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**|Educational Accountability Tests, Social and Legal Inclusion Approaches to
Discrimination for Students with Disability: A National Case Study from
Australia**

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Running Head

Educational accountability, inclusion and discrimination: A case study from Australia

Abstract

The UN Convention on the Rights of Persons with Disability (CRPD) promotes equal and full participation by children in education. Equity of educational access for all students, including students with disability, free from discrimination, is the first stated national goal of Australian education (MCEETYA 2008). Australian federal disability discrimination law, the Disability Discrimination Act 1992 (DDA), follows the Convention, with the federal Disability Standards for Education 2005 (DSE) enacting specific requirements for education. This article discusses equity of processes for inclusion of students with disability in Australian educational accountability testing, including international tests in which many countries participate. The conclusion drawn is that equitable inclusion of students with disability in current Australian educational accountability testing is not occurring from a social perspective and is not in principle compliant with law. However, given the reluctance of courts to intervene in education matters and the uncertainty of an outcome in any court consideration, the discussion shows that equitable inclusion in accountability systems is available through policy change rather than expensive, and possibly unsuccessful, legal challenges.

The Context: School Curriculum and Educational Assessment in Australia

Educational assessment plays a significant role in the lives of teachers and students. On a daily basis it can be used formatively in classrooms to identify students' strengths and weaknesses and guide future teaching and learning. It is undertaken for

summative purposes when, at a point in time, judgment is made about students' achievement, usually for reporting progress to parents or carers.

Australia has a strong tradition of quality teacher assessment and classroom practice (Cumming 2010; Cumming & Maxwell 2004). Teacher judgment of student achievement is based in well-developed curriculum resources: for over a century, syllabuses have been developed in each Australian state which all schools and teachers must follow, with procedures in place for monitoring teaching quality and student achievement. Under national accord of the federal and eight state and territory education ministers, the Australian Curriculum, Assessment and Reporting Authority (ACARA) has been established to develop national curriculum in nine discipline areas, with implementation by 2014. National curriculum retains principles of design from state syllabuses, providing frameworks of knowledge and skills with flexibility for adaptation by schools and teachers to suit their community. Further, within this structured environment, education provision is to be tailored to suit individual student needs, including needs of students with disability (ACARA 2011f, 10-11).

Curriculum flexibility is reflected in the use of the term Year, not Grade, to denote social cohort grouping in school classes similar to in England, rather than curriculum levels as in the US (Cumming 2010).

In one state, Queensland, processes for assessment validation and external peer-moderation developed to ensure consistency of teacher judgment of student achievement against academic standards have received international acclaim (Cumming 2010; Marion, Peck and Raymond 2011; Sebba and Maxwell 2005). These processes are used for high-stakes reporting and certification at the end of senior

schooling (Years 11 and 12)—under strong quality assurance guidelines, schools and teachers devise and implement syllabus-based assessments tailored to their community (Maxwell and Cumming 2011). Similar validation and moderation processes are available for classroom teaching and assessment activities in earlier years of schooling through Queensland Comparable Assessment Tasks (QCATs) (QSA 2011). Hence, in Australia, quality classroom assessment within flexible curriculum allows teachers to adapt not only instructional content but also assessment activities to suit both curriculum contexts and learners, within a recognised framework where comparability of student work against curriculum standards can be assured.

External Standardised Tests of Student Achievement in Australia

Educational assessment also serves purposes other than improving students' learning and reporting individual student achievement. In many countries, educational accountability assessments provide data on individual student achievement and, aggregated, on comparative performance of schools, districts, states and national educational outcomes.

Australian educational accountability is implemented through the National Assessment Program (NAP) (ACARA 2011a) including the annual National Assessment Program—Literacy and Numeracy (NAPLAN) for all Year 3, 5, 7 and 9 students, and three-yearly tests in Science Literacy, Civics and Citizenship, and Information and Communication Technology (ICT) Literacy for samples of Year 6 and 10 students. Under NAP, Australian students also participate in international test

programs: PISA (Programme for International Student Assessment), TIMSS (Trends in International Mathematics and Science Study), and PIRLS (Progress in Reading Literacy Study).

Participation in NAP is a condition for receipt of federal education funding to states and territories for government schools (COAG 2011) and to non-government schools (*Schools Assistance Act 2008*, s 17). Details of NAP as listed in the *Schools Assistance Regulations 2009* (Cth) (2.1), matching Schedule D in the COAG National Agreement (COAG 2011, [29]), are shown in Figure 1. Overall, Australian students participate in 21 mandated external standardised tests under the NAP: eight for full cohorts of students—NAPLAN; and 13 national and international tests for samples of students.

[Insert Figure 1 about here]

The underlying premises of external standardised tests such as NAP tests are that they are ‘objective’—providing snapshots of student achievement that can be marked through standardised processes; and ‘fair’—all students take the same tests under the same conditions. Australian education policy emphasises equity of involvement in and access to all aspects of education for all students, especially students with disability (MCEETYA 2008). We practise inclusive education, whereby, to the extent possible, students with disability enrol in mainstream schools and participate, with assistance, in mainstream education. Expectations that students with disability will be

included in and able to participate in all educational activities, including assessment, are established not only in policy but also in legislation.

Antidiscrimination Law for Disability and Education in Australia

Australian anti-discrimination legislation is framed within the context of ratification of international rights treaties including the 2007 United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), (see DDA s 12(8)(ba)). The CRPD recognises the human rights of individuals with disability to full enjoyment of life opportunities without discrimination. It recognises the right of individuals with disability to education ‘without discrimination and on the basis of equal opportunity to ensure an inclusive education system at all levels’ (Article 21(1)). It identifies important components of an appropriate education: enablement of effective participation by persons with disability; ‘reasonable’ accommodations (adjustments) to meet an individual’s requirements; and ‘full and equal participation’ in education and as members of society (Article 24).

Australia’s federal *Disability Discrimination Act 1992* (DDA) prohibits discrimination in education, including admission for enrolment, access or limiting access to any benefit provided by an educational authority, subjecting the student to any other detriment, or development of curriculum or training courses ‘having a content that will either exclude the person from participation, or subject the person to any other detriment’ (s 22). Disability in the DDA is defined broadly to encompass past, existing and future disabilities relating to: total or partial loss of bodily or mental functions; presence of disease or illness; ‘malfunction, malformation or disfigurement

of a part' of a person's body; and emotional disorders (s 4). The definition includes what in educational contexts may be considered learning difficulties: disorders affecting the way a person learns, such as dyslexia; and disorders affecting emotions and behaviour, such as test anxiety and attention disorders that could impact on concentration and completion of standardised tests. *Disability Standards for Education 2005* (Standards) were formulated and passed under the DDA to bring 'clarity and specificity' for education (Minister's Foreword).

The intentions of the DDA and Standards are broadly-framed and demonstrate a commitment to the principle that people with disabilities 'have the same rights to equality before the law as the rest of the community' (DDA s 5) across all walks of life, and including the right to dignity, privacy and choice (Howe 1992). Social expectations expressed in legislation are that education providers and authorities will make reasonable adjustments for students with disability (DDA ss 5, 6; DSE ss 3.3, 3.4). The Standards are unusual in a nation suspicious of 'rights talk' (Dickson 2007), in that they expressly acknowledge *rights* to education opportunities on the 'same basis' as students without disability (DSE ss 4.1, 5.1, 6.1, 7.1, 8.2).

The effect of the Standards, in particular, is that educational institutions must be proactive in seeking out and eliminating discrimination, instead of reactive after a student complaint of discrimination. The Standards set the benchmark for compliance with the DDA, compliance with the Standards amounts to compliance with the DDA (DDA s 34). Therefore, an education provider's primary obligation in order to avoid a complaint of discrimination — and litigation — is compliance with the Standards. Conversely, a legal claim for discrimination by a student under the DDA requires a

threshold argument that the Standards have not been met. Noncompliance with the Standards means that a complainant may argue not only an unlawful failure to comply (DDA s 31), but also that unlawful discrimination for the purpose of the DDA has occurred.

Discrimination in Australia under the DDA may be ‘direct’, the less favourable treatment of a person with disability (DDA s 5), or indirect, the imposition of a condition that is facially neutral but which has an unreasonable discriminatory impact on a person with disability (DDA s 6), that is, a person without disability can comply with the condition but a person with disability is not able to comply. The classic example of direct discrimination in education arises when a student is refused enrolment because of their disability. In assessment, it might arise when a student is exempted from an examination because of their disability if the student sees exemption as exclusion, denial of opportunity, and therefore discrimination. In educational assessment, requirements to be able to hold a pencil and to fill in response ‘bubbles’ on response sheets or to read standard size print in order to complete an assessment could constitute indirect discrimination.

The Standards provide Australian students with disability with the right to equal participation in educational activities (Part 3). Adjustments, ‘measures or actions’ that assist a student with disability (s 3.3), are required in all aspects of educational provision and engagement, including assessment and certification, so that students with disability are able to participate fully in a course or program, in consultation with the student or student’s associate (s 6.2). Adjustments for assessment by a provider include measures to ensure

the assessment . . . requirements for the course or program are appropriate to the needs of the student and accessible to him or her; and . . .

the assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed (s 6.3).

However, while Australia's equity policies are broad, and legislation reflects international and national equity intent, exemptions and caveats under the DDA regime may render lawful a potentially discriminatory failure to provide adjustments. Adjustments must be 'reasonable', determined by the 'balance of interests of all parties affected' (DSE s 3.4(1), Note), including effects on students' ability to participate in courses or programs, costs and benefits (DSE s 3.4(2)). However, if following consideration an adjustment is found to be reasonable, it may still be avoided by the provider if it would create unjustifiable hardship (DDA s 11; DSE s 3.4 Note, 10.2).

The Standards apply to education authorities and organisations 'whose purpose is to develop or accredit curricula . . . used by other education providers' (s 2.1), encompassing ACARA, responsible for both curriculum and the NAP. A further limit to required adjustments of especial relevance to assessment is that the Standards allow an educational provider to maintain the 'integrity' of its assessment requirements and processes 'so that those on whom it confers an award can present themselves as

having the appropriate knowledge, experience and expertise implicit in the holding of that particular award' (DSE 2005, s 3.4 Note).

A technical legal issue could arise as to whether NAP tests form part of a 'course or program'. Under state legislation incorporating compulsory education requirements, students enrol in an education program and all it entails (see, eg, *Education (General Provisions) Act 2006* (Qld), s 5(2)(c)). The right given by the Standards is stated generally as the right 'to participate in education and training, on the same basis as students without disabilities' (s 5.1), including activities that are 'part of the broader educational program' (s 5.3.(e)). Given the compulsory nature of school and student participation in NAP and their identified purposes, it is argued NAP tests are part of a broader educational program. In any event, the parent legislation to the Standards, the DDA, expressly contemplates unlawful discrimination in 'subjecting the student to any other [educational] detriment' not expressly listed in the prohibition section (DDA s 22(2)(c)). Exclusion from a testing regime may well amount to such 'other detriment'.

Inclusion of Students with Disability in Australian and International Sample Tests

The purpose of national and international sample tests in the NAP is to provide vignettes of student achievement in Australian schools in specific areas at specific year levels or ages. Outcomes inform state comparisons of student achievement (MCEETYA 2009) and international comparisons for international tests. While

sampling tests are of no import for individual students or schools, they are considered important accountability information on national educational progress and can direct state (Wilson 2010, 52) and national policy (see, eg, Garrett 2010).

National and international comparison tests currently have the simplest response to inclusion of students with disability. Schools for students with intellectual disability are excluded from the population from which test samples are drawn. If selected as part of the random sample, students with disability in regular schools are eligible for exemption from the national sample tests (see ACARA 2010–Science Literacy; MCEETYA 2007–ICT; MCEETYA 2009–Civics and Citizenship). Criteria for exemption are:

Functional disability: the student had a moderate to severe permanent physical disability such that he or she could not perform in the assessment situation.

Intellectual disability: the student had a mental or emotional disability and cognitive delay such that he or she could not perform in the assessment situation. (MCEETYA 2009, 12)

Students with intellectual or functional disability may also be excluded from participation in international comparison tests (Martin et al. 2007–PIRLS; OECD 2010–PISA; Olson et al. 2008–TIMSS) on similar criteria:

- Intellectually disabled students, defined as students who are considered, in the professional opinion of [school staff], to be intellectually disabled, or who have been assessed psychologically as such [including] students who

are emotionally or mentally unable to follow even the general instructions of the assessment . . .

- Students with functional disabilities, defined as students who are permanently physically disabled in such a way that they cannot perform in the PISA testing situation . . . (OECD 2010–PISA, 25)

Guidelines state countries may need to exclude students who would be ‘very difficult or resource intensive to test’, including students with disability (Martin et al. 2008, 408; Mullis et al. 2007, 290). In PISA 2009 exclusion rates for students with disability for Australia, England and the United States of America (US) were 1.27 per cent, 2.27 per cent, and 4.05 per cent, respectively (Brzyska 2011, 6). Exclusion limits are set at five per cent to monitor country compliance with sampling specifications (OECD 2010, 24). Throughout, difficulty in participation is attributed to the student with disability—exclusion is on the basis of disability that prevents them from ‘participating’ or ‘performing’ in the assessment (Martin et al. 2007, 109; MCEETYA 2009, 12).¹

In general, standard test booklets are administered to all students under strict conditions (OECD 2010, 26), translated for international use. Aspects of tests can be adapted to national contexts, such as the specific words or symbols, under consultation (Bradshaw et al. 2010, 6). PISA does provide a shortened one-hour test for students with disability and more flexible test-taking conditions. However, few

¹ A small percentage of students do complete tests such as PISA using standard forms. For example, in Australia, 107 students with functional or intellectual disability are recorded as participating in PISA 2003 (OECD 2007, p. 181). However, they do so with no recognition of their assessment adjustment needs and the validity of outcomes is questionable.

countries and schools have ‘opt[ed] in’ to use it (Brzyska 2011, 3). Australia does not appear to make this test form available.

The issue of accommodations for students with disability has arisen in international test forums in recognition that inclusive education and provision of accommodations in standardised assessments are widespread practice (Ben-Simon 2011). The desirability of inclusive test practices is seen as a social initiative at conflict with psychometric practices for high test score comparability across countries, the latter identified as ‘more crucial in high-stakes testing’ (Ben-Simon 2011, 2). Ben-Simon has recommended students in special education facilities should continue to be excluded, due to complex accommodation needs and probable inability ‘to manage PISA tasks at all’ (Ben-Simon 2011, 3). Accommodations are recommended for other students with disability, with eligibility controlled by a quota and gradual implementation for monitoring (Ben-Simon 2011, 6). Accommodations should be ‘practical, inexpensive and standardized’ (Ben-Simon 2011, 4).

In Australian policy terms, current testing practices for students with disability in the national and international sample tests are not inclusive and potentially offend the requirement in the Disability Standards for reasonable adjustment. An aggrieved student could, therefore, bring an action under the DDA for breach of the Standards (DDA s 32). In addition the student could claim that their deliberate exclusion from the test is direct discrimination (DDA ss 5, 22), or alternatively, that lack of a modified test forms creates a condition with an indirectly discriminatory effect (ss 6, 22). The question is, if a legal challenge arose in Australia, would it succeed? The relevant considerations affecting the likelihood of success will be discussed later.

Inclusion of Students with Disability in NAPLAN

NAP literacy and numeracy tests (NAPLAN) emerged from goals in the first joint ministerial statement, the Hobart Declaration (MCEETYA 1989): to ‘promote equality of education opportunities’, to ‘provide for groups with special learning requirements’, and to develop skills in literacy and numeracy. The subsequent Adelaide Declaration stated ‘[s]chooling should be socially just . . . students’ outcomes from schooling [should be] free from the effects of negative forms of discrimination based on . . . disability’ (MCEETYA 1999, [3.1]).

In conjunction with the Adelaide Declaration, an Australian National Literacy and Numeracy Plan (NLNP) was launched, promoting:

- comprehensive assessment of all students as early as possible, to identify those students at risk of not making adequate progress towards the national numeracy and literacy goals;
- intervening as early as possible to address the needs of students identified as at risk (DEST 1998).

Thus early accountability focus was on students at risk, including students with disability, and appropriate strategies to address their identified learning needs (DEST 1998, [1.1]). Minimum expected literacy and numeracy benchmarks were established for students in Years 3, 5, and 7. Reference to these in the *State Grants (Primary and Secondary Education Assistance) Regulations 2001* (Cth) (regulation 6.2) contained

the proviso that ‘it is recognised that the performance targets may not be met in respect of the very small percentage of students who have severe educational disabilities’. Benchmark standards were replaced by curriculum-based National Statements of Learning (CC 2005) to inform NAPLAN standards from 2008.

NAPLAN test outcomes are high stakes for schools, with all individual school results published on the *MySchool* website (www.myschool.edu.au). For each year level and area of testing, the percentage of students at or below minimum acceptable standards is identified, as well as performance at four higher levels of achievement,.

The tests require strict compliance with standardised procedures. Test accommodations for students with disability are available, if used regularly with students in classrooms, including:

- scribes
- assistive technology
- extra time
- rest break
- large print, screen reader, Braille, coloured overlays
- oral sign support
- reading to students. (ACARA 2011b, 17-19)

Accommodations such as extra time and reading are restricted, ‘[s]pecial provisions must be within reason and must not compromise assessment conditions or the rigour of the assessment standards’ (ACARA 2011b, 13-14). Given the high stakes nature of

NAPLAN, schools invest considerable effort practising the tests. Schools use past tests and exemplar items. However, no practice tests or items are available in modified forms for students with disability, omission that, of itself, may be discriminatory failure to make reasonable adjustment.

Not all students with disability are expected to be able to access NAPLAN tests, although students with ‘significant intellectual or complex disabilities’ should be given the opportunity to participate (ACARA 2011b). Students with disability unable to participate in NAPLAN testing using available accommodations are exempted.

Exempted students are deemed to be below the minimum expected standard for the Year level; they have no opportunity to demonstrate the extent of their learning.

Students who qualify for exemption but who attempt the tests are counted as ‘assessed students with the score that they achieved’ (ACARA 2011b, 10, 5.3). Outcomes for both these groups of students are counted in school profiles, creating disincentive for Australian schools with large enrolments of students with disability.

On the face of it, accommodations for NAPLAN offer inclusive opportunities for students with disability. However, it is clear that not all students are able to participate in NAPLAN, and for some available accommodations may not be adequate. The treatment of students who are exempted (excluded) clearly does not reflect inclusive education policy addressing the needs of all students at risk. Moreover, to deem such students as failing to meet the minimum expected standard suggests less favourable treatment, which may offend the DDA (DDA s 5).

Inclusion of Students with Disability in Educational Accountability Testing in England and the US

National standardised educational accountability testing occurs in England and the United States of America (US). In England, Key Stage 2 assessments undertaken by students at the end of elementary school, approximately 11 years of age, include external tests as well as teacher assessments in English and mathematics.

Accommodations similar to those for NAPLAN are available for students with disability. However, students still unable to access external tests may be identified as proficient at the expected Key Stage 2 level based on teachers' assessments. Further, students with disability not working at Key Stage 2 level may be assessed at the level suitable for their educational program.

In the US, the *No Child Left Behind (NCLB) Act, 2002* has specific focus on achievement of students with disability. Accommodations to standardised tests similar to those in Australia and England are available for students with disability in state-based accountability testing. Importantly, NCLB supports alternative assessments for students with disability when accommodations are insufficient to enable participation (s 1111(b)(2)(I)(ii)). If grade-level expectations are not appropriate, students with disability may be assessed using alternative assessments against modified achievement standards aligned with state curriculum expectations or their Individual Education Plans (DoE[US] 2007). While implementation of these principles in the US is problematic, with statistical limits imposed on how such outcomes can be reported for accountability (DoE[US] 2007), the intention reflects focus on educational outcomes and appropriate assessments for students with disability.

Therefore, both England and the US, under similar educational accountability expectations to those of NAP in Australia, have more flexible assessment arrangements through which students with disability can demonstrate their levels of achievement, through either alternative assessment forms using classroom evidence or alternative standards suited to the students' academic expectations.

NAP and Compliance with Australian AntiDiscrimination Legislation

The object of the Disability Standards is to support full enjoyment of and participation in education opportunities on the same basis as those without disability. As noted previously, it is both unusual and significant that the Standards acknowledge education rights. While intentions are broad, however, within legislation caveats apply with respect to unreasonableness and unjustifiable hardship. Key terms are benefits and detriment. Further, the Standards protect 'integrity' of assessment.

Compliance of NAP practices for students with disability with the Standards has not been challenged. Indeed, in general, compliance of educational activities with the Standards has yet to be examined in any detail by Australian courts, with only one Standards case decided to date, *Walker* (2011). That case concerned the exclusion of a boy with behavioural problems from a mainstream school and the court found that the Standards were not breached.

It is evident that many students with disability in Australia are not able to participate in NAP tests on the same basis as students without disability. First, no adjustments at

all are currently available for national and international sample tests in NAP (Figure 1, Table 2). Students with disability either attempt the tests in standard form, and possibly do not do well, or they are exempted. Such exemption could be considered by students with disability as in breach of the Standards requirement for reasonable adjustment. As noted earlier, if the Standards are not complied with, which is in itself unlawful (DDA s 32), the student also has the opportunity to bring a discrimination claim under the DDA (DDA s 34). The affected student could argue that they have been subjected to less favourable treatment — exclusion from the test — and hence, direct discrimination (DDA s 5). The requirement that students comply with a condition (completing standard test forms with no or unsuitable accommodations) could also constitute indirect discrimination (DDA s 6).

The defence to such claims would likely be that adjustments that would allow the student to complete the test would be unreasonable, or, if reasonable, would impose unjustifiable hardship and that, as such, no failure to make reasonable adjustment and, by implication, no discrimination, have occurred. The defence may rely on arguments that adjustments would be unreasonable on the basis that they would undermine the ‘integrity’ of the test (DSE s 3.4(3)) although outcomes for the NAP do not provide an award or certificate. The defence may argue that adjustments are unreasonable on the balance of interests, taking into account the nature of the disability, effect on the student and others, cost and benefits (DSE 3.4(1)(2)). Finally, the defence may argue that even a reasonable adjustment should be disallowed if to make the adjustment would cause unjustifiable hardship. While hardship takes into account a similar range of factors to reasonableness — effect of disability, costs and benefits — it also allows consideration of the ‘financial circumstances and the estimated amount of

expenditure' (DSE s 10.2(3)). However, given the intention of such accountability testing originally to identify students at risk, including students with disability, and to provide information to assist in early intervention, financial hardship is a problematic argument compared to the hardships that students with disability face in trying to complete, or being unable to complete, the NAP tests — for example, inadequate time extensions or breaks for students with attention disorders or physical impairments, inadequate time for enlarged print or Braille forms, or lack of a Braille form due to reliance on schools to have the resources to prepare such materials.

Benefits and Detriments, and Unjustifiable Hardship: NAP Sample Tests

As noted, above, an enquiry into the reasonableness of an adjustment will require a balancing of the interests of those concerned and, in particular, an enquiry into the effects of the adjustment on the student and on 'anyone else affected, including the education provider, staff and other students', and into the 'costs and benefits' of the adjustment. Whether a reasonable adjustment causes unjustifiable hardship will require consideration of 'the nature of the benefit or detriment likely to accrue to, or be suffered by, any persons concerned' should the adjustment be made (DSE s 10.2; DDA s11(1)(a)). An enquiry is mandated, it is suggested, into the benefits and detriments of an adjustment, financial and personal and practical, for the student, the education provider and others affected.

No clear benefits are derived from NAP sample tests for individuals or schools, although schools are advised that they benefit 'in a number of ways' as 'students [will] have the opportunity to engage with state-of-the-art assessment materials, some

of which are delivered online ... an excellent learning opportunity for students' (ACARA 2011c). At issue, however, is possible detriment to students' wellbeing when students with disability are excluded from educational activities in which other students are not only able to participate, but required to do so. Participation in tests may not be everyone's idea of enjoyment, but the right to participate is denied. The detriment for students with disability is loss of the sense of belonging and the dignity endorsed in the CRPD and legislation. It is also denial of recognition of the extent to which students with disability may value academic learning (OECD/EC 2009, 145-7).

While authorities and courts may question whether a student with disability denied an opportunity to participate in a test has suffered an adverse effect or detriment sufficient to require development of more inclusive practices, students with disability have demonstrated acute awareness of the sense to which they belong and are able to participate in educational activities and opportunities available to students without disability. Structures and boundaries set by systems, schools and teachers (Davis and Watson 2001) and assumptions by others about the capacities of students with disability (McMaugh 2011) contribute to ongoing discrimination in practice. Research using the voice of students with disability on a range of educational issues is still scant; their perspectives on inclusion in or exclusion from assessment, and standardised tests specifically, do not yet appear to have been explored.

Australian case law on the balance of interests of benefits and detriments is limited. Australian courts may read down individual benefits and the need for proactive and positive attention to provide adjustments for students with disability, as in *Walker* (2011) where a student was found to have been treated less favourably but failed to

establish a detriment as a result. In *Walker*, the court provided some guidance as to how the positive obligation of the Disability Standards for provision of reasonable adjustments may be interpreted, stating that the Standards

require no more of a government agency such as the [Victoria Education] Department than that, where necessary, it be alert to the need to adjust its normal practices when dealing with a disabled student; to consider, in consultation with the student or his or her parents, what reasonable adjustments to normal practices should be made to assist the student, and then to decide whether a particular adjustment is necessary and, if so, to implement it. (*Walker* 2011, [274])

This would appear to weight the balance of interests in favour of test developers and administering authorities over individual students. However, when considering optimal outcomes for a student, the Federal Court has held that detriment was ‘masked’ but did occur when a student was not provided with optimal reasonable adjustment in provision of special services for her disability (*Hurst* 2006). In a preliminary hearing in this matter, Kirby P’s commentary from an earlier case (*Haines* 1987) was cited. He noted that the phrases ‘less favourably’ and ‘on the ground of’ were imprecise, permitting wide interpretation but where the ‘motive, reasons or suggested justifications of the detriment are irrelevant, if it can be shown that there is differentiation of treatment, which results in detriment to the person affected’ (*Hurst* 2005, [58]). Detriment is a nuanced condition.

Outsiders may see protection of students with disability from possible repeated failure on NAP sample tests as a benefit. This may not be the perspective of students. It should not be assumed that students with disability are also low academic achievers. In *Hinchliffe* (2004), for example, a university student who was a high achieving occupational therapy student argued (unsuccessfully) that her results would have been even better had her learning materials been more suitably adjusted to accommodate her visual impairment. Another Australian case, *Bishop* (2000), provides some precedent in relation to adjustment to assessment. Bishop, a student with dyslexia, was successful in establishing that lack of accommodations for his disability on a written examination had adverse effect, leading to failure and a delay in his career, and was awarded \$3,000 to redress loss and damage (detriment). The Australian Human Rights and Equal Opportunity Court (HREOC) found that the respondent ‘required [Bishop] to complete the examination in the same two-hour period as the other, able-bodied students’ and that ‘[t]here [was] a real chance that had [the complainant] been given an extra half-hour, or had the examination been conducted orally in his case, he would have passed’ (*Bishop* 2000, [1]). HREOC found the imposition of a condition with which the student could not comply, but students without his disability could, constituted indirect discrimination and was unlawful [1]. The student was not offered the alternative of an oral examination.

National and international tests in NAP do not explicitly require students with disability to be excluded. However, to participate, the condition imposed is that students must complete the standard external tests, a condition which they cannot meet but others without the disability can meet—indirect discrimination. The second question is whether the condition is reasonable. The question may have two parts. Is

the condition reasonable for the international sample tests, and is the condition reasonable for the national sample tests?

For the former, for tests such as PISA, PIRLS and TIMSS, Australia is not the only nation involved in test development and administration. Accommodations for students with disability within restrictions may be introduced, with the recommendation that access should be inexpensive. However, the costs invested by governments in international test programs are substantial. Estimates range from \$2.2m for PISA 2006 in Canada (CMEC 2007), and \$25m for PISA in 2006 and \$15m per grade for TIMSS in 2007 in the US (Scheider 2009). These amounts do not include direct and indirect costs to school districts and schools, or to provinces or states. Such programs of assessment are not small-scale financial activities, funds needed for more inclusive assessments should not be viewed automatically as excessive.

Human rights and antidiscrimination legislation operate in many countries participating in international tests such as Europe, including the United Kingdom (UK), and the US. Equity and discrimination issues of [failure in] inclusion of students with disability in international tests are therefore of international consequence. Challenges on the basis of discrimination may receive more favourable treatment in international human rights courts.

For Australia's national sampling tests, the government funds and takes ownership of the tests and outcomes. Courts are reluctant to intervene in matters of public policy argued as for the greater good, such as the NAP. Therefore, the Australian government may be successful in claiming that meeting the needs of a small number

of students would create undue hardship in terms of cost and convenience over the benefits and detriment that result for students with disability.

Benefits and Detriments, and Unjustifiable Hardship: NAPLAN Tests

NAPLAN originated from a focus on equitable outcomes for all students, identification of students at risk—originally specified as including students with disability. National policy and education goals still address equitable outcomes for students with disability.

Implementation of NAPLAN, while used for accountability purposes, is still argued on these same bases. Benefits of NAPLAN presented to parents regarding individual student reports state that NAPLAN is a ‘valuable tool’, ‘test[ing] the sorts of skills that are essential for every child to progress through school and life’, complementing teacher assessment data, while showing how students’ achievement compares to other students in Australia (ACARA 2011e). NAPLAN is still seen as providing ‘signals if students need more support’ (DET (NSW) 2010, 2).

Current provisions in NAPLAN, on the surface, appear to be compliant with the DDA and Standards, with ACARA providing ‘reasonable adjustments’ for students with disability (ACARA 2011d). Only students with severe intellectual disability are expected to be exempted (ACARA 2011e). Other students are encouraged to participate although accommodations may not be adequate.

However, for many students with disability, current procedures for inclusion in NAPLAN are nonexistent or inadequate. The identified detriment of nonparticipation is still possible. Further, students with disability who cannot participate in NAPLAN do not receive individual reports of educational achievement, areas of strengths and weaknesses, and performance comparative to other students. They miss out on benefits identified for other students and parents, and suffer the social detriments of participatory exclusion identified earlier. They suffer the additional, and more consequential, detriment of being deemed academic failures. The renowned physicist, Stephen Hawking could fail NAPLAN Year 3 tests because of access difficulties. In terms of the purposes of NAPLAN, clear benefits are expected to flow to students with disabilities and their parents/carers, versus social detriment that could result from exclusion.

An approach to inclusion of students with severe physical impairment being trialled in Australia is an interactive pdf version of the NAPLAN tests enabling response by radio button or typing in a text box for students with severe vision problems but not Braille proficient students or students with severe physical disability (ACARA 2011b, 16-17). This is clearly expensive technology. It would appear that a defence to claims for more inclusive practices would not be made by the Australian government or test authority on the basis of unjustifiable hardship. However, in current policy, responsibility for implementation of available accommodations for students with disability is allowed to depend the resources of ‘each school, state and/or territory’ (ACARA 2011d). The interactive pdf version may not be available to all schools and, hence, all students.

Whether current accommodations and adjustments within NAPLAN for all students would be deemed 'reasonable', on the balance of interests of all parties, under the Disability Standards, if a legal challenge occurred, is unknown. Again, detriment is a nuanced term. The two to five per cent of students who are currently affected may appear a small proportion of the school population. However, this represents up to one in twenty students. There were 3.5m students enrolled in Australian schools in 2010 (ABS 2011), more than 300,000 students in each of the NAPLAN test years. So, there were up to 175,000 affected students overall, up to 15,000 in each of the NAPLAN test years. When impact is being considered, absolute numbers are more meaningful than percentages. An argument of unjustifiable hardship for the program designed to assess equity of learning outcomes for all Australian students appears illogical.

England and the US have not argued unjustifiable hardship, cost or convenience to counter the weight of benefits of participation by students with disability in systems such as NAPLAN versus detriments from nonparticipation. In England and the US, alternative processes based on teacher assessment evidence allow students with disability to demonstrate their achievements against expected curriculum standards. In the US, the well-known *No Child Left Behind* legislation (NCLB) mandates the inclusion of students with disability in educational accountability assessments, and provides funding for these students to be assessed using 'alternate assessments' such as teacher-moderated portfolios of students work against expected standards if necessary (NCLB 2002, s 1111(b)(2)(I)(ii); see also Cumming 2012; Karger and Boundy 2008). Work is also being undertaken in the US on modified standardised test formats that maintain construct validity and reliability while providing greater access for students with disability (Elliot et al 2010).

In England, when students are not able to participate in national achievement tests used for accountability purposes (e.g. the Key Stage 2 English and mathematics external tests), teachers have been able to use their own assessments to assert that students have achieved expected attainment levels, with the need to be able to provide student achievement evidence to justify such assertions (DfE[UK] 2010b, 5). These teacher statements of attainment are then included in published league tables.

Different reporting scales can also be used for students with disability who are performing below the expected national curriculum levels for their age group. While outcomes for these students are not publicly reported for individual schools, a national report on outcomes is prepared for students with disability, with outcomes considered in terms of the nature of the students' disability characteristics (DfE[UK] 2010a).

Australia's Disability Standards indicate that 'where a ... program necessarily includes an activity in which the student cannot participate, the student [should be] offered an activity that constitutes a reasonable substitute within the context of the overall aims of the course or program' (s 5.3(e)). Any challenge in Australia for fuller participation in NAPLAN for students with disability should not be on the expectation of more expensive accommodations but on the expectation that an alternative process will be made available to enable full participation.

Appropriate Educational Accountability Standards for Students with Disability

A final issue where discrimination occurs in Australia's educational accountability testing is the use of recognised inappropriate standards for students with disability.

The DDA, 1992 (s 22) identifies discrimination by a provider as development of curriculum ‘having a content that will either exclude the person from participation, or subject the person to any other detriment’. The Standards place positive obligation on provision of appropriate and negotiated programs, curriculum and assessment and certification requirements for participation by students with disability (s 6.3(a)). It was noted at the outset by the Australian government that a small percentage of students with severe intellectual disability may not meet the expected curriculum standard for a Year level, although this is no longer stated. Both the English and US accountability systems adapt accountability standards to suit expected educational achievements of students with intellectual or other disability. Australian students with intellectual disability undertake modified curriculum in schools through Individual Education Plans. A further issue in compliance of the NAP with the intention of CRPD and antidiscrimination legislation is why appropriate educational accountability standards are not in place for these students to demonstrate success in their own learning growth, and to have the dignity afforded to other students.

Educational accountability reporting occurs in both England and the US on outcomes for students with disability. While public monitoring of educational outcomes for students with disability is flagged for the National Report on Schooling, at the time of writing, the Schools Assistance Regulations 2009 (Cth) (reg 3.2(1)(f)) indicate that a definition of disability that would be used for such purpose is still forthcoming.

Conclusion

Participation in NAP international sample tests is funded by the Australian government. Whether the lack of inclusive practices would be found to be noncompliant with the DDA and Standards is hard to determine. Perhaps the Australian government and ministers of education should examine commitment to policy implementation to measure a system's educational wellbeing that exclude students with disability—students whom all other policy indicates are valued and significant members of society. Other countries who participate in these tests may also identify concerns.

Following the same logic, the Australian ministers of education should reconsider legislation and policy to determine whether the national sampling tests are compliant with the intent, if not the letter of the law, and whether exclusion of students with disability from participation constitutes denial of their right and dignity as valued learners. Policy enactment through NAPLAN, originally focused on identifying and addressing the needs of students at risk, including students with disability, must be reexamined. It cannot be effective when it excludes those students it otherwise legislates to protect.

We provide this national case study to show that understandings of equity intentions in assessment practice and in law may not be compatible. Australia would identify itself as a high equity country with considerable attention to the needs of individuals with disability and legislation to protect their needs—in the case of the Standards, a proactive expectation. However, as this analysis shows, a country that has been seen to offer exemplary assessment practices to other nations is turning its back on a significant proportion of its students. In looking to evaluate the achievements of its

educational system, one sector is excluded wholly or in part. Educational accountability practices in England and the US demonstrate equitable concern with the learning outcomes and progress of students with disability. They not only provide more flexible assessment practices suited to the needs of students with disability, they visibly monitor and value their achievement and progression. This does not occur in Australia, where students with disability at best participate with controlled accommodations or are excluded and deemed academic failures. As identified at the beginning of this paper, comparable and reliable methods for teacher-based assessments are already in place at a number of Year levels in Queensland, and have been explored for implementation at a national level for end of schooling certification under the auspices of ACARA (Marion et al. 2011). Alternative processes already exist in Australia, practised to greater technical reliability than elsewhere, whereby all students with disability could be included in educational accountability against NAPLAN standards without discrimination, either direct or indirect, and without authorities having to raise arguments that to do so would be unreasonable or impose financial or other hardship.

Learning outcomes and needs for all students are identified as valued under Australian policy, antidiscrimination law and in particular the Disability Standards for Education. As a country that espouses equity of educational outcomes and participation for all, a social, if not legal, responsibility is in place to ensure such valuing occurs in very publicly-visible education practice. Legal challenges to facially-discriminatory practices may or may not be successful. However, it should not be necessary to test legal interpretations of compliance as practical assessment alternatives exist. Other countries also may need to examine their own practices, legislated intentions and

policy to consider how well students with disability are being treated in educational assessment activities. Principles of inclusiveness must be addressed.

Overall, we recommend that serious consideration needs to be given to appropriate inclusion of students with disability in educational accountability practice both within Australia and internationally: through consideration of appropriate accommodations for all students; through identification of appropriate standards for reporting for all students; and through consideration of alternative assessment processes to assess students with disability against expected curriculum standards. Further, and especially in international accountability studies, more attention needs to be paid to the assessment and nonassessment of students with disability in two ways. First, in reported outcomes, more attention needs to be paid in interpretation of outcomes, and tables of comparison of national achievements, to the impact of inclusion and exclusion of students with disability from mainstream schooling, as opposed to identification of the percentage of students who did not participate in testing due to functional or intellectual impairments. It is possible that outcomes for countries with inclusive practice are distorted in comparison to those for countries where students with disability may either not be in school, or have completed any schooling by the age level of tests.

Secondly, as noted, more consideration needs to be given to the development of test forms and processes that students with mild, moderate, and possibly severe disability can complete. As in the US and England, results for these students should be reported separately. Current international test programs such as PISA already collect data on students excluded from testing on the basis of disability (see OECD 2010). It would

not be a major change to collect data on students with disability who are included in testing and their performance.

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