

Case Note

What Has Age Got To Do With It?: Discrimination in Education and Students with Disabilities

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The decision of the Court of Appeal of the Supreme Court of Victoria in *State of Victoria v Bacon and others* [1998] VICSC 58 (30 April 1998) addresses a number of significant issues on the subject of the provision of public education to students with disabilities.¹ Conspicuous amongst these is the method of formulation and implementation of government policy for public education, and the access by people with disabilities to appropriate education and training programs without discrimination. The discrimination complaints in the *Bacon* case challenged the processes of formulation and implementation of education policy by the Victorian government. The litigation exposed not only the deep-seated reliance upon stereotyping in the formulation of educational policy, but also the crucial intersection of the grounds of age and disability which formed the basis of the discrimination complaints. The Victorian Court of Appeal provided guidance concerning the indicia of unlawful discrimination in education, and in its commentary upon the actions of the government departments concerned, offered direction upon non-discriminatory approaches to policy formation and implementation, in particular upon the value of extensive consultation. Whilst the Court of Appeal did not uphold the finding of unlawful age discrimination made by the trial judge, Beach J, it did confirm the finding of indirect discrimination on the ground of disability.

The *Bacon* case is not the first to raise the dual issues of age and disability discrimination in education. In the Queensland case of *Hashish v Minister for Education* (1996) EOC 92-777, an age discrimination in education complaint which arose from plans to terminate the attendance of the complainant at a school established to provide special programs for students with hearing impairments was unsuccessful. The complainant in the Queensland case was a student with multiple disabilities. In the successful complaints in *State of Victoria v Bacon*, the challenge to age-based educational policy making for students with a disability was at the very heart of the claims of unlawful discrimination. The Victorian litigation also squarely confronts the issue of who should contribute to educational policy for students with disabilities, particularly intellectual disabilities. Finally, the litigation confronts the way in which the law defines and regulates human differences through the establishment of narrow categories of reference, such as age and disability, which inevitably overlap and as a consequence tend to confound the regulatory mechanisms of anti-discrimination statutes.²

Background to the Complaints

In 1996 the Victorian government introduced a school funding policy which was age-based. The effect of the policy was that state funding for students aged 18 years and over would be removed unless such students were formally enrolled in the VCE (units 1-4). The VCE is the ultimate formal school qualification for most students in the state of Victoria. It was estimated that approximately 1250 students, the vast majority aged 18 to 21 years, were adversely affected by the policy as their schools would not receive funding once they reached 18 years. At the time of the introduction of the age-based school funding, the Department of Human Services introduced a new program entitled 'Future for Young Adults' (FFYA). The net financial benefit to the State of Victoria through the implementation of the age-based policy together with the introduction of FFYA was calculated as \$17 million.

The age-based school funding had a particular effect upon the programs offered by the Berendale Special School (Berendale) in suburban Melbourne. The school was attended by students with intellectual disabilities. The staff at Berendale had developed a two year program designed to provide the school's students with skills to prepare them for post-school options. It was called the Transition 18+ program. The aims of the program included promoting the independence of students, such as independent living skills in the areas of travelling, day to day transactions and purchases, social skills, self esteem, and communication skills. The program also incorporated vocational experience in the form of extended work placements. Upon the implementation of the age-based funding policy, the Transition 18+ program was no longer funded and was discontinued. Students enrolled at Berendale were required to find alternative arrangements to make the transition from school to post-school options. Nine students made complaints of unlawful age and disability discrimination in education as a consequence of the implementation of the government educational funding policy and the consequent termination of the Transition 18+ program. The dearth of programs preparing students for life after school, and lack of post school options for students with disabilities had also been highlighted in the *Hashish* case in Queensland. This issue was prominent also in the Victorian case when the adequacy of the alternative programs available for former Berendale students was assessed by the court.

Special Complaint

After the complaints of unlawful age and disability discrimination were lodged on 5 June 1997, various applications were heard in the Anti-Discrimination Tribunal of Victoria. The President of the Tribunal in hearing the applications by the parties noted that the complaints were serious, and also that '[t]he scope of the matters upon which the respondent (Department of Education) is willing to conciliate is very limited'.³ The Department of Education on 28 August 1997 gave notice that it required the Tribunal to refer the matter to the Supreme Court of Victoria for determination on the basis that the complaint was a special complaint within the terms of ss 125 (1) (b) and (c) *Equal Opportunity Act* (1995) (Vic). Section 125 (1)(b) and (c) provide that

'A special complaint is- ...

- (b) a complaint the resolution of which may have significant social, economic, or financial effects on the community or a section of the community; or
- (c) a complaint the subject matter of which involves issues of a particular complexity and the resolution of which may establish important precedents in the interpretation or application of this Act’.

The complaints were heard in the Supreme Court before Beach J from 22-24 October 1997.

Anti-Discrimination Legislation

The *Equal Opportunity Act* (1995) (Vic) prohibits direct and indirect discrimination (as defined in sections 7, 8 and 9) on the basis of attributes including age and impairment (s 6(a) and (b)). Section 37 (2) provides that

An educational authority must not discriminate against a student -

- (a) by denying or limiting access to any benefit provided by the authority;
- (b) by expelling the student;
- (c) by subjecting the student to any other detriment.

It was accepted that the complainants, all of whom had mild intellectual disability, were persons with an impairment in terms of the definition in section 4(1) of the *Equal Opportunity Act* 1995 (Vic).

Judgment of Beach J⁴

The complainants argued that the discontinuance of the program at Berendale contravened section 37(2) *Equal Opportunity Act* 1995 (Vic). The trial judge accepted that the complainants’ submissions were well-founded. Evidence that parents chose Berendale school because of the existence of the Transition 18+ program was accepted by the Court. In the proof of detriment to the complainants significant reliance was placed upon affidavit evidence of the complainants’ parents concerning the complainants’ experience of alternative programs after leaving Berendale. The affidavit evidence revealed the unsatisfactory nature of experiences of students enrolled at TAFE programs in particular.

The trial judge held that the complainants had proved less favourable treatment on the ground of age in circumstances which amounted to direct discrimination, and made a further finding of indirect discrimination on the ground of disability. Relying upon the High Court decision in *Waters v Public Transport Corporation* (1991) 173 CLR 149, and in particular the judgment of Dawson and Toohey JJ, Beach J rejected the argument of the State of Victoria that it was not unreasonable for the State to confine school education principally to children. In doing so, Beach J assessed the reasonableness of the State’s age requirement upon the complainants by reference to a number of factors including the availability of alternative programs. The affidavit evidence from parents was pivotal in founding the judge’s decision that the FFYA program was

not a satisfactory alternative to the Transition 18+ program which had been discontinued. This finding underpinned the determination of unlawful indirect discrimination on the ground of impairment.

The Department of Education sought to rely upon the exemption in section 38 which provides that

An educational authority that operates an educational institution or program wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment may exclude-

- (a) people who are not of the particular sex, race, religious belief, age or age group; or
- (b) people who do not have a general, or particular, impairment - from that institution or program.

Beach J rejected an argument by the respondent that the effect of the introduction of the 1996 age-based funding policy was to permit the Department to exclude students over the age of 18 from Berendale by retrospectively classifying Berendale as an institution or program operated for a particular age or age group. His Honour stated:

where you have an established institution providing unrestricted programs for students who have a particular impairment you cannot at a later point in time introduce a new criteria (sic) which has the effect of excluding certain students from the institution not on the ground that they do not suffer the same impairment as those students attending Berendale but on the ground of the new criteria (sic), in this instance their age.

Significantly, in framing the orders as required by section 128, Beach J held that ‘during the hearing no complex issues of policy were identified by counsel for the respondent’ and the judge stated that he was unable to discern any. The paucity of policy matters raised by counsel influenced the judge’s decision that it would be a ‘fairly straight-forward matter to re-introduce the program for the complainants’. Whilst acknowledging the different functions and responsibilities of executive government and the Courts, Beach J did comment unfavourably upon the manner of the implementation of the government’s age-based policy. He stated:

Whilst it is no function of this court to involve itself in government policy I think it is regrettable that the new policy relating to funding of students was introduced in the abrupt and unsympathetic manner it was. Surely, it could have been phased in in such a way as to allow the students at Berendale who were already enrolled in the program to complete the program and those at Berendale intended to enter the program to enter it and complete it. If such a course had been adopted the parents of the complainants and the complainants would have been spared the anxiety they have obviously experienced as a consequence of the termination of the program.

The statement in a sense complements the findings of unlawful discrimination, in addressing some of the acute practical difficulties associated with the implementation of government policy. The focus of the comments is not so much upon the law's concern with definitions, or what Martha Minow has identified as 'boundaries'⁵, but with the significant area of human relationships within the framework of legal regulation.

Court of Appeal

The State of Victoria appealed from the decision of Beach J to the Court of Appeal, challenging the findings of Beach J in respect of both direct and indirect discrimination. The Court, consisting of Winneke P, Ormiston and Phillip JJA overturned the finding of unlawful direct discrimination on the ground of age, but upheld the finding of indirect discrimination on the ground of impairment. Winneke P wrote the leading judgment, the reasoning of which Ormiston and Phillips JJA accepted.

Indirect Discrimination

In respect of the challenge to the finding of indirect discrimination, Winneke P held that whilst the line between a condition, requirement or practice imposed upon the complainant and the educational service provided may be fine, the trial judge had been entitled to find that the educational service provided in the case was 'education and training to students at government schools, including special schools, in Victoria'. Further, he held that the condition or requirement imposed after the introduction of the age based policy was that 'the student, if 18 years or over, must be enrolled for VCE at a government school'. Winneke P held that '(the age-based) policy effectively amounted to an alteration to that (educational) service by excluding the intellectually impaired'.

The State of Victoria sought to argue that the judge had erred in finding that the condition or requirement imposed by the policy was unreasonable. They did this largely by reasserting the primacy of the policy assumption that 'school education is for children', and further that the substitute program provided by the Human Services Department, 'Futures for Young Adults', was satisfactory to meet the needs of the complainants. The Court rejected these arguments. Winneke P held that 'there was a wealth of evidence ... which entitled His Honour to conclude that the 'Futures for Young Adults' program ... was anything but a satisfactory substitute for the '18+ transition 'program', and that the Judge had not failed to pay due regard to relevant evidence in determining whether the requirement or condition was unreasonable. Winneke P also commented upon the manner of the policy making in respect of the students with disabilities, and the apparent failure to make accommodation in the age-based policy on account of the clear disjunction between chronological age and 'intellectual age' of the complainants:

Although the appellant's motive for, or awareness of, the impact of its policy upon the respondents are not matters relevant to the question whether discrimination occurs, it was clear from the evidence that it was understood that this policy would exclude intellectually disabled students in special schools because, co-incidentally with the introduction of the policy, the appellant also introduced the 'Futures for Young Adults Program' through its Human Services

Department in order to accommodate the intellectually disabled students who were to be excluded from school education.

Direct Discrimination

Winneke P failed to uphold the finding of the trial judge on direct discrimination on the basis that the judge had erred in applying the test for differential treatment as provided in s 8 of the *Equal Opportunity Act 1995 (Vic)*. Section 8 provides that discrimination is direct

if a person treat, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

The trial judge had chosen as the relevant ‘comparator’ students at Berendale Special School under the age of 18 years. The Court of Appeal did not accept this as a correct comparison in terms of the Act. Upon analysis of the situation of students over and under 18 years at Berendale, Winneke P concluded that, ‘in truth, the relevant comparator does not exist’. This indicates a perception that the access to education by students with disabilities in a special school is materially different at least in some respects from public education generally. It also illustrates the difficulties associated with pursuing complaints with an age discrimination ‘dimension’, where the complainant is also a person with a disability, and in particular the rigidity of the classifications adopted by anti-discrimination statutes.

Age Stereotypes and Education

At the very heart of the *Bacon* litigation was a rudimentary and intractable conflict in perspectives about the function of chronological age as a factor in educational policy development. The view of the government was given in evidence before the Anti-Discrimination Tribunal by the Manager of the Schools Equity Support Unit. He stated that

The particular decision in 1996 was taken in continuation of the view held for some years by various education ministers that school should be basically for children and not for adults, and that adults were better suited to undertaking programs that were not school based.⁶

A contrary perspective underpinning the complainants’ case is that chronological age is a crude and arbitrary characteristic upon which to formulate education policy. This is even more clearly demonstrated in cases where there is a disjunction between the chronological and functional ages of those affected by the policymaking. There is an unresolved tension between social, economic, education and anti-discrimination objectives where age is concerned, as I have argued elsewhere.⁷

The tension emerges luminously in arguments in the *Bacon* litigation and is illustrated keenly in the evidence recounted above. The view was repeated in Ground 16 of the grounds of appeal to the Court of Appeal, and given the status by counsel for the State of Victoria of ‘self-evident truth’.⁸

The focus of anti-discrimination legislation upon attributes or characteristics, such as age and impairment, also compounds the analysis of the complainants' position. Persons with intellectual disabilities in the position of the complainants in *Bacon* are not merely to be viewed as a sum of their legislatively defined characteristics. They do not relate to the world, and the education system in particular, in an artificial fashion which is defined by the drafters of statutes. The educational needs and entitlements of persons with disabilities ought not to be confined solely within the legal lens, especially when policy is formulated. Whilst anti-discrimination law defines categories of unlawful behaviour, and as such may seek to exert a powerful influence upon the policymaking arena, law alone cannot provide a complete framework for assessing the needs of individual students or groups of students.⁹ Just as the differentiation between children and adults which underpins the government's education policy ultimately fails to provide guidance, so too, the multiple categories of reference (age and impairment) adopted by the legislation incompletely comprehend the experiences of the complainants. The complainants' success in *Victoria v Bacon* is significant at a number of levels, not least for the individual students and their families. However, the clear messages which the judges have articulated for policy makers deserve close scrutiny and implementation.

Endnotes

- 1 Grateful thanks is owed to Mr Colin G Morris of Colin G Morris and Associates, Dandenong, Vic, who first brought this case to my attention, who graciously supplied information about the litigation, and who patiently answered my innumerable questions. Without his assistance this note could not have been written. Further acknowledgment must go to the participants in the session 'Into the Labyrinth: Special Education and the Law' at the Australia and New Zealand Education Law Association Conference in Canberra in October 1998. The comments, questions and contributions of the participants have been much appreciated, and have assisted in the development of this treatment.
- 2 For a sustained and critical treatment of the law's approaches to difference, see Martha Minow *Making All the Difference: Inclusion, Exclusion and American Law*, Ithaca: Cornell University Press, 1990.
- 3 *Bacon and Ors v State of Victoria* Anti-Discrimination Tribunal of Victoria, Unreported, 30 June 1997, (C McKenzie, President) (Transcript of Proceedings)
- 4 *Bacon and Ors v State of Victoria* Supreme Court of Victoria, Unreported, 7 November 1997, Beach J.
- 5 Martha Minow *Making All the Difference: Inclusion, Exclusion and American Law*, Ithaca: Cornell University Press, 1990, 9-10.
- 6 *Bacon and Ors v State of Victoria*, Anti-Discrimination Tribunal of Victoria, Unreported, 30 June 1997 (C. MacKenzie, President), (Transcript of Proceedings), p 3.
- 7 'Age Discrimination in Education: A Critique of Law and Policy' (1997) 2,1 *ANZJLE* 59-68.
- 8 Ground 16 stated that 'the Judge should have found to be reasonable within the meaning of s. 9(1)(c) of the Act a requirement, condition or practice that, in order to receive education and training in a government school beyond the age of 18 years, a student must be enrolled in VCE at a government school, after having regard to the following considerations:

- (a) school education is prima facie for children;
- (b) it is reasonable that there be an age beyond which free government school education will no longer be provided;
- (c) it is reasonable that there be an exception in the case of children who are on their way to their ultimate formal school-based qualification (VCE);
- (d) there is no basis for claiming that the exception ought to apply in the case of other children who are not doing VCE; and
- (e) The Futures for Young Adults Program is a program which provides adequately for the care of young people with mild intellectual impairment such as the applicants'.

It is instructive to note the mixed use of language used in ground 16. Students with intellectual disabilities are classed as 'children' in (d), but 'young adults' and 'people' in (e). The 'people' in (e) are entitled to 'care', but not to 'education', which is the preserve of the 'children' in (a), (c) and (d). Mixed messages such as these bedevil the policy framework of age discrimination law.

- 9 Martha Minow *Making All the Difference: Inclusion, Exclusion and American Law*, Ithaca: Cornell University Press, 1990, 372-390.