

Equity in assessment in Australia: The legal perspective

Paper presented at the 32nd Annual Conference of the International Association for Educational Assessment, Singapore, March 2006

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Introduction

Equity in assessment usually conjures up issues of accommodation for students with special needs, issues of cultural bias, and appropriate administration conditions. In this paper, we focus on considerations of equity in summative assessments, in the main for external reporting and student high school certification, and the issues of equity that have been raised, or might be raised, in legal challenges. We consider the general policies on equity in assessment in Australia at national and state levels, and how these may or may not be challenged by students and authorities in the courts. In the discussion we go beyond consideration of special needs and issues of bias to consider a range of assessment-related that have already been considered, either in Australia or internationally.

External assessments of some import in Australia include traditional high school certification and graduation assessments—which across the states include components of school-based teacher assessments and external curriculum-based examinations—and the more recently introduced Years 3, 5 and 7 (and future Year 9) assessments of literacy and numeracy. At present these latter assessments are also state-based although a future national literacy and numeracy testing approach has been legislated.

Equity in assessment policies in Australia

Principles for quality and equity in assessment that have received endorsement in Australia posit the need for a variety of assessments for all students and alternative assessments and accommodations for students of difference (ACACA, 1995). The guidelines start with the proposition that

(f)undamental to equity in assessment is the recognition that the construction of the knowledge and skills to be assessed should involve a critical evaluation of the extent to which the choice of a particular set of knowledge and skills is likely to privilege certain groups of students and exclude others by virtue of gender, socioeconomic, cultural or linguistic background. A concern with equity also leads to adopting a proactive stance on the appropriate representation in the curriculum of different kinds of cultural knowledge and experience as valued knowledge and skills. (p. 1)

The former equity policy used by the Queensland Studies Authority (QSA-QSCC, 2001a) asked teachers and schools to consider a range of factors when considering appropriateness of assessment materials for students identified as at risk under several categories of disability or disadvantage in schooling, such as for students who have English as a second language:

- Do assessment tasks and test materials provide opportunities for students to demonstrate learnings in a variety of communication modes (e.g. written, oral, signed, first language)?
- Do curriculum and test materials cater for students' learning styles (e.g. visual, kinaesthetic, tactile)?
- Do curriculum and test materials indicate when students with English as a second or a subsequent language may use dictionaries and bilingual dictionaries?
- Are assessment tasks and test materials contextualised linguistically for students with English as a second or a subsequent language? (p. 10)

Similar questions are raised for other groups, for example, for indigenous students it was expected that '(c)urriculum and test materials need to include and to value the experiences and perspectives of Aboriginal peoples and Torres Strait Islander peoples' (p. 3), as well as for students with disabilities. An accompanying document on students with social and emotional disorders noted that assessment

requirements might need to be staggered to reduce the stress of too many assignments and examinations at one time (QSA-QSCC, 2001b, p. 2).

Further, the Australian Government has recently introduced legislation mandating disability standards for education, including educational assessment, despite considerable opposition from state ministers regarding the imposition and funding implications.¹ The regulations state:

Measures that the education provider may implement to enable the student to participate in the learning experiences (including the assessment and certification requirements) of the course or program, and any relevant supplementary course or program, on the same basis as a student without a disability, include measures ensuring that:

- (a) the curriculum, teaching materials, and the assessment and certification requirements for the course or program are appropriate to the needs of the student and accessible to him or her; and ...
- (f) the assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed.

Exemption is offered under a claim of ‘unjustifiable hardship’ (s.10.2), however establishing this claim is not straightforward in the courts and is not successfully made on a basis of additional costs. Clearly, this Australian legislation offers no excuses for inappropriate assessments within schools and states, and would also apply to the any national testing. It is too soon to see the import of the legislation for legal challenge.

Equity for special needs or all students

It is clear that in Australia the educational and social expectations of schools and systems are that assessment principles will ensure appropriate consideration of a range of issues identified for equity, especially for students who are identified as members of groups with specific needs, or classes of students. However, there may be a new trend developing in education also, where all students are seen as having their own needs. For example, the new draft QSA equity statement (QSA, 2005) has a broader definition of equity for schooling purposes:

‘Equity’ in education means providing students with learning opportunities and support whatever their personal, social and cultural backgrounds and circumstances. This is a principle of inclusivity, broadly defined to include all students. Equity removes barriers to participation and maximises the learning of all students. Equity therefore requires that educational materials and practices be adaptable to meet different student needs. This includes accommodating impairments, redressing disadvantage and ensuring freedom from prejudice in educational practice.

While the policy identifies students with special needs,

- students with impairments that have a physiological basis, such as those involving sensory, motor or neurological factors
- students from socio-economic, cultural and/or linguistic backgrounds that impart some form of educational disadvantage; this includes students:
 - of Aboriginal and/or Torres Strait Islander backgrounds
 - with non-English-speaking backgrounds
 - who are migrants or refugees

¹ *Disability Standards for Education 2005* (Cth), formulated under the *Disability Discrimination Act 1992* (Cth).

- from rural and remote locations
- in low socio-economic circumstances
- students with learning difficulties that do not stem from impairment, socio-economic, cultural and/or linguistic factors
- students with significantly different patterns of educational development and orientation, influenced by factors such as:
 - gender
 - special talents.

Membership of one of these groups does not imply the same needs as other members of that group. Students should be considered according to their particular needs. (p. 3)

the commitment is to

- ensuring that the learning outcomes and achievements of *all* students can be fairly and appropriately recognised through special assessment arrangements, where appropriate (our emphasis)
- supporting accommodation of assessments for students with impairments (for example, by allowing signing for students with a speech impairment, or computer-simulated laboratory work for students with a physical impairment).

The *Statement of Equity Principles* by the Board of Studies in New South Wales (BoSNSW, 2000) has a similar focus on providing positive experiences for all students, emphasising that a range and variety of assessment approaches and accommodations are necessary.

At this point, we leave for your consideration, the likelihood that students may challenge equity in assessment in ways that go beyond the traditional groupings and issues of accommodations. For example, consider the extent to which current assessment activities do represent indigenous knowledge and cultures, or the extent to which current assessments offer challenges to students of considerable talent.

Assessment, equity and the law

Sources of legal action around the world have different bases. For example, in the USA many education cases have been fought and won on constitutional grounds and individual rights. In countries such as Australia, where individual rights do not have a constitutional basis, legal challenges in this area are usually brought through tort, or negligence, law, or on a statutory basis, under anti-discrimination laws.

Australia has a two tiered system of legislative prohibition of discriminatory conduct. At the federal level there are four stand alone acts, each of which prohibits discrimination on the basis of a particular protected attribute: The *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. Each of these acts prohibits discrimination in the area of education. At the State and Territory level, each state and territory has a multi-purpose act prohibiting discrimination on the ground of a variety of protected attributes in a variety of protected areas. The protected attributes always include race, sex, disability or impairment and age but may also include a diverse range of other attributes including, for example, religion, parental status, appearance, sexuality and political activity. Each State and Territory act prohibits discrimination in the area of education.

The legal burden for proof of discrimination

The common interpretation of discrimination will not necessarily be congruent with a legal interpretation, the level of proof needed for a case to succeed in court. Two kinds of discrimination are recognised in Australian legislation—direct

discrimination and indirect discrimination. Direct discrimination requires proof that the complainant was treated ‘less favourably’ than a student without the student’s protected attribute ‘in circumstances which are the same or not materially different’.² Indirect discrimination addresses ‘hidden’ institutional discrimination where practices applicable to all have a discriminatory effect upon people with a protected attribute. Proof of indirect discrimination requires proof of the existence of a discriminatory term, requirement or condition with which the person with a protected attribute cannot comply but with which those without the same protected attribute can comply. It is also necessary to prove that the term imposed is ‘not reasonable’.³

Simple examples illustrate how discrimination might arise in an assessment context. Direct discrimination in the administering of a test might happen, for example, if a marker marks a student of a particular race, sex, religion ‘harder’ than students not of that race, sex or religion. Indirect discrimination might arise in the administering of a test if there were, for example, a requirement that students complete the test in a set time. Students with a disability may not be able to comply with this requirement—they may not be able to write quickly, or they may have a processing disorder. Students without disability can comply. The term is not reasonable.

Each Australian legislative scheme recognises that there will be instances where discrimination will not be unlawful. This is clear in the definition of indirect discrimination in that it is necessary to show that the term or requirement imposed is ‘not reasonable’ before it will be held to cause unlawful discrimination.

It is true to say that few assessment challenges have been made in Australia, or have made it to the courts at least. More cases exist between students and universities, including challenges made on the basis of racial bias, sexuality, and disability. Increasingly, the payment of fees in universities by students is leading to an increase in student expectations and in litigation. Schools where students pay fees may also find an increase in litigation from parents who are in essence contracting a service and outcomes from the school.

A considerable number of legal challenges do occur in education in Australia and countries such as England, although not nearly the quantity of actions that occur in the USA. In countries such as Australia, tribunals and mediation play a major part in settling disputes before they can escalate into major court challenges and the resulting time and financial costs. Where school-based challenges have most often occurred in Australia are the areas of physical injury to students and claims of negligence (tort), discrimination on the basis of provision of services or school entry to students with disability, and allegations of sexual misconduct and often vicarious liability to obtain authority financial payments for damages.

While assessment challenges are few, we will discuss the areas where they could arise, drawing on experiences mainly from the USA, but also with Australian examples.

² See for example the formula in the *Anti-Discrimination Act 1991 (Qld)* s 10: ‘Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.’

³ See, for example, the formula in the *Anti-Discrimination Act 1991 (Qld)* s 11: ‘Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term- (a) with which a person with an attribute does not or is not able to comply; and (b) with which a higher proportion of people without the attribute comply or are able to comply; and (c) that is not reasonable.’

Legal challenges for high school certification testing

Opportunity to learn

A major area of assessment challenge for high school certification relates not to disabilities and accommodations but to the appropriateness of the examination content for the instruction or curriculum the student has received, what we would call its validity. The term ‘opportunity to learn’ has gained acceptance in educational parlance but is derived from lawsuits conducted in the USA in the high-stakes testing arena.

Australia has two types of standards or contents operating. The first are the various discipline syllabuses operating in each state. It is expected in Australia and most nations with similar external examination systems, that the examinations will have a very direct relationship to the syllabus being assessed, and to the instruction being taught. However, in a secondary school in New South Wales, students whose English High School Certificate (HSC) examination results were in the lowest twenty per cent of the state outcomes, compared with results for other subjects which were in the top twenty per cent, took action, settling out of court, as did students in *Swansea High School*.⁴ In both cases, it was clear that there had been a failure by the school or teachers to teach appropriate curriculum, and inappropriate instruction and management, and the match between what students learned and the assessments was broken.

Additional high school graduation testing

In other external examination contexts, tests may be constructed on more curriculum-free bases. In these cases, opportunity to learn is a much more significant issue.

In some states in Australia, students complete external curriculum examinations to receive their high school certificates. In South Australia, students complete a considerable proportion of school-based assessment for certification, but must also satisfy a minimal level of literacy achievement through school-based assessment. In Queensland, the introduction of such a sufficiency requirement has been recommended and the format is still being considered. Queensland students, of course, complete external certification requirements through school-based assessment. The possibility still looms of a single test to provide this minimum requirement, similar to the Year 3, 5 and 7 tests. The federal government is also requiring national tests to be undertaken in future years. What stakes these may play for student certification is yet unknown.

However, certification decision-making made on such a single instrument will be challenged legally. Clearly, accommodations such as those originally discussed are necessary. However, in the USA, following several problems and legal actions, and despite considerable emphasis on high stakes testing for yearly progress reporting of schools and contingent funding, and for student graduation and certification, some changes to allow alternative processes in assessment for students are already being legislated. For example, in the state of Washington, for students who fail the standardised certification test (usually a single occasion test), processes are being developed to evaluate portfolios of evidence for students who fail the test on two occasions. Nationally in the USA, modified tests for special education students who have ‘significant learning disabilities, emotional disorders or other impairments’, an

⁴ Cited in Tronc K, ‘Educational Malpractice’ (1999) *Australian Professional Liability–Education* 32-000 at 20,303.

estimated two per cent of students, will be allowed, in conjunction with alternative or modified assessments allowed for other students academically below grade level.⁵

Furthermore, in Alaska, as a result of a class action suit (brought by a not for profit law firm), a ruling was made to allow students with disabilities to receive a diploma without passing the state's high school exit examination requirements in reading, writing and mathematics that was to be introduced, provided they met all other graduation requirement.

In California, a new class action is being brought by schools claiming to be underfunded and therefore not preparing minority and disadvantaged students adequately for a state exit examination—failure to provide opportunity to learn. The case is arguing for alternative provisions for the students, especially students who are 'English-learners'. However, the authorities had decided not to offer such alternatives. A lawsuit had already be settled by the state giving special education students a one-year waiver.

Indeed, in the USA, some courts use content standards to define what students should be learning, and 'as an explicit declaration of what students should be learning and have used them to determine whether schools are providing students with an adequate education' (Gayler, Chudowsky, Hamilton, Kober & Yeager, 2004, p. 82). In Australia, the federal government and the state education authorities have all been working on statements of 'essential learnings', trying to identify what all students should be taught and learn in school across the years, going beyond basic literacy and numeracy outcomes. As these descriptions become more embedded in public expectations, and if further assessments should ever be tied to these, failure by groups, rather than individuals, to achieve these outcomes could again become the basis of legal challenge. Similar activities are being pursued in other nations. The same legal issues could apply.

Appropriateness of standards set

Again, in the USA, challenges have been made on the appropriateness of standards set, and the failure of a large cohort of students on a test that was finally judged to be of an inappropriate setting, with the results for a whole cohort of students being adjusted (up) and a review of the examination process. In Queensland in 1967 a similar event occurred with 87 per cent of students failing a Physics Senior examination. At that time, the event led to a review of procedures that in turn informed the development of school-based assessment. However, if the same event happened in Australia or England today, the outcome may be more pursued differently litigiously-inclined students and their parents. To have sat the examination in a daily sequence of examinations was an emotionally disturbing event for performance on the examinations that followed.

Disability

In addition to the known cases on instructional negligence, students with special needs do have the capacity to challenge inappropriate accommodations for high school certification examinations. In the most public case, *BI v Board of Studies*⁶, a student with ADHD challenged the provisions he was offered. His medical certification for HSC examinations indicated that his circumstances meant '*poor concentration and poor sequencing skills; impair(ed) ability to read questions in*

⁵ Plan Takes Shape For Special-Ed Tests: New Rules to Aid 'No Child' Goal, *Washington Post*, December 15, 2005; p. B04.

⁶ [2000] NSWSC 921.

examinations; impair(ed) ability to plan answers to questions; impair(ed) ability to check answers'. It was indicated that he required extra time to compensate for his difficulties, and that without extra time '*he would be unable to demonstrate his knowledge*'.

Guidelines for schools and students on applying for special arrangements are clearly stated (BoSNSW (undated)). Rest breaks and extra time were two categories of special provisions available in the system. BI was granted rest breaks but not extra time. The student requested a review of this provision, arguing with medical support that taking such breaks worsened his condition as he took a long time to get restarted on such activities. The arguments were made that the conditions had been applied inflexibly and did not take appropriate consideration of his condition. However, as part of the policy, the student had been required to complete some pretests that showed that he could write at an acceptable speed and had an appropriate reading level.

The court noted:

The evidence disclosed that the Board approves the provision of extra time to students whose ability to read or to write is functionally affected. Students with severe physical disabilities such as cerebral palsy or juvenile arthritis may be eligible for extra time. Students who use the services of a writer may be granted extra time to take into account the dictation process. The provision of rest breaks is granted to students who have demonstrated difficulties with concentration and focussing.

and found

To my mind the submission that the Board's policy was applied inflexibly with respect to the plaintiff is not made out. I consider the evidence shows that the Board, through its delegate Ms Speers, demonstrated a willingness to reconsider the plaintiff's application (described as a "re-appeal") on its merits. Support for this view, if it were needed, might be evidenced by the circumstance that Ms Speers sought Dr Concannon's views in the light of the strong support provided by Dr Selikowitz. I find that Ms Speers had regard to the individual merits of the application in making her determination.'

In other words, with the policy in place, as long as the organisation can show that it has applied due and thoughtful consideration to issues of accommodations, and as long as the withholding of accommodations is made on the basis of the policy, reasonable judgment, and not the convenience of the examiner, legal challenges are unlikely to succeed. In this case, the plaintiff, BI, was required to pay most of the costs of the defendant as well as his own costs.

Multiple forms of assessment

Principles of quality assessment indicate that a variety of assessment activities should be undertaken. Most principles will advocate a range of assessment formats, including group work and self and peer assessments, to promote quality and engaged learning. Although case authority on student challenges to such approaches does not exist in school education, it is worth considering one challenge that occurred in the Technical and Further Education sector (TAFE) in Australia, a case that reinforces the statement on care when assessing students with social and emotional disorders (QSA-QSCC, 2001b).

In the case of *Reyes-Gonzalez v NSW TAFE Commission*,⁷ fourteen separate allegations of discriminatory treatment by the TAFE College attended by the complainant were dismissed by the NSW Administrative Decisions Tribunal on grounds ranging from a deficiency of evidence, to a failure to prove that he had been treated less favourably than others without his impairment would have been treated in the same circumstances, to a failure to prove that his treatment and not his impairment had caused him detriment. Reyes-Gonzalez had been diagnosed with schizophrenia which resulted in problems with meeting schedules and deadlines, problems interacting in groups, and, as a result, problems with completing his courses. The clear implication of the decision is his complainant's disability was fundamental to his failure at TAFE. Medical evidence which detailed the significant impact of his impairment on the complainant's ability to complete tertiary studies and undertake assessments was persuasive:

His illness, as noted by me and others, would affect his capacity to study at TAFE, this would include working in groups. He may be sensitive or over sensitive to peer assessment, particularly if others are not aware of his disabilities and do not take those disabilities into account. ... I would equally expect him to have problems writing examinations, presenting in front of a class, doing group projects and being peer assessed.⁸

There was also some suggestion that his disability impacted not only the complainant's difficulties with completing course requirements but also on his dealings with TAFE in relation to his discrimination claims. The tribunal's finding in relation to several allegations of discrimination illustrate 'the degree of sensitivity of the Applicant in his perception of circumstances which otherwise are neutral but which, as a consequence of his disability, he either misunderstands or unduly gives greater emphasis than would a person who did not have his disability.'⁹

Legal challenges for high stakes external tests

The major external testing of high stakes for schools, with the potential to impact on school funding, are the current Year 3, 5 and 7 literacy and numeracy assessments. States are required to report school performances of the percentage of students achieving the national benchmarks in these areas. The expectation is that all students will achieve these tests, with the exception of a small percentage, who may be identifiable as the extremely learning disabled. However, in practice, students may be excluded from the tests for a range of reasons. In Queensland, the guidelines to schools indicate that students who may be exempt from sitting the tests are:

- those for whom English is not their first language and who are assessed by an English as a Second Language (ESL) teacher and classroom teacher as achieving at or below Reading Level 4 and Writing Level 4 using the National Languages and Literacy Institute of Australia (NLLIA) ESL Bandscales. Please also refer to the Bandscales for Aboriginal and Torres Strait Islander learners (Junior Primary).
- those with intellectual impairment who have been identified as having educational needs at Levels 5 or 6 through the system ascertainment

⁷ *Reyes-Gonzalez v NSW TAFE Commission* [2003] NSWADT 22 (Unreported, Ireland J, Members Silva and Strickland, 3 February 2003) ('*Reyes-Gonzalez*'). Reyes-Gonzalez also alleged, but failed to prove, instances of race discrimination.

⁸ *Ibid* [16].

⁹ *Ibid* [43], [46], [56].

process.

In exceptional circumstances where undertaking the tests may be a traumatic experience for a student, the principal, in consultation with specialist and support staff and parents/carers, may make decisions regarding that student's participation in the tests. (QSA, undated).

The percentage of students exempted from testing in each state for reading, say, in Year 3 in 2004, varied from 0.3 per cent for Northern Territory to 2.8 per cent in South Australia, while the percentage of students absent or withdrawn by parents ranged from 2.6 per cent for Queensland to 7.4 per cent for Western Australia and 12.5 per cent for Northern Territory (MCEETYA, 2005, p. 11). Students exempted are considered not to meet the benchmarks, students absent or withdrawn are not included in the populations. The national report indicates that caution is needed in interpreting the results for this reason. Therefore, it seems unlikely that serious consequences for differential performance could flow to states of schools. If such consequences did occur, for example, financial punishment, legal remedies may well be sought.

Such testing, and its consequences, is in its infancy in Australia. To date, parents are not fully cognisant of, and still somewhat naïve about, the purposes of such testing, of the identification of their child, or the impact for their school. If the testing continues, and grows in perceived importance, parents and students could be expected to take more interest in the results and to be more concerned about apparently inappropriate outcomes or student accommodations. At present, the Australian government has provided additional funding, under some conditions, for tutoring for students identified as 'below the benchmark' in literacy or numeracy, identified by being below or above a cut-score. Parents are notified about their child's status and are in control of the funds, not schools. However, the current practice is to report student achievement without measurement error, contrary to best practice measurement principles. Therefore, some parents have not received funding for students who may, with a reasonable degree of probability, be below the benchmark. Such parents in future, if the funding continues, seek legal remedy.

It is of interest to note that in Australia reporting by sex, indigenous status, language background, geographic location and socio-economic status but not for students identified with disability although all students are expected to achieve. In the USA such reporting includes students with disability as a group for whom progress is recorded.

Funding

Funding to schools in Australia has a fairly stabilised and central base, unlike countries such as the USA where school funding has tended to be more locally-based and related to regional taxes. However, in the USA, regions or groups that believe that they are disadvantaged in terms of financial resources, and demonstrating low achievement on national performance measures, have argued in court for increased funds. In Australia, the states rarely take on the federal government on funding issues. However, given the disparate performance of rural, and indigenous, students on the national literacy and numeracy benchmarks in Australia, where the groups generally display a one to two year performance lag respectively, one wonders whether an argument for increased funds may arise at some point. To date, such class actions have not occurred in Australia.

Scoring of tests

An area of litigation for all students has occurred due to misscoring of tests. The dramatic increase in the USA of standardised testing under the No Child Left Behind Act (2002) has led to fairly regular reports of failures in test scoring. These failures have affected both large numbers of students (and teachers undertaking proficiency tests), often preventing them from attaining the university of their choice, having impact on their employability, or in the worst instances, requiring students to unnecessarily undertake summer studies and resit examinations. Test developers are paying large sums of money to settle class actions. The general explanation, apart from wet weather, is that the increasing demand on testing has led to overstretching of the test development industry.

Such problems have arisen with limited frequency in Australia but have occurred, for example, loss of HSC papers in New South Wales, misrecording of results of the GAMSAT. As the number of mandated tests increase in Australia, the likelihood of errors and similar class actions will increase. Schools could end up misreported to the authorities and to the public, with the increasing emphasis on publication of various 'league tables'.

Release of full test data

In the USA, a parent sued to have access to all information about his son's test scores, arguing that without information, he could not identify his son's achievement progress. The court ruled that the test and data were confidential and that test data do not have to be released (Dunkelberger, 2003). In Australia, privacy laws for individuals are very strong. In Queensland, parents of children in Years 3, 5 and 7 in 2005 received a blob on a bar to indicate their child's performance relative to the year cohort and relative to the benchmarks. In previous years, parents have received information on specific item performance for their child. The guidelines of the Education ministers' technical advisory group (PMRT, 2005, p.3) indicate that

(a)ccess to data collections will be available to interested parties subject to privacy and confidentiality considerations, and the provisions of the Census and Statistics Act.

While education systems may prevail regarding confidentiality of test items for commercial and benchmarking purposes, full disclosure of an individual's information may become an issue to be settled in the court, if such tests are to fulfil their presumed purpose to provide advice on student's learning progress and needs.

Placement, diagnostics

A further area on which we will touch only briefly are assessments related to student placement in learning programs, either in special education programs or specialised educational programs. There is a history of cases across England and the USA regarding inappropriate testing of students and placement in programs. For example, in Montana, USA, in *BM v State*,¹⁰ it was found that school authorities owed a duty of reasonable care in testing a child and placing them in a special education program. While that case was rejected on policy reasons, as no damages were established, the student had to repeat a year, 'regressed developmentally and suffered emotional harm'.¹¹ Other historical cases have involved testing children with inappropriate tests (for example, not recognising that a child was hearing impaired or

¹⁰ 200 Mont 58.

¹¹ *Culhane op cit* at 351.

a speaker of a language other than English). In *Snow v State*¹² where a child was placed on the basis of an inappropriate intelligence test, a cause of action was found to exist, but the basis was medical negligence, not educational negligence. In England, in *Phelps v Hillingdon London Borough Council*,¹³ damages were awarded to a student whose reading difficulties had not been diagnosed and addressed through instruction, resulting in learning and mental impairment.

Somewhat similar assessment-related issues, usually challenged on discrimination grounds due to race, disability or special needs, have occurred within Australian cases. In *In the Matter of 'Carl'*,¹⁴ a student succeeded on selection tests for entry to a selective high school but was denied a place on the basis of lack of residency requirements. The plaintiff challenged over some time but was not successful. In a case with some similarities, *Ellis v Mount Scopus Memorial College*,¹⁵ a student challenged his failure to be included in a Hebrew immersion class, judged by the school on the basis of being 'over' fluent in the language in comparison to other students, as discrimination due to race. This student was also unsuccessful, and the school decision-making process upheld.

Conclusion

In this paper, we have discussed various causes of action that will be considered by courts regarding educational assessment and placement. The discussion is framed to show that such causes go beyond simple discrimination cases to challenge many dimensions of examination and testing processes. Australia, and many other countries, are continuing to increase external testing requirements, often through single paper and pencil formats and machine scoring. High stakes addendum requirements are being added to high school certification. At the same time, our societies are becoming more litigious and parents and students are becoming more vocal in demanding what they perceive to be appropriate educational rights and social justice.

It is hoped that this discussion provokes some thought to the dangers of increasing testing legislation and practice without due thought to the consequences that may result for individuals. It is always best to avoid the use of precious educational resources on needless legal costs. It is hoped therefore also that this paper provides some guidance for schools and authorities about the practices and guidelines that should be put in place to avoid unnecessary litigation and to ensure equity in assessment for all students.

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¹² 98 AD 2d 442

¹³ [2001] 2 AC 619

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