

CASE NOTE

PURVIS v NEW SOUTH WALES (DEPARTMENT OF EDUCATION & TRAINING)*

A CASE FOR AMENDING THE *DISABILITY DISCRIMINATION ACT 1992* (CTH)

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[This case note examines the important High Court decision in Purvis, which considered aspects of the Disability Discrimination Act 1992 (Cth). The case explored the tensions that arise from trying to balance the duty to provide a non-discriminatory educational setting and the duty to provide employees and students with a safe environment. This case note provides an analysis of the key issues in the case, including the definition of 'disability', the appropriate comparator, the meaning of the term 'accommodation' and the test for determining whether discrimination is 'on the ground' of disability. Although all members of the High Court adopted a wide and beneficial construction of the term 'disability', a majority of the Court adopted a narrow approach to the substantive definition of direct discrimination. This approach represents a departure from established discrimination jurisprudence. It is contended that the majority approach was due to the absence of an appropriate and applicable defence or exception in the legislation relating to health and safety. This case note calls for the defences in the legislation to be strengthened to enable the rights of disabled students to be properly balanced with the rights of others.]

CONTENTS

I	Introduction	533
II	The Background and Facts	534
III	The Issues	536
	A The Definition of Disability	538
	B Identifying the Appropriate Comparator	541
	1 The Majority of the High Court	542
	2 The Minority of the High Court	544
	3 Did the Majority Get It Right?	547
	C Section 5(2) — Accommodation or Services	548
	D Discrimination on the Ground of Disability	551
IV	Defences, Exceptions and Exemptions	555
	A Unjustifiable Hardship	555
	1 A Gap in the Defence	555

* (2003) 202 ALR 133 ('Purvis').

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2004]	<i>Case Note</i>	533
	2 The Criteria for Determining Unjustifiable Hardship	557
	B Comparison with Exceptions in State Legislation	558
	C Temporary Exemptions.....	560
	D Notions of Reasonableness in Indirect Discrimination	561
V	Conclusion	562

I INTRODUCTION

Since the inclusion of students with disabilities in mainstream schools, educational authorities have grappled with the tensions that arise from trying to balance the duty to provide a non-discriminatory educational setting and the duty to provide employees and students with a safe environment. These tensions are particularly pronounced in the case of students who, due to disabilities, engage in challenging and violent behaviour.

The High Court decision in *Purvis*¹ was eagerly awaited by educational administrators and disability advocacy groups alike. It was hoped that the decision would clarify the rights and obligations involved in educating such students. It was also hoped that the decision would clarify the interpretation of key provisions of the *Disability Discrimination Act 1992* (Cth) ('DDA').

From the perspective of an educational administrator, *Purvis* strikes a much-needed balance between the management of students with disabilities that cause violent behaviour and the safety and welfare of others in the school. The majority of the High Court clearly recognised that, in fulfilling its obligation to provide education to students with disabilities in a non-discriminatory way, a school must be aware of its duties to other students and staff.

Taking into account these competing obligations, the result in *Purvis* — overturning a first instance finding that the expulsion of a disabled student prone to violence was discriminatory — appears entirely appropriate. It would be untenable for a school to be required, without exception, to tolerate students who engage in violent behaviour that is detrimental to the wider student body and staff.

The outcome in *Purvis* might be considered fair and practical bearing in mind the facts of the case. However, it is contended that in its narrow interpretation of certain provisions of the *DDA*, the majority of the High Court departed from previous discrimination jurisprudence in a manner inconsistent with the terms and purpose of the legislation.

It is submitted that the narrow interpretation was motivated by the fact that the *DDA* does not provide adequate exceptions relating to the safety and welfare of others. It fails in two key respects. First, the defence of unjustifiable hardship applies only in respect of the application for admission of a student, not his or her ongoing enrolment.² Second, while acting in direct compliance with prescribed legislation is a defence, no occupational health and safety legislation has

¹ (2003) 202 ALR 133.

² The recently introduced Disability Discrimination Amendment (Education Standards) Bill 2004 (Cth) proposes to extend the defence of unjustifiable hardship to post-enrolment situations: see sch 1, item 3. See further below n 180 and accompanying text.

been prescribed. Thus the majority of the High Court adopted a narrow interpretation to strike a balance between the rights and obligations of different groups within an educational setting.

The *DDA* should be amended to allow for the achievement of this balance through adequate defences, preventing the need for judicial distortion of its ameliorative provisions. The defence of unjustifiable hardship should be extended to cover all substantive provisions of the *DDA* and occupational health and safety legislation should be prescribed for the purposes of the direct compliance with prescribed legislation defence. The legislature could then mandate a broader interpretation of the substantive provisions of the *DDA* than that adopted by the majority in *Purvis*.

Part II of this case note contains the background to and facts of *Purvis*. Part III contains an analysis of the key issues in the case. Part IV examines some of the exceptions and exemptions that are presently available in anti-discrimination legislation.

II THE BACKGROUND AND FACTS

Purvis concerned the treatment of the student Daniel Hoggan by a New South Wales government school, South Grafton High School. Daniel was born on 8 December 1984.³ He suffered brain damage within the first year of his life that caused intellectual disabilities, a visual disability and epilepsy.⁴ His disabilities manifested in behaviour that varied from the norm, such as rocking, humming and swearing.⁵ According to the testimony of a child neurologist, '[t]he major part of [Daniel's] difficult behaviour would be disinhibited and uninhibited behaviour.'⁶

Daniel was a ward of the state and had been in the foster care of Mr and Mrs Purvis since 1989.⁷ He attended the Support Unit at Grafton Primary School for four years until 1993 and later attended Gillwinga Primary School until 1996.⁸ In 1996, Mr and Mrs Purvis applied for Daniel to be enrolled at South Grafton High School.⁹ Through the Department of Education, the State of New South Wales administered the school and employed its principal and staff. After the school rejected his application, Mr Purvis filed a discrimination complaint with the Human Rights and Equal Opportunity Commission ('HREOC') against the State in relation to the rejection.¹⁰

At the commencement of the 1997 school year, after several meetings between the school and Mr and Mrs Purvis, and between the Teacher's Federation, the teachers and the school, Daniel's application for enrolment was accepted and the

³ Ibid 175 (Gummow, Hayne and Heydon JJ).

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid 142 (McHugh and Kirby JJ).

⁸ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 113 (Commissioner Innes).

⁹ *Purvis* (2003) 202 ALR 133, 175 (Gummow, Hayne and Heydon JJ).

¹⁰ Ibid 197 (Callinan J).

HREOC complaint discontinued.¹¹ Daniel commenced Year 7.¹² He had full-time support from a teacher's aide and an individualised welfare and discipline policy.¹³ In addition, the school established a case management committee for him.¹⁴

During his first year, Daniel was suspended five times for his behaviour, which included kicking another student, kicking the teacher's aide, punching the teacher's aide in the back and swearing.¹⁵ By the end of 1997, Daniel was excluded from South Grafton High School because of his behaviour and the risk he posed to staff and other students.¹⁶ It was suggested to Mr and Mrs Purvis that Daniel attend the specialist support unit at another high school.¹⁷ At the time of Daniel's exclusion, the principal of South Grafton High School stated in a letter to Mr and Mrs Purvis that: 'As well as Daniel's education, I am also responsible for over 1000 other students and 80 teaching or SASS staff. The health and safety of all these people are also of great concern'.¹⁸

On 22 March 1998, Mr Purvis lodged a complaint of disability discrimination with HREOC on Daniel's behalf against the State.¹⁹ The complaint alleged that during Daniel's attendance at South Grafton High School, a number of incidents and actions of the State — including the suspensions and ultimate exclusion from the school — constituted discriminatory treatment of Daniel in breach of the *DDA*.²⁰

The Acting Disability Discrimination Commissioner of HREOC investigated the complaint and, after an attempt to conciliate was unsuccessful, it was referred to HREOC for hearing.²¹ The hearing took place before Deputy Disability Commissioner Graeme Innes over 23 days in 1999.²² On 13 November 2000, HREOC handed down its decision.²³ Commissioner Innes found that some of the disciplinary measures imposed on Daniel, and his ultimate exclusion from South Grafton High School, constituted conduct in breach of the *DDA*.²⁴

The State appealed to the Federal Court under s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).²⁵ Emmett J found that HREOC had erred in a number of ways, set aside its decision and remitted the matter to

¹¹ *Ibid* 197–8 (Callinan J).

¹² *Ibid* 199 (Callinan J).

¹³ *Ibid* 198 (Callinan J).

¹⁴ *Ibid*.

¹⁵ *Ibid* 175–6 (Gummow, Hayne and Heydon JJ), 199 (Callinan J).

¹⁶ *Ibid* 176 (Gummow, Hayne and Heydon JJ).

¹⁷ *Ibid* 200 (Callinan J).

¹⁸ *Ibid* 176 (Gummow, Hayne and Heydon JJ).

¹⁹ *Ibid* 200 (Callinan J).

²⁰ *Ibid* 175 (Gummow, Hayne and Heydon JJ).

²¹ *Ibid* 200 (Callinan J).

²² *Ibid*.

²³ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117.

²⁴ *Ibid* 75 172–7.

²⁵ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 70 (Emmett J).

HREOC.²⁶ Purvis appealed to the Full Court of the Federal Court, which dismissed the appeal.²⁷

Purvis then appealed to the High Court. In a 5:2 decision handed down on 11 November 2003, the Court dismissed the appeal.²⁸ The majority comprised the separate judgments of Gleeson CJ and Callinan J, and the joint judgment of Gummow, Hayne and Heydon JJ. The minority comprised the joint judgment of McHugh and Kirby JJ.

III THE ISSUES

Disability discrimination is the most common foundation for education-related claims under Australian anti-discrimination legislation.²⁹ Section 22 of the *DDA* provides:

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:
 - (a) by refusing or failing to accept the person's application for admission as a student; or
 - (b) in the terms or conditions on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:
 - (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
 - (b) by expelling the student; or
 - (c) by subjecting the student to any other detriment.³⁰

According to s 4, '*educational authority* means a body or person administering an educational institution.'³¹

Discrimination may occur directly or indirectly. Direct discrimination is defined in s 5 of the *DDA*:

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

²⁶ Ibid 83 (Emmett J).

²⁷ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237.

²⁸ As a result of legislative changes, the consequence was that the original HREOC complaint was taken to have been terminated, leaving Purvis entitled to commence a new proceeding in the Federal Magistrates Court: *Purvis* (2003) 202 ALR 133, 187–8 (Gummow, Hayne and Heydon JJ).

²⁹ In 2002–03 there were 98 education-related complaints under the *DDA*, compared to 3 under the *Racial Discrimination Act 1975* (Cth) and 9 under the *Sex Discrimination Act 1984* (Cth): HREOC, *Annual Report 2002–2003* (2003) 74, 77, 80. Over the same period there were 49 education-related complaints under the *Equal Opportunity Act 1995* (Vic) ('*EOA*') on the ground of disability, compared to 19 on the ground of race and 7 on the ground of sex: Equal Opportunity Commission Victoria, *Annual Report 2003: Tampering with Human Rights* (2003) 30.

³⁰ Cf *EOA* s 37.

³¹ Cf *EOA* s 4.

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.³²

Indirect discrimination is defined in s 6 of the *DDA*:

For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.³³

Purvis was run as a direct rather than an indirect discrimination case.³⁴ In contrast to direct discrimination, where emphasis is placed on the reasons for less favourable treatment, indirect discrimination contemplates a condition that requires a person to act in a way that is impossible because of that person's disability. In other words, indirect discrimination involves a policy, practice, requirement or condition that appears neutral but that has a disparate impact on people with disabilities. At first instance, Commissioner Innes noted that the case was not argued on the basis of indirect discrimination because the condition imposed on Daniel was not imposed on other students.³⁵ Daniel was not required to comply with the normal standards and practices of the school concerning discipline and welfare since he had a tailor-made welfare and discipline policy.

The major issues considered by the High Court in *Purvis* were

- 1 the construction of the definition of 'disability' under the *DDA*;
- 2 the appropriate comparator to determine whether there has been less favourable treatment for the purposes of s 5(1);
- 3 the meaning of 'accommodation or services' in s 5(2); and
- 4 the correct test for determining whether discrimination against a person is 'on the ground of' his or her disability.

³² Cf *EOA* s 8, which uses the words 'same or similar circumstances' in the definition of direct discrimination.

³³ Cf *EOA* s 9.

³⁴ *Purvis* (2003) 202 ALR 133, 135 (Gleeson CJ), 177 (Gummow, Hayne and Heydon JJ).

³⁵ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 168. This also seems to have been the view of Gleeson CJ in the High Court: see *Purvis* (2003) 202 ALR 133, 135.

A *The Definition of Disability*

In the *DDA*, 'disability' is defined in s 4:

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness;
or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

The definition of disability in the *DDA* has been described in academic commentary as 'a unique and powerful feature of the Australian legislation.'³⁶ Its wide scope avoids distracting disputes over whether a person fits into particular diagnostic categories.³⁷

The issue before the High Court in *Purvis* was whether the definition of disability includes behaviour resulting from the disability.³⁸ At first instance, Commissioner Innes appeared to treat Daniel's disability as falling within limbs

³⁶ Lee Ann Basser and Melinda Jones, 'The *Disability Discrimination Act 1992* (Cth): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26 *Melbourne University Law Review* 254, 263.

³⁷ Graeme Innes, 'The Role of Public Inquiries and Exemption Powers in Eliminating Disability Discrimination' (Paper presented at the Constructing Law and Disability Conference, Canberra, 4 December 2000) <http://www.hreoc.gov.au/disability_rights/speeches/2000/constructing.htm>. The importance of a broad definition was also mentioned by the Disability Discrimination Commissioner in 1997: Elizabeth Hastings, *FoundDDAions: Reflections on the First Five Years of the Disability Discrimination Act* (1997) <http://www.hreoc.gov.au/disability_rights/hr_disab/found.html>.

³⁸ In one of its submissions to the Productivity Commission's review of the *DDA*, HREOC stated: Most (but not all) decisions of HREOC as a tribunal have taken the approach that less favourable treatment because of behaviour which is part of or a manifestation of a disability is less favourable treatment because of the disability, and thus that the concept of direct discrimination is applicable.

HREOC, *Productivity Commission Review of the Disability Discrimination Act: Initial Submission — Human Rights and Equal Opportunity Commission* (2003) 20, submission to the Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004).

(f) and (g) of the definition, without distinguishing between the disability and the resulting behaviour.³⁹

On appeal, Emmett J preferred a narrower construction:

It is only a disorder or malfunction or disorder, illness or disease that is manifested in certain symptoms that will constitute a disability. Thus, it is the disorder or malfunction or the disorder, illness or disease that is the disability. It is not the symptom of that condition that is the disability.⁴⁰

His Honour relied on the fact that disability is defined in limbs (f) and (g) to include a ‘disorder or malfunction’ and a ‘disorder, illness or disease’ respectively, and that ‘[e]ach of those expressions is then limited by a relative clause that describes certain symptoms’.⁴¹ His Honour stated that if Parliament had intended to define disability by reference to symptoms, it could have defined disability as ‘disturbed behaviour that results from a disorder, illness or disease’.⁴² Emmett J’s construction was adopted by the Full Court on appeal.⁴³

Emmett J’s construction of the definition of disability is very narrow. It is a ‘literal or technical’ construction rather than a ‘fair, large and liberal’ interpretation.⁴⁴ However, as stated by Brennan CJ and McHugh J in *I W v City of Perth*,⁴⁵ ‘when ambiguities arise, [courts and tribunals] should not hesitate to give the legislation a construction and application that promotes its objects’ provided they ‘faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope.’⁴⁶ In particular, anti-discrimination legislation such as the *DDA* should be given a wide and beneficial interpretation in accordance with its objects and purpose.⁴⁷

³⁹ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 74 (Emmett J), referring to *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 146 (Commissioner Innes).

⁴⁰ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 77 (Emmett J).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 248 (Spender, Gyles and Conti JJ).

⁴⁴ *Coburn v Human Rights Commission* [1994] 3 NZLR 323, 333 (Thorp J), quoted by Brennan CJ and McHugh J in *I W v City of Perth* (1997) 191 CLR 1 (*I W*) in the context of restating the ‘rule of construction that beneficial and remedial legislation ... is to be given a liberal construction’: at 12 (citations omitted). Gummow J also cited these words: at 39. However, Brennan CJ and McHugh J further stated that ‘the task remains one of statutory construction ... [and] a court or tribunal is not at liberty to give [legislation] a construction that is unreasonable or unnatural’: at 12.

⁴⁵ (1997) 191 CLR 1.

⁴⁶ *Ibid.* 15. Brennan CJ and McHugh J also acknowledged (at 15):

No doubt most anti-discrimination statutes are legislative compromises ... Because of the restricted terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory.

⁴⁷ See *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 372 (Brennan J), 394 (Dawson and Toohey JJ), 407 (McHugh J) (*Waters*), a case brought under the *Equal Opportunity Act 1984* (Vic). See also *I W* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 22–3 (Dawson and Gaudron JJ), 27 (Toohey J), 39 (Gummow J), 58 (Kirby J), a case brought under the *Equal Opportunity Act 1984* (WA).

One of the generally stated objectives of anti-discrimination legislation is to eliminate discrimination as far as possible, promoting ‘recognition and acceptance of everyone’s right to equality’.⁴⁸ One of the express objects of the *DDA* is ‘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.’⁴⁹ Therefore, the provisions of the *DDA* should, as far as possible, be interpreted in a way that promotes the elimination of discrimination. This would involve a broad construction of the definition of disability, recognising that the behaviour and the disability are indivisible.

Applying these considerations, a majority of the High Court concluded that the definition of disability includes behaviour resulting from the disability.⁵⁰ Gummow, Hayne and Heydon JJ indicated that while the approach of the judges in the Federal Court was open in light of the grammatical structure of the definition, ‘[t]o identify Daniel’s disability by reference only to the physiological changes which his illness brought about in his brain would describe his disability incompletely.’⁵¹ Their Honours stated that Daniel’s disability could fall within any of limbs (a), (e) or (g) of the definition of disability and that these provisions in fact have an overlapping operation.⁵² Additionally, their Honours stated that

to focus on the cause of 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.⁵³

McHugh and Kirby JJ emphasised that ‘[t]o construe “disability” as including functional difficulties gives effect to the purposes of the Act. Such a construction accords with the Act’s beneficial and remedial nature.’⁵⁴ Their Honours also stated that a narrow interpretation of the definition of disability, referring only to the underlying condition, would undermine the utility of the prohibition against discrimination in the case of a ‘hidden’ impairment, such as Daniel’s brain damage.⁵⁵

Callinan J took a different approach. While not expressing a concluded view on the matter, his Honour stated that ‘the Act cannot be sensibly read ... as extending to behaviour which constitutes criminal or quasi-criminal conduct.’⁵⁶ To do so, his Honour stated, would be a ‘startling proposition’ and would mean that

behaviour with a capacity to injure, indeed even kill someone, or to damage property (by, for example, burning a school down) could be excused, and the

⁴⁸ *EOA* s 3.

⁴⁹ *DDA* s 3(c).

⁵⁰ *Purvis* (2003) 202 ALR 133, 152–3 (McHugh and Kirby JJ), 182–3 (Gummow, Hayne and Heydon JJ).

⁵¹ *Ibid* 182.

⁵² *Ibid*.

⁵³ *Ibid* 183.

⁵⁴ *Ibid* 152.

⁵⁵ *Ibid* 153.

⁵⁶ *Ibid* 196.

[school] bound to tolerate it, or seek to abate it, no matter how difficult, disruptive, expensive, or ineffectual measures for abatement might be.⁵⁷

However, a wide definition of disability does not necessarily extend the operation of the *DDA* to cover criminal conduct since a definition is not a substantive provision. *Purvis* was not determined according to the definition of disability; rather, the case was decided by applying the appropriate test for direct discrimination. The function of a definition in a statute is merely to indicate that when particular words are found in the substantive part of that statute, they are to be understood in the defined sense. Such provisions are, therefore, no more than aids to the construction of the statute and do not operate in any other way. Indeed, Gleeson CJ expressly disagreed with Callinan J's caveat, stating that 'disturbed behaviour' in limb (g) of the definition of disability 'could include behaviour that is grossly anti-social, dangerous, and criminal.'⁵⁸

Given the broad definition of disability adopted by a majority of the High Court, the effect of the *DDA* and its operation in relation to discrimination are confined primarily by the substantive provisions of the Act.

B Identifying the Appropriate Comparator

In a claim of direct discrimination under s 5(1) the tribunal must compare two ways of treating persons to determine whether one is less favourable than the other. The question of the appropriate comparator, as it is commonly known, has been much discussed in Australian cases.⁵⁹ It has been debated in the context of the HREOC and Federal Court decisions on appeal in *Purvis*.⁶⁰

As there was general agreement amongst the judges in *Purvis* about the definition of 'disability', the identification of the appropriate comparator was determinative.⁶¹

Commissioner Innes held that he was required to compare the treatment of Daniel with the treatment of other Year 7 students at South Grafton High School in 1997.⁶² He stated that taking 'the comparator as another student who may have hit a member of staff, confuse[s] the comparator (being a person who does not have Daniel's disabilities) with the circumstances in which the comparison is made.'⁶³ In determining whether the treatment occurred in circumstances that are

⁵⁷ Ibid.

⁵⁸ Ibid 135.

⁵⁹ See, eg, *I W* (1997) 191 CLR 1, 33–4 (Toohey J), 40–1 (Gummow J), 66–9 (Kirby J); *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 327 (Lockhart J) ('*Mt Isa Mines*'); *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191, 195 (Black CJ), 204–5 (Lockhart J). See also *Monash University v Kapoor* [1999] VSC 463 (Unreported, Byrne J, 9 December 1999) [71]–[77]. An appeal to the Victorian Court of Appeal, in which the comparator issue was not considered, was unsuccessful: *Kapoor v Monash University* [2001] 4 VR 483.

⁶⁰ See Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 333 fn 29.

⁶¹ *Purvis* (2003) 202 ALR 133, 178 (Gummow, Hayne and Heydon JJ).

⁶² *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 172.

⁶³ Ibid. Commissioner Innes referred to Commissioner McEvoy's decision in *Cowell v A School* (Unreported, HREOC, Commissioner McEvoy, 10 October 2000), known as *A J v A School* before the suppression order was lifted. The decision was on remittal to HREOC following

the same or not materially different, he stated that it would defeat the operation of s 5 to refer to the actual incident or conduct itself.⁶⁴ Instead, he said that the circumstances ‘must be the setting in which the less favourable treatment has occurred’,⁶⁵ namely Year 7 at South Grafton High School in 1997. As no other Year 7 student had been excluded or suspended in that year,⁶⁶ the Commissioner concluded that Daniel had been treated less favourably than other students who did not have his disability.⁶⁷

On appeal, Emmett J held that this approach was incorrect because it ignored ‘the requirement that actual treatment or proposed treatment must be compared with actual treatment or hypothetical treatment “in circumstances that are the same or are not materially different”.’⁶⁸ His Honour held that the correct approach would be to determine ‘the treatment that would have been accorded to a year 7 student of the school in 1997 who had engaged in behaviour similar to that of the complainant and who did not have the complainant’s disability.’⁶⁹ Only if such a hypothetical student would not have been suspended and excluded from the school would Daniel have been treated less favourably than the comparator. On appeal, the Full Court of the Federal Court agreed.⁷⁰

1 *The Majority of the High Court*

On appeal to the High Court, the majority agreed with the judges in the Federal Court. As Gleeson CJ stated: ‘The required comparison is with a pupil without the disability; not a pupil without the violence.’⁷¹ Requiring a disabled person to identify an able-bodied comparator who has or would have been treated differently discloses a ‘narrow’ interpretation of discrimination.

The majority considered that the words ‘in circumstances that are the same or are not materially different’ in s 5 of the *DDA* allow the court to impute the complainant’s behaviour to the hypothetical comparator. In other words, the majority considered that Daniel’s violent behaviour formed part of the circumstances in which the school made its decisions about him. The circumstances are only the same if the pupil with whom the comparison is made also engages in violent behaviour. Examined from this perspective, while the school treated Daniel as it did because of his disability in that the disability caused the violence, it did not treat him less favourably than it would have treated a person without his disability in the same circumstances.

Mansfield J’s decision in *A School v Human Rights and Equal Opportunity Commission [No 2]* (1998) 55 ALD 93.

⁶⁴ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 173.

⁶⁵ *Ibid.*

⁶⁶ *Ibid* 75 172.

⁶⁷ *Ibid* 75 174.

⁶⁸ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 80 (emphasis in original).

⁶⁹ *Ibid.*

⁷⁰ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 248 (Spender, Gyles and Conti JJ).

⁷¹ *Purvis* (2003) 202 ALR 133, 137. See also at 185 (Gummow, Hayne and Heydon JJ). Callinan J agreed with Gummow, Hayne and Heydon JJ: at 197.

In construing the appropriate comparator, the majority of the High Court appears to have imported considerations of health and safety into the substantive definition of direct discrimination. Gleeson CJ acknowledged that in its application to educational authorities, the *DDA* deals with ‘an area of relationships governed by legal obligations designed to protect the young and vulnerable.’⁷² The tort of negligence imposes on educational authorities a non-delegable duty to take reasonable measures to protect students from risks of injury that are reasonably foreseeable.⁷³ Thus in providing a non-discriminatory educational setting to students with disabilities, educational authorities must take care to prevent risks of injury to other students. This includes taking care to prevent injuries to students inflicted unintentionally and perhaps even intentionally by students with severe behavioural disorders.

In addition to common law obligations, educational authorities — as employers and occupiers — have obligations under state occupational health and safety legislation. In the same year that HREOC found New South Wales liable for disciplining Daniel and ultimately excluding him from a mainstream school, *WorkCover Authority of New South Wales (Inspector Batty) v New South Wales (Department of Education & Training)*⁷⁴ dealt with charges brought against the State under the *Occupational Health and Safety Act 1983* (NSW) for failing to ensure that employees in a school were not placed at risk of injury by the challenging behaviour of two students with disabilities. The two students — one with autism and one with a hearing impairment — assaulted staff on a number of occasions.⁷⁵ After steps were taken to control the students’ behaviour and limit the risks they posed to others, the students were suspended and ultimately excluded from the school.⁷⁶ Although the New South Wales Industrial Relations Commission recognised the value of ‘pursuing worthwhile programmes for students with disabilities’, it noted that ‘considerations of occupational health and safety must over-arch all of the processes of the [school]’.⁷⁷ The State pleaded guilty to the offences and was fined \$80 000.⁷⁸

In *Purvis*, Gleeson CJ acknowledged that the school ‘showed concern and sensitivity in its dealings with [Daniel]’, but recognised that it ‘was charged with the care and protection of all the pupils in the school’ and was obliged to heed its legal responsibilities to the other students and the staff.⁷⁹ Following from this, Gleeson CJ said that if there were a reasonable construction of the *DDA* that avoided a conflict between the responsibilities of the school to its staff and the

⁷² *Ibid* 136.

⁷³ *Commonwealth v Introvigne* (1982) 150 CLR 258; *New South Wales v Lepore* (2003) 212 CLR 511.

⁷⁴ [2000] NSW IR Comm 181 (Unreported, Marks J, 8 September 2000).

⁷⁵ *Ibid* [6] (Marks J).

⁷⁶ *Ibid*.

⁷⁷ *Ibid* [32] (Marks J).

⁷⁸ *Ibid* [46] (Marks J).

⁷⁹ *Purvis* (2003) 202 ALR 133, 136.

other students, and the obligations imposed by the *DDA*, that construction should be preferred.⁸⁰

Gummow, Hayne and Heydon JJ stated that the construction of the comparator adopted by their Honours ‘allows for a proper intersection between the operation of the Act and the operation of state and federal criminal law.’⁸¹ Their Honours said it would be a ‘startling result’ if the *DDA* did not allow an educational authority to require that pupils comply with the criminal law.⁸²

The majority’s use of a narrow construction to balance obligations imposed by the *DDA* and those imposed by other areas of the law is arguably due to the lack of an adequate defence to discrimination relating to the health, safety and welfare of others. The *DDA* does not offer an educational authority any general defence to discrimination once a student is enrolled at a school. In particular, the defence of unjustifiable hardship, which would arguably apply to a situation involving a student prone to violent or dangerous behaviour, does not apply after a student is enrolled.⁸³

2 *The Minority of the High Court*

McHugh and Kirby JJ relied heavily on the objects and purpose of the *DDA* in disagreeing with the majority regarding the appropriate comparator. Their Honours stated that ‘[i]t would be wrong and contrary to the purpose of the Act to construe its ameliorative provisions narrowly’⁸⁴ and concluded:

The circumstances of the person alleged to have suffered discriminatory treatment are excluded from the circumstances of the comparator in so far as those circumstances are related to the prohibited ground. The contrary view would seriously undermine the remedial objects of the Act.⁸⁵

In other words, according to the minority the correct comparator for direct discrimination is someone who does not have the disability or suffer its effects. In *Purvis*, this would be a well-behaved student with no brain damage. This follows the established approach in discrimination law jurisprudence ‘that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* are to be excluded from the circumstances of the comparator.’⁸⁶

⁸⁰ Ibid.

⁸¹ Ibid 186.

⁸² Ibid.

⁸³ *DDA* s 22(4); *contra* *EOA* s 39. See below Part IV(A)(1).

⁸⁴ *Purvis* (2003) 202 ALR 133, 139.

⁸⁵ Ibid 141.

⁸⁶ Ibid 162 (McHugh and Kirby JJ) (emphasis in original). See *I W* (1997) 191 CLR 1, 33–4 (Toohey J), 66–7 (Kirby J); *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191, 209 (Wilcox J); *Mount Isa Mines* (1993) 46 FCR 301, 327 (Lockhart J); *Commonwealth v Humphries* (1998) 86 FCR 324, 333 (Kiefel J); *Sullivan v Department of Defence* [1992] EOC ¶92-421, 79 005 (Commissioner Wilson); *Proudfoot v Australian Capital Territory Board of Health* [1992] EOC ¶92-417, 78 980 (Commissioner Wilson); *Garity v Commonwealth Bank of Australia* [1999] EOC ¶92-966, 79 129 (Commissioner Nettlefold). See also *School Board of Nassau County v Arline*, 480 US 273, 282 (1987) (Brennan J).

Regarding the narrow approach adopted by the majority, McHugh and Kirby JJ expressed the following concern:

If the functional limitations and consequences [of disabilities] ... were to be attributed to the comparator as part of the relevant circumstances ... persons suffering from those disabilities would lose the protection of the Act in many situations.⁸⁷

This echoes the statement of Sir Ronald Wilson, the former President of HREOC, in *Sullivan v Department of Defence*:

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.⁸⁸

This statement was quoted by McHugh and Kirby JJ in *Purvis*⁸⁹ and has also been approved in a number of other decisions.⁹⁰ Academic commentary has suggested that the approach adopted by the majority in *Purvis* does not accord with the objectives of the *DDA*.⁹¹

Moreover, the narrow approach adopted by the majority does not sit comfortably with the construction of the comparator for the purposes of direct discrimination under the *Equal Opportunity Act 1984* (WA) adopted in *I W* by Toohey and Kirby JJ.⁹²

As under s 5 of the *DDA*, the definition of direct discrimination under s 66A(1) of the *Equal Opportunity Act 1984* (WA) involves treating a person with an impairment 'less favourably' than a person without such an impairment 'in the same circumstances, or in circumstances that are not materially different'. Unlike the *DDA*, s 66A(1) of the *Equal Opportunity Act 1984* (WA) provides that discrimination on the ground of impairment includes discrimination on the ground of

- (b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person; [or]
- (c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; ...

⁸⁷ *Purvis* (2003) 202 ALR 133, 164.

⁸⁸ [1992] EOC ¶92-421, 79 005.

⁸⁹ (2003) 202 ALR 133, 162.

⁹⁰ See *I W* (1997) 191 CLR 1, 67 (Kirby J); *Mt Isa Mines* (1993) 46 FCR 301, 327 (Lockhart J); *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191, 195 (Black CJ), 205 (Lockhart J); *Monash University v Kapoor* [1999] VSC 463 (Unreported, Byrne J, 9 December 1999) [73].

⁹¹ Gaze, above n 60, states that the approach in the Federal Court decision of *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237 with which the majority of the High Court agreed was 'narrow and technical' (at 333) and 'deprives the legislation of meaning' (at 333 fn 29). Additionally, in her submission to the Productivity Commission's review of the *DDA*, Lee Ann Bassar stated that '[t]he use of such a comparator seriously undermines the operation of the Act, especially in the absence of any positive duty to accommodate': Submission to the Australian Government Productivity Commission, 15 December 2003, 1 (Lee Ann Bassar).

⁹² (1997) 191 CLR 1, 33-4 (Toohey J), 66-9 (Kirby J). Gummow J concurred with Toohey J on this point: at 40-1.

I W concerned a local council's refusal to permit a change of zoning to allow a shop to be developed as a 'drop-in' centre for people with HIV/AIDS. The Equal Opportunity Tribunal established under the *Equal Opportunity Act 1984* (WA)

found that five of the majority on the Council cast their votes not upon planning or like grounds but because of views which they then held about HIV/AIDS impairment or the characteristics which they ascribed to persons so impaired.⁹³

The respondents contended that while the comparator is a person free of the impairment, that person retains the characteristics imputed to or which characterise the impaired person.⁹⁴ That is, the features identified in s 66A(1)(b) and (c) are to be shared by both the impaired person and the comparator and are included in the 'circumstances' identified in the section as those in which the differential treatment is to be considered. The complainant, on the other hand, contended that such an approach would fatally frustrate the purposes of the *Equal Opportunity Act 1984* (WA). By way of example, the complainant contended that if homosexuality is a perceived characteristic of AIDS sufferers, discriminating against AIDS sufferers would not be contrary to the Act so long as the discriminator would also discriminate against homosexuals who do not have AIDS.⁹⁵

A majority of the High Court, consisting of the joint judgment of Brennan CJ and McHugh J, the joint judgment of Dawson and Gaudron JJ and the single judgment of Gummow J, dismissed the appeal; Toohey and Kirby JJ dissented in separate judgments. Because of the grounds upon which their Honours dismissed the appeal, the majority judges did not need to consider the question of the appropriate comparator. Toohey and Kirby JJ both discussed the issue, however. Their being in dissent does not affect the validity of their views.⁹⁶

Toohey J found the complainant's illustration 'apt'⁹⁷ and subsequently held that in identifying the comparator, the characteristics that appertain generally to or are generally imputed to persons having the same impairment are to be ignored.⁹⁸ His Honour stated that '[a]ny other approach would render the Act ineffective.'⁹⁹ Gummow J agreed with Toohey J on this point.¹⁰⁰

Kirby J accepted that 'minds might differ' upon the proper construction of s 66A(1) as regards the appropriate comparator.¹⁰¹ However, his Honour concluded that considering the treatment of a person with characteristics that appertain generally to or are generally imputed to persons having the same

⁹³ *Ibid* 51 (Kirby J).

⁹⁴ *Ibid* 33 (Toohey J).

⁹⁵ *Ibid*.

⁹⁶ *Purvis* (2003) 202 ALR 133, 163 (McHugh and Kirby JJ). This is particularly so since Gummow J, a member of the majority, agreed with Toohey J on this point: *I W* (1997) 191 CLR 1, 40–1.

⁹⁷ *I W* (1997) 191 CLR 1, 33.

⁹⁸ *Ibid* 34.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* 40–1.

¹⁰¹ *Ibid* 69.

impairment as the complainant ‘would tend to defeat the achievement of the purpose of the Act.’¹⁰²

In *Purvis v New South Wales (Department of Education & Training)*, the Full Court of the Federal Court distinguished *I W* on the basis that the views of Toohey and Kirby JJ in that case were directed to a different issue in a different statutory setting, namely s 66A(1) of the *Equal Opportunity Act (WA)*.¹⁰³

However, Toohey and Kirby JJ were motivated by the beneficial objects of the legislation, which included the elimination of discrimination as far as possible. For this reason, it is arguable that they intended to establish a general principle that a comparison for the purposes of direct discrimination can never involve the inclusion of the behaviour that is the subject of the complaint. Indeed, that principle was applied to the *DDA* in *Commonwealth v Humphries*¹⁰⁴ and *Garity v Commonwealth Bank of Australia*.¹⁰⁵

The majority of the High Court in *Purvis* did not refer to *I W*.

3 Did the Majority Get It Right?

In their joint minority judgment in *Purvis*, McHugh and Kirby JJ expressed the view that

[i]t is essential ... that Australian courts give full effect to the language and purpose of the ameliorative provisions of the Act whatever opinion individual judges may have of the justice or wisdom of particular provisions. This is particularly so where, as here, the Act contains novel concepts and beneficial objects and applies to many cases involving circumstances quite different from the present.¹⁰⁶

In *Waters v Public Transport Corporation*, the High Court held that anti-discrimination laws are designed to protect or enforce human rights and should receive a beneficial construction.¹⁰⁷ In *Qantas Airways Ltd v Christie*,¹⁰⁸ McHugh J cited *Waters* when confirming that the objects of anti-discrimination legislation ‘must always be considered when interpreting any of its provisions and, so far as possible, its provisions should be given a meaning consistent with its objects.’¹⁰⁹ As Kirby J stated in *I W*, ‘protective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation.’¹¹⁰

¹⁰² Ibid 68.

¹⁰³ (2002) 117 FCR 237, 248–9 (Spender, Gyles and Conti JJ). The Full Court also distinguished *X v McHugh (Auditor-General (Tas))* [1994] EOC ¶92-623 because it arose in an employment setting and asserted the result ‘without setting out any satisfactory comparative analysis such as is required’: *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 246 (Spender, Gyles and Conti JJ).

¹⁰⁴ (1998) 86 FCR 324.

¹⁰⁵ [1999] EOC ¶92-966.

¹⁰⁶ (2003) 202 ALR 133, 140.

¹⁰⁷ (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 372 (Brennan J), 407 (McHugh J).

¹⁰⁸ (1998) 193 CLR 280.

¹⁰⁹ Ibid 307 (citations omitted). This case considered the anti-discrimination provisions of the *Industrial Relations Act 1988* (Cth).

¹¹⁰ (1997) 191 CLR 1, 58 (citations omitted), quoted in *Purvis* (2003) 202 ALR 133, 146 (McHugh and Kirby JJ).

Following these views, the appropriate comparator should be determined in light of the construction of the definition of disability, in line with the objects and purpose of the legislation. If the definition of disability is given a wide and beneficial reading to include disturbed behaviour, the comparator must be a person without the disability and therefore without the disturbed behaviour. To hold otherwise would rob the prohibition against discrimination of all content.

However, motivated by the lack of adequate defences and exceptions, the majority adopted a narrow construction of the appropriate comparator. According to Beth Gaze, many courts have likewise approached the interpretation of anti-discrimination statutes in the same way as the interpretation of other statutes, without considering that the subject matter might warrant a particular approach to interpretation.¹¹¹ The problem is that such narrow interpretations may become precedents for interpreting generic provisions that need to operate in a range of contexts. Restrictive and technical distinctions have been introduced into the law, quite possibly motivated by the desire to reach a particular outcome in a particular case.

The *DDA* should be amended to obviate the need for the narrow construction by providing adequate defences. In particular, the defence of unjustifiable hardship should be extended to cover all substantive provisions of the *DDA*, including provisions relating to the ongoing enrolment of a student. In addition, Parliament should follow the approach of McHugh and Kirby JJ in *Purvis* and ‘adopt a comparator which is consistent with the objects of the *DDA* ... a person without the complainant’s disability.’¹¹²

C Section 5(2) — Accommodation or Services

In determining whether circumstances are the same or not materially different for the purposes of direct discrimination, s 5(2) of the *DDA* requires the court to take into account any different accommodation or services required by a person with a disability to participate on an equal footing with others. For example, circumstances are not considered ‘materially different’ or ‘not the same’ because a person with a disability requires special services such as a ramp or special facilities or equipment.

Section 5(2) has previously been interpreted as standing for an obligation to make ‘reasonable accommodation’ for people with disabilities.¹¹³ The issue before the High Court in *Purvis* was whether this interpretation was correct.

Commissioner Innes followed this approach, holding that the State had an obligation to make a reasonably proportionate response to Daniel’s disability.¹¹⁴

¹¹¹ Gaze, above n 60, 333.

¹¹² Bassar, above n 91, 2.

¹¹³ See, eg, *J v A School* [1998] EOC ¶92-948, 78 313 (Commissioner Wilson); *Garity v Commonwealth Bank of Australia* [1999] EOC ¶92-966, 79 128-9 (Commissioner Nettlefold).

¹¹⁴ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 169-71, 75 174. In support of this proposition, Commissioner Innes cited *Southern Community College v Davis*, 442 US 397 (1979); *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 170. The Commissioner also quoted *A School v Human*

He made a finding of fact that had the State met this obligation, Daniel may have behaved and not been suspended and excluded.¹¹⁵ He held that failing to provide accommodation to Daniel by, inter alia, failing to obtain expert advice and apply school policies more flexibly, amounted to unlawful discrimination.¹¹⁶

On appeal, Emmett J held that the case did not have anything to do with accommodation and questioned whether the obligation to make reasonable accommodation is in fact contained in the *DDA*.¹¹⁷ The Full Court did not express an opinion on these comments.

A majority of the High Court held that s 5(2) did not impose an obligation to make reasonable accommodation for people with disabilities.¹¹⁸ Gummow, Hayne and Heydon JJ noted that Purvis' argument on the comparator question was not said to depend on s 5(2), but commented that the section did not require the provision of different accommodation or services.¹¹⁹ Their Honours concluded: 'there is no textual or other basis in s 5 for saying that a failure to provide such accommodation or services would constitute less favourable treatment'.¹²⁰

McHugh and Kirby JJ examined the issue in greater detail. Their Honours held that s 5(2) 'recognises rather than imposes the obligation of accommodation'.¹²¹ In other words, while there is no express obligation under the *DDA* to accommodate a person with a disability, as a matter of practice to avoid a finding of unlawful discrimination an 'alleged discriminator must accommodate the disabilities of the disabled person unless it "would impose unjustifiable hardship" ... on the alleged discriminator'.¹²² Additionally, the concept of reasonable accommodation is sometimes involved with notions of indirect discrimination. To avoid indirectly discriminating against a person with a disability, various accommodations may have to be provided by the alleged discriminator to the person with the disability. An example of this would be adjusting a school's discipline policy for a student who, because of his or her disability, is unable to comply with it.

Further, McHugh and Kirby JJ considered that it was 'a serious mistake to construe the term "accommodation" as equivalent to "reasonable accommodation", a term not used in the Act.'¹²³ Their Honours said: 'Adding the qualifica-

Rights and Equal Opportunity Commission [No 2] (1998) 55 ALD 93, 104 (Mansfield J): 'it is not necessarily the case that, where the DD Act 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': *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 169.

¹¹⁵ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 174.

¹¹⁶ *Ibid.*

¹¹⁷ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 79.

¹¹⁸ *Purvis* (2003) 202 ALR 133, 158 (McHugh and Kirby JJ), 184 (Gummow, Hayne and Heydon JJ).

¹¹⁹ *Ibid* 184.

¹²⁰ *Ibid.*

¹²¹ *Ibid* 159.

¹²² *Ibid* 154 (McHugh and Kirby JJ).

¹²³ *Ibid* (citations omitted).

tion “reasonable” to the requirement of accommodation imposes an unwarranted gloss on the Act’.¹²⁴

Consequently, McHugh and Kirby JJ expressed the view that the Draft Disability Standards for Education 2003, formulated by the Commonwealth Attorney-General under s 31 of the *DDA*, misstate the law in so far as they indicate that the *DDA* contains an obligation of reasonable accommodation.¹²⁵

Following from this, McHugh and Kirby JJ stated that HREOC erred in finding that the failure to provide accommodation to Daniel amounted to unlawful discrimination.¹²⁶ In this respect, their Honours said:

No matter how important a particular accommodation may be for a disabled person ... failure to provide it is not a breach of the Act per se. ... 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.¹²⁷

McHugh and Kirby JJ then discussed their Honours’ view of the proper operation of s 5(2), saying that it ‘recognises ... that the comparison of ‘material circumstances’ may require the injection into the equation of all those matters and things that the disabled person requires to compete on equal terms with the able-bodied comparator.’¹²⁸ It has the effect that a discriminator does not escape a finding of discrimination by asserting that the actual circumstances involved apply equally to those with and without disabilities. Their Honours used the example of a person with dyslexia who

is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. ... Section 5(2) of the Act requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with

¹²⁴ Ibid 155.

¹²⁵ Ibid 157. On 15 June 2004, the Commonwealth Attorney-General released the Draft Disability Standards for Education 2004 (‘Draft Standards’). They use the expression ‘reasonable adjustments’: see, eg, Draft Standards pt 3. This expression is not found in the *DDA*. They require education providers to consult with disabled students and prospective students about whether any adjustments are necessary to enable them to participate in education on the same basis as other students, and to make any ‘reasonable adjustments’ that may be necessary, unless this would cause ‘unjustifiable hardship’: see Draft Standards pts 4, 5. On the same day, the Attorney-General announced that he would introduce legislation to amend the *DDA* to ensure that the Draft Standards were consistent with the legislation: Attorney-General and Minister for Education, Science and Training, ‘Improved Opportunities for Students with Disabilities’ (Press Release, 15 June 2004). On 12 August 2004, the Disability Discrimination Amendment (Education Standards) Bill 2004 (Cth) was introduced into the House of Representatives: Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 2004, 32 510 (Phillip Ruddock, Attorney-General). In sch 1, item 4, the Bill proposes to insert s 31(1A) into the *DDA*: ‘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.’

¹²⁶ *Purvis* (2003) 202 ALR 133, 159. McHugh and Kirby JJ stated: ‘Even if the department had agreed to provide the accommodation to Mr Hoggan, the failure to provide it would not have been a per se breach of the Act. The failure to provide the required accommodation goes to the issue of materially different circumstances, not obligation’: at 159.

¹²⁷ Ibid 158.

¹²⁸ Ibid 166.

the aid of a computer that has a spell checker. When that comparison is made the employer will be shown to have breached the Act unless it can make out a case of unjustifiable hardship ...¹²⁹

Applied to the facts, McHugh and Kirby JJ found that 's 5(2) required the issue of less favourable treatment to be determined by reference to Mr Hoggan's circumstances *upon being given the required accommodation or services*.¹³⁰ Their Honours held that had Daniel been provided with the required accommodation or services, '[o]n the commissioner's findings it is probable that he would not have misbehaved.'¹³¹ Thus, s 5(2) became decisive: 'the correct comparator was a student who *did not misbehave*, not a student who misbehaved.'¹³²

As stated above, the majority in *Purvis* did not consider in any detail the arguments surrounding s 5(2). While the comments of McHugh and Kirby JJ were obiter dicta, the comments may well be persuasive in future discrimination cases.

D Discrimination on the Ground of Disability

If the comparison reveals that a disabled person was treated less favourably, the next question is whether that treatment was 'because of' or 'on the ground of' the disability.¹³³ This is often referred to as the causation question. Given the view of the majority of the High Court on the appropriate comparator for the purposes of direct discrimination, it did not need to consider the causation question. However, it addressed the issue briefly as it had been much debated in the lower courts and was the third issue raised in the appeal.

Commissioner Innes described the test for causation as a 'but for' test.¹³⁴ Relying on, inter alia, *X v McHugh (Auditor-General (Tas))*¹³⁵ and *Y v Australia Post*,¹³⁶ he determined that since Daniel's behaviour was so closely connected to his disability, his treatment by the school because of his behaviour amounted to discrimination on the ground of his disability.¹³⁷

¹²⁹ Ibid 165.

¹³⁰ Ibid 166 (emphasis in original).

¹³¹ Ibid. This appears stronger than the actual finding of Commissioner Innes, who held only that Daniel *may* have behaved had the school made reasonable accommodations: *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 174.

¹³² *Purvis* (2003) 202 ALR 133, 166 (emphasis in original).

¹³³ Section 22 of the *DDA* states that '[i]t is unlawful for an educational authority to discriminate against a person *on the ground of* the person's disability' (emphasis added). Section 5(1) uses the language of less favourable treatment '*because of* [the person's] disability' (emphasis added).

¹³⁴ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 168.

¹³⁵ [1994] EOC ¶92-623. In this decision it was held that under the *DDA*, '[i]t 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': at 77 312 (Commissioner Wilson).

¹³⁶ [1996] EOC ¶92-865.

¹³⁷ *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶93-117, 75 167.

On appeal, Emmett J rejected this conclusion. As discussed above,¹³⁸ his Honour drew a distinction

between a disability within the meaning of the Act, on the one hand, and behaviour that might result from or be caused by that disability on the other hand. Less favourable treatment on the ground of the behaviour is not *necessarily* less favourable treatment by reason of the disability.¹³⁹

In other words, discrimination on the ground of the behaviour did not constitute discrimination on the ground of disability. The Full Court agreed with this analysis.¹⁴⁰

Before the High Court, counsel for the State argued that the ‘true basis’ of Daniel’s treatment was not Daniel’s disability, but the protection of the health, safety and welfare of staff and other students.¹⁴¹ This argument drew upon the High Court decision of *Australian Iron & Steel Pty Ltd v Banovic*, in which the Court held that under the *Anti-Discrimination Act 1977* (NSW) a tribunal is required to find the ‘true basis’ or ‘true reason’ for any impugned act or decision.¹⁴² In that case, Dawson J stated that the test of determining the true basis is not a subjective test¹⁴³ and Deane and Gaudron JJ noted that in some cases genuinely assigned reasons may in fact mask the true basis for the decision.¹⁴⁴ The search for the true basis has subsequently been held to be a factual inquiry.¹⁴⁵

It is often difficult to establish the true basis for a decision, particularly where it is taken for many reasons. In such circumstances, s 10 of the *DDA* may assist:

If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act);

then, for the purposes of this Act, the act is taken to be done for that reason.

While it is necessary for courts to consider the true basis or real reason for the treatment, it has been said not to be necessary to consider the motive or intention

¹³⁸ See above Part III(A).

¹³⁹ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 77 (emphasis in original).

¹⁴⁰ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 248 (Spender, Gyles and Conti JJ).

¹⁴¹ Transcript of Proceedings, *Purvis v New South Wales (Department of Education & Training)* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2003).

¹⁴² (1989) 168 CLR 165, 176 (Deane and Gaudron JJ), 184 (Dawson J) (*Banovic*). See also *Waters* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 400–1 (McHugh J); *University of Ballarat v Bridges* [1995] 2 VR 418.

¹⁴³ *Banovic* (1989) 168 CLR 165, 184.

¹⁴⁴ *Ibid* 176. Deane and Gaudron JJ said: ‘there may be other situations in which habits of thought and preconceptions may so affect an individual’s perception of persons with particular characteristics that genuinely assigned reasons for an act or decision may, in fact, mask the true basis for that act or decision’: at 176.

¹⁴⁵ *Waterhouse v Bell* (1991) 25 NSWLR 99, 105–6 (Clarke JA).

of the alleged discriminator.¹⁴⁶ Thus if a reason proffered for conduct can be characterised as a motive or intention, it may be rendered irrelevant. This was discussed by Lockhart J in the Full Court of the Federal Court decision of *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd.*¹⁴⁷ That case involved the exclusion of women from the lead industry due to health concerns. Following Clarke JA in *Waterhouse v Bell*,¹⁴⁸ Lockhart J stated: ‘The presence of intention, motive or purpose relating to health does not necessarily detract from the conclusion that there is discrimination on the ground of sex.’¹⁴⁹

In *Purvis*, Gummow, Hayne and Heydon JJ did not discuss the *Banovic* approach directly. However, their Honours doubted ‘that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed “because of” disability.’¹⁵⁰ Indeed, their Honours viewed it as a ‘mistake’ to treat motive, purpose or effect ‘as substitutes for the statutory expression “because of”.’¹⁵¹ Their Honours concluded: ‘Rather, the central question will always be — *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it ‘because of’, ‘by reason of’, that person’s disability?’¹⁵²

McHugh and Kirby JJ appeared to adopt the *Banovic* approach.¹⁵³ Their Honours held that the mere assertion of a ground which is not the protected attribute (such as the health, safety and welfare of others, as argued by counsel for the State) will not prevent the act from being discriminatory if the true basis for the act in question is the protected attribute (the disability).¹⁵⁴ Like Gummow, Hayne and Heydon JJ, McHugh and Kirby JJ considered that the causation question is resolved by examining the reason for the alleged discriminator’s actions: ‘was the disability a reason for the treatment suffered?’¹⁵⁵ Their Honours said that in answering this question, ‘while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive.’¹⁵⁶ Their Honours concluded that while Commissioner Innes had wrongly described this inquiry as a ‘but for’ test, he had conducted it properly:

¹⁴⁶ *Waters* (1991) 173 CLR 349, 359–60 (Mason CJ and Gaudron J). Deane J agreed: at 382. See also *Travers v New South Wales* (2001) 163 FLR 99, 115 (Federal Magistrate Raphael). This has been codified in s 10 of the *EOA*.

¹⁴⁷ (1993) 46 FCR 301.

¹⁴⁸ (1991) 25 NSWLR 99, 108.

¹⁴⁹ (1993) 46 FCR 301, 327. Black CJ agreed: at 307. *Contra* the views of Lee J (at 333):

Before it could be said that discrimination had occurred under ss 5(1) of the SD [Sex Discrimination] Act, it would be necessary to show that the actions of the employer arose out of ill-disposition or lack of [im]partiality or even-handedness towards an employee or applicant for employment, such attitude being grounded upon the sex of that person or upon a characteristic appertaining or imputed thereto.

¹⁵⁰ (2003) 202 ALR 133, 187.

¹⁵¹ *Ibid.*

¹⁵² *Ibid* (emphasis in original).

¹⁵³ *Ibid* 172. Of the approach of Commissioner Innes, McHugh and Kirby JJ said (at 172): ‘Correctly, it focuses on the “real reason” for the alleged discriminator’s act.’

¹⁵⁴ *Ibid* 170.

¹⁵⁵ *Ibid* 141–2.

¹⁵⁶ *Ibid* 171.

He correctly held that the benevolent motive of the principal did not excuse the discriminatory treatment of Mr Hoggan. The commissioner also correctly found that, because Mr Hoggan was treated less favourably because of his behaviour, he was discriminated against on the ground of his disability.¹⁵⁷

On the other hand, while Gleeson CJ accepted the need to determine the true basis of the alleged discriminator's decision as set out in *Banovic*,¹⁵⁸ his Honour concluded that there was 'no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members.'¹⁵⁹ His Honour did not express an opinion about the proper role of the motive or intention of the alleged discriminator.

Callinan J did not express an opinion regarding the *Banovic* approach or the proper role of motive or intention.

A majority of the Court¹⁶⁰ emphasised the need to focus on the language of the *DDA*. Three judges¹⁶¹ discussed the need to search for the 'true basis' of the decision. Two judges¹⁶² expressly confirmed the irrelevance of the motive or intention of the alleged discriminator. Three judges¹⁶³ doubted the utility of distinctions between motive, purpose and effect. While two judges¹⁶⁴ held that the stated basis of the decision in *Purvis* — the safety of other pupils and staff — was not the true basis of the decision, one judge¹⁶⁵ accepted that it was. And one judge¹⁶⁶ expressed no opinion.

The judges therefore used different language to describe the test for determining whether discrimination was 'on the ground of' the disability. However, it is submitted that the effect of the Court's decision is that the tribunal must search for the reason for the discrimination and that motive and intention are irrelevant. The inquiry is about the real reason for the treatment; it answers the question of why the person was treated as they were. In this sense, the reason for the discrimination is the same thing as the basis, true basis or true reason for the discrimination.¹⁶⁷

¹⁵⁷ Ibid 172.

¹⁵⁸ Ibid 138. Gleeson CJ cited *Banovic*: at 138 fn 5.

¹⁵⁹ Ibid 139.

¹⁶⁰ McHugh, Gummow, Kirby, Hayne and Heydon JJ.

¹⁶¹ Gleeson CJ, McHugh and Kirby JJ.

¹⁶² McHugh and Kirby JJ.

¹⁶³ Gummow, Hayne and Heydon JJ.

¹⁶⁴ McHugh and Kirby JJ.

¹⁶⁵ Gleeson CJ.

¹⁶⁶ Callinan J.

¹⁶⁷ As Kirby J noted during argument: 'though I myself have been guilty of it, the addition of the word "true" is not really very helpful. It is simply trying to say this is really and truly the ground': Transcript of Proceedings, *Purvis v New South Wales (Department of Education & Training)* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 30 April 2003).

IV DEFENCES, EXCEPTIONS AND EXEMPTIONS

A *Unjustifiable Hardship*

Under the *DDA*, in most areas of activity there is an exception that makes discrimination lawful if it would impose an ‘unjustifiable hardship’ on the discriminator to provide the services or facilities required by the person with the disability.¹⁶⁸

In relation to education, s 22(4) of the *DDA* provides:

This section does not render it unlawful to refuse or fail to accept a person’s *application for admission* as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority.¹⁶⁹

In assessing unjustifiable hardship, it has been suggested that the tribunal may evaluate all the material before it ‘without ultimately placing any substantial emphasis on the onus of proof.’¹⁷⁰ However, as a matter of practice, there is an evidential burden on the educational authority to demonstrate that accepting a person’s application for admission would impose unjustifiable hardship.

1 *A Gap in the Defence*

On its terms, s 22(4) does not apply to events occurring after admission to a school.¹⁷¹ In this respect, the *DDA* is significantly different from the *Equal Opportunity Act 1995* (Vic) and other state anti-discrimination laws. In state anti-discrimination legislation, there are exceptions and exemptions from discrimination that apply to educational authorities without any limitation with regard to admission, as discussed below.¹⁷²

This gap in the *DDA* was identified as early as 1997 by the then Disability Discrimination Commissioner, the late Elizabeth Hastings. In a speech that year, she said:

You will notice that there is at present no provision for the lawful exclusion of a student once admitted to an educational institution. This lacuna in the legislation was highlighted in an application for an exemption from the Act, and I have written to the Attorney-General pointing it out. I think the Act requires

¹⁶⁸ This includes: employment (s 15); commission agents (s 16); contract workers (s 17); partnerships (s 18); education (s 22); access to premises (s 23); the provision of goods, services and facilities (s 24); accommodation (s 25); and clubs and incorporated associations (s 27).

¹⁶⁹ (Emphasis added.)

¹⁷⁰ *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306, 315 (Tamberlin J). The *DDA* does not expressly place the burden of proving exceptions and exemptions upon the respondent. *Contra Anti-Discrimination Act 1977* (NSW) s 109; *Anti-Discrimination Act 1991* (Qld) s 206; *Equal Opportunity Act 1984* (WA) s 123; *Discrimination Act 1991* (ACT) s 71(2); *Anti-Discrimination Act 1992* (NT) s 91(2); *Anti-Discrimination Act 1998* (Tas) s 101.

¹⁷¹ See also *A School v Human Rights and Equal Opportunity Commission [No 2]* (1998) 55 ALD 93, 104 (Mansfield J).

¹⁷² See below Part IV(B).

amendment here to accommodate situations where the status of a student changes through the course of education, and to preclude the possibility of a student being refused admission in case later adjustments may prove too onerous, for example in the case of a child with a progressive disease.¹⁷³

The second reading speech of the Disability Discrimination Bill 1992 (Cth) refers to unjustifiable hardship as a 'general exemption', suggesting that the gap in the legislation is a drafting error:

The Bill provides for two general exemptions: unjustifiable hardship and the inherent requirements of the job. ... Under the Bill, employers, providers of accommodation, education, goods and services, clubs and sporting groups would be able to argue that action necessary to accommodate the needs of people with disabilities would impose unjustifiable hardship.¹⁷⁴

In *Purvis*, McHugh and Kirby JJ expressed the view that the limited operation of unjustifiable hardship in the *DDA* is an anomaly that requires correction by Parliament.¹⁷⁵

The issue was addressed in the Draft Disability Standards for Education 2004, formulated by the Attorney-General under s 31 of the *DDA*. They propose to expand the scope of the defence of unjustifiable hardship from the process of enrolment to include the total period in which a student is enrolled at an educational institution.¹⁷⁶

So that the Draft Standards are not wider than the *DDA*, and therefore open to being struck down by a court, the *DDA* should be amended. While it may be technically possible to amend only s 31 to empower the drafting of standards wider than the *DDA*, this is not the best approach. The *DDA* needs to retain uniformity in its drafting style and the amendment should be made to s 22, enlarging the unjustifiable hardship defence. Otherwise, reading the *DDA* alone would be misleading as to its coverage: as regards events occurring after admission, the defence would be absent in s 22 but present in the Draft Standards.

In its *Review of the Disability Discrimination Act 1992*,¹⁷⁷ the Productivity Commission recommended that the *DDA* 'be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.'¹⁷⁸ The Commission acknowledged that the limited

¹⁷³ Elizabeth Hastings, 'The Right to Belong — Disability Discrimination Law in Education' (Speech delivered in Sydney, July 1997) <http://www.hreoc.gov.au/disability_rights/speeches/1997/edspeech.html>.

¹⁷⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2753 (Brian Howe, Minister for Health, Housing and Community Services). See also Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) 7, 11–12.

¹⁷⁵ (2003) 202 ALR 133, 156.

¹⁷⁶ Draft Standards s 10.2. In addition to extending the defence of unjustifiable hardship, the Draft Standards also propose a defence of 'protection of public health', which provides that it is not unlawful for an education provider to discriminate against a student with a disability if it is reasonably necessary to protect the health and welfare of the student or others: see Draft Standards s 10.4.

¹⁷⁷ Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004).

¹⁷⁸ *Ibid* 211.

coverage of the defence of unjustifiable hardship has created uncertainty and caused problems in the area of education.¹⁷⁹ In particular, it pointed out that the limited scope of the defence might in fact encourage discrimination at the enrolment stage to avoid the risk of having to provide different services or facilities after the student is enrolled.

In light of these considerations, on 12 August 2004, the Commonwealth Attorney-General introduced the Disability Discrimination Amendment (Education Standards) Bill 2004 (Cth) into the House of Representatives.¹⁸⁰ The Bill proposes to extend the defence of unjustifiable hardship to cover post-admission events by repealing s 22(4) of the *DDA* and substituting the following:

This section does not make it unlawful for an education provider to discriminate against a person or student ... on the ground of the disability of the person or student or a disability of any associate of the person or student if avoidance of that discrimination would impose an unjustifiable hardship on the education provider concerned.

2 *The Criteria for Determining Unjustifiable Hardship*

Generally, defences to discrimination are to be read in the context of the objects of the anti-discrimination legislation and exemptions are to be construed narrowly.¹⁸¹ Section 11 of the *DDA* identifies some of the matters to be considered in determining whether the defence of unjustifiable hardship applies. It provides that a tribunal must consider, inter alia:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; ...

The non-financial criteria for determining unjustifiable hardship in the *DDA*, namely criteria (a) and (b), have been emphasised in some education cases, particularly regarding the effect of the student with the disability on other students.¹⁸² In *Purvis*, McHugh and Kirby JJ made it clear that criterion (a) encompasses the broad range of detriments likely to be suffered by any person concerned if a disabled student with challenging or violent behaviours were admitted into a school.¹⁸³ According to their Honours, the unjustifiable hardship defence '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.'¹⁸⁴ If the

¹⁷⁹ Ibid 205–6.

¹⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 2004, 32 510 (Phillip Ruddock, Attorney-General).

¹⁸¹ *Waters* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 407 (McHugh J).

¹⁸² See, eg, *Finney v Hills Grammar School* [1999] EOC ¶93-020, 79 473–4 (Commissioner Innes), in which HREOC made it clear that when considering unjustifiable hardship in education cases, educational and social — as well as financial — benefits and detriments are relevant.

¹⁸³ (2003) 202 ALR 133, 156.

¹⁸⁴ Ibid.

defence applied to post-admission events, it could certainly be founded on a disabled student's behaviour.

The courts have taken a narrow view of criterion (c).¹⁸⁵ Financial hardship is relevant, but alone it will rarely displace the objective of ensuring that people with disabilities have the same rights of access and opportunities as those without disabilities. However, there is no established method of dealing with criterion (c). Generally, any alleged financial burden is assessed relative to the overall financial budget of the educational institution involved. This approach can cause problems in cases of government schools funded through individual school global budgets. Funds are normally committed to specific areas, such as staff salaries and specific educational programs, and are not available for the provision of direct benefits to students. Thus, while the overall financial budget of the school — and indeed the state education department¹⁸⁶ — may appear large, suggesting that accommodation of the disabled student will involve little financial hardship, there may in fact be scarce funds available for this purpose.

B Comparison with Exceptions in State Legislation

It is contended that the *DDA* does not make adequate provision for the competing legal obligations imposed on schools because it fails to provide adequate exceptions and defences after a student is enrolled. As argued above, this motivated the narrow interpretation of the appropriate comparator for assessing direct discrimination adopted by the majority of the High Court in *Purvis*.¹⁸⁷

In contrast, state and territory anti-discrimination legislation contains general and education-specific exceptions to discrimination that help to balance the competing legal obligations imposed on schools. For example, the *EOA* contains the following relevant exceptions, which apply in relation to impairment. Regarding education in particular, s 39 provides that discrimination is lawful where a person requires special services or facilities in order to participate in a particular educational program and it is not reasonable to provide those services or where, even after the provision of those services, the person would not be able to participate in the program. There is also a general exemption in s 80 providing that the discrimination is lawful if it is reasonably necessary to protect the health or safety of any person or property. This provision would arguably cover discrimination against a disabled student prone to engaging in conduct that endangers the health and safety of others. Finally, there is a general exemption in s 69 providing that the discrimination is lawful if it is done in compliance with, or is authorised by, an enactment, such as other legislation, regulations or

¹⁸⁵ See, eg, *Scott v Telstra Corporation Ltd* [1995] EOC ¶92-717, 78 401-2 (Commissioner Wilson).

¹⁸⁶ 'It would be quite difficult ... for the multimillion dollar state system to demonstrate that it would be an unjustifiable hardship to provide an education to students who have disabilities if they were obliged to respond to a complaint under the *DDA*': Elizabeth Hastings, 'Assumption, Expectation and Discrimination: Gender Issues for Girls with Disabilities' (Speech delivered in 1997) <http://www.hreoc.gov.au/disability_rights/speeches/1997/gender.html>.

¹⁸⁷ See above Part III(B).

orders.¹⁸⁸ Provisions such as s 69 have been relied upon, with varying results, where the respondent contends that its conduct was necessary to comply with occupational health and safety legislation.¹⁸⁹

Thus, if a disabled student brought a complaint under the *EOA* in respect of action taken in response to behaviour that threatened the safety and welfare of others, the school would probably be able to avail itself of one of a number of exceptions or exemptions.

This is not presently the case under the *DDA*: direct compliance with another enactment is not a defence. While s 47(2) of the *DDA* makes lawful anything done by a person in direct compliance with a prescribed law, including a prescribed state law, there is currently no occupational health and safety law prescribed for this purpose.¹⁹⁰ Thus, pursuant to s 109 of the *Commonwealth Constitution*, the *DDA* will prevail over state occupational health and safety legislation in the event of a direct inconsistency.

The *DDA* could be amended to provide a general exception relating to acts done in compliance with other laws. However, such provisions are problematic as they subordinate anti-discrimination legislation to other laws. Perhaps for this reason HREOC expressed support for the prescribed laws exception in one of its submissions to the Productivity Commission's review of the *DDA*. It considered

the prescribed laws mechanism an appropriate means for determining when the *DDA* should give way to other laws, noting that this mechanism provides for scrutiny through provision for parliamentary disallowance as well as through consultation between governments.¹⁹¹

Nevertheless, HREOC considered that the current exception in s 47(2) could be revised to cover not only actions in 'direct compliance' with other laws, but also actions 'consistent with but not directly required by' another law.¹⁹² Alternatively, HREOC suggested that

[r]emoval of the word 'direct' would make this provision a more widely applicable mechanism for recognition of other laws but would clearly also require a high degree of scrutiny of any laws to be prescribed to ensure that *DDA* rights were not inappropriately set aside.¹⁹³

¹⁸⁸ See *Waters* (1991) 173 CLR 349, 389–90 (Dawson and Toohey JJ) concerning the operation of an equivalent provision in the *Equal Opportunity Act 1984* (Vic).

¹⁸⁹ See, eg, *H J Heinz Co Australia Ltd v Turner* [1998] 4 VR 872, which examined the interaction of the *Equal Opportunity Act 1984* (Vic) and the *Occupational Health and Safety Act 1985* (Vic); *Higginson v Cargill Australia Ltd* [2001] EOC ¶93-174, which examined the interaction between the *Anti-Discrimination Act 1977* (NSW) and the *Occupational Health and Safety Act 1993* (NSW).

¹⁹⁰ See *Disability Discrimination Regulations 1996* (Cth) reg 2A, sch 1. Currently, laws of both New South Wales and South Australia are prescribed, including ss 75(3) and 75A of the *Education Act 1972* (SA). Section 75(3) states that where the Director-General of Education (a position established under the Act) is of the opinion that it is in the best interests of a child to be enrolled at a special school, he or she may direct that the child be so enrolled.

¹⁹¹ HREOC, above n 38, 14. HREOC also stated (at 14): 'However, the prescribed laws provision is clearly not the only mechanism which should be considered for determining the relationship between the *DDA* and other laws.'

¹⁹² *Ibid.*

¹⁹³ *Ibid* 47.

In their submissions to the Productivity Commission, both the Australian Education Union¹⁹⁴ and the Victorian Government¹⁹⁵ noted the need for clarity regarding the relationship between occupational health and safety law and anti-discrimination law.

It is therefore submitted that state laws relating to occupational health and safety should be prescribed. This is necessary because of the tensions that arise in balancing occupational health and safety considerations and anti-discrimination law in relation to students with disabilities prone to challenging and violent behaviour. In the absence of such an exemption, it is not surprising that the majority of the High Court in *Purvis* adopted a narrow construction of the *DDA*.

C Temporary Exemptions

Under both state and federal anti-discrimination legislation an educational authority may obtain a temporary exemption from the operation of the legislation if the purpose of the exemption is generally consistent with the aims of the legislation.¹⁹⁶ Temporary exemptions could clearly cover such things as a specific sporting event or educational program.

In *Purvis v New South Wales (Department of Education & Training)*,¹⁹⁷ the Full Court of the Federal Court was critical of the idea that temporary exemptions might be used by schools to deal with individual students with challenging behaviours.¹⁹⁸ The Court noted that an application for such an exemption would

¹⁹⁴ One of the Australian Education Union submissions stated that '[t]he intersection of legislation relating to anti-discrimination and occupational health and safety is an area that requires investigation': Submission to Australian Government Productivity Commission, 22 April 2003, 10 (Australian Education Union). It also stated (at 9):

The failure of the Act to outline the respective but differing obligations of authorities and institutions leaves institutions and education workers as 'the meat in the sandwich' between the specified rights of the student and their parents and the unspecified obligations of authorities to ensure that resourcing is adequate to meet those rights, as well as the specific obligations as an employer under Occupational Health and Safety legislation.

¹⁹⁵ The Victorian Government submission stated that 'the Victorian Government supports an amendment ... which clarifies the obligations on respondents to comply with other laws, such as occupational health and safety': Submission to the Australian Government Productivity Commission, 31 March 2004, 6–7 (Victorian Government).

¹⁹⁶ See *DDA* s 55; *EOA* s 83. A well-known exemption under the *DDA* concerns the Melbourne tram system: see Notice of HREOC exemption re: Public Transport Corporation (Victoria) and Others (15 March 1999) <http://www.hreoc.gov.au/disability_rights/exemptions/melbtram/notice.htm>. HREOC granted a conditional exemption from the provisions of ss 23 and 24 of the *DDA* in respect of the manner in which the Public Transport Corporation provided tram and light rail services in Melbourne. The Corporation was exempted from providing disabled access to trams and the safety zones at which they pick up and set down passengers. The exemption was conditional on the Corporation committing to implement the action plan *21st Century Accessibility*, lodged with HREOC pursuant to s 64 of the *DDA*. The effect of the exemption was that if the Corporation commenced in 2002 to replace its existing fleet of trams with accessible trams, it would not be acting unlawfully in continuing to provide services with trams already in its fleet that might be inaccessible to some people with disabilities. The exemption expired on 15 March 2004. In the interim, the Disability Standards for Accessible Public Transport 2002 were introduced pursuant to s 31 of the *DDA*. No application has yet been made for a new exemption.

¹⁹⁷ (2002) 117 FCR 237.

¹⁹⁸ *Ibid* 247–8 (Spender, Gyles and Conti JJ).

inevitably involve time delays, expenses, staff disruption and the risk of harm to others pending a decision.¹⁹⁹

In contrast, on appeal to the High Court, McHugh and Kirby JJ indicated that the terms of s 55 of the *DDA* were flexible enough to apply to situations such as those that arose following Daniel's enrolment.²⁰⁰ Their Honours went further: 'Indeed, the section seems wide enough to permit the grant of an exemption from the Act's provisions generally in all cases where the violent behaviour of students with a disability may pose a threat to other pupils or staff.'²⁰¹ The rest of the High Court did not consider this issue.

D *Notions of Reasonableness in Indirect Discrimination*

The definition of indirect discrimination in s 6 of the *DDA* contains an element of 'reasonableness'.²⁰² It could be suggested that a limited form of the defence of unjustifiable hardship is available by virtue of the reasonableness element in the definition of indirect discrimination. However, as an element of proving prima facie discrimination it has a very different legal role and function from a true defence. In particular, the complainant bears the onus of establishing the unreasonableness of the requirement or condition imposed by the educational authority.²⁰³ This would not be the case if it were a defence.²⁰⁴

The test of reasonableness in indirect discrimination is an objective test requiring consideration of all the circumstances of the case affecting both the complainant and the respondent.²⁰⁵ The test 'is less demanding than one of necessity, but more demanding than a test of convenience.'²⁰⁶

In *Purvis*, excluding Daniel because of his conduct — repeated swearing and violent behaviour — in accordance with the school's discipline policy might have fallen within the first part of the definition of indirect discrimination.²⁰⁷ It could have been argued that the school imposed a requirement to comply with its discipline policy and that a substantially higher proportion of persons without Daniel's disability would be able to comply. The question would then be whether such a condition was unreasonable.

¹⁹⁹ *Ibid.*

²⁰⁰ *Purvis* (2003) 202 ALR 133, 160.

²⁰¹ *Ibid.*

²⁰² *DDA* s 6(b).

²⁰³ There is no express provision reversing the onus of proof in s 6 of the *DDA*. *Contra Sex Discrimination Act 1984* (Cth) s 7C; *Age Discrimination Act 2004* (Cth) s 15(2); *Anti-Discrimination Act 1991* (Qld) s 205; *Anti-Discrimination Act 1992* (NT) s 91(1). While not expressly stated, it also appears that the onus of proof is reversed in s 8(2) of the *Discrimination Act 1991* (ACT). That section states that the prohibition of indirect discrimination 'does not apply to a condition or requirement that is reasonable in the circumstances.'

²⁰⁴ Regarding the onus of proof of the defence of unjustifiable hardship, see above n 170 and accompanying text.

²⁰⁵ *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ, Pincus and Gummow JJ), approved in *Waters* (1991) 173 CLR 349, 365 (Mason CJ and Gaudron J), 383–4 (Deane J), 395 (Dawson and Toohey JJ).

²⁰⁶ *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ, Pincus and Gummow JJ).

²⁰⁷ *DDA* s 6(a).

However, as discussed above,²⁰⁸ since Daniel had a tailor-made welfare and discipline policy with which he was required to comply, the first part of the definition of indirect discrimination may not have been satisfied. It is perhaps for this reason that *Purvis* was not run as an indirect discrimination case. Moreover, it would have been difficult to establish that the requirement that Daniel behave appropriately was an unreasonable requirement.

V CONCLUSION

The High Court decision in *Purvis* shows a Court grappling with the lack of clarity in the *DDA* regarding the competing tensions that arise in this area of discrimination law. In considering whether the educational authority contravened the *DDA*, the Court acknowledged the special duty of care owed by schools to students and the occupational health and safety responsibilities of schools to staff and students in their care. The Court also recognised the efforts made by the school to support and accommodate Daniel in a mainstream educational setting. The majority of the High Court ultimately decided to find in favour of the educational authority.

Although both the majority and minority of the High Court adopted a wide and beneficial construction of the term 'disability' in the *DDA*, the majority adopted a narrow approach to the appropriate comparator for the purposes of direct discrimination. This represents a departure from established discrimination jurisprudence, which emphasises that anti-discrimination legislation should be construed beneficially in light of its purpose and objectives. However, it provided the majority with the outcome sought.

It is contended that the majority approach was due to the absence of an appropriate and applicable defence or exception. The defence of unjustifiable hardship was not available as it does not extend to schools in respect of post-admission events. The defence of compliance with prescribed legislation would not assist as no occupational health and safety legislation has been prescribed. Thus, the majority implied limitations in other areas of the legislation.

In properly structured and well-drafted anti-discrimination legislation, balancing the rights of the complainant with the rights and interests of others would be achieved through appropriate exceptions and defences. Without adequate exceptions and defences, there will always be a risk that courts will interpret substantive provisions narrowly to obtain particular results and that those interpretations will become precedents for the interpretation of generic provisions.

Parliament should strengthen the defences in the *DDA* by extending the defence of unjustifiable hardship to cover events following admission to a school and prescribing occupational health and safety legislation. These changes would go some way to obviating the need for courts to construe the legislation in a narrow fashion and not in accordance with its objects. They would clarify and reinforce the right of educational administrators to take into account their

²⁰⁸ See above nn 34–5 and accompanying text.

2004]

Case Note

563

obligations to staff and other students whilst providing meaningful educational programs to students with disabilities.