In this paper I propose to examine several recent decisions involving complaints of discrimination made against educational authorities. Two of the complaints were made pursuant to the provisions of the *Disability Discrimination Act (Cth) 1992* and the other two were made pursuant to the *Anti Discrimination Act, 1991 (Qld)*. Whilst these latter two complaints were made under different legislation, the educational authorities sought to rely on the 'unjustifiable hardship' provision similar to that contained in the *Federal Act*.

These cases obviously differ factually and involve quite different discrimination issues.

I intend and hope that this paper will be of practical benefit to schools in assisting them to develop guidelines concerning the enrolment of students with disabilities and, in examining the cases in question, to highlight how a complaint may never have eventuated if things had been done differently.

Before examining the cases I propose to briefly examine the relevant provisions of the federal Act.

'Disability' is defined in Section 4 of the *Disability Discrimination Act* to mean:

1. total or partial loss of the person's bodily or mental functions;
2. total or partial loss of a part of the body;
3. the presence in the body of organisms causing disease or illness;
4. the presence in the body of organisms capable of causing disease or illness;
5. the malfunction, malformation or disfigurement of a part of the person's body;
6. disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction;

7. and a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior.'

The definition includes a disability that:

8. presently exists;

9. previously existed but no longer exists;

10. may exist in the future; or

11. is imputed to a person.

An 'Educational Institution' is defined in Section 4 as meaning 'a school, college, university or other institution in which educational training is provided'.

Section 5 of the Act deals with disability discrimination. Sub-section 5(1) provides that:

'For the purposes of this Act, a person ('discriminator') discriminates against another person ('aggrieved person') on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.'
Sub-section (2) goes on to provide that in determining whether the circumstances are materially different, the fact that a person with a disability requires different accommodation or services which would be unnecessary for other people is irrelevant.

Section 22 deals with discrimination in education. Sub-section (1) provides that:

'(1) It is unlawful for an educational authority to discriminate against a person on the ground of a person's disability or a disability of any of the other person's associates:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.'

Sub-section (4) of Section 22 provides that:

'This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority.'

Section 11 provides that in determining what constitutes unjustifiable hardship all relevant circumstances of the particular case are to be taken into account including:
(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and

(b) the effect of the disability of a person concerned; and

(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and

(d) in the case of the provision of services, or the making available of facilities - an action plan given to the Commission under Section 64.'

Finney v Hills Grammar School

The first case I propose to consider is the much publicised case of Finney v Hills Grammar School. The complaint was initially heard by the Human Rights & Equal Opportunity Commission with the decision of Commissioner Innes was delivered on 20 July 1999.

In his reasons, the Commissioner found that the Hills Grammar School had not made out the defence of unjustifiable hardship and he concluded that the decision of the school in refusing enrolment was an act of unlawful discrimination on the ground of Scarlett's disability.

The complaint

This case arose out of an application by Mr and Mrs Finney to enrol their daughter Scarlett in the kindergarten class at the Hills Grammar School.

The application was lodged on 3 March 1997. At the time, Mrs Finney advised the school that Scarlett had the condition of spina bifida. Her covering letter stated:

'Scarlett has spina bifida and requires a school with certain specifications, for example, level walkways, and grounds, preferably no steps into classrooms etc, wheelchair accessibility.'

Scarlett and her parents subsequently attended an interview with the Registrar on 26 March 1997 when a general discussion took place about Scarlett's needs at school and the Registrar was provided with contact details of persons who could verify this information and also speak generally on the condition of spina bifida. A tour of the school was undertaken by Mrs Finney, who was clearly impressed both by the school's facilities and the specific statement in the school prospectus that the school catered for children with physical disabilities.

Subsequently the Registrar contacted Mrs Finney and advised the following:

X he had concerns as to how Scarlett would fit in;

X Scarlett would be the first and only child with spina bifida to attend the school;

X the school would only be entitled to funding for two weeks wages for a teacher's aide for the whole year;
they should not put all their hopes in the school and should consider other schools located nearby.

A further interview was held with Scarlett, her parents and the Registrar. Scarlett's toileting needs were obviously of major concern to the Registrar as she required catheterisation and occasional nappy changing due to lack of bladder and bowel control.

A community nurse was available to attend to Scarlett's needs once a day, a fact which was communicated to the Registrar by Mrs Finney.

By August 1997 Scarlett's mother telephoned the school and enquired of the status of her enrolment application. She was anxious to secure a position for Scarlett in the school year commencing 1998. The Registrar expressed further concerns as to how the school would cope with Scarlett in the classroom. Mrs Finney stated that she advised the Registrar that Scarlett could manage with little assistance and would become more independent as she got older. The Registrar advised that the next step was to arrange a time for Scarlett to meet the kindergarten teacher and that he would contact Mrs Finney to arrange a suitable time.

The next contact occurred on 11 August 1997 when the Registrar telephoned Mrs Finney to advise her formally that Scarlett's application had not been successful. This was confirmed by letter dated 20 August 1997 which stated that:

'An important factor in the consideration of each application is the ability of the school to meet the special needs of every child, given the level and nature of available resources.
Following a thorough examination of Scarlett's special needs and the school's ability to meet them, we do not believe that we have adequate resources to look after her in the manner which she requires and in a way that is suitable for her. It is with great regret that we have reached this conclusion.'

A complaint was lodged by Mr and Mrs Finney on behalf of Scarlett with the Human Rights & Equal Opportunity Commission on 1 September 1997. The school sought to rely on the exemption contained in Section 22(4) relating to unjustifiable hardship. The Commissioner hearing the enquiry was required to determine whether firstly, if Scarlett would require services or facilities that were not required by students who do not have a disability and secondly, whether the provision of the additional services or facilities required by Scarlett would impose 'unjustifiable hardship' on the school.

At the hearing before the Commission a good deal of evidence was heard from allied health professionals relating to the toileting needs and mobility restrictions of Scarlett.

Evidence was given by an occupational therapist familiar with Scarlett's needs that the premises and facilities were accessible to her and could be managed by her with relatively minor changes.

The changes included:

X alterations to the toilet cubicle so as to contain a lockable cupboard and drop-down hand rails installed close to the toilet;

X hand rails added to stairs;
X modification in the distances to be travelled each day by Scarlett by re-arranging the curriculum. Alternatively, this could be overcome by the provision of a powered wheelchair or scooter to cover long distances and to negotiate uneven pathways leading to playing fields.

The occupational therapist also stated that in her view Scarlett's potential for development in a regular class would be the same as any other child although some direction may be needed for Scarlett to stay on task.

The principal of the school gave evidence of the financial position of the school. This, of course, was a relevant consideration in determining 'unjustifiable hardship'. In the case of the Hills Grammar School, as with the majority of independent schools, the aim of the budget is not to make a profit but if any surplus is made, it goes towards funding capital projects and other services for the students. School fees represented 75% of the school's income with the remaining 25% from Commonwealth and State funding. At the time of hearing of the complaint before the Commissioner the level of the school debt was approximately $5.4m.

The school was funded as a category three school but students with disabilities were able to be funded at the category 12 level. He also gave evidence that 'one off' capital grants were available to assist disabled students and he believed that this type of grant was available up to $10,000.

In his evidence he stated that he had assessed Scarlett's application with the Registrar and had formed these views as to Scarlett's needs:
The school would need to have teachers who were interested and willing to accept the additional responsibility of teaching and supervising Scarlett.

Teachers would need to be trained so that they knew how to look after her with an estimated cost of $2,500 per training session.

Special toilet facilities would need to be provided.

All parts of the school would need to be accessible by wheelchair.

A full time special integration aide would be need to be employed to look after Scarlett's special needs at an estimated cost of between $20,000 - $25,000 per year but which cost was revised at the time of the hearing before the Commission to be $30,000 - $35,000.

The school would need to organise special transport arrangements and care for excursion purposes.

The curriculum would need to be modified in special areas.

Special plans would need to be implemented in order to integrate Scarlett into school life in the playground.

They had also formed the view that they would need to have someone available to catheterise Scarlett twice a day, have someone available on a regular basis to change her nappy, provide a private toilet area, provide someone to push her wheelchair around the school and ensure that there was someone to accompany Scarlett on excursions to care for her.

The headmaster and the Registrar concluded that the school could not cater for Scarlett, primarily because the level of current funding would not be sufficient to meet her needs. He was concerned that without a full time integration aide the possibility existed that Scarlett would
consume too much of the teachers' time to the detriment of other children in the class. He was also concerned at the potential industrial and occupational health issues for staff and he personally approved the letter which was forwarded to Mrs Finney confirming the fact that her enrolment application was refused.

Evidence was also given at the hearing before the Commission by an architect and by a member of a construction consultancy company. They had been instructed by the school to prepare a report on the physical alterations and additions that would be required for the school to become accessible for children with a physical disability and to users of wheelchairs in accordance with the Australian Standards. The brief was to accommodate a person who was permanently in a wheelchair. Their report stated that the total cost of physical alterations and additions to the school would be $1,079,022.

The Commissioner, in his findings, found that the school could not rely on the exemption provided in Section 22, subsection 4 of the Act.

He made numerous factual findings, including:

only minimal additional training was required for the teachers at the school to teach and supervise a child such as Scarlett;

satisfactory arrangements could be put in place to deal with the toileting needs of Scarlett. There was an existing accessible toilet in the Junior School building which was locked and used as a storage cupboard which could be allocated for her exclusive use and a lockable cupboard installed at minimal expense.
a full time integration aide was not necessary;

there was insufficient evidence that Scarlett had any learning disability or any need for assistance and that any assistance she may require could be adequately accommodated by the aides already engaged at the school or by a minimum amount of additional teachers' aide time;

many of the modifications suggested in the report of the architect and the consultant were not required to accommodate Scarlett. She was not permanently in her wheelchair and all areas of the school were not required to be wheelchair accessible. Similarly, the installation of lifts in a number of buildings was not necessary.

he considered the report to be of minimal value to the enquiry because it was so far removed from Scarlett's actual needs;

most of the accessibility changes required to be made were not major;

adequate arrangements could be made to accommodate Scarlett attending school excursions as Mrs Finney has indicated she would be willing to accompany Scarlett on school excursions, including transporting her when necessary;

whilst Scarlett may not be able to participate or may participate differently in some activities in the school's curriculum, the changes were minimal and not difficult to implement;

he did not accept that the school was not cashed up to the extent that it could not apply surplus funds to modify the school or employ additional staff to accommodate Scarlett. (It is interesting to note that this was after he had heard evidence that the school's annual report had shown an operation profit of $132,000 in 1996 and $208,000 in 1997 but these figures were before debt reduction.)
many of the modifications the school stated it would be necessary to undertake to accommodate Scarlett did not relate to services or facilities required by her and that a much lesser expenditure would have been necessary to accommodate her at the school;

he was not prepared to regard the enrolment as binding the parties further than the end of year 6;

the views of the parents should be given weight, alongside the views of experts in the field who have had the chance to assess the individual in question and form an opinion;

the Principal and the Registrar had made a decision which was genuine but misguided. Their decision that the school did not have the capacity to provide Scarlett with an education because of her disability was based on genuine and often flawed assumptions.

The Commissioner went on to say that the greatest barriers which people with a disability face in our community are the negative assumptions made about them by other members of the community.

The school unsuccessfully appealed against the decision on appeal and submitted that:

it was neither relevant nor open to the Commissioner to make findings as to how the school determined the application and its failure to obtain an expert assessment of Scarlett before the refusal.

the appropriate period against which the question of unjustifiable hardship should be evaluated should be 13 years as opposed to the six year period found by the Commissioner to be appropriate, having regard to the numerous contingencies that might occur and to the natural 'pause' occurring between primary and secondary school.
the Commissioner failed to consider the fact that the school operated to a budget which
took account of long term planning. The Commissioner had found that the financial
consequences of accommodating Scarlett was only a 'small fraction' of the $1.1M figure
estimated by the school's consultant.

Justice Tamberlin rejected each of these submissions. He found that the Commissioner had made
no reviewable error of law or principle and that his approach was both reasonable and
methodical. If there were any misstatements or oversights on his part, Justice Tamberlin found
that they were only of minor significance and would not have affected the outcome.

**K v N School**

The next decision is a decision of the Anti-Discrimination Tribunal of Queensland in the case of
**K v N School.**

This decision was handed down on 7 January 1997 and involved a complaint of discrimination
under the *Anti-Discrimination Act 1991 (Queensland).*

In this case the school admitted it had discriminated against K on the basis of her disability and
sought to rely on the exemption on the ground of unjustifiable hardship provided by Section 44 of
the Queensland Act.

At the time of the hearing K was aged 11 : years. Her condition had never been able to be
diagnosed and there was some difficulty in predicting her future development. A variety of
assessments of K were carried out, the results of which suggested that she functioned at the level of a child between 4 and 7 years and needed the highest level of educational support available in the State system. She had attended N School since the beginning of 1993. The school had decided to exclude her and three other special needs children from the school from the beginning of 1996. She was still attending the school in 1996 after an interim order had been made by the Tribunal that she be permitted to continue to attend pending the determination of the complaint.

Evidence was given that Commonwealth funding of $4,000 was received to support the four special needs students attending the school and the school also contributed $4,537 to the salary of the special education teacher.

K's classroom teacher was also assisted by two parent aides. She was relatively new to the teaching profession and found it difficult to cope with K's individual needs, as well as those of the rest of the class.

Evidence was given that K had significant behavioural problems, including fits of screaming and incidents of hyperventilation which had decreased over time.

A good deal of expert evidence was given in the case, all of which supported K's placement in a mainstream classroom. All agreed that considerable support was necessary to meet K's needs. Emphasis was placed on the fact that the inclusion of a child with special needs would have a much greater chance of succeeding if the teachers and principal involved had a positive attitude.
The estimated cost of providing a satisfactory educational program for K was determined by the Tribunal to be $10,000 per annum.

The Chairman of the Board of Directors gave evidence on behalf of the school. In 1996 the school had received funding of $3,300 for K and with the annual fees of $1,200, provided a total of $4,500, less than half the estimated figure.

The school, in the previous three years, had alternated between surplus and deficit in its operating results and in 1996 had achieved a surplus of $1,100.

The Chairman expressed the fear that if K was permitted to return to the school other children would be withdrawn and three parents had sworn affidavits to this effect.

Contrary evidence was given by another parent who had decided to remove her child from the school because of what she perceived as its negative attitude towards K and the complaint before the Tribunal.

The Tribunal, after considering the financial evidence, formed the view that provision of the necessary services to K would cause hardship. The Tribunal found that hardship would be caused in the form of stress to the teachers who had inadequate experience in teaching special needs children. A further matter causing hardship was the considerable animus which had built up between the school and the child's parents.
The Tribunal then considered whether that hardship was unjustifiable. It considered that the
hardship was unjustifiable in that a small school like N should not be required to apply the
resources to benefit a small number of children when there were five schools within a range of
25kms which were already equipped to deal with children with special needs.

*L v Minister for Education for the State of Queensland*

The next decision is also a decision of the Anti Discrimination Tribunal of Queensland in the
case of *L v Minister for Education for the State of Queensland*. In this case the Tribunal found
that the Department of Education had discriminated against the child. The Tribunal also found
that the provision of special services and facilities for the child would have imposed unjustifiable
hardship on the educational authority. This case, as with the previous case, involved a complaint
pursuant to the *Anti-Discrimination Act, 1991*.

L was a 7 year old girl suffering from an intellectual impairment described as 'global
developmental delay'. The impairment had had a severe impact on her intellectual development,
her ability to communicate, her gross motor skills and her ability to care for herself in eating and
attending to her personal hygiene.

In previous years L had attended a Special Education Development Unit for two or three days a
week, until she commenced attending a State School for five days a week in 1995. She had
previously attended the school in 1994 for three days a week, with the remaining two days spent
at a Special Development Unit. In mid-1995 she was suspended because of disruptive behaviour
and increased health and hygiene risks to other students. Prior to commencing primary school,
she had been assessed to determine the amount of support she needed. This assessment indicated the highest level of support was required. Following the assessment, an individual program was developed and funding for a teacher's aide was obtained.

At the hearing before the Tribunal, L's two classroom teachers gave evidence. Neither had any qualification for teaching disabled children and neither had previously taught a child with L's level of disability. It was clear from the evidence that the developmental gap between L and the other children in the class caused difficulties. There were increasingly limited opportunities for inclusion of L in ordinary classroom activities and it was necessary for her to spend most of the day in a withdrawal area at the back of the classroom.

L had frequent bouts of crying and she often vocalised, which was disturbing for the class. It was very difficult to persuade her to remain on any given task for more than a couple of minutes.

The classroom teacher primarily responsible for her gave evidence of L's need for constant one to one supervision. He considered that the length of time it took to teach her simple activities was disproportionate and was detrimental to his ability to provide adequate teaching to the other children in the class. There were problems with regurgitating and toileting. L had to be prompted to wipe her mouth when she had vomited and, despite hourly toileting, there continued to be regular accidents. L was physically mobile and had a propensity to disappear from the classroom.

The evidence of the classroom teachers was that she was learning very little.
After concerns had been expressed by the teachers and parents of other children in L's class a further assessment of L was carried out. This assessment concluded that L would require long-term special education support and that a special school setting would be more appropriate.

In June 1995 the question of L's placement was discussed with her mother but she declined the offer of a special school placement.

In July 1995 L was suspended for a period of five school days as a result of, to quote the school, 'behaviour prejudicial to the good order and discipline of the school, and heightened health and hygiene risks to other students'.

Subsequently, the Regional Director of the Department of Education decided that the suspension should be extended.

This exclusion was then investigated by a Review Officer who recommended that L be excluded from the school but that she be permitted to enrol at a special school or in a special education unit.

The Tribunal found that the complainant had discharged the onus of establishing that she had been discriminated against by an educational authority. The Minister for Education had argued that there was no discrimination in the suspension of L because she had been treated precisely the same way as would a student without her impairment but displaying similar disruptive behaviour.
This submission was rejected on the basis that the very behaviour for which L was suspended was characteristic of a child with her impairment.

Three experts specialising in special education for children with disabilities gave evidence.

The first expert gave evidence for the complainant. He stated that the best place for the education of children with an intellectual impairment was the regular classroom environment. He considered that in dealing with behaviour difficulties such as those of L, the appropriate approach was to collect data through observation and, with support from an inclusion teacher, devise strategies by which the classroom teacher could address them. He also suggested that if the difficulties continued, rather than altering the child's placement, one should try different strategies. He did not concede that there was any point at which this process should be abandoned, notwithstanding lack of success.

A second expert also gave evidence for the complainant. He considered that inclusion of the intellectually disabled in regular schools in general conferred greater benefits than those of a special education setting. This was based largely on his perception that the development of language and social skills occurred best through interaction with non-disabled peers. He considered that a regular teacher without formal training in special needs education should be able to teach a child such as L. He also expressed the view that where barriers to progress existed in the form of behavioural difficulties, assistance from an integration teacher should be sufficient to overcome them.
A third expert gave evidence for the respondent Minister. She did not consider the regular classroom to be the best possible placement for all children with intellectual disability, particularly in the present circumstances where an attempted integration had failed.

She did not agree with one of the other experts called that language and social skills would necessarily be acquired through contact with non-disabled peers. She considered that the development of such skills for a disabled child required specialist teaching.

Evidence was also given before the Tribunal of the implications of various teaching options for L, from both educational and economic perspectives. Evidence as to the annual recurrent costs attributable to L's attendance varied from $41,153 to $70,000. The additional capital costs appeared to be limited to approximately $5,000 for the provision of a single glass withdrawal area.

The complainant argued that the hardship exemption was not applicable as there was no requirement for special services or facilities. This argument was rejected by the Tribunal as it was clear that L had in the past required, and would continue to require, services and facilities of a distinct character individual to her.

The Tribunal went on to find that the provision of the special services and facilities would impose unjustifiable hardship on the educational authority involved. In determining this, the Tribunal considered not only the issue of economic liability but also the human cost and benefits involved.
The Tribunal did not accept that the current situation of L being taught by a regular classroom teacher without special education training, with the assistance of an advisory visiting teacher and a teacher aide, was adequate to meet L's needs. Even if it was adequate, the Tribunal considered that the demands imposed on the teacher involved, pending resolution of L's present behavioural problems, would of themselves constitute unjustifiable hardship.

The Tribunal further found that cost alone would not persuade it that unjustifiable hardship existed. The Tribunal considered the greater problem to be that, even with the level of resources provided, as long as L remained in the regular classroom, disruption of other children was inevitable until her skills improved. The Tribunal also considered that the process of intervention, with withdrawal of her from the classroom when she was noisy or required toileting, was of itself disruptive to other children.

**Murphy & Grahl v The NSW Department of Education**

The fourth case is a decision of the Human Rights & Equal Opportunity Commission in New South Wales in *Murphy & Grahl v NSW Department of Education*. The decision was delivered on 27 March 2000 and, as with the Finney case, has attracted considerable publicity. The case involved a complaint brought by Marita Murphy and Bernhard Grahl on behalf of themselves and their daughter, Sian Grahl.

Sian was aged 8 at the time of the hearing. She suffered a severe disabling neuro-muscular disease called Spinal Muscular Atrophy. She was confined to a wheelchair, she had difficulty grasping and holding a pen or pencil, was easily fatigued and needed assistance with toileting.
She needed to be lifted and could not sit for long periods unaided. She did not have an intellectual disability.

Sian and her parents lived in the small NSW town of Bellingen. She attended the Bellingen Primary School in 1996 and 1997. In November 1997 her parents sold their home in Bellingen and moved to Sydney as a result of their perception that the family had been unfairly and improperly treated in the course of Sian's schooling at Bellingen.

Sian's mother, Ms Murphy, commenced the enrolment process during 1995. The principal of the school was a Mr Wayne Houston and the majority of the complaints related to his conduct.

Shortly after Sian commenced at the school on 1 February 1996, the professional relationship between Mr Houston and Ms Murphy progressively deteriorated. In January 1997 Sian's parents resorted to formal complaint procedures within the Education Department against Mr Houston. To show the extent of the deterioration, on 1 December 1997 the principal summoned local police officers to have Ms Murphy (Sian's mother) escorted from the school.

The Education Department submitted before the Commission that the continuing deterioration and ultimate breakdown in the relationship between the parents and the school was caused by the 'aggressive, hostile, demanding and unreasonable attitude' of Ms Murphy, and her frustration at being unable to have her every unreasonable demand satisfied immediately. The Education Department also claimed that the allegations against the Principal were exaggerated and untrue.
On the other hand, the complainants submitted that they were continually confronted by 'attitudinal barriers' within the school, particularly those set by the principal.

The Commissioner found that the Department of Education, through its school principal, had discriminated against Sian and her parents and ordered the Department to pay compensation of $25,000. He also ordered the Department to provide a written apology to Sian and her parents which was also to be inserted in the school newsletter and in any newspaper circulating in the Bellingen District.

I intend to highlight some of the unfortunate incidents which led to this complaint being brought.

The first related to the enrolment process. At the first meeting, on 10 March 1995, Ms Murphy alleged that the principal advised her that Sian would be better off going to a primary school 20 kilometres from Bellingen. Ms Murphy advised the principal that this would involve a bus journey of 45 minutes each way. It was too far for her to travel and, in any event, they preferred her to be with friends. It was apparent from the outset that if Sian was to attend Bellingen, there was a need for modifications to be made to existing facilities. There was a recognised procedure of the Education Department to be followed in this event. Assessments were subsequently made on site of modifications that were required. It is unfortunate to note in correspondence from the principal his reference to Sian as 'the disabled enrolment'.
The application for enrolment raised the issue of the additional human resources required to facilitate the teaching of Sian. A submission for special aide funding support was presented to the appropriate committee.

The principal made no effort to keep the child's parents informed as to the enrolment process. This was of major concern to the child's mother as clearly her enrolment was contingent upon the completion of the structural modifications and the funding for the teacher's aide.

In October 1995 the principal wrote to Mrs Murphy and advised her that Sian's enrolment would be deferred until the property issues had been addressed at the school.

The Commissioner was highly critical of these actions of the principal, particularly in view of the fact that the work had been identified, costed and scheduled to be carried out prior to the commencement of the 1996 school year. Furthermore, Ms Murphy had been advised unofficially that the special needs funding had been allocated. It was clear by October 1995 that the structural modifications would be carried out by the start of the school year in 1996 and that a teacher's aide would also be available.

At about this time invitations from the principal had been extended to the parents of all children commencing school in 1996 to attend the kindergarten orientation day. The complainants were excluded from the invitation list. After Ms Murphy complained, the principal sent an invitation but stated that it was 'a courtesy invitation and did not mean that Sian's enrolment has been accepted'.
The Commissioner found that this letter displayed a rigid and inflexible attitude which was not only totally unnecessary but also failed to reasonably inform the parents of what had happened and what was expected.

The teacher's aide for Sian was informed before the end of term in December 1995 that she would be reappointed the following year and would be caring for Sian.

Still the parents had not been informed.

On 17 January 1996 Ms Murphy had not heard and appealed to Mr Phillips, the District Supervisor. Bear in mind that at this stage the aide had already been told of her appointment and the structural works were nearing completion.

On 24 January 1996, a week before school was due to start, Mr Houston advised the parents of Sian, in writing, of his decision to accept the enrolment. The Commissioner found that this occurred only as a result of the District Supervisor's intervention.

The Commissioner accepted Ms Murphy's evidence that the enrolment of Sian was an 'alienating process' and that tensions had clearly developed between Ms Murphy and the principal. He also found that no fault lay with the parents.

He found that the failure on the part of the principal 'to advise Ms Murphy appropriately and penetrate an apparently impenetrable bureaucratic barrier was extremely stressful for her, her
husband and Sian’. Similarly, the exclusion from the orientation day when the principal knew that the required structural changes and additional resources were in hand and would be completed for the start of the 1996 school year.

He found that the continuing failure to accept the application for enrolment caused a detriment to Sian and her parents. They were treated less favourably than able bodied children and their parents as a consequence of the fact that Sian had a disability.

He found that the school had unlawfully discriminated against Sian.

At the hearing, the school submitted that Ms Murphy was a 'trouble maker', that she was unreasonable, unduly aggressive and at times abusive, even that she was a poor parent who provided an inadequate lunch for her child. The Department submitted that the principal and his staff were caring and understanding and that they were doing all they could to educate a child with a disability, a difficult task made more difficult by the meddlesome and trouble making Ms Murphy.

The Commissioner rejected this submission.

In the course of 1996-1997 the Commissioner found that complainants were faced with a variety of provocations which generated added hostility.
On 7 February 1996 Ms Murphy proposed to the principal that a case management meeting should be held to discuss Sian, her perceived needs and the best approach to providing the necessary support. The principal responded that his preference was for such a meeting to be held later than earlier. A meeting was held on 25 March 1996 and Ms Murphy gave evidence that the only positive thing to come from the meeting was the introduction of a communications book designed to provide a regular written form of communication between parents and teacher.

In this case, evidence was given that only three case management meetings were held in the two years that Sian was a student.

On 26 January 1997 Ms Murphy and Mr Grahl made a formal complaint to the Department against the principal. This generated considerable hostility towards them by the principal and others.

An issue relating to Sian's access to the school also arose together with the provision of appropriate furniture to assist her posture. The furniture issue was delayed for over 12 years, which the Commissioner found to be totally unacceptable.

Complaint was also made by Sian's parents of the appointment of the teacher's aide. The aide had no specific expertise and had worked at the school as an administrative assistant in the school office.
The Commissioner was careful not to criticize the teacher's aide and found her to be a caring person who did the best she could, given her relative inexperience and the fact that she was poorly equipped in terms of the necessary skills. The Commissioner was, however, critical of the system which employed an unskilled person for a specific job who had little training. He stated that this not only caused problems for the child with a disability, but also reasonably heightened the concerns of any caring parent.

Another unfortunate incident was the placement of a poster in the staff room by a member of staff at a time when the relationship between Sian, her parents and Mr Houston was marked by ill will and serious animosity. Sian's father attended a meeting in the staff room as a member of the Parents & Citizens Committee. He sighted the poster, took objection to it and removed it.

The poster consisted of a photograph of one of the school teachers with an injured leg sitting in a wheelchair with the caption 'Special needs? - everyone in this school is special'.

A further incident occurred in September 1996 when a large industrial bin was shifted from its usual position and placed in the disabled car parking bay which was used by Ms Murphy. Mr Houston gave evidence that this was done to accommodate the school dental van which was for a time located at the school. There was only one disabled parking space in an area which provided parking for 16 cars. Ms Murphy complained to Mr Houston when she encountered what she considered to be a potentially dangerous situation when parking and unloading Sian and her equipment. He responded by saying words to the effect 'That garbage bin will stay where it is until I decide to shift it'.
A further unfortunate incident which occurred on 26 November 1997 was described by the Commissioner as the 'most regrettable incident of them all'.

From late in 1997, Sian and her mother walked to the school, with the most convenient access being via a particular gate.

Heavy rain had apparently eroded part of the entrance and by 24 November 1997, immediately following further heavy rain, the entrance was difficult to negotiate. The Commissioner found that modest earth works could have resolved the difficulty. Ms Murphy requested some action, as a result of which a Workplace Health & Safety 'meeting' was convened which resolved to close the gate.

Understandably, Ms Murphy responded angrily to the closure which led to the principal requesting the police to remove Ms Murphy from the school.

The Commissioner found that the gate closure incident was falsely presented as taken because of a danger to Sian. He found that it was taken on account of her disability and was an unlawful act of discrimination and contrary to Section 23 of the Act.

As I have already said, the Commissioner made a finding of unlawful discrimination against the Department of Education and ordered it to pay $25,000 to Sian and her parents and, in addition, to provide an apology in the terms previously referred to.
Conclusions

It is important to put these decisions into perspective. It must be remembered that for a complaint to be made under Section 6 of the Disability Discrimination Act there must first be discrimination on the basis of the disability. The onus of establishing this is on the person alleging discrimination.

If there are no available places in the year in which admission is sought, the application cannot be considered and there can be no discrimination. Similarly, there is likely to be no discrimination in the situation where the school has an established procedure for dealing with applications for enrolment such as places of enrolment being offered in the order of receipt of applications except in certain circumstances, for example where siblings, are involved. If the application of the student with a disability would not ordinarily be considered because of this practice, it is likely that there will be no discrimination.

It is worthwhile noting that if the school does have such an established procedure, relevant particulars of that procedure should be included on the application form for enrolment.

The application form should also have a specific question directed to whether the student has any special needs with sufficient space for reasonable detail to be provided. It would also be useful to state on this form that enrolment of a child with special needs may be refused where the provision of the additional services and facilities required by such a student would impose unjustifiable hardship on the educational authority.
It is when there are available places and admission is sought by a student with a disability that particular care must be taken to ensure the application is properly considered.

The first thing that should be done is to discuss the application with the parents or care givers and the child, depending on their age. It is essential from the outset that a cooperative working relationship be developed with the child's parents or care givers. This will assist to provide the appropriate environment for the child to better learn and develop. If it appears that the relationship is becoming strained, it would be useful to involve another staff member at the school to become involved in the discussions until the tensions eased. The case of Grahl v Minister of Education is a classic example of the disastrous consequences that can result when a hostile relationship develops between the school and the child's parents or care giver.

A detailed note should be kept of this meeting and in fact of all conversations and meeting with the parents or care givers. In evidence given in the Finney case the Registrar said he had taken 'detailed notes' but the 'detailed notes' turned out to be a few notes written on the back of an envelope. Similarly, the Registrar would have found it much easier to give evidence of his conversations with the people he contacted had he been able to rely on detailed notes rather than his memory.

The Principal or Registrar speaking with the parents or care givers should advise them of the services and facilities available at the school. This information should be given in an open, honest and straight forward manner. Preferably information should not be provided in a too negative fashion, ie 'we do not do this' and 'we do not cater for that'. Bear in mind that the
provisions of the *Disability Discrimination Act*, as they relate to education, are based on the sound principle of equality of education opportunity. The parents and child should be offered an inspection of the school’s facilities at the earliest opportunity.

The parents' views on the additional services and facilities that the child needs should be obtained. Remember that they are the ones responsible for the day to day care of the child. If it is thought appropriate, the information provided by them should be verified where necessary.

It is also often appropriate for the student to be observed in their present setting.

The teachers at the school or kindergarten presently attended by the child should also be consulted to ascertain what assistance the child was then receiving and ascertaining their views as to the services and facilities that may be required in the future.

If your school has a special education teacher that teacher should be involved at an early stage in the process. The special education teacher may wish to conduct a formal assessment of the child. If that teacher determines that for example, additional classroom support is needed and existing staff would be unable to provide this support, the additional support required should be quantified and costed. It will then be necessary to examine whether this additional charge can be met from available funding or from within the school’s budget.
If the student is being assisted by for example an Occupational Therapist, Physiotherapist, Speech Therapist and receiving medical treatment it may be necessary to speak with those individuals and obtain written reports. It would be necessary to first obtain the consent of the parents.

There are also a number of organisations in each State set up to assist children suffering from, for example, cerebral palsy, autism or Downs Syndrome which are always happy to provide advice as to the needs of a child with a particular disability in a school environment. It is my understanding that, in the majority of cases, no charge is made for this service, particularly where the child is already receiving services from that organisation.

It may be necessary to engage an expert building consultant or architect to obtain detailed costings of the modifications that would need to be made to existing facilities. A clear lesson to be learned from the Finney case is that, if such a report is to be obtained, make sure it is relevant to the child's circumstances. In that situation, costings were presented to the Commission on the basis that Scarlett was permanently in a wheelchair. The modifications included widening of all doorways, installation of ramps and lifts and modification of the toilets. The estimated cost was $1,079,022, whereas the Commissioner found that the cost of the actual modifications required amounted to a fraction of this cost.

Additional funding may be available through either or both the Commonwealth and State Government. This may be in the nature of re-current funding or capital funding. Details should be obtained and I would recommend that a good starting point for obtaining this information is the organisation in your State representing the independent schools.
It is important for the Principal to be involved in this process. In many cases I would imagine the Principal would be the person making the necessary inquiries. If this is being done by the Registrar of the school, for example, it is most important that the Principal is kept well informed of the progress of the application and attends the relevant meetings, such as with the parents or care givers.

It is also imperative that the parents or care givers be kept informed of the progress of the application. Again, the case of *Grahl v Minister for Education* is a classic example of the consequences of a failure of the school to keep parents or care givers properly informed.

If there is any doubt about any matters seek clarification from the parents or care givers. It may be necessary to seek further expert advice. In such a situation, it is obviously preferable to obtain such advice from those professionals already involved in the care of the child.

When the school has all this information in its possession it is then in a position to properly assess the application.

If the child requires additional services and facilities because of the disability and the provision of those services and facilities by the school would cause unjustifiable hardship, then the enrolment should be refused on that basis.

Whether the exemption will be made out will depend on the facts of each individual case. I would recommend that if there is any doubt, advice should be sought initially from the
organisation in your State representing the independent schools. Remember that the school will be much better placed if proper enquiries and assessments have been made and detailed records have been kept of those enquiries and assessments.

It is important that each school develop a set of written guidelines for dealing with applications for enrolment of children with a disability. This will provide the school with a useful checklist to ensure that nothing has been overlooked. It is also appropriate that those members of staff who may deal with the initial enquiries from parents or care givers of such a child be properly informed of the school's guidelines and be trained to respond to enquiries. First impressions are very important and the wrong, often discriminatory message, can too easily be conveyed by ill informed staff.

It must be stressed that the process of catering for a child with a disability, as with any other student, does not end with the admission of the student. Their needs must be constantly monitored and regular meetings held with relevant parties to ensure that their needs are being met. Again, the case of Grahl highlights the additional hostilities that can develop as a result of a totally inadequate case management system being in place.

The unjustifiable hardship provision relates to the refusal of enrolment. If discrimination is alleged to have occurred whilst a student attends the school, it is likely that indirect discrimination would be alleged. The relevant section dealing with indirect disability discrimination is Section 6 which provides that:
'For the purposes of this Act, a person ('discriminator') discriminates against another person ('aggrieved person') on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with the requirement or condition:
(a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which the aggrieved person does not or is not able to comply.'

It would then be up to the school to establish that the further requirement or condition imposed by the school on the student was reasonable having regard to the circumstances of the case. Whether or not the requirement or condition imposed will again depend on the facts of the particular case. However, a school will be much better placed to satisfy the test of reasonableness if the needs of the student have been properly assessed and recorded.