

November 2004

**DISABILITY DISCRIMINATION IN EDUCATION AND  
THE DEFENCE OF UNJUSTIFIABLE HARDSHIP**

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**ISSN: 1321-7828  
ISBN: 1 74067 393 X**

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## **ABSTRACT**

The *Disability Discrimination Act 1992* (Cth) (the ‘DDA’) provides protection for the rights of people with disabilities in Australia in many facets of everyday life. This paper examines the DDA in relation to the prevention of discrimination in the area of education. This is of relevance to tertiary institutions such as universities, given that de-institutionalisation and mainstreaming over the last decade particularly has resulted in many more disabled people seeking to continue their studies at the tertiary level.

The DDA prevents educational institutions from discriminating against a student on the grounds of the student’s disability in relation to admission and access to the institution and its services and facilities. However, the DDA also provides that it is not unlawful to discriminate in relation to these matters if the disabled student’s requirements are such that an unjustifiable hardship would be imposed upon the educational institution.

Over the last twelve years, the courts have decided individual complaints consistent with the broad principles established by the DDA. Particularly relevant is the recent case of *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62, which has tested the boundaries of the DDA with respect to the definition of “disability”, the “appropriate comparator” issue and the provision by the educational institution of “reasonable accommodations”. The cases of *Hills Grammar School v HREOC* and *Purvis* discuss the unjustifiable hardship defence with the *Hills Grammar School* case particularly, providing a detailed determination of what constitutes the defence for the purposes of the DDA.

Legislative amendments to the DDA as a result of a recent review undertaken by the Productivity Commission, in addition to the introduction of new education standards, have clarified the obligations imposed upon educational institutions with regard to disabled students. Educational institutions must take those steps necessary to satisfy the requirements of the DDA, thus avoiding claims of unlawful discrimination being made against them.

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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.<sup>1</sup>

## INTRODUCTION

This paper explores the application of the *Disability Discrimination Act 1992* (Cth) (the 'DDA'), with a particular focus on educational institutions, and on the issue of the application of the defence of unjustifiable hardship. The DDA prevents, among other things, an educational institution such as a university from discriminating against a student on the ground of the student's disability, by refusing to enrol the student or by denying or limiting the student's access to any benefit provided by the educational authority. The concept of unjustifiable hardship arises because the DDA further provides that an institution may seek to avoid any obligations under the Act if it can show that the adjustments that it might have to make to provide services and facilities for a disabled student may cause unjustifiable hardship for the institution.

The DDA has recently been reviewed by the Federal Government Productivity Commission<sup>2</sup> in its report (*Review of the DDA 1992*),<sup>3</sup> the findings and recommendations of which in part, are highlighted throughout this report. The outcome of this review and the recent drafting of disability standards for education (the education standards) are of particular relevance to educational institutions.

The first part of this paper addresses discrimination generally; how it is defined, its types and the various factors which constitute its makeup. Following this part is a brief overview of the exemptions to unlawful discrimination including, and with a particular focus on the defence of unjustifiable hardship. Finally this paper examines some recent developments which have occurred in this area of law.

The United Nations *Declaration of the Rights of Disabled Persons* (1978) provides that all individuals with disabilities have a right, amongst other things, to protection from discriminatory treatment in the area of education, and assistance to enable them to become as self-reliant as possible.<sup>4</sup> The DDA implemented the Australian Government's obligations as a signatory to this declaration<sup>5</sup> when the Act was passed in 1992 and came into effect in March 1993.

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<sup>1</sup> Commissioner Graeme Innes, *Finney v The Hills Grammar School* [1999] HREOCA 14 at para. 6.14.

<sup>2</sup> The Productivity Commission is an independent agency and the Government's principal review and advisory body on microeconomic policy and regulation. The DDA was reviewed in April, 2004.

<sup>3</sup> *Productivity Commission Inquiry Report*, Volume 1: Chapters, Report No. 30, 30 April 2004 ('*Productivity Commission Report*').

<sup>4</sup> The declaration is attached to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) at Schedule 5.

<sup>5</sup> The Australian Government lacks specific power to legislate regarding human rights, disability or discrimination. It does have power over external affairs however, which includes legislating to implement treaties and on matters of international concern (*Productivity Commission Report*, 1).

The DDA and various State anti-discrimination laws<sup>6</sup> in Australia reflect this declaration by providing in general terms that discrimination on the basis of physical, intellectual, psychiatric, sensory, and neurological and learning disability is unlawful. The DDA and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) largely provide the Federal framework for the protection of the rights of people with disabilities in Australia.<sup>7</sup>

The DDA has been amended since its inception and continues to evolve. It operates at a fairly high level of principle by making discrimination on the ground of disability unlawful in certain areas, but it does not provide much detail on how the law should be applied in individual cases. Over time the courts have decided individual complaints consistent with the broad principles set by the DDA.<sup>8</sup>

The environment in which the DDA operates has changed over the past 11 years with ‘de-institutionalisation’<sup>9</sup> and ‘mainstreaming’<sup>10</sup> exposing many people with disabilities to new opportunities and challenges and likewise exposing many parts of the general community to people with disabilities. Of importance is the fact that there is a generation of children with disabilities moving through the mainstream education system who will soon be seeking possible higher education opportunities.<sup>11</sup>

## **WHAT IS THE PURPOSE OF THE DDA?**

Section 3 of the DDA sets out the objects of the Act. These are:

- a) To eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
  - (i) work, accommodation, education, access to premises, clubs and sport; and
  - (ii) the provision of goods, facilities, services and land; and
  - (iii) existing laws; and
  - (iv) the administration of Commonwealth laws and programs; and
- b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

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<sup>6</sup> *Discrimination Act 1991* (ACT) Div. 4.5, *Anti-Discrimination Act 1977* (NSW) Part 4A, *Anti-Discrimination Act* (NT) s 24, *Anti-Discrimination Act 1991* (Qld) s 7, *Equal Opportunity Act 1984* (SA) part 5, *Anti-Discrimination Act 1998* (Tas) Div. 5, *Equal Opportunity Act 1995* (Vic) s 37, *Equal Opportunity Act 1984* (WA) s 66A.

<sup>7</sup> *Australian and New Zealand Equal Opportunity Law and Practice* (1998) 1, 344.940 at 7.370.

<sup>8</sup> *Productivity Commission Report*, 2.

<sup>9</sup> This refers to a shift from institution-based to community-based care of people with disabilities.

<sup>10</sup> This refers to a shift from services that cater separately and exclusively for people with particular types of disability to those that cater for the ‘mainstream’ population.

<sup>11</sup> *Productivity Commission Report*, 2.

There is therefore an attempt to provide a clear and comprehensive national mandate for the elimination of discrimination and to bring people with disabilities into the economic and social mainstream of Australian life.<sup>12</sup>

## **HOW DOES THE DDA APPLY TO EDUCATIONAL INSTITUTIONS SUCH AS UNIVERSITIES?**

Educational institutions<sup>13</sup> are bound by the DDA under section 22 of the Act which provides that it is unlawful for an educational authority to discriminate against a person on the ground of the person's disability in relation to:

### *Admission*

- Refusal or failure to accept an application for admission from a person with a disability;<sup>14</sup> or
- Accepting a person with a disability as a student on less favourable terms or conditions than others. For example, asking a potential student with a disability to pay higher fees than other students.

### *Access*

- Denying or limiting access to people with a disability. For example, not allowing a person to attend excursions or join in school sports, delivering lectures in an inaccessible format, inaccessible student common rooms; or
- Expelling a person because of a disability; or
- Subjecting a person with a disability to any other detriment.

### *Harassment*

- Humiliating comments or actions about a person's disability, such as insults, or comments or actions which create a hostile environment.

However, section 22 (4) of the DDA provides that it is not unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person would require services or facilities that are not required by students

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<sup>12</sup> *Australian and New Zealand Equal Opportunity Law and Practice* (2001) 1, 344.940 at 7.420.

<sup>13</sup> In all jurisdictions except Tasmania, a reference to an 'educational institution' means 'a school, college, university or other institution at which education or training is provided'.

<sup>14</sup> International students are covered by the DDA. However the operation of the *Migration Act 1958* (Cth) is exempt from the provisions of most of the DDA and thus discrimination can legally occur with respect to the granting of visas. The *Migration Act 1958* (Cth) requires a frank disclosure of any relevant factors by a student applying for a visa. The officer who determines the outcome of the visa application is required to consider the public interest (primarily on an economic basis) in making a determination and thus may reject an application on the basis of a medical report which indicates a disability which may involve costly accommodations. Such rejection would not be considered discriminatory. Nevertheless international students with disabilities do apply for student visas and are granted those visas and the moment the student enters Australia, the provisions of the DDA are available to the student. Likewise an international student may develop a disability whilst studying in Australia and the university is prevented from discriminating against that student on the grounds of the disability. C. Stickels & R. Guthrie, 'Do International Students with Disabilities get 'A Fair Go' at Australia's Universities?' Working Paper Series 95.07, Curtin Business School, June 1995.

who do not have a disability, and the provision of which would impose ‘unjustifiable hardship’ on the educational institution. The Human Rights and Equal Opportunity Commission (‘HREOC’) asserts that large publicly funded organisations such as universities may find it difficult to establish a defence based on unjustifiable hardship. However even large institutions such as government instrumentalities have been able to show that unjustifiable hardship will occur through significant financial expenditure.<sup>15</sup>

In order to understand the application of the principles that promote human rights and equality for people with disabilities in the context of education, it is necessary to elaborate on various issues which underpin discrimination legislation in Australia.

## WHAT IS DISCRIMINATION?

Generally speaking, discrimination is any practice that makes distinctions between individuals or groups so as to disadvantage some and advantage others. Motive and intention to discriminate are irrelevant to the fact of discrimination.<sup>16</sup> This was illustrated in the case of *Hills Grammar School v Human Rights and Equal Opportunity Commission*,<sup>17</sup> where the appellant school admitted directly discriminating against a student Scarlett Finney, who suffered from spina bifida, by refusing to enrol her. The school sought to apply the defence of unjustifiable hardship on the ground that the accommodations and adjustments that were necessary to support the student’s enrolment would constitute such hardship on the school. In making this assessment, the school’s administration made enquiries about the needs of children with spina bifida generally, but did not look at the specific needs of Scarlett Finney herself. The school did not necessarily intend to discriminate against Scarlett, but in failing to look at the specific needs of the particular child the defence failed and the school was found liable for unlawful discrimination.

This issue was also tested in the case of *X v McHugh, Auditor General for the State of Tasmania*<sup>18</sup> where the HREOC found that the dismissal of an employee suffering from paranoid schizophrenia constituted discrimination on the ground of disability notwithstanding that the employer was unaware of the complainant’s disability. The Commission found:

But that is not the test. Intention or motive is not required, as the High Court has said. The objective of the Act is to eliminate, as far as possible, discrimination against persons on the ground of disability in areas of public life; it therefore proscribes, not merely deliberate discrimination, but thoughtless discrimination

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<sup>15</sup> See *Ellis v Metropolitan Transit Authority* (1988) EOC 92-232.

<sup>16</sup> See *Waters v Public Transport Corporation* (1991) 173 CLR 349. Also see *Garity v Commonwealth Bank of Australia* [1999] EOC 92-966 where Commissioner Nettlefold stated; ‘The effect of an impugned practice, not the underlying intent, is the governing factor in determining whether the practice gave rise to discrimination. Intent to discriminate is not a necessary element of discrimination ... The task is to determine whether the ‘true’ basis of the employer’s conduct is or was grounded on the prescribed consideration ... The test to be applied is objective, in the sense that it is necessary to show no more than that, because of the aggrieved person’s disability, she received the less favourable treatment.’ *Ibid* 79 129.

<sup>17</sup> [2000] EOC 93-081.

<sup>18</sup> (1994) EOC 92-623.

as well. Employers are required to be vigilant in their regard for circumstances affecting the interests of their employees, I agree, at least in the circumstances of this case with the interpretation of the Act advanced by Counsel for the respondent, namely, that s 5 is about objective discrimination. It is not necessary that an employer know of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability.<sup>19</sup>

The essence of discrimination is such that it requires some type of comparison. This is discussed below (see 'The requirement to compare'). The onus of proving discrimination rests with the complainant.<sup>20</sup> Once it has been established that discrimination has occurred, the onus moves from the complainant to the respondent who may seek to prove that the discrimination was lawful under the relevant Act.<sup>21</sup>

## **GROUNDS FOR DISCRIMINATION**

Anti-discrimination legislation in Australia makes it unlawful to discriminate on specific grounds. Unless a person is allegedly being discriminated against on a ground as specified in legislation, there is no unlawful discrimination. Under Commonwealth legislation there is a separate Act for each ground of discrimination; that is, disability, sex (including marital status and pregnancy) and race. Each State and Territory has *one* Act under which it is unlawful to discriminate on a number of grounds. These vary from State to State, but all include reference to disability or impairment.

## **WHAT IS A 'DISABILITY'?**

There are some differences between the legislative definitions of 'disability' and 'impairment'. The term 'disability' is defined in the DDA<sup>22</sup> in the following terms:

- a) Total or partial loss of the person's bodily or mental functions (e.g., being paraplegic, having epilepsy);
- b) Total or partial loss of a part of the body (e.g., amputations);
- c) The presence in the body of organisms causing disease or illness (e.g., having AIDS or hepatitis);
- d) The presence in the body of organisms capable of causing disease or illness (e.g., being HIV positive but not having full-blown AIDS);
- e) The malfunction, malformation or disfigurement of a part of the person's body (e.g., having a sight impairment, having a club foot, having a harelip);
- f) A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction (e.g., being dyslexic);

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<sup>19</sup> *Australian and New Zealand Equal Opportunity Law and Practice* (2002) 1, 4.320 .42.

<sup>20</sup> *Scott & Anor v Telstra* [1995] EOC 92-717.

<sup>21</sup> L. Basser & M. Jones, 'The Disability Discrimination Act 1992 (Cth): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26 (2) *Melbourne University Law Review, Symposium, Contemporary Human Rights in Australia* 267. ('A Three-Dimensional Approach to Operationalising Human Rights').

<sup>22</sup> Section 4.



- g) A disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour (e.g., having schizophrenia, having Alzheimer's disease, having a psychiatric condition).

The DDA has the most comprehensive definition of the term 'disability' and also has the widest application in Australia. The legislation of the majority of States and both Territories contain a very similar definition to that of the DDA, although not as broad. Unlike some counterpart State legislation,<sup>23</sup> the DDA defines disability so as to include people who currently have a disability, people who previously had, but no longer have a disability (e.g., having a medical history of severe asthma which is now under control), people for whom a disability may exist in the future (e.g., being a member of a family which has a history of heart disease) and people to whom a disability is imputed (e.g., assuming that a gay man has AIDS when he is in fact quite healthy).<sup>24</sup>

Additionally, under section 8 of the DDA, the definition of disability discrimination includes less favourable treatment because a person is accompanied by an interpreter, reader, assistant or carer. Guide dogs, wheelchairs and palliative or therapeutic devices that disabled persons may need are also addressed by the Commonwealth and State legislation.<sup>25</sup>

This definition of disability ensures that the DDA covers all types of disability, thus placing the focus of the DDA on the alleged act of the discriminator and not on the nature of the person's disability.<sup>26</sup>

## **BEHAVIOUR AS A MANIFESTATION OF DISABILITY**

A contentious issue in relation to the definition of disability is the interpretation of paragraph (g) of section 4 with reference to the extent to which a distinction is drawn between a disability and its manifestations.<sup>27</sup> The issue seems to have been settled for the time being as a result of the High Court decision in *Purvis v State of New South Wales (Department of Education and Training)*,<sup>28</sup> where the court considered whether the definition of disability in paragraph (g) refers only to the underlying disorder suffered, or whether it includes the behavioural manifestations of that disorder. The Chief Justice observed that the problem with regard to the definition of disability arose partly because:

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<sup>23</sup> Victoria, South Australia, Western Australia, Queensland and Northern Territory do not provide for the 'future existence' of disabilities.

<sup>24</sup> All examples are taken from *Australian and New Zealand Equal Opportunity Law and Practice* (2001) 1, 344.940 at 7.422.

<sup>25</sup> *Disability Discrimination Act 1992* (Cth) s 7, 9; *Discrimination Act 1991* (ACT) s 9; *Anti-Discrimination Act 1977* (NSW) s 49B (3); *Anti-Discrimination Act 1992* (NT) s 21; *Anti-Discrimination Act 1991* (Qld) s 4; *Equal Opportunity Act 1984* (SA) s S66 (d) (ii), (e); *Anti-Discrimination Act 1988* (Tas) s 3; *Equal Opportunity Act 1984* (WA) s 66A (4).

<sup>26</sup> *Productivity Commission Report*, 47.

<sup>27</sup> *Federal Discrimination Law* (2004), Human Rights and Equal Opportunity Commission, 99.

<sup>28</sup> (2003) HCA 62.

par (g) begins by reference to physical conditions and then adds a reference to a condition (‘disturbed behaviour’) of a condition. It is necessary to relate par (g), with its added reference to resulting behaviour, to the provisions of s 5 as to what amounts to discrimination.<sup>29</sup>

The case involved Daniel Hoggan, the foster child of Mr and Mrs Purvis. Daniel was enrolled in a mainstream Year 7 class at Grafton High School in New South Wales in 1997. Daniel had multiple, complex disabilities due to a severe brain injury received as an infant. During 1997, he was disciplined and suspended on several occasions for verbal and physical abuse of teachers, teachers’ aides and other students. The school recommended Daniel be moved to a special education unit.

The NSW Department of Education rejected an appeal from Mr and Mrs Purvis against the move to a special education unit. The Purvis’s made a disability discrimination complaint to the HREOC which found in their favour and the case then proceeded through the courts on appeal. The steps in this process were as follows:

- HREOC found the Department of Education had discriminated against Daniel on the ground of his behaviour and therefore on the ground of his disability.<sup>30</sup>
- The Federal Court at first instance disagreed with the HREOC. It said ‘the behaviour of the complainant is not *ipso facto* a manifestation of a disability within the meaning of the Act’.<sup>31</sup>
- The Full Court of the Federal Court agreed with the first Federal Court decision. It said Daniel’s ‘conduct was a *consequence* of the disability rather than any part of the disability within the meaning of s 4 of the Act’. That is, Daniel’s behaviour was separate to his disability, even though it was caused by his disability.<sup>32</sup>
- The High Court said Daniel’s conduct was part of his disability for the purposes of the DDA because it was ‘disturbed behaviour’ under part (g) of the definition. The High Court said the Federal Court had erred in distinguishing between a condition and its behavioural manifestations.

...to focus on the cause of the behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person different in the eyes of others.<sup>33</sup>

That is, direct discrimination on the ground of a behaviour that is a consequence of a disability is discrimination on the ground of the disability.<sup>34</sup>

However, the majority of the High Court went on to find that the Department of Education had not unlawfully discriminated against Daniel *because* of his disability

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<sup>29</sup> Gleeson CJ at 4.

<sup>30</sup> *Purvis v The State of New South Wales (Department of Education)*, HREOC, 2000.

<sup>31</sup> *State of NSW (Department of Education) v HREOC* [2001] FCA 1199.

<sup>32</sup> *Purvis v State of NSW (Department of Education and Training)* [2002] FCAFC 106.

<sup>33</sup> Gummow, Hayne and Heydon JJ at 212.

<sup>34</sup> *Purvis v State of NSW (Department of Education and Training)* [(2003) HCA 62.

when it suspended then expelled him from school by reason of his behaviour (also see ‘The requirement to compare’ below with regards to this case):

It may be accepted ... that the term ‘disability’ includes functional disorders, such as incapacity, or a diminished capacity to control behaviour. At it may be also accepted ... that the disturbed behaviour of the pupil that resulted from his disorder was an aspect of his disability. However, it is necessary to be more concrete in relating par (g) of the definition of disability to s 5. The circumstances that gave rise ... to the treatment, by way of suspension and expulsion, of the pupil, was his propensity to engage in serious acts of violence towards other pupils and members of the staff. In his case, that propensity resulted from a disorder; but such a propensity could also exist in pupils without any disorder. What, for him, was disturbed behaviour, might be, for another pupil, bad behaviour ... The circumstances are relevantly the same, in terms of treatment, when that person engages in violent behaviour ... There are pupils who have no disorder, and are not disturbed, who behave in a violent manner towards others. They would probably be suspended, and, if the conduct persisted, expelled, in less time than the pupil in this case.<sup>35</sup>

A similar approach to the interpretation of the definition of disability was taken in an earlier decision in *Randell v Consolidated Bearing Company*.<sup>36</sup> In that matter, the applicant had a mild dyslexic learning difficulty and complained of discrimination when he was dismissed as a result of poor work performance. Raphael FM stated:

In my view there is no distinction between this applicant’s ‘disability’ and its ‘manifestation’. His ‘disorder’ resulted in his ‘learning differently’. He learned more slowly. He was dismissed because he was learning too slowly.<sup>37</sup>

Raphael FM found that the failure of the respondent to provide the assistance to the applicant which was available to improve his work performance and which had been made available to staff in the past, and his subsequent dismissal, constituted disability discrimination. This decision was referred to with approval by McHugh and Kirby JJ in the *Purvis* case in finding that the HREOC was correct in determining that Daniel Hoggan’s behaviour was a manifestation of his disability and therefore part of his disability for the purposes of section 4.

## **DIRECT AND INDIRECT DISCRIMINATION**

Discrimination can be direct or indirect.

### *DIRECT DISCRIMINATION*

Section 5 of the DDA provides:

- (1) For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the

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<sup>35</sup> Gleeson CJ at 11.

<sup>36</sup> [2002] FMCA 44.

<sup>37</sup> [2002] FMCA 44, [48].

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.

- (2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

Most anti-discrimination statutes define direct discrimination in a similar fashion with some variations in the wording. Direct discrimination is generally described in most statutes as occurring when an aggrieved person is treated less favourably, by reason of a prohibited ground, attribute or characteristic, when compared to the treatment of another person *without* the ground, attribute or characteristic, in the same or not materially different circumstances.

For direct discrimination, there must be a connection between the less favourable treatment and the ground, attribute or characteristic of the aggrieved person. Different anti-discrimination statutes adopt different expressions in reference to this connection. For example, the DDA refers to less favourable treatment being 'because of' the disability of the aggrieved person. In Western Australia the expression 'on the ground of' is used and in Victoria the expression 'on the basis of' is used.<sup>38</sup>

### *THE REQUIREMENT TO COMPARE*

Section 5 (1) of the DDA requires a comparison to be made between the manner in which a person with a disability is treated and the manner in which a person without the disability is treated.<sup>39</sup> Additionally, section 6 (a) of the DDA which deals with indirect discrimination (see below), requires identification of a pool of persons with whom the aggrieved person can be compared. The person without the disability is often referred to as the 'comparator'. The issue of an appropriate comparator is a complex one, and whilst the law appears to be settled in this area by reason of the decision of the High Court in *Purvis* (this aspect discussed below), the issue of the

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<sup>38</sup> *Equal Opportunity Act 1984* (WA) s 66A, *Disability Discrimination Act 1992* (Cth) s 5, *Anti-Discrimination Act 1977* (NSW) s 49B, *Anti-Discrimination Act* (NT) s 19, *Anti-Discrimination Act 1991*(Qld) s 8, *Equal Opportunity Act 1984* (SA) s 66, *Equal Opportunity Act 1995* (Vic) s 7, *Discrimination Act 1991* (ACT) s 8.

<sup>39</sup> Section 5 (1) of the DDA. The *Discrimination Act 1991* (ACT) at s 8 refers to 'unfavourable treatment' of a person because they have an attribute covered by the Act. Unlike other anti-discrimination Acts throughout Australia, this term does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the aggrieved person or the conditions imposed upon the aggrieved person. If the consequence is unfavourable for the aggrieved person, or if the condition imposed would disadvantage that person, there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by that person. This interpretation was given in the case of *Prezzi v Discrimination Commissioner & Anor* (1996) EOC 92. However the ACT's Discrimination Commissioner has acknowledged that most often there is still an implied comparator used for the purposes of determining whether someone has been treated unfavourably (*Australian and New Zealand Equal Opportunity Law and Practice* (1998) 1, 344.940).

selection of an appropriate comparator in a given case is likely to remain a contentious one.

In a review of Federal Court discrimination cases heard in the period September 2000 to September 2002, the HREOC concluded:

The issue of how an appropriate comparator is chosen in a particular case has been a complicated and vexed one since the inception of the DDA, and one that continues to be the subject of academic and judicial debate.<sup>40</sup>

Identification of an appropriate comparator for the DDA is infinitely more complicated than for other Federal legislation such as the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth) where many more comparators and comparative situations are usually available.<sup>41</sup> Some of the problems with the comparator have arisen from practical difficulties in identifying circumstances that are ‘the same or not materially different’.<sup>42</sup> Various HREOC and Court decisions have taken different approaches to interpreting circumstances ‘that are not materially different’ and the characteristics that should therefore be imputed to the real or hypothetical comparator.<sup>43</sup>

The history of *Purvis*<sup>44</sup> illustrates the complex nature in identifying an appropriate comparator. At first instance, the Human Rights and Equal Opportunity Commissioner found that the comparator was another student at the school in the same year but without the disability, including without the associated behaviour. The Full Court of the Federal Court and the High Court rejected this comparator. However, the High Court was divided on this issue. The majority of the High Court said the circumstances for comparison *included* disruptive behaviour; that is the comparator was a student without the disability who behaved in a similarly ‘violent’ manner, for reasons other than disability. Gleeson CJ stated:

The circumstances to which s 5 directs attention as the same circumstances would involve violent conduct on the part of another pupil who is not manifesting disturbed behaviour resulting from a disorder ... The required comparison is with a pupil without the disability; not a pupil without the violence.<sup>45</sup>

In essence, the majority of the High Court distinguished between two types of behaviour that seemed outwardly identical and that had the same disturbing or harmful effect on others, but that had different causes:

- ‘disturbed’ behaviour that was a manifestation or symptom of a disability; and

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<sup>40</sup> HREOC 2003b, 70.

<sup>41</sup> *Productivity Commission Report*, 307-308.

<sup>42</sup> *Productivity Commission Report* 309.

<sup>43</sup> For HREOC interpretations see *IW v City of Perth & Ors* (1997) 191 CLR 1 and *McKenzie v Dept of Urban Services & Canberra Hospital* (2001) FMCA 20. Cases that did not follow HREOC interpretation include *NSW v HREOC & Purvis* (2001) FCA 1199 and *Minns v State of NSW* (2002). FMCA 44 (*Productivity Commission Report*, 309).

<sup>44</sup> See brief facts of case at ‘behaviour as a manifestation of disability’.

<sup>45</sup> (2003) 202 ALR 133, 137 [11].

- ‘wilful’ behaviour that was not related to a disability.<sup>46</sup>

The majority finding of no direct discrimination rested largely on its view that the comparator was a (hypothetical) student exhibiting ‘wilful’ behaviour similar in outward appearance to Daniel’s ‘disturbed’ behaviour.<sup>47</sup>

The Productivity Commission observes that the majority view appears to imply that different treatment of a person with a disability on the ground of the behaviour caused by their disability cannot constitute direct discrimination under the DDA, and if this approach were extended to other manifestations of disability (for example, to non-behavioural symptoms or limitations caused by a disability), the scope of the direct discrimination provisions could be significantly narrowed.<sup>48</sup>

The minority of the High Court argued that if disruptive behaviour was, in effect, part of Daniel’s disability (which all members of the High Court agreed it was), then it could not also be imputed to the comparator.<sup>49</sup>

One commentator expressed concern as to the majority view asserting that the significant differences in a student’s ability to control their behaviour had been overlooked in the circumstances of the comparison.<sup>50</sup> She stated:

a person without a disability who exhibits the kind of anti-social behaviour that goes on in Purvis is doing a deliberate act. They are acting up and acting out in response to authority or against authority. The person with a disability like the complainant in Purvis is acting in a way that they actually have no control over ... the problem in Purvis is if you don’t analyse why the young man is behaving [disruptively] - if you simply compare behaviours, you’d have to say it was fair enough to expel him from school. You can’t come to any other conclusion.<sup>51</sup>

*Purvis* demonstrates the practical importance of identifying the correct comparator and circumstances for comparison in determining direct discrimination.<sup>52</sup>

The issue of the requirement of an appropriate comparator for the purposes of section 5 of the DDA was also raised in the case of *A School v HREOC & Anor*<sup>53</sup> In this case, the student (AJ), suffered from a disability which resulted in lengthy absences from school and the inability to climb stairs to attend certain classrooms. It was alleged that the school, in providing educational services to AJ engaged in direct discrimination by treating AJ less favourably than other students without a disability, in that she was not provided with adequate work or supervision during those periods of absences. Mansfield J held that the HREOC in its original finding that the school directly discriminated against the student (AJ):

<sup>46</sup> *Productivity Commission Report*, 309.

<sup>47</sup> *Productivity Commission Report*, 309.

<sup>48</sup> *Productivity Commission Report*, 310.

<sup>49</sup> *Productivity Commission Report*, 309.

<sup>50</sup> Submission to the Productivity Commission; Lee Ann Basser is a Barrister and Solicitor of the Supreme Court of Victoria and senior lecturer in law at La Trobe University.

<sup>51</sup> *Productivity Commission Report*, 310 (*Transcript. P. 2735*).

<sup>52</sup> *Productivity Commission Report*, 309.

<sup>53</sup> [1998] 1437 FCA.

did not properly assess the conduct of the school by the comparison which s 5 dictated ... They do not identify how the school's treatment of AJ was different from that accorded to other students. They do not ... discuss what would have been accorded to other students without her disability; in the same or similar circumstances ... The Commission found that AJ nevertheless had a clear need for one or two persons to be available to her for such care as a personal priority. The reasons do not proceed to address whether such support was, or would have been, provided to other students in the same or similar circumstances and do not address whether one reason for the school treating AJ differently, if it did was by reason of her disability.

Thus the finding by the Commission that the school had directly discriminated against the student in the provision of education services (contrary to section 22) was set aside by Mansfield J on the basis that the HREOC did not properly address the comparator issue as dictated by sections 5 and 22 of the DDA.

### *INDIRECT DISCRIMINATION*

Under section 6 of the DDA, and the *Anti-Discrimination Acts* of NSW and Qld, and the *Equal Opportunity Acts* of Victoria, SA and WA,<sup>54</sup> indirect discrimination on the ground of a disability occurs where:

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 a requirement or condition:<sup>55</sup>

- (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.

Section 6 makes it clear that all four of these aspects are cumulative.<sup>56</sup>

Generally, indirect discrimination occurs when policies and practices which appear to be neutral result in a person/group being affected.<sup>57</sup> Bowen CJ and Gummow J in the case of *The Secretary of the Department of Foreign Affairs & Trade v. Styles & Anor* (1988) EOC 92-239 described it as 'practices which are fair in form and intention but discriminatory in impact and outcome'. The nature of indirect discrimination is such that it can occur without any intention to disadvantage a particular group or

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<sup>54</sup> *Anti-Discrimination Act 1977* (NSW) s 49B (1) (b); *Anti-Discrimination Act 1991* (Qld) s 11; *Equal Opportunity Act 1995* (Vic) s 9; *Equal Opportunity Act 1984* (SA) s 66 (b); *Equal Opportunity Act 1984* (WA) s 66A (3). Indirect discrimination is specifically prohibited by the DDA and by equal opportunity legislation in all States and in the ACT. Whilst not specifically set out in the NT legislation, indirect discrimination is nevertheless intended to be included under the Act at the time of drafting.

<sup>55</sup> 'having regard to the objects of the Act, it is clear that the words "requirement or condition" should be construed broadly so as to cover any form of qualification or pre-requisite', *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56 Dawson J at 10.

<sup>56</sup> *W v Flinders University of South Australia* [1998] HREOCA 19 Commissioner McEvoy at 6.4.

<sup>57</sup> R. Guthrie, *Laws Relating to Safety, Compensation and Equality in Employment* (2003) 238.

individual. The courts will determine if indirect discrimination has occurred by judging the effects of a policy or practice rather than the actual intent or motive of the alleged discriminator.<sup>58</sup> Indirect discrimination is as unlawful as direct discrimination; the principle difference is that in indirect discrimination the focus shifts from the *behaviour* of the alleged discriminator to the *impact* of their action.<sup>59</sup>

#### *‘SUBSTANTIALLY HIGHER PROPORTION’*

Section 6 (a) of the DDA requires consideration of whether or not a substantially higher proportion of persons without the disability of the aggrieved person comply or are able to comply with the requirement or condition. Therefore, a crucial element in any claim of indirect discrimination will be identification of a pool of persons with whom the aggrieved person can be compared.<sup>60</sup>

In the context of sex discrimination cases brought under State legislation and the former provisions of the *Sex Discrimination Act 1984* (Cth)<sup>61</sup> (‘SDA’), a number of decisions have considered the manner in which such a comparison is to take place. In the *Australian Iron and Steel* case, a majority of the High Court held that it was necessary to first identify a ‘base group’ or ‘pool’ which will then ‘enable the proportions of complying men and women to be calculated’.<sup>62</sup> In this case, the retrenchment policy that was held to be discriminatory was the ‘last on, first off’ policy of the employer. While on the face of it the policy appeared neutral, the effect of past discriminatory hiring practices whereby employment of women was delayed in preference to men meant that a higher proportion of the female members of the workforce than males were retrenched. The High Court held that the relevant proportions for comparison were the number of men who could comply as a proportion of all relevant men and the number of women who could comply as a proportion of all relevant women.

Determining the appropriate pool will vary according to the nature and context of the case and very few cases have considered this issue under the DDA. This may be because in the context of physical disability particularly, compliance or non-compliance with a requirement or condition (such as the use of stairs), is a matter easily accepted without the need for complex comparisons or statistical information.<sup>63</sup>

This aspect was illustrated in the case of *Minns v New South Wales*.<sup>64</sup> The complainant was a student at two State high schools and alleged that those schools indirectly discriminated against him on the basis of his disability, by requiring that he comply with its disciplinary policy and subsequently suspending and expelling him. He claimed that he was unable to comply with the requirement or condition imposed in the form of the disciplinary policy due to his disabilities (Asperger’s syndrome, ADHD and Conduct disorder).

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<sup>58</sup> R. Guthrie, *Laws Relating to Safety, Compensation and Equality in Employment* (2003) 239.

<sup>59</sup> *A Three-Dimensional Approach to Operationalising Human Rights*, 264.

<sup>60</sup> *Federal Discrimination Law 2004*, HREOC, 116.

<sup>61</sup> Note that the provisions of the SDA and the DDA were previously in the same terms in relation to indirect discrimination. However the SDA was amended to insert the current s 5 (2), which does not provide for the comparison equivalent to s 6 (a) of the DDA.

<sup>62</sup> (1989) 168 CLR 165, 178 (Deane and Gaudron JJ).

<sup>63</sup> *Federal Discrimination Law 2004*, HREOC, 116.

<sup>64</sup> [2002] FMCA 60.



In considering the issue of the comparison as required by s 6 (a), Raphael FM stated:

The applicant submits that the requirement contained in s 6 (a) with which a substantially higher proportion of persons without the disability comply or are able to comply is satisfied by comparing Ryan's situation with that of all the other students in his cohort. Ryan's disabilities and in particular the disability of conduct disorder makes it impossible for him to behave in a manner compliant with the discipline policy. The respondent argues that this form of comparison whilst it found favour with the Full Court of the Federal Court in *Department of Foreign Affairs v Styles* (1989) 88 ALR 621 was undermined by the decision of the High Court in *Australian Iron and Steel v Banovic* (1987) 168 CLR 165. The very sophisticated test required in *Banovic* was discussed by Sackville J in *Commonwealth Bank of Australia v HREOC* (1998) 150 ALR 1 where he said at [40] in reference to *Banovic*:

The case authoritatively establishes that the word 'proportion' used in s.24 (3) (a) of the *Anti Discrimination Act* (equivalent to s.5 (2) (a) of the *SD Act*) requires more than a mere numerical comparison. That proposition is not in question in this case. *Banovich* (sic) is, however, important in the present context because of the comments of the majority (Dean, Dawson and Gauldron JJ) on the selection of the base groups for the purposes of the comparison required by s.5\_(2) (a) of the *SD Act*.'

The respondent submits that no attempt to properly define the base group was made. The respondent argues that no calculation of the persons to whom the requirement or condition applies in order to determine the initial pool was made. There was no division between people without the disability and people with the disability so that the denominator could be identified as those to whom the requirement applied and the numerator being those who actually comply. It is argued that the proper course to take is for the two fractions to be compared to calculate whether the group with the disability are disproportionately represented in the impact of the requirement or condition.

The approach taken in *Banovic* and *Commonwealth Bank* are required in cases where it is necessary to tease out actual discrimination which is not evident at first blush being the result of:

'Practices that are fair in form but discriminatory in practice.'

The respondent's submissions are well taken. It is for the applicant to prove his case and if that requires a complex, time consuming and undoubtedly expensive exercise in comparisons then it must be undertaken. It should be noted that the cases as quoted by the respondent in support of the complex comparisons are sex discrimination cases (*Banovic*, *Commonwealth Bank v HREOC*, *Bogle v Metropolitan Health Service Board* (2002) EOC 93-069, *Bonella & Ors v Wollongong City Council* (2002) EOC 93-183). There are no cases dealing with disability discrimination. *Hoggan* (No.1) is such a case and at [40] Emmett J said:

‘Section 6(a) on the other hand contemplates a situation where discrimination operates indirectly. One example of such indirect discrimination would be requiring a complainant to act in a way that was made impossible by a person’s disability. Thus an illustration of conduct that might fall within s.6 (a), based on the facts in the present case, would be the situation where the school expelled the complainant because he continued to swear and demonstrate violent behaviour.’

In making that observation Emmett J did not appear to be troubled by fitting the applicant into a pool. There is no evidence in this case that any one else suffered Ryan’s disabilities although it is known from the evidence of the teachers and of the school records placed in evidence that the majority of students in Ryan’s classes did comply with the policies. No evidence was produced by the respondent that any members of Ryan’s classes were unable to comply with the policies apart from Ryan.<sup>65</sup>

It would appear that the approach in *Banovic* should be regarded as the correct one, but in practice it may be that the comparison required is in fact a reasonably simple one (such as in *Minns*).<sup>66</sup>

#### ‘REQUIREMENT NOT REASONABLE’

The DDA does not define ‘reasonable’ for the purposes of section 6 (b). However, reasonableness is a well-established legal concept.<sup>67</sup> In *Clarke v Catholic Education Office*<sup>68</sup>, Madgwick J stated:

Reasonableness is to be determined having regard to all the circumstances of the case. These include but are not limited to:

- the nature and extent of the effect of the discriminatory requirement or condition;
- the reasons advanced in favour of it;
- the possibility of alternative action; and
- matters of ‘effectiveness, efficiency and convenience’.

In this case, a student with a severe hearing impairment enrolled at a Catholic secondary college. The student, Jacob Clarke, depended on the Auslan signing system to understand language and communication and the learning support model proposed by the college did not include the services of an Auslan interpreter. The parents claimed the school had indirectly discriminated against Jacob when they established a rule or expectation with which Jacob was not able to comply. To attend the school, receive instruction and participate in the full quality of the educational experience, it was proposed in this case, that the school expected Jacob to understand spoken English. Jacob’s reliance on Auslan for communication and social interactions meant

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<sup>65</sup> [2002] FMCA 60, [254] at 250-254.

<sup>66</sup> *Federal Discrimination Law 2004*, HREOC, 118.

<sup>67</sup> *Productivity Commission Report*, 49.

<sup>68</sup> (2003) 202 ALR 340, [51].

he was not able to comply with the school's expectation. To determine a case of indirect discrimination, Madgwick J had to decide:

- whether a student with total hearing loss since birth was unable to comply with a requirement established by the school on enrolment that the student should be able to 'participate in and receive instruction without the assistance of an interpreter'; and
- that a substantial proportion of the students who do not have the disability were able to comply; and
- that the requirement made by the school was not reasonable; and
- that Jacob was not able to comply.

Thus, the condition of enrolment established by the college was that Jacob and his parents accept a model of support that did not include Auslan. This requirement established the expectation that attendance at the school was dependent upon all students accessing and participating in spoken English as the primary mode of instruction. As Jacob was not able to comply with this requirement he was not able to access instruction, and consequently, was not able to attend the school.

Justice Madgwick then had to consider whether the proposed model of support for Jacob was a reasonable accommodation of his educational needs. The parents argued the model was not reasonable because:

- Jacob was dependent on Auslan; note-taking had limited effectiveness;
- they had offered \$15,000.00 to mitigate any financial strain caused by Jacob's enrolment; and
- an important consideration involved Jacob attending a religious secondary school with his friends and colleagues.

The CEO counter argued by claiming that:

- Jacob was a 'total communicator' and not Auslan dependent;
- the long term goal was to make him an independent learner;
- the model of support considered the wishes of the parents and was proposed by professionals in the field;
- the offer of a grant from the parents was not acceptable; and
- the model of support did not ultimately rule out the possibility of an Auslan interpreter.

While finding that the requirements, expectations or conditions established on enrolment were 'not reasonable' within the terms of the Act, and that the school had in fact indirectly discriminated against Jacob, Madgwick J commended the open enrolment policy of the CEO as consistent with the intent of the disability discrimination legislation. He proposed the case involved individual mistakes made in good faith rather than systemic discrimination. He also found the CEO had underestimated the importance of Auslan for Jacob's communication and that, at least for the first few years of secondary school, Auslan would be an integral part of Jacob's learning and socializing. Madgwick J also claimed the CEO had not made any determined effort to find or train an Auslan interpreter and therefore had no intention

of including Auslan in the model of support at any stage. Further to these findings, the school had made this intention clear to the parents when they rejected the offer to assist in finding and training a teacher or teacher aide in Auslan or to find volunteers who may be able to assist Jacob.

In *Travers v New South Wales*<sup>69</sup> Raphael FM considered a requirement or condition that a student in a particular class utilise the toilet in another building, rather than a toilet outside her classroom (which was available to another student with a disability). This was a requirement with which the applicant, a student with a disability that caused incontinence, could not comply because the student was unable to reach the toilet in time to avoid an accident. Raphael found the requirement unreasonable having considered the perspective of the applicant, the school and other students.

Another relevant case which illustrates indirect discrimination is *Scott v Telstra Corp Ltd.*<sup>70</sup> Telstra had a blanket policy of providing standard handsets for telephones but refused to provide any alternate telecommunications devices, including teletypewriters, for people with hearing impairments. Telstra argued that the service it provided was the telephone network and that the provision of handsets was additional to that service. However the HREOC found that the service provided was communication over the network and that the requirement that the network be accessed by standard handsets was clearly one with which a disproportionate number of people with profound hearing loss could not comply and which was patently unreasonable in the circumstances. The refusal to provide people with profound hearing loss with teletypewriters therefore amounted to indirect discrimination.

A prominent case in this area is that of *Waters & Ors v The Public Transport Corporation*<sup>71</sup> where changes were made to the Victorian public transport system which included the introduction of 'scratch' tickets and the removal of conductors from trams. The complainants were made up of physically and intellectually disabled transport users. The Equal Opportunity Board of Victoria in the first instance held that the complainants were unable to comply with the requirements to use scratch tickets and the High Court later agreed that to use such tickets imposed a requirement that a person had sufficient mental capacity to understand the system. The scratch tickets also indirectly discriminated against blind people as it imposed a condition that a person could see to use the system. The Board also held that the removal of the conductors imposed a condition that the complainants could 'use trams without the assistance of conductors',<sup>72</sup> a condition that some of the complainants could not comply with because of their physical disabilities. This was also endorsed by the High Court. The case however was referred by the High Court back to the Board for a consideration of the respondent's financial situation which was not originally taken into account in determining the reasonableness of the condition.

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<sup>69</sup> (2001) 163 FLR 99.

<sup>70</sup> [1995] EOC 92-717.

<sup>71</sup> (1990) EOC 92-293; (1991) 173 CLR 349.

<sup>72</sup> *Waters v Public Transport Corporation* (1991-1992) 173 CLR 349, per Mason CJ and Gaudron J at 361-362 (Deane J agreeing at 382); Dawson & Toohey JJ at 393.

## INDIRECT DISABILITY DISCRIMINATION AND UNIVERSITIES

In the context of education, particularly with respect to universities, a common method of student assessment of academic knowledge is by way of time-limited written examinations. If this were the only method of assessment available, it could be seen to be indirectly discriminatory against students who, because of their disability, would find it impossible to demonstrate their true academic knowledge due to the time constraints, whereas a substantial proportion of students without a disability would be able to comply with this requirement. University, policies and practices relating to methods of assessment may need to be reviewed in order to mitigate the potential for claims of unlawful indirect discrimination.<sup>73</sup> In *Hinchcliffe v University of Sydney*<sup>74</sup> the court considered a claim of indirect discrimination, where the applicant student, who was vision impaired, claimed that the university indirectly discriminated against her by imposing a condition or requirement that the applicant participate in her course without all course materials being provided in a format suitable to her needs. In relation to the 'requirement or condition', Driver FM held that for the purposes of s 6 of the DDA:

the relevant requirement or condition must be one imposed upon not only the applicant but also on the class of other persons to whom the applicant is to be compared ... I adopt the description by Drummond J in *Sluggett v Human Rights and Equal Opportunity Commission* [2002] FCA 987 (2002)123 FCR 561 at [56]: 'the concept of a requirement or condition with which the aggrieved party is required to comply involves the *notion of compulsion or obligation* [original emphasis retained]' ... The applicant had characterised the obligation [emphasis added] as an obligation to receive course material in only one format ... The relevant requirement or condition ... is, in my view, the requirement or condition imposed by the university that students deal with course materials provided by the university in a single or standard format that the university chose to provide to all students. In other words, students were generally expected to either read course materials in the format that they were given to them or seek themselves to convert those materials into a different format which was preferred by them...as in the case of *Waters* it was a requirement which potentially might impact adversely upon the applicant by reason of her disability.<sup>75</sup>

Driver FM held that the comparator base group for the purposes of section 6 (a) to be the group of students undertaking the same degree course as the applicant at the time she was undertaking it, a substantial proportion of whom were not vision impaired and could comply with the condition. In terms of whether the applicant could comply with the university's requirements, Driver FM held that generally she could:

The need for Ms Hinchcliffe to reformat material probably inconvenienced her, relative to students who did not suffer from her disability. That is a relevant issue for the purposes of s 22 (2) (c) of the DDA. However, for the purposes of

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<sup>73</sup> Most Universities provide alternatives to time-limited exams. See Curtin University's general policy at Counselling and Health Services homepage ([www.counselling.curtin.edu.au/disability2.html](http://www.counselling.curtin.edu.au/disability2.html)) and assessment policy ([www.policies.curtin.edu.au/documents/assessment\\_policy.doc](http://www.policies.curtin.edu.au/documents/assessment_policy.doc)).

<sup>74</sup> [2004] FMCA 85.

<sup>75</sup> At 106, 107, 108, 109.

s 6 (c) of the DDA the inconvenience suffered by the applicant did not approach the standard necessary to establish an inability to comply with the university's requirement or condition. The standard requires that the applicant prove a 'serious disadvantage' with the result that the applicant could not 'meaningfully participate' in the course of study for which she had been accepted: *Catholic Education Office v Clarke* at [66] & [126].<sup>76</sup>

In terms of whether the requirement was reasonable in the circumstances, Driver FM held that the existence of a disability services officer who provided assistance to the applicant whenever sought (although at times imperfectly) rendered the University's requirement reasonable. In conclusion Driver FM found the claim under section 6 had failed and it was therefore unnecessary to consider whether the University had breached s 22 (2) (a) or (c) of the DDA.

Another indirect discrimination case involving a university is that of *W v Flinders University of South Australia*.<sup>77</sup> One of the primary issues dealt with in *W* was whether the reasonable adjustment the complainant requested to accommodate her disability compromised the academic integrity of the course she was enrolled in. The complainant had sought an adjustment to the schedule of a teaching practicum and the University had refused based on its belief that a minimum format of the practicum was an essential requirement of the course. The University had adapted the practicum format previously, but advised it could not adapt the practicum in the way the complainant requested. Commissioner McEvoy found that the requirement or condition imposed was compliance with the curriculum and the assessment requirements associated with each subject. In terms of section 6 (a) the Commissioner held that a substantially higher proportion of persons without the complainant's symptoms would be able to comply with the requirement without any accommodations as sought by the complainant. In terms of reasonableness, the Commissioner respected the fact that the University must maintain the academic integrity of its courses, and although it must provide reasonable accommodation to persons with disabilities, this did not mean that the university was obliged to forgo the academic requirements of its courses for people with disabilities. On this basis, the condition was held to be reasonable. In fact the Commissioner was satisfied that the University made such accommodation as could be made that were consistent with the academic integrity of the course.

#### *REASONABLE ACCOMMODATIONS, SERVICES OR FACILITIES*

In determining whether circumstances are 'not materially different' for the purposes of section 5 (1) of the DDA, an adjustment must be made for any accommodation or services required by a person with a disability so as the disabled person can participate in the particular activity. Section 5 (2) of the DDA provides that for the purposes of the comparison required by section 5 (1) the circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

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<sup>76</sup> At 115.

<sup>77</sup> [1998] HREOCA.

Sir Ronald Wilson, the then Commissioner of the HREOC, acknowledged that people with disabilities may require different treatment to achieve equality:

It will be remembered that s 5 (2) of the Act ensures that it is not just a question of treating the person with a disability in the same way as other people are treated; it is to be expected that the existence of the disability may require the person to be treated differently from the norm; in other words that some reasonable adjustment be made to accommodate the disability.<sup>78</sup>

In the context of education, the HREOC has interpreted section 5 (2) of the DDA to mean that institutions must provide 'different accommodations or services' to enable a person to participate in a course of study or gain access to educational goods, services of facilities. The provision of these different accommodations or services for people with disabilities is sometimes referred to as making 'reasonable adjustment'. Failure to respond adequately to a request for an adjustment might result in a claim of discrimination.<sup>79</sup>

This interpretation of the DDA is contentious because the term 'reasonable adjustment' does not appear in the DDA and thus the obligation to make reasonable adjustments has been questioned in several cases, most notably the *Purvis* case.<sup>80</sup> The *Purvis* case clarifies that the DDA creates no general obligation upon organisations to make reasonable adjustments to accommodate the needs of people with disabilities. Prior to *Purvis* there appeared to be a belief that the DDA provided such an obligation, notwithstanding that the term 'reasonable adjustments' did not appear.<sup>81</sup>

In *Purvis* McHugh and Kirby JJ stated:

It is not accurate ... to say that s 5 (2) of the Act imposes an obligation to provide accommodation. No matter how important a particular accommodation may be for a disabled person or disabled person generally, failure to provide it is not a breach of the Act per se. Rather, s 5 (2) has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with and without disabilities. No doubt as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting that the Act imposes an obligation to provide accommodation for the disabled.

Thus the High Court decision of *Purvis* has questioned the presumption that the DDA implies that reasonable adjustments must be made in order to avoid discriminating against people with disabilities, and the Court appears to have narrowed significantly the protection that the Act was thought to provide.<sup>82</sup>

In its review of the DDA, the Productivity Commission noted that the issue of reasonable adjustments generated significant comment from participants. In essence,

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<sup>78</sup> *AJ & J v A School (No 1)* (1998) EOC 92-948, Ibid 78,313.

<sup>79</sup> *Productivity Commission Report*, 52.

<sup>80</sup> *Productivity Commission Report*, 52.

<sup>81</sup> R. Davern, *DDA Review* (2004) FindLaw website.

<sup>82</sup> *Productivity Commission Report*, 189.

the Commission noted the High Court position in *Purvis*. For an excerpt of the Commission's report with respect to reasonable adjustments, refer to the Appendix.

The DDA does not specify the types of adjustments required to remove discrimination. What exactly constitutes 'reasonable adjustments' is determined on a case by case basis and is dependant on the particular circumstances. Educational institutions must make 'reasonable adjustments' if a person with a disability meets the essential entry requirements, but needs these adjustments in order to perform essential course-work.<sup>83</sup> This is so that students with disabilities are able to participate and have the same opportunities as those who do not have a disability. In other words, adjustments must be made in terms of the university's programs, facilities and procedures that would result in fair and equitable outcomes for students, thereby enabling them to partake in the course.

### *REASONABLE ADJUSTMENTS IN THE UNIVERSITY CONTEXT*

It would seem clear from the decision in *W v Flinders University* that the academic standards which the DDA will not require to be changed can include standards which are connected with subsequent fitness to practice a profession. There is no imposition by the DDA of a disconnection between academic courses and their professional application if genuine academic requirements are structured around professional requirements. That is, if a course is designed to teach and test abilities which are based on the entry requirements for a profession, the DDA does not require changes to the course requirements, even though a less professionally focussed course might have been open to a wider range of students with disabilities.<sup>84</sup>

None of this is to prejudge the issue of whether a particular student can or cannot meet relevant course requirements, including with provision of equipment, assistance or other modifications which can be provided without unjustifiable hardship and without compromising academic standards. Some adjustments, such as provision of course materials in alternative formats would not appear to raise any issues of academic standards. Other adjustments however, such as being excused from performing a practical task, could well call into question whether the student has mastered and demonstrated the skills which the course is designed to teach and test, depending on the nature of the course.<sup>85</sup>

In some cases it may not be clear in advance whether a student with a disability can or cannot meet course requirements, until the student and the university have discussed possible difficulties and adaptations. The draft education standards (see 'Recent developments' below) if introduced, are likely to require some process of consultation before decisions are made on what adjustments are possible to accommodate a student's disability. A process of consultation before deciding that a student or prospective student cannot fulfil course requirements likewise seems an important step in avoiding unlawfully discriminatory decisions under the existing DDA provisions.<sup>86</sup>

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<sup>83</sup> HREOC Disability Rights, *DDA Guide: Getting and Education*.

<sup>84</sup> 'Disability Rights' *Frequently asked questions: Education* (2002) at <[www.hreoc.gov.au](http://www.hreoc.gov.au)>.

<sup>85</sup> 'Disability Rights' *Frequently asked questions: Education* (2002) at <[www.hreoc.gov.au](http://www.hreoc.gov.au)>.

<sup>86</sup> 'Disability Rights' *Frequently asked questions: Education* (2002) at <[www.hreoc.gov.au](http://www.hreoc.gov.au)>.



## EXEMPTIONS FROM THE OPERATION OF THE DDA

### *SPECIAL MEASURES*

The DDA exempts ‘special measures’ for people with disabilities.<sup>87</sup> This means it is not unlawful to do an act that is reasonably intended to provide people with disabilities with goods or access to facilities, services or opportunities or grants, benefits or programs to meet their special needs. In education, the DDA at s 22 (3) allows institutions that cater wholly or partly for people with particular types of disability to discriminate against people who do not have that disability. For example, a school for students with vision impairments may enrol only students with vision impairments.

### *INHERENT REQUIREMENTS*

In the area of employment, section 15 of the DDA makes disability discrimination unlawful in decisions relating to who should be employed, trained, promoted, transferred or dismissed, and how much an employee should be paid. However in recruitment and dismissal situations, employees must be able to carry out the ‘inherent requirements’ of the particular employment. These are taken to be those activities essential to the completion of a particular task.<sup>88</sup> When it is applicable, the inherent requirements test must be carried out in conjunction with the unjustifiable hardship provisions for making adjustments for people with disabilities. In practice this means that where an inherent requirements test is relevant, the employer can only reject a candidate (or dismiss an employee) for either being unable to fulfil the inherent requirements of the job, or being able to fulfil the inherent requirements only if the employer makes reasonable adjustments that would not be required by a person without a disability, which would cause the employer unjustifiable hardship.<sup>89</sup> In the case of *X v The Commonwealth*<sup>90</sup> McHugh J considered the concept of ‘inherent requirements’ and stated:

Whether something is an ‘inherent requirement’ of a particular employment for the purposes of the Act depends on whether it was an ‘essential element’ of the particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment ... carrying out the employment without endangering the safety of other employees is an inherent requirement of any employment...

There is no equivalent ‘inherent requirements’ clause in relation to education in the DDA. However, academic entry and assessment criteria are regarded as an ‘essential element’ of the reasonable requirements that all students must meet in their studies.<sup>91</sup> The HREOC confirmed this in the case of *W v Flinders University*. Commissioner McEvoy stated:

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<sup>87</sup> Section 45.

<sup>88</sup> *Productivity Commission Report*, 51.

<sup>89</sup> *Productivity Commission Report*, 51.

<sup>90</sup> (1999) 200 CLR 1992.

<sup>91</sup> *Productivity Commission Report*, 51.

It is (in part) in this respect that the University must maintain the academic integrity of all its courses and although it must provide appropriate accommodations to persons with disabilities so that they are not thereby precluded from undertaking such studies as they choose at University, this does not of course mean that the University is obliged to forgo the academic requirements of its courses for people with disabilities. It is these considerations which must be taken into account in considering what is 'reasonable having regard to circumstances of the case'. The circumstances of this case included the consideration that the requirements or condition relates to assessment leading to the conferral of a degree. Among the circumstances to be taken into account therefore are those which relate to the issue of academic integrity. This is not to accept the complainant's argument that the University is assuming that she wishes to, or will, become, a full time teacher: it is the conferral of the degree with which the University is concerned. Further, however, the maintenance of its academic integrity on a broad basis is absolutely fundamental to any University's overall function and credibility.<sup>92</sup>

The draft education standards (see 'Recent developments' below) clarify that inherent academic requirements must be maintained equally for all students in enrolment and assessment.

If it can be demonstrated that a potential student's disability may place the potential student or others at risk while partaking in the course, then a decision not to admit the potential student may not be seen as discriminatory. For example, if an educational institution refused to enrol a student in their nursing course because the student had epilepsy, the institution may be seen to discriminate directly against that person on the ground of a disability, particularly if it could not be established that the condition had no effect on the ability to complete the course. If however it could be demonstrated that the student's medical condition may place her, or others at risk while studying, working in laboratories and completing hospital-based internships, then such a decision may not be seen as direct discrimination. The important lesson from the cases is that the student's condition must be specifically and personally assessed and the decision of the institution should not be based on a general enquiry about the condition or statistical overviews.

### *UNJUSTIFIABLE HARDSHIP*

An educational institution may avoid a finding of unlawful discrimination if it can demonstrate that to comply with the DDA an unjustifiable hardship would be imposed upon the institution. The appropriate approach by a court to the concept of unjustifiable hardship is first to determine whether or not the respondent has discriminated against the complainant and then determine whether or not the respondent is able to make out the defence of unjustifiable hardship.<sup>93</sup> Where this defence is raised, the tribunal or court must undertake an individualised investigation.<sup>94</sup>

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<sup>92</sup> At 50.

<sup>93</sup> *Sluggett v HREOC* (2002) 123 FCR 561, 568 [24]-[25] (Drummond J).

<sup>94</sup> *A Three-Dimensional Approach to Operationalising Human Rights*, 271.

Section 22 (4) of the DDA provides that it is not 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. Thus, although the DDA does not expressly require that 'reasonable adjustments' are to be made by educational institutions (as discussed above), it does limit the different accommodation or services that an educational institution must take into account to a level at which an unjustifiable hardship would be imposed upon the institution.<sup>95</sup> The defence of unjustifiable hardship as set out in the DDA has the effect of 'capping' the obligation to make adjustments so that the response is reasonably proportionate to the circumstances of the case.

This then would seem to imply an obligation to make adjustments where they would not result in unjustifiable hardship, although as noted in the *Purvis* case by the minority, this obligation might only be enforceable in the breach. Thus, if a person makes no adjustments or insufficient adjustments and a complaint is made against them, they might not be able to use this defence.<sup>96</sup>

Currently, the defence is only available in considering whether or not to accept a person's application at enrolment to the educational institution. Once a disabled student is admitted, the defence is no longer available which means that the educational institution is obliged to make the necessary accommodations for the disabled student. For example in the *Hills Grammar School* case referred to above, the school refused to enrol Scarlett Finney on the grounds that the provision of support to her would have caused the school unjustifiable hardship. Had the school enrolled Scarlett, such an argument would not have been available and the school would have had to provide whatever was reasonably needed to enable Scarlett to participate.<sup>97</sup>

This limitation in the coverage of unjustifiable hardship has caused problems and created uncertainty for educational providers when dealing with people with disabilities post-enrolment because under the current provisions, post-enrolment situations are not covered by the defence.<sup>98</sup>

#### *HOW IS UNJUSTIFIABLE HARDSHIP DETERMINED?*

Section 11 of the DDA provides that in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account.

The *Hills Grammar School* case provides an excellent illustration of the application of section 11. As noted above, Scarlett Finney had spina bifida. Her parents had applied to enrol her for kindergarten at the Hills Grammar School which refused the enrolment based on unjustifiable hardship grounds. The majority of the evidence submitted by both parties concerned whether the provision of services or facilities required by Scarlett would impose unjustifiable hardship. The school admitted

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<sup>95</sup> *Productivity Commission Report*, 52.

<sup>96</sup> *Productivity Commission Report*, 188.

<sup>97</sup> *A Three-Dimensional Approach to Operationalising Human Rights*, 272.

<sup>98</sup> *Productivity Commission Report*, 205.

directly discriminating against Scarlett on the ground of her disability, but claimed that inadequate school resources would result in the school being unable to meet Scarlett's needs. The HREOC considered a large number of possible factors relevant to the situation including additional training of teachers, teachers' aides, classroom assistance, curriculum modifications, school accessibility, excursions, toiletry needs and modifications, the availability of funding and the school's financial circumstances. Commissioner Innes weighed the benefits and detriments (as required by section 11 of the DDA), for Scarlett, the Finney family, the school and the community if Scarlett were not to attend the school. On balance the Commissioner found that it would not have caused unjustifiable hardship to the school to have enrolled Scarlett in kindergarten. This case highlights the fact that no single factor alone is likely to constitute grounds for claiming unjustifiable hardship. All relevant factors are weighed up to determine, in the circumstances, whether unjustifiable hardship exists.

Importantly, it was noted in *Hills Grammar School* that the enquiries made by the school to assess the adjustments required for Scarlett were not satisfactory. Commissioner Innes observed that the decision not to enrol Scarlett had been made taking into account the assessment for a child with spina bifida generally rather than specifically for Scarlett and that given the implications of the condition are quite varied, to base Scarlett's condition on a worst case scenario and thus the level of adjustment required on that scenario, was inappropriate. This aspect is reflected in the judgment of McHugh and Kirby JJ in the *Purvis* case:

the elimination of discrimination against people with disabilities is not furthered by 'equal' treatment that ignores their individual disabilities. The Act imposes a prima facie requirement on persons falling within its terms to accommodate the disabilities of each disabled person in order to achieve real – not notional – equality. In this context, 'accommodation' means the making of suitable provision for the disabled person.<sup>99</sup>

Section 11 sets out in general terms the relevant factors to be taken into account, namely:

(a) the nature of the benefit or detriment likely to accrue or be suffered by any person concerned.

In matters before the HREOC, when it sat as a tribunal, a number of decisions considered that the group of 'any persons concerned' extends beyond the immediate complainant and respondent.<sup>100</sup> In the *Hills Grammar School* case, the finding of the Commissioner was expressed by him to have been based on a weighing of his findings of fact and a consideration of the benefits and detriments to all concerned which included Scarlett, her parents, the school and the community. The nature of these benefits and detriments included appointment of new teaching staff, additional training of teachers, toiletry needs and modifications, classroom modifications, transportation issues, financial circumstances and availability of funding.

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<sup>99</sup> at [86] to [89] 2003.

<sup>100</sup> *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92-903, *Ibid*, 77,452 and *Cooper v Holiday Coast Cinema*, Unreported, HREOC, Commissioner Kein, 29 August 1997.

In other cases before HREOC, a number of decisions considered s 11(a), which requires consideration be given to ‘the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned’. In *Francey v Hilton Hotels of Australia Pty Ltd*<sup>101</sup> for example, Commissioner Innes considered a complaint brought by a person with asthma (and her associate) that the respondent’s policy of allowing people to smoke in their nightclub made it a condition of access to those premises that patrons be able to tolerate environmental tobacco smoke. This was a condition with which the complainant could not comply. In finding that the defence of unjustifiable hardship was not made out, Commissioner Innes considered the benefits and detriments to the complainants, the respondent, staff and potential staff, patrons and potential patrons of the nightclub. He stated:

Having weighed all of the above factors, I conclude that a finding that the respondent’s conduct unlawfully discriminates against the complainants would not cause unjustifiable hardship. The capacity for all Australians, with or without a disability, to participate as far as possible in all aspects of community life must be the paramount consideration. When the benefits set out above to other patrons and staff, as well as to the respondent itself, are added, the scales are weighted heavily. Whilst there are clearly consequences which cause some hardship to the respondent, financial and otherwise, they are unable to tip the scales. The financial consequences depend very much on the course chosen to remedy the discrimination and even taken at their worst are not unduly large in the context of the respondent’s overall revenue. Further, the respondent will be required to address the same issues in five years time by the NSW legislation already referred to.<sup>102</sup>

In *Cooper v Holiday Coast Cinema*<sup>103</sup> the complaint concerned the condition that patrons of a cinema access the premises by way of stairs. This was a condition with which the complainant, who used a wheelchair, could not comply. Commissioner Keim considered s 11(a) and stated:

I am of the view that the phrase should be interpreted broadly. I am of the view that it is appropriate not only to look to the complainants themselves but also their families and to other persons with disabilities restricting their mobility who might, in the future, be able to use the respondent’s cinema. In the same way, in terms of the effect of the order on the respondent, it is appropriate for me to look at the hardship that might be suffered by the shareholders of the respondent; its employees; and also its current and potential customers. The latter groups of people are particularly important in terms of financial hardship from an order forcing the cinema complex to close.<sup>104</sup>

In *Scott v Telstra Corporation Ltd*,<sup>105</sup> the issue of unjustifiable hardship concerned the provision of a tele-typewriter (‘TTY’) to customers of the respondent who had profound hearing loss. The respondent argued that it was relevant to consider costs

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<sup>101</sup> Ibid, 77,452.

<sup>102</sup> At 4.

<sup>103</sup> Unreported, HREOC, Commissioner Keim, 29 August 1997.

<sup>104</sup> Ibid 7.

<sup>105</sup> (1995) EOC 92-717, 78,402 Sir Ronald Wilson.

relating to its potential liability if it was required to provide *other* products to facilitate access to its services by people with disabilities. The argument was dismissed.

The respondent has also provided figures on a best and worst case basis of its potential liability if it has to provide other products as well as TTYs. I do not consider these figures relevant. The only relevant factors that have to be considered are those referable to the supply of TTYs and the resultant revenue to the respondent. It is quite wrong to confuse the issue of unjustifiable hardship arising from the supply of TTYs to persons with a profound hearing loss with possible hardship arising from other potential and unproved liabilities. It follows that the reliance by the respondent on the cost of providing products other than the TTY to persons other than persons with a profound hearing loss to show unjustifiable hardship is an erroneous application of s 11 of the DDA.<sup>106</sup>

The Commission agreed that the service offered by Telstra should include the provision of access to the telecommunications network. Commissioner Wilson said that the services enable communication over the network to take place. The Commission rejected outright Telstra's argument that the benefits to the class members of having access to the telecommunications system were not relevant to the assessment of unjustifiable hardship. The Commission in deciding on the question of unjustifiable hardship considered:

- the financial circumstances of Telstra;
- the cost of supplying TTYs (estimated to be \$5,600,000);
- extended time period over which people would take up the opportunity to rent TTYs;
- the revenue to Telstra from renting TTYs and from increased use of the telecommunications system; and
- the enormous benefit to be gained by Mr Scott and other deaf people through being able to use the telecommunications system.

The Commission refused to be influenced in its decision about unjustifiable hardship by the argument that to make a decision in favour of the Mr Scott and Disabled Persons International (DPI) would open a 'floodgate' to complaints. The Commission decided that Telstra had indirectly discriminated against Mr Scott and members of the class represented by DPI.

The Commission rejected the argument that to not discriminate would cause an unjustifiable hardship on Telstra. Telstra was ordered to supply a voucher for value \$600 to purchase a TTY to each class member who did not qualify for a TTY under another scheme. If more than one class member lived in the same household only one of them could qualify for the voucher.

Since the decision, Telstra have agreed to provide this system not only for profoundly deaf Australians, but also to anyone in Australia with a severe hearing loss or speech impairment.

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<sup>106</sup> Ibid.

In *Purvis* the High Court noted that safety considerations of other students and teachers should be taken into account when determining unjustifiable hardship.

The nature of the detriment likely to be suffered by any persons concerned, if the student was admitted, would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides. Any negative impact that may be caused by the presence of a student with a disability in a mainstream class is a proper matter to be considered when making a decision on whether that individual student can be admitted. Thus, the Act provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff.<sup>107</sup>

b) The effect of the disability of a person concerned.

For example, flexible teaching methods to accommodate a student with a disability may enhance learning for other students (e.g., other students may learn sign language to improve their communication with a student with a hearing impairment). Conversely a student with a learning disability may require more teaching resources which detract from the resources available for other students.

In the case of *Hills Grammar School*, Commissioner Innes set out the benefits and detriments to be ‘accrued or suffered by any person concerned’. In terms of the benefits for the complainant Scarlett Finney, these included a unique learning environment which would enhance her learning process and the multi-disciplinary approach of the school which would enhance the management skills required by Scarlett in order to operate within the timetable of multiple teachers and class environments. For the school, the changes to improve accessibility of the school to Scarlett would have improved the school for everyone using it and any additional teacher training would have meant that teachers were better qualified. For the community, Commissioner Innes stated:

The quality of life of a community is improved by the inclusion of all persons in that community. Therefore, including Scarlett in the School community would have improved the quality of life for that community. Of course, the School community includes in this sense all of the families linked with the School, and this is therefore a much broader benefit.<sup>108</sup>

In terms of detriments, the Commissioner noted that these would mostly be directed at the school in additional running and capital costs which overall were considered to be a minor detriment.

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

For example, the cost of providing a modified computer for a person with a visual impairment may be beyond the financial resources of a small secretarial training college but is a minor expense for a university. In *Hills Grammar School*, a detailed

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<sup>107</sup> At para 94.

<sup>108</sup> At 6.16.

estimate was made by the respondent; however the HREOC held that the respondent greatly overstated the costings.

(d) In the case of the provision of services, or the making available of facilities, an action plan given to the Commission under s 64 (4).<sup>109</sup>

The concept of unjustifiable hardship suggests that some hardship will be justifiable. In *Finney Commissioner Innes* stated:

The concept of ‘unjustifiable hardship’ connotes much more than just hardship of the respondent. The objects of the [DDA] make it clear that elimination of discrimination as far as possible is the legislation’s purpose. Considered in that context, it is reasonable to expect that [a respondent] should have to undergo some hardship ... the nub of the issue is whether such hardship was unjustifiable.<sup>110</sup>

It follows that an educational institution must thoroughly assess the student’s request for adjustments *before* asserting any unjustifiable hardship. The HREOC is not required to consider the defence of unjustifiable hardship unless there is detailed evidence in support of unjustifiable hardship. The Commissioner is likely to insist upon evidence concerning each of the relevant factors listed above.

#### *ONUS OF PROVING UNJUSTIFIABLE HARDSHIP*

The DDA and various State legislation does not expressly stipulate who bears the burden of proving unjustifiable hardship.<sup>111</sup> This issue was discussed in the *Hills Grammar School* case where the complainant relied on *Scott v Telstra Corp Ltd*<sup>112</sup> and argued that the burden lies with the respondent that is, the party who seeks the protection of the defence. The complainant also submitted however, that the preferred course of gathering information about the needs of a spina-bifida child is a combined effort between the parents of the child and the school concerned.

The respondent school argued that the burden of establishing the services and facilities needed by Scarlett should be shared between the parties through an interactive process. In his findings Commissioner Innes stated:

The onus of proof clearly shifts to the respondent to establish unjustifiable hardship once the complainant has proved that discrimination has occurred ... Courts and Tribunal in Australia have been consistent in this approach since the commencement of disability discrimination legislation. However, I agree with

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<sup>109</sup> Any organisation can submit a voluntary action plan under the DDA to be registered by HREOC. If a discrimination complaint is subsequently made against the organisation, its voluntary action plan must be taken into account in the assessment of unjustifiable hardship under s 11 (d) of the Act. However an action plan does not confer immunity from liability against a complaint of discrimination (*Productivity Commission Report*, 54).

<sup>110</sup> At para. 7.6.

<sup>111</sup> The *Anti-Discrimination Act 1977* (NSW) at s 109 and *Equal Opportunity Act 1984* (WA) at s 123 do make express provision in this regard.

<sup>112</sup> (1995) EOC 92-717 at 78,401.



the submissions of both parties that the most appropriate way to approach the process is as a ‘combined effort’ or a ‘shared burden’.<sup>113</sup>

The Commissioner’s approach in this regard was accepted on appeal in the Federal Court. However, Tamberlin J stated:

The Commissioner accepted the submission of the School that the burden of proving the services and facilities was a shared burden, and he proceeded on the basis that there was a shared burden of proof in relation to unjustifiable hardship ... the Commissioner was entitled to approach the matter by evaluating all the material before him without ultimately placing any substantial emphasis on the onus of proof.<sup>114</sup>

Tamberlin J’s comment is interesting because he suggests that Commissioner Innes proceeded on the basis that the burden of proving unjustifiable hardship is a shared one. However, whilst Commissioner Innes acknowledged that it is a shared burden with respect to *establishing* what types of services and facilities are required by a disabled student, this is in contrast to proving that unjustifiable hardship exists and in this respect, Commissioner Innes did not depart from the *Scott v Telstra* principle whereby the onus of proving unjustifiable hardship rests with the respondent. Tamberlin J’s view may possibly be seen as a departure from this principle and suggests a somewhat illogical notion of shared burden of proof, given that the parties will be attempting to assert conflicting outcomes.

## RECENT DEVELOPMENTS

In April 2004, the Productivity Commission submitted a detailed review of the DDA to the Commonwealth Attorney General, Phillip Ruddock. The terms of reference of the review included the effectiveness of the DDA and whether its objects were being met, and identification of relevant alternatives to the legislation including non-legislative approaches.

The Productivity Commission suggested a significant number of new inclusions and many amendments to the DDA. To date, most of these have not been acted upon by the Federal Government. Some of the recommendations made included:

- That the defence of unjustifiable hardship be extended to all stages in the educational process, not just at enrolment. The original provision has always been considered a drafting error and this recommendation has been adopted by the Government into a Bill proposing amendment to the DDA (see below).
- The Commission considers that the task of eliminating discrimination cannot be achieved in the absence of an express duty in the DDA to make reasonable adjustments. The Commission suggested either amending the definition of direct discrimination to include a requirement to provide the ‘different accommodations or services’ (which is already mentioned in s 5

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<sup>113</sup> At 7.2.

<sup>114</sup> *Hills Grammar School v HREOC* [2000] FCA 658, at 24 and 38.

(2)). This however would still express the duty in an indirect manner. Alternatively the Commission suggested that a specific duty to make reasonable adjustments be included, putting the Act on a more proactive basis by focusing on what needs to be done to avoid charges of direct or indirect discrimination. The defence of unjustifiable hardship would still apply. The Commission also suggested that the DDA be amended to include upon whom the duty to provide the adjustments would fall.<sup>115</sup> The Commission believes that such a duty would enable those with disabilities to start at the same notional ‘starting line’ as people without disabilities. It would not mean that a person with a disability is given an advantage over others who do not have a disability; rather it would remove a source of disadvantage faced by them that arises from their disability. For example, the provision of a screen reader for a student with a visual impairment might address the disadvantage faced by that person, but does not mean that that person is receiving preferential treatment because the screen reader would be of no use to someone without a visual impairment. The duty to make adjustments amendment provisions have been introduced into Parliament in a Bill (discussed below) which seeks to amend the DDA by inserting after s 31 (1):

(1A) For the avoidance of doubt, disability standards may require a person or body dealing with persons with disabilities to put in place reasonable adjustments to eliminate, as far as possible, discrimination against those persons.

Part 3 of the draft education standards also deal with the requirement to make reasonable adjustments.

There has been no proposed amendment to the DDA as to which party bears the burden of proving unjustifiable hardship. However, the draft education standards place the onus of proof as to unjustifiable hardship upon the ‘provider’ (educational authority).

- That the definition of direct discrimination in the DDA be supplemented with examples (either included in the Act or in guidelines) to clarify the ‘circumstances that are the same or not materially different’ for the purposes of making a comparison for s 5. The Productivity Commission also noted that some of the problems relating to the comparator actually stem from deficiencies in the definition of ‘disability’ rather the comparator *per se*.<sup>116</sup> Additionally with regard to the definition of disability, the Commission recommended that it would be beneficial to clarify this area by way of adding a note to the Act that explains that behaviour that is a symptom or manifestation of a disability is part of the disability for the purposes of the Act, notwithstanding that this matter has been addressed by the High Court.<sup>117</sup> This recommendation has to date, not been taken up.

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<sup>115</sup> *Productivity Commission Report*, 194-195.

<sup>116</sup> *Productivity Commission Report*, 311.

<sup>117</sup> *Productivity Commission Report*, 304.

- That the proportionality test section 6 (a) for indirect discrimination is a contentious issue. Anti-discrimination Acts in the ACT, NT and Tasmania as well as the *Sex Discrimination Act 1984* (Cth) and the new *Age Discrimination Act 2004* (Cth) do not include a proportionality test. Instead they use a concept of ‘disadvantage’ that is similar to the ‘unfavourable’ and ‘less favourable’ tests found in definitions of direct discrimination. The Commission found that the proportionality test is complex unnecessarily and places an unwarranted burden of proof upon the complainant and the Commission believes that s 6 (a) and (c) are sufficient to demonstrate indirect discrimination. This recommendation has to date, not been taken up.
- That section 6(b) (reasonableness of requirement or condition in indirect discrimination) could benefit from clarification of the criteria that should be considered in determining whether a rule or condition is reasonable, as appears in some other anti-discrimination Acts such as the *Sex Discrimination Act 1984* (Cth) and the *Discrimination Act 1991* (ACT). This is particularly important considering that the Productivity Commission has also recommended that the DDA be amended to include an express duty to provide ‘reasonable’ accommodations. In this way the meaning and application of ‘reasonable’ in the context of ‘reasonable adjustments’ and ‘reasonable’ for the purposes of section 6 (b) can be distinguished. Whilst the recommendation regarding reasonable adjustments has been taken up, the issue of reasonableness in the context of indirect discrimination has to date, not been taken up.
- The Productivity Commission also examined the issue of who should pay for the adjustments. Up until now the presumption has been that the educational institution pays. However, this may not be the most equitable or efficient arrangement. The Commission suggested that an additional clause to the list of ‘relevant circumstances’ may help to recognise the role of the broader community in funding adjustments. The United Kingdom’s DDA equivalent in respect to discrimination in employment includes as a factor in determining ‘reasonableness’ that regard should be given to ‘the availability to the employer of financial or other assistance with respect to taking the step’. The advantage of this provision is that the mutual obligations of all the parties are recognised and it puts the onus upon the educational institution to become aware of potential sources of funding, including the government and non-government organisations. In fact the Commission considers it appropriate for the government to play a major role in funding adjustments. The Productivity Commission’s recommendation in this regard was that the criteria for determining unjustifiable hardship should be expanded to include as a relevant circumstance, the availability of financial and other assistance. This issue has to date, not been taken up.

## THE EDUCATION STANDARDS

Since 1995, work on the development of disability standards for education<sup>118</sup> has been undertaken, led by a taskforce established by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA). The current Federal Government hopes that the standards will raise public awareness of the barriers frequently encountered by people with disabilities in the area of education, which simply do not arise for other students. The standards clarify the expectation of students with disabilities from educational institutions so as to give more guidance to educational institutions on how to comply with the DDA and thus hopefully avoid claims of unlawful discrimination. Universities will be able to refer to these standards to check whether they are complying with the DDA. This makes the task of complying with complex legislation easier as the standards set out the types of measures that organisations should take in order to satisfy their obligations under the legislation.<sup>119</sup> It is recommended that if an educational institution acts in accordance with the standards then the institution will not be in breach of the DDA.

A number of key concepts were developed as underpinning the development of the standards. Importantly, the areas of 'reasonable adjustment' and 'unjustifiable hardship' were two such concepts. The High Court decision in *Purvis* clarified that the DDA creates no general obligation upon educational authorities to make reasonable adjustments to accommodate the needs of disabled persons. Prior to *Purvis*, it was implied that the DDA made such a provision, despite the fact that the term 'reasonable adjustment' was not even mentioned in the legislation. As discussed in this paper, the proposed amendment to the legislation will be such that the standards may require an institution to put into place reasonable adjustments.

The current draft of the education standards proposes to alter the application of unjustifiable hardship by extending the defence to situations post-enrolment. The Productivity Commission's review recommending that the extension be amended through the DDA and the standards and not the standards alone has been acted upon (see below).

On 12 August 2004, the Federal Government introduced the *Disability Discrimination Amendment (Education Standards) Bill 2004* in response to the Productivity Commission's review and the draft education standards. The Bill amends the DDA to ensure that the standards are supported by the legislation. Additionally, the Bill amends the DDA to extend the defence of unjustifiable hardship to post-enrolment situations in education as discussed above. The Bill lapsed as it was introduced almost simultaneously with the announcement of the 2004 Federal Election, however in a media statement on 17 November 2004, it was announced that the Bill had been re-introduced. Consequently, it will still be some time before the Bill is passed through Parliament.

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<sup>118</sup> Under section 31 of the DDA, the Minister may formulate disability standards in relation to education of persons with disabilities. Under s 32 a breach of the standards is unlawful.

<sup>119</sup> *Productivity Commission Report*, page 405.

## CONCLUSION

This paper has explored the application of the *Disability Discrimination Act 1992* (Cth) as it relates to disability discrimination in education and the issue of the defence of unjustifiable hardship.

The DDA was enacted as a result of growing international action to promote human rights and equality for people with disabilities.<sup>120</sup> Although anti-discrimination legislation has existed in Australia since 1977,<sup>121</sup> overall the legislation has been patchy and not all disabilities have been covered.<sup>122</sup>

The enactment of the DDA extends the application of disability discrimination principles not only to employment, but also to cover the areas of education, access to premises used by the public, the provision of goods, services and facilities, accommodation, sport, land, clubs and incorporated associations. The definition of disability under the DDA is comprehensive and ensures that all types of disabilities are covered, so that the focus is not on the nature of the person's disability but on the alleged act of the discriminator. However the spotlight was put firmly back onto the definition of disability in the case of *Purvis* which confirmed that a manifestation of disturbed behaviour which results from an underlying disorder is part of, and satisfies the definition of disability for the purposes of the Act. Any departure from this approach would probably require legislative amendment.

Discrimination can be direct or indirect and both require identification of a comparator in order to assess whether a person (or group of persons) has been treated less favourably. The issue of an appropriate comparator has been a complicated one since the inception of the DDA and given the result in *Purvis* and the fact that the High Court was divided on this issue, it is suggested that the issue will remain a contentious one.

Educational institutions, including universities, must make reasonable adjustments to accommodate students with disabilities, notwithstanding the fact that there is no express duty in the DDA requiring them to do so. This lack of express duty was confirmed in *Purvis* and supported by the Productivity Commission. However it was also noted in *Purvis* that in practice the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. What is 'reasonable' can only be determined by the particular circumstances of the case. The draft education standards may require an institution to put into place reasonable adjustments.

The provision of reasonable adjustments in the education context is subject to the defence of unjustifiable hardship. Previously this defence was only available at enrolment, however with amendment to the DDA it will apply to post-enrolment stages also. In determining what constitutes unjustifiable hardship, all relevant circumstances of the case must be taken into account. The *Hills Grammar School* case highlights that assessment based on general assumptions are not acceptable and that the person with the disability must be individually assessed as to the level of

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<sup>120</sup> *Productivity Commission Report*.

<sup>121</sup> *Anti-Discrimination Act 1977* (NSW).

<sup>122</sup> *Productivity Commission Report*.

adjustments required. Additionally, unjustifiable hardship is not simply a question of financial hardship; as noted in *Purvis*, safety considerations of other students and teachers was taken into account when weighing up the nature of the deterrents likely to be suffered by any person concerned.

For universities particularly, *W v Flinders University* confirms that academic entry and assessment criteria are regarded as an essential part of the reasonable requirements that all students must meet in their studies. The draft education standards clarify that inherent academic requirements must be maintained equally for all students in enrolment and assessment.

Whilst one of the objectives of the DDA is to eliminate as far as possible, discrimination against persons in all areas of life, including in education, the decision in *Purvis* could be seen as being at variance with this aim. However the reality of the situation remains; how do educational institutions deal with a situation where a student's behaviour, which results from an underlying condition, causes actual or potential physical and/or emotional harm to other students or teachers? How does an educational institution balance its legal obligations given that it must operate in an environment which promotes inclusiveness but in which a duty of care is owed to every student? It may be that the decision in *Purvis* reflects for now a pragmatic and workable approach, but one which is bound to be revisited in the future.

Finally, educational institutions must keep abreast of the changes and the on-going development in this area of law. In particular, the new standards are of crucial importance in this regard and educational institutions need to be well versed in the standards' compliance procedures in order to satisfy the requirements of the DDA, thus avoiding claims of unlawful discrimination against them.

## APPENDIX

‘No issue has caused as much comment during this inquiry as ‘reasonable adjustments’. The many comments the Productivity Commission received on this subject shows that reasonable adjustments can mean different things to different people ... There is no explicit provision in the DDA that says that adjustments must be made to meet the needs of people with disabilities. For example, the term ‘reasonable adjustments’ (sometimes also called ‘reasonable accommodations’) does not appear anywhere in the DDA. However, various sections of the Act seem to imply, or have been interpreted, to require that ‘reasonable adjustments’ be made in certain circumstances. These include the definition of discrimination (s.5 (2)), the reasonableness component of the definition of indirect discrimination (s.6 (b)), and the unjustifiable hardship defence.

The Australian Government at the time the DDA was introduced appeared to intend that the provision of reasonable adjustments was in fact a duty. This is evident in the explanatory memorandum and the second reading speech which both used the term ‘reasonable accommodation’ in the context of unjustifiable hardship.

The DDA provides that circumstances are not considered to be ‘materially different’ if ‘different accommodation or services’ are required by a person with a disability (s.5 (2)). There is a long history of debate over whether or not this section implies an obligation to make adjustments by providing different accommodation or services.

The meaning of this section has been considered variously by HREOC Commissioners, the Federal Court, and most recently the High Court. In one of the most influential cases, *A School v HREOC and Anor*, Mansfield J rebutted the respondent’s argument that the DDA did not impose a positive obligation to treat a person with a disability more favourably than a person without a disability. His Honour commented that: ‘it is not necessarily the case that, where the DDA applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services.’ ((1998) FCA 1437)

Subsequently, HREOC Commissioner McEvoy said:

the substantial effect of section 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing ... so that in truth the person with a disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances. (McEvoy (HREOC unreported 2000), quoted in HREOC 2003b, p. 75).

By contrast, the opposite view—that section 5(2) does not impose a duty to provide the different accommodations required by a person with a disability—was found in *Clark v Internet Resources* (Commissioner Mahoney, HREOC 2000) and *Commonwealth of Australia v Humphries* ((1998) 1031 FCA).

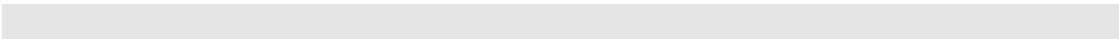
This issue came to a head when the High Court considered the *Purvis* case involving alleged discrimination against a student in a NSW school (*Purvis v New South Wales*

*(Department of Education and Training)* (2003) HCA 62). As noted by Lee Ann Bassar, although the majority of judges in this case ‘did not consider the duty to make reasonable adjustments in any detail, the minority considered the issue in some detail’ (sub. DR266, p. 2). Justices McHugh and Kirby, in the minority, concluded, among other things, that s.5 (2) does not impose an obligation to make adjustments and that failure to provide adjustments is not a *per se* breach of the Act. They found that the ‘failure to provide the required accommodation goes to the issue of materially different circumstances, not obligation’ ([2003] HCA 62).

According to Lee Ann Bassar, the view of McHugh and Kirby JJ is that:

in the absence of an express duty to make reasonable adjustments, the Act operates in a negative fashion. According to McHugh and Kirby JJ there is no obligation to make adjustments or accommodations but a failure to make reasonable adjustments may lead to a finding of unlawful discrimination. (Sub. DR266, p. 2)

Although this might not be the end of the matter (a majority of the High Court could presumably take a different view in a subsequent case), the Productivity Commission is satisfied that section 5(2) of the DDA cannot be relied upon to imply a duty to make adjustments.’





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