

DISABILITY LITIGATION AND UNIVERSITIES IN AUSTRALIA AND THE UNITED STATES: A COMPARATIVE PERSPECTIVE

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Australia and the United States have both enacted laws prohibiting discrimination against persons with disabilities. Universities in both nations now have substantial experience in applying these laws to the broad range of problems encountered in delivering postsecondary education. Comparative analysis of the case law involving disability discrimination in postsecondary settings in both nations provides timely feedback for practitioners and policymakers alike. A review of reported litigation involving universities and issues of disability in Australia suggests substantial similarities in litigants, problems, and outcomes. It also permits some anticipation and understanding of the complexity in fact patterns that may arise in future disputes, especially as more students are encouraged to pursue tertiary education and students with disabilities are better prepared to avail themselves of these opportunities. Greater numbers of students may lead to a steady, if not increasing, volume in litigation despite any 'learning curve' as institutions respond to statutory mandates and demand. If American experience offers any perspective, litigation will remain a viable strategy for persons with disabilities to ensure institutional and policy responsiveness. Further problems may be anticipated in areas of litigation not previously addressed, including issues related to various forms of testing, transitions in preparing students for professional practice and students who attempt to harm themselves. On the other hand, litigation in both nations generally confirms support for institutions that can demonstrate sincere efforts to accommodate the needs of those with disabilities on campus but that do not undermine institutional capacity to maintain standards or preserve quality.

I INTRODUCTION

Australia and the United States have each enacted laws prohibiting discrimination against persons with disabilities in efforts to broaden opportunities for these long disadvantaged populations. Universities in both nations now have substantial experience in applying these laws to the broad range of problems encountered within the delivery of postsecondary education. Yet 'legal rules are not self-enforcing. When a new legal rule is announced, those subject to it must determine what constitutes compliance and what actions they will take to demonstrate compliance'.¹ An important source of evidence about the scope of, and problems with, university dealings with persons with disabilities comes from the case law. Litigation provides important feedback from adjudicatory systems about the appropriateness of specific practices within a statutory framework. The case law provides guidance about the scope and limits of programs and practices to those interested in remedying long years of discrimination and in ensuring that institutions higher education are places of opportunity for all who can benefit.

Comparative analysis of the case law involving disability discrimination in postsecondary settings is instructive and timely for Australians and Americans alike. Despite differences

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between statutes in time periods of implementation and in cumulative case law resolving disputes over practice, a comparison of the experiences of both nations offers lessons to practitioners and policymakers. In Australia, where limited research examining the impact of legislation protecting persons with disabilities on universities is available, analysis of the reported litigation involving such claims may provide important feedback to those responsible for developing policies to better address the needs of this group of Australians. The extensive body of case law interpreting American disability law across a broad range of problems encountered in higher education settings over three and a half decades of implementation as well as the extensive record of scholarship on this topic may help to identify issues and practices not yet evident in the cases arising under more recently enacted Australian law and may signal future challenges for Australian practitioners to anticipate.

This study begins with a comparative overview of the legal framework and context necessary to understanding the reported case law on discrimination against persons with disabilities in higher education in Australia. Next follows a review of the case law reported for Australia based on a survey of all litigation reported between 1993-2008 involving universities in Australia and disability in some way. The next section develops context for a discussion and comparison of Australian litigation with that from the United States by presenting a parallel overview of the legal framework, and relevant literature on disability discrimination and the law in higher education in the United States. These materials then allow for a comparison of similarities and differences in the problems encountered in both countries as postsecondary institutions implement mandates to eliminate barriers to full participation by persons with disabilities.

II AUSTRALIAN CONTEXT

A *Statutory Framework*

Persons with disabilities in Australia are protected from discrimination through a two-tiered system of federal and state laws. Anti-discrimination legislation was first enacted in several states beginning with New South Wales in 1977.² Concerns for broadening access for university students with disabilities in Australia gradually gathered momentum. In 1990, the Commonwealth Department of Employment, Education and Training (DEET) issued *A Fair Chance for All: A Discussion Paper* which contained a statement of objectives that continues to guide Australian policies and practice into the present:

to ensure that Australians from all groups in society have the opportunity to participate successfully in higher education. This will be achieved by changing the balance of the student population to reflect more closely the composition of the society as a whole.³

The report went on to identify persons with disabilities as one of the six underrepresented groups targeted for special attention. This initiative was accompanied by the development of programmatic and funding resources to expand support for students with disabilities in the tertiary sector. These programs are now administered through the Australian Department of Education, Science and Training (DEST).

In 1992 the Commonwealth passed basic legislation, the *Disability Discrimination Act*, making it unlawful to discriminate against persons on the basis of disability.⁴ The *DDA* covers two forms of discrimination: direct and indirect. Direct discrimination involves fact patterns where persons with disabilities receive less favourable treatment than those without disabilities whereas indirect discrimination involves settings in which an ostensibly neutral policy or action imposes

unreasonable requirements on those with disabilities. Key in determining whether discrimination has occurred is defining when treatment is less favourable or a requirement, unreasonable.⁵ The *DDA* anticipated the development of standards⁶ which, were issued in 2005 and addressed these issues in greater detail.

Enforcement of the *DDA* is ‘largely private’ and reactive, based on a complaint-driven model.⁷ After the ‘occurrence of wrongdoing’ the victim must file a claim with the Human Rights and Equal Opportunity Commission (HREOC), a federal agency, before seeking recourse in the courts.⁸ The claimant must show that he or she suffered some ‘detriment’ and was less favourably treated than those comparably situated ‘because of’ his or her disability.⁹ The *DDA* applies to universities, as educational institutions, and prohibits discrimination in admission, access, or in the provision of goods and services which would limit a student’s enjoyment of any benefit provided others by the educational authority.¹⁰ An exception to this mandate, however, allows an education provider some discretion in accommodating students with disabilities when ‘avoidance of that discrimination would impose an unjustifiable hardship on the education provider concerned’.¹¹

Thirteen years later in August 2005, the Disability Standards for Education (*Standards*) came into effect after a long history of negotiation between Commonwealth, State and Territorial representatives. The *Standards* cover areas of admission, curriculum, student services, participation in university activities and harassment, require providers to consult with students, and provide for ‘reasonable’ adjustment across these areas.¹² Most important in terms of this analysis, the *Standards* define ‘an adjustment [or accommodation]... [as] reasonable in relation to a student with a disability if it balances the interests of all parties affected’.¹³ They specify that:

- (2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:
 - (a) the student’s disability;
 - (b) the views of the student or the student’s associate ...
 - (c) the effect of the adjustment on the student, including the effect on the student’s
 - (i) ability to achieve learning outcomes; and
 - (ii) ability to participate in courses or programs; and
 - (iii) independence.
 - (d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;
 - (e) the costs and benefits of making the adjustment;¹⁴

The *Standards* permit a university to ‘ensure the integrity’ of its courses and programs:

- (3) In assessing whether an adjustment to the course or program...is reasonable, the provider is entitled to maintain the academic requirements of the course of program, and other requirements or components that are inherent in or essential to its nature.¹⁵

The *Standards* require that a provider comply ‘to the maximum extent not involving unjustifiable hardship’¹⁶ but do allow a provider leeway not to comply ‘if, and to the extent that, compliance would impose unjustifiable hardship on the provider’.¹⁷ Decisions about unjustifiable hardship are to be assessed by the standard of ‘all relevant circumstances of the particular case’ as well as the purposes of the *DDA* to end discrimination and protect the rights and interests of

all relevant parties.¹⁸ The *Standards* provide general guidance about the factors to be included in decisions about accommodations. ‘The effect of standards is that compliance with them by a service provider will amount to compliance with the *DDA*’.¹⁹ They also accord university providers some discretion to make decisions reflecting the specific facts in individual cases.

Effective July 2009, the *DDA* was amended and a duty to make reasonable accommodation for individuals with disabilities imposed.²⁰ The changes clarify how the burden of proof is allocated between parties in claims of indirect discrimination. Plaintiffs must establish their inability to comply with a requirement or condition because of a disability but they are no longer required to demonstrate that the requirement falls disproportionately on those with disabilities.²¹ Instead, that burden of proof has shifted to the respondent to demonstrate that the requirement or policy is reasonable.²² Respondents must make reasonable adjustments unless the accommodation constitutes an unjustifiable hardship. The burden of proof for establishing unjustifiable hardship rests on the entity making that claim.²³

A more nuanced interpretation and understanding of the *DDA* depends on the emergence of case law assessing its application to practice.²⁴ This study begins to respond to the need for a better understanding of the impact of the *DDA* on universities in Australia with a review of all cases reported by Australian courts and tribunals in the fifteen years (1993-2008) since its passage. Little evidence of the impact of the changes attributable to either the *Standards* or the *DDA* is available within the time period covered by the litigation included in this study.

B *Postsecondary Sector*

In 2007 there were 960,892 students enrolled in 39 Australian universities (37 public and 2 private) with 273,099 of these, international students. TAFE and VET institutions enrolled 599,000 for the same period.²⁵ Estimates of the enrolment of students with disabilities in the university sector are not regularly included in the extensive data published annually by DEST. As a consequence, consistently reported information about progress in expanding the numbers of such students is difficult to find. About 20% of Australians have some form of disability²⁶ including about 8.2% of those aged 15-24 years.²⁷ The proportion of students with disabilities in universities has more than doubled in recent years and is estimated to be about 6%.²⁸ No breakdown by category of disability could be identified for this research except for evidence that the numbers of university students reporting learning disabilities increased by 88.1% between 1996 and 2003 whereas the overall growth in university enrolments was only 14.5% over the same period of time.²⁹ General guidelines have been developed and distributed for program development and service delivery for individual universities.³⁰ Universities may also choose to file action plans with the HREOC. Universities receive funding to support implementation of their programs targeting disabled and other groups of underrepresented students through the Higher Education Equity Program (HEEP).³¹

There is limited research reported in the scholarly literature on disability and university education in Australia. In general, articles point to barriers to research informing policy on this topic³² and to problems associated with full inclusion for university students with disabilities.³³ The few articles available describing programs and initiatives in Australian universities focus primarily on teaching and learning, especially problems related to learning disabilities and argue that students’ needs are not being adequately served.³⁴

Legal scholarship directly addressing the impact of the *DDA* on universities in Australia is also limited. The Regulatory Impact Statement (2004) issued in conjunction with the *Standards*

describes an effort to collect statistics on numbers of complaints nationwide related to all aspects of the education and training sector.³⁵ Over a three year period 1998-2001, 133 complaints on average were lodged each year, of which ‘only 23% were referred for conciliation or to a tribunal, court or other hearing’...with ‘the risk of complaints (percentage of average complaints per year per student with disability) [being] about 0.66%’.³⁶ These data are not subcategorized by type of educational provider. The remaining analyses identified are found primarily in the *Australian and New Zealand Journal of Law and Education* and generally emphasize education as a whole in Australia rather than problems specific to the university sector. From a policy perspective Ian Dempsey concluded in 2003 ‘there is little evidence that the *DDA* has had a significant impact on enrolment patterns for students with a disability’.³⁷ In 2003 Elizabeth Dickson, who has assumed an important role in scholarship on this topic, argued broadly that courts and tribunals have ‘misconstrued the cause and nature of disability’ and ‘eroded the effectiveness of...anti-discrimination statutes, as a tool for social reform, in the area of education’.³⁸ Dickson extended her analysis to the ‘reasonable adjustments’ provisions of the *Disability Standards for Education*³⁹ and subsequently to the tertiary sector in *Disability Standards for Education and Reasonable Adjustment in the Tertiary Education Sector* to conclude that ‘there are limits to what can be done to neutralize the impact of a student disability’ and that providers also have an ‘obligation to its student body, to potential employers, and...to society...to maintain and protect the academic integrity of all degrees and diplomas awarded’.⁴⁰

Similarly, some literature on disability and testing in university admissions was identified. Gosden and Hampton in ‘Academic Standards Versus Disability Rights’ included some analysis of this issue under the *DDA*.⁴¹ More recently, Mawdsley and Cumming developed a comparative analysis of high stakes testing for elementary and secondary students with disabilities in Australia and the United States⁴² while Cumming and Dickson surveyed issues of assessment and disability in Australia across the array of testing and training settings primarily affecting elementary and secondary students.⁴³ Neither directly addressed the various forms of standardized testing in university admissions, however. Currently, some Australian universities may award ‘bonus’ points to their ‘admissions index’ score if students apply under categories, including disability, designated for special consideration. A report in January 2009 described efforts by some students, parents and medical practitioners to ‘game’ this system in the form of ‘an outbreak of anxiety and depression in some private schools’ accompanied by requests for ‘special consideration’ in admissions and ‘special treatment’ for ‘extra exam time,’ all in pursuit of ‘bonus’ points in the competition for university admissions.⁴⁴ Finally, in 2008, the Australian Council for Education Research (ACER) described efforts to develop broader alternatives to offset some of the discriminatory effects of the current standardized entrance tests (Equivalent National Tertiary Entrance Rank – ENTER) required of all Year 12 students seeking admission to university. Two promising measures, termed the Special Tertiary Admissions Test (STAT) and the uniTEST, are currently under evaluation.⁴⁵ Issues relating to testing for students with disabilities at all levels would appear to be beginning to command some scholarly attention in Australia.

III REPORTED LITIGATION: AUSTRALIA

A *Research Methods*

This research employs methodology developed in previously reported studies assessing the impact of litigation on various groups and issues across the postsecondary sector in the United States⁴⁶ and in Australia.⁴⁷ It surveys all cases in the on-line data bases of reported opinions

published by the Australian Legal Information Institutes (AUSTLII) and cross-checked in a review of on-line opinions reported for all Commonwealth, State and Territorial courts and tribunals in Australia. This study includes all reported decisions from federal courts and tribunals: the High Court, the Federal Court of Australia issued both en banc and by a single judge, the Federal Magistrates Courts, and decisions by the HREOC, the Administrative Appeals and Industrial Relations Tribunals. For States and Territories, it incorporates all court opinions as well as the relevant tribunal decisions. The time period selected for this study (1993-2008) reflects the fifteen years since the *DDA* came into effect.

The search strategy was broadly framed and applied across all databases. It was limited to cases involving universities in any way and excluded decisions involving Technical and Further Education (TAFE) institutions or other tertiary providers.⁴⁸ The search employed ‘key words’ to identify all cases that included the terms ‘universit!’ and ‘disability!’ anywhere in the text of the reported decision. The search engine then rank-ordered the results in terms of the frequency with which the terms appeared in each case. Where multiple decisions were identified for the same case, a common occurrence, all were read but only the key decision in terms of two criteria, the court or tribunal issuing the opinion and the role of a university in the dispute, was included in study results so as to eliminate double-counting.⁴⁹ The cases identified in this manner formed the data-base for subsequent analysis and provides a comprehensive set of cases across the complex range of relationships involving persons with disabilities and universities.

Analysis of the reported litigation then proceeded to identify the following information:

- Date, court system and court or tribunal reporting the decision,
- Complainant in the litigation,
- Fact pattern or issue giving rise to the dispute, and
- Where possible, the outcome reported in the decision.⁵⁰

Once this information was compiled for each reported decision, the data were aggregated and grouped into appropriate categories. Analysis was then based on frequency counts of the case law data. Finally, the findings on litigation involving disability and universities in Australia were compared with analyses of litigation in American postsecondary institutions.

B Findings

Between 1993 and 2008, there were 59 reported decisions involving universities in Australia and issues related to disability in some way. Table 1 provides a timeline tracking litigation reported in Australia at both Commonwealth and State and Territorial levels.

In general, litigation may be seen to be increasing over the past several years with almost half of all decisions reported since 2004. Nonetheless, there were two earlier ‘spikes’ in litigation reported in 2002 and 1997. In part, the few cases reported during the first four years in the study period may reflect ‘start up’ effects as various stakeholder groups were introduced to their rights and obligations under the newly introduced *DDA* and State and Territorial protections. Over the 15 year period covered in this review reported litigation was almost evenly divided between Commonwealth courts and tribunals (28 or 47%) and those in the States and Territories (31 or 53%) although in the most recent five year period, litigation reported from State and Territorial courts and tribunals increased at a somewhat greater rate than that from Commonwealth courts and tribunals.

Table1: Timeline of Reported Litigation (1993-2008)

Year	Commonwealth	State/Territory	Total
1993	0	0	0
1994	0	0	0
1995	2	0	2
1996	0	0	0
1997	5	3	8
1998	1	0	1
1999	2	2	4
2000	0	0	0
2001	2	0	2
2002	4	5	9
2003	2	2	4
2004	2	5	7
2005	1	2	3
2006	3	3	6
2007	1	4	5
2008	3	5	8
Totals	28 (47%)	31 (53%)	59

Table 2 presents study findings about the distribution of reported litigation between jurisdictions and systems for dispute resolution.

Litigation was reported in all jurisdictions except Western Australia and the Northern Territories where there were no reported decisions. Not surprisingly, more litigation was reported for New South Wales than for other States and Territories. While demographics may account for most of this finding, the fact that New South Wales has protected the rights of persons with disabilities since 1977 may also contribute to this finding.⁵¹

Table 2: Distribution of Reported Litigation by Dispute Resolution System and Level (1993-2008)

Jurisdiction	Courts	Tribunals	Totals
Commonwealth	13	15	28
New South Wales	5	9	14
South Australia	0	4	4
Queensland	1	3	4
Victoria	0	3	3
ACT	1	2	3
Tasmania	1	2	3
Totals	21	38	59

Tribunals were more frequently the forum for dispute resolution across all jurisdictions with some differences evident between the Commonwealth and States and Territories in the proportion of cases decided by courts as opposed to tribunals. The relatively greater numbers of decisions reported for Commonwealth courts may be due, in part, to the holding in the *Brandy* case in 1993 finding that decisions of tribunals at the federal level have no adjudicatory effect in terms of statutory interpretation⁵² as well as to differences between State and Territorial and Commonwealth statutes. In the cases identified in this survey of litigation, tribunals in the Commonwealth system were often called on to resolve disputes over benefits, with 10 of the 15 reported claims involving conflicts over the eligibility of students under various programs designed to support persons with disabilities whereas the litigation reported by Commonwealth courts included a broader range of issues. Reflecting the relative allocation of responsibilities between the Commonwealth and State and Territorial authorities, cases involving issues related to employment were somewhat more likely to be reported by State and Territorial courts and tribunals.

Table 3 presents findings categorizing the status of the party alleging a violation of rights under statutes protecting persons with disabilities in university settings.

Table 3: Reported Litigation by Party (1993-2008)

Party	Commonwealth	State/Territory	Totals
Students	24	19	43 (73%)
Staff	3	7	10 (17%)
Faculty	1	5	6 (10%)
Totals	28	31	59 (100%)

Not unexpectedly, almost three-quarters of reported litigation involved complaints by students, with a somewhat greater proportion of this group reported by Commonwealth, as opposed to State and Territorial, courts and tribunals. A fourth of the reported claims involved faculty and staff in Australian universities with three-fourths of this group reported by State and Territorial courts and tribunals. Somewhat greater numbers of cases were reported for staff than for faculty. No general data were found to provide context on numbers of faculty and staff with disabilities on campus. Regardless, the demographic profile and work expectations for faculty and staff on campus may well be generally similar to those for the workforce and the limited number of cases identified for these groups may simply reflect experience derived from the broader area of employment-related litigation on disability discrimination with the lessons disseminated to university employment settings.

Table 4 categorizes the reported litigation by frequency and type of dispute.

Not unexpectedly, disputes over the reasonableness of adjustments requested or provided gave rise to a third of the reported opinions and were most numerous for students, staff and faculty alike. For students, 11 of the 13 challenges over accommodations involved specific requests for adaptations to courses and programs. None succeeded, often not because a university refused to accommodate students' needs, but rather because either the student lodged multiple, changing requests for modifications to an accommodation, or alternatively from a student's failure to follow through on the terms of the initial agreement on accommodations negotiated between the university and the student. Many in this group of cases involved students with various forms of

Table 4: Reported Litigation by Party and Issue (1993-2008)

Issue \ Party	Students	Staff	Faculty	Total
Accommodation	13	3	4	20 (34%)
Benefits	10	2	1	13 (22%)
Discipline	8	2	1	11 (18%)
Admissions	4	0	0	4 (7%)
Information	3	1	0	4 (7%)
Privacy	2	2	0	4 (7%)
Procedure	3	0	0	3 (5%)
Total	43	10	6	59 (100%)

mental illness or emotional disorders. Seven involved students enrolled in professional programs including four in law schools. Some instances arose from students' challenging a grade or the lack of an honours award. In two cases, students sought access to faculty grading of other students' work for a class.⁵³ Another involved details related to access to, and responsibility for the costs and delivery of, printed materials for a student with impaired vision.⁵⁴ Two cases dealt with issues related to physical access. One addressed access for a wheelchair bound student to his graduation⁵⁵ while the second, brought by a student group, sought access for international students with disabilities to public transport on the same terms as that available to students with disabilities from Australia.⁵⁶ In the two cases where physical access was the issue, students prevailed.

Seven cases involved issues related to accommodations for university faculty and staff. Several of these dealt with pre-existing conditions and disputes over modifications to already agreed-upon accommodations, often precipitated by further deterioration in the status of the health of the employee. One reviewed a faculty member's failure to cooperate with a reallocation in his teaching load.⁵⁷ Another arose over the 'fit' between the terms of an employment contract and rights to accommodation when an employee, just before starting work, was injured in a car accident and unable to work during the contract period. Subsequently, the recovered, now semi-disabled but willing, worker prevailed when he claimed that the university discriminated in its refusal to renew his contract with a provision for accommodations.⁵⁸ Another case reviewed a university's refusal to pay for ergonomic furniture to accommodate an employee's deteriorating health status when that employee failed to update medical information.⁵⁹

The second most frequently litigated category of claims involved issues associated with benefits, whether in the form of denials of eligibility by a public agency or of initiatives by a public agency seeking to recoup monies previously paid. This group of cases comprised more than a fifth (22%) of reported litigation across all subgroups of stakeholders. Most student cases arose from issues related to the 'fit' between various scholarships and financial aid (AUSstudy) available to university students and vocational rehabilitation funding through Disability Services Payments (DSP), often after cancellation of the latter. Complex issues of whether university education, especially involving postgraduate study, is vocational rehabilitation as opposed to training for a career often underlay the reasoning in these opinions. Other issues identified are subsumed in a range of claims: the continued eligibility of the family for a child disability support allowance

to provide continued support for their son while attending university;⁶⁰ continued eligibility of postgraduate students for training allowances at the thesis or dissertation phases of their studies;⁶¹ and, the eligibility of a 70 year old, disabled and never employed pensioner for a third Pension Education Supplement.⁶²

Cases involving faculty and staff also sought to reconcile issues of ‘fit’ usually between rights for those seeking to continue work and to retain benefits under statutes designed to protect workers in the workplace as, for example, workmen’s compensation. These cases included difficult fact patterns involving: how to reconcile rights to continued employment while exhausting existing entitlements, such as sick leave and retirement benefits;⁶³ the rights of insurers required to pay benefits to employees with disabilities who continue on salary;⁶⁴ and the obligations of employees to inform employers of underlying disabling conditions, rather than, claiming benefits for worker’s compensation post hoc.⁶⁵

Another group of 11 cases addressed issues related to disciplinary actions taken against students, staff and students. Eight of these involved students. In seven of these the university disciplined a student with disabilities for various disruptive behaviours including, in three instances, various threats made against faculty, staff or other students.⁶⁶ Only one case addressed a dismissal for academic reasons and that decision sustained the university’s claim of insufficient progress by the student.⁶⁷ The reported opinions supported the actions of universities in all but one of the cases involving students. In that case, a university order expelling a disruptive student from a club located in the university centre was overturned.⁶⁸ In all three cases involving faculty and staff, the reported litigation let universities’ actions in disciplining employees stand.

Four cases were identified in an issue area that only affects students - admissions. Two involved admissions into a program, and two, readmission. One, *Rana*, complicated by multiple claims arising from years of troubled relationships at various stages in a long university career, appeared in eight separately reported decisions.⁶⁹ The applicant was denied admission in large part because of documentation by undergraduate program faculty about his inability to work with others – a required criterion for admission. In a second case, a prospective applicant sought accommodations in the form of help in strengthening his background preparation prior to applying to a university.⁷⁰ The two remaining cases dealt with the re-admission of students into programs in which they had been previously enrolled.⁷¹ In all four cases decisions not to admit were sustained.

Four decisions turned primarily on issues clarifying the obligations of persons with disabilities to supply information about their condition so as to ensure an accommodation is appropriate to, and meets, documented needs. In all cases, a court or tribunal found the failure of complainants to supply information about their needs for accommodation to be a sufficient justification for denying the request. Among this group of cases, formal compliance with procedural details would appear to be problematic in several cases where underlying mental illness appears to play some role. The same standard applied again, when, after negotiating an initial agreement on accommodations, individuals requested additional or alternative accommodations. Courts and tribunals would appear to agree that further rounds of formal notification and documentation may be necessary.⁷²

A third set of four cases addressed issues related to privacy. Two of these were brought either by a student or on behalf of a student. In one, a student asked that a health counsellor employed by a university, be disciplined for disclosing his HIV status to his parents.⁷³ In a second, the mother of a student with disabilities abused by a student teacher interning in his classroom sought documents under the state’s freedom of information laws from the university’s education faculty.⁷⁴ In the two cases involving staff, the reported litigation sustained the refusal by a university to

disclose a staff member's personnel file containing materials related to its denial of permission to work at home⁷⁵ and the discipline of a staff member assigned to work with a disabled student who subsequently used that student's password to access his computer.⁷⁶

A last group of decisions turned on issues of procedure. One dismissed a claim because of a failure to submit his claim to the HREOC prior to filing in court.⁷⁷ A second rejected a student's claim for ignoring all requests to file supporting evidence in the case.⁷⁸ A third was rejected by the Administrative Appeals Tribunal because it involved a claim against a private university.⁷⁹

IV AMERICAN CONTEXT

This review next turns to an overview of the statutes protecting individuals with disabilities against discrimination and the context of higher education in the United States. Such a comparison is useful primarily because of the much longer time period during which American universities have been responsible for implementing statutory mandates designed to eliminate discrimination against students with disabilities and the extensive litigation that these obligations have generated. This overview may assist policymakers and administrators in Australia to anticipate areas of future challenge and to develop approaches to manage and minimize the risks of litigation.

A Statutory Framework

Two statutes provide the framework of rights and duties that protect Americans with disabilities against discrimination. The earlier, the *Rehabilitation Act of 1973* specifically the provisions in *Section 504* (hereinafter referred to as *Section 504*),⁸⁰ applies to programs or activities receiving federal financial assistance. This includes most colleges and universities. It is designed as a 'complaint-driven' model and enforced by the Office of Civil Rights (OCR) within the federal Department of Education. Seventeen years later in 1990, Congress passed the *Americans with Disabilities Act (ADA)*.⁸¹ 'The primary goal of the *ADA* was to extend the protections of *Section 504* to a much broader segment of society'.⁸² The *ADA* greatly expanded the scope of protections afforded to Americans with disabilities but did not fundamentally alter the definitions of, or rights and duties afforded to, those with disabilities in the postsecondary context.⁸³ Instead, it extended coverage to private employers (Title I), to state and local governmental agencies (Title II) and private institutions providing educational programs (Title III). The *ADA*, like most civil rights statutes in the United States, relies for enforcement on complaints filed by victims. The Equal Employment Opportunity Commission (EEOC), an independent federal regulatory agency, is responsible for implementation of the *ADA*.

The basic legal framework defining disability and protections from discrimination was set forth in *Section 504* and subsequently incorporated into the *ADA*.⁸⁴ Both acts set a similar standard for protecting individuals defined as disabled. 'No otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination'.⁸⁵ 'A handicapped or disabled person is "otherwise qualified" to participate in a program if she can meet its necessary requirements with reasonable accommodation'.⁸⁶ No accommodation is required if the institution can demonstrate that the student cannot meet academic standards with reasonable accommodations. Similar to the *DDA*, both statutes cover two forms of discrimination. In the United States 'discriminatory treatment' or intentional actions that consciously and differentially impact persons with disabilities, would appear to resemble 'direct discrimination' in Australia whereas 'disparate impact' or actions arising from ostensibly neutral policies or requirements with discriminatory effects on those

with disabilities would appear to resemble ‘indirect discrimination’ in Australia.⁸⁷ In terms of allocating responsibilities between parties to litigation, the complainant bears the initial burden of demonstrating eligibility as an individual with a disability who is otherwise qualified and can, with or without reasonable accommodation, perform the essential functions of the task or job. In disparate treatment cases the complainant must show evidence of bias or intent by the respondent whereas in disparate impact cases the complainant must provide evidence that an ostensibly neutral policy or act disproportionately excludes individuals with disabilities. Subsequently, the burden of proof then shifts to the respondent to demonstrate that reasonable accommodation is not possible either because the requirement is consistent with business or program necessity, poses a direct threat to health or safety, or creates an undue hardship, defined in terms of direct impact on expenses, resources or operations, on the respondent. Finally, even if the respondent carries this burden, a complainant has a final opportunity to rebut by demonstrating a less discriminatory alternative is available.⁸⁸ In disparate impact cases, the respondent bears much of the burden of persuasion. Although the *ADA* and *Section 504* contain different procedures and remedies for violations, commentators agree that ‘courts generally read the two statutes together to grant the same substantive protections’.⁸⁹

American courts have generated an extensive body of case law interpreting and applying the provisions of these laws to educational institutions over the past three and a half decades. Both *Section 504* and the *ADA* cover students and employees in higher education. Claimants have two potential federal claims and procedures for seeking relief: the OCR and EEOC as well as remedies under individual state statutes – all of which complicate issues of jurisdiction and remedies.

Until September 2008 much of the case law interpreting *Section 504* and the *ADA* focused on the issue of whether a complainant met the statutory definition of an individual with a disability – a pre-requisite to eligibility for protection. Between 1999 and 2000 a series of decisions by the United States Supreme Court repeatedly narrowed the definition of an individual with a disability.⁹⁰ In September 2008, Congress reacted by amending the *ADA* to broaden the definition of persons with disabilities ‘to the maximum extent permitted by the terms of this Act’.⁹¹ This change more closely aligns analysis of the statutory framework providing rights to people with disabilities in the United States with that in Australia.

B *Postsecondary Sector*

Over time, both the *ADA* and *Section 504* have raised awareness among Americans with disabilities of the rights and protections available to them as students and employees alike. At least as important in terms of impact on higher education, however, was a third statute, enacted in 1975, that sets forth rights and extensive requirements that apply to all ‘special education’ students in elementary and secondary educational institutions. Now termed the *Individuals with Disabilities Act (IDEA)*,⁹² this law sets employs a distinctive schema of rights, obligations and remedies that differs in important ways from those set forth in *Section 504* and in the *ADA* as well as the *DDA* in Australia. The *IDEA* succeeded in building a pipeline of students prepared to undertake tertiary education. In 2006-07 the National Centre for Education Statistics reported that 13.7% of all children and youth aged 3-21 were served under the terms of the *IDEA* in elementary and secondary schools.⁹³ By 2000, 74% of high school graduates with disabilities entered a postsecondary program. Students with disabilities identified as academically talented enrolled in postsecondary education at the same rate (79%) as their non-disabled peers.⁹⁴ In 2007, there were approximately 20,333,000 students enrolled in postsecondary education: 11,240,000

undergraduates, 2,575,000 postgraduates and 6,518,000 in community colleges.⁹⁵ In 2003-04, 11.3% of the students enrolled in some form of postsecondary education in the United States reported some type of disability.⁹⁶ As in Australia, data on numbers of postsecondary students with disabilities in the United States are not systematically reported.

Policy resources are now widely available to provide postsecondary administrators with information, strategies and programs for dealing with the broad range of disabilities on campus. These track on the growth in enrolments of students with disabilities as well as on increasing litigation implicating issues related to disability discrimination generally.⁹⁷ As examples, researchers describe increasing enrolments of tertiary students in the United States with psychological disorders⁹⁸ and depression.⁹⁹ Unfortunately, these occasionally lead to serious problems. By one estimate, 1100 higher education students in the United States attempt or commit suicide each year.¹⁰⁰ Generally, increasing numbers of college students also report various forms of learning disabilities.¹⁰¹

Scholarly analyses of the many legal issues faced by those in the postsecondary sector responsible for eliminating discrimination against persons with such wide-ranging problems are commonly available. No compilation or data base of reported litigation that parallels the review of cases from Australia reported previously in Section III of this analysis is available, however. Differences in the relative size of the postsecondary sectors in the two nations plus the sheer volume of reported cases in the United States over the three decade period in which litigation on these topics has been reported make such an endeavour impractical. Consequently, the following analysis relies on the very extensive body of legal scholarship addressing issues related to disabilities in the postsecondary sector in the United States to frame the discussion and comparison with litigation reported in Australia.

V DISCUSSION: A COMPARATIVE PERSPECTIVE

Why compare the litigation involving postsecondary institutions in Australia and the United States? Litigation provides important feedback from adjudicatory systems about the appropriateness of specific practices within a statutory framework.

Second, there is a lack of discussion, based on research evidence, about the impact of the laws on disability on universities in Australia. Third, the large body of litigation and extensive analysis of issues related to institutional practices in the United States would appear to suggest strong similarities in institutional approaches and responses by courts to common problems as well as to point to issues likely to lead to litigation in Australia in the future.

When viewed comparatively, there would appear to be substantial overlap between litigation involving universities and persons with disabilities in Australia and in the United States. Until the *ADA* was amended in 2008, a substantial proportion of the reported litigation in the United States turned on whether a complainant met the statutory definition of an individual with disabilities. Few cases in Australia, except those dealing with ‘imputed’ disability,¹⁰² dealt with issues related to definition. Beyond issues of definition, this review suggests many commonalities as to stakeholders, problems and outcomes. Similarly, most litigation in both countries would appear to arise in the context of individual requests for modifications to decisions about requests for adaptations by individuals with disabilities in fact-specific circumstances, rather than broad challenges to ostensibly neutral policies and practices. The exceptions that can be identified may be attributed in part to structural differences in the organization of higher education between the

two countries as well as to differences in specific statutory schemes for providing benefits and protections to disabled students and workers.

A Stakeholders

In terms of stakeholders, most reported litigation in both countries involves students. While no actual ‘count’ is available to document what proportion of the reported litigation is brought by students in the United States, key scholars in this area of law suggest the preponderance of student-related litigation,¹⁰³ a finding similar to that in Australia. Many claimants in both nations were also enrolled in professional and postgraduate programs. Similarly, a substantial proportion of the litigation involving students in both countries arose from claims by students with emotional or mental disorders.

In the United States substantial numbers of cases involve students with disabilities associated with learning disorders or with obvious forms of substance abuse. By contrast, no claims arising from issues directly related to learning disabilities were reported in Australia. Again, many of the learning disability cases in the United States have turned on questions of whether such students met the statutory definition of an individual with disabilities and so may not be directly comparable. Further, these differences may also reflect, in part, the greater availability of opportunities for mediation and conciliation available through the tribunal system in Australia which may encourage the greater likelihood of earlier settlements by students with other disabilities in Australia.

More limited numbers of cases involving claims by faculty and staff were identified for Australia – a finding similar to findings for the United States.¹⁰⁴ Most problems encountered by those working in academe are common across the workforce at large and would appear to have been addressed by those in the workplace responsible for monitoring and disseminating advice on issues of disability discrimination in employment law generally. Such feedback is widely disseminated and available to universities as responsible employers. There were no cases reported in Australia, and few in the United States,¹⁰⁵ that reflect the characteristics or culture of academic work, specifically the roles of faculty directly related to teaching, research or service. ‘Somewhat unique to higher education, however, is the difficulty in measuring competence’.¹⁰⁶ Such cases may be anticipated in both nations as questions arise about the disability status of the aging cohort of tenured faculty from the ‘baby boomer’ generation.

In only a few instances in Australia, did claims involve third-party stakeholders in some way in the litigation. One involved a student organization challenging the denial of rights to free access on public transportation on behalf of international students with disabilities.¹⁰⁷ Another involved a student in a dispute over housing conditions.¹⁰⁸ Others involved parents of students with disabilities seeking a continuance of benefits¹⁰⁹ and of a child with disabilities allegedly abused by a student teacher in a practicum setting.¹¹⁰ No case identified entities or actors involved in the varied state requirements that often precede and determine university admissions.¹¹¹ The reported litigation from the United States reveals a much broader range of interests and stakeholders. These include litigation involving: numerous testing companies that provide standardized assessments for admission, certification and other measures used in professional credentialing; providers of both on- and off-campus services, internships and activities offered to students both to support and supplement their educational programs; various athletic associations that regulate university athletics; and the numerous business, accrediting and credentialing associations that support university functions and programming.

B Problems

With some exceptions, the reported litigation suggests universities in both nations face common problems.

1 Accommodations

In terms of disputes over requests for accommodations, a substantial proportion of claimants in both nations are students. In Australia, universities were successful in most disputes about accommodations whether for students or for employees. These results would appear to comport with outcomes of litigation in the United States where the ‘vast majority of ...claims allege that a college or universities failed to make reasonable accommodations to known physical or mental limitations’.¹¹² Universities often prevail when ‘the un-contradicted evidence before the court establishes that [they] made extensive efforts to accommodate the plaintiff’.¹¹³ Both Australian and American cases require universities to show careful consideration of requests for adjustments on an individualized basis.

2 Admissions

To start at the beginning of the educational cycle, courts in both nations have dealt with issues of disability tied to decisions about admissions or re-admissions processes. First are questions associated with standardized testing that is often prerequisite to postsecondary admissions. In both Australia and the United States, some form of state or national standardized tests is often required, especially for admission to more competitive and prestigious institutions although in Australia admissions to university are much more heavily entangled with state standards and requirements.

In the United States, universities are generally permitted to set standards for standardized test required for admission whereas, in areas of professional preparation, external accreditation agencies often require such exams for professional credentialing with such standards integrated into program curriculum. If justified by practice and students with disabilities must be able to demonstrate that they are otherwise qualified, that is, they meet minimum academic standards.¹¹⁴ These issues arise primarily in the context of requests by students with learning disabilities for various types of accommodations in testing. The recent amendments to the *ADA* should refocus this debate. This may better align judicial analysis in disability litigation cases with that in the case law on other areas of discrimination¹¹⁵ so as to examine questions of the reasonableness of the specific accommodations requested in testing, the reliability and validity of tests taken under non-standard conditions and current practices of ‘flagging’ the resulting scores.¹¹⁶

Greater pressures on admissions to Australia’s ‘elite’ universities may be a consequence of efforts to expand university enrolments. This may produce future challenges to the various testing systems at State and Territorial levels especially from students seeking accommodations for various types of learning disabilities.¹¹⁷ Initial evidence of attempts to ‘game’ the current approaches to accommodations for standardized tests for students with disabilities in Australia may anticipate future problems.¹¹⁸

Other challenges related to admissions involve standards or requirements for admission set by various regulatory and educational bodies. In the United States, the law allows programs to set ‘technical standards’ for performance in an educational program or activity and require that applicants meet the standards. Only after admission can an institution inquire about disabilities or require a medical examination, if appropriate to the technical standards of the program of

studies.¹¹⁹ In *Ohio Civil Rights Commission v. Case Western Reserve University*¹²⁰ a university was sustained in refusing admission to medical school for a blind applicant who could not meet the standard set by the American Association of Medical Colleges (the accreditation agency) that candidates for a medical degree be able to observe laboratory demonstrations and patient appearance and behaviours. To date, issues of admissions in Australia involved challenges to decisions made by admissions committees and, in one instance, a request by a prospective student for an accommodation from the university in the form of help prior to the admissions process.¹²¹ In one Australian case, the appropriateness of program requirements that applicants demonstrate work experience relevant to the proposed program of studies as well as the capacity to work well with others was sustained when an applicant with disabilities was denied admission.¹²²

Issues related to re-admission to the same program of studies, many times after episodes of substance abuse or acute mental illness when the student has previously either withdrawn voluntarily or failed to contest a dismissal for academic reasons, also fall within this grouping. In the United States, courts in such instances generally respond by examining the evidence as to whether the student continues to be ‘otherwise qualified’ in light of prior academic performance and current medical records and balancing that against the reasonableness of the requested accommodation.¹²³ So, for example, an alcoholic law student was no longer ‘otherwise qualified’ after failing or dropping out of school twice and not readmitted despite two rounds of detoxification.¹²⁴

In both countries, few students prevailed in challenges to decisions about admissions. Australia may expect to face more disputes over admissions, however, as policy initiatives to expand access to university education take effect.

3 *Notice and Documentation*

Similarly, courts in both nations require that requests for accommodation by persons with disabilities be documented. In the United States, ‘the law is clear that institutions are only required to accommodate known disabilities’.¹²⁵ The burden of requesting an accommodation rests with the individual with a disability who must supply documentation.¹²⁶ That individual must demonstrate that the accommodation is ‘available and reasonable’.¹²⁷ In Australia, this too would appear to be an emerging standard. Yet, basic requirements for initial documentation form only a starting point for inquiry. Several cases involved disputes to revise or add to previously negotiated accommodations and the continuing burden on students and employees to provide further documentation. Some limits to this obligation however could be identified in one Australian decision. In that case involving the transfer of a faculty member with disabilities from one campus to another, the university bore the burden of continuing the accommodation rather than requiring the faculty member to request the same accommodation a second time.¹²⁸

4 *Issues of Curriculum, Physical Barriers, and Other Accommodations*

In cases involving adjustments to course requirements, the principle of judicial deference to professional academic judgments has meant that few such challenges succeed in either nation.¹²⁹ This extends both to denials of academic accommodations and academic dismissals. American universities have not been required to make accommodations that eliminated course requirements reasonably necessary to a defined program of studies¹³⁰ or even to alter course testing formats¹³¹ if the university can provide a sound pedagogical justification for its educational methods and standards. In Australia such deference may not be as clearly formulated as a legal standard but the

limited litigation identified in this study may point to similar judicial hesitation to second-guess the substance of academic assessments, at least at the program or course level.¹³² Further, the facts in many cases describe efforts to accommodate students with multiple opportunities to complete course or program requirements.

In terms of various physical or architectural barriers, in Australia as in the United States, courts appear to be impatient with obstacles that limit participation by students and employees with disabilities.¹³³ In only one case, decided ultimately on issues of timely notification to university authorities, did an Australian court fail to support a student's request to accommodate her physical limitation.¹³⁴

In the United States the scope of responsibilities assigned a university to ensure that students with disabilities have access to all educational programs and activities both on and off campus is ever broadening: from housing on campus or off campus,¹³⁵ internships on and off campus to distance learning, assistive technologies and study abroad programs in other nations.¹³⁶ In Australia, the scope of university responsibilities is less clear. Two cases, one involving a university student organization¹³⁷ and a second, university-associated housing,¹³⁸ point to future needs to clarify the scope of university responsibilities in Australia for the broad range of activities that support its core mission.

Despite requiring full access, however, challenges remain at some point over the appropriate allocation of costs between institutions and students and employees with disabilities. Institutions in both nations are generally responsible for supplying the resources needed to appropriately accommodate the needs of persons with disabilities on campus. Two cases in Australia identified this as an issue.¹³⁹ In the United States there are relatively few cases that directly address issues of costs, an area that may well attract more litigation in the future as the burden of tuition and student debt increase.

5 *Benefits*

Closely related to issues of costs associated with ensuring that students and employees with disabilities are appropriately accommodated are cases involving disputes over entitlements to, or recovery of, benefits paid to assist persons with disabilities. This was the second most numerous group of Australian cases identified in this survey. Such cases are found in the litigation reported in the United States. Unfortunately, in both nations, this complex area requiring reconciliation of the 'fit' between various statutory schemes that provide benefits to students or employees with disabilities has received little attention from scholars or policy advocates. This is unfortunate as the availability of various benefits programs is a key incentive (or disincentive) that supports students and employees with disabilities on campus.

The term benefits covers a wide range of statutory entitlements from worker's compensation, unemployment benefits, social security, and disability support payments, to AUSTudy, Commonwealth Scholarships, welfare and other types of government equity scholarships. Underlying various 'statutory' entitlements are numerous issues related to the objectives and design of each benefit program as weighed against the objectives of the *DDA* to maximize opportunities, whether for employees or university students. Occasionally, these operate at cross-purposes. While there are extensive materials explaining the purposes and details of individual benefit programs, there are few analyses unravelling questions about how these benefits intersect with the *DDA*. The findings from this study suggest that scholars and policymakers need to

examine these issues more closely and develop solutions better adapted to supporting those with disabilities who work and study on campus.

That some recognize the importance of this issue, at least for Australian students, is evident from a submission to the Bradley Review of Higher Education addressing finances.¹⁴⁰ One call for more funding outlined the dimension of this problem: that ‘University scholarships are treated as income under the Social Security Income test whereas Commonwealth Scholarships are not’ [Further] ‘significantly disadvantaged students are placed in a position of receiving a degree of assistance from their university, but . . . may see their Centrelink allowance reduced’.¹⁴¹ In effect, this means that equity scholarships subsidize social security payments.¹⁴² Other materials suggest that Commonwealth policies emphasize programs to assist students with disabilities that focus primarily on vocational education and training, rather than on university-level education.¹⁴³ Evidence from the reported litigation suggests the importance of addressing the complex issues of statutory ‘fit’ as students with disabilities are caught between provisions and interpretations that may operate at cross purposes.

In terms of employment in Australia, the *DDA* would appear to have had minimal impact on increasing participation in the workforce of persons with disabilities. ‘Since 1993, the labour force participation rate of people with disabilities has fallen, while the rate for people without disabilities has risen’.¹⁴⁴ The speaker attributed some of this phenomenon to the extra costs of working despite the specific exemption of social security benefits under the *DDA*. Further, the proportion of the Australian population receiving disability support pensions (DSP) increased from less than 2% of the population in 1980 to 3% by 2000. Eligibility for DSP requires that a person be ‘unable to work full time, or be retrained for full-time work, for at least two years because of a disability, illness or injury’.¹⁴⁵ Again, evidence from the reported case law on university employees illustrates issues of ‘fit’ between the *DDA*, a statute designed to increase employment for persons with disabilities, and incentives created by statutes designed to protect those unable to work or to ensure appropriate working conditions.

These problems are similar in complexity, if not in detail, to those in the United States and are equally avoided by legal scholars. Further, Congress in amending the *ADA* in 2008 did nothing to resolve issues of ‘fit’ between benefits programs when it added a provision: ‘Nothing in this Act alters the standards for determining eligibility for benefits under State worker’s compensation laws or under State and Federal disability programs’.¹⁴⁶ For example, one ongoing dispute allocating fiscal responsibilities between postsecondary institutions and state vocational rehabilitation agencies to cover the costs incurred in support of students with disabilities was resolved in 1998 when vocational rehabilitation agencies were re-assigned their traditional obligations to pay for auxiliary aids and services.¹⁴⁷ However, this controversy has since migrated into the realm of a dispute over responsibilities for the costs of postgraduate education.¹⁴⁸ Few scholars have addressed these questions as applied to students¹⁴⁹ and employees. One scholar described federal legislation on this topic as ‘daunting’ and understanding ‘an impossible task even for legal experts’.¹⁵⁰ There is some case law interpreting these questions but limited controlling precedent and few decisions specific to faculty or staff in higher education settings.

6 *Discipline*

Courts in Australia and the United States regularly address problems associated with disciplinary actions involving students, faculty and staff with disabilities. In both countries the cases reveal common fact patterns in which claimants either failed to comply with a policy or order or engaged in threatening behaviours and similar outcomes. In terms of the former, the

reported litigation often examines a claimant's conduct in light of the reasonableness of the policy or order under the circumstances. Courts in the United States generally rejected challenges to dismissals of students refusing to comply with an institution's rules of conduct – this despite the fact that they accord greater scrutiny to cases involving students with disabilities.¹⁵¹ Misconduct, even that arising from disability, is a non-discriminatory reason that justifies disciplinary action and evidence that an individual is not otherwise qualified.¹⁵² This general approach would appear to hold true in employee as well as student cases in both nations. Australian courts used a similar standard in sustaining discipline of a student with a personality disorder who 'blew up' when the university could not persuade contractors to stop a jackhammer used in nearby construction. Other students living in the same unit were required to 'tolerate' the disturbance while it lasted.¹⁵³ Similarly in litigation involving employees, Australian courts and tribunals sustained university disciplinary actions for failures to comply with university orders reassigning teaching duties, requiring a psychiatric examination and excluding individuals from campus.

Several disciplinary actions arose from threatening behaviours by students and employees. Such cases appear with some frequency in the United States also. These cases occasionally raise questions of 'imputing' or 'regarding' an individual as being disabled and are associated with fact patterns where a student or employee has reacted with hostility or aggressiveness towards others. Such individuals may have no prior record of disability and may be volatile or 'quick tempered' as opposed to having an emotional or mental disability. In such cases, requiring psychiatric evaluation may 'impute' disability and trigger statutory protections. Such cases also arise when the institution subsequently seeks dismissal for misconduct for a failure to comply with an order for psychological evaluation. Courts in the United States, although often finding such claimants not to be otherwise qualified, are somewhat less deferential than in cases involving academic dismissals.¹⁵⁴ Often courts attempt to discern whether the 'disciplinary decision was motivated, in whole or in part, by animosity towards the student or employee with disabilities or is a form of retaliation'.¹⁵⁵

Cases in Australia, although fewer and less nuanced, dealt with similar fact patterns. Several dealt with 'imputed' disability in situations involving non-cooperative, persistent or aggressive behaviours in situations where there had been no prior request for an accommodation.¹⁵⁶ These decisions offer few bright lines distinguishing between discrimination based on the imputation of disability, retaliation or misconduct. Two cases identified in the litigation reported in Australia involved individuals who directly threatened harm to others or themselves. One involved an outright threat to kill¹⁵⁷ while the threat in the second may have been somewhat less direct.¹⁵⁸ No case in Australia dealt with the complex, and all-too-common question of suicides on campus.

Cases involving disciplinary issues are common in the United States and the subject of substantial scholarly analyses. 'Student challenges to disciplinary decisions...generally fail... [but] courts are less deferential to these decisions than to academic ones'.¹⁵⁹ Generally, unless the plaintiff can produce evidence of discriminatory animus by those involved in the incident or in the proceedings that follow, many courts find that a 'student who cannot comply with an institution's rules of conduct is not otherwise qualified for retention'.¹⁶⁰

Cases arising from students who pose a direct threat to themselves appear with some regularity in the United States and are a specific concern in the scholarly literature, which may provide some guidance for those faced with similar issues on Australian campuses. The OCR (U.S. Department of Education) has addressed such complaints about universities and issued guidance to help in interpreting the responsibilities of institutions. To demonstrate that an individual is a 'direct threat' to himself or herself, the institution must make 'an individualized

and objective determination' that there is a 'high probability of substantial harm and not just a slightly increased, speculative, or remote risk' before requiring a student to withdraw.¹⁶¹ Further, that assessment must be 'based on a reasonable medical judgment...the most current medical knowledge or the best available objective evidence'.¹⁶² As applied, this standard has been interpreted to mean universities that dismiss a student who attempted suicide may have engaged in discrimination based on imputed disability because they refused to reconsider their decisions or review evidence from mental health professionals.¹⁶³ In a recent review of disputes involving mandatory withdrawals of students at risk of suicide, one author concluded that in every case in which the OCR was involved, 'the agency found for the student, often concluding that the university failed to satisfy the "direct threat" standard by neglecting to conduct an "individualized and objective assessment" and consider reasonable modifications that would mitigate risk'.¹⁶⁴

C Outcomes

Despite important differences between American and Australian laws protecting persons with disabilities, the case law provides evidence of similarities in outcomes of litigation. With the exception of cases involving disputes over physical barriers, students and employees prevail infrequently in either nation. Further, it would appear that litigants, especially those with emotional and mental disorders, encounter many obstacles in pursuing their rights under disability statutes in both nations. Most important are those associated with rule-based organizations that are modern universities whether as places to learn or to work. Failures to follow through with procedural requirements to notify those in charge in a timely manner, to supply documentation at appropriate times and to comply with policies and orders, are common problems with poor prognosis in terms of litigation outcomes.

The importance of university initiatives in support of students, faculty and staff with disabilities is also apparent in both countries. Generally, the reported litigation contains detailed accounts of procedures made available to those with disabilities, and efforts by campus personnel, to facilitate inclusion. Evidence of sincere and repeated efforts to accommodate the needs of students and employees would appear to be prerequisite to documenting reasonableness. The cases and legal analyses illustrate some similarities in approaches to constructing opinions within a framework that assesses individual behaviours and performance with the context of institutional standards and practice before considering whether an adjustment is reasonable or an unjustifiable hardship for the provider.

VI CONCLUSIONS

Litigation provides important feedback from dispute resolution systems about the appropriateness of practices within specific statutory frameworks and guidance for those charged by institutions of higher education with managing the risks of potential litigation. How does a comparative analysis of reported litigation involving students, faculty and staff on campus add to the body of knowledge that informs policy and practice related to persons with disabilities in institutions of higher education in Australia and the United States? More specifically, what does evidence from the case law, the application of the provisions of two different statutory frameworks to problems arising in two different systems of higher education, tell those responsible for managing the risks of litigation?

Several conclusions are appropriate. First, the evidence generated in this analysis serves as an initial framework for comparing data on litigation involving students and employees in higher

education. Second is confirmation as to the similarities in problems encountered by the higher education sectors in both nations and in approaches to amending statutory frameworks to better meet needs identified during implementation. Third is evidence of differences, many of which may reflect the structure and organization of university education in the two nations as well as differences in systems for dispute resolution. Fourth is the lack of attention, by policymakers and scholars alike, to issues related to the 'fit' between various benefits' programs for students and workers with disabilities on campus.

Comparison also enables perspective. From that of Australia, this analysis permits some anticipation and understanding of the complexity in fact patterns that may arise in future disputes, especially as more students are encouraged to pursue tertiary education and students with disabilities are better prepared to avail themselves of these opportunities. Greater numbers of students may lead to a steady, if not increasing, volume in litigation despite the 'learning curve' as institutions respond to statutory mandates and greater demand. If American experience offers any perspective over time, litigation remains a viable strategy for ensuring institutional and policy responsiveness. Further problems may be anticipated in areas not previously addressed by Australian courts and tribunals. A sample includes issues related to various forms of testing, transitions in preparing students for professional practice, and students who attempt to harm themselves. In addition, litigation may implicate a broader range of stakeholders involved in the delivery of postsecondary education. On the other hand, litigation in both nations generally confirms support for institutions that can demonstrate sincere efforts to accommodate the needs of each individual with disabilities on campus but, at the same time, do not undermine institutional capacity to maintain standards and preserve quality.

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Keywords: disability; litigation; comparison; Australia; United States.

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- 3 Department of Employment, Education and Training (Cth) (1990) <www.dest.gov.au/archive/highered/eippubs/eip9608/chapter1.htm> at 3 April 2009.

- 4 *Disability Discrimination Act* (Cth) (*DDA*). At s 4 the statute defines disability to mean: (a) total or partial loss of the person's bodily or mental functions; or (b) total or partial loss of a part of the body; or (c) the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness; or (e) the malfunction, malformation or disfigurement of a part of the person's body; or (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior; and includes a disability that: (h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future; or (k) is imputed to a person.
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- 6 *DDA* s 31(1)(b).
- 7 Belinda Smith, 'Australian Anti-Discrimination Laws – Framework, Developments and Issues' (Paper presented at the 9th JILPT Comparative Labor Law Seminar, Tokyo, 18-19 February 2008).
- 8 The Australian Human Rights and Equal Opportunity Commission (HREOC) was established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The HREOC was renamed the Australian Human Rights Commission in the 2009 amendments to the *DDA*. For purposes of the time period covered by this study, the Commission will be referred to as the HREOC, however.
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- 33 Janette Ryan and John Struhs, 'University Education for All? Barriers to Full Inclusion of Students with Disabilities in Australian Universities' (2004) 8(1) *International Journal of Inclusive Education* 73.
- 34 Janette Ryan, (2007) 'Learning Disabilities in Australian Universities: Hidden, Ignored, and Unwelcome' (2007) 40(5) *Journal of Learning Disabilities* 436; Janette Ryan and M. Brown, 'Just for Them to Understand Better: The Impact of Learning Difficulties at University' (2005) 10(1) *Australian Journal of Learning Disabilities* 19; T Heiman and K Precel, 'Students with Learning Disabilities in Higher Education' (2003) 38 *Journal of Learning Disabilities* 248.
- 35 *Education Standards, Regulatory Impact Statement s 5.2.*
- 36 *Education Standards Regulatory Impact Statement s 5.2, 13.*
- 37 Ian Dempsey, 'The Impact of the Disability Discrimination Act on School Students with a Disability in Australia' (2003) 8 *Australia and New Zealand Journal of Law and Education* 35, 35.
- 38 Elizabeth Dickson, 'Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991(Qld) and in its Interpretation and Application' (2003) 8 *Australia and New Zealand Journal of Law and Education* 45.
- 39 Dickson, above n 19.
- 40 Dickson, above n 24, 38.
- 41 Richard Gosden and Greg Hampton, 'Academic Standards Versus Disability Rights' (December 2000) *UltiBASE*, a peer-reviewed e-journal for tertiary teachers <<http://ultibase.rmit.edu.au/Articles/dec00/gosden1.pdf>> at 7 May 2009.
- 42 Ralph Mawdsley and J Joy Cumming, 'High Stakes Testing and Demand for School District Accountability: A Dilemma for Special Education Students in the United States and Australia' (2004) 9(2) *Australia and New Zealand Journal of Law and Education* 19.
- 43 J Joy Cumming and Elizabeth Dickson, 'Equity in Assessment: Discrimination and Disability Issues from an Australian Legal Perspective' (2007) 19(3 &4) *Australia and New Zealand Journal of Law and Education* 201.
- 44 Anna Patty, 'Elite Students Exploit Uni Entry Scheme', *Sydney Morning Herald* (Sydney), 12 January 2009, 1 <<http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2009/01/11/1231608523331.html>> at 30 April 2009.
- 45 Australian Council for Education Research, 'Aptitude tests – inclusive and valid' (December 2008) *Higher Education Update*, Edition 3 <<http://www.acer.edu.au/documents/ACERHigherEducationUpdate3.pdf>> at 29 April 2009.
- 46 For studies employing this methodology see Lelia Helms and Charles Helms, 'Forty Years of Litigation Involving Medical Students and their Education: Part I, General Educational Issues' (1991) 66(1) *Academic Medicine* 1; 'Forty Years of Litigation Involving Medical Students and their Education: Part II, Issues of Finance' (1991) 66(2) *Academic Medicine* 71; 'Forty Years of Litigation Involving Residents and Programs of Graduate Medical Education: Part I. General Programmatic Issues' (1991) 66(11) *Academic Medicine* 649; 'Forty Years of Litigation Involving Residents and Programs of Graduate Medical Education: Part II. Malpractice Issues' (1991) 66(12) *Academic Medicine* 718; 'Litigation Involving Medical Faculty and Academic Medical Centers (1950-1991)' (1993) 68(1) *Academic Medicine* 7. See also Lelia Helms, Selden Biggs and Charles Helms, 'Litigation in Medical Education: Retrospect and Prospect' (1995) 11 *Journal of Contemporary Health Law and Policy* 317; Oren Griffin, Alan Henkin and Lelia Helms, 'Systematizing Information for Public Sector Risk Management: A Perspective from Higher Education' (2000) 24(2) *Educational Research Quarterly* 21;

- Christopher Pierson and Lelia Helms, 'Liquor and Litigation: Forty Years of Litigation over Alcohol on Campus' (2000) 142(2) *Education Law Reporter* 609; Becky Elkins, Lelia Helms and Christopher Pierson, 'Greek Letter Organizations, Alcohol and Courts: A Risky Business' (2003) 44(1) *Journal of College Student Development* 67; Lelia Helms, Christopher Pierson and Katherine Streeter, 'The Risks of Litigation: A Case Study of Resident Assistants' (2003) 180(1) *Education Law Reporter* 25.
- 47 Lelia Helms, 'Comparing Litigation in Higher Education: The United States and Australia in 2007' (2009) *International Journal of Law and Education* 14(2), 37-62.
- 48 The search strategy for Australia was limited to the term university and so includes only litigation reported involving the 39 self-accrediting institutions in Australia in which the terms university and disability appear in some way. This limitation may be attributed to the varied and inconsistent terminology employed to describe TAFE and other VET providers. For evidence of this, see the lists of Australian providers of tertiary education available through the website of the Department of Education, Employment and Workplace Relations at <<http://www.goingtouni.gov.au/Main/CoursesAndProviders/ProvidersAndCourses/HigherEducation>> or alternatively at the website of the Australian Qualifications Framework <<http://www.aqf.edu.au/AbouttheAQF/Pathways/tabid/156/Default.aspx>>. As a consequence, no keyword search strategy that was both reliable and comprehensive could be formatted for tertiary providers not designated as universities.
- 49 For example in one case, *Harding v UNSW* or *Harding v Vice Chancellor, UNSW*, all arising under the same set of operative facts, five different decisions were identified: 2001 NSWADT 205 (7/12/01); 2002 NSWSC 113 (13/3/02); 2002 NSWCA 325 (12/9/02); 2002 NSWADTAP 36 (24/10/02); 2003 NSWADT 74 (15/4/03). In several others, which involved different claims and multiple defendants but the same claimant and underlying disability, the reported litigation was counted only once, despite the fact that they could reasonably be counted multiple times. In this example, litigation involving a complainant named Rana, encompassed four different alleged violations against four different entities or individuals, all arising from activities related to obtaining education at both undergraduate and postgraduate levels. These disputes have produced eight different reported opinions identified for this research over a six year period: 2003 FMCA 297 (11 July 2003); 2003 FMCA 525 (21 November 2002); 2004 FMCA 325 (26 February 2004); 2004 FCA 559 (7 May 2004); 2005 FMCA 1473 (24 November 2005); 2006 FMCA 1797 (23 November 2006); 2008 FCA 1903 (17 December 2008); and 2008 FMCA 1720 (24 December 2008).
- 50 In some cases, especially those resolving matters of procedure, the researcher could not determine an outcome directly relevant to the underlying claim at issue in the dispute.
- 51 *Anti-Discrimination Act 1977*(NSW), above n 2.
- 52 *Brandy v Human Rights and Equal Opportunity Commission* [1993] HCA 10 (23 February 1993) holding that under the constitutional doctrine of separation of powers, the HREOC could not be constituted as a court under the provisions of the Racial Discrimination Act 1975 (Cth) and therefore could not exercise judicial power in the form of an enforceable decision.
- 53 *Rabel v Swinburne University of Technology* [1997] VADT 56 (16 June 1997); *Anderson v The Pro-Vice-Chancellor, Charles Sturt University* [2003] NSWADT 121 (23 May 2003).
- 54 *Hinchcliffe v University of Sydney* [2004] FMCA 85 (17 August 2004) ('*Hinchcliffe*').
- 55 *Kinsela v Old University of Technology* [1997] HREOCA 5 (24 February 1997) ('*Kinsela*').
- 56 *Sydney University Postgraduate Representative Association (SUPRA) ors v Minister for Transport Services ors* [2006] NSWADT 83 (23 March 2006) ('*SUPRA*').
- 57 *Sheikholeslami v University of NSW (No.3)* [2008] FMCA 35 (25 January 2008).
- 58 *Paks v Victoria University of Technology* [1997] VADT 53 (10 September 1997).
- 59 *McCormack v Charles Sturt University* [2008] ACTDT 4 (30 June 2008) ('*McCormack*').
- 60 *McDonald and Department of Family and Community Services* [1999] AATA 540 (23 July 1999) ('*McDonald*').
- 61 *Komidar and Department of Health, Housing and Community Services* [1995] AATA 679 (30 November 1995); *Canzato v Unisure Pty Ltd (University of Adelaide)* [2006] SAWCT 15 (28 February 2006).

- 62 *Messner and Secretary, Department of Employment and Workplace Relations* [2006] AATA 437 (19 May 2006).
- 63 *Chalmers v Deakin University* [1997] IRCA 231 (15 July 1997).
- 64 *American Home Assurance Company v Whitfield Matter No Ca 40591* [1997] NSWSC 314 (18 August 1997).
- 65 *Lloyd v Unisure Pty Ltd (University of Adelaide)* [2008] SAWCT 30 (18 June 2008).
- 66 *H v S* [1997] HREOCA 41 (23 July 1997); *Liu v The University of Melbourne* [2002] VCAT 896 (28 August 2002); *Wecker v University of Technology, Sydney* [2007] NSWSC 927 (23 August 2007) ('*Wecker*').
- 67 *Huang v University of New South Wales* [2008] FCA 1930 (18 December 2008).
- 68 *Soulitopoulos v LaTrobe University Liberal Club* [2002] FCA 1316 (25 October 2002) ('*Soulitopoulos*').
- 69 *Rana* above n 49. Although reported multiple times over several separate issues, this case is classified under admissions since the most recent and numerous opinions have dealt primarily with the claimant's efforts to gain entry into a postgraduate program. *Rana v University of South Australia* [2004] FCA 1316 (7 May 2004) ('*Rana*').
- 70 *Croker v State of NSW Anor* [2003] FMCA 181 (19 May 2003) ('*Croker*').
- 71 *Brackenreg v Queensland University of Technology* [1999] QADT 11 (20 December 1999); *Harding v UNSW* [2002] NSWSC 113 (1 March 2002).
- 72 For example, *Prag v University of New South Wales* [2004] ACTSC 51 (24 June 2004).
- 73 *AW v Vice Chancellor, University of Newcastle* [2008] NSWADT 104 (18 March 2008).
- 74 *Macquarie University v Howell (GD)* [2008] NSWADTAP 46 (25 July 2008) ('*Howell*').
- 75 *Curtin v Vice-Chancellor, University of New South Wales* [2005] NSWADT 104 (10 May 2005).
- 76 *Gallant v Queensland University of Technology* [2004] QADT 5 (10 February 2004).
- 77 *Sluggett v Flinders University of South Australia* [2003] FCAFC 27 (5 March 2003) ('*Sluggett*').
- 78 *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1325 (11 October 2006).
- 79 *Pinero and Australian Catholic University Limited* [2006] AATA 371 (28 April 2006).
- 80 *Section 504 of the Rehabilitation Act of 1973, Section 504*, 29 USC § 794 (2000 & Supp. 2004).
- 81 *Americans with Disabilities Act of 1990*, 42 U.S.C. §§ 12101-12121 (2000) as amended Pub L 110-325 (September 25, 2008).
- 82 Laura Rothstein, 'Disability Law and Higher Education: A Road Map' (2004) 63 *Maryland Law Review* 122, 122.
- 83 *Ibid* 133.
- 84 Both define an 'individual with a disability' as: any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. See above n 80, 706 (8)(B) and n 81, 12102(2).
- 85 See above n 80 and 81.
- 86 *Kaltenberger v Ohio College of Podiatric Medicine*, 162 F 3d 432, 435 (1998) at 435; *el Kouni v Trustees of Boston University*, 169 F Supp 2d 1, 4 (2001).
- 87 See U.S. Equal Employment Opportunity Commission, *Fact Sheet on Employment Tests and Selection Procedures* <http://www.eecoc.gov/policy/docs/factemployment_procedures.html> at 9 October 2009.
- 88 Title VII of the Civil Rights Act 1964, 42 U.S.C. § 2000e-2(h) (2000).
- 89 Marie-Therese Mansfield, 'Academic Accommodations for Learning Disabled College and University Students: Ten Years after Guckenberger' (2007) 34(1) *Journal of College and University Law* 203, 206; Bonnie Poitras Tucker, 'Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Student' (1996) 23 *Journal of College and University Law* 1, 2.
- 90 The Supreme Court held that if a limiting condition could be ameliorated with some form of intervention (e.g., medication or some form of prosthetic device) that person was no longer 'substantially limited'. In other words, 'the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment': *Sutton v United Air Lines, Inc*, 527 US 471,

474(1999). For example, a person with epilepsy would no longer be considered as disabled if his or her seizures were controlled by medication. Further, if that person refused to use medication, he or she would not be considered ‘otherwise qualified’: *Murphy v United Parcel Service, Inc*, 527 US 516, 521 (1999). Finally, three years later the Supreme Court narrowed the scope of what could be considered a ‘major life activity’. It ruled that a major life activity is one that involves the performance of a variety of tasks central to most people’s daily lives and remanded the case for a factual determination as to whether the subset of manual tasks limited by carpal tunnel syndrome met that standard: *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 US 184, 190 (2002).

- 91 In pertinent part, the Amendments define major life activities in terms of ‘activities, including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working,’ and in terms of ‘bodily functions, including but not limited to, those of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions’. The Amendments then clarify other important issues: that a transitory condition, as opposed to an impairment, is six months or less in duration; that an impairment may be episodic or in remission, if it substantially limits a major life activity when active; that an impairment that substantially limits one major life activity need not limit other major life activities; and that whether an impairment substantially limits a major life activity is to be considered without regard to the ameliorative effects of mitigating measures. *Americans with Disabilities Act of 1990* Pub L 101-336, 104 Stat 327as amended Pub L 110-325 (September 25, 2008), 42 USC §§ 12101-12213 and codified at § 12101 3(C)(4)(A) <<http://www.access-board.gov/about/laws/ada-amendments.htm>> at 8 May 2009.
- 92 *Individuals with Disabilities Education Act (IDEA)*, as reauthorized in 2004, Pub L 108-446, 118 Stat 2647, 20 USC §§ 1400-1461. Originally titled the *Education for all Handicapped Children Act of 1975*, this program has been repeatedly amended and renamed in subsequent Congressional reauthorizations. The *IDEA* set forth basic rights of children with disabilities to education. These include rights to: a free appropriate public education; in the least restrictive environment that is, to the maximum extent appropriate, delivered in a classroom setting with students not identified as having disabilities; a written ‘individualized educational program’ based on a careful evaluation of the child’s needs and periodically negotiated in consultation with the child’s parents, teachers and educational experts. Numerous scholarly analyses as well as materials designed for practitioners are available on this topic. For one that combines these perspectives see Dixie Snow Huefner, *Getting Comfortable with Special Education Law: A Framework for Working with Children with Disabilities* (2nd ed, 2006).
- 93 National Center for Education Statistics, ‘Participation in Education’ Table 8-2, ‘Percentage of children and youth ages 3-21 served under the Individuals with Disabilities Act, by disability: Selected years, 1976-77 through 2006-07’, U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS), Office of Special Education Programs (OSEP), Data Analysis System, 1976-2006. <<http://nces.ed.gov/programs/coe/2008/section1/table.asp?tableID=868>> at 5 May 1009.
- 94 Thomas Wolanin and Patricia Steele, ‘Higher Education Opportunities for Students: A Primer for Policymakers’ (June 2004) *Institute for Higher Education Policy*, Washington DC, viii <<http://ihep.org/Publicatons/publications-detail.cfm?id=59>> at 18 May 2009.
- 95 In the United States community colleges serve functions that combine the roles played by TAFE and VET institutions in Australia. All data on institutions and the postsecondary sector in the U.S. are derived from information for 2007 as reported in the annual ‘Almanac Issue, 2008-09’, *The Chronicle of Higher Education* (Washington DC) 29 August 2008, Vol. LV, No. 1.
- 96 National Center for Education Statistics, above n 93, ‘Profile of Undergraduate Students, 2003-04’ reporting that among the 11.3% with a disability, 25.4% reported an orthopedic condition; 21.9%, a mental illness/depression; 17.3%, health impairments/problems; 11%, attention-deficit disorders; 7.5%, specific learning disabilities; 5%, hearing problems; 3.8%, visual problems; 0.4% speech problems; and 7.8%, other.

- 97 *The Chronicle of Higher Education*, above n 95, published weekly serves as a major forum for communication within this sector. In addition, two publications focus on issues related to the law and tertiary education: the *Journal of College and University Law*, published quarterly under the auspices of the National Association of College and University Attorneys, and West's *Education Law Reporter (ELR)*, distributed bi-weekly by West Publishing.
- 98 Erica Good, 'More in College Seek Help for Psychological Problems,' *New York Times* (New York City), 3 February 2003, A 11 estimating that 41 % of college and university students had sought counseling for psychological disorders.
- 99 American College Health Association, 'American College Health Association National College Health Assessment Spring 2006 Reference Group Data Report (Abridged)' (2007) 55 *Journal of American College Health* 195, 205. 44% of a population of 95,000 students surveyed claimed that depression interfered with their studies with 9.3% reporting serious suicidal thoughts during the previous academic year.
- 100 National Mental Health Association and the JED Foundation, 'Safeguarding your Students against Suicide' (2002) <[http://www.jedfoundation.org/articles/Safeguarding Your Students.pdf](http://www.jedfoundation.org/articles/Safeguarding%20Your%20Students.pdf)> at 5 May 2009. The JED Foundation is a not-for-profit organization working to prevent suicide and reduce emotional distress, especially among college students. See also Peter Lake and Nancy Tribbensee, 'The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury' (2002) 32 *Stetson Law Review* 125.
- 101 As in Australia, recent data on this topic are difficult to gather. One source estimated that 29% of those reporting a disability in 1999 claimed some form of a learning disability. See National Center for Educational Statistics, Laura Horn, Jennifer Berkold and Project Officer Larry Bobbit, 'Students with Disabilities in Post Secondary Education. A Profile of Preparation, Participation and Outcomes'. (1999) *NCES 1997-187*, U.S. Department of Education, Washington DC. Two other sources estimate the proportion of students reporting learning disabilities at 40-41% in 1999 and 1998 respectively. See Wolanin and Steele, above n 94 and American Council on Education, 49 *Higher Education and National Affairs* 2 (Washington DC) 17 January 2000 <http://www.acenet.edu/hena/issues/2000/01_17_00/disabilities.cfm> at 5 May, 2009. Generally, most sources document increased percentages of students identifying themselves as learning disabled.
- 102 *Zhang v University of Tasmania* [2008] FCA 516 (24 April 2008); *Wilde v University of Sydney* [2002] NSWSC 954 (15 October 2002); *Liu v. The University of Melbourne* [2002] VCAT 896 (28 August 2002).
- 103 Rothstein, above n 82.
- 104 Ibid 124: '[M]ost higher education staff positions do not involve duties that are unique to the higher education setting...It is thus probable that the percentage of staff with disabilities in higher education is similar to that of staff with disabilities throughout the general workforce'.
- 105 See discussion in Suzanne Abram, 'The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty,' (2003) 32 *Journal of Law and Education* 1, 5-17.
- 106 Rothstein above n 82, 157.
- 107 *SUPRA*, above n 56.
- 108 *Arcibal, Juanito Quiba v University of Tasmania and Ms Angela Medwin* [2003] TASADT 2 (5 May 2003) ('*Arcibal*').
- 109 *McDonald*, above n 60.
- 110 *Howell*, above n 74.
- 111 To explore this finding as to the lack of standardized testing cases, a series of keyword search strategies were formulated and applied to state and federal databases so as to broaden the numbers of cases retrieved that might incorporate this topic but not include the term university. No reported litigation could be identified.
- 112 For a detailed overview of issues related to students with mental and emotional disabilities see Barbara Lee and Gail Abbey, 'College and University Students with Mental Disabilities: Legal and Policy Issues' (2004) 34(2) *Journal of College and University Law*, 349, 353.

- 113 Ibid, 364 citing *Millington v. Temple University School of Dentistry*, No. 04-3965, 2006 WL 2974141, 7-8 (E.D. PA. 13 October 2006) reported in 261 Fed Appx 363 (2008).
- 114 Laura Rothstein, *Disabilities and the Law* 214 (2nd ed, 1997).
- 115 Henry Morris, ‘Shifting the Playing Field: The ADA Amendments Act of 2008’ (4 June 2009) Vol 7(7) *NACUANOTES*, 4. The author concludes that ‘the Amendments will probably have their greatest impact on the types of issues litigated. These will switch from whether the individual has a disability to whether discrimination occurred and whether there were failures to accommodate. This change will make ADA cases more similar to other discrimination cases (age, gender, race) and will probably make it harder for employers to prevail on summary judgment’.
- 116 For a discussion of this question see Diana Pullin and Kevin Heaney, ‘The Use of “Flagged” Test Scores in College and University Admissions: Issues and Implications Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act’ (1997) 23 *Journal of College and University Law* 797; Kristan Mayer, ‘Note, Flagging Nonstandard Test Scores in Admissions to Institutions of Higher Education’ (1998) 50 *Stanford Law Review* 469; see also *Doe v. National Board of Medical Examiners*, 199 F.3d 146 (1999).
- 117 In March 2008, the Government commissioned a review to assess and make recommendations about reforms to the Australian postsecondary education sector. In response to the Bradley Review, the Government announced in May 2009 that it will provide an additional \$5.4 billion to support higher education and research over the next four years. See Denise Bradley, AC, Emeritus Professor, *Review of Australian Higher Education Final Report*, December 2008 and *Transforming Australia’s Higher Education System*, May 2009 <<http://www.deewr.gov.au/HigherEducation/Review/Pages/default.aspx>> at 24 September 2009.
- 118 Patty, above n 44.
- 119 See 34 C.F.R. Part 104, §104.42(b)(4), 104.42(c).
- 120 666 N.E.2d 1376 (1996).
- 121 *Croker*, above n 70.
- 122 *Rana*, see above n 69.
- 123 One of the clearest interpretations of requirement that a student be ‘otherwise qualified’ may be found in a federal district court statement addressing accommodations to graduation tests: ‘[I]f the [disability] is extraneous to the activity sought to be engaged in, the [person with a disability] is “otherwise qualified.”... [But] if the [disability] itself prevents the individual from participation in an activity or program, the individual is not “otherwise qualified.”... To suggest that ... any standard or requirement which has a disparate effect on [persons with disabilities] is presumed unlawful is farfetched. The repeated use of the work “appropriate” in the regulations suggests that different standards for [persons with disabilities] are not envisioned by the regulations’: *Anderson v. Banks*, 520 F Supp 472, 510-11(1981). See also *Anderson v. University of Wisconsin*, 841 F 2d 737 91988); *Hash v University of Kentucky*, 138 S.W. 3d 123 (2004).
- 124 *Anderson v. University of Wisconsin*, 841 F.2d 737 (1988).
- 125 Rothstein, above n 82,143.
- 126 *Wong v. Regents of the University of California*, 410 F.3d 1052 (2005).
- 127 Lee and Abbey, above n 112, 361.
- 128 *Pataki v University of Tasmania* [2000] TASSC 144 (18 October 2000).
- 129 See *Board of Curators of the University of Missouri v. Horowitz*. 435 US 78 (1978), the basic case establishing this principle in the American law of higher education.
- 130 *Doherty v Southern College of Optometry*, 862 F 2d 570 (1988); *Darian v University of Massachusetts, Boston*, 980 F Supp. 77 (1997); *Guckenberger v Boston University (Guckenberger II)*, 974 F Supp. 106 (1997).
- 131 See *Wynne v. Tufts University School of Medicine*, 932 F2d 19 (1991); *Zukle v. Regents of the University of California*, 166 F3d 1041 (1999); and *Millington v. Temple University School of Dentistry*, 261 Fed Appx 363 (2008).
- 132 For an Australian perspective see J Joy Cumming ‘Where Courts and Academe Converge: Findings of Fact or Academic Judgment’ (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 97.

- 133 Rothstein, above n 40, 143. See also *Kinsela*, above n 55 and *Sluggett*, above n 77.
- 134 *Sluggett*, above n 77.
- 135 34 CFR § 104.45.
- 136 *Bird v Lewis and Clark College*, 303 F3d 1015 (2002).
- 137 *Soulitopoulos*, above n 68.
- 138 *Arcibal*, above n 108.
- 139 *Hinchcliffe*, above n 54; *McCormack*, above n 59.
- 140 Equal Opportunity Practitioners in Higher Education, ‘Submission to the Bradley Review of Higher Education – Student Issues: Underpinning Social Inclusion through Access and Participation’ (July 2008) Address by EOPHEA, National Co-convenor to the Go8/DEEWR *Forum on Social Inclusion* held at the University of Melbourne <www.adcet.edu.au> at 1 May 2009.
- 141 *Ibid* 2.1.3.
- 142 *Ibid*.
- 143 Australian National Training Authority, ‘National Strategy – Bridging Pathways’ <<http://www.dest.gov.au/NR/rdonlyres/762DFA7B-A708-4E28-B74B-05407868F4A8/11002/BridgingPathwaysNationalStrategy.rtf>> at 26 May 2009.
- 144 David Mason, Director Disability Rights Policy, ‘Hot Topics in Disability Discrimination Law: Employment and Disability,’ Human Rights and Equal Opportunity Commission (Sydney) 21 June 2006 <http://www.hreoc.gov.au/disability_rights/speeches/2006/topics.htm> at 28 May 2009.
- 145 Australian Bureau of Statistics, ‘4102.0 Australian Social Trends, 2002, Income Support: Trends in Disability Support’ (5 September 2002). <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f958417aeca25706c00834efa/4898>> at 28 May 2009.
- 146 Amendments to Title V §501, Section 6, (a) (1) (e) of the *Americans with Disabilities Act of 1990*, above n 81.
- 147 Rehabilitation Act Amendments of 1998, as amended by the *Workforce Investment Act of 1998*, Pub.L. No. 105-220 (August 7, 1998), 29 U.S.C. §721 (a)(8)(A)(i) (1999).
- 148 See Kyle Murray and Lelia Helms, ‘The Buck Stops Here: Graduate Level Disability Services and the 1998 Rehabilitation Act Amendments’ (2001) 28(1) *Journal of College and University Law* 1.
- 149 See Mark C. Weber, ‘Disability Discrimination by State and Local Government: the Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act’ (1995) 36 *William and Mary Law Review* 1989.
- 150 See Tory Lucas, ‘Disabling Complexity: The Americans with Disabilities Act of 1990 and its Interaction with Other Federal Laws’ (2005) 38 *Creighton Law Review* 871, 874.
- 151 Lee and Abbey, above n 112, 378.
- 152 *Ibid* 379.
- 153 *Arcibal*, above n 108.
- 154 Lee and Abby, above n 112, 382.
- 155 *Ibid*.
- 156 *Shaw v University of Queensland* [1999] IRCA 5 (20 August 1999); *Wilde v University of Sydney* [2002] NSWSC 94 (15 October 2002); *Liu*, above n 66. The provisions governing these cases have been clarified by the recent amendments to the *DDA 2009* (Cth) s 4 to ensure that ‘a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability’.
- 157 *Wecker*, above n 66.
- 158 *H v. S*, above n 66.
- 159 Lee and Abbey, above n 112, 350.
- 160 *Ibid* 378.
- 161 Letter from Rhonda Bowman, Team leader, U.S. Dept. of Education, Office for Civil Rights, to Lee Snyder, President, Bluffton University (December 22, 2004) <<http://www.bazelon.org/pdf/OCRComplaintBluffton.pdf>> at 27 May 2009.
- 162 *Ibid*.
- 163 *Ibid*.
- 164 Lee and Abbey, above n 112, 387.