49 Emmett, J. stated obiter in *New South Wales (Department of Education) v. Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69 at [77] that “where an educational authority is unaware of the disability, but treats a person differently, namely less favourably, because of that behaviour, it could not be said that the education authority has treated the person less favourably because of the disability”. This was based on the decision in *Tate v. Rafin* [2000] FCA 1582 at [64]–[67].
51 Mummery, L.J. in *Clark v. Novacold* [1999] 2 All ER 977 at [987] ‘The definition of discrimination in the [1995 UK Act] does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the “reason” for the treatment of the disabled employee and the comparison to be made is with the treatment of “others to whom that reason does not or would not apply” The “others” with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons “to whom that reason does not or would not apply”.’
52 *McAuley Catholic High School v. C and others* [2003] EWHC 3045 (Admin), [2004] 2 All ER 436, [2004] ELR 89 Silber J at [40] said “the comparator should be selected in education discrimination claims in the same way as the courts had established that they should be chosen for employment discrimination”. 

54 Purvis, n 50 above at 223.

55 Some commentators, such as HREOC in Federal Discrimination Law 2004, have taken the view that Purvis is not a suitable precedent for building on because of the perceived limitations that the decision imposes. Further resolution of the situation is awaited.


57 DDA 1995, s 28S (6)-(8).

58 See Post-16 Code of Practice, para. 5.16 for further discussion and examples.


61 Ibid.

62 n 39 above.

63 DDA 1995, s 28S(7).


65 DDA 1995 s 13 covers discrimination by a trade organisation.

66 The Disability Rights Commission have suggested that all examining bodies and standard setting agencies should be brought within the terms of the DDA and lobbied for this to be introduced into the Disability Discrimination Bill 2005.


70 Ibid. at [63].

71 n 50 above at [187] and [236].


73 DDA 1995, s 28T(1)(a) and (b).

74 Hamilton, n 9 above.

75 DDA 1995, s 28S(2) and Sched 4C paras 2 or 6.


77 DDA 1995, s 28T(4).

79 Conciliation are non-binding and thus should not be regarded as precedent. They are usually made without admission of liability.


86 DDA 1995 ss 28T(3)–(5).

87 DDA 1995, s 28S(3)(a).

88 DDA 1995, s 28S(3)(b).

89 Skill has further detail and discussion on this issue on their website at www.skill.org.uk. However the position suggested in the Post-16 Code of Practice is that disclosure to ‘someone within the institution’ may be sufficient (para 4.18). However, it is submitted that this is not definitive. It is arguable that disclosure to a member of house staff is not the same as disclosure to a tutor.

90 Examples of the way that confidentiality requests should be dealt with can be found at www.skill.org.uk.

91 Common examples of hidden disabilities include dyslexia, dyspraxia, epilepsy, some mental health problems.

92 This is the suggestion on the skill website – http://www.skill.org.uk/info/dda_myths.asp. Anecdotal evidence from practice suggests that the reality is that many students in the UK are asked to pay for testing.

94 Ibid.
95 Ibid.
97 Ibid. However, the draft standards contain a section on requests for information and make it clear that the institution has a right to ask for information if it necessary to make the adjustment – Draft Education Standards, section 3.7. Available at http://www.ag.gov.au (accessed 24th February 2005).
100 The draft standards have addressed this type of situation and provide for reasonable adjustments to be made on a timely basis – Draft Education Standards section 3.7 Available at http://www.ag.gov.au (accessed 24th February 2005).
101 DDA 1995, s 28R(1) and Sched 4C paras 1 or 5.
102 DDA 1995, s 28R(2).
103 DDA 1995, s 28R(3).
107 The DDA (Amendment) Regulations 2003 SI 1673/2003 introduced a general ground of protection from harassment as from 1st October 2004.
108 Commonwealth Act 1992, s 37 ‘It is unlawful for a person who is a member of staff of an educational institution to harass another person who: (a) is a student at that educational institution or is seeking admission to that educational institution as a student; and (b) has a disability; in relation to the disability.’ Commonwealth Act 1992, s 38 ‘It is unlawful for a person who is a member of the staff of an educational institution to harass another person who: (a) is a student at that educational institution or is seeking admission to that educational institution as a student; and (b) has an associate with a disability; in relation to the disability.’
110 DDA 1995, s 28W and Sched 4 Part 3. If the provider of legal education is a private institution then it had to comply with duties to make
reasonable adjustments under Part III by October 2004. However, if a
government institution offers the provisions of facilities and services which
are not purely educational, such as public access to its gym facilities,
then it has to ensure that its premises are in compliance with the Part
III duties on accessibility by October 2004.

111 DDA 1995, s 28W(2).
113 Many of the examples given are based on those cited in the post-16

115 DDA 1995, s 31B.
116 DDA 1995, s 28V.
119 DDA 1995, s 28V(2) and (5).
121 On the Australian Human Rights and Equal Opportunity Com-
misson website, it claims that well over 1,000 cases have been
conciliated.

122 Although it is commendable that the conciliated cases are reported in
an anonymised format, it is not always clear to which sector of
education they apply as the designation ‘student’ is often used in a
context where ‘pupil’ would be more accurate.

125 A view that is frequently expressed in the UK by those trying to
implement the anti-discrimination provisions but not fully cognisant
with the legislation, is that health and safety ‘trumps’ everything. A
balance therefore should be drawn between the legitimate needs of
a disabled student and the legitimate boundaries of health and
safety within which an institution feels that it must operate. Health
and safety should not be used to evade responsibilities under the
DDA because it is believed to be too difficult to comply.

126 Anecdotal evidence relating to the acceptance by an institution of
abusive and racist behaviour by a student with disabilities, who was
allowed to stay on a programme of study. It is submitted that if the
same behaviour had been demonstrated by a non-disabled student,
it would have resulted in immediate use of the institution’s disciplin-
ary procedures and probable expulsion of the student.

127 DDA 1995, s 58(1).
128 DDA 1995, s 58(5) and Commonwealth Act s 123.
REFERENCES