AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

RE: **ESTHER WOODBURY, JOHN SULLIVAN, ROBERT BUCKLEY and DOROTHY BUCKLEY (ACT) [2007] ACTDT 4 (5 APRIL 2007)**
(Complainants)

and

AUSTRALIAN CAPITAL TERRITORY
(Respondent)

DT83/98; DT121/01; DT 122/01; DT 193/01; DT 194/01; DT 195/01; DT 196/01; DT 187/01; and DT 188/01

Catchwords: Discrimination in the provision of educational and other services to two young boys suffering from autism spectrum disorder and other conditions. Direct and indirect discrimination. "Defences" to otherwise discriminatory conduct under sections 27, 30, 47, 51 and 53.

Discrimination Act 1991, ss. 3, 7, 8, 18, 20, 27, 30, 47, 51, 53, 102

De Domenico v Marshall (unreported) [2001] ACTSC 52
Edgley v Federal Capital Press of Australia Pty Ltd [2001] FCA 379
Richardson v ACT Health & Community Care Service [2000] FCA 654
Scott v Telstra 1995 EOC 92-717
Graham Barclay Oysters v Ryan; Ryan v Great Lakes Council (2003) 194 ALR 337
Auton and Ors v The Attorney General of British Columbia and the Medical Services Commission of British Columbia 2002 BCCA 538
Minister for Immigration v Teoh 1995 183 CLR 273

Tribunal: Mr R J Cahill, President

Date: 5 April 2007

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT83/98,DT121/01, DT122/01, DT193/01, DT194/01, DT 195/01, DT 196/01, DT187/01 and DT188/01

RE: **ESTHER WOODBURY, JOHN SULLIVAN, ROBERT BUCKLEY and DOROTHY BUCKLEY**
Complainants

AND: **AUSTRALIAN CAPITAL TERRITORY**
Respondent

ORDER

Tribunal : Mr R J Cahill, President

Date : 5 April 2007

Order :

The complaints made by Ms Esther Woodbury on behalf of her son, Jack Sullivan, and her husband and her daughter are dismissed under section 102(2)(a)(ii) of the Act, on the grounds that they have not been substantiated.

The complaints made by Mr Robert Buckley on behalf of his son, Kieran Buckley, and his wife and daughter are dismissed under section 102(2)(a)(ii) of the Act, on the grounds that they have not been substantiated.

All interim Orders made by this Tribunal in relation to this matter are discharged.

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R J Cahill
President

RE:

Complainant: ESTHER WOODBURY, JOHN SULLIVAN. ROBERT BUCKLEY and DOROTHY BUCKLEY

Respondent: AUSTRALIAN CAPITAL TERRITORY

Tribunal Reference:

DT83/98
Complainant: Esther Woodbury
Respondent: Dept Education & Training & Children's Youth & Family Services

DT121/01
Complainant: Robert & Dorothy Buckley
Respondent: ACT Community Care

DT122/01
Complainant: Robert & Dorothy Buckley
Respondent: ACT Department of Health & Community Care

DT193/01
Complainant: Robert Buckley
Respondent: Department of Education & Community Services

DT194/01
Complainant: John Sullivan & Esther Woodbury -
Respondent: Department of Health & Community Care (Disability Program)

DT195/01, DT 196/01 and DT 187/01
Complainant: Esther Woodbury
Respondent: Department of Education & Community Services

DT188/01
Complainant: Robert Buckley
Respondent: Department of Education & Community Services

Tribunal: Mr R J Cahill, President

Date: 05 April 2007

Contents

Appearances

Complainant
Mr Anforth

Respondent
Dr Jarvis

Introduction

1. Prior to the final hearing, a number of Orders and undertakings by ACT departments continued a limited ABA program at North Ainslie Primary School. This involved both boys and enabled them to continue a number of years of their primary school education under that system.

2. I delivered my decision in this matter orally on 10 January 2007. I then indicated that I would provide more substantial reasons. This judgment is an expansion of that oral decision. I have dated the reasons 5 April 2007 so that any formal period for appeal runs from that date.

3. The Hearing in this matter has been complicated by the fact that numerous separate applications, involving two young boys have all been held jointly. The case was complex and lengthy and would have been exponentially lengthened in time and in expense had this step not been taken. Nevertheless, each application and argument pursuant to it has been considered.

4. I plan to have this judgment, with lengthy annexures, placed onto CD and made available to the parties. In the interim, I am making available this written decision, minus the annexures, which are already in possession of all parties. It is hoped that CD can be available.

The Parties

5. This complaint involves two boys, Jack Sullivan (d.o.b. 08 December 1989) and Kieran Buckley (d.o.b. 22 June 1991). Both boys have been diagnosed with an Autism Spectrum Disorder (ASD). This is a complex developmental disorder, encompassing levels of functioning ranging from severely cognitively impaired to gifted intelligence. Both boys are cognitively impaired.

6. In addition to ASD, both boys are afflicted with other conditions. Jack has been diagnosed with "global dyspraxia" and possibly "dysarthria", conditions that have severely inhibited his development, especially speech. Jack has also received "Ritalin" as medication for "hyperactivity".

5. Kieran, within three days of his birth, was diagnosed with the heart condition "tri-cuspid artesia". Treatment required young Kieran to undergo open-heart surgery at 15 months and again at three years of age. This condition and its treatment certainly contributed to some delay, at least in Kieran's physical development.

6. Ms Esther Woodbury, for herself and on behalf of her son Jack Sullivan, presented her claims to the Tribunal in February 1998. Since then, Jack's father and sister (Mr John Sullivan and Rebecca Sullivan) were joined as Complainants. Also, with agreement by all parties, Mr Robert Buckley, on behalf of himself and his son Kieran Buckley, were joined as Complainants in this matter. Since then, with agreement by all parties, Kieran's mother and sister, Ms Dorothy Buckley and Rhiannon Buckley, were joined as Complainants.

7. I wish to take this opportunity to express the deep admiration the Tribunal has for the parents of Jack and Kieran, whose dedication to achieve the best results for their sons is outstanding.

8. While the material put before the Tribunal is lengthy and complex and is constituted by several separate complaints, a simplistic understanding of the case can be expressed in two broad claims. That is, the Complainant claims:

1. the Respondent failed to provide adequate early-intervention and education services to Jack and Kieran, and this constituted discrimination; and
2. the Respondents failed to keep informed of, and advise government about, relevant developments in the treatment of Autism, and this constituted discrimination.

9. The Respondent's submissions deal with the applications by referral to several ACT agencies and their involvement on a separate basis. These are:

- Department of Education and Community Services (DECS);
- Department of health and Community Care (DHCC); and
- ACT Health and Community Care Services (ACTHCCS).

10. The principle issues, from the Respondent's perspective, arise in respect of DECS. However, the ultimate responsibility lies with the ACT.

11. The ACT Department of Education, Training and Children's Youth and Family Services was named as the original Respondent. Over the years that this matter has been before the Tribunal, the Complainants have made claims against other ACT agencies. Also, as this matter has progressed, the portfolio responsibilities of the various Respondents have been altered and redistributed. The Respondents are a variety of ACT agencies, some of which are separate statutory entities, but it is agreed that the ultimate responsibility as Respondent falls upon Australian Capital Territory.

Material on which decision based

12. This case presented procedural challenges to the Tribunal. Various complaints have been placed before the Tribunal between 1997 and 2001, with the later complaints building on the existing framework provided by earlier complaints. The Complainants submitted separate lengthy and detailed submissions in respect of each application. The Respondent made submissions on a general basis, but dealt with each of the issues raised.

13. The focus of any enquiry must be the act or acts complained of, and any evidence must be relevant to the complaint (see *De Domenico v Marshall* (unreported) [2001] ACTSC 52). This decision must, therefore, be limited to the complaints put before the Tribunal, maintained within the timeframe of those complaints, as informed by the evidence placed before the Tribunal.

14. The parties have agreed that the material placed before the Tribunal, including that provided by the ACT Human Rights Commissioner, would constitute the factual matrix upon which this decision is based.

15. The scope of the complaint is well defined by the Complainants' Submissions, which are annexed to this decision (Annexure 1) as well as by the Summary of the Respondent's Submissions, which is also annexed to this decision (Annexure 2).

16. A large volume of material was presented to the Tribunal and this is on the public record and accessible to interested persons. Consequently, I do not propose to quote extensively from the evidence that was put before me. Rather, I will focus any comments on those aspects of the evidence that I found to be the most relevant to the conclusions and the findings that I have reached. However, it should be noted that I have given due and careful consideration – both during the course of the hearing and subsequently – to all aspects of the evidence.

Approaches to Educating Children with Autism

17. Much of the evidence placed before this Tribunal concerns the methods used by the Respondent when providing services to Jack and Kieran. Therefore, an important factor in exploring the substance of the Complainants' complaints is the conceptualisation of the particular method being sought by the Complainants.

18. The Complainants' claims focus on the Respondent's obligation to be informed of and provide methods appropriate to Jack and Kieran's disability, with regard to health and education services. The Complainants are very clear that the method that the Respondent ought to have been aware of and have provided is "Applied Behavioural Analysis" (ABA).

19. As informed by the various experts who provided evidence, the Tribunal understands that ABA is a therapy involving analysis of behaviour and utilising stimulus-response routines to encourage and discourage specific behaviours. The aim of the therapy is to teach children small units of behaviour that will build into more complex and socially useful skills. It also aims to reduce problematic behaviours. The initial stages of ABA require the formulation of an entirely individualised program, addressing that child's strengths and deficits. Applying the program, including continuous monitoring and updating, is extremely resource intensive. However, the process aims to reduce the intensity of the behavioural treatment when it becomes apparent that the child's functional skills will be enhanced, rather than damaged, by a placement in a more typical environment (such as regular or special education classrooms).[1]

20. In the course of these proceedings, the term 'ABA' has sometimes been used interchangeably with 'Lovaas'. This is a style of implementing ABA as well as a term

[1] The information contained in this paragraph was gleaned from expert evidence, in particular see evidence presented by James Mulick PhD (Exhibit 11A, p 4).

referring to a study undertaken by Dr I Lovaas in 1987. In this study, Dr Lovaas compared three groups of young autistic children, in the following groupings:

- an experimental group, which received between 30 to 40 hours of 1:1 ABA style behavioural intervention for two years, provided by the staff of the Young Autism Project.
- a first control group, which received about 10 hours of 1:1 ABA style behaviour intervention for two years, provided by the staff of the Young Autism Project; and
- a second control group, which received about 10 hours of 1:1 ABA style behaviour intervention for two years, provided by an outside provider.

21. Dr Lovaas' findings were that: 47% of the experimental group achieved normal intellectual functioning and were placed in mainstream classrooms; 40% were classified as mildly mentally retarded and were placed in classrooms for the language impaired; and 10% were placed in classrooms for autistic and profoundly retarded children. In contrast: only 2% of the first and second control groups achieved normal intellectual functioning; 45% were found to be in the mildly retarded language impaired classes; and 53% were placed in classrooms for autistic and profoundly retarded children.

22. Dr Lovaas' experimental design does not identify the critical level of treatment. One experimental group received 10 hours of ABA per week, which was reported as producing similar results to the usual eclectic teaching methods, while the other experimental group received 40 hours of ABA per week. What can be extrapolated from the Lovaas study is that, upon receipt of somewhere between 10 and 40 hours per week of ABA, a child of between two and four years of age has a 47% likelihood of achieving a standard of function whereby they could be placed in mainstream classrooms. The experts that provided evidence to this Tribunal differed in opinion on exactly how many hours would be optimal.

23. There are certainly other approaches to education children with ASDs.

24. Ms Elaine Williams, M.A., provided expert testimony to the Tribunal that ASDs are neurobiological disorders, reflected in abnormalities in human chromosomes and genetic defects leading to abnormalities in the brains of persons with ASDs. Ms Williams stated that,

> *in lieu of an as yet undiscovered medical "cure" for Autism, it is broadly agreed that the most effective therapy is early and intensive, behaviourally-based educational intervention. However, precisely what are the optimal parameters of "early" and "intensive" has not yet been subjected to controlled studies and is the topic of intense debate in the U.S. and elsewhere.*

25. Ms Williams' expert opinion is that, among the many treatment approaches to consider, the primary contenders are ABA and the TEACCH program.

26. The TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children) method is based on acknowledging and respecting the unique perspectives of autistic persons and aims to improve adaptive functioning. While this method adopts an individualised approach, it does not provide the intensive one to one regime that ABA requires. Associated with Dr Shopler, TEACCH was established in the 1970s and is an

internationally recognised method. However, there are no published, comprehensive, long-term studies of the effectiveness of the TEACCH model.[2]

27. The Tribunal accepts that Jack and Kieran both made positive progress after undertaking a Lovaas style ABA program, but cannot reach a conclusion that, had the ABA program begun earlier, Jack and Kieran would have achieved to a higher level. Nor can the Tribunal reach a conclusion that, had a program other than ABA been applied, the children would have achieved to a lower level. In any case, it is not appropriate for the Tribunal to determine the efficacy or otherwise of one of a number of programs available to a service delivery agency. While ABA has gained in popularity over the last decade, it is not the only acceptable method of teaching children who have ASD.

28. I would, however, like to take the opportunity to make comment about ABA in respect of my own observations that, although the program is resource intensive, there is obvious potential for young children to derive significant benefit from receiving ABA. According to much of the evidence before me, there is potential for ultimate benefits (including cost benefits) to the entire community in introducing ABA to young children with ASDs. I would add that any provider who does not explore this method or properly determine an appropriate level in its provision is not maximising resources for ultimate benefit. However, those types of decisions must fall within the purview of the policy makers.

29. Notwithstanding the Tribunal's position regarding the benefits of ABA, I should also add that there are undoubtedly many factors that impact on the educational and developmental achievements of Jack and Kieran. I cannot place enough praise on the efforts of the parents of these two boys. The level of care and investment in the development of their children undoubtedly contributed to positive outcomes. However, the capacity of each boy to reach their full potential could also be impacted upon by their other clinical and medical conditions.

Background to the Complaints

30. The case catalogues a complex struggle by the parents to achieve the introduction of the full ABA process for their children.

31. Although the scope of the complaints is set out at Annexure 1 and the response is at Annexure 2, it is practical to provide a brief summary background to the complaints, as distilled from the evidence put before the Tribunal.

Jack Sullivan (date of birth 08 December 1989)

Jack was diagnosed with autism in February 1992. In April 1992, he was referred to Child Health and Development Service (CHADS) with a clinical condition of speech delay and behaviour problems. The Respondent provided speech assessments and therapy. The Complainants' witness, Ms E Watson, agreed that the referrals and response were appropriate in the circumstances.

From August 1992 to July 1993, Jack attended an Early Intervention Service playgroup for two sessions of 90 minutes each week. The Respondent described this

[2] See E Williams, MA 'Educational Interventions for Students with Autism' pp7-8(Exhibit 3b).

playgroup as 'special education services for children with autism or learning disabilities.'

From July 1993 to October 1995, Jack attended the Autism Unit at Hughes Primary School. Jack appears to have experienced, at best, no improvement in his skill level during this time.

In October/November 1995, the parents of three children at the Autism Unit at Hughes Primary School, including Ms Woodbury, began negotiating with the principal, for an 'autism-specific program'.

From October 1995 to April 1997, Jack attended Cranleigh School. During this time, Ms Woodbury requested that the Respondent provide an autism-specific program – specifically, Ms Woodbury asked the Respondent to provide ABA. Cranleigh agreed to provide only some of the resources requested. However, prior to any resources being provided, Jack was withdrawn from Cranleigh.

From April 1997 until June 1998 Jack was home educated. During this time, the Respondent offered other educational alternatives and provided various services and assistance, including speech assessments, psychological assessments and therapy. The respondent also provided funding, which was used to pay Special Teaching Assistants (STAs), through a program called Family Based Respite Care (FaBRIC).

During this time, Ms Sullivan researched, designed, monitored and modified Jack's program. This program was styled on ABA and Ms Sullivan's testimony is that Jack achieved significant progress.

In June 1998, the Respondent provided a room and 12 hours of STA to Jack at North Ainslie Primary School (NAPS). Ms Woodbury continued to provide the ABA style of program to Jack at this venue.

In July 1998, a full-time teacher was placed in the NAPS Unit. This teacher was Dorothy Buckley. At this time, Kieran was placed in the NAPS Unit.

From August 1998, the Respondent provided the NAPS Unit with consultation by Ms E Watson, a Sydney-based speech pathologist with ABA experience.

Toward the end of 1999, the Respondent wrote to the Complainants to inform them that the NAPS Unit would continue in 2000 and to inform the Complainants that the NAPS Unit student allocation would be broadened from two to four students. The Complainants sought and were granted a temporary injunction to prevent this decision being implemented.

Kieran Buckley (date of birth 22 June 1991)

Kieran was diagnosed with tri-cuspid artesia when he was three days old. This condition caused some developmental delays, at least physically. Although Kieran's parents were concerned about his developmental delays, health professionals in Adelaide, where the Buckleys resided, did not diagnose Kieran with ASD.

In early 1995, Kieran and Mrs Buckley moved residence from Adelaide to Canberra and Mr Buckley arrived in mid 1995. In early 1995, Kieran was assessed by CHADS and placed in the Rivett Early Intervention Unit. The Respondent provided Kieran with physiotherapy, speech therapy and a psychological assessment.

In June 1995, the Buckleys asked CHADS to assess Kieran for Autism. This was undertaken in October 1995. Kieran was assessed as having a mild intellectual disability with some autistic features.

From early 1996 until September 1996, the Buckleys' sought and received various assessments and advice from professionals regarding Kieran. During this time, the Buckleys became aware of ABA. They sought training in its delivery and began providing an ABA program to Kieran at home.

In September 1996, Dr T Attwood formally diagnosed Kieran with ASD.

From 1996 to May 1997, Kieran attended Turner Primary School undertaking a generic special education program. Dissatisfied with Kieran's progress, the Buckleys requested the respondent provide an ABA program, which was refused.

In May 1997, Kieran attended Rivett Early Intervention Unit and then Turner Pre School. The respondent provided part time STA care and the Buckleys provided a support person as a "shadow" for Kieran.

Around the middle of 1997, the respondent provided about four hours per week assistance, through FaBRIC, to help the Buckleys provide ABA in the home.

In June 1997, together with a group of parents, the Buckleys requested specifically that the Respondent provide an ABA program as an option for children with Autism. As a result of this meeting, the Autism Working Party was developed to examine methods of treatment and education for ASD, including ABA. This Working Party was comprised of presented its report and recommendations to the Respondent in 1998.

From October 1997 until November 1998, Mr Buckley wrote many letters to various public officials requesting autism-specific disability services, education and therapy. The ABA program Mr Buckley was promoting had very exact requirements and, although the Respondent introduced some form of ABA type programming, Mr Buckley was concerned that the allocation of resources were too low for the programme to be effective.

From February 1998 until May 1998, Turner Primary School provided a Learning Support Unit, using ABA principles. The school principal considered the allocation of resources extensive and unfair for other children and stopped the program.

In July 1998, Kieran joined Jack Sullivan as the only students in the NAPS Unit. Dorothy Buckley accepted the position as teacher and began delivering an ABA program. The NAPS Unit also operated with one full-time STA and the parents organised another STA, funded mainly through FaBRIC, but partially funded by the parents. Ms E Watson, a Sydney-based speech-pathologist with ABA experience, was contracted by the Respondent to provide monthly consultation with the NAPS Unit.

From August 1998 until January 2002, the NAPS Unit operated as a dedicated ABA based program.

Toward the end of 1999, the Respondent wrote to the Complainants to inform them that the NAPS Unit would continue in 2000 and to inform the Complainants that the NAPS Unit student allocation would be broadened from two to four students. The Complainants sought and were granted a temporary injunction to prevent this decision being implemented.

> Around February 2000, funding provided by FaBRIC was withdrawn. The acronym stands for "Family Based Respite Care" and, with regard to the purpose of FaBRIC funding, it is doubtful whether the funding of classroom activities was appropriate. However, as Mr Buckley was attending North Ainslie Primary School in order to fully supervise Kieran during the lunchbreak, some FaBRIC support was re-introduced. In December 2000, this FaBRIC support was reduced from 10 hours per week to two and a half hours per week.
>
> In January 2001, Jean Bright becomes the teacher at the NAPS Unit. In February 2002, both boys were withdrawn from the NAPS Unit and the program ceased operating.

32. Prior to August 1998, the complaints appear to revolve around the failure by the Respondent to provide ABA. From August 1998, apart from the injunctive relief sought to restrain the Respondent from allocating more students to the NAPS Unit, the complaint appears to revolve around the allocation of resources to the program.

33. The interim orders and undertakings given by the ACT provided opportunity for both boys to remain in the NAPS Unit for quite some time, perhaps until their primary education was complete. As stated, I observed and applaud the dedication of the parents to Jack's and Kieran's best outcomes and can appreciate that, by withdrawing the children from the NAPS Unit, they acted within their understanding of the best interest of the boys. However, I would like to take this opportunity to congratulate the ACT for providing an ABA program at the NAPS Unit. Since hearing this case, I have, myself, become a proponent of ABA. And the initiative shown by the Respondent potentially creates a national benchmark in the provision of services for children with ASD.

Procedural History

34. This matter has been before the Tribunal for a long period of time. The following provides a précis of the progression of the case from Ms Woodbury's first application, on 24 February 1998, until this decision.

35. Following the initial application, the Tribunal asked both parties to supply certain information and material at call over hearings held on 14 April 1998, 18 August 1998 and 27 May 1998.

36. In August 1998, the Respondent made a motion to the Tribunal to have the complaint struck out, as provided by section 89 of the Discrimination Act. This motion also argued that section 27 of the Discrimination Act provided grounds upon which the complaint should be struck out. The Tribunal conducted a hearing of this application on 18 December 1998. The Tribunal considered there was a case to be heard and dismissed the motion to strike out. In relation to the application of section 27, as it was considered central to the case, the Tribunal asked the parties to provide detailed submissions by 22 January 1999. The 22 January 1999 was postponed to early February due to difficulties experienced by the Respondent.

37. At a call over hearing on 2 February 1999, the Tribunal made orders for submissions and replies and relisted the matter for 23 March 1999. The matter was then relisted for 22 April 1999.

38. At the call over hearing on 22 April 1999, the Complainant requested an adjournment pending the result of *Richardson v ACT Health & Community Care Service* [2000] FCA 654, which was then on appeal before the Federal Court. This appeal included a consideration of the application of section 27 of the Discrimination Act 1991. This provision is vital to the Tribunal's decision. Therefore, after seeking agreement by all parties, on 2 December 1999, the Tribunal agreed to put the matter on hold pending the Federal Court decision in the *Richardson* matter.

39. In November 1999, Ms Woodbury lodged another complaint with the ACT Human Rights Office and in February 2000, Mr Buckley lodged a complaint with the ACT Human Rights Office, both of which were referred to the Tribunal.

40. The Tribunal ordered the parties to supply certain information and materials at call over hearings conducted on 10 November 2000, 12 January 2001, 23 March 2001, 20 April 2001, 25 May 2001, 29 June 2001, 19 September 2001, 5 October 2001, 9 November 2001 and 19 November 2001. The directions became more particularised as the matter progressed.

41. At a call over hearing on 14 December 2001, the Respondent made undertakings to continue an ABA program for Jack and Kieran at the NAPS Unit.

42. At a hearing on 22 January 2002, the Tribunal reiterated that the current resourcing levels would continue, but allowed that the replacement teacher for Ms Buckley was appropriate.

43. As of 11 March 2002, all undertakings were withdrawn because Jack and Kieran were withdrawn from the NAPS Unit. Without students, the NAPS Unit closed.

44. Hearings were conducted on 15,16 and 17 May 2002. On 31 May 2002, a direction hearing was conducted. The Hearings were resumed on 2, 3 and 19 July 2002. The matter was adjourned to 1 and 4 October 2002. However, on 30 September 2002, the Complainants asked for these dates to be vacated. The Hearings were resumed on 18 and 19 December 2002.

45. A call over hearing was held on 7 February 2003. The matter was set down for hearing on 8, 9 and 10 April 2003. On 1 April, the dates were changed and the matter was listed for a directions hearing on 10 April 2003.

46. Hearings were conducted on 1, 2 and 3 July 2003.

47. Written submissions were lodged by 17 December 2003 and oral submissions were made at a hearing on 18 November 2004.

48. A hearing was held on 10 January and the parties were given an opportunity to hear my position with regard to this, the formal decision.

49. This matter placed an enormous amount of material before the Tribunal. Providing the appropriate consideration and attention to this material has been resource intensive.

Summary of the Complaints

50. At the risk of simplification, the substance of the Complainants' complaints are best reflected in paragraphs one to four of the Respondent's submissions, as follows:

> "1. The basis of the complaints is that the Territory failed to provide a form of treatment for Kieran Buckley (DOB 22-06-91) and Jack Sullivan (DOB 08-12-89), who suffer from Autism Spectrum Disorder (ASD). The treatment is usually known as the "Lovaas" approach, after the surname of the American psychologist who published a research paper in 1987 showing positive results of a program for treating young children with ASD. It is conceded that until mid 1998 the ACT did not provide any Lovaas-style program.[3]
>
> 2. The corollary of this aspect of the complaint is that the services that were provided to the children were not as effective as Lovaas, and this also amounted to discrimination.
>
> 3. In mid-1998 DECS did commence a Lovaas-based program for the children at NAPS. From this time, the complaint is in essence that the agency failed to provide certain resources to the program or that it was inadequate in certain respects.[4]
>
> 4. There are also some additional allegations that are dealt with separately below:
>
> a. that the Department of Health and Community Care (DHCC) refused a funding arrangement to the Buckleys,[5]
> b. that DHCC gave advice to an organisation known as FABRIC, causing it to propose to withdraw a service to Kieran Buckley; and
> c. that DECs proposed in 1999 to introduce 2 additional students to the NAPS unit attended by the children.[6]"

51. Paragraph six of the Respondent's submission sets out an explanation of the Respondent's case:

> "6. The substance of the respondents' case is
>
> (a) that the necessary causal link between alleged acts or omissions of the respondents and a relevant attribute of the Complainants is not established,
>
> (b) that the alleged acts or omissions of the respondents do not amount to "treatment" under the Act.

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[3] It follows that the ACT failed to do a variety of specific acts associated with providing such a program, eg advising the government to do so, procuring staff and other resources to do so, advising the public about the program etc. The Complainant's Submissions are frequently put in the form that the ACT failed to do such things, but in the respondent's submission this is essentially window dressing. It is conceded that prior to 1998 the respondent did not provide a Lovaas-based program, and so it follows that it did not do a variety of things that would be necessary or associated with the provision of such a program.

[4] See eg Complainant's submissions, DT 121, 122/01, para 43-4; DT 193/01, paras 1-5; DT 194/01, paras 2-3.

[5] Ibid, DT 121-2/01, para 9-12.

[6] Ibid, DT 196/01, para 1.

(c) In the alternative, that any discriminatory treatment of the Complainants was not unlawful by virtue of section 27.

(d) Also in the alternative, the respondent submits that provision of the services at the level demanded by the Complainants would constitute an unjustifiable hardship.

(e) The respondent also relies on section 30, as is set out below."

52. The Respondent's position is that it did not discriminate against the Complainants. However, the Respondent raises several arguments in the alternative. These are that:

- any act[7] by the Respondent that may be considered discriminatory, is protected by the Act, pursuant to section 8(2), as reasonable in all the circumstances;
- any act by the Respondent that may be considered discriminatory, is protected by the Act, pursuant to section 27, as services designed to address the special needs of a relevant group;
- any by the Respondent that may be considered discriminatory is protected by the Act, pursuant to section 30, as acts done under a statutory authority, etc; and
- any act by the Respondent that may be considered discriminatory is protected by the Act, pursuant to section 47, which provides a defence of unjustifiable hardship.

53. The Respondent's case is essentially that it provided, through a variety of agencies, services to the Complainants and it provided those services within the principles and stated specialist knowledge available to it at the time. The Respondent contends that the children received a variety of services and inputs from health and other professionals, at the request of parents or by referral from government agencies, such as the Child Health and Development Service (CHADS).

Summary of complaint – pre and post 1998 matters

54. The complaints prior to August 1998 revolve around a failure to provide a specific service and this is conceded by the Respondent. From August 1998, apart from the individual funding matters set out in paragraph 4 of the Respondent's submissions (see paragraph 42 of this decision), the complaint revolves around the allocation of resources to the program.

55. The Respondent contends that, prior to the establishment of the NAPS unit, there is no basis for a complaint in regard to the provision of ABA. The Respondent's position is that the ABA program was not a widely-known or accepted approach, and there had been no demand for it.

56. The Complainants raised the case of Laura Ferris in the context that this situation put the Respondent on notice of ABA as a therapy that the Respondent ought to have investigated. The Ferris' supplied a statement to the Tribunal, at exhibit 17b.

57. Laura Ferris was a little girl who, in 1994, was diagnosed with a "childhood disintegrative disorder" which saw a monumental decrease in her cognitive abilities. In 1994, Laura was

[7] Section 4(2) of the *Discrimination Act* 1991 (ACT) deems an "act" to include a failure to act. Therefore, any conduct or proposed conduct and the imposition or proposed imposition of a condition may be constituted by a failure to undertake conduct or a failure to impose a condition.

admitted to hospital. At the time, Laura was being schooled at the Autistic Unit at Hughes Primary School. The Ferris' requested ABA, which was funded and provided in hospital and continued in a specially set up government house. This program ran from June 1994 until September 1994.

58. The Housing and Community Services Bureau, under the direction of the Minister for Community Services, organised a workshop where Jenny Bolland (an expert on ABA from Western Australia) explained the principles underlying ABA. The teacher from the Autistic Unit at Hughes Primary School attended this workshop.

59. In 1994, the ACT Legislative Assembly Committee on Social Policy held an inquiry into early intervention services. Submissions were made to the inquiry regarding the Ferris case and also the intensive behaviour modification programs practiced by Professor Lovaas were described.

60. In 1996, the ACT Autism Association held a seminar at Malkara School. This was attended by the Principal of Malkara School. The seminar was specifically on intensive behaviour modification programs and a colleague of Professor Lovaas, John McEachin, spoke at the seminar.

61. This information, provided to the Tribunal by Sue and Stephen Ferris, the parents of Laura Ferris (Exhibit 17b), supports the assertion that the Respondent had been made aware of ABA type programs. However, the Tribunal accepts the Respondent's position that the Ferris case as a "crisis intervention" and, while it did bring ABA to the attention of the Respondent, it did not provide a model for ongoing general educational programs for autistic children.

62. In this context, some four years after the Ferris case was publicised, when the NAPS Unit began its program, ABA was not being provided at the expense of the public purse in any other State or Territory in Australia. While the NAPS Unit was operational, it was the only school-based ABA project in New South Wales and the ACT. Elizabeth Watson, the Sydney-based private consultant employed by the Respondent to supervise and assist the ABA program at NAPS, did not begin running programs until about 1997. This suggests that the introduction of the program at NAPS was well ahead of contemporary programs for providing educational services to children with ASDs.

The Legislative Scheme

63. Discrimination is a technical, legal and statutory concept, which is much narrower than the colloquial use of the term.

64. The objects of the Act are stated in section 3 as:

> "(a) to eliminate, so far as possible, discrimination to which this Act applies in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs;
> (b) to eliminate, so far as possible, sexual harassment in those areas;
> (c) to promote recognition and acceptance within the community of the quality of men and women; and

(d) to promote recognition and acceptance within the community of the principle of equality of opportunity for all persons."

Grounds for Discrimination

65. The Act applies to discrimination on the ground of any of the several attributes specified in section 7(1), which *inter alia* includes:

(j) disability; and

(n) association (whether as a relative or otherwise) with a person identified by reference to an attribute referred to in another paragraph of this subsection.

66. The Tribunal accepts that, at all times material to the complaints, Jack and Kieran had a disability, and that Mrs Woodbury, Mr Sullivan, Rebecca Sullivan, Mr Buckley, Mrs Buckley and Rhiannon Buckley had an association with Jack and Kieran. Therefore, the Complainants had attributes identified as grounds for discrimination in section 7(1).

Unlawful Discrimination

67. For conduct to be unlawful it must occur in a relevant area. The Complainants allege that the Respondent discriminated against them by reference to sections 18 and 20 of the Act. Section 18 proscribes various forms of discrimination by educational authorities, stating:

(1) It is unlawful for an educational authority to discriminate against a person—
   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.

(2) It is unlawful for an educational authority to discriminate against a student—
   a) by denying the student access, or limiting the student's access, to any benefit provided by the authority;
   b) by expelling the student; or
   c) by subjecting the student to any other detriment.

68. Section 20 proscribes various forms of discrimination in the provision of goods, services and facilities, stating:

It is unlawful for a person (the provider) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—

(a) by refusing to provide those goods or services or make those facilities available to the other person; or

(b) in the terms or conditions on which the provider provides those goods or services or makes those facilities available to the other person; or

(c) in the way in which the provider provides those goods or services or makes those facilities available to the other person.

Direct/Indirect Discrimination

69. Section 8 of the Act provides:

> **8 What constitutes discrimination**
>
> (1) For this Act, a person ***discriminates*** against another person if—
>
> (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or
>
> (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.
>
> (2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.
>
> (3) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—
>
> (a) the nature and extent of the resultant disadvantage; and
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.

70. Under section 8(1)(a) of the Act, discrimination is conduct that treats another person unfavourably because of that person's relevant attribute. This has been accepted as "direct" discrimination where the true reason for the actions relate directly to a person's relevant attribute (see *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379). What is relevant under section 8(1)(a) is the Respondent's reason for doing an act, not its causative effect. Under this provision, it is not a relevant consideration that the conduct complained of is reasonable.

71. To constitute "direct" discrimination under section 8(1)(a), there must be treatment or proposed treatment directed toward, or aimed at, a person because of a relevant attribute.

72. Section 8(1)(b) refers to indirect discrimination.

73. Section 8(2) provides for the distinction between direct and indirect discrimination. This provision places a limit upon liability for indirect conduct by saying that this type of conduct will be discriminatory only if it is unreasonable.

74. In *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379, Beaumont ACJ and Gyles J, supported by Higgins J in his separate judgment, discussed the dichotomy between s 8(1)(a) and s 8(1)(b) and provided the following guidance for the application of section 8:

> 54. … section 8(1)(a) is directed at adverse behaviour **towards** a person, because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination.
>
> 55. Secondly, s 8 applies where, although the particular conduct is not aimed at the Complainant, it has, or is likely to have, the "effect" of

> disadvantaging him or her, because of an attribute. In this context, the noun "effect" appears to have its primary dictionary meaning: "1. That which is produced by some agency or cause; a result; a consequence: (e.g.) the effect of heat" (*Macquarie*).
>
> 56 The drawing of a distinction between the intended operation of the two limbs of s 8(1) along these lines is both supported by, and, I think, provides the rationale for, s 8(2). That is to say, the legislature has proceeded upon the basis that s 8(1)(a) conduct is *per se* (i.e. of itself, whether reasonable or not) deemed to be discriminatory; whereas, by contrast, s 8(1)(b) conduct will be regarded as discriminatory only if it unreasonable. Both logic and experience would support the making of such distinctions: on the one hand, it may reasonably be anticipated that it would be easier for a Complainant to prove the existence of circumstances which justify a finding of s 8(1)(b) conduct than s 8(1)(a) behaviour; but, on the other hand, it may be thought that some limit should be placed upon liability for "indirect" (i.e. s 8(1)(b) conduct) as distinct from "direct" (s 8 (1)(a) conduct) discrimination.

75. Section 4A(1) of the Act deems an "act" to include a failure to act. This means that the conduct or proposed conduct and the imposition or proposed imposition of a condition may be constituted by a failure to undertake conduct or a failure to impose a condition. Section 4A(2) provides another qualification on interpreting section 8(1), which provides that the role of the "attribute" need not have been the sole or even the dominant reason for the treatment complained of.

76. To determine whether conduct is discriminatory, the first consideration that the Tribunal must make is whether the necessary causal link between the alleged acts or omissions by the Respondent and the relevant attribute of the Complainants is established. That is, whether the Respondent treated or proposed to treat the Complainant in any way **because** of the Complainants' attribute. If so, section 8(1)(a) is satisfied. Otherwise, the consideration is whether section 8(1)(b) will apply – that is, whether the Respondent imposed a condition or requirement, or proposed to do so, and this either had the effect or was likely to have the effect of disadvantaging the Complainants.

77. If section 8(1)(b) is satisfied, the next issue to consider is whether such conduct was reasonable in the circumstances. Section 8(3) provides some direction regarding matters to be taken into consideration with respect to determining whether conduct is unreasonable. The discretion available to the Tribunal to determine "reasonableness" was discussed in *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379

> 85 As the primary Judge noted at par 55, the considerations mentioned in s 8(3) are, by express provision, not to be taken as an exhaustive statement of the considerations that may properly be taken into account in determining "reasonableness". Moreover, as Brennan J has observed (in the passage cited above from *Waters* (at 378)), the questions that arise in this area are ones "of fact and degree". Dawson and Toohey JJ were of the same view in *Waters*. In their opinion, the issue was "a question of fact" (at 395) and "a question of fact rather

than law" (at 396). As has been seen, s 108D(1) of the Act provides for an appeal on a question of law.

86 It is true that an error of law will arise if "the true and only reasonable conclusion contradicts the determination" (*Edwards (Inspector of Taxes) v Bairstow* (1956) AC 14 per Lord Radcliffe at 36). It may also be accepted that "if the facts inferred ... from the evidence ... are **necessarily** within the description of a word or phrase in a statute or **necessarily** outside that description, a contrary decision is wrong in law" (emphasis added) (*The Australian Gas Light Co v The Valuer-General* (1940) 40 SR (NSW) 126 per Jordan CJ at 138; see also *Vetter v Lake Macquarie City Council* [2001] HCA 12 per Gleeson CJ, Gummow and Callinan JJ at [23] - [32].) But, generally speaking (that is, in the absence of a special context and none is present here) where a statute (as in the present case) uses words according to their ordinary meaning, and it is (as, in my view, here) reasonably open to hold that the facts of the case fall within those words, the question as to whether they do, or do not, is one of fact (see *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395 - 396).

87 I agree with the primary Judge that what was "reasonable" raised "clear and simple issues of fact".

88 It follows, in my view, that his Honour was correct in holding that there was no question of law involved in this connection. Accordingly, this aspect of the appeal to the Supreme Court should be dismissed.

89 I would add, for completeness, that even if a question of law were to be found to have arisen here, the scope of permissible appellate intervention would necessarily be limited. Deane J in *Waters* observed (at 383) that a determination of "reasonableness" involves "an element of wide discretionary judgement". In this regard, Gleeson CJ, Gaudron and Hayne JJ observed in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 (at 1354):

> *"[19] `Discretion' is a notion that `signifies a number of different legal concepts'. In general terms it refers to a decision-making process in which `no one [consideration] and no combination of [considerations] is necessarily determinative of the result'. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.* ***The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to***

make a particular decision if he or she forms a particular opinion or value judgment. (Emphasis added)

[20] In the present case, the decision by Boulton J to terminate the bargaining period involved, in effect, two discretionary decisions. The first was as to his satisfaction or otherwise that the industrial action being pursued posed a threat for the purposes of s 170MW(3) of the Act. Although that question had to be determined by reference to the facts and circumstances attending the industrial action taken in support of claims with respect to a certified agreement, the threat as to which his Honour had to be satisfied was one that involved a degree of subjectivity. In a broad sense, therefore, that decision can be described as a discretionary decision. And if Boulton J was satisfied that there was a threat for the purposes of s 170MW(3), that necessitated the making of a further discretionary decision as to whether the bargaining period should be terminated.

[21] Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in House v The King in these terms:

`If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so'."

78. If either section 8(1)(a) applies or section 8(1)(b) applies and the imposition or proposed imposition of a condition or requirement is not reasonable in the circumstances, other avenues exist within the Act to obviate the conduct complained of being unlawful discrimination.

Measures Intended to Achieve Equality

79. If application of section 8 to these circumstances could result in a finding that the Respondent discriminated against the Complainants, a defence may be available via section 27, which is a general exception to unlawful discrimination contained in Division 4.1 of the Act.

80. There are two versions of this provision applicable in relation to this case:

1. Section 27, as applicable from 1991 to 1999

   Measures intended to achieve equality

   27. Nothing in Part III renders it unlawful to do an act a purpose of which is—

   (a) to ensure that members of a relevant class of persons have equal opportunities with other persons; or

   (b) to afford members of a relevant class of persons access to facilities, services or opportunities to meet their special needs.

2. Section 27, as applicable from 1999 until 2004[8]

   27. Measures intended to achieve equality

   (1) Part 3 does not make it unlawful to do an act if a purpose of the act is—

   (a) to ensure that members of a relevant class of people have equal opportunities with other people; or

   (b) to give members of a relevant class of people access to facilities, services or opportunities to meet the special needs they have as members of the relevant class.

   (2) However, subsection (1) does not make it lawful to do an act for a purpose mentioned in that subsection if the act discriminates against a member of the relevant class in a way that is not reasonable for the achievement of that purpose.

81. This provision is central to this case and, as stated, proceedings were stalled while awaiting the Federal Court decision *Richardson v ACT Health & Community Care Service* [2000] FCA 654. The construction placed upon section 27 by Finkelstein J, with Heerey J in agreement was:

> 25. Section 27 is concerned to make lawful two types of conduct. First, it is designed to ensure that people who share a particular attribute may be provided facilities etc that are available to the general community. What it is intended to allow is "positive discrimination". Second, the section is designed to permit discrimination between persons who have one of the attributes mentioned in s 7 provided the discrimination results from the need to satisfy the special needs of those persons. So, for example, if limited facilities are available and one person in a class has a greater need for those facilities than another and is provided those facilities for that reason, the discrimination is not unlawful.

[8] Note - the rewording of section 27 was done to clarify the meaning of that section, which means that the operation of the post 1999 provision is declaratory and the pre 1999 provision was intended to mean the same.

> 26. To determine whether discriminatory conduct is rendered lawful by the application of s 27 the act of discrimination must be for a permitted purpose. That is, the conduct which s 27 protects is not discrimination that has the effect of achieving equality, but discrimination which is intended to have that effect. The word "purpose" refers to the actual intention of the decision-maker or actor. The decision-maker's intention is a matter to be established by reference to the facts, including reference to the circumstances from which inferences may be drawn as to the state of mind of the decision-maker: compare *Colyer* above at 773 per Kenny JA. To determine whether the decision-maker holds the requisite state of mind, it will be permissible to enquire whether the conduct in question was capable of achieving equal opportunity (s 27(a)) or meeting special needs (s 27(b)). That enquiry may be necessary for the purpose of establishing that the claimed intention is one that is likely to have been held by the decision-maker. It is not, however, to substitute for an enquiry into the subjective state of mind of the decision-maker an objective criterion. It is merely one of the means by which a claimed subjective intention can be established, in cases where there may be doubt.
>
> 27. In view of the construction placed upon s 27 by the Tribunal, the requisite factual enquiry was not undertaken. Further, the Tribunal's finding which was referred to by the trial judge, namely that the housing program "was designed to meet the special needs of disadvantaged persons" should not be understood as a finding concerning the state of mind of the decision-maker. The full text of what the Tribunal said was that "the action taken by the Respondent is taken in the course of a program designed to meet the special needs of disadvantaged persons". It was not in dispute that the object of the program was to provide accommodation to meet the special needs of disadvantaged people. However, the fact that the particular decision about which complaint is made was taken in the course of such a program does not bring it within s 27. It was still necessary to determine the reason for taking that decision and in particular whether it was taken for a permitted purpose. As that was not the subject of any investigation the Tribunal and the trial judge, by refusing to set aside the decision of the Tribunal, fell into error.

82. In the Explanatory Memorandum to the Discrimination Amendment Bill (No 2) 1999, the Attorney-General stated that:

> 'Section 27 has commonly been used to ensure that any special measures conferred on a disadvantaged class of persons for their benefit are not to be taken to discriminate against those persons who are not so disadvantaged. The AAT in the *Vella* decision and the Supreme Court in *Richardson* have interpreted the section to an additional effect.
>
> The AAT stated that the wording of section 27 was such that no person could make a discrimination complaint about anything done in the

> course of providing a program designed to meet the needs of disadvantaged persons. This included a member of the disadvantaged class that any special measures program was intended to benefit. Thus, section 27 as it currently stands is not limited to barring actions only by those persons who are not disadvantaged.
>
> Concern has been raised that this could lead to the effect that it might be considered lawful to discriminate against a person in a special measure program for a reason unrelated to the provision of the special measure; for example, on an irrelevant ground of race or sex. The amendment will make it clear that it will not be lawful to discriminate on irrelevant grounds. It is intended to ensure that a service provider could not refuse a person access to a special facility, or special services designed to suit their needs because, for example, of their religion or sex if they were an irrelevant consideration for the purpose of providing the service.
>
> The amendment will allow people within a disadvantaged group to take action against a service provider if they are treated unfavourably in the course of the provision of a special measures program, in a way that is irrelevant to achieving the purposes of that special measure, and enable them to avail themselves of the remedies under the Act.'

83. There is no suggestion from the Complainants, in their allegations against the Respondent, that discrimination occured on a basis irrelevant to the services provided by the Respondent. That is, the Complainants contend that it was within the provision of service that the discrimination occurred.

84. Section 27 requires that the Tribunal undertake an examination of the subjective state of the Respondent's mind. That is, the Tribunal must ascertain what are the acts or omissions that are alleged to constitute discrimination and then the Tribunal must make a finding on the subjective reasoning by the Respondent in making those acts or omissions. If the reason for undertaking an act or omission is to achieve equal opportunity or to meet the special needs of a person, then section 27 will apply and the discrimination complained of will not be unlawful.

85. The Respondent made decisions about the level of service it would provide to Jack and Kieran. The services offered were intended to meet their special needs. The requisite factual enquiry for this Tribunal in respect to whether section 27 will apply is to be based on the reason for taking any decision and whether the taking of that decision is for a permitted purpose.

Unjustifiable Hardship and Acts Done Under a Statutory Authority

86. As an alternative to the section 27 defence, the Respondent also seeks to rely on the "unjustifiable hardship defence" at sections 51 and 53, which state:

> **51 Discrimination by educational institutions**

(1) Section 18 does not make unlawful discrimination on the ground of disability in relation to a failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students who have a disability that the Complainant does not have.

Note The Legislation Act, dict, pt 1 defines *fail* to include refuse.

(2) Section 18 does not make unlawful discrimination on the ground of disability in relation to a failure to accept an application by a person who has a disability for admission as a student at an educational institution if the person, if so admitted, would require services or facilities that are not required by students who do not have a disability, the provision of which would impose unjustifiable hardship on the relevant educational authority.

53 Discrimination in the provision of goods and services

(1) Section 20 does not make unlawful discrimination on the ground of disability in relation to the provision of goods, services or facilities if—

(a) because of a person's disability, the goods, services or facilities would have to be provided in a special way; and

(b) their provision in that way would impose unjustifiable hardship on the person providing, or proposing to provide, the goods, services or facilities.

(2) In this section:

services includes services provided by an employment agency.

87. These provisions are based on the test of unjustifiable hardship set out in section 47, which states:

47 Unjustifiable hardship

In deciding what is unjustifiable hardship for this division, all the relevant circumstances of the particular case must be taken into account, including the following:

(a) the nature of the benefit or detriment likely to accrue or be suffered by all people concerned;

(b) the nature of the disability of the person concerned;

(c) the financial circumstances of, and the estimated amount of expenditure by, the person claiming unjustifiable hardship.

88. In *Scott v Telstra 1995* EOC 92-717 the Human Rights and Equal Opportunity Commissioner considered the defence of unjustifiable hardship in the context of the cost of supplying telephone services to deaf people. In dismissing the defence, Sir Ronald Wilson held that a consideration of unjustifiable hardship requires a balancing between the hardship caused to the Complainant by reason of lack of the service and the financial cost to the organisation.

89. Providing ABA at the level requested imposes a significant financial cost on the Respondent. The financial circumstances of the Respondent are a matter to be considered with respect to a defence under sections 51 and 53. However, as the then Chief Justice Gleeson stated in *Graham Barclay Oysters v Ryan; Ryan v Great Lakes Council* (2003) 194 ALR 337, 340-1:

> Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially

> political. … When courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that in a representative democracy, are ordinarily decided through the political process.

90. The defence of unjustifiable hardship requires a balancing of competing needs. Section 47 requires the Tribunal to look to the nature of the benefit or detriment likely to accrue or be suffered by all the people concerned. This section requires an evaluation of the benefit of ABA to the Complainant as well as the cost of ABA to the Respondent.

91. As discussed earlier, the Tribunal cannot make a determination that ABA is the only appropriate method of education children with ASDs. Therefore, it would be inappropriate for the Tribunal to make an evaluation on the detriment suffered by the Complainants because the Respondent did not provide or did not adequately provide ABA. Furthermore, the cost to the Respondent of the program as requested by the Complainants is high. While the Commissioner considered this defence as possibly supported, it is not the purview of the Tribunal to undertake policy decisions on government budget allocation, which a determination of whether or not the requested service imposed unjustifiable hardship would, in essence, amount to.

Acts Done Under Statutory Authority

92. The Respondent also seeks to rely on the defence provided in section 30, which states:

> **30 Acts done under statutory authority etc**
> (1) This Act does not make unlawful anything done necessarily for the purpose of complying with a requirement of—
> (a) a Territory law; or
> (b) a determination or direction made under a Territory law; or
> (c) an order of a court; or
> (d) an order made by the tribunal under division 8.4.
> (2) The Minister may, in writing, declare that subsection (1) (a) and (b) expire on a day stated in the declaration.
> (3) The declaration is a notifiable instrument.
> Note A notifiable instrument must be notified under the Legislation Act.
> (4) Subsection (1) (a) and (b) and this subsection expire on the day stated in the declaration.

93. The interpretation the Respondent placed on the application of this provision is that, in order to exercise their obligations of reasonable skill and diligence, of impartiality, of probity and of acting in accordance with directions, the relevant government officials could not "go further than their resources allowed". This defence, according to the Respondent, relies on the same evidence as that used to support the claims of unjustifiable hardship under sections 51 and 53.

94. If the costs applicable to the individual children were multiplied over the potential client group, the cost of providing ABA for all children who sought it would require a high level of resource allocation. In this regard, section 30 would operate to the effect that any senior government official who made a decision to make such a substantial budget reallocation may

be in breach of various financial provisions applicable in the ACT as, to do so without the specific approval of the legislature, might be contrary to ACT statute.

95. The respondent's submissions details the financial effects of widening the introduction of ABA to potential client groups. Although the Respondent's submission are at Annexure 2, I am reproducing paragraphs 94 to 110 for the edification of any reader without access to the Annexures:

The cost of the Lovaas program

94. The cost of what DECS were able to provide at NAPS is set out in the evidence of Ms Hargreaves and Mr Curry. DECS established a unit at NAPS that had a dedicated classroom and associated resources (eg furniture, a computer etc), a full-time teacher and 2 part-time STAs - for 2 students. The staff-only costs in 2001 were $82,672 or $41,336 per student. This was about 250% of staff costs per student in DECS' other autism-specific units: EX 39 (Hargreaves statement), table 1. Mr Curry gave oral evidence that the total cost per student at NAPS was about $60,000 per annum, 10 times the cost of an ordinary mainstream primary school student: TR 806-807.

95. Other NAPS costs included a total of over $36,000 on the Watson consultancy in 1998-2001, and $13,000 for NAPS initial set-up costs in 1998.

96. The Complainant contended in oral argument that the costs of the NAPS unit should be compared not with other autism units, but with special schools. In the respondent's submission, such a comparison would be spurious. NAPS is not comparable with a special school, because (i) it was specific to one disability diagnosis (autism), (ii) it had only one kind of program – Lovaas, (iii) it never had more than 2 students, and (iv) it was intended to be attached to a mainstream primary school: RXN Hargreaves TR 739. Moreover, the parents of both Complainants had explicitly rejected placement in a special school for their children. The Buckleys asked for Kieran to be placed in a mainstream primary school at Turner PS, then at NAPS; Mrs

Woodbury withdrew her son from Cranleigh, and also had her son placed at Turner, then NAPS (see above paras 24-25).

Territory Budget allocations and the constraints on public bodies

97. It is not the case that officials of the executive government are free to adopt a "whole-of-government" approach to providing the programs of their agencies, as is suggested in the Complainant's Submissions. The principles of government embodied in the *Financial Management Act 1996* (FMA) require expenditure to be enacted in an appropriation of parliament. Transfers between and within appropriations are subject to the Act, to approval by the "Executive", in the sense that term is used in the ACT Self Government Act: see Part 2, ss 14, 15.

98. At a lower level, government officials are constrained by the *Public Sector Management Act* (PSM Act), and by the provisions relating to their department's appropriations in the budget. Senior departmental officials (Ms Healy of DHCC , Mrs Hargreaves and Mr Curry of DECS) have given evidence to the effect that their agency is a department of state of the Territory whose programs must be implemented in accordance with government policy, including the policy embodied in the budget: see Respondents Statement of Facts and Contentions adopted as evidence by each relevant witness, at paragraphs 4-5, 12, 21-24. It is sufficient to give the relevant passage for DECS:

> *"21. DECS is a department of state of the Australian capital territory under the control of the Minster for Education and community Services. The primary function of DECS is to provide advice to the Minister and the ACT Government on education and community services and related matters.*
>
> *22. Public schools in the ACT are established and conducted by the ACT Schools Authority (ACTSA) under the Schools Authority Act 1976. The person appointed as the ACTSA is the Chief Executive of DECS [Ms Fran Hinton].*

23. The responsibilities of DECS through the ACTSA include the operation of public schools and the provision in them of educational services to pre-school and school age children.
24. The educational services provided by DECS are provided in accordance with government policy and priorities and funding provided by the ACT budget.

25. Within the framework set out in paragraphs 21-24, DECS also provides special educational services for disabled children, including children with ASD..."

99. The PSM Act reflects this position. Chief Executives have responsibilities to the Minister (section 29), and all officers have the obligations set out in section 9.

100. Having regard to their obligations as public officials it cannot seriously be suggested that the various officials approached by the Complainants were free to use funds of the magnitude required to purposes other than those identified in their agency budgets.

101. In the case of ACTCCS expenditure on services to the public was governed by written agreements between it and the Department for 1996 to 2002 (as is further detailed below).

102. The costs of the Lovaas program may be compared with the 2001 budget allocations in the field of disability in the evidence of DECS witnesses Ms Hargreaves and Mr Curry, and of the DHCC witness Ms Healy. In 2001 additional funds of $50,000 were allocated in the Territory DECS budget to special education of children with autism generally: EX 34, attachment 4 (extract from 2001-2 Budget Paper No 3, p. 65. The staff costs alone of the NAPS program ($82,000 in 2001) exceeded this amount: EX 39 Hargreaves statement, table 1.

103. The Tribunal would be entitled to conclude from this that the expenditure required even for a 2-student unit at NAPS is of such a magnitude as to require express provision in the budget.

104. If not, the special expenditure on NAPS, when compared with what was spent on other autism units, and with the budget allocations, must be regarded as being at the outer margin of what could be lawfully authorised by a public official without the approval of the Executive.

105. If the costs to DECS are measured on the basis that Lovaas costs are to be applied to all DECS autism units, based on 2001 figures, $1.5 million would be needed for staff costs alone, an increase of 200%. This figure can be derived from the actual staff costs of about $562,000 for staff for the 36 students in 2001 ($15,000 per student) as compared with NAPS costs per student of about $42,000, set out in Mrs Hargreaves' table 1.

106. The DHCCC service agreement 2001-2002 (EX 24 at p. 11) indicates that in 2001 the total of health budget payments for services to disability was about $ 76 million. There is no breakdown of the amount spent on disabled children. In the statement of Ms Healy of DHCC (EX 34, p. 3) it was noted that in 2001 an extra $250,000 budget initiative was allocated for *all* disabled children in the ACT. Ms Healy in oral evidence explained that half of this went to delivery of services by ACTHCCS and half by CHADS. DECS expenditure of $82,000 on staff at NAPS in 2001 therefore represented about 30% of what was allocated in the budget initiative for *all* disabled children.

107. The Complainants have also asserted that there would be an overall saving to the public purse from implementation of a Lovaas program. This assertion is based on the assumptions that the superior levels of functioning achieved by those on such programs

would effectively reduce the public funds needed in the future to maintain otherwise lower functioning individuals. No evidence was adduced to support this assertion.

Potential size of broader client group

108. The Complainants should not be heard to suggest that the Territory ought to have commenced a program just for 2 students. The respondent is the body politic of the Territory administering public funds, and it is bound to do so on an equitable basis. The Complainant's case must be that the Territory was remiss in not identifying Lovaas programs as a general program for children with autism and allocating the funds to establish them.

109. The potential hardship to the ACT (DECS) may also be measured on this basis, not on the basis of the costs of 2 students only. The potential size of the whole client group for these programs is the proper measure of the expenditure at issue. The size of the potential client group can be estimated by reference to the statistics provided in the evidence of Ms Hargreaves of DECS and Ms Healy of DHCC. Ms Hargreaves' evidence was that in 2001 DECS had a total of 38 students in autism-specific educational units (including the Complainants). This figure did not include students with autism at other schools such as Cranleigh.

110. The other evidence was not specific about a total population of children with ASD, but it suggested that the incidence of ASD is growing. Based on 1998 census figures there were 5,800 disabled children in the ACT for whom DHCC would potentially have to fund programs: XN Healy, TR 659 EX 37. There was no evidence about the proportion of these diagnosed with ASD. Research of the general incidence of ASD is summarised in Ex 36 (Helen Baker's study in "A Comparison Study of ASD Referrals" (2002) 32 *Journal*

of Autism and Developmental Disorders 121). The general incidence of autism reported varies between about 0.05 and 0.1% of the population (9.2 per 10,000 in a Welsh study). The incidence increased by up to 300% between 1987 and 1998. In the ACT there were 27 new diagnoses of autism in 1998, a 200% increase since 1989.

Other Considerations

96. The Complainants asked that, in making its decision, the Tribunal consider the decision of the Court of Appeal of British Columbia in *Auton and Ors v The Attorney General of British Columbia and the Medical Services Commission of British Columbia* 2002 BCCA 538. This case was based on a very similar factual scenario: parents of children with severe autism complained of the failure of both government education and health services to provide ABA, to the detriment of the children.

97. However, an important distinguishing feature of *Auton* was that, at the time of the claim, no Autism-specific programs existed. That is, autism sufferers were not getting equal benefit from a legislative instrument that established the Ministry of Health in order to provide health services to the people of the Province. In the present case, there are established health and education services and programs to serve the needs of members of the community, including children, who suffer from ASDs.

98. The Complainants raised other international cases and indicated a rights-based approach would be appropriate. The Discrimination Act is specific and definitional and Australian authorities exist, particularly with respect to *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379), to assist interpretation and application of the Act. This does not suggest that, in reaching this decision, the Tribunal did not take into account its obligations as a decision-maker, including consideration of Conventions to which Australia is a signatory (*Minister for Immigration v Teoh* 1995 183 CLR 273).

Decisions following hearing

99. The following provides for the decision that the tribunal must make as well as orders that the tribunal may make following the decision:

> **102 Decisions following hearing**
> (1) In this section
> ***unlawful conduct*** means conduct that is unlawful under part 3, part 5 or part 7 or section 66.
> (2) After completing a hearing, the tribunal must—
> (a) dismiss any complaint that the tribunal is satisfied—
> (i) is frivolous, vexatious or not made in good faith; or
> (ii) has not otherwise been substantiated; or
> (b) if satisfied that the respondent has engaged in unlawful conduct—

(i) order the respondent not to repeat or continue the unlawful conduct; or
(ii) order the respondent to perform any reasonable act or acts to redress any loss or damage suffered by a person as a result of the unlawful conduct by the respondent; or
(iii) except if the complaint has been dealt with as a representative complaint—order the respondent to pay to a person a specified amount by way of compensation for any loss or damage suffered by the person as a result of the unlawful conduct by the respondent.

(3) An order under subsection (2) (b) (iii) may include an order for payment of a specified amount—
(a) authorised by the tribunal in accordance with the prescribed scale; or
(b) if there is no prescribed scale—decided by the tribunal;
in relation to the expenses reasonably incurred by a person in connection with the hearing.

(4) If the tribunal dismisses a complaint under subsection (2) (a) (i), the tribunal may, by written notice given to the Complainant, order the Complainant to pay to the respondent a specified amount—
(a) authorised by the tribunal in accordance with the prescribed scale; or
(b) if there is no prescribed scale—decided by the tribunal;
in relation to the expenses reasonably incurred by the respondent in connection with the hearing.

(5) If the tribunal dismisses a complaint or makes an order under subsection (2) (b) in relation to a complaint, the tribunal must, within 28 days after making that decision, give the parties to the hearing written notice of the decision and, if an order under subsection (2) (b) has been made, setting out the terms of the order.

Reason for Decision

100. The two fundamental issues that can be distilled from the complaints are:

a. whether the Respondent discriminated against the Complainant by failing to keep informed of relevant developments in the treatment of Autism and the consequential failure to advise government; and

b. whether the Respondent discriminated against the Complainants by providing required medical and educational services that did not meet the Complainants' needs.

101. The Tribunal considers that a decision upon these central issues will substantially decide all the complaints that make up this matter. That is why, with the full agreement of the parties, the Tribunal amalgamated the various complaints.

102. There are, however, the three specific claims of discrimination that must also be addressed. These are the claims set out in paragraph four of the Respondent's submission, that:

- The Respondent refused a funding arrangement to the Buckleys;
- The Respondent gave advice to FaBRIC, causing it to propose to withdraw a service to Kieran Buckley; and

- The Respondent proposed to introduce two additional students to the NAPS Unit.

103. Another specific claim that must be addressed is With regard to the refusal of an "Individual Support Package", the Tribunal is satisfied, also on the evidence presented to the Tribunal by Christine Healy, from the Department of Disability, Housing and Community Services, on 19 December 2002, that the Respondent had insufficient funds to meet the level of community support services requested and that it was reasonable that Kieran was assessed as not requiring the priority funding.

104. With regard to the claim that the Respondent was discriminatory in withdrawing the FaBRIC funding, the Tribunal is satisfied, also on the evidence presented to the Tribunal by Christine Healy, that the withdrawal of the funding appropriate in the circumstances and not discriminatory. The purpose of this funding was to provide short-term substitute for usually care provided by primary carers. When the child is at school, the school assumes these responsibilities. Therefore, FaBRIC funding was never an appropriate resource to fund the STAs at the NAPS Unit.

105. The final of the three specific claims is that the proposal by the Respondent to introduce two additional children into the NAPS Unit constituted discrimination. The Tribunal cannot be satisfied that any allocation of extra students would constitute discrimination and, in any event, certainly would fall within the purview of section 27. This point is moot however, as no other students were allocated to the Unit.

106. With respect to the alleged failure by the Respondent to keep informed of relevant developments in the treatment of Autism and the alleged consequential failure to inform government, the Tribunal considers these allegations as focussing on the provision or otherwise of ABA.

107. This case does not represent a scientific inquiry into the efficacy or otherwise of the ABA process for children suffering ASDs. It is noted that research demonstrates the highest success with the method for children between three and five years. Thus, I have not set out to detail the expert evidence from a variety of sources presented to me in this case, but I am satisfied that considerable case has been made out to indicate the outstanding success of the ABA process for children of younger ages, particularly if the program is properly resourced.

108. It is also noted that the Complainants own witness stated that by 2002, only 10 states in the United States publicly funded ABA programs. In 1998, when ABA was introduced into the NAPS Unit, the Respondent was the only public authority in Australia to use public funds for a school-based ABA program. The full evaluation and research remains to be completed. The high level of resourcing and expertise required for a successful ABA program is fully appreciated.

109. With respect to the claim that the Respondent discriminated against the Complainant because the Respondent did not provide the medical and educational services sufficient to the needs of the Complainants, the Tribunal considers this a matter that, even where it to constitute discrimination, would fall very much within the purview of section 27 of the Act.

110. I am satisfied on the evidence that appropriate medical and educational services were provided to the Complainants by the Respondent. These services undoubtedly fall short of

meeting every exigency of every citizen and, in this case, certainly fall short of the hopes and expectations of the parents. However, the allocation of budget resources to fund programs and services is a matter for government.

111. The Complainants consider the services that were provided to them insufficient, and there may well be flaws in the creation and/or implementation of policies. However, alleged maladministration is not discrimination and the Discrimination Act is not a tool to be used to force a hearing to query the implementation of programs.

112. I do not consider that discrimination is made out according to section 8. Direct discrimination, under section 8(1)(a) does not apply. As stated under the heading "Legislative Scheme" beginning on page 12 of this decision, to constitute "direct" discrimination, there must be treatment or proposed treatment directed toward, or aimed at, a person because of a relevant attribute. The respondent did not provide ABA prior to 1998 and, post 1998, by provided ABA to an allegedly unsatisfactory level. The provision or otherwise of this service lacks the necessary causal connection to the two boys. It is the position of the Tribunal that the provision or otherwise of this service was dictated by budgetary considerations.

113. I also do not consider that "indirect" discrimination, under section 8(1)(b) applies to this situation. That provision is explained in some detail in this decision – see paragraphs 60 to 69. Under this subsection, conduct will be regarded as discriminatory only if it unreasonable (*Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379 at 56). I cannot find that the conduct of the Respondent, in not providing ABA prior to 1998, or in providing ABA to the level that it did post 1998, could be classified as unreasonable in the circumstances. Paragraphs 94 to 110 (reproduced at paragraph 86 of this decision) of the Respondent's submissions outline the financial considerations that, alone, would allow a finding that the treatment or proposed treatment of the boys and their families was reasonable in the circumstances. There are other considerations that go to the issue of the reasonableness of the decisions made by the Respondent with respect to ABA. These have been discussed throughout this decision and were particularly addressed under the heading of "Approaches to Education Children with Autism" beginning on page 5 of this decision.

114. The decisions taken by the Respondent with respect to the provision of services to Jack and Kieran, as well as the assistance to their families, were taken in the course of providing programs and services that were:

> designed to meet the special needs of disadvantaged persons that a purpose of the decision was, on the face of it, "to afford members of a relevant class of persons access to facilities, services or opportunities to meet their special needs" within the terms of s 27(b).' (*Richardson v ACT Health & Community Care Service* [2000] FCA 654, at 5)

115. I am satisfied that the purpose of the provision of services to the Complainants was "genuine and not colourable" (*Colyer v State of Victoria* [1998] 3 VR 759) and, any act that may constitute discriminatory conduct is not unlawful by virtue of section 27(b) of the Act.

116. Comparisons with some jurisdictions in the United States and in Canada must be distinguished on the basis of statutory or constitutional guarantees that will necessitate the application of programs such as ABA if sought by the individual or the parent. I refer specifically to the detailed evidence of Professor Sallows who has chronicled the long and

hard struggle for the introduction, with government support, under the framework of statute, in the State of Wisconsin, USA. At the time of the hearing, the Professor himself had begun considerable preliminary research to support the validity of the process. I also heard evidence from other sources that support alternative methods of dealing with such cases. This is set out in paragraphs 16-22 of the respondent's submissions (at Annexure 2) and also discussed earlier in this decision under the heading "Approaches to Education Children with ASDs".

117. It is obvious that I have not canvassed all the points made in the submissions or in all the evidence that was put before the Tribunal. This is because I consider some of the points raised to be invalid or outside the scope of my inquiry. I have attempted to focus only on those areas of the evidence that enabled me to make a decision about whether the respondents discriminated against the Complainants in the terms of the Act, which is the purpose of this Tribunal.

118. Discrimination in the ACT does not necessarily act as a vehicle for complaints about levels of service and funding for the disabled. This case demonstrates a need for consideration for establishing a general complaints mechanism about levels of service. There do exist other sporadic and limited mechanisms for complaints of this nature, however, there is a need for coordination.

119. The question of budgetary allocations for individual service packages and for general levels of service ultimately remains a political decision to be made by government. It is only in a narrow class of cases that discrimination will be made out under the legal requirements of the ACT Discrimination Legislation.

Summary

120. I have reached the general conclusion that all of the issues involved here arise from resource allocation and government budget allocation decisions.

121. There is no evidence of discrimination as defined in the Act, either of a direct or an indirect nature.

122. Even if there had been discrimination, a number of "defences", in particular section 27, would have applied in favour of the respondents.

Order of the Tribunal

123. The complaints made by Ms Esther Woodbury on behalf of her son, Jack Sullivan, and her husband and her daughter are dismissed under section 102(2)(a)(ii) of the Act, on the grounds that they have not been substantiated.

124. The complaints made by Mr Robert Buckley on behalf of his son, Kieran Buckley, and his wife and daughter are dismissed under section 102(2)(a)(ii) of the Act, on the grounds that they have not been substantiated.

125. All interim Orders made by this Tribunal in relation to this matter are discharged.