



**HUMAN RIGHTS
COMMISSION**

Secretary
Standing Committee on Education, Training and Youth Affairs
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2600

Dear Ms Lilburn

Inquiry into the Needs of Students with a Disability

Thank you for the opportunity to provide a submission to the Inquiry.

The ACT Human Rights Commission (the Commission) is established under the *Human Rights Commission Act 2005* (HRC Act). The Commission comprises the Human Rights & Discrimination Commissioner, and Children & Young People Commissioner, Health Services Commissioner, and Disability & Community Services Commissioner.

For the information of the Committee, the Commission previously provided input into Mr Shaddock's ACT Special Education Review.

Complaints about disability services

The Disability and Community Services Commissioner has a statutory oversight role in relation to disability services in the ACT. Under the HRC Act, the Commissioner has authority to investigate and resolve complaints. We provide an intake service, and speak with people in the ACT community who have concerns about disability services and services for the carers of people with disability.

We have not received a significant number of complaints from people accessing special education services in the ACT. Those complaints we have received were in relation to transport and therapy services, and were resolved to the complainants' satisfaction. We have also received enquiries regarding accessing therapy and other disability services and limitations placed on children in the education setting that the parents felt were unreasonable. These oral enquiries were not formalised as written complaints.

The low number of complaints may reflect the apparent reluctance of people with disability to complain regarding services. This may be for a number of reasons including fear of retribution given the high level of reliance many people with disability have on their service providers. In the case of families with children with special needs this is exacerbated by the extra time involved in supporting a child with a disability.

Complaints about services for children and young people

The Children & Young People Commissioner (CYPC) has a statutory oversight role in relation to services for children and young people in the ACT. Under the HRC Act, the CYPC has

authority to investigate and resolve complaints. We provide an intake service, and speak with people in the ACT community who have concerns about services provided to children and young people, including schools.

While we have not received a significant number of complaints, we have noticed some commonalities in the stories conveyed to us. The following scenarios relate to students with a disability attending mainstream schools, and after school care services, rather than special education schools. Parents have told us they are not able to access additional assistance to allow their child to function to their potential in the classroom. They have expressed concern about the way school staff manage their child's behaviour, when that behaviour is an aspect or characteristic of their disability. Parents have expressed concern that their child's teacher does not have specific training in the area of their child's disability. More broadly we receive enquiries about perceived failures to respond to incidents of bullying in schools.

We note that this information is anecdotal, and not all enquiries have been investigated or substantiated. Many young people and parents choose not to proceed with a formal written complaint, due in part to the fact that families caring for a child or young person with a disability are often living in situations of stress, and have limited time, energy and resources to pursue a complaint.

Complaints about Discrimination

Under s.18 of the Discrimination Act 1991, it is unlawful for an education authority to discriminate against a person in the terms or conditions on which they are admitted as a student because of their disability. Under s.8(1)(a) of the Act, direct discrimination occurs when a person treats another person unfavourably because of that person's relevant attribute. Under s.8(1)(b), indirect discrimination is unlawful in circumstances where, although the particular conduct is not aimed at the complainant, it has, or is likely to have, the effect of unreasonably disadvantaging him or her, because of an attribute.

Section 51 provides an exception, where:

- the failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students who have a disability that the application does not have; or
- the person, if so admitted, would require services or facilities that are not required by students who do not have a disability, the provision of which would impose unjustifiable hardship on the relevant educational authority.

In determining unjustifiable hardship, s.47 suggests factors such as the following must be considered:

- The nature of the benefit or detriment likely to accrue or be suffered;
- The nature of the disability of the person concerned; and
- The financial circumstances of, and the estimated amount of expenditure by, the person claiming unjustifiable hardship.

The case law across Australia on the question of unjustifiable hardship in the school environment has been mixed. In some cases, the economic cost to a school to make adjustments for a student with a disability, coupled with other factors such as the disruption to other students, has been found to constitute unjustifiable hardship.¹ In other cases, the benefit to other students and the school community of having students with a disability in the school community has been seen as outweighing the economic costs.²

In the Commissioner's view it is implicit in ACT law that unlawful discrimination will occur where a person does not make 'reasonable adjustment' for a person with a disability in public life. However, the ACT Discrimination Act does not currently expressly include this requirement. Recently the Commonwealth amended its *Disability Discrimination Act 1992* to explicitly include this requirement. The Commission submits that such amendment of the ACT Discrimination Act would not mean any major change to the existing law, but would provide greater certainty and clarity for students with disabilities and their families as well as schools, and would harmonise ACT discrimination law with Commonwealth law in this area. The Commission referred to this issue in a 2008 paper, prepared by an intern, 'Mainstreaming Equality in the ACT – An Equality Duty for the ACT Discrimination Act' which is attached.

In 2008/09, 13% of the Commission's discrimination complaints were in relation to education (across a range of attributes). Over the past 2 years, the Commission has considered eight complaints of discrimination against education providers. However, six of these concerned tertiary education (and so may be outside the terms of reference for the Committee). Therefore, the Commission is able to provide limited anecdotal or other evidence of discrimination against students on the basis of disability in ACT Government and non-government schools.

The former ACT Discrimination Tribunal did consider a matter of disability discrimination in the provision of education in the case of *Woodbury v ACT*³. That case concerned the provision of early-intervention and education services to Jack and Kieran, two boys with Autism Spectrum Disorder. By the time the Tribunal delivered reasons in 2007 for its decision the young man had left school (the original papers were filed in 1998). The complainants alleged that relevant ACT Government agencies had not kept informed of relevant developments in the treatment of Autism and had not provided the required medical and educational services for the complainants' needs. Much of the complaint concerned the provision of Applied Behavioural Analysis (ABA) therapy. Former President Cahill ultimately found the complaints turned on issues of budget funding in his view discrimination complaints were not the appropriate vehicle to consider the adequacy of such decisions:

I am satisfied on the evidence that appropriate medical and educational services were provided to the Complainants by the Respondent. These services undoubtedly fall short of meeting every exigency of every citizen and, in this case, certainly fall

¹ See for example *L v Minister for Education for Queensland* (1996) EOC 92-787

² See for example *Hills Grammar v HR&EOC* (2000) 100 FCR 306

³ [2007] ACTDT 4

short of the hopes and expectations of the parents. However, the allocation of budget resources to fund programs and services is a matter for government.

The Complainants consider the services that were provided to them insufficient, and there may well be flaws in the creation and/or implementation of policies. However, alleged maladministration is not discrimination and the Discrimination Act is not a tool to be used to force a hearing to query the implementation of programs.

The High Court has considered disability discrimination in the case of *Purvis v NSW*⁴, which was brought under the Commonwealth *Disability Discrimination Act 1992* ('DDA'). However this decision can be distinguished from the ACT Discrimination Act on the basis the ACT Act does not require a 'comparator', and instead only requires a person is treated 'less favourably'. In contrast, the Commonwealth DDA requires that a person was treated 'less favourably' implying a comparison to the treatment of others.

Obligations for schools and for the Department of Education and Training under the Human Rights Act 2004

As a public authority, the ACT Department of Education and Training (DET) has a specific obligation under s.40B of the Human Rights Act 2004 (the 'HR Act') to act compatibly with human rights, and when making decisions give proper consideration to relevant human rights. The Commission notes that the Committee's terms of reference include the provision of transport and therapy to students with disabilities, and other service providers such as ACTION and Therapy ACT would also be subject to the same obligations.

In terms of the provision of private education, the Act does not expressly include non-government providers in the definition of public authorities. However, s.40 states that a public authority includes an entity whose function are, or include, functions of a public nature. Section 40A states that in deciding whether functions are a public nature matters such as:

- Whether the function is connected to or generally identified with functions of government;
- Whether the entity is publicly funded to perform the function.

Subsection 40(3) lists services that are clearly of a public nature and this includes 'public education'. Whether private education providers would be caught by this definition is still to be tested by a Court (either in the ACT or Victoria).

Under s.28 of the HR Act, human rights may only be limited when such a limitation is reasonable and permitted under a Territory law. In this context, rights such as Equality before the law (s.8), and the Protection of Family and Children (s.11) are particularly important.

Whether the decisions of actions of education providers might unreasonably limit the right to equality and protection of children in the provision of education, transport or therapy to

⁴ (2003) 217 CLR 92

students with disabilities will depend on the particular circumstances. However, the Committee should consider these obligations in assessing any problems identified by families and other stakeholders.

Participation of children and young people

Article 12 of the UNCRC states that children and young people have the right to express their opinion on decisions that affect their life, and to have their views seriously considered.

This principle applies at both an individual and systemic level. Individual students with a disability should be involved as far as possible in the design and implementation of their Individual Learning Plan (ILP). Individual students should be invited to give feedback (in a manner appropriate for them) on the suitability and effectiveness of the services provided to them. More broadly, the student group should be consulted on the design and implementation of special education services, and mainstream education services.

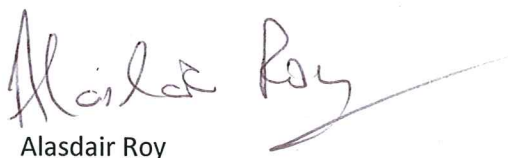
There are a range of resources that could provide schools with practical advice on how to involve children and young people in decision making about issues that affect their lives. For example:

- *Taking PARTicipation Seriously*, produced by the NSW Commission for Children and Young People (<http://kids.nsw.gov.au/kids/resources/participationkit.cfm>)
- *Taking Young People Seriously*, produced by the Victoria Office for Youth (<http://www.youth.vic.gov.au/Web21/ofy/dvcofy.nsf/allDocs/RWPC26E050A4E61D8E5CA2570F200807FF2?OpenDocument>)
- *Rewriting the Rules for Youth Participation*, produced by the National Youth Affairs Research Scheme ([http://www.dest.gov.au/sectors/youth/programmes_funding/nyars/Rewriting the Rules for Youth Participation.htm](http://www.dest.gov.au/sectors/youth/programmes_funding/nyars/Rewriting_the_Rules_for_Youth_Participation.htm))
- *Involving children and young people: participation guidelines* produced by WA Commissioner for Children & Young People (<http://www.ccyp.wa.gov.au/content.aspx?cld=169>)

Conclusion

We would welcome the opportunity for further discussion of the issues raised in the Inquiry. Please contact Elizabeth Cusack, Sean Costello or Brianna McGill on 6205 2222 if you require further information about any of the issues raised in this submission.

Yours sincerely



Alasdair Roy

Children & Young People Commissioner
A/g Human Rights & Discrimination Commissioner
A/g Disability & Community Services Commissioner

4 January 2010