

# Chapter 5

## The Disability Discrimination Act

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# The Disability Discrimination Act

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## 5.1 Introduction to the DDA

### 5.1.1 2009 Amendments to the DDA

Readers should note that the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) has made a number of significant changes to the *Disability Discrimination Act 1992* (Cth) ('DDA'). These changes commenced operation from 5 August 2009 and this chapter has been updated to reflect the law as amended.

Where an act occurred prior to 5 August 2009, the old provisions of the DDA will apply. For an archived version of *Federal Discrimination Law* that considers the law prior to 5 August 2009, see: <[www.humanrights.gov.au/legal/FDL/archive.html](http://www.humanrights.gov.au/legal/FDL/archive.html)>.

### 5.1.2 Scope of the DDA

The DDA covers discrimination on the ground of disability, including discrimination because of having a carer, assistant, assistance animal or disability aid.<sup>1</sup> The DDA also prohibits discrimination against a person because their associate has a disability.<sup>2</sup>

'Disability' is broadly defined and includes past, present and future disabilities, including because of a genetic predisposition to that disability, as well as imputed disabilities.<sup>3</sup> 'Disability' also expressly includes behaviour that is a manifestation of the disability.<sup>4</sup>

The definition of discrimination includes both direct<sup>5</sup> and indirect<sup>6</sup> disability discrimination. Following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), a failure to make reasonable adjustments is also an explicit feature of the definitions of direct and indirect discrimination.<sup>7</sup>

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<sup>1</sup> See s 8 which extends the concept of discrimination by treating having a carer, assistant, assistance animal or disability aid in the same way as having a disability. The definition of 'discriminate' includes a note that states that section 8 extends the concept of discrimination.

<sup>2</sup> See s 7, which extends the concept of discrimination to apply to a person who has an associate with a disability in the same way as it applies to a person with the disability. The definition of 'discriminate' includes a note that states that section 7 extends the concept of discrimination.

<sup>3</sup> Section 4.

<sup>4</sup> Section 4.

<sup>5</sup> Section 5.

<sup>6</sup> Section 6.

<sup>7</sup> See s 5(2) direct discrimination and 6(2) indirect discrimination.

The DDA makes it unlawful to discriminate on the ground of disability in many areas of public life. Those areas are set out in Part II Divisions 1 and 2 of the DDA and include:

- employment;<sup>8</sup>
- education;<sup>9</sup>
- access to premises;<sup>10</sup>
- the provision of goods, services and facilities;<sup>11</sup>
- the provision of accommodation;<sup>12</sup>
- the sale of land;<sup>13</sup> and
- the administration of Commonwealth laws and programs.<sup>14</sup>

It is unlawful for a person to request information in connection with an act covered by the DDA if

- people who do not have the disability would not be required to provide the information in the same circumstances; or
- the information relates to disability.<sup>15</sup>

However, it is not unlawful to request information if the purpose of the request was not discriminatory<sup>16</sup> or if it is evidence in relation to an assistance animal.<sup>17</sup>

Harassment of a person in relation to their disability or the disability of an associate is also covered by the DDA (Part II Division 3) and is unlawful in the areas of employment,<sup>18</sup> education<sup>19</sup> and the provision of goods and services.<sup>20</sup>

The DDA contains a number of permanent exemptions (see 5.5 below).<sup>21</sup> The DDA also empowers the Australian Human Rights Commission to grant temporary exemptions from the operation of certain provisions of the Act.<sup>22</sup>

The DDA does not make it a criminal offence per se to do an act that is unlawful by reason of a provision of Part II.<sup>23</sup> The DDA does, however, create the following specific offences:

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<sup>8</sup> Section 15.

<sup>9</sup> Section 22.

<sup>10</sup> Section 23.

<sup>11</sup> Section 24.

<sup>12</sup> Section 25.

<sup>13</sup> Section 26.

<sup>14</sup> Section 29.

<sup>15</sup> Section 30(1),(2).

<sup>16</sup> See s 30(3): the prohibition does not apply where a respondent produces evidence that the information was not requested for a discriminatory purpose and that evidence is not rebutted.

<sup>17</sup> Section 30(4).

<sup>18</sup> Section 35.

<sup>19</sup> Section 37. Note that harassment in education is in the context of harassment by a member of staff of a student or prospective student. See also 5.2.6(b) below in relation to the Education Standards.

<sup>20</sup> Section 39.

<sup>21</sup> See Part II, Division 5.

<sup>22</sup> Section 55. The Australian Human Rights Commission has developed criteria and procedures to guide the Commission in exercising its discretion under s 55 of the DDA. The Commission's guidelines and further information about the temporary exemptions are available at:

<[http://www.humanrights.gov.au/disability\\_rights/exemptions/exemptions.html](http://www.humanrights.gov.au/disability_rights/exemptions/exemptions.html)>.

<sup>23</sup> Section 41.

- committing an act of victimisation,<sup>24</sup> by subjecting or threatening to subject another person to any detriment on the ground that the other person:
  - has made or proposes to make a complaint under the DDA or *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act');
  - has brought, or proposes to bring, proceedings under those Acts;
  - has given, or proposes to give, any information or documents to a person exercising a power or function under those Acts;
  - has attended, or proposes to attend, a conference or has appeared or proposes to appear as a witness in proceedings held under those Acts;
  - has reasonably asserted, or proposes to assert, any rights under those Acts; or
  - has made an allegation that a person has done an unlawful act under Part II of the DDA;<sup>25</sup>
- inciting, assisting or promoting the doing of an act that is unlawful under a provision of Divisions 1, 2, 2A or 3 of Part II;<sup>26</sup>
- publishing or displaying an advertisement or notice that indicates an intention by that person to do an act that is unlawful under Divisions 1, 2 or 3 of Part II;<sup>27</sup> and
- failing to provide the source of actuarial or statistical data on which an act of discrimination was based in response to a request, by notice in writing, from the President or Australian Human Rights Commission.<sup>28</sup>

Note that conduct constituting such offences is also included in the definition of 'unlawful discrimination' in s 3 of the AHRC Act (see 1.3 above), allowing a person to make a complaint to the Australian Human Rights Commission in relation to it.

### 5.1.3 Limited application provisions and constitutionality

The DDA is intended to 'apply throughout Australia and in this regard relies on all available and appropriate heads of Commonwealth constitutional power'.<sup>29</sup>

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<sup>24</sup> Section 42(1).

<sup>25</sup> Section 42(2). Note that the offence also occurs if a person is subjected to a detriment on the ground that the 'victimiser' believes that the person has done, or proposes to do, any of the things listed. See further 5.6 below.

<sup>26</sup> Section 43.

<sup>27</sup> Section 44.

<sup>28</sup> Section 107.

<sup>29</sup> Second reading speech, Disability Discrimination Bill 1992, House of Representatives Hansard, 26 May 1992, p 2750.

Section 12 of the DDA sets out the circumstances in which the Act applies. Its effect is, amongst other things, to limit the operation of the DDA's provisions to areas over which the Commonwealth has legislative power under the *Constitution*. While these areas are, particularly by virtue of the external affairs power, potentially very broad, it is nevertheless important for applicants to consider the requirements of s 12 in bringing an application under the DDA.

## (a) The Disabilities Convention and Matters of International Concern

Section 12 of the DDA provides, in part:

12 Application of Act

(1) In this section:

... *limited application provisions* means the provisions of Divisions 1, 2, 2A and 3 of Part 2 other than sections 20, 29 and 30.

(8) The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:

- (a) give effect to [ILO 111]; or
- (b) give effect to the [ICCPR]; or
- (ba) give effect to the Disabilities Convention; or
- (c) give effect to the [ICESCR]; or
- (d) relate to matters external to Australia; or
- (e) relate to matters of international concern.

On 17 July 2008 Australia ratified the *Convention on the Rights of Persons with Disabilities*<sup>30</sup> ('Disabilities Convention') and, since 5 August 2009, the DDA makes explicit reference to the Disabilities Convention in s 12(8)(ba).

A number of cases prior to the ratification of the Disabilities Convention had held that preventing disability discrimination was, in any event, a 'matter of international concern'. In *Souliotopoulos v La Trobe University Liberal Club*,<sup>31</sup> for example, Merkel J found that Divisions 1, 2 and 3 of Part 2 of the DDA, but in particular s 27(2), had effect by reason of s 12(8)(e) because the prohibition of disability discrimination is a matter of 'international concern'.

His Honour held that when considering 'matters of international concern', the relevant date at which to consider what matters are of international concern is the date of the alleged contravention of the DDA, not the date of commencement of the DDA (March 1993). His Honour observed that

[t]he subject matter with which s 12(8) is concerned is, of its nature, changing. Thus, matters that are not of international concern or the subject of a treaty in March 1993 may well become matters of international concern or the subject of a treaty at a later date. Section 12(8) is ambulatory in the sense that it intends to give the Act the widest possible operation permitted by s 51(xxix).<sup>32</sup>

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<sup>30</sup> Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>31</sup> (2002) 120 FCR 584.

<sup>32</sup> (2002) 120 FCR 584, 592 [31].

The approach of Merkel J was followed by Raphael FM in *Vance v State Rail Authority*.<sup>33</sup>

## (b) Discrimination in the course of trade and commerce

The operation of the limited application provisions of the DDA was also raised in the Federal Court in *Court v Hamlyn-Harris*<sup>34</sup> ('*Court*'). In that case, the applicant, who had a vision impairment, alleged that his employer had unlawfully discriminated against him by dismissing him. The employer was a sole-trader carrying on business in two States.

In support of his application alleging discrimination in the course of employment (that is, a breach of s 15, which is a limited operation provision), the applicant relied upon s 12(12) of the DDA. That subsection provides:

- (12) The limited application provisions have effect in relation to discrimination in the course of, or in relation to, trade or commerce:
  - (a) between Australia and a place outside Australia; or
  - (b) among the States; or
  - (c) between a State and a Territory; or
  - (d) between 2 territories.

In his decision, Heerey J considered s 12(12) of the DDA and, in particular, whether the alleged termination of the applicant's employment was in the course of, or in relation to, trade or commerce. In finding that the alleged termination did not come within the meaning of 'in trade or commerce', his Honour relied upon the decision of the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*.<sup>35</sup> Heerey J concluded:

In the present case the dealings between Mr Court and his employer Mr Hamlyn-Harris were matters internal to the latter's business. They were not in the course of trade or commerce, or in relation thereto ...

That being so, I conclude this Court has no jurisdiction to hear the application. I do not accept the argument of counsel for Mr Court that the [*Human Rights and Equal Opportunity Commission Act 1986* (Cth)] is not confined to the limited application provisions of the [DDA] but applies to 'unlawful discrimination in general'. Being a Commonwealth Act, the [DDA] has obviously been carefully drafted to ensure that it is within the legislative power of the Commonwealth.<sup>36</sup>

It does not appear that Heerey J was referred to other sub-sections of s 12, such as s 12(8), or asked to find that disability discrimination in employment was a matter of 'international concern.'

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<sup>33</sup> [2004] FMCA 240. See also *O'Connor v Ross (No 1)* [2002] FMCA 210 in which it was held that equal access to accommodation for people with disabilities was a matter of 'international concern' and the earlier decisions of the then Human Rights and Equal Opportunity Commission: *Allen v United Grand Lodge of Queensland* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 April 1999) (extract at (1999) EOC 92-985); *Maguire v Sydney Organising Committee for the Olympic Games* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 18 November 1999) (extract at (2000) EOC 93-041).

<sup>34</sup> [2000] FCA 1870.

<sup>35</sup> (1990) 169 CLR 594.

<sup>36</sup> [2000] FCA 1870, [14]-[15].



### 5.1.4 Retrospectivity of the DDA

In *Parker v Swan Hill Police*,<sup>37</sup> the applicant complained of discrimination against her son as a result of events occurring in 1983. North J held that the DDA, which commenced operation in 1993, did not have retrospective operation. The application was therefore dismissed.<sup>38</sup>

### 5.1.5 Jurisdiction over decisions made overseas

The issue of whether the DDA applies to decisions made overseas to engage in discrimination in Australia arose for consideration in *Clarke v Oceania Judo Union*.<sup>39</sup> Mr Clarke alleged that the respondent discriminated against him, contrary to s 28 of the DDA dealing with sporting activities, on the basis of his disability (blindness) when he was prohibited from:

- competing in the judo Open World Cup tournament held in Queensland; and
- participating in a training camp which followed the tournament unless accompanied by a carer.

The respondent brought an application for summary dismissal, arguing that the appropriate jurisdiction to hear the matter was that of New Zealand, on the basis that this was where the respondent was incorporated and was where the relevant decision to exclude Mr Clarke from the contest was made.

Raphael FM dismissed the respondent's application. His Honour held where relevant act/s of discrimination occurred within Australia, it is irrelevant where the actual decision to discriminate was made.<sup>40</sup>

However, in *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736 Scarlett FM cited *Brannigan v Commonwealth of Australia*<sup>41</sup> as authority for the proposition that the DDA does not apply to acts of discrimination which occur outside of Australia.<sup>42</sup> This decision was upheld by Edmonds J of the Federal Court on appeal.<sup>43</sup>

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<sup>37</sup> [2000] FCA 1688.

<sup>38</sup> Presumably the same principle concerning retrospective application would apply in the case of the RDA, SDA and ADA.

<sup>39</sup> (2007) 209 FLR 187.

<sup>40</sup> The Court adopted the submissions of the Acting Disability Discrimination Commissioner, appearing as amicus curiae, on this point. The submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/anthony\\_clarke.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/anthony_clarke.html)>.

<sup>41</sup> (2003) 110 FCR 566

<sup>42</sup> *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736 [136].

<sup>43</sup> *Vijayakumar v Qantas Airways Ltd* [2009] FCA 1121 [33]-[41].

## 5.2 Disability Discrimination Defined

### 5.2.1 'Disability' defined

Section 4(1) of the DDA defines 'disability' as follows:

*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 (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

To avoid doubt, a *disability* that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

#### (a) Identifying the disability with precision

The decision of the Full Federal Court in *Qantas Airways Ltd v Gama*<sup>44</sup> highlights the need to identify the relevant disability with some precision, as well as identifying how the alleged discrimination is based on that particular disability.

Mr Gama suffered from a number of workplace injuries, as well as depression. At first instance,<sup>45</sup> Raphael FM accepted that a derogatory comment in the workplace that Mr Gama climbed the stairs 'like a monkey' constituted discrimination on the basis of race as well as disability. His Honour also held that certain comments about Mr Gama manipulating the workers compensation system constituted discrimination on the basis of disability.

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<sup>44</sup> [2008] FCAFC 69. The then Human Rights and Equal Opportunity Commission was granted leave to appear as intervener in the appeal and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/qantas\\_v\\_gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html)> and <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html)>.

<sup>45</sup> *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767.

On appeal, the Full Federal Court upheld the findings of race discrimination, but overturned the findings of disability discrimination. Whilst the Court noted that it was not in dispute that Mr Gama had suffered a number of workplace injuries over a long period of time, the Court accepted the submission by Qantas that Raphael FM's reasons

did not identify the relevant disability nor the particular way in which the remarks constituted less favourable treatment because of the disability. Rather the remarks tend to reflect a belief that Mr Gama had made a claim for workers compensation to which he was not entitled.

In our opinion the learned magistrate's findings of discrimination of the grounds of disability cannot be sustained.<sup>46</sup>

Nevertheless, as discussed at 7.2.1(b), despite overturning the finding of a breach of the DDA, the Full Court did not disturb the award of damages in Mr Gama's favour.<sup>47</sup>

## **(b) Distinction between a disability and its manifestations**

In 2009 the definition of disability in s 4 of the DDA was amended to clarify that a disability includes behaviour that is a symptom or manifestation of the disability.<sup>48</sup>

This amendment codifies the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*<sup>49</sup> ('*Purvis*') on this point. In *Purvis*, all members of the Court (apart from Callinan J who did not express a view)<sup>50</sup> found that the definition of disability in s 4 of the DDA as it then was, included the functional limitations that may result from an underlying condition. The case concerned a child who suffered from behavioural problems and other disabilities resulting from a severe brain injury sustained when he was six or seven months old. The Court found that his 'acting out' behaviour, including verbal abuse and incidents involving kicking and punching was a manifestation of his disability and therefore an aspect of his disability.

The majority of the Court went on, however, to hold that the respondent did not unlawfully discriminate against the student 'because of' his disability when it suspended and then expelled him from the school by reason of his behaviour. This is discussed further in 5.2.2(a) below.

However, whether or not particular negative behaviour will be attributed to an underlying disability is a question of fact which may vary from case to case. In *Rana v Flinders University of South Australia*,<sup>51</sup> Lindsay FM noted that the decision in *Purvis* 'establishes beyond doubt...that no distinction is to be drawn between the disability and its manifestations for the purposes of

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<sup>46</sup> [2008] FCAFC 69, [91]-[92] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

<sup>47</sup> [2008] FCAFC 69, [93]-[99] (French and Jacobson JJ), [121] (Branson J).

<sup>48</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item

6.

<sup>49</sup> (2003) 217 CLR 92.

<sup>50</sup> (2003) 217 CLR 92, 175 [272].

<sup>51</sup> [2005] FMCA 1473.

establishing whether discrimination has occurred'.<sup>52</sup> However, in deciding the matter before him, Lindsay FM found that there was insufficient evidence that the negative behaviour that had caused the respondent to exclude the applicant from certain university courses was, in fact, a manifestation of his mental illness, rather than having some other cause.<sup>53</sup>

## 5.2.2 Direct discrimination under the DDA

Section 5 of the DDA defines 'direct' discrimination. It provides:

### 5 Direct disability discrimination

- (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
- (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
  - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
- (3) For the purposes of this section, circumstances are not *materially different* because of the fact that, because of the disability, the aggrieved person requires adjustments.

Section 5(2) was inserted into the definition of direct discrimination by the 2009 changes to the DDA.<sup>54</sup> That provision is intended to introduce an explicit duty to make reasonable adjustments<sup>55</sup> and is considered further below: see 5.2.4.

The changes to the remainder of s 5 appear unlikely to impact upon its operation. The significant issues that have arisen under ss 5(1) and (3) (previously (2)) are:

- (a) issues of causation, intention and knowledge;
- (b) the 'comparator' under s 5 of the DDA; and
- (c) the concept of 'adjustments' under s 5(3) (previously 'accommodation' under s 5(2)) of the DDA.

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<sup>52</sup> [2005] FMCA 1473, [52].

<sup>53</sup> [2005] FMCA 1473, [61]. See also [46].

<sup>54</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17.

<sup>55</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 8 [39].

**(a) Issues of causation, intention and knowledge**

**(i) Causation and intention**

Those sections which make disability discrimination unlawful under the DDA provide that it is unlawful to discriminate against a person 'on the ground of the person's disability'.<sup>56</sup> Section 5(1) of the DDA provides that discrimination occurs 'on the ground of' a disability where there is less favourable treatment 'because of' the aggrieved person's disability. It is well established that the expression 'because of' requires a causal connection between the disability and any less favourable treatment accorded to the aggrieved person. It does not, however, require an intention or motive to discriminate.

In *Waters v Public Transport Corporation*<sup>57</sup> ('*Waters*'), the High Court considered the provisions of the *Equal Opportunity Act 1984* (Vic). Section 17(1) of that Act defined discrimination as including, relevantly, less favourable treatment 'on the ground of the status' of a person, 'status' being defined elsewhere in that Act to include disability. Mason CJ and Gaudron J held:

It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations.<sup>58</sup>

In *Purvis v New South Wales (Department of Education and Training)*<sup>59</sup> ('*Purvis*'), McHugh and Kirby JJ reviewed both English and Australian authority and concluded that:

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. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.<sup>60</sup>

Motive may nevertheless be relevant to determining whether or not an act is done 'because of' disability.<sup>61</sup> In *Purvis*, Gummow, Hayne and Heydon JJ stated:

we doubt 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. Rather, the central questions will always be –

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<sup>56</sup> See ss 15-29. Note that it is also unlawful to discriminate on the ground of a disability of any of a person's associates: see s 7.

<sup>57</sup> (1991) 173 CLR 349.

<sup>58</sup> (1991) 173 CLR 349, 359, McHugh J agreeing, 382. Cited with approval for the purposes of the DDA in *Travers v New South Wales* (2001) 163 FLR 99, 114-115 [65].

<sup>59</sup> (2003) 217 CLR 92.

<sup>60</sup> (2003) 217 CLR 92, 142-143 [160].

<sup>61</sup> See, for example, *Forbes v Australian Federal Police (Commonwealth)* [2004] FCAFC 95, [69]; *Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664, [112].

*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. Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of'.<sup>62</sup>

It appears to be accepted that a 'real reason' or 'true basis' test is appropriate in determining whether or not a decision was made 'because of' a person's disability.

In *Purvis*, McHugh and Kirby JJ stated that the appropriate test is not a 'but for' test, which focuses on the consequences for the complainant, but one that focuses on the mental state of the alleged discriminator and considers the 'real reason' for the alleged discriminator's act.<sup>63</sup> Gleeson CJ in *Purvis* similarly inquired into the 'true basis' of the impugned decision. In that case, the antisocial and violent behaviour which formed part of the student's disability had caused his expulsion from the school. Gleeson CJ held:

The fact that the pupil suffered from a disorder resulting in disturbed behaviour was, from the point of view of the school principal, neither the reason, nor a reason, why he was suspended and expelled ... If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, ss 5, 10 and 22 [of the DDA] are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil. In the light of the school authority's responsibilities to the other pupils, the basis of the decision cannot fairly be stated by observing that, but for the pupil's disability, he would not have engaged in the conduct that resulted in his suspension and expulsion. The expressed and genuine basis of the principal's decision was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people.<sup>64</sup>

In *Forbes v Australian Federal Police (Commonwealth)*<sup>65</sup> ('*Forbes*'), the Full Federal Court had to consider whether the Australian Federal Police ('AFP') discriminated against the applicant when it withheld certain information about her depressive illness from a review panel convened to consider her re-employment.

At first instance,<sup>66</sup> Driver FM had held that a relevant issue for the review panel was the apparent breakdown in the relationship between the applicant and the AFP. His Honour held that the information relating to the applicant's illness would have helped to explain that breakdown. He considered that the AFP was therefore under an obligation to put before the review panel information concerning the applicant's illness, as its failure to do so left the

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<sup>62</sup> (2003) 217 CLR 92, 163 [236]. See also 101-102 [13]-[14] (Gleeson CJ).

<sup>63</sup> (2003) 217 CLR 92, 143-144 [166].

<sup>64</sup> (2003) 217 CLR 92, 101-102 [13], footnotes omitted. The majority of the Court (Gummow, Hayne and Heydon JJ with whom Callinan J agreed) decided the issue on the basis of the 'comparator' issue: see 5.2.2(b) below. See also *Tyler v Kesser Torah College* [2006] FMCA 1.

<sup>65</sup> [2004] FCAFC 95.

<sup>66</sup> *Forbes v Commonwealth* [2003] FMCA 140.

review panel 'under the impression that [the appellant] was simply a disgruntled employee'.<sup>67</sup>

On appeal, however, the Full Court found that his Honour had erred in finding discrimination, as he had not made a finding that the decision of the AFP was 'because of' the appellant's disability. The Full Court stated:

It is, however, one thing for the AFP to have misunderstood its responsibilities to the Panel or to the appellant (if that is what the Magistrate intended to convey). It is quite another to conclude that the AFP's actions were 'because of' the appellant's depressive illness. The Magistrate made no such finding.

In [*Purvis*], there was disagreement as to whether the motives of the alleged discriminator should be taken into account in determining whether that person has discriminated against another because of the latter's disability. Gummow, Hayne and Heydon JJ thought that motive was at least relevant. Gleeson CJ thought that motive was relevant and, perhaps, could be determinative. McHugh and Kirby JJ thought motive was not relevant. All agreed, however, that it is necessary to ask why the alleged discriminator took the action against the alleged victim.

In the present case, therefore, it was necessary for the Magistrate to ask why the AFP had withheld information about the appellant's medical condition from the Panel and to determine whether (having regard to s 10) the reason was the appellant's depressive illness. His Honour did not undertake that task and therefore failed to address a question which the legislation required him to answer if a finding of unlawful discrimination was to be made. His decision was therefore affected by an error of law.<sup>68</sup>

The Court further found that the AFP's decision to withhold the information about the appellant's medical condition from the review panel was not because of the appellant's disability, but rather because the AFP believed that she did not have a disability.<sup>69</sup>

The reasoning in *Forbes* was subsequently applied in *Hollingdale v North Coast Area Health Service*,<sup>70</sup> where the applicant was dismissed from her employment because of her refusal to attend work. Driver FM found that the respondent had dismissed the applicant not because of her disability (keratoconus), but because it believed that she was a 'malingerer':

Ms Hollingdale refused to attend work ... because she claimed she was unfit for work because of her keratoconus. She had a medical certificate certifying that she was unfit for work. The Area Health Service refused to accept it. I find that the Area Health Service believed that Ms Hollingdale was malingering. No other conclusion is reasonably open on the evidence. It was because the Area Health Service believed that Ms Hollingdale was malingering, and therefore had no medical reason for non attendance at work, that she was dismissed. It necessarily follows that her keratoconus was not the reason for her dismissal. Rather, the reason was the belief of the Area Health Service that Ms Hollingdale had no medical condition which prevented her from working. An employer does not breach the DDA by dismissing a

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<sup>67</sup> [2003] FMCA 140, [28].

<sup>68</sup> [2004] FCAFC 95, [68]-[70] (emphasis in original). See also [76].

<sup>69</sup> [2004] FCAFC 95, [71]-[73].

<sup>70</sup> [2006] FMCA 5.

malingerer or someone who is believed to be one [footnote: *Forbes v Commonwealth* [2004] FCAFC 95].<sup>71</sup>

In cases where the alleged treatment is based on certain facts or circumstances that are inextricably linked to the complainant's disability, a court may be more inclined to accept that such treatment is 'because of' that disability. For example, in *Wiggins v Department of Defence – Navy*<sup>72</sup> ('*Wiggins*') the Navy argued that its refusal to transfer the applicant to other duties was not because of her disability, but because of her absences from work. McInnis FM rejected this submission, saying that

the absence was clearly due to the depression and the submissions by the Respondent seeking to distinguish the absence from the disability should not be permitted. The leave taken by the Applicant I am satisfied was due almost entirely to her depressive illness for which she required treatment. It is inextricably related to her disability and in turn it was the disability which effectively caused the concern ... and led to the transfer.<sup>73</sup>

Similarly, in *Ware v OAMPS Insurance Brokers Ltd*,<sup>74</sup> Driver FM stated:

The question is why was Mr Ware demoted? Was it because of or by reason of his disabilities?

...

Mr Ware's absences from the workplace provided Mr Cocker [of the respondent] with what he regarded as sufficient cause for demotion but the real reason for the demotion was that Mr Cocker had exhausted his capacity to accommodate Mr Ware's condition. To my mind, this establishes a sufficient causal link between the less favourable treatment and Mr Ware's disabilities.<sup>75</sup>

In relation to the applicant's dismissal from employment, his Honour concluded:

To the extent that the termination decision was based upon pre-existing concerns about Mr Ware's performance and behaviour, it was discriminatory. Mr Ware's performance and behaviour were influenced by his disabilities. ... Mr Crocker had accepted (grudgingly) that no summary dismissal action would be taken. Mr Ware would be given the chance to prove himself by reference to specified criteria. He was not given a reasonable opportunity to prove himself and he was not assessed against those criteria. The hypothetical comparator would have been judged against those criteria. Mr Ware was not judged against those criteria essentially because Mr Crocker changed his mind. In dismissing Mr Ware, Mr Crocker recanted the consideration that he gave [the applicant] by reference to his disabilities. The dismissal was therefore because of those disabilities.<sup>76</sup>

Whilst the above decisions all concentrated on discerning the causal basis of the alleged discriminatory treatment, it is important to also recall that the DDA provides that a person's disability does not need to be the *sole*, or even the *dominant* reason for a particular decision. Section 10 provides:

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<sup>71</sup> [2006] FMCA 5, [159].

<sup>72</sup> (2006) 200 FLR 438.

<sup>73</sup> (2006) 200 FLR 438, 476 [170].

<sup>74</sup> [2005] FMCA 664.

<sup>75</sup> [2005] FMCA 664, [112]-[113].

<sup>76</sup> [2005] FMCA 664, [120].



## 10 Act done because of disability and for other reason

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.

Accordingly, in circumstances where the alleged discriminator's conduct may be attributable to multiple reasons, only one reason needs to be based on the person's disability to constitute discrimination.

### (ii) *Knowledge*

Related to the question of intention and causation is the issue of the extent to which an alleged discriminator can be found to have discriminated against another person on the ground of his or her disability where the discriminator has no direct knowledge of that disability. It appears that, at least in some circumstances, a lack of such knowledge will preclude a finding of discrimination.

The issue did not directly arise in *Purvis*, as the school knew of the disability of the student. However, at first instance, Emmett J made the following obiter comments:

where an educational authority is unaware of the disability, but treats a person differently, namely, less favourably, because of that behaviour, it could not be said that the educational authority has treated the person less favourably because of the disability...<sup>77</sup>

A similar approach was taken by Wilcox J in *Tate v Rafin*.<sup>78</sup> In that case, the applicant had his membership of the respondent club revoked following a dispute. The applicant claimed, in part, that the revocation of his membership was on the ground of his psychological disability which manifested itself in aggressive behaviour, although the respondent club was unaware of his disability. Wilcox J concluded that the club had not treated Mr Tate less favourably because of his psychological disability:

The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability.<sup>79</sup>

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<sup>77</sup> *New South Wales (Department of Education & Training) v Human Rights & Equal Opportunity Commission* (2001) 186 ALR 69, 77 [35].

<sup>78</sup> [2000] FCA 1582.

<sup>79</sup> [2000] FCA 1582, [67]. As can be seen from this statement, his Honour's reasoning was also related to the issue of the relevant 'comparator' for the purposes of determining 'less favourable treatment', see further 5.2.2(b). See also earlier decisions of the then Human Rights and Equal Opportunity Commission in *H v S* [1997] HREOCA 41; *White v Crown Ltd* [1997] HREOCA 43; *R v Nunawading Tennis Club* [1997] HREOCA 60. Cf *X v McHugh, (Auditor-General for the State of Tasmania)* (1994) 56 IR 248.

His Honour's reasoning is consistent with the decision of the Full Court in *Forbes* (discussed above), where the Court accepted that the respondent had withheld certain information about the applicant's medical condition on the ground that it considered that she did not have a disability and that this did not amount to discrimination 'because of' disability.<sup>80</sup>

However, it is likely that the reasonableness of a respondent's purported disbelief of an applicant's disability will be an important factor in applying the reasoning in *Forbes*. In *Forbes* there were a number of significant factors to support the respondent's disbelief that the applicant had a disability. For example:

- Ms Forbes had lodged a claim for compensation with Comcare alleging that she had suffered a depressive illness as a result of an altercation in the workplace. Comcare rejected that claim on the basis that the medical evidence did not show that she had suffered a compensable injury;
- Ms Forbes sought review of Comcare's refusal. Following reconsideration of Ms Forbes' claim, Comcare affirmed its refusal of the claim;
- Ms Forbes had also lodged a formal grievance in relation to the workplace incident that had allegedly led to her suffering the depressive illness. An internal investigation into her complaint concluded that her allegations were unsubstantiated; and
- a further internal investigation into Ms Forbes' complaints (carried out at Ms Forbes' behest) also concluded that her allegations were unsubstantiated.

In the absence of such factors to support a respondent's disbelief of an aggrieved person's disability, it may be difficult for a respondent to convince the court that the purported disbelief of the disability was genuinely the true basis of the less favourable treatment.

In *Zoltaszek v Downer EDI Engineering Pty Ltd (No. 2)*<sup>81</sup> Barnes FM found that the respondent had been unaware that the applicant suffered from any disability until December 2006. Accordingly his Honour held that it had not been established that the respondent had discriminated against the applicant "on the ground of" his disability as required under s 17 of the DDA prior to that point in time<sup>82</sup>.

Whilst the above cases illustrate that lack of knowledge of the aggrieved person's disability may preclude a finding of discrimination, it is important to also note that imputed or constructive knowledge of the person's disability may suffice. For example, in *Wiggins* the Navy argued that the officer who demoted the applicant did not know the nature and extent of the applicant's disability, only that the applicant had a medical condition confining her to on-

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<sup>80</sup> [2004] FCAFC 95, [71]-[73], [76].

<sup>81</sup> [2010] FMCA 938.

<sup>82</sup> *Ibid* [89]-[95]. This finding was upheld on appeal: *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744.

shore duties. On this basis, the Navy submitted that it had no relevant knowledge of the applicant's disability.

McInnis FM rejected the Navy's submission. His Honour 'deemed' the officer to have known the nature and extent of the applicant's disability as he **could have** accessed her medical records if he wanted to. This was sufficient to 'establish knowledge in the mind of' the Navy.<sup>83</sup> His Honour stated:

I reject the submission of the Respondent that the Navy does not replace Mr Jager as the actual decision-maker in the context or that the maintenance of information in a file does not equate to operational or practical use in the hands of the discriminator. In my view that is an artificial distinction which should not be permitted in discrimination under human rights legislation. To do so would effectively provide immunity to employers who could simply regard all confidential information not disclosed to supervisors as then providing a basis upon which it could be denied that employees as discriminators would not be liable and hence liability would be avoided by the employer.<sup>84</sup>

## **(b) The 'comparator' under s 5 of the DDA**

Section 5(1) of the DDA requires a comparison to be made between the way in which the discriminator treats (or proposes to treat) a person with a disability and the way in which a person 'without the disability' would be treated in circumstances that are not materially different. That other person, whether actual or hypothetical, is often referred to as the 'comparator'.

Prior to the 2009 changes to the DDA,<sup>85</sup> section 5(1) required a comparison between the aggrieved person and a person without the disability in 'circumstances that **are the same or** not materially different' (emphasis added). The relevant circumstances are now simply 'not materially different' (with 'the same' being removed). It seems unlikely that this change will materially alter the operation of the section.

The issue of how an appropriate comparator is chosen in a particular case has been complicated and vexed since the commencement of the DDA. While the law appears to have been settled by the decision of the High Court in *Purvis*, the issue is likely to remain a contentious one.

### **(i) Early approaches**

Sir Ronald Wilson suggested in *Dopking v Department of Defence*<sup>86</sup> that:

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

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<sup>83</sup> [2006] 200 FLR 438, 476 [168].

<sup>84</sup> [2006] 200 FLR 438, 476 [168].

<sup>85</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17.

<sup>86</sup> (1992) EOC 92-421. Note that this case is also cited as *Sullivan v Department of Defence*.

materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.<sup>87</sup>

This approach was approved in *IW v City of Perth*<sup>88</sup> ('*IW*') by Toohey J (with Gummow J concurring) and Kirby J, the only members of the Court to consider this issue. In that case the aggrieved person complained of discrimination because of infection with HIV/AIDS. The respondent argued that the comparator should be imbued with the characteristics of a person infected with HIV/AIDS. As a consequence, there would not be discrimination if a person with HIV/AIDS was treated less favourably on the basis of a characteristic pertaining to HIV/AIDS sufferers, such as 'infectiousness', so long as the discriminator treated less favourably all persons who were infectious. Their Honours rejected this submission. Cases dealt with under the DDA prior to *Purvis* also applied this approach.<sup>89</sup>

A similar approach was adopted by Commissioner Innes in *Purvis v The State of NSW (Department of Education)*.<sup>90</sup> The student in that case, whose behavioural problems were an aspect of his disability, was suspended, and eventually expelled, from his school. Commissioner Innes found that the comparator for the purpose of s 5 of the DDA was another student at the school in the same year but without the disability, including the behaviour which formed a part of that disability.

## (ii) *The Purvis decision*

The approach of Commissioner Innes was rejected on review by both Emmett J<sup>91</sup> and the Full Federal Court.<sup>92</sup> The Full Court found that the proper comparison for the purpose of s 5 of the DDA was

between the treatment of the complainant with the particular brain damage in question and a person without that brain damage but in like circumstances. This means that like conduct is to be assumed in both cases.

....

The principal object of the Act is to eliminate discrimination on the ground of disability (of the defined kind) in the nominated areas (s 3). The object is to remove prejudice or bias against persons with a disability. The relevant prohibition here is against discrimination on the ground of the person's disability (s 22). Section 5 of the Act is related to the assessment of that issue. It is difficult to illustrate the comparison called for by s 5 by way of a wholly hypothetical example, as it involves a comparison of treatment by the particular alleged discriminator, and requires findings of fact as to the particular disability, as to how the alleged discriminator treats or proposes to

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<sup>87</sup> (1992) EOC 92-421, 79,005.

<sup>88</sup> (1997) 191 CLR 1, 33 (Toohey J), 67 (Kirby J). See also *Human Rights & Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 327 (Lockhart J); *Commonwealth v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 191, 209 (Wilcox J). Cf *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13.

<sup>89</sup> See, for example, *Commonwealth v Humphries* (1998) 86 FCR 324, 333; *Garity v Commonwealth Bank of Australia* (1999) EOC 92-966.

<sup>90</sup> (2000) EOC 93-117.

<sup>91</sup> *New South Wales (Department of Education & Training) v Human Rights & Equal Opportunity Commission* (2001) 186 ALR 69.

<sup>92</sup> *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237.

treat the aggrieved person, and as to how that alleged discriminator treats or would treat a person without the disability. The task is to ascertain whether the treatment or proposed treatment is based on the ground of the particular disability or on another (and non-discriminatory) ground. There must always be that contrast. To be of any value, the hypothetical illustration must make assumptions as to all factual integers.<sup>93</sup>

The Full Court also noted that the decisions of Toohey and Kirby JJ in *IW* were given in the context of the *Equal Opportunity Act 1984 (WA)* which has a different structure to the DDA.

The majority of the High Court in *Purvis* took the same approach as the Full Federal Court. While accepting that the definition of disability includes its behavioural manifestations (see 5.2.1 above), the majority nevertheless held that it was necessary to compare the treatment of the pupil with the disability with a student who exhibited violent behaviour but did not have the disability. Gleeson CJ stated:

It may be accepted, as following from paras (f) and (g) of the definition of disability, that the term 'disability' includes functional disorders, such as an incapacity, or a diminished capacity, to control behaviour. And it may also be accepted, as the appellant insists, that the disturbed behaviour of the pupil that resulted from his disorder was an aspect of his disability. However, it is necessary to be more concrete in relating part (g) of the definition of disability to s 5. The circumstance that gave rise to the first respondent's treatment, by way of suspension and expulsion, of the pupil, was his propensity to engage in serious acts of violence towards other pupils and members of the staff. In his case, that propensity resulted from a disorder; but such a propensity could also exist in pupils without any disorder. What, for him, was disturbed behaviour, might be, for another pupil, bad behaviour. Another pupil 'without the disability' would be another pupil without disturbed behaviour resulting from a disorder; not another pupil who did not misbehave. The circumstances to which s 5 directs attention as the same circumstances would involve violent conduct on the part of another pupil who is not manifesting disturbed behaviour resulting from a disorder. It is one thing to say, in the case of the pupil, that his violence, being disturbed behaviour resulting from a disorder, is an aspect of his disability. It is another thing to say that the required comparison is with a non-violent pupil. The required comparison is with a pupil without the disability; not a pupil without the violence. The circumstances are relevantly the same, in terms of treatment, when that pupil engages in violent behaviour.<sup>94</sup>

Similarly, in their joint judgment, Gummow, Hayne and Heydon JJ stated:

In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, s 5(1) requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in *those* circumstances if the person concerned was not disabled...

The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the

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<sup>93</sup> (2002) 117 FCR 237, 248 [29], 249 [32] (emphasis in original).

<sup>94</sup> (2003) 217 CLR 92, 100-101 [11].

person referred to in the provision as the 'discriminator'. It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability ... Once the circumstances of the treatment or intended treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in circumstances that were the same or were not materially different.

In the present case, the circumstances in which [the student] was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils.<sup>95</sup>

By contrast, McHugh and Kirby JJ (in dissent) applied the earlier approach noted above, stating:

Discrimination jurisprudence establishes 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.<sup>96</sup> (emphasis in original)

Their Honours disagreed with the majority that the application of the comparator test in the circumstances of the case called for a comparison with a person without the student's disability but who had engaged in the same violent behaviour, on the basis that:

[the student's] circumstances [are] materially different from those of a person who is able to control his or her behaviour, but who is unwilling to do so for whatever reason. In [the student's] circumstances, the behaviour is a manifestation of his disability – for the 'normal' person it is an act of freewill.<sup>97</sup>

### **(iii) Applying Purvis**

In applying *Purvis*, courts have had close regard to the particular facts of the case in considering how the comparator should be constructed, and how that comparator would have been treated by the respondent in the same or similar circumstances to the applicant. The following cases illustrate the challenges raised by *Purvis* in applying the comparator element of direct discrimination.

In *Power v Aboriginal Hostels Ltd*,<sup>98</sup> Selway J followed the approach set out by Gummow, Hayne and Heydon JJ in *Purvis*. His Honour considered the correct approach to a claim of discrimination in which an applicant was dismissed from work following absences for illness, concluding:

If the employer would treat any employee the same who was absent from work for some weeks (whether or not the employee had a disability or not) then this would not constitute discrimination under the DDA. On the other hand, if the employer terminates the employment of an employee who has a

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<sup>95</sup> (2003) 217 CLR 92, 160-161 [223]-[225]. Callinan J agreed with their Honours' reasoning on this issue (see 175 [273]).

<sup>96</sup> (2003) 217 CLR 92, 131 [119].

<sup>97</sup> (2003) 217 CLR 92, 134 [128].

<sup>98</sup> (2003) 133 FCR 254.

disability (including an imputed disability) in circumstances where the employer would not have done so to an employee who was not suffering a disability then this constitutes discrimination for the purpose of the DDA.<sup>99</sup>

The same approach had been taken by the FMC in the earlier case of *Randell v Consolidated Bearing Company (SA) Pty Ltd.*<sup>100</sup> The applicant, who had a mild dyslexic learning difficulty, was employed by the respondent on a traineeship to work in the warehouse sorting and arranging stock for delivery. The applicant was dismissed after seven weeks on the basis of his poor work performance.

Raphael FM found that the appropriate comparators were other trainees employed by the respondent who had difficulties with their performance.<sup>101</sup> The evidence established that in the past the respondent had sought assistance in relation to such difficult trainees from Employment National but, in the case of the applicant, it had failed to do so. Raphael FM concluded that the applicant had been discriminated against on the basis of his disability.

In *Minns v New South Wales*,<sup>102</sup> the applicant had been a student at two State schools. The applicant alleged that those schools had directly discriminated against him on the basis of his disabilities (Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder) by requiring that he attend part-time, by suspending him and by eventually expelling him.

In determining whether the allegation of direct discrimination had been made out, Raphael FM applied the reasoning of Emmett J in *Purvis*.<sup>103</sup> As it was not submitted by either party that an actual comparator existed in this case, Raphael FM held that the appropriate comparator was a hypothetical student who had moved into both high schools with a similar history of disruptive behaviour to that of the applicant.<sup>104</sup> His Honour ultimately found that there was no direct disability discrimination. In respect of most of the allegations he could not conclude that the treatment of the applicant had been 'less favourable' than that of this hypothetical student.<sup>105</sup>

In *Forbes*, the appellant contended that the decision of the review panel not to reemploy her was based on her absence from work and that this absence was in turn a manifestation of her depressive illness. It was therefore argued that the decision not to reemploy her discriminated against her on the ground of her disability. The Full Court rejected this argument:

The Magistrate found that the appellant's absence from work for a period of over two years was 'clearly important in establishing [the] breakdown' of the relationship between herself and the AFP. If the [DDA] makes it unlawful to refuse re-employment to someone because of their lengthy absence from work, where that absence is due to a disability, the appellant's submission would have force. The difficulty is that the appellant must establish that the

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<sup>99</sup> (2003) 133 FCR 254, 259 [8].

<sup>100</sup> [2002] FMCA 44.

<sup>101</sup> [2002] FMCA 44, [48].

<sup>102</sup> [2002] FMCA 60.

<sup>103</sup> *New South Wales (Department of Education & Training) v Human Rights & Equal Opportunity Commission* (2001) 186 ALR 69.

<sup>104</sup> [2002] FMCA 60, [197].

<sup>105</sup> [2002] FMCA 60, [199]-[242]. His Honour stated that in some circumstances he was unable to conclude the treatment was 'because of the aggrieved person's disability' (see [242]).

AFP treated her less favourably, in circumstances that are the same or are not materially different, than it treated or would have treated a non-disabled person. The approach of the majority in [*Purvis*] makes it clear that the circumstances attending the treatment of the disabled person must be identified. The question is then what the alleged discriminator would have done in those circumstances if the person concerned was not disabled.

Here, the appellant was not reappointed because the history of her dealings with the AFP, including her absence from work for nearly three years, showed that the employment relationship had irretrievably broken down. There is nothing to indicate that in the same circumstances, the AFP would have treated a non-disabled employee more favourably. On the contrary, the fact that the Panel did not know of the appellant's medical condition indicates very strongly that it would have refused to reemploy a non-disabled employee who had been absent from work for a long period and whose relationship with the AFP had irretrievably broken down.<sup>106</sup>

The Full Court also made the following comments, with reference to the decision of the High Court in *Purvis*, in relation to the appropriate comparator (see 5.2.2(a) above):

The circumstances attending the AFP's treatment of the appellant would seem to have included the AFP's genuine belief that the appellant, despite her claims to have suffered from a serious depressive illness, did not in fact have such an illness. That belief was in fact mistaken, but it explains the AFP's decision to regard the information concerning the appellant's medical condition as irrelevant to the question of her re-employment. This suggests that the appropriate comparator was an able-bodied person who claimed to be disabled, but whom the AFP genuinely believed (correctly, as it happens) had no relevant disability. If this analysis is correct, it seems that the AFP treated the appellant no less favourably than, in circumstances that were the same or were not materially different, it would have treated a non-disabled officer.<sup>107</sup>

The decision in *Purvis* was also applied in *Fetherston v Peninsula Health*<sup>108</sup> ('*Fetherston*') in which a doctor's employment was terminated following the deterioration of his eyesight and related circumstances. Heerey J identified the following 'objective features' relevant for the comparison required under s 5, noting that 'one should not "strip out" [the] circumstances which are connected with [the applicant's] disability: *Purvis* at [222], [224]':

- (a) Dr Fetherston was a senior practitioner in the ICU, a department where urgent medical and surgical skills in life-threatening circumstances are often required;
- (b) Dr Fetherston had difficulty in reading unaided charts, x-rays and handwritten materials;
- (c) There were reports of Dr Fetherston performing tracheostomies in an unorthodox manner, apparently because of his visual disability;
- (d) Medical and nursing staff expressed concern about Dr Fetherston's performance of his duties in ways apparently related to his visual problems;

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<sup>106</sup> [2004] FCAFC 95, [80]-[81] (emphasis in original).

<sup>107</sup> [2004] FCAFC 95, [76].

<sup>108</sup> [2004] FCA 485.



- (e) In the light of all the foregoing Dr Fetherston attended an independent eye specialist at the request of his employer Peninsula Health but refused to allow the specialist to report to it.<sup>109</sup>

His Honour went on to consider how the respondents would have treated a person without the applicant's disability in those circumstances and held:

The answer in my opinion is clear. Peninsula Health and any responsible health authority would have in these circumstances treated a hypothetical person without Dr Fetherston's disability in the same way. An independent expert assessment would have been sought. A refusal to allow that expert to report must have resulted in termination of employment.<sup>110</sup>

In *Trindall v NSW Commissioner of Police*<sup>111</sup> (*Trindall*) the applicant complained of disability and race discrimination in his employment as a NSW police officer. The applicant had an inherited condition known as 'sickle cell trait'. He asserted that because of this condition he was given restricted duties and subjected to unnecessary and unreasonable restrictions in his employment. Driver FM held that the appropriate hypothetical comparator was:

- (a) a New South Wales police officer without the sickle cell trait;
- (b) who is generally healthy but who has concerns about his health; and
- (c) who has a low risk of injury of a similar nature to that of a person with the sickle cell trait and who should take reasonable precautions to avoid that risk of injury.<sup>112</sup>

His Honour found that there was no discrimination in the initial informal conditions imposed on the applicant pending further medical assessment.<sup>113</sup> However, the formal conditions subsequently imposed were not compelled by the applicant's medical certificate and were discriminatory, in breach of ss 5 and 15(2)(a) of the DDA.<sup>114</sup>

In *Ware v OAMPS Insurance Brokers Ltd*,<sup>115</sup> the applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him in his employment on the basis of his disability contrary to ss 15(2)(c) and 15(2)(d) of the DDA. The respondent claimed that its treatment of the applicant had been because of his poor work performance, not his disability.

Applying *Purvis*, Driver FM held that the proper comparator in this case was:

- (a) an employee of OAMPS having a position and responsibilities equivalent of those of Mr Ware;
- (b) who did not have Attention Deficit Disorder or depression; and
- (c) who exhibited the same behaviours as Mr Ware, namely poor interpersonal relations, periodic alcohol abuse and periodic absences

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<sup>109</sup> [2004] FCA 485, [86].

<sup>110</sup> [2004] FCA 485, [89]. His Honour also held that the applicant must fail because the termination was not *because of* the applicant's disability, because of his refusal to allow the report of the specialist to be released to his employer: [92]-[93].

<sup>111</sup> [2005] FMCA 2.

<sup>112</sup> [2005] FMCA 2, [145].

<sup>113</sup> [2005] FMCA 2, [151]-[151].

<sup>114</sup> [2005] FMCA 2, [169]-[170].

<sup>115</sup> [2005] FMCA 664.

from the workplace, some serious neglect of duties and declining work performance, but with a formerly high work ethic and a formerly good work history.<sup>116</sup>

Driver FM held that the respondent had treated the applicant less favourably by demoting and subsequently dismissing the applicant.<sup>117</sup> This was because the respondent had not demoted or dismissed the applicant with reference to the criteria it had indicated to the applicant by letter that his future performance would be assessed, but some other criteria (namely, his unauthorised absences from the workplace for which he was subsequently granted sick leave).<sup>118</sup> His Honour noted that the applicant's 'relaxed attitude to his attendance' had been 'tolerated' by the respondent for a long time and a work place culture of 'long lunches' was also 'tolerated' by the respondent. His Honour then held that if unauthorised absence was to be 'the predominant consideration' for the future treatment of the applicant, that should have been made clear to the applicant in the respondent's letter which specified the criteria against which the applicant's future performance would be assessed.<sup>119</sup>

Consequently, his Honour held that the applicant had been treated less favourably than the hypothetical comparator in being demoted and subsequently dismissed, as the hypothetical comparator would have been assessed against the specified performance criteria:

If the hypothetical comparator had had the same work restrictions placed on him ... it is reasonable to suppose that those work restrictions would have reflected the concerns of OAMPS and that the hypothetical comparator's performance would have been judged against the criteria stipulated. In the case of [the applicant], the employer, having accepted his return to work on a restricted basis, having regard to his disabilities, treated him unfavourably by demoting him by reference to a factor to which no notice was given in the letter ... setting out the conditions which [the applicant] must meet and the criteria against which his performance would be assessed. I find that the hypothetical comparator would not have been treated in that way.<sup>120</sup>

To the extent that the termination decision was based upon [the applicant's] absence from the workplace on 22 and 24 September 2003, this was less favourable treatment than the hypothetical comparator would have received in the same or similar circumstances because of [the applicant's] disabilities, for the same reasons I have found the demotion decision was discriminatory. The absences were properly explained after the event and a medical certificate was provided. The hypothetical comparator would not have been dismissed for two days absence for which sick leave was subsequently granted.<sup>121</sup>

In *Hollindale v North Coast Area Health Service*,<sup>122</sup> Driver FM held that it was not discriminatory for the respondent to require the applicant to undergo a medical assessment following a period of serious inappropriate behaviour

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<sup>116</sup> [2005] FMCA 664, [100].

<sup>117</sup> [2005] FMCA 664, [102]-[106].

<sup>118</sup> [2005] FMCA 664, [110].

<sup>119</sup> [2005] FMCA 664, [110].

<sup>120</sup> [2005] FMCA 664, [111].

<sup>121</sup> [2005] FMCA 664, [119].

<sup>122</sup> [2006] FMCA 5.

caused by the applicant's bi-polar disorder. His Honour held that a hypothetical comparator, being an employee in a similar position and under the same employment conditions as the applicant who behaved in the same way but did not have bi-polar disorder,<sup>123</sup> would have been treated the same way:

If such a hypothetical employee had exhibited the inappropriate behaviour of Ms Hollingdale to which a medical cause was suspected (as it was here) medical intervention would almost certainly have been sought. I have no reason to believe that the hypothetical comparator would have been treated any differently than Ms Hollingdale. It was untenable for the Area Health Service to have a mental health employee exhibiting behaviours which might stem from a mental disability and which adversely impacted upon other employees at the workplace.<sup>124</sup>

In *Moskalev v NSW Dept of Housing*,<sup>125</sup> the applicant alleged that the Department directly discriminated against him by refusing to put him on its priority housing register. Driver FM held that the proper comparator was a person without the applicant's disability, who was seeking accommodation of the same kind and who asserted a medical or other reason for requiring that accommodation.<sup>126</sup>

In *Huemer v NSW Dept of Housing*,<sup>127</sup> the applicant alleged that his tenancy was terminated by the Department because of his mental illness. In rejecting the claim, Raphael FM held that the Department's action was a consequence of numerous complaints about the applicant's anti-social behaviour and the decision to evict him was made by the Consumer Trade and Tenancies Tribunal on the basis that he had breached his tenancy agreement.<sup>128</sup> In relation to whether the applicant was treated less favourably due to anti-social behaviour caused by his disability, Raphael FM applied *Purvis* and concluded that:

The course of action taken in dealing with the manifestation of Mr Huemer's disabilities was taken for the protection of the other tenants of the estate and the staff of [the Department]. It was action of a type similar to that discussed in *Purvis*.<sup>129</sup>

In *Gordon v Commonwealth*,<sup>130</sup> the applicant's provisional employment as a field officer with the Australian Tax Office (ATO) was withdrawn whilst he was completing induction, based on medical reports which showed (inaccurately, as it turned out) that he had severe high blood pressure which was said to affect his ability to drive. The ATO argued that the applicant was dismissed, not because of his high blood pressure, but because he failed to meet one of the pre-employment conditions, namely being certified fit for the position. Heerey J rejected that submission, stating that

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<sup>123</sup> [2006] FMCA 5, [140].

<sup>124</sup> [2006] FMCA 5, [150].

<sup>125</sup> [2006] FMCA 876.

<sup>126</sup> [2006] FMCA 876, [28].

<sup>127</sup> [2006] FMCA 1670.

<sup>128</sup> [2006] FMCA 1670, [8].

<sup>129</sup> [2006] FMCA 1670, [9].

<sup>130</sup> [2008] FCA 603.

viewed in a practical way, the inescapable conclusion from the evidence is that the real and operative reason for withdrawing the offer was Mr Gordon's imputed hypertension.<sup>131</sup>

It is worth noting that in a decision made under the SDA,<sup>132</sup> Gordon J noted that 'the test of discrimination is not whether the discriminatory characteristic is the "real reason" or the "only reason" for the conduct but whether it is "a reason" for the conduct'.<sup>133</sup> His Honour took the view that the Federal Magistrate at first instance<sup>134</sup> had 'impermissibly emphasised the motive or driving reason behind the [employer's] conduct, instead of focusing on whether the conduct occurred because of [the employee's] sex, pregnancy or family responsibilities'.<sup>135</sup> His Honour did not, however, discuss the decision in *Purvis* upon which the Court at first instance had based its analysis.<sup>136</sup>

In *Razumic v Brite Industries*,<sup>137</sup> the Court had to consider the application of the reasoning in *Purvis* to a disability discrimination complaint brought against an employer which predominantly employed staff with disabilities. The applicant sought to argue that the relevant comparator was a person with a disability. Ryan J rejected this argument holding that this argument

ignores the fact that not all the other disabled employees of the respondent suffered from the same disability as she does. It also ignores the point of the test formulated by the majority in *Purvis* which erects, as the relevant comparator, a person, without the applicant's disabilities, who exhibits the same behaviour as the applicant.<sup>138</sup>

Ryan J rejected the applicant's claim of direct disability discrimination holding that he was satisfied that

had a person without the applicant's disabilities caused the same degree and disruption within the respondent's unique workplace, he or she would have been dismissed long before that decision was taken in relation to the applicant.<sup>139</sup>

In *Varas v Fairfield City Council* ('*Varas*'),<sup>140</sup> the applicant alleged that she was discriminated against on the basis of an imputed disability (histrionic personality disorder) in relation to her suspension from employment, a requirement that she undergo psychiatric and/or psychological assessments and her termination from employment. Driver FM accepted that the respondent had imputed a disability to the applicant.<sup>141</sup> However, applying *Purvis*, Driver FM held that the employer's decision to suspend and then terminate the applicant's employment was based on the applicant's history of

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<sup>131</sup> [2008] FCA 603, [57].

<sup>132</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702.

<sup>133</sup> [2008] FCA 702, [48].

<sup>134</sup> *Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960.

<sup>135</sup> [2008] FCA 702, [49].

<sup>136</sup> [2007] FMCA 1960, [125] and [146].

<sup>137</sup> [2008] FCA 985.

<sup>138</sup> [2008] FCA 985, [69].

<sup>139</sup> [2008] FCA 985, [72].

<sup>140</sup> [2008] FMCA 996.

<sup>141</sup> [2008] FMCA 996, [87].

workplace incidents, complaints by co-workers and certain recommendations by a psychologist who had interviewed staff in relation to those complaints.<sup>142</sup>

In relation to the requirement that the applicant undergo further medical assessments, Driver FM held that

although the Council's directions for Ms Varas to attend Dr Korner were because the Council had imputed to her a histrionic personality disorder (and hypochondriasis) the requests were reasonable in the circumstances and did not constitute a detriment for the purposes of the DDA.<sup>143</sup>

An appeal against Driver FM's finding that the Council did not discriminate against Ms Varas on the basis of an imputed disability was dismissed.<sup>144</sup> In dismissing the appeal, Graham J accepted that the circumstances that led to the termination of Ms Varas's employment was 'her propensity to engage in serious acts of discourtesy, rudeness and intimidating and provocative behaviour towards other staff members and members of the public'. His Honour stated:

[In the applicant's case] that propensity was thought by the Council to have resulted from a disorder; but such a propensity could also exist in other library staff without any disorder. What, for her, may have been thought to have been disturbed behaviour, might, for other library staff have been bad behaviour. Another library staff member 'without the disability' would be another library staff member without disturbed behaviour resulting from a disorder or a perceived disorder, not another library staff member who did not misbehave or use inappropriate language in public areas within the relevant library. There are library staff members who are not thought to have any disorder and who are not disturbed, who behave in an inappropriate manner towards other staff members and members of the public and who use inappropriate language to other staff members and in general conversation in public areas in which they work. If their conduct persistent they would probably be warned and if it continued they would probably be dismissed in less time than elapsed before the appellant was dismissed in this case, especially if they refused to consult with a medical practitioner to whom they had reasonably been referred for assessment.<sup>145</sup>

In *Zhang v University of Tasmania*<sup>146</sup> the Full Federal Court heard an appeal from the judgment of a single judge who dismissed an application by Ms Zhang claiming unlawful discrimination. The issue on appeal was the applicant's allegation that the University constructively terminated her candidature as a graduate student on the basis of her imputed psychological disability. Applying *Purvis*, the majority of the Full Federal Court held

the relevant comparator is another PhD candidate manifesting disruptive behaviour to the extent that there was a worsening of relations between her and other university members generally and eventually a break down of relations with her supervisor.<sup>147</sup>

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<sup>142</sup> [2008] FMCA 996, [93]-[94], [116].

<sup>143</sup> [2008] FMCA 996, [105].

<sup>144</sup> *Varas v Fairfield City Council* [2009] FCA 689.

<sup>145</sup> [2009] FCA 689, [89].

<sup>146</sup> [2009] FCAFC 35.

<sup>147</sup> [2009] FCAFC 35, [66].

Jessup and Gordon JJ then considered whether Ms Zhang's treatment by the University (namely, the imposition of conditions on her continued study and ultimately the constructive termination of her PhD candidature) was less favourable than would have been given to others who did not have a psychological disability.<sup>148</sup> Their Honours noted the paucity of evidence about what happened in other cases where students had manifested similar disruptive behaviour and the University's policies for handling disruptive students.<sup>149</sup> The available evidence from University personnel to the effect that they would have done the same thing with another student in the same circumstances was 'less than satisfactory,' but there was no evidence to suggest that the University would have treated another disruptive student more favourably than Ms Zhang.<sup>150</sup> Consequently, Jessup and Gordon JJ (Gray J dissenting) concluded that there was no error in the primary judge's conclusion that the University did not contravene the DDA.<sup>151</sup>

In *Gibbons v Commonwealth of Australia*,<sup>152</sup> the applicant was an officer of the Australian Federal Police. He claimed that he was discriminated against on the ground of his disability (a personality disorder which was exacerbated by a head injury) in that he was not provided with reasonable adjustment and that his employment was terminated.

Burnett FM noted the dicta in *Featherston* analysing *Purvis* and stated:

By analogy in this case the comparison required by section 5 is with an officer without the disability, not an officer without inappropriate behavioural responses. Accordingly the treatment of the Applicant is to be compared with the treatment that would have been given, in the same circumstances, to an officer whose similar inappropriate behavioural responses was not disturbed behaviour resulting from a disorder.<sup>153</sup>

Burnett FM noted the respondent's evidence that anyone who had acted in the way that the applicant did after having been given a number of warnings about the offending behaviour would also have had their employment terminated. Burnett FM concluded that the applicant has been treated no less favourably than a comparator without the disability.<sup>154</sup>

In *Flanagan v Murdoch Community Services Inc*<sup>155</sup> the applicant alleged that she had been discriminated against on the basis of her disability by the respondent, her employer. The applicant had an intellectual disability and worked for the respondent as a supported employee at a carwash. The respondent had imposed certain driving conditions following an incident that raised concerns as to the applicant's driving. There was evidence of previous related incidents. Gordon J, applying *Purvis*, held that the relevant comparator was a person displaying the same behaviour as the applicant but without the disability<sup>156</sup>. The relevant comparator was "a non-supported employee

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<sup>148</sup> [2009] FCAFC 35, [67].

<sup>149</sup> [2009] FCAFC 35, [67].

<sup>150</sup> [2009] FCAFC 35, [68].

<sup>151</sup> [2009] FCAFC 35, [69].

<sup>152</sup> [2010] FMCA 115.

<sup>153</sup> [2010] FMCA 115, [112].

<sup>154</sup> [2010] FMCA 115, [118].

<sup>155</sup> [2010] FCA 647.

<sup>156</sup> *Ibid* [68].

involved in a similar incident with a history of related incidents<sup>157</sup>. On this basis her Honour held that the applicant was treated no less favourably than an employee manifesting the same behaviour with the same history. The application was dismissed.

In *Sluggett v Commonwealth of Australia*<sup>158</sup> the applicant alleged that she had been discriminated against on the basis of her disability, post-polio syndrome, by the respondent employer. The applicant was employed by the Commonwealth Public Service in a variety of roles between 1996 and May 2008, at which time her employment was terminated by involuntary redundancy. The applicant alleged that she was the subject of systematic discrimination in the form of direct and indirect discrimination as well as harassment within the terms of the DDA. A wide range of allegations of direct discrimination were made including allegations that commencing a disciplinary investigation into her conduct and being offered a voluntary redundancy amounted to less favourable treatment because of her disability.

Applying *Purvis*, Brown FM stated that what was required was a comparison between the applicant and a person without her disability but who displayed the same behavioural characteristics. Here this required a comparator who did not suffer from the characteristics of post-polio syndrome but 'displayed the same level of intransigence and obstructive behaviour in the workplace... over the course of her employment'<sup>159</sup>. Brown FM concluded that the comparator would have been treated in the same manner by the management of the respondent employer. The complaint was dismissed.

**(iv) The applicant as his or her own comparator?**

In *Varas*, the applicant alleged that the appropriate comparator was herself, arguing that the required comparison should be between how she was treated before and after she was imputed to have a mental illness. Driver FM noted that such an approach was 'novel', although open under the DDA:

Ms Varas asserts that she is her own comparator because her behaviour was generally consistent throughout her long period of employment with the Council, where the manner in which she was dealt with by the Council changed markedly during and after 2005 [when she was allegedly imputed with a psychological disability]. While the approach is novel, upon reflection, I think that it is an approach which is open under the DDA. To put the proposition another way, the proposed comparator is an actual employee (namely Ms Varas) who:

- (a) exhibited the same behaviours;
- (b) occupied the same position and performed the same duties;
- (c) demonstrated the same work performance; and
- (d) was not imputed with a disability (prior to 2006).<sup>160</sup>

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<sup>157</sup> Ibid [69].

<sup>158</sup> [2011] FMCA 609.

<sup>159</sup> Ibid at [733].

<sup>160</sup> [2008] FMCA 996, [73].

In applying the above comparator in relation to the termination of the applicant's employment, the applicant argued that her workplace behaviour had not significantly changed during the relevant period. Prior to being imputed with a disability she was only disciplined for such behaviour whereas after being imputed with a disability she was dismissed. Driver FM held that the comparison put forward by the applicant was 'too simplistic',<sup>161</sup> in that it ignored the fact that the applicant's work performance and behaviour had both significantly declined during 2005 and had resulted in a 'crisis' which compelled the respondent to take decisive action.<sup>162</sup> His Honour accepted that, even if the applicant had not been imputed with a disability, it was

extremely likely that, in the light of the earlier counselling and warnings given to Ms Varas, further disciplinary action would have culminated in her dismissal in 2006.<sup>163</sup>

In dismissing the appeal against the judgment of Driver FM, Graham J noted that characterisation of the appellant as the relevant comparator seemed appropriate.<sup>164</sup>

### (c) 'Adjustments' under s 5(3) of the DDA

Section 5(3) of the DDA provides that for the purposes of s 5:

circumstances are not *materially different* because of the fact that, because of the disability, the aggrieved person requires adjustments.

Prior to the 2009 changes to the DDA<sup>165</sup> s 5(2) was worded similarly to what is now s 5(3), although instead of referring to 'adjustments' it referred to 'different accommodation or services that may be required by the person with a disability'. The Explanatory Memorandum to the amending legislation states that the 'new reference to "adjustments" covers "accommodation or services."<sup>166</sup>

In *Purvis*, the High Court decided that the former provision did not impose a positive obligation to accommodate a person's disability.<sup>167</sup> From 5 August 2009, the new s 5(2) of the DDA makes explicit that the failure to make reasonable adjustments **can** amount to direct discrimination.<sup>168</sup> (See further 5.2.4.)

The effect of s 5(3) would appear likely to remain the same as the effect of the former 5(2), as described in *Purvis*. Gummow, Hayne and Heydon JJ stated:

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<sup>161</sup> [2008] FMCA 996, [115].

<sup>162</sup> [2008] FMCA 996, [115].

<sup>163</sup> [2008] FMCA 996, [117].

<sup>164</sup> *Varas v Fairfield City Council* [2009] FCA 689, [81].

<sup>165</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17, commenced operation 5 August 2009.

<sup>166</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [40].

<sup>167</sup> *Purvis* 2003) 217 CLR 92, 159 [217]-[218]; *Fetherston* [2004] FCA 485, [77]; *Commonwealth v Humphries* (1998) 86 FCR 324, 335.

<sup>168</sup> For a discussion of the case law about whether former s5(2) imposes a positive obligation to accommodate disability, please see the archived version of *Federal Discrimination Law* at <<http://www.humanrights.gov.au/legal/FDL/archive.html>>.



What is meant by the reference, in s 5(1) of the Act, to 'circumstances that are the same or are not materially different'? Section 5(2) provides some amplification of the operation of that expression. It identifies one circumstance which does not amount to a material difference: 'the fact that different accommodation or services may be required by the person with a disability'. But s 5(2) does not explicitly oblige the provision of that different accommodation or those different services. Rather, s 5(2) says only that the disabled person's need for different accommodation or services does not constitute a material difference in judging whether the discriminator has treated the disabled person less favourably than a person without the disability.

The Commission submitted that s 5(2) had greater significance than providing only that a need for different accommodation or services is not a material difference. It submitted that, if a school did not provide the services which a disabled person needed and later expelled that person, the circumstances in which it expelled the person would be materially different from those in which it would have expelled other students. In so far as that submission depended upon construing s 5, or s 5(2) in particular, as requiring the provision of different accommodation or services, it should be rejected. As the Commonwealth rightly submitted, 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 of the disabled person for the purposes of s 5.<sup>169</sup>

In *Tyler v Kesser Torah College*,<sup>170</sup> a student with behavioural difficulties was temporarily excluded from the respondent school. The school's regular discipline policy was not applied to the student and the Court noted as follows:

To that extent, Rabbi Spielman treated Joseph differently from how he would have treated a student without Joseph's disabilities. However, that fact by itself does not establish unlawful discrimination. The College had already decided in consultation with the Tylers that Joseph had special needs that required a special educational programme. These were special educational services for the purposes of s 5(2) of the DDA. The non application of the College's usual discipline policy to Joseph was an element of those special services. It follows, in my view, that the non application of the school's discipline policy to Joseph could not, of itself, be discriminatory for the purposes of s 5(1) of the DDA.<sup>171</sup>

Therefore, the appropriate comparator in this case was:

- a student in the same class as Joseph;

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<sup>169</sup> (2003) 217 CLR 92, 159 [217]-[218]. Callinan J appeared to agree with their Honours on this point: (2003) 217 CLR 92, 175 [273]. Note that at first instance, Emmett J formed a view that 'accommodation' and 'services' should be understood by reference to the inclusive definitions of those terms in s 4 of the DDA. For example, 'accommodation' under that definition 'includes residential or business accommodation'. His Honour concluded that the case before him did not have anything to do with 'accommodation' or 'services' in the sense defined and hence s 5(2) had no relevant application to the case: *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69, 79 [48]. This point was not considered on appeal by the Full Federal Court. However the approach of Emmett J was rejected by McHugh and Kirby JJ ((2003) 217 CLR 92, 121-122 [86]-[89]) and also appears to have been implicitly rejected by Gummow, Hayne and Heydon JJ in their joint judgment, 159 [217]-[218]). Such an argument was earlier rejected by Kiefel J in *Commonwealth of Australia v Humphries* (1998) 86 FCR 324.

<sup>170</sup> [2006] FMCA 1.

<sup>171</sup> [2006] FMCA 1, [104].

- who did not have the same disability;
- who exhibited the same behaviours as Joseph; and
- who was not subject to the College's normal discipline policy because of special needs.

Driver FM noted that

The last element was necessary because the special services put in place for Joseph could not to be taken as discriminatory because of the operation of s 5(2) of the DDA and without that element, a fair comparison could not be made.<sup>172</sup>

### 5.2.3 Indirect discrimination under the DDA

From 5 August 2009,<sup>173</sup> the definition of indirect discrimination in s 6 of the DDA is as follows:

#### 6 Indirect disability discrimination

- (1) For the purposes of this Act a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
  - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
- (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
- (4) For the purpose of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the

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<sup>172</sup> [2006] FMCA 1, [106]-[107].

<sup>173</sup> The date of commencement of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) which amended s 6: see sch 2, item 17.

circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

**(a) 2009 changes to indirect discrimination**

Section 6(2) was introduced into the DDA by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth). It is intended to impose an explicit duty of 'reasonable adjustments' upon people doing acts covered by the DDA.<sup>174</sup> That new obligation is discussed further below: see 5.2.4.

2009 amendments to the DDA also made the following significant changes to s 6:

- the section no longer requires the applicant to prove that a 'substantially higher proportion of persons without the disability comply or are able to comply' with the relevant requirement or condition (former s 6(a));
- instead, the section now requires that an applicant prove that the requirement or condition 'has or is likely to have, the effect of disadvantaging persons with the disability (s 6(1)(c));
- the definition of indirect discrimination has been extended to include *proposed* acts of indirect discrimination (see ss 6(1)(a) and (2)(a)); and
- the burden of proving the 'reasonableness' of the requirement or condition now rests on the alleged discriminator.<sup>175</sup>

The following sections consider the case law relevant to the following issues under the new definition of indirect discrimination:

- the relationship between 'direct' and 'indirect' discrimination;
- defining the 'requirement or condition';
- inability to comply with a requirement or condition.
- 'disadvantaging persons with the disability'; and
- reasonableness.

Readers interested in the operation of the old indirect discrimination provisions of the DDA can refer to the archived version of *Federal Discrimination Law* online at <[www.humanrights.gov.au/legal/FDL/archive.html](http://www.humanrights.gov.au/legal/FDL/archive.html)>.

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<sup>174</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41-7].

<sup>175</sup> Please refer to [5.2.3] of previous versions of *Federal Discrimination Law* for a discussion on the former s6 definition of indirect discrimination, which will remain relevant for acts of alleged discrimination occurring prior to 5 August 2009. See <<http://www.humanrights.gov.au/legal/FDL/archive.html>>.

## (b) The relationship between 'direct' and 'indirect' discrimination

In *Waters v Public Transport Corporation*<sup>176</sup> ('*Waters*'), Dawson and Toohey JJ considered, in obiter comments, whether or not the provisions of the *Equal Opportunity Act 1984* (Vic) relating to direct and indirect discrimination (on grounds including 'impairment', as was the subject of that case) were mutually exclusive. Citing the judgments of Brennan and Dawson JJ in *Australian Iron & Steel Pty Ltd v Banovic*<sup>177</sup> ('*Banovic*'), which had considered the sex discrimination provisions of the *Anti-Discrimination Act 1977* (NSW), their Honours concluded:

discrimination within s 17(1) [direct discrimination] cannot be discrimination within s 17(5) [indirect discrimination] because otherwise the anomalous situation would result whereby a requirement or condition which would not constitute discrimination under s 17(5) unless it was unreasonable could constitute discrimination under s 17(1) even if it was reasonable ... there are strong reasons for ... concluding that s 17(1) and s 17(5) deal separately with direct and indirect discrimination and do so in a manner which is mutually exclusive.<sup>178</sup>

In *Minns v New South Wales*<sup>179</sup> ('*Minns*'), the applicant alleged direct and indirect disability discrimination by the respondent. The respondent submitted that the definitions of direct and indirect discrimination are mutually exclusive and that the applicant therefore had to elect whether to pursue his claim as a direct or indirect discrimination complaint.

Raphael FM cited the views of Dawson and Toohey JJ in *Waters*, as well as the decision of the Federal Court in *Australian Medical Council v Wilson*<sup>180</sup> (a case under the RDA), in holding that the definitions of direct and indirect discrimination are mutually exclusive, stating: 'that which is direct cannot also be indirect'.<sup>181</sup>

However, Raphael FM stated that this does not prevent an applicant from arguing that the same set of facts constitutes direct and indirect discrimination:

The complainant can surely put up a set of facts and say that he or she believes that those facts constitute direct discrimination but in the event that they do not they constitute indirect discrimination.<sup>182</sup>

His Honour relied upon the approach of Emmett J at first instance in *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission*<sup>183</sup> and that of Wilcox J in *Tate v Rafin*<sup>184</sup> to suggest that 'the same facts can be put to both tests'.<sup>185</sup>

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<sup>176</sup> (1991) 173 CLR 349.

<sup>177</sup> (1989) 168 CLR 165, 184, 171.

<sup>178</sup> (1991) 173 CLR 349, 393.

<sup>179</sup> [2002] FMCA 60.

<sup>180</sup> (1996) 68 FCR 46.

<sup>181</sup> [2002] FMCA 60, [173].

<sup>182</sup> [2002] FMCA 60, [245].

<sup>183</sup> (2001) 186 ALR 69.

<sup>184</sup> [2000] FCA 1582, [69].

<sup>185</sup> [2002] FMCA 60, [245].

Similarly, in *Hollingdale v Northern Rivers Area Health Service*,<sup>186</sup> the respondent sought to strike out that part of the applicant's points of claim that sought to plead the same incident in the alternative as direct and indirect discrimination. Raphael FM said:

There is, in my view, no obligation upon an applicant to make an election between mutually exclusive direct and indirect disability claims. If both claims are arguable on the facts, they may be pleaded in the alternative. The fact that they are mutually exclusive would almost inevitably lead to a disadvantageous costs outcome for the applicant, but that is the applicant's choice.<sup>187</sup>

In *Purvis v New South Wales (Department of Education and Training)*<sup>188</sup> ('*Purvis*'), the case was only argued before the High Court as one of direct discrimination and the question of the relationship between direct and indirect discrimination was not addressed. The possible factual overlap between the two grounds of discrimination was, however, highlighted in the decision of McHugh and Kirby JJ in an example given in the context of considering 'accommodation' under former s 5(2) of the DDA.<sup>189</sup> Their Honours cited the example of a 'student in a wheelchair who may require a ramp to gain access to a classroom while other students do not need the ramp'. In such a case, they stated that former s 5(2) makes clear that the circumstances of that student are not materially different for the purposes of former s 5(1). However, they continued:

This example also illustrates the unique difficulty that arises in discerning the division between s 5 and s 6 of the Act because s 5(2) brings the requirement for a ramp, normally associated with indirect discrimination, into the realm of direct discrimination.<sup>190</sup>

### (c) Defining the 'requirement or condition'

The concept of a 'requirement or condition' with which an aggrieved person is required to comply has been held to involve 'the notion of compulsion or obligation'.<sup>191</sup>

The courts have, however, emphasised that the words 'requirement or condition' should be construed broadly 'so as to cover any form of qualification or prerequisite'.<sup>192</sup>

Applicants must nevertheless be careful to ensure that 'the actual requirement or condition in each instance [is] formulated with some precision'.<sup>193</sup> For

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<sup>186</sup> [2004] FMCA 721.

<sup>187</sup> [2004] FMCA 721, [19].

<sup>188</sup> (2003) 217 CLR 92.

<sup>189</sup> See generally 5.2.2(c) above.

<sup>190</sup> (2003) 217 CLR 92, 127 [105].

<sup>191</sup> *Sluggett v Human Rights & Equal Opportunity Commission* (2002) 123 FCR 561, 577 [56]. See also *Fetherston v Peninsula Health* [2004] FCA 485, [81]; *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 473 [105]-[106].

<sup>192</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-407 (McHugh J); *Catholic Education Office v Clarke* (2004) 138 FCR 121, 143 [103]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110]; *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 395 [107]; *Trindall v NSW Commissioner of Police* [2005] FMCA 2, [175].

<sup>193</sup> *Waters* (1991) 173 CLR 349, 393.

example, in *Ferguson v Department of Further Education*,<sup>194</sup> the applicant claimed that the respondent had discriminated against him on the basis of his disability by requiring him to comply with a requirement or condition that he substantially attend his classes, undertake resource based learning and communicate with other students, lecturers and support officers with limited assistance from an Auslan interpreter.<sup>195</sup> Raphael FM ultimately dismissed the application on the basis that, even if the applicant had had the benefit of more assistance there was no evidence that it would have allowed him to complete his course any earlier, as he claimed.<sup>196</sup>

In the course of his reasoning, however, Raphael FM criticised the manner in which the applicant had formulated the relevant requirement or condition in the case:

It may be that if the applicant had somehow incorporated the failure to provide the needs assessment as part of the actual requirement or condition rather than limiting the requirement or condition to attending his classes etc with only limited assistance from an Auslan interpreter a case might have been capable of being made out. An example of such a claim would have been:

TAFE required Mr Ferguson to comply with the requirement or condition that he undertake his learning and complete his course within a reasonable time without the benefit of a needs assessment.

That seems to me to [be] a facially neutral requirement or condition which [the applicant] could have proved that a substantially higher proportion of persons without the disability were able to comply with. He could also have proved that it was not reasonable having regard to the circumstances of his case.<sup>197</sup>

In making those remarks his Honour referred to the comments of Tamberlin J in *Catholic Education Office v Clarke*<sup>198</sup> ('*CEO v Clarke*') concerning the importance of the proper characterisation of the condition or requirement from the perspective of the person with the disability.<sup>199</sup>

In *Nojin v Commonwealth of Australia*<sup>200</sup> Gray J made a number of comments in regard to how the applicants had formulated the requirement or condition in that case. The applicants were persons with disabilities employed in Australian Disability Enterprises. Each underwent an assessment to determine the level of wages they would receive for the work they performed. The assessment was conducted using the Business Services Wage Assessment Tool ('BSWAT').

Gray J stated:

The possibility that the definition of s 6 of the [DDA] can be applicable beyond the realm of general requirements or conditions imposed on an entire class of person, with and without disabilities, must be approached with caution. If a disabled person is the only person required to comply with a particular requirement or condition, because it is not applied to any other person, there

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<sup>194</sup> [2005] FMCA 954.

<sup>195</sup> [2005] FMCA 954, [30].

<sup>196</sup> [2005] FMCA 954, [32], [35].

<sup>197</sup> [2005] FMCA 954, [33].

<sup>198</sup> (2004) 138 FCR 121, 125 [12]-[13].

<sup>199</sup> [2005] FMCA 954, [34].

<sup>200</sup> [2011] FCA 1066.

is no real comparator group, only a notional one. Similarly, if the only people required to comply with a particular requirement or condition are people all of whom are disabled, there is no real comparator group for the purposes of s 6(a)<sup>201</sup>.

The applicants argued that certain aspects of the BSWAT, including the assessment of various 'competencies', were discriminatory in respect of persons with intellectual abilities compared to supported employees without an intellectual disability. Gray J found that it was difficult to treat parts of the BSWAT as a requirement or condition without regard to its impact as a whole. His Honour noted that whilst people with an intellectual disability might not perform as well in the competencies assessed, people with a physical disability may be less productive on the productivities assessed because of their disability. Gray J stated that the comparison simply on the basis of competencies was an unreal comparison because competency testing was only one part of the BSWAT.

Gray J held that the only requirement or condition with which the applicants were required to comply was that their wage levels be determined by assessment using the BSWAT and that they were able to comply with this requirement or condition. The applications were dismissed.

**(i) Distinguishing the requirement from the inherent features of a service**

In defining a requirement or condition in the context of goods or services being provided, it is necessary to distinguish the relevant requirement or condition from the inherent features of the particular goods or services. In *Waters*, Mason CJ and Gaudron J explained this distinction as follows:

the notion of 'requirement or condition' would seem to involve something over and above that which is necessarily inherent in the goods or services provided. Thus, for example, it would not make sense to say that a manicure involves a requirement or condition that those availing themselves of that service have one or both of their hands.<sup>202</sup>

The distinction between a condition of a service and the service itself was raised at first instance in *Clarke v Catholic Education Office*<sup>203</sup> ('*Clarke*'). The applicant contended that his son ('the student'), who was deaf, was subjected to indirect discrimination by virtue of the failure of the respondent school to provide Australian Sign Language ('Auslan') interpreting assistance. Instead, the school had relied upon the use of note-taking as the primary communication tool to support the student in the classroom. The applicant alleged that this did not allow the student to adequately participate in classroom instruction.

Madgwick J referred to the principle set out in *Waters* that the DDA is beneficial legislation which is to be broadly construed, noting that:

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<sup>201</sup> Ibid at [81].

<sup>202</sup> (1991) 173 CLR 349, 361 (Mason CJ and Gaudron J, with whom Deane J agreed), see also 394 (Dawson and Toohey JJ), 407 (McHugh J).

<sup>203</sup> (2003) 202 ALR 340.

it would defeat the purpose of the DDA if a narrow interpretation [of the expression 'requirement or condition'] were to be taken.<sup>204</sup>

His Honour found that the requirement or condition was correctly defined as being a requirement that the student was 'to participate in and receive classroom instruction without the assistance of an interpreter'.<sup>205</sup> His Honour did not accept the argument by the respondent that it was an intrinsic feature of the respondent's 'education' or 'teaching' service that it be conducted in English.

Madgwick J held that a characterisation of the requirement or condition as being participation in classroom instruction without an Auslan interpreter

makes a cogent and fair distinction between the service provided, namely education by classroom instruction or teaching, and an imposed requirement or condition, namely that [the student] participate in such instruction without the assistance of an Auslan interpreter. It is not necessarily inherent in the education of children in high schools that such education be undertaken without the aid of an interpreter. It is not perhaps even necessarily inherent, in an age of computers and cyberspace, that it be conducted to any particular degree in spoken English or in any other spoken language, although the concept of conventional classroom education may be accepted as necessarily implying the use of a spoken language. At least in the circumstances of this case, it was not inherent, however, that an interpreter would not be supplied, if needed. It is accepted by the respondents that their schools are and should be open for the reception and education of pupils with disabilities, including congenital profound deafness. A person disabled by that condition may, at least for a significant period of time, be unable, to a tolerable level, to receive or to offer communication in or by means of spoken English or any other spoken language, without the aid of an interpreter, at least in some areas of discourse, knowledge or skill. Effectively to require such a person to receive education without the aid of an interpreter, while it may or may not be reasonable in the circumstances, is to place a requirement or condition upon that person's receipt of education or educational services that is not necessarily inherent in classroom instruction. There is nothing inherent in classroom instruction that makes the provision of silent sign interpretation for a deaf pupil impossible...<sup>206</sup>

His Honour's decision was upheld on appeal.<sup>207</sup>

**(ii) Imposition of the requirement or condition**

Prior to the 2009 amendments to the DDA,<sup>208</sup> an aggrieved person was required to demonstrate that a requirement or condition was actually imposed

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<sup>204</sup> (2003) 202 ALR 340, 351 [44].

<sup>205</sup> (2003) 202 ALR 340, 351 [45]. Cf *Gluyas v Commonwealth* [2004] FMCA 224. In that matter, the applicant, who had Asperger's Syndrome complained that a requirement that he perform 'ad hoc tasks of a non-priority nature' was a requirement or condition of his employment with which he could not comply by reason of his disability. Without reference to authority on the issue, Phipps FM stated: 'It is impossible to see how the requirement to comply with a requirement or condition could be established from the way the applicant has put his case' ([19]). The application was summarily dismissed.

<sup>206</sup> (2003) 202 ALR 340, 351 [45].

<sup>207</sup> (2004) 138 FCR 121.

<sup>208</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).



upon them: it did not apply to requirements or conditions with which a discriminator *proposed* to require an aggrieved person to comply.

The definition of indirect discrimination now applies to requirements or conditions with which the discriminator 'requires or proposes to require' an aggrieved person to comply.<sup>209</sup> This is consistent with the approach taken in the SDA,<sup>210</sup> ADA<sup>211</sup> and the definition of direct discrimination in s 5 of the DDA.

An applicant does not necessarily need to show that the relevant requirement or condition was imposed or is proposed to be imposed by way of a positive act or statement. In *Waters*,<sup>212</sup> for instance, Mason CJ and Gaudron J noted that

compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination.<sup>213</sup>

Similarly, McHugh J in that case stated:

In the context of providing goods and services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.<sup>214</sup>

The inaccessibility of premises or facilities may give rise to the imposition of a relevant requirement or condition for the purposes of establishing indirect discrimination.<sup>215</sup> For example, in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*<sup>216</sup> ('Access For All Alliance') the applicant organisation complained that certain council facilities (a community centre, concrete picnic tables and public toilets) were inaccessible to members of the organisation who had disabilities. In relation to the community centre Baumann FM found the following requirements or conditions to have been imposed:

Persons are required to attend and enjoy entertainment held from the stage at the Centre viewed from the outside grassed area without:

- (a) an accessible path and platform; and
- (b) an accessible ramp and path from the grassed area to the toilets situated inside the Centre.<sup>217</sup>

In relation to the picnic tables, he identified the requirement or condition as follows:

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<sup>209</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 9 [41-6].

<sup>210</sup> See SDA, s 5(2).

<sup>211</sup> See ADA, s25(1)(a).

<sup>212</sup> (1991) 173 CLR 349.

<sup>213</sup> (1991) 173 CLR 349, 360.

<sup>214</sup> (1991) 173 CLR 349, 407.

<sup>215</sup> It is likely that the 2009 amendments to the definition of indirect discrimination that expressly make unlawful the failure to make reasonable adjustments will further support these kinds of claims (see further discussion at [5.2.4] below).

<sup>216</sup> [2004] FMCA 915.

<sup>217</sup> [2004] FMCA 915, [20].

Persons seeking to enjoy the amenity of the...foreshore are required to use tables which do not make provision for both wheelchair access to the tables and are not designed to accommodate the wheelchairs at the table.<sup>218</sup>

Finally, he identified the requirement or condition in relation to the public toilets as:

Members of the applicant seeking to enjoy the amenity of the... foreshore are required to use toilet facilities where wash basins are not concealed from the public view.<sup>219</sup>

Baumann FM went on to uphold the complaint in relation to the public toilets, but dismissed the complaint in relation to the community centre and picnic tables (see 5.2.3(f) below).

In *Devers v Kindilan Society*,<sup>220</sup> ('*Devers*') Marshall J held that an employer who was unaware of an employee's requirement for adjustments for her disability did not impose a requirement or condition upon that employee that they work without such adjustment.

The applicant (who has profound deafness) worked as a disability support worker in a residential care facility operated by the respondent. The applicant claimed, amongst other things, that the respondent had imposed a requirement or condition upon her that she work without a telephone typewriter (TTY – a device that can be used by deaf people to communicate over the telephone) and without flashing lights to alert her that someone was at the door of the facility.

Marshall J held that the respondent could not be said to have imposed a requirement or condition upon the applicant that she access her employment without those things when the respondent was unaware that the applicant required them.<sup>221</sup>

The applicant in *Devers* also complained that she was required to attend training sessions without the use of a qualified Auslan interpreter. Marshall J held that such a requirement or condition was imposed by the respondent, except on the occasions when the applicant chose to attend training sessions without a qualified interpreter.<sup>222</sup> The exception arose from a training session for which a qualified interpreter was not available. The respondent had suggested that the applicant attend a later repeat session for which an interpreter would be booked, but the applicant chose to attend the earlier session without a qualified interpreter. In relation to that event, his Honour concluded that no requirement or condition to attend without a qualified interpreter had been imposed.<sup>223</sup>

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<sup>218</sup> [2004] FMCA 915, [21].

<sup>219</sup> [2004] FMCA 915, [22].

<sup>220</sup> [2009] FCA 1392. Note that this case was not brought under the 'reasonable adjustment' provisions of s 6(2) of the DDA which had not commenced at the time of the events the subject of the case.

<sup>221</sup> See [2009] FCA 1392, [42] (re TTY); [51] (re flashing lights).

<sup>222</sup> [2009] FCA 1392, [69].

<sup>223</sup> [2009] FCA 1392, [67]-[68]. The findings of Marshall J were not disturbed on appeal: *Devers v Kindilan Society* [2010] FCAFC 72.

**(iii) Requirement 'imposed' by employers**

Where the alleged discriminatory requirement or condition arises from the failure of an employee to follow the proper procedures of his or her employer, the employer will not ordinarily be regarded as having imposed that requirement or condition. The employer may, however, be held vicariously liable for the conduct of the employee, although this involves a different test than that required under s 6 (see further 5.4.1 below).

The above distinction arose for consideration in *Vance v State Rail Authority*.<sup>224</sup> The applicant, a woman with a visual disability, complained of indirect disability discrimination in the provision of services by the respondent. The applicant had been unable to board a train because the guard had not allowed sufficient time for her to do so, by closing the doors without warning while the applicant was attempting to board.

The primary argument pursued under the DDA was that the respondent required the applicant to comply with a requirement or condition defined as follows:

That in order to travel on the 11.50am train on 8 August 2002 operated by the Respondent any intending passenger at Leumeah Station had to enter the train doors promptly which may close without warning.<sup>225</sup>

Raphael FM found that the guard on the train simply did not notice the applicant attempting to board the train and closed the doors after a period of between 10 and 15 seconds believing that no-one was getting on.<sup>226</sup> It did not follow, however, that the respondent Authority (the individual guard was not named as a party) imposed a requirement or condition consistent with that conduct.

The evidence before the Court established that the respondent had detailed procedures for guards to ensure that all passengers were on board prior to doors of the train closing. In these circumstances, Raphael FM asked:

Can it be said that this requirement was imposed by virtue of what the applicant alleged occurred on this day? In other words does the alleged action of the guard constitute a requirement imposed by his employer. This could only be the case if the employer was vicariously liable for the acts of the employee. Such vicarious liability is provided for in the DDA under s 123.

His Honour considered that the respondent was not vicariously liable under s 123 for the conduct of its employees on the basis that the respondent had taken reasonable precautions and exercised due diligence to avoid the employee's conduct. Raphael FM concluded:

If the respondent has no liability under s 123(2), which I have found it does not, and if all the evidence is that the respondent itself did not impose the alleged requirement or condition, then I cannot see how there can be any liability upon it.<sup>227</sup>

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<sup>224</sup> [2004] FMCA 240.

<sup>225</sup> [2004] FMCA 240, [2].

<sup>226</sup> [2004] FMCA 240, [45], [47].

<sup>227</sup> [2004] FMCA 240, [54].

Raphael FM accordingly dismissed the application under the DDA.<sup>228</sup>

In *Sluggett v Commonwealth of Australia*<sup>229</sup> the applicant alleged that she had been discriminated against on the basis of her disability, post-polio syndrome, by her employer, the Commonwealth Public Service. The applicant alleged that she was the subject of systematic discrimination in the form of direct and indirect discrimination as well as harassment within the terms of the DDA. In relation to indirect discrimination, the applicant argued that she had been unreasonably required by her employer to comply with various conditions as to how she performed her duties and the setup of her workstation, with which she could not comply because of her disability.

Brown FM was of the view that the evidence indicated that the applicant decided what she would and would not do whilst employed by the respondent. Management of the employer accepted that some duties were not appropriate and did not allocate them to her. However, the applicant declined to perform many of the duties that were allocated. Over time she was released from those duties also. Management of the respondent went to some lengths to modify the duties remaining by enlisting qualified experts to provide advice as to her duties and workstation and making the recommended modifications. Brown FM held that the applicant 'was not compelled to perform duties... which she judged were beyond her capacity. She did not do them and she was not subject to a compulsion to do them'<sup>230</sup>. The complaint was dismissed.

#### **(d) Inability to comply with a requirement or condition**

Following the 2009 changes to the DDA, the definition of indirect discrimination in s 6(1) requires an aggrieved person to show that 'because of the disability, the aggrieved person does not or would not, is not able to or would not be able to comply' with the relevant requirement or condition.<sup>231</sup>

This is a change from the previous definition of the DDA which did not require an aggrieved person to show that their inability to comply with the requirement or condition was 'because of their disability'.<sup>232</sup>

In considering whether an aggrieved person is 'able to comply' with a requirement or condition, courts have emphasised the need to take a broad and liberal approach.<sup>233</sup> The relevant question would appear to be *not* whether the complainant can technically or physically comply with the relevant

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<sup>228</sup> [2004] FMCA 240, [61]. His Honour did, however, find liability for negligence under the Court's accrued jurisdiction, applying the different test for vicarious liability at common law ([64]). He awarded compensation of \$5,000 ([71]).

<sup>229</sup> [2011] FMCA 609. Note that the 2009 amendments to the DDA did not apply in this case.

<sup>230</sup> *Ibid* at [738].

<sup>231</sup> Section 6(1)(b) as amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17.

<sup>232</sup> See the former 6(1)(c).

<sup>233</sup> See, for example, *Travers v New South Wales* [2000] FCA 1565, [17], where the court held that a 'reasonably liberal' approach was required in assessing whether the complainant was able to comply with the relevant condition.

requirement or condition, but whether he or she would suffer 'serious disadvantage' in complying with the requirement or condition.<sup>234</sup>

(i) **Serious disadvantage**

In *Clarke*, Madgwick J held that 'compliance' with a requirement or condition 'must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group'.<sup>235</sup> In concluding that a deaf student would not have been able to 'comply' with a requirement or condition that he participate in classroom instruction without an Auslan interpreter, his Honour stated:

In my opinion, it is not realistic to say that [the student] could have complied with the model. In purportedly doing so, he would have faced serious disadvantages that his hearing classmates would not. These include: contemporaneous incomprehension of the teacher's words; substantially impaired ability to grasp the context of, or to appreciate the ambience within which, the teacher's remarks are made; learning in a written language without the additional richness which, for hearers, spoken and 'body' language provides and which, for the deaf, Auslan (and for all I know, other sign languages) can provide, and the likely frustration of knowing, from his past experience in primary school, that there is a better and easier way of understanding the lesson, which is not being used. In substance, [the student] could not meaningfully 'participate' in classroom instruction without Auslan interpreting support. He would have 'received' confusion and frustration along with some handwritten notes. That is not meaningfully to receive classroom education.<sup>236</sup>

The 'serious disadvantage' approach was also adopted by the Full Federal Court in *Hurst and Devlin v State of Queensland* ('*Hurst*').<sup>237</sup> In that case, the respondent was found to have imposed a requirement or condition upon the applicants that they receive their education in English without the assistance of an Auslan teacher or interpreter. At first instance,<sup>238</sup> Lander J stated that whether the applicant had complied, or could comply, with the requirement or condition was a 'matter of fact'.<sup>239</sup> In relation to the application by Devlin, his Honour held that the evidence that he had fallen behind his hearing peers academically established that he could not comply with the requirement or condition imposed on him by the respondent, even though the respondent's conduct was not the only reason he had fallen behind.<sup>240</sup>

However, Lander J held that *Hurst* had not established that she could not comply with the requirement or condition that she be instructed in English. This was because there was no evidence that she had fallen behind her

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<sup>234</sup> *Clarke* (2003) 202 ALR 340, 352-53, [49], upheld on appeal *CEO v Clarke* (2004) 138 FCR 121. See also *Hurst v Queensland* (2006) FCR 562, 580 [106], 585 [134].

<sup>235</sup> (2003) 202 ALR 340, 352-353 [49].

<sup>236</sup> (2003) 202 ALR 340, 352-353, [49] (upheld on appeal: *CEO v Clarke* (2004) 138 FCR 121) (emphasis added).

<sup>237</sup> (2006) 151 FCR 562.

<sup>238</sup> [2005] FCA 405.

<sup>239</sup> [2005] FCA 405, [69].

<sup>240</sup> [2005] FCA 405, [805]-[806].

hearing peers academically as a result of receiving her education in English.<sup>241</sup> While his Honour accepted that that may be as a result of the ‘attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan’,<sup>242</sup> he stated that it was ‘a matter on which the experts have not discriminated’.<sup>243</sup>

The finding of Lander J that Hurst was able to comply with the respondent’s condition as she could ‘cope’ without the assistance of Auslan was reversed on appeal.<sup>244</sup> The Full Federal Court unanimously held that Lander J had incorrectly focused on the comparison between the academic performance of Hurst and that of her peers.<sup>245</sup> Rather, the Court held that the critical issue was:

whether, by reason of the requirement or condition that she be taught in English without Auslan assistance, she suffered serious disadvantage.<sup>246</sup>

The Full Federal Court further held that a child may be seriously disadvantaged if ‘deprived of the opportunity to reach his or her full potential and, perhaps, to excel’.<sup>247</sup> In summary, the Court held:

In our view, it is sufficient to satisfy that component of s 6(c) (inability to comply) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can ‘cope’ with the requirement or condition. A disabled person’s inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage. In Tiahna’s case, the evidence established that it had done so.<sup>248</sup>

By contrast to the above decisions, an arguably narrower approach was taken in *Hinchliffe v University of Sydney* (*‘Hinchliffe’*).<sup>249</sup> In *Hinchliffe*, Driver FM held that the applicant and those assisting her were able to reformat the university course materials and, accordingly, she was able to comply with the university’s condition that she use the course materials provided to her. Whilst there was a limited amount of material which could not be reformatted in an accessible format, which imposed a condition with which the applicant could not comply, his Honour had accepted that this condition was ‘reasonable’ in all of the circumstances of the case.<sup>250</sup> Accordingly, the applicant’s case failed.

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<sup>241</sup> [2005] FCA 405, [819].

<sup>242</sup> [2005] FCA 405, [819].

<sup>243</sup> [2005] FCA 405, [820]. For a critique of this finding, see B Fogarty, ‘The Silence is Deafening: Access to education for deaf children’, (2005) 43(5) *Law Society Journal* 78.

<sup>244</sup> *Hurst v Queensland* (2006) 151 FCR 562. For a discussion of this case, see Natasha Case, ‘Clarifying indirect disability discrimination’, (2006) 44(9) *Law Society Journal* 42.

<sup>245</sup> (2006) 151 FCR 562, 580, [106].

<sup>246</sup> (2006) 151 FCR 562, 580 [106].

<sup>247</sup> (2006) 151 FCR 562, 584 [125].

<sup>248</sup> (2006) 151 FCR 562, 585 [134].

<sup>249</sup> (2004) 186 FLR 376.

<sup>250</sup> *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 476 [115]-[116]. Arguably, his Honour did not take the ‘reasonably liberal approach’ suggested in *Travers* when considering the applicant’s ability to comply with the requirement or condition. While the applicant’s evidence was that she was able to reformat material, such process was ‘time consuming and left her with no time to study’ (381 [8]). In such circumstances it is arguable that the applicant could not meaningfully comply with the requirement or condition. Similarly, in *Ball v Silver Top Taxi Service Ltd* [2004] FMCA 967, Walters FM held that although it would cause ‘significant inconvenience’ to the applicant to comply with the requirement or condition imposed by the respondent, she could have complied with it ([70]). These decisions should

In *Devers*, the applicant (who has profound deafness) worked as a disability support worker in a residential care facility operated by the respondent. The applicant complained, amongst other things, that she was not provided with flashing lights to alert her that someone was at the door and that she was required to attend training sessions and staff meetings without the use of a qualified Auslan interpreter.

Marshall J found that the requirement or condition that the applicant access her employment without flashing lights was imposed by the respondent once it was aware that the applicant required their installation.<sup>251</sup> Applying the test in *Hurst*, his Honour concluded that the applicant had not shown that she suffered any serious disadvantage from her inability to answer the door. Relevantly, the applicant had been provided with a pager so that staff were able to attract her attention. Marshall J concluded: 'Her work consisted of caring for the clients at the [community residential unit] and she has not shown that her inability to answer the door led to any serious disadvantage.'<sup>252</sup>

On the issue of interpreters, Marshall J held that this was a requirement with which the applicant could not comply. Although staff assisted with interpreting and the applicant's disadvantage was ameliorated by the provision of information in other forms such as workbooks and minutes of meetings, she was at a disadvantage in completing training, receiving information and participating in meetings and accordingly could not comply with the requirement.<sup>253</sup>

#### **(ii) Practicality and dignity**

In considering whether a complainant is able to comply with the relevant requirement or condition, it is also relevant to consider whether he or she can comply reasonably, practically and with dignity. In *Access for All Alliance*, Baumann FM cited with apparent approval a submission by the Acting Disability Discrimination Commissioner, appearing in the matter as amicus curiae, that:

in determining whether or not an applicant can 'comply' with a requirement or condition for the purposes of s 6(c), the Court should look beyond 'technical' compliance to consider matters of practicality and reasonableness.<sup>254</sup>

His Honour found that the relevant condition was that members of the applicant use toilet facilities where wash basins were not concealed from view. He accepted that this condition could not be complied with by people with disabilities who were 'required to undertake a careful toileting regime...

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perhaps be viewed with some caution in light of the 'serious disadvantage' approach confirmed by the Full Federal Court in *Hurst v Queensland* (2006) 151 FCR 562.

<sup>251</sup> [2009] FCA 1392, [52].

<sup>252</sup> [2009] FCA 1392, [54].

<sup>253</sup> [2009] FCA 1392, [73] (re training), [101] (re staff meetings). The applicant's claim was, however, unsuccessful as she was unable to establish that the requirement was not reasonable: [104]-[105]. The findings of Marshall J were not disturbed on appeal: *Devers v Kindilan Society* [2010] FCAFC 72.

<sup>254</sup> [2004] FMCA 915, [9]. The submissions of the Acting Disability Discrimination Commissioner are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/hervey.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/hervey.html)>.

which reasonably requires use of wash basins out of public view and in private'.<sup>255</sup>

Similarly, in *Travers v New South Wales*<sup>256</sup> ('*Travers*'), (see 5.2.3(f) below), the applicant was a 12-year-old girl with spina bifida and resultant bowel and bladder incontinence. She claimed that she was denied access to an accessible toilet which was near her classroom. It was argued by the applicant that requiring her to use toilets further away from her classroom imposed a condition with which she was unable to comply because she was unable to reach the toilet in time to avoid a toileting accident.<sup>257</sup> In considering an application for summary dismissal, Lehane J held that while it was not *literally* impossible for the applicant to comply with the condition, the consequences would have been seriously embarrassing and distressing. In those circumstances, the applicant was not able to comply with the requirement or condition in the relevant sense.<sup>258</sup>

### **(e) The effect of disadvantaging persons with the disability**

Prior to 5 August 2009, s 6(a) of the DDA required an aggrieved person to prove that a substantially higher proportion of people without the disability of the aggrieved person complied or were able to comply with the relevant requirement or condition.<sup>259</sup>

Section 6(1)(c) now requires an aggrieved person to prove that the condition or requirement 'has or is likely to have the effect of disadvantaging persons with the disability'.

The term 'disadvantaging' is not defined in the DDA. The Explanatory Memorandum states that 'in order for there to be discrimination, there must be a differential impact'.<sup>260</sup>

Two particular issues would seem likely to arise under the new s 6(1)(c):

- defining the group of people with the disability of the aggrieved person; and
- the evidence required to establish the group is disadvantaged by the condition or requirement.

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<sup>255</sup> [2004] FMCA 915, [81]. See further 5.2.3(c) above.

<sup>256</sup> (2001) 163 FLR 99.

<sup>257</sup> In support of this interpretation of compliance, Lehane J referred to a line of cases including *Mandla v Dowell Lee* [1983] 2 AC 548; *Australian Public Service Association v Australian Trade Commission* [1988] EOC 92-228, 77,162; *Styles v Secretary, Department of Foreign Affairs & Trade* [1988] EOC 92-239, 77,238.

<sup>258</sup> [2000] FCA 1565, [17].

<sup>259</sup> Accordingly, for claims concerning actions prior to 5 August 2009, an applicant will need to identify a pool of persons without the disability with whom the aggrieved person can be compared. For information about the approach to indirect discrimination for incidents occurring prior to 5 August 2009, please refer to the archived version of *Federal Discrimination Law* at <<http://www.humanrights.gov.au/legal/FDL/archive.html>>.

<sup>260</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 9 [41-3].



**(i) Defining the group of people with the disability of the aggrieved person**

The need to identify the relevant 'disability' with some precision has been discussed above.<sup>261</sup>

It is likely to be particularly important in this context as a broad definition of a person's disability (for example 'visual impairment') may make proof of this element more difficult: it may require an aggrieved person to show that persons with a similar but less acute disability are also disadvantaged by the relevant requirement or condition. Such an approach would seem to be inconsistent with the protective purpose of the DDA.

**(ii) Evidence of disadvantage**

The nature of the evidence that an aggrieved person will need to adduce to prove that a requirement or condition 'has, or is likely to have, the effect of disadvantaging people with the disability' is likely to vary from case-to-case.

In the context of the *Sex Discrimination Act 1984* (Cth), it has been successfully argued that a requirement to work full-time is a condition, requirement or practice that has the effect of disadvantaging women. The courts have accepted, sometimes as a matter of judicial notice without any specific evidence, that this disadvantage stems from the fact that women are more likely to require part-time work to meet their family responsibilities.<sup>262</sup>

A similar approach was taken in relation to proof of the elements of the pre-2009 indirect discrimination provisions of the DDA. For example, in *Penhall-Jones v State of NSW*,<sup>263</sup> the applicant alleged that she had been indirectly discriminated against because her employer required her to attend formal and stressful interviews. Under the former indirect discrimination provisions, the applicant was required to show that a substantially higher proportion of people without her disability (which was adjustment disorder) could comply. Raphael FM rejected Ms Penhall-Jones' claim because she had not led any evidence of how other persons with her disability would have responded to such an interview, nor how persons without her disability would have responded. In reaching this conclusion his Honour did, however, note that he accepted

that there are occasions where one can take the evidence of one complainant as being typical of all members of the group. One person in a wheelchair who complained that she was unable to climb the stairs to the Opera House might be accepted as speaking for all persons in her position, but the very nature of the complaints made by Ms Penhall-Jones cries out for more particularisation of the group to which it is said she belongs. In the absence of such particularisation Ms Penhall-Jones cannot proceed with a claim of indirect discrimination.<sup>264</sup>

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<sup>261</sup> See *Qantas Airways Ltd v Gama* [2008] FCAFC 69 and the discussion at 5.2.1(a).

<sup>262</sup> See *Hickie v Hunt & Hunt* [1998] HREOCA 8, [6.17.10] (extract at (1998) EOC 92-910); *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [70].

<sup>263</sup> [2008] FMCA 832, [69].

<sup>264</sup> [2008] FMCA 832, [69].

In *Rawcliffe v Northern Sydney Central Coast Area Health Service*,<sup>265</sup> Smith FM noted that the authorities on the former s 6(a) of the DDA (requiring a comparison with people without the disability) ‘allow considerable flexibility’<sup>266</sup> on the identification of the relevant groups for comparison, including the application of ‘commonsense’<sup>267</sup> or ‘ordinary human experience of which I can take judicial notice’,<sup>268</sup> rather than necessarily requiring statistical or other such evidence.<sup>269</sup>

## (f) Reasonableness

Section 6(3) of the DDA provides a defence to a claim of indirect discrimination, where the condition or requirement is shown to be reasonable in the circumstances of the case. Section 6(4) of the DDA shifts the burden of proving ‘reasonableness’ onto the person who requires or proposes to require, the person with the disability to comply with the requirement or condition.

This is a change from the position prior to the 2009 amendments to the DDA<sup>270</sup> – previously an applicant needed to prove that the requirement or condition was *not* reasonable.

Placing the burden of proving reasonableness on the respondent is consistent with the approach taken in the *Sex Discrimination Act 1984* (Cth)<sup>271</sup> (‘SDA’) and the *Age Discrimination Act 2004* (Cth).<sup>272</sup>

However, unlike the SDA,<sup>273</sup> the DDA does not provide guidance on the matters to be taken into account in deciding whether the relevant requirement or condition is reasonable in the circumstances.<sup>274</sup> The DDA simply requires that reasonableness be assessed ‘having regard to the circumstances of the case’. It is clear that this requires all relevant circumstances, including the circumstances of the respondent, to be taken into account.<sup>275</sup>

In *Waters*, the Victorian Equal Opportunity Board at first instance had held that the question of whether the respondent’s scratch ticketing system was reasonable was to be assessed by having regard solely to the circumstances of the complainants.<sup>276</sup> In balancing the relevant considerations, the Board had therefore disregarded the financial and economic considerations advanced by

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<sup>265</sup> [2007] FMCA 931.

<sup>266</sup> [2007] FMCA 931, [84].

<sup>267</sup> [2007] FMCA 931, [87].

<sup>268</sup> [2007] FMCA 931, [86].

<sup>269</sup> Approving *Jordan v North Coast Area Health Service (No 2)* [2005] NSWADT 258.

<sup>270</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth)

<sup>271</sup> *Sex Discrimination Act 1984* (Cth), s7B.

<sup>272</sup> *Age Discrimination Act 2004* (Cth), s15(2).

<sup>273</sup> See s 7B of the SDA.

<sup>274</sup> See discussion of ‘reasonableness’ under the SDA at 4.3.3 above.

<sup>275</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 378-380.

<sup>276</sup> Earlier decisions of the Human Rights and Equal Opportunity Commission had also held that evidence adduced by a respondent in relation to financial hardship should not be considered relevant to determining the reasonableness or otherwise of a requirement or condition as such factors should be considered in the context of the defence of ‘unjustifiable hardship’: see, for example, *Scott v Telstra Corporation Ltd* (1995) EOC 92-917, 78,400; *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92-903, 77,450-51.

the respondent. On appeal, Phillips J rejected this approach, holding that 'reasonableness' was to be assessed by reference to all relevant factors, including the circumstances of the respondent. The majority of the High Court agreed with that approach.<sup>277</sup> For example, McHugh J held:

In a legal instrument, subject to a contrary intention, the term 'reasonable' is taken to mean reasonable in all the circumstances of the case. Nothing in the context of s 17(5)(c) indicates that the term should not be given its ordinary meaning.<sup>278</sup>

And further:

In reconsidering whether the imposition of the requirements or conditions was reasonable, the Board must examine all the circumstances of the case. This inquiry will necessarily include a consideration of evidence viewed from the point of view of the appellants [the applicants at first instance] and of the Corporation [the respondent at first instance].<sup>279</sup>

Whilst the decision in *Waters* involved a provision in the *Equal Opportunity Act 1984* (Vic), the broad approach taken to the issue of 'reasonableness' has also been applied in relation to the DDA.<sup>280</sup>

A comprehensive summary of the relevant principles in relation to the assessment of reasonableness in the context of former s 6(b) was provided in *CEO v Clarke*.<sup>281</sup> Relevant to the current terms of s 6, the Court held:

- (ii) The test of reasonableness is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the condition or requirement, on the other: *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, at 263, per Bowen CJ and Gummow J; *Waters v Public Transport Corporation*, at 395-396, per Dawson and Toohey JJ; at 383, per Deane J. Since the test is objective, the subjective preferences of the aggrieved person are not determinative, but may be relevant in assessing whether the requirement or condition is unreasonable: *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, at 82-83, per Lockhart J.
- (iii) The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience: *Styles*, at 263. It follows that the question is not whether the decision to impose the requirement or condition was correct, but whether it has been shown not to be objectively reasonable having regard to the circumstances of the case: *Australian Medical Council v Wilson* (1996) 68 FCR 46, at 61-62, per Heerey J; *Commonwealth Bank v HREOC*, at 112-113, per Sackville J.

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<sup>277</sup> (1991) 173 CLR 349, 365 (Mason CJ and Gaudron J), 383 (Deane J), 396-397 (Dawson and Toohey JJ), 408-411 (McHugh J).

<sup>278</sup> (1991) 173 CLR 349, 410.

<sup>279</sup> (1991) 173 CLR 349, 411.

<sup>280</sup> See, for example, *Sluggett v Human Rights & Equal Opportunity Commission* (2002) 123 FCR 561, 574 [46].

<sup>281</sup> (2004) 138 FCR 121.

- (iv) The Court must weigh all relevant factors. While these may differ according to the circumstances of each case, they will usually include the reasons advanced in favour of the requirement or condition, the nature and effect of the requirement or condition, the financial burden on the alleged discrimination [sic] of accommodating the needs of the aggrieved person and the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement condition: *Waters v Public Transport Corporation*, at 395, per Dawson and Toohey JJ (with whom Deane J agreed on this point, at 383-384). However, the fact that there is a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that a requirement or condition is unreasonable: *Commonwealth Bank v HREOC*, at 88, per Beaumont J; *State of Victoria v Schou* [2004] VSCA 71, at [26], per Phillips JA.<sup>282</sup>

**(i) Education cases**

The issue of 'reasonableness' has frequently arisen in the educational context.<sup>283</sup> For example, in *Hurst and Devlin v Education Queensland*,<sup>284</sup> the applicants alleged that the respondent imposed a requirement or condition that they receive their education in English (including in Signed English<sup>285</sup>) without the assistance of an Auslan<sup>286</sup> teacher or interpreter. In determining whether that requirement or condition was 'reasonable', Lander J followed the approach of Madgwick J in *Clarke* and stated that the 'question of reasonableness will always be considered in light of the objects of the Act'.<sup>287</sup> His Honour held that it was reasonable for Education Queensland not to have adopted a bilingual-bicultural program<sup>288</sup> in relation to the education of deaf students prior to 30 May 2002,<sup>289</sup> stating:

I am satisfied on the evidence...that Education Queensland has progressed cautiously but appropriately, towards the introduction of a bilingual-bicultural program and the use of Auslan as a method of communication for those programs.

It must be accepted that an education system cannot change its method of education without first inquiring into the benefits of the suggested changes and the manner in which those changes might be implemented.

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<sup>282</sup> (2004) 138 FCR 121, 145-146 [115] (Sackville and Stone JJ, with whom Tamberlin J agreed).

<sup>283</sup> See further 5.2.6(b) (Education Standards) below.

<sup>284</sup> [2005] FCA 405. For a discussion of the decision of Lander J, see Ben Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78-81.

<sup>285</sup> Signed English is the reproduction of English language into signs. It has the same syntax and grammar as English and as such, is not a language separate from English: [2005] FCA 405, [127]-[128]. Signing in English, however, refers to the use of Auslan signs in English word order: [2005] FCA 405, [129].

<sup>286</sup> Auslan is the native language of the deaf community in Australia. It is a visual-spatial language with its own complex grammatical and semantic system and does not have an oral or written component: [2005] FCA 405, [125]-[126].

<sup>287</sup> [2005] FCA 405, [74]-[75].

<sup>288</sup> A bilingual-bicultural approach to the education of the deaf recognises Auslan and Signed English as distinct languages and students are instructed in Auslan as a first language and learn Signed English as a second language: [2005] FCA 405, [466].

<sup>289</sup> [2005] FCA 405, [790].

It must be first satisfied that there are benefits in the suggested changes. It must be satisfied that it can implement those changes without disruption to those whom it is delivering its service.

It was appropriate, in my opinion, for Education Queensland to take the time that it did in considering the benefits which would be associated with bilingual-bicultural program and the use of Auslan.

I accept the respondent's argument that changes, as fundamental as those proposed in the bilingual-bicultural program, should be evolutionary rather than revolutionary. It is too dangerous to jettison a system of education and adopt a different system without being first sure that the adopted system is likely to offer increased benefits to the persons to whom the education is directed.<sup>290</sup>

However, Lander J found that 'Auslan will still be of assistance to those who are profoundly deaf even if delivered on a one-on-one basis',<sup>291</sup> though the Total Communication Policy adopted by the respondent did not allow for Auslan as a method of communication.<sup>292</sup> Consequently, (without making any findings about the reasonableness of the Total Communication Policy), his Honour held that it was unreasonable for the respondent not to have assessed the applicants' needs prior to 30 May 2002 to determine whether they should be instructed in English or in Auslan. Furthermore, his Honour held that if such an assessment had been undertaken, it would have established that 'it would have been of benefit to both of [the applicants] to have been instructed in Auslan rather than in English'.<sup>293</sup>

The first applicant (Hurst) successfully appealed the decision of Lander J to the Full Federal Court.<sup>294</sup> However, that appeal was only in relation to Lander J's finding that Hurst, unlike Devlin, was able to comply with the condition of being taught without the assistance of Auslan (discussed at 5.2.3(c)). The Court did not disturb or discuss Lander J's findings on the issue of reasonableness.

In *Hinchliffe v University of Sydney*<sup>295</sup> ('*Hinchliffe*'), Driver FM held that, with the exception of certain course material, the applicant could comply with the university's condition that she use the course materials provided to her. In relation to the occasional material which was not accessible, his Honour held that the availability of a disability services officer to deal with such occasional problems in reformatting course materials was sufficient and adequate and, accordingly, rendered the university's requirement reasonable.<sup>296</sup>

In *Travers* (see 5.2.3(d) above) Raphael FM considered a requirement or condition that students in a particular class utilise the toilet in another building, rather than a toilet outside the classroom. This was a requirement with which the applicant, a student with a disability that caused incontinence, could not

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<sup>290</sup> [2005] FCA 405, [781]-[785].

<sup>291</sup> [2005] FCA 405, [793].

<sup>292</sup> [2005] FCA 405, [794].

<sup>293</sup> [2005] FCA 405, [795]-[797].

<sup>294</sup> *Hurst v Queensland* (2006) 151 FCR 562. The then Human Rights and Equal Opportunity Commission was granted leave to intervene in these proceedings. The submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/hurst.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/hurst.html)>.

<sup>295</sup> (2004) 186 FLR 376.

<sup>296</sup> (2004) 186 FLR 376, 478 [122].

comply.<sup>297</sup> Raphael FM found the requirement or condition to be unreasonable, having considered the perspective of the applicant, the school and other students.

In *Minns*, the applicant complained about the application of a school's disciplinary policy to him (see 5.2.2(b) above). Raphael FM held that the high school disciplinary policy was reasonable in all of the circumstances. He found that the classes would not have been able to function if a student could not be removed for disruptive behaviour and other students would not be able to achieve their potential if most of the teacher's time was taken up handling that student.<sup>298</sup>

## **(ii) Employment cases**

The potentially broad scope of the considerations that are relevant to the question of 'reasonableness' has also been confirmed in the employment context. In *Daghlian*, the respondent's 'no chair' policy, which prohibited employees from using stools behind the retail counter, was found to impose a 'requirement or condition' that the applicant not be seated at the retail counter during her work hours.<sup>299</sup> The applicant had physical disabilities which limited her ability to stand for long periods.

In finding that the requirement or condition was not reasonable, Conti J considered a wide range of factors, including:

- health and safety issues (it was claimed by the respondent that the presence of stools created a danger of tripping for other staff);
- the needs of the applicant (identified in medical and ergonomic reports) to assist her to work satisfactorily and efficiently in the performance of her duties, notwithstanding her physical disabilities;
- the applicant's status as a competent and conscientious employee and a dutiful member of the counter staff;
- the desire of the respondent to create a 'new image' for its post shops; and
- the ability for the needs of the applicant to be accommodated through structural changes to the counter area.<sup>300</sup>

In *Trindall*, Driver FM accepted that the imposition of certain requirements were reasonable in light of the applicant's sickle cell trait, including the imposition of 'flexible and informal restrictions' and the requirement that the applicant provide a medical report to justify the lifting of certain work restrictions. However, his Honour held that it was unreasonable for the

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<sup>297</sup> See [5.2.3(d)] on the issue of the inability to comply with a requirement or condition.

<sup>298</sup> (2001) 163 FLR 99, [263].

<sup>299</sup> [2003] FCA 759, [110]-[111].

<sup>300</sup> [2003] FCA 759, [111].

respondent to require a *further* medical opinion before it would lift the relevant restrictions.<sup>301</sup>

In *Devers*, Marshall J found that the applicant had not proven<sup>302</sup> that it was unreasonable to require her to work without certain workplace adjustments. The applicant (who has profound deafness) worked as a disability support worker in a residential care facility operated by the respondent. The applicant complained, amongst other things, that she was not provided with flashing lights to alert her that someone was at the door and that she was required to attend training sessions and staff meetings without the use of a qualified Auslan interpreter.

In relation to the flashing lights, Marshall J took into account that the applicant was working approximately 15 hours per fortnight, that answering the door was incidental to the performance of her duties and that the respondent's policy was not to have staff members work alone at any time.<sup>303</sup>

In relation to the failure to provide interpreters for training sessions, Marshall J took into account the cost, that Ms Devers was a casual employee, that the respondent sought to ensure that information was conveyed to the applicant in other ways and that '[a]s a not for profit, charitable organisation, its primary obligation was the care of its clients, within its budget'.<sup>304</sup> In relation to the failure to provide interpreters for staff meetings, Marshall J also took into account the discrepancy between the applicant's income and the cost of interpreters and that her inability to comply with the requirement or condition did not cause her 'significant adverse consequences'.<sup>305</sup>

On appeal Ms Devers contended, amongst other things, that Marshall J erred by considering the amount of time that she was in the workplace as a factor relevant to assessing whether the requirement that she work without the adjustments in question was reasonable. The Full Federal Court agreed with Marshall J that this factor was relevant and stated:

It would be inappropriate to disregard completely the fact that the appellant was, in a relative sense, only an occasional presence in the workplace rather than a permanent employee. That factor would not justify discrimination but it is a factor which may be taken into account in assessing both the arguments the appellant advanced as to what she needed to perform her tasks and, as importantly, the reasonable balance which has to be struck when that issue is raised.<sup>306</sup>

### **(iii) Access to premises**

The reasonableness of implicit requirements or conditions associated with the accessibility of public premises and facilities arose for consideration in *Access*

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<sup>301</sup> [2005] FMCA 2, [179]-[182].

<sup>302</sup> Note that since this decision, the onus of proof in relation to the reasonableness of a requirement or condition has shifted to the respondent: see DDA s 6(4). The DDA also now contains an explicit recognition of the need to make reasonable adjustments: ss 5(2), 6(2).

<sup>303</sup> [2009] FCA 1392, [55].

<sup>304</sup> [2009] FCA 1392, [80]-[83].

<sup>305</sup> [2009] FCA 1392, [104]-[105].

<sup>306</sup> *Devers v Kindilan Society* [2010] FCAFC 72 [87].

for All Alliance (see 5.2.3(c) above). In that case, members of the applicant organisation alleged that certain public premises were inaccessible to people with disabilities. Bauman FM found that the conditions for access to the community centre and picnic tables were reasonable in all the circumstances.<sup>307</sup> However, his Honour found that the requirement or condition relating to the public toilets, namely that the wash basins were outside the toilet and not concealed from public view, was not reasonable, on the basis that:

some persons with disabilities have personal hygiene difficulties and some are required to undertake a careful toileting regime...which reasonably requires use of wash basins out of public view and in private.<sup>308</sup>

His Honour went on to find that justifications for the placement of the basins outside the toilets advanced by the respondent were 'offset by the community expectation that persons with a disability should be entitled to complete a toileting regime in private'.<sup>309</sup> Suggested alternatives to being able to use the wash basins as part of a toileting regime (such as carrying 'Wet Ones', sponges, clean clothes and paper towels) were rejected by his Honour as 'inadequate'.<sup>310</sup>

Baumann FM also considered the relevance of the Building Code of Australia ('BCA') and the Australian Standards. His Honour accepted the submission of the Acting Disability Discrimination Commissioner, appearing as amicus curiae, that 'as standards developed by technical experts in building, design and construction, the BCA and the Australian Standards are relevant and persuasive in determining...whether or not a requirement or condition is "reasonable"'.<sup>311</sup> His Honour accepted that the Australian Standards and the BCA were 'a minimum requirement which may not be enough, depending on the context of the case, to meet the legislative intent and objects of the DDA'.<sup>312</sup> In relation to the toilet facilities, Baumann FM found that the lack of any requirement under the Australian Standards or the BCA to provide an internal wash basin did not alter his finding as to unreasonableness.<sup>313</sup>

#### **(iv) Goods and services**

The issue of reasonableness in relation to goods and services (as well as access to premises) arose in *Forest*.<sup>314</sup> The respondent in that case argued that it was reasonable to prohibit assistance animals, other than guide and hearing dogs and other animals approved in advance, from the relevant medical premises (a hospital and a dental clinic) on the grounds of health and

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<sup>307</sup> [2004] FMCA 915, [76]-[78] (in relation to the community centre), [79-80] (in relation to the picnic tables).

<sup>308</sup> [2004] FMCA 915, [81].

<sup>309</sup> [2004] FMCA 915, [81].

<sup>310</sup> [2004] FMCA 915, [81].

<sup>311</sup> [2004] FMCA 915, [13]-[14]. The submissions of the Acting Disability Discrimination Commissioner are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/hervey.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/hervey.html)>.

<sup>312</sup> [2004] FMCA 915, [13]-[14].

<sup>313</sup> [2004] FMCA 915, [81].

<sup>314</sup> (2007) 161 FCR 152, reversed on appeal in *Queensland (Queensland Health) v Forest* [2008] FCAFC 96.



safety and infection control.<sup>315</sup> At first instance, Collier J rejected this argument, noting the beneficial objects of the DDA and the fact that s 9 does not distinguish between guide and hearing dogs and other types of assistance animals. Her Honour further held that the respondent's policy on admission of animals was vague, lacking in objective criteria and effectively gave complete discretion to the respondent to determine whether the relevant animal was an assistance animal for the purposes of the DDA.<sup>316</sup>

On appeal,<sup>317</sup> however, the Full Federal Court disagreed. Spender and Emmett JJ noted that there was no suggestion that the policy relating to admission of animals would be exercised in a capricious or arbitrary fashion.<sup>318</sup> Their Honours concluded:

The fact that a judgment was required is not of itself unreasonable. There was nothing unreasonable, in the circumstances of this case, in requiring the approval of the management of the hospital or the health centre, as the case may be, before a dog was permitted entry into the relevant facility.<sup>319</sup>

Similarly, Black CJ observed in obiter that

it is not per se unreasonable for a health authority to administer objective criteria to protect those to whom it has a duty of care.<sup>320</sup>

For a discussion of the provisions of the DDA relating to assistance animals, see 5.2.5(c) below.

## 5.2.4 Reasonable adjustments

From 5 August 2009, the DDA creates an explicit duty to make reasonable adjustments for people with disability.

The duty is embedded into the definitions of both direct (s 5(2)) and indirect (s 6(2)) discrimination. The Explanatory Memorandum to the amending legislation states:

Until relatively recently, the general view, including in the case law, was that the Disability Discrimination Act impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination – subject to the defence of unjustifiable hardship. This view was supported by the Explanatory Memorandum of the Disability Discrimination Act and Second Reading Speech delivered when the Disability Discrimination Act was first enacted.<sup>321</sup>

The introduction of a duty to make reasonable adjustment is also consistent with the requirement to make 'reasonable accommodation' in the Disabilities Convention.<sup>322</sup>

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<sup>315</sup> (2007) 161 FCR 152, 171, [72].

<sup>316</sup> (2007) 161 FCR 152, 172-174, [74]-[84].

<sup>317</sup> *Queensland (Queensland Health) v Forest* [2008] FCAFC 96.

<sup>318</sup> [2008] FCAFC 96, [126].

<sup>319</sup> [2008] FCAFC 96, [126].

<sup>320</sup> [2008] FCAFC 96, [10].

<sup>321</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [38].

<sup>322</sup> See Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41-7].

In the educational context, the *Disability Standards for Education 2005* ('Education Standards') also impose a positive obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities (see discussion under 5.2.6(b)).

**(a) 'Reasonable adjustments'**

'Reasonable adjustment' is defined in subsection 4(1) as follows:

[a]n adjustment to be made by a person is a *reasonable adjustment* unless making the adjustment would impose an unjustifiable hardship on the person.

Accordingly, 'reasonable adjustments' are all adjustments that do not impose an unjustifiable hardship on the person making the adjustments.<sup>323</sup>

**(b) Direct discrimination under s 5(2)**

Section 5(2) provides:

5(2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

The Explanatory Memorandum states that:

New subsection 5(2) provides that a person is discriminating against another person if he or she fails to make, or proposes not to make, reasonable adjustments for the person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability in circumstances that are not materially different.<sup>324</sup>

As discussed above, new s 5(3) provides that, circumstances are not *materially different* merely because of the fact that the person with the disability requires adjustments to be made.

**(c) Indirect discrimination under s 6 (2)**

New s 6(2) provides:

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<sup>323</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [36].

<sup>324</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8.

- 6(2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

The Explanatory Memorandum to the amending legislation states that

a person does not discriminate if the person makes all reasonable adjustments to eliminate the disadvantage or minimise it to the greatest extent possible.

...the question of whether the person has made 'all reasonable adjustments' takes into account the circumstances of the parties involved, including what is or is not possible *for the person making the adjustments*. On the other hand, the question of what adjustments can be made to 'minimise *as much as possible* the disadvantageous effect of the requirement or condition' requires a consideration to be made of what adjustments are possible to be made *generally* – not what is possible *for that particular person*.<sup>325</sup>

## 5.2.5 Associates, carers, disability aids and assistance animals

### (a) Associates

The DDA protects the associates of people with disability from discrimination. Section 7 of the DDA extends all of the DDA's provisions to people who have an associate with a disability.<sup>326</sup> It provides:

- (1) This Act applies in relation to a person who has an associate with a disability in the same way as it applies in relation to a person with the disability

Example: It is unlawful, under section 15, for an employer to discriminate against an employee on the grounds of a disability of any of the employee's associates.

- (2) For the purposes of subsection (1), but not without limiting that subsection, this Act has effect in relation to a person who has an associate with a disability as if:

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<sup>325</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41-8] -10 [41-9] (emphasis in original).

<sup>326</sup> Section 7 was inserted by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17. Prior to the commencement of these amendments on 5 August 2009, individual sections of the DDA expressly protected against discrimination on the ground of the disability of a person's associates.

- (a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has an associate with the disability; and
  - (b) each other reference to a disability were a reference to the disability of the associate.
- (3) This section does not apply to section 53 or 54 (combat duties) and peacekeeping services) or subsection 54A(2) or (3) (assistance animals).<sup>[327]</sup>

Note: The combined effect of sections 7 and 8 is that this Act applies in relation to a person who has an associate who has a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to a person with a disability.

## **(b) Disability aids, carers, assistants and assistance animals**

The DDA also prohibits discrimination against people who have a carer, assistant, assistance animal or disability aid.<sup>328</sup>

The DDA was amended in 2009<sup>329</sup> to clarify the law following the decision of the Full Federal Court in *Queensland v Forest*<sup>330</sup> (*Forest*). In that case, Spender and Emmett JJ held that former ss 7 to 9 of the DDA were concerned only with defining certain circumstances of discrimination, but an applicant must still establish that such discrimination was on the ground of their disability. Accordingly, for acts of alleged discrimination occurring prior to 5 August 2009 (the date of commencement for the 2009 amendments), before a finding of unlawful conduct under Part 2 of the DDA can be made by reason of one person discriminating against another within ss 7, 8 or 9, it is also necessary to make a finding that the discrimination occurs on the ground of disability.<sup>331</sup>

Section 8 now provides:

- (1) This Act applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability
  - Example: For the purposes of section 5 (direct discrimination), circumstances are not materially different because of the fact that a person with a disability require adjustments for the person's carer, assistant, assistance animal or disability aid (see subsection 5(3)).
- (2) For the purposes of subsection (1), but without limiting that subsection, this Act has effect in relation to a person with a disability who has a carer, assistant, assistance animal or disability aid as if:

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<sup>327</sup> Sections 54A(2) and (3) are provisions relating to the control of assistance animals.

<sup>328</sup> See s 9 of the DDA for the definition of these different terms.

<sup>329</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17.

<sup>330</sup> [2008] FCAFC 96; Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 [45]-[46].

<sup>331</sup> For analysis of the law prior to 5 August 2009 see: <[www.humanrights.gov.au/legal/FDL/archive.html](http://www.humanrights.gov.au/legal/FDL/archive.html)>.

- (a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has the carer, assistant animal or aid; and
  - (b) each other reference to a disability were a reference to the carer, assistant, animal or aid.
- (3) This section does not apply to section 48 (infectious diseases) or section 54A (exemptions in relation to assistance animals)

Note: The combined effect of sections 7 and 8 is that this Act applies in relation to a person who has an associate who has a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to a person with a disability.

New section 8 clarifies that the discrimination provisions in Part 2 of the DDA apply equally to having an aid, assistant, or assistant animal by providing that the types of discrimination in s 7 and s 8 are discrimination on the ground of disability.<sup>332</sup> Therefore, for acts of alleged discrimination occurring after 5 August 2009, it will not be necessary to make the additional finding that the discrimination under new s 8 occurs on the ground of disability.

### **(c) Special provisions about assistance animals**

The DDA includes special provisions about the rights and responsibilities of both service providers and people who have assistance animals. The 2009 amendments to the DDA significantly changed the operation of the DDA in relation to assistance animals.<sup>333</sup>

#### **(i) What is an 'assistance animal'?**

Section 9 (2) defines an assistance animal as a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - (i) to assist a person with a disability to alleviate the effect of the disability; and
  - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Note: For exemptions from Part 2 for discrimination in relation to assistance animals, see section 54A.

The Explanatory Memorandum to the 2009 amendments to the DDA states:

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<sup>332</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 11, [46].

<sup>333</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, items 17, 76.

The purpose of this amendment is to provide greater certainty to both service providers and people with assistance animals. The third limb of the definition (paragraph 9(2)(c)) is designed to ensure that people with disability who may not live in a State or Territory that has a relevant accreditation scheme, or who may not have access to a recognised assistance animal trainer continue to be protected under the Disability Discrimination Act (if they are able to demonstrate the requirements of the relevant sections).<sup>334</sup>

**(ii) Guide and hearing dogs**

Early cases decided by the then Human Rights and Equal Opportunity Commission in relation to assistance animals involved persons with visual or hearing disabilities and their officially trained guide or hearing dogs. For example, in *Jennings v Lee*,<sup>335</sup> the respondent was found to have discriminated against the applicant, who has a visual impairment, by refusing to permit her to be accompanied by her guide dog when she ate in his restaurant.

Similar findings of unlawful discrimination were made in the context of the refusal to provide accommodation in a caravan park to an applicant with a hearing impairment because he was accompanied by his hearing dog<sup>336</sup> and the refusal to allow an applicant with a visual impairment to enter a store because she was accompanied by her guide dog.<sup>337</sup>

**(iii) Other types of assistance animals**

Section 9(2) makes explicit that an assistance animal can be either a dog or 'other animal'. This confirms the observation of Collier J about former s 9(1)(f) in *Forest* that 'there is no pre-requisite as to the type of animals that can be assistance animals'.<sup>338</sup> The section also confirms the obiter comments of Spender and Emmett in that case on appeal:

The question is not whether the dogs do in fact assist Mr Forest to alleviate the effects of a disability but whether they were trained with that purpose or object in mind.<sup>339</sup>

In *Ondrich v Kookaburra Park Eco Village*,<sup>340</sup> Burnett FM concluded that the evidence did not demonstrate that there was any relationship between the training of the dog, the skills acquired from that training and the alleviation of the effects of the applicant's disability. Burnett FM concluded the applicant did not possess an animal trained to assist her to alleviate the effects of her disability as required under former s 9(1)(f).

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<sup>334</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 11 [50].

<sup>335</sup> [1996] HREOCA 29.

<sup>336</sup> *Brown v Birss Nominees Pty Ltd* [1997] HREOCA 54.

<sup>337</sup> *Grovenor v Eldridge* [1999] HREOCA 3 (extract at (1999) EOC 92-993).

<sup>338</sup> (2007) 161 FCR 152, 175, [94].

<sup>339</sup> [2008] FCAFC 96, [106].

<sup>340</sup> [2009] FMCA 260, [111]-[125].

**(iv) Assistance animal exemptions**

The DDA provides for specific exemptions relating to assistance animals. The Explanatory Memorandum to the 2009 amendments to the DDA states that new s 54A provides ‘certainty for both people with assistance animals and service providers by clarifying the entitlements and obligations of both parties’.<sup>341</sup>

New s 54A provides that it is not unlawful:

- to request or require that an assistance animal remain under the control of the person with the disability or another person on behalf of the person with the disability (s 54A(2)).
- for a person to discriminate against a person with a disability on the ground of the disability if:
  - they reasonably suspect that the assistance animal has an infectious disease; and
  - the discrimination is reasonably necessary to protect public health or the health of other animals (s 54A(4)).
- for a person to request the person with the disability to produce evidence that an animal:
  - is an ‘assistance animal’; or
  - is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place (s 54A(5)).
- for a person to discriminate on the ground that a person has an assistance animal if the person with the assistance animal fails to produce evidence that the animal:
  - is an assistance animal; or
  - is trained to meet standards of hygiene and behaviour appropriate for an animal in a public place (s 54A(6)).

Section 54A(3) provides that for the purposes of subsection (2), an assistance animal may be under the control of a person even if it is not under the person’s direct physical control.

The provisions relating to assistance animals do not affect the liability of a person for damage to property caused by an assistance animal.<sup>342</sup>

## **5.2.6 Disability standards**

Section 31(1) of the DDA provides that the Minister (the Attorney-General) may formulate ‘disability standards’ in relation to ‘any area in which it is

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<sup>341</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 19, [111].

<sup>342</sup> See DDA, s 54A(7).

unlawful under [Part 2] for a person to discriminate against another person on the ground of a disability of the other person'.<sup>343</sup>

Section 31(2)(a) provides that, without limiting s 31(1), a disability standard may deal with:

- (i) reasonable adjustments;
- (ii) strategies and programs to prevent harassment or victimisation of persons with a disability;
- (iii) unjustifiable hardship;
- (iv) exemptions from the disability standard, including the power (if any) of the Commission to grant such exemptions.

Generally, the standards will prevail over State and Territory legislation,<sup>344</sup> however s 31(2)(b) also provides that a disability standard may provide 'that the disability standard, in whole or in part, is or is not intended to affect the operation of a law of a State or Territory'.

It is unlawful for a person to contravene a disability standard.<sup>345</sup> The exemption provisions (Part II Division 5) generally do not apply in relation to a disability standard.<sup>346</sup> However, if a person acts in accordance with a disability standard the unlawful discrimination provisions in Part II do not apply to the person's act.<sup>347</sup>

## (a) Transport Standards

The *Disability Standards for Accessible Public Transport 2002* ('the Transport Standards') were formulated under s 31 of the DDA and came into effect on 23 October 2002. The Transport Standards apply to operators and providers of public transport services, and set out requirements for accessibility of the premises, conveyances and infrastructure that are used to provide those services.<sup>348</sup> The application and operation of the Transport Standards is yet to be squarely considered by the courts at the date of publication.

However, brief mention of the Transport Standards was made in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*.<sup>349</sup> The applicant, a

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<sup>343</sup> Note that this provides a more comprehensive power to make standards than previously existed under the DDA prior to the 2009 amendments (made by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 62).. Prior to these changes, s 31 limited the power of the Minister to make standards with respect to specific areas such as employment and education.

<sup>344</sup> See s 13(3A), which provides that s 13(3) does not apply in relation to Division 2A of Part 2 (Disability standards). Section 13(3) provides that the DDA is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the DDA.

<sup>345</sup> Section 32.

<sup>346</sup> Section 33.

<sup>347</sup> Section 34. Note, however, that a Disability Standard on one of the general topics on which standards can be made under the DDA - public transport, access to premises, education, employment, or administration of Commonwealth laws and programs - will not necessarily provide a complete code which displaces all application of the existing DDA provisions on that subject. How far it displaces the existing DDA provisions will depend on the terms of the particular standard. See further: <[http://www.humanrights.gov.au/disability\\_rights/faq/standards.html#gap](http://www.humanrights.gov.au/disability_rights/faq/standards.html#gap)>.

<sup>348</sup> See further: <[http://www.ag.gov.au/www/agd/nfs/Page?Humanrightsandanti-discrimination\\_Disabilitystandardsforaccessiblepublictransport](http://www.ag.gov.au/www/agd/nfs/Page?Humanrightsandanti-discrimination_Disabilitystandardsforaccessiblepublictransport)>.

<sup>349</sup> (2007) 162 FCR 313.



disability rights organisation, alleged that the respondent council had built or substantially upgraded a number of bus stops since the commencement of the Transport Standards which did not comply with those standards.

The application was summarily dismissed by Collier J on the basis that the applicant, as an incorporated association, was not itself 'aggrieved' by the alleged non-compliance with the Transport Standards and therefore lacked standing to commence the action.<sup>350</sup> However, her Honour did accept that individual members of the applicant organisation may have had standing to bring proceedings in relation to the same facts.<sup>351</sup>

The respondent Council had also sought to have the matter summarily dismissed on a separate ground relating to the 'equivalent access' provisions under the Transport Standards.<sup>352</sup> The Council claimed that no individual instance of discrimination had been alleged and therefore the applicant had not proven that the respondent had failed to provide equivalent access to an individual who could not negotiate the relevant bus stops by reason of the Council's failure to comply with the Transport Standards. Although unnecessary to decide this issue, Collier J made the following obiter comments:

I do not accept the submission of the respondent that the applicant's claim should be dismissed unless the applicant proves that the respondent has failed to provide equivalent access to an individual, who cannot negotiate the public transport infrastructure by reason of a failure of the respondent to comply with the Standards. In my view, as submitted by the applicant, the provisions in the Disability Standards as to equivalent access go to conduct which may be raised in defence of alleged failure of the respondent to comply with the Disability Standards.<sup>353</sup>

However, her Honour did not elaborate further on the application of the Transport Standards more generally.

In *Killeen v Combined Communications Network Pty Ltd*<sup>354</sup> the interpretation of "allocated space" in sections 1.11, 9.1 and 9.3 of the Transport Standards was considered in regard to wheelchair accessible taxis. The applicant argued that these sections required an "allocated space" be a three dimensional space for a single wheelchair without any intrusions, being 800mm by 1300mm horizontally and 1410mm high throughout. It was argued that the requirement in s 9.3 as to "minimum headroom" of 1410mm required that the height must be maintained throughout the entire "allocated space" so as to form a 'rectangular prism'.

Edmonds J did not agree. His Honour stated that whilst s 9.1 requires a clear floor space with a minimum measurement of 800mm by 1300mm, the reference to 'clear' is a reference to clear of objects encroaching at ground level. Edmonds J held that the reference in s 9.3 to "minimum headroom" refers to the height between floor and ceiling space in those parts of the

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<sup>350</sup> (2007) 162 FCR 313, 331-335 [52]-[69]. See below discussion at 6.2.1.

<sup>351</sup> (2007) 162 FCR 313, 335 [69].

<sup>352</sup> Transport Standards ss 1.16, 33.3-33.5.

<sup>353</sup> (2007) 162 FCR 313, 335 [73].

<sup>354</sup> [2011] FCA 27.

vertical plane through which the head and shoulders of the wheelchair occupant will pass or stand when accessing the taxi. It does not require the height to be “not less than” 1410mm in all parts of the vertical plane.

## **(b) Education Standards**

The *Disability Standards for Education 2005* ('Education Standards'), also formulated under s 31 of the DDA, came into effect on 18 August 2005. The purpose of the Education Standards is to 'clarify, and make more explicit, the obligations of education and training service providers under the DDA and the rights of people with disabilities in relation education and training'.<sup>355</sup>

The Education Standards apply to 'education providers', defined to include:<sup>356</sup>

- educational institutions, meaning a school, college, university or other institution at which education or training is provided;
- persons or bodies administering an educational institution; and
- organisations whose purpose is to develop or accredit curricula or training courses used by other education providers.

The above categories include Commonwealth, State and Territory governments and agencies, as well as private organisations and individuals.<sup>357</sup>

The Education Standards cover the following areas relevant to education:

- enrolment;
- participation;
- curriculum development, accreditation and delivery;
- student support services; and
- elimination of harassment and victimisation.

Perhaps the most significant feature of the Education Standards is the introduction of a positive obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities.<sup>358</sup> The Standards also impose an obligation on education providers to consult with affected students or their associates in relation to such adjustments.<sup>359</sup>

In relation to harassment and victimisation, for example, part 8 of the Education Standards imposes a positive obligation on education providers to

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<sup>355</sup> *Disability Standards for Education 2005 – Guidance Notes*, p 1.

<sup>356</sup> Education Standards, s 2.1.

<sup>357</sup> *Disability Standards for Education 2005 – Guidance Notes*, p 1. A detailed list of examples of the types of education providers subject to the Education Standards appears as Note 1 to s 1.5 of the Standards.

<sup>358</sup> See, generally, Education Standards, Part 3. The obligation to provide reasonable adjustments arises from ss 4.2(3)(c), 5.2(2)(c), 6.2(2)(c), 7.2(5)(c) and 7.2(6)(c).

<sup>359</sup> See, generally, Education Standards, s 3.5.

develop and implement strategies and programs to prevent harassment or victimisation of a student with a disability, or a student who has an associate with a disability, in relation to the disability.<sup>360</sup>

Education providers must also take 'reasonable steps' to ensure that its staff and students are informed about the prohibition against harassment and victimisation, as well as the appropriate action to be taken if it occurs and the complaint mechanisms available.<sup>361</sup> The Standards also provide guidance on the types of measures that education providers should implement in order to fulfil their obligations in relation to victimisation and harassment.<sup>362</sup>

A number of exceptions to the Standards are provided in Part 10. Most importantly, education providers are not required to comply with the Standards to the extent that compliance would impose 'unjustifiable hardship'.<sup>363</sup>

At the time of publication, the application of the Education Standards had not yet been considered by the courts.

### **(c) Proposed access to premises standards**

The Australian Building Codes Board, along with disability advocates, design professionals, and members of Government and the property industry have been preparing a new disability standard pursuant to s 31 of the DDA in relation to access to premises (Premises Standards). The proposed Premises Standards will include an Access Code which will detail design and construction requirements necessary to achieve compliance with the DDA in relation to access to buildings.<sup>364</sup> Once the Premises Standards are finalised the intention is that the Australian Building Codes Board will revise relevant parts of the Building Code of Australia (BCA) to ensure consistency with the Access Code within the Premises Standards.

The Premises Standards will commence on 1 May 2011, in line with the adoption of the Building Code of Australia in each State and Territory. This will allow States and Territories time to adopt the Premises Standards within their building law frameworks.

## **5.2.7 Harassment**

Division 3 of Part 2 of the DDA contains separate provisions that make it unlawful to 'harass' a person with a disability (or an associate of a person with a disability) in relation to that disability. For example, s 35(1) provides:

- (1) It is unlawful for a person to harass another person who:

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<sup>360</sup> Education Standards, s 8.3(1).

<sup>361</sup> Education Standards, s 8.3(2).

<sup>362</sup> Education Standards, s 8.5.

<sup>363</sup> Education Standards, s 10.1, 10.2. The meaning of 'unjustifiable hardship', in the context of the DDA, is considered further at 5.5 below.

<sup>364</sup> A copy of the draft Access Code is available at:

<<http://www.abcb.gov.au/index.cfm?objectid=DDA9AB21-92E3-61E9-F0BC5802DAFDF14E>>. The Regulatory Impact Statement in relation to the proposed disability standard and revised building code is available at: <<http://www.abcb.gov.au/index.cfm?objectid=DA16DEA7-9D69-9836-2175127D975F8D70>>.

- (a) is an employee of that person; and
  - (b) has a disability;
- in relation to the disability.

The harassment provisions are limited to the following areas of public life:

- employment;<sup>365</sup>
- education;<sup>366</sup> and
- the provision of goods, services and facilities.<sup>367</sup>

'Harass' is not defined in the DDA. In *McCormack v Commonwealth*,<sup>368</sup> ('*McCormack*') Mowbray FM adopted the following definition from the Macquarie Dictionary:

*Harass* 1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc.<sup>369</sup>

In *Penhall-Jones v State of NSW*,<sup>370</sup> Raphael FM concluded that the little authority that there is on what constitutes 'harassment' under s 35(1) identifies it as something which is repetitious or occurs on more than one occasion.<sup>371</sup>

In relation to the meaning of the phrase 'in relation to the disability', his Honour applied the following statement of McHugh J in *O'Grady v The Northern Queensland Company Ltd*:

The prepositional phrase 'in relation to' is indefinite. But, subject to any contrary indication derived from its context or drafting history, it requires no more than a relationship, whether direct or indirect, between two subject matters.<sup>372</sup>

On the basis of these authorities, Simpson FM concluded that for a finding of harassment to be made out, an applicant must not only prove on the balance of probabilities that disparaging or other comments have been made about him/her, but also that the disparaging comments were made in relation to the applicant's disability and to the applicant personally.<sup>373</sup>

In *King v Gosewisch*,<sup>374</sup> the applicants alleged that they were subjected to disability harassment by several attendees of a public meeting when they advocated for disability rights. The alleged harassment was also said to be linked to the delay in the starting time of the meeting due to the need to transfer the meeting to the ground floor to accommodate the applicants who used wheelchairs.

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<sup>365</sup> Sections 35 and 36.

<sup>366</sup> Sections 37 and 38.

<sup>367</sup> Sections 39 and 40.

<sup>368</sup> [2007] FMCA 1245.

<sup>369</sup> [2007] FMCA 1245, [75].

<sup>370</sup> [2008] FMCA 832.

<sup>371</sup> [2008] FMCA 832, [39].

<sup>372</sup> [2007] FMCA 1245, [73], quoting *O'Grady v The Northern Queensland Company Ltd* (1990) 169 CLR 356, 376 (McHugh J).

<sup>373</sup> *Orlowski v Sunrise Co-operative Housing Inc* [2009] FMCA 31, [21].

<sup>374</sup> [2008] FMCA 1221.

The court accepted that the applicants were probably subjected to hostile remarks as alleged.<sup>375</sup> However, the court did not accept that the remarks were based on the applicants' disability or even the fact that the meeting had been transferred to the ground floor to accommodate them.<sup>376</sup> Rather, the harassing comments were held to have been motivated by other factors, such as the behaviour of the applicants during the meeting and a perception that the meeting was intended for local residents and the applicants had dominated the meeting for their own purposes.<sup>377</sup> For example, the court observed:

Rightly or wrongly, some of the members and the public regarded the behaviour and intervention in the meeting of the Applicants as disruptive. Political type public gatherings often engender robust sharing of views and comments with asides that can be, either directly or indirectly, focused on personalities rather than issues.

As the Applicants during the meeting continued to advocate for an exchange of views with candidates about their case of interest, namely access issues for the disabled across the city, some of the public became heated and disrespectful. However, those remarks were, in my view, in relation to the perceived behaviour of the Applicants in the meeting, not 'in relation to the disability.' In those circumstances, the remarks do not, in my view, constitute harassment within the meaning of ss 39 and 40.<sup>378</sup>

The relationship between harassment and discrimination is yet to have received much judicial consideration. There is certainly considerable overlap between these two concepts, given that harassment of a person with a disability in relation to that disability will typically also constitute less favourable treatment because of that disability for the purposes of establishing direct discrimination. Indeed, the sub-heading of Division 3 of Part 2 is entitled 'Discrimination involving harassment', which suggests that harassment is to be regarded as a discrete kind of discrimination, albeit with separate statutory force.

However, there may also be circumstances in which the discrimination and harassment provisions operate independently. In *McDonald v Hospital Superannuation Board*,<sup>379</sup> for example, Commissioner Johnston accepted that one employee had made disparaging comments to another employee in relation to the applicant's disability. The Commissioner held that the relevant comments could not amount to harassment, as they had not been made to the applicant. However, he held that that the comments amounted to discrimination, on the basis that:

To address a derogatory comment to a fellow worker about aspects of another worker by reference to a disability of the latter, and thereby to lower the dignity and regard of other persons toward that worker is to treat the latter differentially.<sup>380</sup>

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<sup>375</sup> [2008] FMCA 1221 [97].

<sup>376</sup> [2008] FMCA 1221 [98].

<sup>377</sup> [2008] FMCA 1221 [98].

<sup>378</sup> [2008] FMCA 1221 [105].

<sup>379</sup> [1999] HREOCA 13 (extract at (1999) EOC 93-025).

<sup>380</sup> [1999] HREOCA 13 (extract at (1999) EOC 93-025).

Commissioner Johnston went on to accept that certain other disparaging comments, which had been made in the presence of the applicant, did amount to harassment.<sup>381</sup>

## **5.3 Areas of Discrimination**

### **5.3.1 Employment (s 15)**

Section 15 of the DDA deals with discrimination in employment, as follows:

#### **15 Discrimination in employment**

- (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:
  - (a) in the arrangements made for the purpose of determining who should be offered employment; or
  - (b) in determining who should be offered employment; or
  - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:
  - (a) in the terms or conditions of employment that the employer affords the employee; or
  - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
  - (c) by dismissing the employee; or
  - (d) by subjecting the employee to any other detriment.
- (3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

This section considers the following issues:

- (a) the meaning of 'employment';
- (b) the meaning of 'arrangements made for the purposes of determining who should be offered employment';
- (c) the meaning of 'benefits associated with employment' and 'any other detriment'; and
- (d) the 'inherent requirements' defence (s 21A).

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<sup>381</sup> [1999] HREOCA 13 (extract at (1999) EOC 93-025).

## (a) Meaning of 'employment'

The issue of whether a priest was in the 'employment' of a church for the purposes of s 15 was considered in *Ryan v Presbytery of Wide Bay Sunshine Coast*.<sup>382</sup> The applicant had been forced to resign from a position as Minister with the respondent Church. The nature of that 'resignation' was a matter of dispute and followed the respondent 'severing the pastoral tie' with, or 'demonstrating', the applicant.

Baumann FM considered an application to allow an extension of time for the commencement of proceedings pursuant to s 46PO(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the AHRC Act). In dismissing the application, Baumann FM considered the prospects of success of the application, including whether or not the applicant and respondent were in a relationship of employer and employee for the purposes of s 15 of the DDA.

Based on common law authorities, Baumann FM found that the applicant would have 'some difficulty in establishing, as a matter of law, that he was an employee of the Church at the time'. This was because the relationship with the church was 'a religious one, based on consensual compact to which the parties were bound by their shared faith, based on spiritual and religious ideas, and not based on common law contract'.<sup>383</sup>

In *Zoltaszek v Downer EDI Engineering Pty Ltd (No.2)*<sup>384</sup> Mr Zoltaszek argued that he was an employee of Downer within the meaning of s 15 of the DDA. Mr Zoltaszek was the sole director and shareholder of Impowest Pty Ltd. Mr Zoltaszek worked for Downer under an agreement between Impowest and Downer. Mr Zoltaszek contended that his activity was 'entirely controlled' by Downer and that from the beginning of his engagement he was always 'treated as [a] person' in documents in relation to work issued by Downer and that Impowest was 'not seriously treated as a company'.<sup>385</sup>

Barnes FM considered the tests set out in *Stevens v Brodribb Sawmilling Company Proprietary Limited*<sup>386</sup> and *Hollis v Vabu Pty Limited*<sup>387</sup> for assessing the distinction between an independent contractor and an employee. Barnes FM concluded that Mr Zoltaszek was an employee of Impowest and Impowest was an independent contractor providing the services of Mr Zoltaszek as a contract worker to Downer.<sup>388</sup> On this basis, Barnes FM held that s 15 of the DDA had no application to the proceedings. However, Barnes FM did

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<sup>382</sup> [2001] FMCA 12.

<sup>383</sup> [2001] FMCA 12, [16]-[17]. Baumann FM cited with approval *Greek Orthodox Community of South Australia Inc v Ermogenous* (2000) 77 SASR 523, which had adopted a decision of Wright J, President of the Industrial Relations Commission of New South Wales, in *Knowles v Anglican Church Property Trust, Diocese of Bathurst* [1999] 89 IR 47, a case of alleged unfair dismissal by a priest of the Anglican church.

<sup>384</sup> [2010] FMCA 938.

<sup>385</sup> *Ibid* [42].

<sup>386</sup> (1986) 160 CLR 16

<sup>387</sup> (2001) 207 CLE 21.

<sup>388</sup> [2010] FMCA 938 [85].

consider Mr Zoltaszek to be a contract worker under s 17 of the DDA. These findings were upheld by the Federal Court on appeal.<sup>389</sup>

**(b) 'Arrangements made for the purposes of determining who should be offered employment'**

Section 15(1)(a) prohibits discrimination 'in the arrangements made for the purposes of determining who should be offered employment'.

In *Y v Human Rights & Equal Opportunity Commission*,<sup>390</sup> the applicant complained of disability discrimination after having been unsuccessful in his application for a job. The applicant sought to characterise the discrimination as being discrimination 'in the arrangements made for the purpose of determining who should be offered employment', contrary to s 15(1)(a) of the DDA. Finkelstein J rejected the applicant's argument, finding that the section:

seeks to outlaw the established ground under which persons with a disability will not even be considered for employment. It is not apt to cover the situation where a particular individual is refused employment, or an interview for employment, because of that person's particular disability.<sup>391</sup>

A similar issue arose in *Vickers v The Ambulance Service of NSW*<sup>392</sup> ('*Vickers*'). The applicant applied for a position as an ambulance officer and passed the initial stages of the respondent's job application process, including interview. He was then referred for an independent medical assessment. During that assessment, the applicant disclosed that he suffered from Type 1, insulin-dependent diabetes. Despite the applicant providing a letter supporting his application from his treating endocrinologist, his application was refused. The applicant claimed that the respondent had discriminated against him pursuant to s 15(1)(a) 'in the arrangements made for determining who should be offered employment' on the basis that it had effectively applied a blanket policy of excluding all persons with diabetes without taking into account their individual characteristics.<sup>393</sup>

Raphael FM found that there was insufficient evidence to infer that either the respondent or the organisation that had carried out the medical assessment had applied a blanket policy of all excluding applicants with diabetes.<sup>394</sup> His Honour also held that the respondent's process of selection, including the medical assessment stage, was the same for the applicant as for others.<sup>395</sup> Accordingly, he rejected the applicant's claim under s 15(1)(a).

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<sup>389</sup> *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744.

<sup>390</sup> [2004] FCA 184.

<sup>391</sup> [2004] FCA 184, [34]. Note that such a situation is covered by s 15(1)(b) which makes it unlawful to discriminate 'in determining who should be offered employment'. Section 15(4) makes a defence of 'inherent requirements' available in such cases. See further 5.3.1(d) below.

<sup>392</sup> [2006] FMCA 1232. For discussion of this case, see Brook Hely, 'Judge me by what I can do – not by what you think I can't', (2006) 44(11) *Law Society Journal* 48.

<sup>393</sup> The applicant relied in particular upon the decision of the NSW Administrative Decisions Tribunal in *Holdaway v Qantas Airways* (1992) EOC 92-395.

<sup>394</sup> [2006] FMCA 1232, [39].

<sup>395</sup> [2006] FMCA 1232, [40]-[42].



However, his Honour ultimately found in favour of the applicant on the basis that the respondent had breached s 15(1)(b) (discrimination in determining who should be offered employment) and had failed to make out either the inherent requirements or unjustifiable hardship defences. (See further 5.3.1(d) below).

**(c) 'Benefits associated with employment' and 'any other detriment'**

The meaning of the expressions 'benefits associated with employment' and 'any other detriment' was considered in *McBride v Victoria (No 1)*.<sup>396</sup> The applicant, a prison officer, had complained to a supervisor about rostering for duties which were inconsistent with her disabilities (which had resulted from work-related injuries). The supervisor was found to have responded: 'What the fuck can you do then?'<sup>397</sup>

McInnis FM accepted an argument by the applicant that this behaviour denied the applicant 'quiet enjoyment' of her employment which was a benefit associated with employment, in breach of s 15(2)(b) of the DDA.<sup>398</sup> He further held that the conduct was sufficient to constitute 'any other detriment' under s 15(2)(d).

In *Ware v OAMPS Insurance Brokers Ltd*,<sup>399</sup> the applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him in breach of s 15(2)(d) by virtue of the following measures:

- unilaterally changing his duties;
- removing his assistant;
- placing restrictions on his performance of duties;
- setting new performance criteria without providing him with any opportunity to fulfil those criteria or any realistic or fair timeframe for doing so; and
- demoting him.<sup>400</sup>

In relation to the first measure, Driver FM found that, on the evidence, whilst the applicant's duties were unilaterally altered by the respondent, this did not constitute a detriment as the applicant had not objected to the changes. On the contrary, the applicant had expressed satisfaction with the changes and they had been a measure to 'better fit [the applicant's] duties with his capacity'.<sup>401</sup>

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<sup>396</sup> [2003] FMCA 285.

<sup>397</sup> [2003] FMCA 285, [48].

<sup>398</sup> [2003] FMCA 285, [55], [61]. The applicant relied upon *R v Equal Opportunity Board; Ex parte Burns* (1985) VR 317.

<sup>399</sup> [2005] FMCA 664.

<sup>400</sup> [2005] FMCA 664, [102].

<sup>401</sup> [2005] FMCA 664, [102].

However his Honour held that the remaining measures did constitute 'detriments' within the meaning of s 15(2)(d).<sup>402</sup>

In *Penhall-Jones v State of NSW*,<sup>403</sup> Raphael FM held that the making of a sarcastic remark by one employee to another employee because of the other person's disability constituted disability discrimination. His Honour did not specifically identify the section of the DDA that the conduct breached, however, given the context of the claim it seems that it is likely to have been one of the subsections of s 15 and most likely s 15(2)(d).

#### (d) Inherent requirements

From 5 August 2009, s 21A(1) of the DDA provides a defence to a claim of unlawful discrimination in work where:

- the discrimination relates to particular work (including promotion or transfer to particular work); and
- a person is, because of their disability, 'unable to carry out the inherent requirements of the particular work even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.'<sup>404</sup>

This defence was previously contained in s 15(4). That section has been repealed.<sup>405</sup>

This defence applies equally to employees, contract workers, commission agents, partnerships and qualifying bodies.<sup>406</sup> It also applies in a broad range of work situations:

- in the arrangements made for the purpose of determining who should be offered employment (s15(1)(a));
- in the terms and conditions on which employment is offered (s15(1)(c));
- when offering employment, promotion or transfers (s 15(1)(d));
- in the terms and conditions of employment (s 15(2)(a)); and
- dismissing the employee (s 15(2)(c)).

However, the defence does **not** apply to:

- denying a person with disability access to opportunities for promotion, transfer or training;
- denying a person with disability access to any other benefits associated with employment;

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<sup>402</sup> [2005] FMCA 664, [103]-[104].

<sup>403</sup> [2008] FMCA 832, [65].

<sup>404</sup> These changes were introduced by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 1, item 41.

<sup>405</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 1, item 25.

<sup>406</sup> DDA, s 21A(3).

- subjecting the person with disability to any other detriment; or
- discrimination in s 20 (registered organisations under the *Fair Work (Registered Organisations) Act 2009*).<sup>407</sup>

The Explanatory Memorandum to the 2009 amendments to the DDA states:

The purpose of the first exclusion is to ensure people with disability retain an entitlement to have the opportunity to seek a promotion or transfer on an equal basis with others. Thus an employer could not, by denying access to the opportunity for promotion or transfer, deny an employee with disability the opportunity to demonstrate that he or she can in fact carry out the inherent requirements of the job sought.

The second and third area exclusions relate to instances of discrimination by an employer against a person who is already employed. In those instances, the employee is already carrying out the inherent requirements of the job, the defence of inherent requirements would bear no meaning. That is, if the employee is carrying out the inherent requirements of the job, but is then denied access to a benefit or is subjected to a detriment by his or her employer (other than dismissal or a change in terms and conditions), it cannot be a defence to claim that the reason for the discrimination was that the employee was unable to carry out the inherent requirements of the job.

However, if an existing employee became unable to meet the inherent requirements of the job, the defence of inherent requirements would remain available to the employer, should he or she decide to dismiss the employee or to change the terms and conditions of the employment on that basis.<sup>408</sup>

The onus of proving the elements of the defence is on the respondent.<sup>409</sup>

Section 21A(2) lists the factors the court must take into account in determining whether the aggrieved person would be able to carry out the inherent requirements of the work as:

- the aggrieved person's past training, qualifications and experience relevant to the particular work;
- the aggrieved person's performance in working for discriminator if the aggrieved person already works for the discriminator;
- any other factor that is reasonable to take into account.

**(i) Meaning of 'inherent requirements'**

The meaning of 'inherent requirements', albeit in a different statutory context, was considered by the High Court in *Qantas Airways Ltd v Christie*.<sup>410</sup> The applicant in that case had complained that he was terminated from his employment as a pilot by reason of his age (60 years) contrary to s 170DF(1) of the *Industrial Relations Act 1988* (Cth). Section 170DF(2) of that Act provided a defence if the reason for termination was based on the 'inherent

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<sup>407</sup> See DDA, ss 15, 21A(4).

<sup>408</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 14 [75]-[77].

<sup>409</sup> *Commonwealth v Human Rights & Equal Opportunity Commission* (1996) 70 FCR 76, 87-88; *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254, [19] (Selway J); *Williams v Commonwealth* [2002] FMCA 89, [144].

<sup>410</sup> (1998) 193 CLR 280.

requirements of the particular position'. In considering the meaning of 'inherent requirements', Brennan CJ stated:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.<sup>411</sup>

Gaudron J held that an 'inherent requirement' was something 'essential to the position'<sup>412</sup> and suggested that:

A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with.<sup>413</sup>

The High Court subsequently considered the meaning of 'inherent requirements' in the context of s 15(4) in *X v Commonwealth*.<sup>414</sup> The appellant, X, was discharged from the Army upon being diagnosed HIV-positive (although he enjoyed apparent good health and was 'symptom free'). The Commonwealth argued that it was an inherent requirement of the applicant's employment that he be able to be deployed as required by the Defence Force. This requirement arose out of considerations of operational effectiveness and efficiency. The Commonwealth maintained that the appellant could not be deployed as needed because, whether in training or in combat, he may be injured and spill blood with the risk of transmission of HIV infection to another soldier.

McHugh J noted that it is for the trier of fact to determine whether or not a requirement is inherent in a particular employment. A respondent is not able to organise or define their business so as to permit discriminatory conduct.<sup>415</sup> However, his Honour suggested that 'appropriate recognition' must be given 'to the business judgment of the employer in organizing its undertaking and in regarding this or that requirement as essential to the particular employment'.<sup>416</sup>

McHugh J also noted that the concept of 'inherent requirements' must be understood in the context of the defence of 'unjustifiable hardship' (see 5.5.1 below) such that an employer may be required to provide assistance to an employee to enable them to fulfil the inherent requirements of a job.<sup>417</sup> This would now appear to have been codified in s 21A(1)(b) (discussed further below).

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<sup>411</sup> (1998) 193 CLR 280, 284 [1].

<sup>412</sup> (1998) 193 CLR 280, 294 [34].

<sup>413</sup> (1998) 193 CLR 280, 295 [36].

<sup>414</sup> (1999) 200 CLR 177.

<sup>415</sup> (1999) 200 CLR 177, 189-190 [37]. See also Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) who noted that 'the reference to "inherent" requirements would deal with some, and probably all, cases in which a discriminatory employer seeks to contrive the result that...disabled [people] are excluded from a job' (208 [102]).

<sup>416</sup> (1999) 200 CLR 177, 189 [37].

<sup>417</sup> (1999) 200 CLR 177, 190 [39]. Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) noted their agreement with McHugh J on this point, 208-209 [104].

In *Williams v Commonwealth*,<sup>418</sup> it was held that the 'inherent requirements' of a position did not include 'theoretical' or 'potential' requirements of the position. The applicant was discharged from the RAAF on the ground of his insulin dependent diabetes. His discharge followed the introduction of a directive requiring every member of the RAAF to be able to be deployed to 'Bare Base' facilities (which imposed arduous conditions and provided little or no support) and undertake base combatant duties. The applicant was engaged as Communications Information Systems Controller and his work was generally performed in comfortable air-conditioned centres unless he was on exercises.

The Commonwealth argued that the inherent requirements of the position included the ability to be deployed to 'Bare Base' facilities and the applicant was unable to carry out these 'inherent requirements' by virtue of his diabetes. This was due to problems with ensuring a regular supply of insulin, potential complications relating to diabetes and the conditions under deployment including arduous conditions and irregular meals. Alternatively, it was argued that in order for the applicant to carry out the inherent requirements of the employment, he would require services or facilities which would impose unjustifiable hardship on the respondent.

At first instance, McInnis FM applied *X v Commonwealth*<sup>419</sup> and upheld the application, finding that deployment of the type suggested by the Commonwealth was not part of the inherent requirements of the applicant's particular employment. In doing so he distinguished the 'theoretical potential requirements' of the employment from its inherent requirements:

On the material before me I am not prepared to find that in analysing the particular employment of this Applicant that there are inherent requirements of that employment that he should perform combat or combat related duties in any real or actual day to day sense. At its highest there is a requirement or minimum employment standard which has been artificially imposed on all defence personnel which cannot in my view simply apply to each and every occupation regardless of the practical day to day reality of the inherent requirements of the particular employment of the member concerned ... I reject [the respondent's submission] that the theoretical potential requirements of members of the RAAF should be used as a basis upon which an analysis of the particular employment and inherent requirements of the particular employment can be assessed for this Applicant.<sup>420</sup>

The decision of McInnis FM was overturned by the Full Federal Court in *Commonwealth v Williams*<sup>421</sup> on the basis of the exemption in s 53 of the DDA (considered below in 5.5.2(b)). His Honour's findings in relation to inherent requirements were not considered.

The relevance of pre-employment training or induction periods in applying the inherent requirements defence was considered by Heerey J in *Gordon v Commonwealth*.<sup>422</sup> In that case, the applicant had been offered employment

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<sup>418</sup> [2002] FMCA 89.

<sup>419</sup> (1999) 200 CLR 177.

<sup>420</sup> [2002] FMCA 89, [146].

<sup>421</sup> (2002) 125 FCR 229.

<sup>422</sup> [2008] FCA 603.

as a field officer with the Australian Tax Office (ATO), a position which required a significant amount of driving. His offer of employment was subsequently withdrawn whilst he was completing induction, based on medical assessments revealing that he had very high blood pressure which was said to affect his ability to drive.

Heerey J noted that the applicant would not have been required to drive during the 16 week induction program, during which time his blood pressure could have been satisfactorily brought under control with medication. Accordingly, by the completion of the induction program, he would have been able to comply with the requirement of the position to be able to drive.<sup>423</sup>

**(ii) Extent to which an employer must assist an aggrieved person to be able to carry out inherent requirements**

Section 21A(1)(b) requires a discriminator to show that a person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments. As discussed above 'reasonable adjustments' are all adjustments that do not impose an unjustifiable hardship on the person making the adjustments.<sup>424</sup>

It is likely that the cases determining to what extent an employer must assist an aggrieved person carry out the inherent requirements of the job under former s 15(4) of the DDA will remain relevant despite the slightly different wording of s 21A.

Section 15(4) provided that it was a defence for an employer to discriminate against an employee where the employee, because of his or her disability:

- (a) would be unable to carry out the inherent requirements of the particular employment; or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

In *X v Commonwealth*, the High Court made it clear that s 15(4) did not require an employer to modify the nature of a particular employment, or its inherent requirements, to accommodate a person with a disability. Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) observed:

the requirements that are to be considered are the requirements of the *particular* employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work.<sup>425</sup>

This point was central to the decision in *Cosma v Qantas Airways Ltd*<sup>426</sup> ('*Cosma*'). The applicant in that matter was employed by the respondent as a porter in ramp services at Melbourne Airport. It was accepted that he was not

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<sup>423</sup> [2008] FCA 603, [77]-[82]. See further the discussion of this case at 5.3.1(d)(iv).

<sup>424</sup> DDA, s 4(1).

<sup>425</sup> (1999) 200 CLR 177, 208 [102].

<sup>426</sup> [2002] FCA 640.

able to perform the 'inherent requirements' of his position due to a shoulder injury. His application was dismissed by Heerey J because the applicant failed to identify any services or facilities which might have been provided by the employer pursuant to former s 15(4)(b) to enable him to fulfil the inherent requirements of the particular employment. His Honour noted:

this provision does not require the employer to alter the nature of the particular employment or its inherent requirements. Rather it is a question of overcoming an employee's inability, by reason of disability, to perform such work. This is to be done by provision of assistance in the form of 'services', such as providing a person to read documents for a blind employee, or 'facilities' such as physical adjustment like a wheel chair ramp. The 'services' or 'facilities' are external to the 'particular employment' which remains the same.<sup>427</sup>

The decision in *Cosma* was distinguished in the case of *Barghouthi v Transfield Pty Ltd*,<sup>428</sup> where Hill J found that an employee had suffered unlawful discrimination when he was constructively dismissed from his employment after advising his employer that he was unable to return to work on account of a back injury. Hill J held that, unlike the position in *Cosma*, there was no evidence that the applicant 'could not continue his employment with [the respondent] working in an office or in some capacity not inconsistent with his disability'. His Honour went on to find that:

The failure to explore such possibilities means that the respondent's dismissal cannot fall within the terms of s 15(4) and the dismissal amounts to discrimination in employment.<sup>429</sup>

While the decision would appear to blur the distinction between factors which accommodate the needs of a person with a disability and those which require a modification of the nature of a particular employment, the decision highlights that the onus is on the respondent to make out this defence to a claim of discrimination.

### **(iii) 'Unable to carry out'**

Another issue relevant to the 'inherent requirements' defence is the extent to which an aggrieved person must be unable to carry out the relevant inherent requirements.

In *X v Commonwealth*, it was held at first instance by the then Human Rights and Equal Opportunity Commission<sup>430</sup> that the ability to carry out the inherent requirements of the employment should be understood as referring to the employee's physical ability to perform the characteristic tasks or skills of the particular employment. Given that the employee was able to perform the requisite tasks, the complaint was upheld. The inability to deploy the

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<sup>427</sup> [2002] FCA 640, [67]. Alternative duties which had been arranged as part of the applicant's rehabilitation programme (which was ultimately unsuccessful) were found not to be part of his 'particular employment': *ibid* [54]-[55]. The decision of Heerey J was upheld on appeal: *Cosma v Qantas Airways Ltd* (2002) 124 FCR 504.

<sup>428</sup> (2002) 122 FCR 19.

<sup>429</sup> (2002) 122 FCR 19, 27 [24].

<sup>430</sup> *X v Department of Defence* (1995) EOC 92-715.

complainant was found to result not from the personal consequence of the complainant's disability, but from the policy of the ADF.

This reasoning of the Commission was rejected by the majority of the High Court. McHugh J stated:

'the inherent requirements' of a 'particular employment' are not confined to the physical ability or skill of the employee to perform the 'characteristic' task or skill of the employment. In most employment situations, the inherent requirements of the employment will also require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees.<sup>431</sup>

Similarly, Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) held:

It follows from both the reference to inherent requirements and the reference to particular employment that, in considering the application of s 15(4)(a), it is necessary to identify not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on. Those circumstances will often include the place or places at which the employment is to be performed and may also encompass other considerations. For example, it may be necessary to consider whether the employee is to work with others in some particular way. It may also be necessary to consider the dangers to which the employee may be exposed and the dangers to which the employee may expose others.<sup>432</sup>

A similar issue arose in *Vickers*, where the applicant was refused a position as an ambulance officer because of his Type 1, insulin-dependent diabetes. The respondent argued that the applicant's diabetes posed a grave risk to the safety of himself, his patients and the community at large due to the risk of him suffering a hypoglycaemic event whilst driving an ambulance at a high speed or whilst treating a patient. Accordingly, it argued, he was unable to *safely* carry out the inherent requirements of the employment.

Raphael FM applied *X v Commonwealth* and held that mere technical ability to comply with the inherent requirements of a position was not sufficient; the aggrieved person must be able to do so *safely*.<sup>433</sup> However, his Honour held that the safety risk posed by a person's disability must be considered in light of that person's individual characteristics, rather than assumptions about that person's disability based on stereotypes. In addition, that risk must be balanced against other relevant factors, including the likelihood of that risk eventuating. His Honour held that there is no requirement on an employer to 'guarantee' the safety of a potential employee and others, as this would be 'far too exclusionary of persons with diabetes'.<sup>434</sup>

His Honour accepted the evidence that the applicant's diabetes was very well controlled and a hypoglycaemic event was therefore very unlikely.<sup>435</sup> His Honour further held that the chances were even more remote that the

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<sup>431</sup> (1999) 200 CLR 177, 181-182 [11].

<sup>432</sup> (1999) 200 CLR 177, 208 [103].

<sup>433</sup> [2006] FMCA 1232, [47]. See also *Gordon v Commonwealth* [2008] FCA 603, [66].

<sup>434</sup> [2006] FMCA 1232, [47].

<sup>435</sup> [2006] FMCA 1232, [49]-[50].



applicant would suffer a hypoglycaemic event whilst driving an ambulance or treating a patient in circumstances where a delay of 30 – 60 seconds to consume some glucose would be critical to the care of his patient or to the safety of co-workers or members of the public.<sup>436</sup>

In *Power v Aboriginal Hostels Ltd*<sup>437</sup> (*Power*), Brown FM referred to the distinction that needed to be drawn between ‘inability’ and ‘difficulty’ exhibited by the person concerned in the performance of the inherent requirements of the employment.<sup>438</sup> His Honour noted that whilst the applicant may have found it difficult to perform the tasks of the position of assistant manager of the hostel because of his psychiatric illness, ‘difficulty’ is not sufficient for the purposes of former s 15(4): ‘Rather it must be shown that the person’s disability renders him or her **incapable** of performing the tasks required of the position’.<sup>439</sup>

Applying *X v Commonwealth*, Brown FM noted that ‘such inability must be assessed in a practical way’.<sup>440</sup> In his view the only practical way to make the assessment in this case was to examine the medical evidence.<sup>441</sup> Having made that assessment he accepted that the applicant was not incapable of performing the inherent requirements of his position of assistant manager, regardless of the workplace environment, and former s 15(4) therefore had no application.<sup>442</sup>

#### (iv) *Imputed disabilities*

Another issue which has arisen in the context of former s 15(4) is whether ability to carry out the inherent requirements of the position should be assessed by reference to the aggrieved person’s actual disability or imputed disability.

This issue arose in *Power*. The applicant had been dismissed from his employment after the respondent imputed to him the disability of depression and determined that that disability rendered him unable to perform the inherent requirements of the position of assistant manager at one of its hostels. At first instance, Brown FM accepted that the defence under former s 15(4) was made out, because: ‘[i]n essence, the respondent was entitled to consider that Mr Power was not cut out for the particular job...’.<sup>443</sup>

On appeal, Selway J held that Brown FM had erred, stating:

The requirement of s 15(4) of the DDA in the current context is to determine whether or not the employee ‘because of his or her disability would be unable to carry out the inherent requirements of the particular employment’. It is not

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<sup>436</sup> [2006] FMCA 1232, [51]-[53].

<sup>437</sup> [2004] FMCA 452.

<sup>438</sup> [2004] FMCA 452, [23].

<sup>439</sup> [2004] FMCA 452, [57] (emphasis added).

<sup>440</sup> [2004] FMCA 452, [58].

<sup>441</sup> [2004] FMCA 452, [58], [68].

<sup>442</sup> [2004] FMCA 452, [65], [68]-[69].

<sup>443</sup> [2004] FMCA 452, [119].

relevant to that determination to consider whether the termination may have been justifiable for other reasons or not.<sup>444</sup>

His Honour also considered the issue of whether the aggrieved person's actual or imputed disability was relevant when applying former s 15(4), observing:

The next question is whether the appellant is unable to perform those duties 'because of his disability'. That question was not addressed by the learned Federal Magistrate. In my view the failure to address that question was an appealable error. If the question had been addressed then there are two possibilities. The first is that the 'imputed disorder' of depression is the relevant disability. Alternatively, his actual condition of an adjustment disorder (from which he seems to have recovered) is the relevant disability.

The appellant's submissions assumed that the relevant disability was the actual condition of the appellant at the time of his termination. On that basis the appellant submitted that he could perform the inherent requirements of the position - indeed, he was doing so for the four weeks before his employment was terminated. Consequently, he argued, s 15(4) of the DDA had no application.

On the other hand the respondent's submissions assumed that the relevant disability was the imputed disorder of depression, notwithstanding that the appellant was not suffering from that disability. On this basis the respondent argued that in light of the report of Dr Ducrou the appellant was unable to comply with the inherent duties of the position.

So far as my research reveals, there is no authority directly on point. The definition of 'disability' in s 4 of the DDA purports to be an exhaustive definition, 'unless the contrary intention appears'. There is no obvious contrary intention disclosed by s 15(4). Nor is there any obvious reason to imply one. The DDA is principally directed to the elimination as far as possible of 'discrimination against persons on the ground of disability' in relevant areas (s 3 DDA). It is not directed at achieving 'fair outcomes' as such. Consequently what is prohibited is discriminatory behaviour based upon disability. 'Imputed' disability is sufficient for this purpose. What the DDA prohibited in this case was not the dismissal of the appellant for a reason which was wrong, but the dismissal of the appellant who had a disability (albeit an imputed one) in circumstances where a person without a disability would not have been dismissed. When it is understood that the DDA is directed at the ground of discrimination (which includes imputed disability) and not 'fair outcomes' then there seems no reason to imply that 'disability' appearing in s 15(4) of the DDA does not include imputed disability.<sup>445</sup>

On remittal from the Federal Court,<sup>446</sup> Brown FM noted that the applicant had been dismissed on the basis of a disability (depression) that he did not have. The applicant did, however, have another disability (adjustment disorder) which had 'resolved' prior to his dismissal. Brown FM concluded that it was the aggrieved person's **actual** disability that was to be considered when applying s former 15(4), stating that 'it would be absurd if the exculpatory provisions of section 15(4) were to be implied to the imputed disability per

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<sup>444</sup> (2003) 133 FCR 254, 262 [13].

<sup>445</sup> (2003) 133 FCR 254, 262-263 [15]-[18].

<sup>446</sup> *Power v Aboriginal Hostels Ltd* [2004] FMCA 452.

se<sup>1447</sup> such that an employer could lawfully dismiss an employee on the basis that they were unable to carry out the inherent requirements of the position because of a disability that they did not have.

A similar result was reached, by different reasoning in *Gordon v Commonwealth*<sup>448</sup> ('*Gordon*'). In *Gordon*, the applicant had been offered a position as a field officer with the Australian Tax Office ('ATO'), which involved a significant amount of driving. The offer had been made subject to a satisfactory medical assessment during the induction phase of the position. The offer was subsequently withdrawn whilst the applicant was completing his induction on the basis of certain medical reports showing him to have very high blood pressure which was said to affect his ability to drive.

Heerey J held that the relevant medical reports did not paint an accurate picture of the applicant's blood pressure, as additional medical evidence demonstrated that he suffered from 'white coat syndrome' (anxiety when undergoing medical assessments), which temporarily raised his blood pressure when the readings were taken. Accordingly, the ATO had essentially withdrawn the offer based on an imputed disability (severe hypertension) that the applicant in fact did not have, or at least not to the extent believed by the ATO and its medical adviser.

In considering the application of former s 15(4), Heerey J cited the passage from Selway J's judgment in *Power* (quoted above), which his Honour regarded as authority for the proposition that, when applying former s 15(4), it is the applicant's **imputed** disability that must be considered.<sup>449</sup> His Honour does not appear to have been referred to the decision of Brown FM, on remittal in *Power*, taking the contrary view. His Honour added that the word 'disability' should logically be interpreted consistently throughout s 15, such that if the alleged discrimination under s 15(1) or (2) was based on an imputed disability, then the defence under former s 15(4) should also be applied by reference to that same imputed disability. His Honour concluded:

Since s 15 as a whole is setting up a norm of conduct, it is to be read as addressed to employers as at the time they are contemplating potentially discriminatory conduct. Subsections (1) and (2) tell employers what they must not do. Subsections (3) and (4) tell them in what circumstances they may lawfully do what would otherwise amount to unlawful discrimination. This suggests that what subs (4) is concerned with are circumstances known to the employer at the time. However, consistently with the philosophy of anti-discrimination legislation (see [58] above), the criterion is an objective one – as is indicated by the reference to 'all other factors that it is reasonable to take into account'. The relevant circumstances include the nature of the imputed disability in light of such medical investigation as may be reasonable and the availability of reasonable treatment.<sup>450</sup>

In the circumstances of the case, his Honour held that the respondent had failed to show that the applicant was unable to carry out the inherent requirements of the position 'by reason of his imputed (or indeed actual)

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<sup>447</sup> [2004] FMCA 452, [65]. See also [17]-[22].

<sup>448</sup> [2008] FCA 603.

<sup>449</sup> [2008] FCA 603, [63].

<sup>450</sup> [2008] FCA 603, [65].

hypertension'.<sup>451</sup> This was on account of the fact that at the time of the alleged discrimination it was reasonably apparent that:

- the applicant may have been affected by 'white coat syndrome';
- 'ambulatory testing' (using a device to record blood pressure over a 24 hour period) would have likely revealed that his blood pressure was significantly lower than first thought; and
- in any event, even with elevated blood pressure, this could have been satisfactorily brought under control within the period of his induction, during which time the applicant would not have been required to drive a vehicle.<sup>452</sup>

Interestingly, his Honour's reasoning appears to suggest that where medical investigations or treatment are reasonably available that would have revealed the person's imputed disability to be less severe (or possibly even false) than was imputed, it is that disability rather than the imputed disability that is relevant when applying former s 15(4). In most cases, this would presumably equate with the person's actual disability (or lack thereof).

Despite the repeal of s 15(4) and the insertion of the 'inherent requirements' defence into s 21A his Honour's reasoning would still appear to be relevant to the defence.

### 5.3.2 Education

A number of significant cases under the DDA have related to disability discrimination in education.<sup>453</sup> Section 22 of the DDA provides:

#### 22 Education

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability:
  - (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:
  - (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.
- (2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability:

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<sup>451</sup> [2008] FCA 603, [82].

<sup>452</sup> [2008] FCA 603, [77]-[82].

<sup>453</sup> See, for example, *Purvis v New South Wales (Department of Education & Training)* (2003) 217 CLR 92; *Minns v New South Wales* [2002] FMCA 60; *Clarke v Catholic Education Office* (2003) 202 ALR 340; *Finney v Hills Grammar School* [1999] HREOCA 14 (extract at (1999) EOC 93-020); *Travers v New South Wales* (2001) 163 FLR 99; *AJ & J v A School (No 2)* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner McEvoy, 10 October 2000).

- (a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or
  - (b) by accrediting curricula or training courses having such a content.
- (3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.

As discussed above at 5.2.6(b), since 18 August 2005 disability discrimination in education is subject to the *Disability Standards for Education 2005*. These Standards clarify the obligations and responsibilities of education providers in avoiding unlawful discrimination on the basis of disability in education.

### **(a) 'Educational authority'**

Another issue that has arisen in relation to s 22 is the scope of the expression 'educational authority.' In *Applicant N v Respondent C*,<sup>454</sup> the respondent argued that it was a child care centre, not an 'educational authority' and therefore not subject to s 22 of the DDA. McInnes FM held that the expression 'educational authority' should be interpreted broadly and would include a child care centre.<sup>455</sup> His Honour held:

On the evidence and the pleadings before this court, at the very least, in my view, the Respondent can be said to manage an institution which provides for education of children in the development of mental or physical powers and/or the moulding of some aspects of character.<sup>456</sup>

### **(b) Education as a service?**

One matter that remains unresolved in relation to s 22 is whether an education authority or institution is the provider of a 'service', so as to also trigger the application of s 24 (provision of goods, services and facilities).

In *Clarke v Catholic Education Office*,<sup>457</sup> the applicant's complaint related to the terms and conditions under which his son was offered enrolment at the respondent's school. This was argued as being unlawful discrimination contrary to s 22(1)(b) or alternatively unlawful discrimination in the provision of educational services, contrary to s 24(1)(b). Madgwick J was prepared to permit this alternative claim to be included as part of the proceedings.<sup>458</sup>

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<sup>454</sup> [2006] FMCA 1936.

<sup>455</sup> [2006] FMCA 1936, [38]-[43].

<sup>456</sup> [2006] FMCA 1936, [42] (emphasis added).

<sup>457</sup> (2003) 202 ALR 340.

<sup>458</sup> (2003) 202 ALR 340, 349-350 [39]. Cf *Ferneley v The Boxing Authority of New South Wales* [2001] FCA 1740 in the context of the SDA.

However, in upholding the applicant's claim, his Honour did not make it clear under which specific provision the discrimination was found to be unlawful.<sup>459</sup>

### (c) Availability of defence of unjustifiable hardship

As originally drafted, the DDA provisions relating to education only provided for a defence of unjustifiable hardship<sup>460</sup> for admission of students to educational institutions. The defence was not available in relation to the treatment of students once they had been admitted. This distinction was of some importance in the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*<sup>461</sup> (see 5.2.1 above). The case involved the expulsion of a child with behavioural problems from a school. The case was brought as one of direct discrimination, and due to the drafting of the DDA at the time, it was also not open to the respondent to argue that permitting the child to remain at the school would have imposed an unjustifiable hardship. Accordingly, the case fell to be decided on the question of whether the school's expulsion of the child was 'on the ground of' the student's disability for the purposes of establishing direct discrimination under s 5.

Section 22(4) of the DDA was subsequently amended in 2005 to, amongst other things, extend the unjustifiable hardship defence to the treatment of students post-admission.<sup>462</sup> From 5 August 2009,<sup>463</sup> there is a general defence of unjustifiable hardship and s 29A provides a defence of unjustifiable hardship in relation to all aspects of education.

### 5.3.3 Access to premises

Section 23 of the DDA deals with discrimination in relation to access to premises, as follows:

#### 23 Access to premises

It is unlawful for a person to discriminate against another person on the ground of the other person's disability:

- (a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or

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<sup>459</sup> (2003) 202 ALR 340, 360 [82]. Note, however, that in *Rana v Human Rights & Equal Opportunity Commission* [1997] FCA 416, O'Loughlin J held that s 24 had no operation in relation to a claim under s 27 based on the principle of statutory construction that an express reference to one matter indicates that other matters are to be excluded.

<sup>460</sup> See 0 below on the issue of unjustifiable hardship generally.

<sup>461</sup> (2003) 217 CLR 92.

<sup>462</sup> The changes to s 22 were introduced by the *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth), which commenced operation on 1 March 2005 (although the amendments to s 22 did not commence until 10 August 2005). The Act also inserted into s 4(1) a new definition of 'education provider', which applies to the newly created s 22(2A).

<sup>463</sup> As a result of the amendments to the DDA in the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), see sch 2, item 41, 60.

- (b) in the terms or conditions on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises; or
- (c) in relation to the provision of means of access to such premises; or
- (d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or
- (e) in the terms or conditions on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or
- (f) by requiring the other person to leave such premises or cease to use such facilities.

Premises are defined by s 4 of the DDA as follows:

*premises* includes:

- (a) a structure, building, aircraft, vehicle or vessel; and
- (b) a place (whether enclosed or built on or not); and
- (c) a part of premises (including premises of a kind referred to in paragraph (a) or (b)).

The scope of the expression ‘terms and conditions’ for the purposes of s 23 was considered in *Haar v Maldon Nominees*.<sup>464</sup> The applicant, who was visually impaired and had a guide dog, complained that she had been discriminated against when she was asked to sit outside on her next visit to the respondent’s premises. McInnis FM upheld the complaint, finding:

In my opinion the imposition of terms and conditions for the purpose of s 23 of the DDA does not have to be in writing or in precise language. So long as the words uttered are capable of meaning and were understood to mean that the Applicant would only be allowed access to the premises in a restricted manner and/or use of the facilities in a restricted manner then in my view that is sufficient to constitute a breach of the legislation.<sup>465</sup>

Other examples of cases concerning access to premises include:<sup>466</sup>

- *Sheehan v Tin Can Bay Country Club*,<sup>467</sup> where Raphael FM decided that a man with an anxiety disorder that required him to have an assistance dog in social situations was discriminated against when his local club imposed the condition that his dog not be allowed into the club unless it was on a leash.<sup>468</sup> See 5.2.5(c).
- *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>469</sup> where the applicant organisation complained that certain council facilities (a community centre, concrete picnic tables and public toilets) were inaccessible to members of the organisation who had disabilities. Baumann FM found that the

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<sup>464</sup> (2000) 184 ALR 83.

<sup>465</sup> (2000) 184 ALR 83, 94 [68].

<sup>466</sup> See also, for example, *Webb v Child Support Agency* [2007] FMCA 1678; *Sluggett v Human Rights & Equal Opportunity Commission* (2002) 123 FCR 561; *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481, 491-492 [29]-[31]; *Grovenor v Eldridge* [2000] FCA 1574.

<sup>467</sup> [2002] FMCA 95.

<sup>468</sup> [2002] FMCA 95, [24].

<sup>469</sup> [2004] FMCA 915.

three areas the subject of the application all fell within the definition of 'premises' for the purposes of s 4 of the DDA.<sup>470</sup> However, only the claim in relation to the toilet facilities (specifically, the fact that wash basins were located outside the toilet) was successful. See 5.2.3(c).

### 5.3.4 Provision of goods, services and facilities

Section 24 of the DDA deals with discrimination in relation to the provision of goods, services and facilities, as follows:

#### 24 Goods, services and facilities

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

#### (a) Defining a 'service'

##### (i) Council planning decisions

In *IW v City of Perth*<sup>471</sup> (*IW*), the High Court considered the meaning of 'services' in s 4(1) of the *Equal Opportunity Act 1984* (WA).<sup>472</sup> In that matter, People Living With Aids (WA) Inc ('PLWA') had applied to Perth City Council for approval to use premises in an area zoned for shopping as a day time drop-in centre for persons who were HIV positive. The respondent Council rejected the application and it was argued that this amounted to discrimination on the grounds of impairment.

A majority of the High Court dismissed the appeal (Toohey and Kirby JJ dissenting). However, of the majority, only Brennan and McHugh JJ based their reasoning on a conclusion that there was no service. Their Honours held that:

when a council is called on as a deliberative body to exercise a statutory power or to execute a statutory duty, it may be acting directly as an arm of

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<sup>470</sup> [2004] FMCA 915, [75].

<sup>471</sup> (1997) 191 CLR 1.

<sup>472</sup> Section 4(1) of the *Equal Opportunity Act 1984* (WA) at that time provided a definition of 'services' which is similar to that contained in s 4(1) of the DDA and included: '(e) services of the kind provided by a government, a government or public authority or a local government body'.



government rather than a provider of services and its actions will be outside the scope of the Act.<sup>473</sup>

They stated further:

when a council is required to act in a quasi-judicial role in exercising a statutory power or duty it may be inappropriate to characterise the process as the provision of a service for the purpose of the Act even in cases when the product of the process is the provision of a benefit to an individual.<sup>474</sup>

In dissenting or obiter comments the other members of the Court said that there was a 'service' being provided by the Council. Dawson and Gaudron JJ said that 'services in its ordinary meaning, is apt to include the administration and enforcement by the City of Perth of the Planning Scheme'.<sup>475</sup> Similarly, Gummow J said that the Council was providing 'services' when it granted or refused a particular application for consent.<sup>476</sup> Toohey J said the 'service' in this case could be seen as the consideration and disposition of the application for planning approval.<sup>477</sup> Kirby J also said that 'services' read in its context includes the provision by a local government body of a planning decision to alter the permissible use of premises.<sup>478</sup>

**(ii) Prisons as a service**

The extent to which a prison may be regarded as the provider of a service arose in *Rainsford v Victoria (No 2)*.<sup>479</sup> The applicant, who suffered a back condition, was a prisoner at Port Philip Prison. He complained that prison transport arrangements which involved lengthy journeys in uncomfortable vehicles would leave him in pain and with limited movement. He also complained that he had been locked down in a Management Unit of Port Philip Prison for 23 hours a day for 9 days during which he was unable to access exercise facilities. The applicant alleged this treatment constituted unlawful discrimination contrary to the DDA.

Raphael FM concluded that the respondents had not provided a service.<sup>480</sup> His Honour stated:

In the case of these particular prison 'services' they cannot be separated from the duty of incarceration. A place must be provided for a prisoner to sleep and in order to move the prisoner from the place of trial to the place of incarceration transport must be used.<sup>481</sup>

His Honour referred to *IW*, authorities reviewed therein<sup>482</sup> and other Australian authorities<sup>483</sup> and stated:

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<sup>473</sup> (1997) 191 CLR 1, 15.

<sup>474</sup> (1997) 191 CLR 1, 15.

<sup>475</sup> (1997) 191 CLR 1, 23-24.

<sup>476</sup> (1997) 191 CLR 1, 44-45.

<sup>477</sup> (1997) 191 CLR 1, 28.

<sup>478</sup> (1997) 191 CLR 1, 72.

<sup>479</sup> (2004) 184 FLR 110.

<sup>480</sup> (2004) 184 FLR 110, 119 [26].

<sup>481</sup> (2004) 184 FLR 110, 117 [20].

<sup>482</sup> (2004) 184 FLR 110, 115 [11]-[15], 117 [19]; *Attorney General (Canada) v Cumming* (1980) 2 FC 122, [131]-[132]; *Savjani v Inland Revenue Commissioners* (1981) QB 458; *R v Entry Clearance Officer; Ex parte Amin* (1983) 2 AC 818; *Farah v Commissioner of Police of the Metropolis* (1998) QB 65.

If, in the case of services of the kind provided by a government one distinguishes the statutory duty element from the services element by assessing whether the alleged services element is intended to provide a benefit to the complainer then it can be seen that the decided cases are consistent.<sup>484</sup>

His Honour then proceeded to draw a distinction between a government authority acting under the authority of statute deciding whether or not to extend a service to an individual, compared with the case before him in which no discretionary element existed. He stated that 'incarceration is the result of the coercive power of the State following judicial determination, and is a decision imposed on both the prisoner *and* the provider of correctional services'.<sup>485</sup>

An appeal against Raphael FM's decision was successful on procedural grounds, namely that his Honour had incorrectly applied the separate question procedure under Part 17, r 17 of the *Federal Magistrates Court Rules 2001* (Cth).<sup>486</sup> However, in obiter comments, Kenny J (with whom Hill and Finn JJ agreed), rejected the distinction sought to be drawn by Raphael FM between the provision of a service pursuant to a statutory discretion and the situation where no discretion existed. Her Honour held:

The Federal Magistrate erroneously relied on a distinction that he drew between the provision of services pursuant to a statutory discretion and 'the situation ... where no discretionary element exists'.

In addition to the management and security of prisons, the purposes of the *Corrections Act 1986* (Vic) include provision for the welfare of offenders. The custodial regime that governs prisoners under this Act is compatible with the provision of services to them: see, for example, s 47. Indeed this proposition is fortified by the provision of the Prison Services Agreement to which counsel for Mr Rainsford referred on the hearing of the appeal. In discharging their statutory duties and functions and exercising their powers with respect to the management and security of prisons, the respondents were also providing services to prisoners. The fact that prisoners were unable to provide for themselves because of their imprisonment meant that they were dependent in all aspects of their daily living on the provision of services by the respondents. Although the provision of transport and accommodation would ordinarily constitute the provision of services, whether the acts relied on by Mr Rainsford will constitute services for the DDA will depend upon the findings of fact, which are yet to be made and, in particular, the identification of the acts that are said to constitute such services.<sup>487</sup>

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<sup>483</sup> (2004) 184 FLR 110, 116 [16]-[17]; *Secretary of the Department of Justice & Industrial Relations v Anti Discrimination Commissioner* 11 TASR 324; *Clarkson v The Governor of the Metropolitan Reception Prison* (1986) EOC 92-153; *Henderson v Victoria* (1984) EOC 92-027 and (1984) EOC 92-105; *Jolly v The Director General of Corrections* (1985) EOC 92-124; *A Complainant v Western Australia* (1994) EOC 92-610; *Hobby v Executive Director of the Department of Corrective Services* (1992) EOC 92-397; *Bandulla v Victoria* [2002] VCAT 91.

<sup>484</sup> (2004) 184 FLR 110, 117 [20].

<sup>485</sup> (2004) 184 FLR 110, 118 [24].

<sup>486</sup> *Rainsford v Victoria* (2005) 144 FCR 279.

<sup>487</sup> (2005) 144 FCR 279, 296 [54]-[55].

The Full Court remitted the matter back to Federal Magistrates Court, where it was subsequently transferred to the Federal Court for hearing before Sundberg J.<sup>488</sup>

Sundberg J confirmed that whether the particular services alleged by the applicant fell within the DDA was a question of fact. His Honour held that it was necessary to identify the alleged service with some precision and then ask whether that service was being provided to the applicant. In doing so, his Honour held, the guiding principle is whether the respondent's actions could be characterised as being helpful or beneficial to the applicant.<sup>489</sup>

On the facts, Sundberg J rejected the applicant's characterisation of the relevant service as 'prison management and control'. Rather, his Honour held that the identification of the services required greater specificity, namely the transportation of prisoners and the accommodation of prisoners in cells within the prison system.<sup>490</sup> When so identified, his Honour held, neither constituted a service within the meaning of the DDA. This was because both alleged services were simply inherent parts of incarceration and prison management. They did not confer any benefit or helpful activity on the prisoners in the relevant sense.<sup>491</sup>

Sundberg J also emphasised that, in considering whether the relevant acts constituted the provision of a service to the applicant, it was necessary to have regard to the wider obligations of the respondents in providing prison management:

Their obligations are not just to the welfare of prisoners but also to the general public and prison staff through providing adequate security measures, to other prisoners by ensuring that prisoners do not harm one another, and to the general good governance of the prison. To suggest that transport of prisoners or cell accommodation is a service to prisoners is to ignore the fact that they are functions performed in order to comply with the sometimes competing obligations of prison management to its prisoners, its staff, the public and the good governance of the prison.<sup>492</sup>

On further appeal,<sup>493</sup> the Full Federal Court concluded that none of the matters about which the appellant complained met the test for indirect discrimination under s 6. Accordingly, the Court considered that it was unnecessary to reach a finding on the question of whether the respondent prison was the provider of a service within the meaning of s 24. However, their Honours did observe, in obiter, that

although the meaning of 'service' is not simple to resolve, and the matter was not argued in depth, we see some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility.<sup>494</sup>

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<sup>488</sup> *Rainsford v Victoria* [2007] FCA 1059. For discussion of this case, see Frances Simmons, 'When is performing a government function a service?' (2008) 46 *Law Society Journal* 40.

<sup>489</sup> [2007] FCA 1059, [73]-[76].

<sup>490</sup> [2007] FCA 1059, [76].

<sup>491</sup> [2007] FCA 1059, [77]-[78].

<sup>492</sup> [2007] FCA 1059, [79].

<sup>493</sup> *Rainsford v Victoria* [2008] FCAFC 31. See also Frances Simmons, 'When is performing a government function a service?' (2008) 46 *Law Society Journal* 40.

<sup>494</sup> [2008] FCAFC 31, [9].

**(ii) The detection and prevention of crime as a service**

In the context of a race discrimination complaint, the NSW Court of Appeal considered the meaning of ‘services’ under s 19 of the *Anti-Discrimination Act 1977 (NSW)* in *Commissioner of Police v Mohamed*.<sup>495</sup>

The respondent had called the police to investigate a complaint that her Caucasian Australian neighbours had thrown rocks at her house, smashed the glass on her front door and had subjected her to physical and verbal abuse.

The respondent subsequently lodged a complaint with the Anti Discrimination Board in NSW, alleging that the conduct of the police officers who responded to her complaint was racially discriminatory.

Various questions of law were referred to the Supreme Court and then the Court of Appeal. On the issue of services, the majority of the Court of Appeal found:

- The detection and prevention of crime can constitute ‘services’ for the purposes of s 19 of the *Anti-Discrimination Act 1977 (NSW)*.<sup>496</sup>
- Conduct of police officers with respect to a request for assistance in relation to possible criminal activity, where protection of persons or property may be required, can involve the refusal or provision of ‘services’ for the purposes of s 19 of the *Anti-Discrimination Act 1977(NSW)*.<sup>497</sup>
- The aggrieved person, as described in s 7(1) of the *Anti-Discrimination Act 1977(NSW)*, will be the person or persons who are treated less favourably or required to comply with a requirement or condition, as described in s 7(1), in relation to the provision or refusal to provide the services and need not be limited to the person or persons reporting an event relating to an alleged criminal offence.<sup>498</sup>

The judgement contains a useful analysis of the Australian and UK case law on whether public authorities can be said to be providing ‘services’ to individuals in the context of interpreting anti-discrimination statutes.<sup>499</sup>

**(iii) Other disputed services**

The applicant in *Vintila v Federal Attorney General*<sup>500</sup> sought to challenge a Regulation Impact Statement (‘RIS’) prepared by the Commonwealth

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<sup>495</sup> [2009] NSWCA 432.

<sup>496</sup> [2009] NSWCA 432, [35] (Basten JA), [1] (Spigelman CJ agreeing), [91] (Handley JA did not consider).

<sup>497</sup> [2009] NSWCA 432, [49] (Basten JA), [1] (Spigelman CJ agreeing), [91] (Handley JA).

<sup>498</sup> [2009] NSWCA 432 2009] NSWCA 432, [49] (Basten JA), [1] (Spigelman CJ agreeing), [91] Handley J considered that victims of alleged criminal offences who report the event to the police could be ‘persons aggrieved’ in relation to the conduct of the police officers responding to the report, at least in the initial stages of any such investigation.

<sup>499</sup> [2009] NSWCA 432, [45]-[48].

<sup>500</sup> [2001] FMCA 110.

Attorney-General for Cabinet in relation to draft disability standards for public transport. He argued that the preparation of the RIS involved the provision of a service and was therefore covered by the DDA.

In summarily dismissing the application, McInnis FM found that an RIS does not constitute the provision of a 'service'. Without reference to other authorities, his Honour held:

In my view an RIS cannot possibly constitute the provision of a service for the purpose of section 24 of the DDA. In my view it is further not correct to suggest that a proposal set out in a document which is no more than an impact statement, or indeed if one uses the expression, 'a cost benefit analysis', can in any way constitute conduct which would attract the attention of section 24 of the DDA. It is, as I have indicated, a document that can be characterised as no doubt a significant document for the proper consideration of cabinet which may reject or accept it, which may decide to introduce a bill into parliament which may decide to embrace part, all or nothing which is set out in the RIS.<sup>501</sup>

In *Ball v Morgan*,<sup>502</sup> McInnes FM held that a particular service would fall outside s 24 of the DDA if it was illegal or 'against good morals'.<sup>503</sup> The applicant had been at an illegal brothel in Victoria and alleged that she had been discriminated against in the provision of the services and facilities at that brothel on the basis of her disability which required her to use a wheelchair. McInnis FM queried whether or not this fell within the scope of 'services' under the DDA:

The preliminary issue therefore which I need to consider is whether the provision of a service characterised as an illegal brothel is a service of a kind which would attract the attention of human rights legislation and in particular whether the provisions relied upon in the DDA can be applied for the benefit of the applicant in the present case even if I were to assume that discrimination has occurred.<sup>504</sup>

McInnis FM dismissed the application, finding:

It is difficult in circumstances of this kind to determine the extent to which the court should refuse to allow a claim to be pursued but in all the circumstances I am satisfied that to do so would be to allow the applicant to pursue a claim arising out of the provision of an illegal service and/or would allow a claim to be pursued in relation to an activity that I am satisfied would affront public conscience and even in this modern age would be regarded as against good morals.<sup>505</sup>

## **(b) 'Refusal' of a service**

In *W*, while finding that the respondent council was providing a service in the consideration of applications for planning approval, Dawson and Gaudron JJ rejected the argument that there had been a refusal to provide the service:

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<sup>501</sup> [2001] FMCA 110, [22].

<sup>502</sup> [2001] FMCA 127.

<sup>503</sup> [2001] FMCA 127, [64].

<sup>504</sup> [2001] FMCA 127, [60].

<sup>505</sup> [2001] FMCA 127, [64].

Once the service in issue is identified as the exercise of a discretion to grant or withhold planning approval, a case of refusal to provide that service is not established simply by showing that there was a refusal of planning approval. Rather it is necessary to show a refusal to consider whether or not approval should be granted.<sup>506</sup>

Similarly, Gummow J held that the Council did not refuse to provide services as it did not refuse to accept or deal with the application by PLWA.<sup>507</sup>

In *Tate v Rafin*,<sup>508</sup> the respondent argued that a person is not discriminated against by being refused access to goods, services or facilities in circumstances where they have access to goods, services or facilities from another source. Wilcox J rejected that argument, holding:

it is no answer to a claim of discrimination by refusal of provision of goods, services or facilities to say that the discriminatee is, or may be, able to obtain the goods, services or facilities elsewhere. The Act is concerned to prevent discrimination occurring; that is why it makes the particular discriminatory act unlawful and provides a remedy to the discriminatee.<sup>509</sup>

The mere fact that a service is not provided on a particular occasion does not necessarily establish that there has been a 'refusal' of that service. For example, in *Ball v Silver Top Taxi Service Ltd*<sup>510</sup> the applicant, who used an electric wheelchair for mobility, brought a complaint against the respondent in relation to its failure to meet her booking for a wheelchair accessible taxi. It was accepted that the services provided by the respondent were 'services relating to transport or travel' for the purposes of s 4(1).<sup>511</sup> The applicant argued that there had been a refusal to provide that service to people with disabilities. Walters FM held, however, that the respondent did not *refuse* to provide the applicant with its services: rather, it did all that it could to dispatch an appropriate taxi on the particular day.<sup>512</sup> His Honour concluded that the respondent dealt with the applicant's booking in the same way as it dealt with bookings for a standard taxi from persons without the applicant's disability.<sup>513</sup>

By contrast, in *Wood v Calvary Hospital*,<sup>514</sup> Moore J emphasised that the meaning of 'refusing' in s 24(1)(a) should be given a beneficial construction and the section 'does not cease to apply where a putative discriminator is for some reason temporarily unable to provide the goods or services'.<sup>515</sup> In that case the applicant had requested certain medical treatment at home through the 'Calvary at Home' scheme. Upon making that request, she was told that she would not be able to be treated at home because of her past intravenous drug use and past aggressive behaviour. However, at the time that the applicant requested to be treated at home, the home visits scheme was closed to new entrants because of staff shortages.

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<sup>506</sup> (1997) 191 CLR 1, 23-24.

<sup>507</sup> (1997) 191 CLR 1, 44-45.

<sup>508</sup> [2000] FCA 1582.

<sup>509</sup> [2000] FCA 1582, [53].

<sup>510</sup> [2004] FMCA 967.

<sup>511</sup> [2004] FMCA 967, [27].

<sup>512</sup> [2004] FMCA 967, [45].

<sup>513</sup> [2004] FMCA 967, [38].

<sup>514</sup> [2006] FCA 1433.

<sup>515</sup> [2006] FCA 1433, [28].

At first instance,<sup>516</sup> Brewster FM held that there must be a service available to be offered before that service can be said to have been refused. As the service was closed at the relevant time, there was no refusal of a service and s 24 did not apply.<sup>517</sup>

However, on appeal to the Federal Court,<sup>518</sup> Moore J disagreed with this approach as taking an unduly narrow reading of 'refusal'.<sup>519</sup> Nevertheless, Moore J rejected the appeal on the basis that the appellant was treated no differently to a person without a disability, as the program was closed to all patients:

The Federal Magistrate's finding that the home visits program was closed seems to lead, inevitably, to the conclusion that the appellant was treated no differently than a person without the disability would have been treated. Neither would have been provided with the service. It is therefore unnecessary to consider the construction of a comparator for the purpose of s 5. The Federal Magistrate was correct in reaching the conclusion that the hospital did not contravene s 5.<sup>520</sup>

### **(c) Delay in providing a service or making a facility available**

The issue of whether discrimination can arise from delay in providing a service or making a facility available in order to accommodate the needs of a person with a disability arose for consideration in *King v Gosewisch* ('*King*').<sup>521</sup> The Burrum Chamber of Commerce held an open meeting for the purpose of introducing local council candidates to the community. The meeting was held on the first floor of the local golf club which was inaccessible to two attendees who used wheelchairs. This gave rise to some heated commotion amongst various attendees and organisers. However, after a 40 minute delay, but prior to the meeting commencing, the meeting was transferred to the ground floor. A claim alleging discrimination in breach of s 24 of the DDA was brought against the organisers of the meeting by the two attendees who used wheelchairs as well as one of their associates.

Baumann FM held that there had been no 'refusal' to provide a service or to make the facilities available, as the time at which the service was provided was the time at which the meeting began, by which time the meeting had moved downstairs and the applicants were able to attend.<sup>522</sup>

Similarly, Baumann FM rejected the claim that the respondent had discriminated against the applicants in relation to the manner and/or terms on which the services or facilities were provided, such as having to ascend the stairs to the first floor or wait 40 minutes to attend the meeting on the ground floor. His Honour noted that the applicants were not required to ascend the stairs to attend the meeting as the meeting did not commence until it had

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<sup>516</sup> *Wood v Cavalry Hospital* [2005] FMCA 799.

<sup>517</sup> [2005] FMCA 799, [23].

<sup>518</sup> [2006] FCA 1433.

<sup>519</sup> [2006] FCA 1433, [28].

<sup>520</sup> [2006] FCA 1433, [31].

<sup>521</sup> [2008] FMCA 1221.

<sup>522</sup> [2008] FMCA 1221 [78]-[81], [88].

been transferred downstairs.<sup>523</sup> In relation to the delay of 40 minutes, his Honour held that this was reasonable in the circumstances and treated the applicants no differently to the other attendees.<sup>524</sup>

#### (d) **Ownership of facilities not necessary for liability**

In *King*,<sup>525</sup> the respondents argued that they could not be liable in respect of the inaccessibility of the meeting on the first floor of the golf clubhouse because they did not own the premises. Baumann FM rejected this argument, stating:

I find no merit in the argument of the Respondents that they can deny any responsibility for making available the premises at the Burrum Golf Club simply because they have no ownership of those facilities. Although it seems they clearly had the consent of the 'owner' or management of the Burrum Golf Club to hold their gatherings at the Clubhouse, the formal nature of their right or licence to do so is not the subject of evidence. They were not trespassers. They exercised some implied licence at least. I am satisfied, for the purposes of section 24 that the Respondents were making '*facilities available*'.<sup>526</sup>

### **5.4 Ancillary Liability**

#### **5.4.1 Vicarious liability**

Section 123(2) of the DDA sets out the circumstances in which a body corporate will be held vicariously liable for particular conduct, as follows:<sup>527</sup>

Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

The meaning of the above section was considered by Raphael FM in *Vance v State Rail Authority*.<sup>528</sup> His Honour noted that the section was similar in its operation to provisions in the SDA (s 106), RDA (s 18A) and State legislation, then stated:

Case law in this area emphasises the importance of implementing effective education programs to limit discriminatory conduct by employees and the necessity of such programs for employers to avoid being held vicariously liable for the acts of their employees. Cases such as *McKenna v State of Victoria* (1998) EOC 92-927; *Hopper v Mt Isa Mines* [1999] 2 Qd R 496; *Gray v State of Victoria and Pettiman* (1999) EOC 92-996; *Evans v Lee & Anor* [1996]

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<sup>523</sup> [2008] FMCA 1221 [84], [88].

<sup>524</sup> [2008] FMCA 1221 [86], [88].

<sup>525</sup> [2008] FMCA 1221.

<sup>526</sup> [2008] FMCA 1221 [75] (emphasis in original).

<sup>527</sup> See also ss 123(1)-(9), which elaborate on the circumstances in which a body corporate will be held liable for particular conduct.

<sup>528</sup> [2004] FMCA 240, [54]-[58].



HREOCA 8 indicate that the test to be applied is an objective one based upon evidence provided by the employer as to the steps it took to ensure its employees were made aware of what constituted discriminatory conduct, that it was not condoned and that effective procedures existed for ensuring that so far as possible it did not occur.<sup>529</sup>

Raphael FM also cited with approval the decision under the RDA in *Korczak v Commonwealth*,<sup>530</sup> to the effect that what is required is proactive and preventative steps to be taken. Perfection is not the requisite level – only reasonableness.<sup>531</sup> In the circumstances of the case before him (see 5.2.3(c) above), his Honour found that the respondent had exercise due care and was not liable under s 123(2) for the actions of its employee.

In *Penhall-Jones v State of NSW*,<sup>532</sup> Raphael FM held that the Ministry of Transport was not vicariously liable for the discriminatory act of one of its employees, which consisted of that employee making a sarcastic comment to the applicant because of her disability. His Honour held that the policies of the Ministry of Transport dealing with disability discrimination ‘constituted “reasonable steps” bearing in mind their comprehensiveness and the action taken in support of them following the complaint’.<sup>533</sup>

## 5.4.2 Permitting an unlawful act

Section 122 of the DDA provides for liability of persons involved in unlawful acts otherwise than as the principal discriminator, as follows:

### 122 Liability of persons involved in unlawful acts

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1, 2, 2A or 3 of Part 2 is, for the purposes of this Act, taken also to have done the act.

In *Cooper v Human Rights & Equal Opportunity Commission*,<sup>534</sup> the applicant alleged that the Coffs Harbour City Council (‘the Council’) was in breach of the DDA by virtue of s 122, for having allowed the redevelopment of a cinema complex without requiring that wheelchair access be incorporated as part of the redevelopment.

The then Human Rights and Equal Opportunity Commission had previously found that the cinema proprietor had unlawfully discriminated against the applicant by requiring him to use stairs to gain access to the cinema.<sup>535</sup> However, in a separate decision in relation to the Council, the Commission held that there was no liability under s 122.<sup>536</sup> The applicant sought review of this latter decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

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<sup>529</sup> [2004] FMCA 240, [56].

<sup>530</sup> (2000) EOC 93-056.

<sup>531</sup> [2004] FMCA 240, [56].

<sup>532</sup> [2008] FMCA 832.

<sup>533</sup> [2008] FMCA 832, [65].

<sup>534</sup> (1999) 93 FCR 481.

<sup>535</sup> *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 32.

<sup>536</sup> *Cooper v Coffs Harbour City Council* (1999) EOC 92-962.

Madgwick J upheld the application and remitted the matter to the Commission for determination according to law.<sup>537</sup> The following principles can be distilled from the decision of Madgwick J.

- The first step in establishing liability under s 122 is to establish whether or not there was an unlawful act of a principal under Division 1, 2 or 3 of Part 2.<sup>538</sup>
- To find that a person has permitted a particular act, it is necessary to show that they were able to prevent it.<sup>539</sup>
- The high standard of knowledge required to prove liability as an accessory in criminal cases is not required: s 122 has been drafted so as to be wider in its scope and the DDA was intended to have far-reaching consequences.<sup>540</sup>
- '[O]ne person permits another to do an unlawful discriminatory act if he or she permits that other to do an act which is in fact discriminatory'.<sup>541</sup> It is not necessary for an applicant to show that the 'permittor' had knowledge or belief that there was *no* defence or exemption (in the present case the defence of unjustifiable hardship) available to the principal.<sup>542</sup>
- It will be an exception to s 122 for a 'permittor' to show that an act was permitted based on an honest and reasonable mistake of fact.<sup>543</sup> In the present matter, the Council would have avoided liability if it acted on an honest and reasonable belief that there was 'unjustifiable hardship' such as would constitute a defence under the DDA.<sup>544</sup>

On remittal, the Council was found to be liable under s 122 for having approved the redevelopment without wheelchair access.<sup>545</sup> Commissioner Carter held:

Prima facie, in permitting the development to proceed without access for persons with disabilities, the Council was about to act unlawfully and in breach of the DDA. It could only avoid such a finding on the basis of an honest and reasonable belief that the operator could properly claim unjustifiable hardship if account were taken of 'all relevant circumstances of the particular case'... In short it had to convert a potentially unlawful situation to one which could withstand scrutiny.

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<sup>537</sup> (1999) 93 FCR 481, 496 [52].

<sup>538</sup> (1999) 93 FCR 481, 490 [27]. The liability of the principal had been established in *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 51 and was not an issue in the proceedings before Madgwick J.

<sup>539</sup> (1999) 93 FCR 481, 494 [41], citing with approval *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (1928) 40 CLR 481, 490-491 (Isaacs J). *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481 was cited with approval in *Elliott v Nanda* (2001) FCR 240, 289-292 [154]-[160]; followed in *Oberoi v Human Rights & Equal Opportunity Commission* [2001] FMCA 34, [27]-[29]; *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109, [24].

<sup>540</sup> (1999) 93 FCR 481, 493 [37]-[39].

<sup>541</sup> (1999) 93 FCR 481, 494 [41].

<sup>542</sup> (1999) 93 FCR 481, 493-494 [40]-[41].

<sup>543</sup> (1999) 93 FCR 481, 495-496 [46]-[49].

<sup>544</sup> (1999) 93 FCR 481, 496 [51].

<sup>545</sup> Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 May 2000 (extract at (2000) EOC 93-089).

In this the onus lay on the Council. Its fundamental obligation was to reasonably inform itself of the relevant facts upon which to found its belief.<sup>546</sup>

The Commissioner found that the Council had not made sufficient inquiry to have enabled it to have been reasonably satisfied as to unjustifiable hardship and was therefore liable under s 122. The Commissioner stated:

To convert a potential finding of unlawfulness to one that it had not acted unlawfully required much more than its mere acceptance of the content of the application, the assumptions which it made about the persons involved, the likely cost of the required access and its impact on the developer's financial position. In fact it made no significant or relevant inquiry. The circumstances of the case required it, if it was to be in a position of avoiding the serious finding of unlawfulness, to at least engage [the architect who wrote the development application] in substantial discussions about the project, what it involved, the costs of it, and the difficulties or otherwise in complying with the DDA requirements. An investigation by it of 'all the relevant circumstances of the case'... would have immediately revealed that the assumptions upon which it had initially proceeded were wrong or at least subject to significant doubt. Such a basic inquiry would have alerted the relevant Council officers that their assumptions made so far were probably not sound.

For there to have been an honest and reasonable basis for a belief that the operator could itself have avoided unlawfulness on the unjustifiable hardship ground further inquiry was essential.<sup>547</sup>

In *King v Gosewisch*<sup>548</sup> the applicants alleged that the organisers of a public meeting were liable under s 122 for causing, inducing, aiding or permitting certain hostile comments directed at the applicants in the course of the meeting, which were alleged to constitute disability harassment. The court rejected the claim that the various comments amounted to disability harassment on the basis that the comments were not in relation to the applicants' disabilities.<sup>549</sup> The court held that it therefore followed that there could be no liability under s 122.<sup>550</sup> In any event, the court accepted that the respondents had not caused, induced, aided or permitted the relevant comments. These comments arose in the context of a heated political meeting in which the respondents generally handled the matter well and did their best to enforce proper meeting procedure whilst allowing the public to have their say.<sup>551</sup>

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<sup>546</sup> Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 May 2000 (extract at (2000) EOC 93-089), 13.

<sup>547</sup> Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 May 2000 (extract at (2000) EOC 93-089), 14.

<sup>548</sup> [2008] FMCA 1221.

<sup>549</sup> [2008] FMCA 1221, [98]-[105].

<sup>550</sup> [2008] FMCA 1221, [106].

<sup>551</sup> [2008] FMCA 1221, [106].

## 5.5 Unjustifiable Hardship and Other Exemptions

### 5.5.1 Unjustifiable hardship

It is a defence to a claim of discrimination in almost all areas specified in Divisions 1 and 2 of Part 2 of the DDA, that 'unjustifiable hardship' would be imposed upon a respondent in order for them to avoid discriminating against an aggrieved person.<sup>552</sup> The only area where the defence is not available is requests for information under s 30.

'Unjustifiable hardship' is defined by s 11 of the DDA as follows:

- (1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the **first person**) would be an **unjustifiable hardship**, all relevant circumstances of the particular case must be taken into account, including the following:
  - (a) the nature of the benefit or detriment likely to accrue to, 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;
  - (d) the availability of financial and other assistance to the first person; and
  - (e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

- (2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

The 2009 changes to the DDA inserted the additional factor of the 'availability of financial and other assistance' in s 11(d).<sup>553</sup> The Explanatory Memorandum states that this is:

designed to allow for a more balanced assessment of the costs of making adjustments. For example, funding to assist in responding to the particular needs of people with disability is available in some circumstances.<sup>554</sup>

The appropriate approach by a Court to the concept of unjustifiable hardship is first to determine whether or not the respondent has discriminated against

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<sup>552</sup> See ss 21B and 29A of the DDA.

<sup>553</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 18.

<sup>554</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 12 [57].

the complainant and then determine whether or not the respondent is able to make out the defence of unjustifiable hardship.<sup>555</sup>

The onus is on the respondent to establish unjustifiable hardship by way of defence: the position under the case law<sup>556</sup> has now been codified in s 11(2).

**(a) 'More than just hardship'**

Implicit in the concept of unjustifiable hardship is that some hardship will be justifiable:

the concept of 'unjustifiable hardship' connotes much more than just hardship on the respondent. The objects of the [DDA] make it clear that elimination of discrimination as far as possible is the legislation's purpose. Considered in that context, it is reasonable to expect that [a respondent] should have to undergo some hardship...<sup>557</sup>

In *Francey v Hilton Hotels of Australia Pty Ltd*<sup>558</sup> ('Francey') Commissioner Innes held that the financial circumstances of the respondent should also be viewed from this perspective:

Many respondents imply that [their financial circumstances] should be given greater weight than other factors. Whilst it is important, it, along with all other provisions of the [DDA], must be considered in the context of the [DDA's] objects. I do not suggest that intolerable financial imposts should be placed on respondents. However, for this defence to be made out the hardship borne must be unjustifiable. Therefore, if other factors mitigate in favour of preventing the discrimination – which is the Parliament's intention in this legislation – then the bearing of a financial burden by the respondent may cause hardship which is deemed justifiable.<sup>559</sup>

This approach was cited with approval in *Access For All Alliance (Hervey Bay) v Hervey Bay City Council*<sup>560</sup> ('Access For All Alliance') in which Baumann FM held:

Whilst I accept the Council has many priorities, and is proactive in acquiring funding to meet and accommodate the needs of those who live within the local authority area, I am satisfied even at a cost of \$75,250 this Council can make the necessary adjustments to its budget to remedy the unlawful discrimination found by me.

His Honour ordered the respondent to undertake the necessary works to prevent the continued discrimination (see 5.2.3(c) above) within nine months.

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<sup>555</sup> *Sluggett v Human Rights & Equal Opportunity Commission* (2002) 123 FCR 561, 568 [24]-[25]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [113]-[114].

<sup>556</sup> *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481, 492 [32]; cited with approval in *Sluggett v Human Rights & Equal Opportunity Commission* (2002) 123 FCR 561, 567-568 [23]-[24].

<sup>557</sup> *Finney v Hills Grammar School* [1999] HREOCA 14 (extract at (1999) EOC 93-020). Affirmed on review in *Hills Grammar School v Human Rights & Equal Opportunity Commission* (2000) 100 FCR 306, 318 [48]. See also *Access For All Alliance (Hervey Bay) v Hervey Bay City Council* [2004] FMCA 915, [84].

<sup>558</sup> (1997) EOC 92-903.

<sup>559</sup> (1997) EOC 92-903, 77, 453.

<sup>560</sup> [2004] FMCA 915, [85].

**(b) 'Any persons concerned'**

It is clear that the expression 'any persons concerned' in s 11 extends beyond the immediate complainant and respondent. The 2009 changes to the DDA inserted the example at the end of s 11 to clarify 'that the nature of the benefit or detriment likely to accrue or be suffered by the community is one of the factors to be taken into account under s 11(a)'.<sup>561</sup>

The example in s 11 reflects the decision of Baumann FM in *Access For All Alliance*, where he took into account the 'real and important' benefits that would flow from an adjustment to public toilets to make them accessible to people with disabilities. His Honour took into account not only the benefit to local residents, but also to visitors to the area.<sup>562</sup>

In *Francey*, Commissioner Innes considered a complaint brought by a person with asthma (and her associate) that the respondent's policy of allowing people to smoke in their nightclub made it a condition of access to those premises that patrons be able to tolerate environmental tobacco smoke. This was a condition with which the complainant could not comply. In finding that the defence of unjustifiable hardship was not made out, Commissioner Innes considered the benefits and detriments to the complainants, the respondent, staff and potential staff, patrons and potential patrons of the nightclub.<sup>563</sup>

In *Cooper v Holiday Coast Cinema Centres Pty Ltd*,<sup>564</sup> the complaint concerned the condition that patrons of a cinema access the premises by way of stairs. This was a condition with which the complainant, who used a wheelchair, could not comply. Commissioner Keim considered s 11(a) and stated as follows:

I am of the view that the phrase should be interpreted broadly. I am of the view that it is appropriate not only to look to the complainants themselves but also their families and to other persons with disabilities restricting their mobility who might, in the future, be able to use the respondent's cinema. In the same way, in terms of the effect of the order on the respondent, it is appropriate for me to look at the hardship that might be suffered by the shareholders of the respondent; its employees; and also its current and potential customers. The latter groups of people are particularly important in terms of financial hardship from an order forcing the cinema complex to close.<sup>565</sup>

In *Scott v Telstra Corporation Ltd*,<sup>566</sup> the issue of unjustifiable hardship concerned the provision of a tele-typewriter ('TTY') to customers of the respondent who had profound hearing loss. The respondent argued that it was relevant to consider costs relating to its potential liability if it was required to provide *other* products to facilitate access to its services by people with disabilities. The argument was rejected by Sir Ronald Wilson:

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<sup>561</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 12 [56].

<sup>562</sup> [2004] FMCA 915, [87], citing with approval *Scott v Telstra* (1995) EOC 92-117, 78, 401.

<sup>563</sup> (1997) EOC 92-903, 77,452.

<sup>564</sup> [1997] HREOCA 51.

<sup>565</sup> [1997] HREOCA 51.

<sup>566</sup> (1995) EOC 92-717, 78,402.

The respondent has also provided figures on a best and worst case basis of its potential liability if it has to provide other products as well as TTYs. I do not consider these figures relevant. The only relevant factors that have to be considered are those referable to the supply of TTYs and the resultant revenue to the respondent. It is quite wrong to confuse the issue of unjustifiable hardship arising from the supply of TTY's to persons with a profound hearing loss with possible hardship arising from other potential and unproved liabilities. It follows that the reliance by the respondent on the cost of providing products other than the TTY to persons other than persons with a profound hearing loss to show unjustifiable hardship is an erroneous application of s 11 of the DDA.<sup>567</sup>

In *Williams v Commonwealth*,<sup>568</sup> (see 5.3.1(d) above), the applicant had been discharged from the RAAF on the basis of disability, namely, his insulin dependent diabetes. His discharge followed the introduction of a directive requiring every member of the RAAF to be able to be deployed to 'Bare Base' settings, which were arduous in nature and lacking in support facilities. The Commonwealth argued that the applicant was unable to meet these 'inherent requirements' by virtue of his diabetes. It also sought to rely on the defence of unjustifiable hardship. McInnis FM found that even if the applicant was required to deploy to 'Bare Base' facilities, the accommodation required for his disability (regular meals and backup supplies of insulin, for example) would not have imposed an unjustifiable hardship on the Commonwealth.<sup>569</sup>

### (c) Other factors

Section 11 provides that 'all relevant circumstances of the particular case must be taken into account' in determining unjustifiable hardship.

In *Access For All Alliance*, Baumann FM accepted that the Australian Standards and the BCA were 'relevant and persuasive' in determining whether or not any hardship faced by the respondent in effecting an alteration to premises is 'unjustifiable'.<sup>570</sup> In that case, the application concerned the placement of wash basins outside public toilets, rendering them inaccessible to people with disabilities which required them to use the basins as part of their toileting regime (see 5.2.3(f) above). Baumann FM found that this constituted indirect discrimination and that there was no unjustifiable hardship. His Honour stated:

It is clear that the Australian Standards or BCA do not proscribe the necessity for internal hand basins. The accessible cubicle conforms with all such standards. I do not regard the fact that the premises comply with the

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<sup>567</sup> (1995) EOC 92-717, 78,402. See also *Finney v Hills Grammar School* [1999] HREOCA 14 (extract at (1999) EOC 93-020). Decision affirmed on review in *Hills Grammar School v Human Rights & Equal Opportunity Commission* (2000) 100 FCR 306, 318 [43]-[45].

<sup>568</sup> [2002] FMCA 89.

<sup>569</sup> [2002] FMCA 89, [149]. The decision of McInnis FM was overturned by the Full Federal Court in *Commonwealth v Williams* (2002) 125 FCR 229 on the basis of the exemption in s 53 of the DDA (considered below in 5.5.2(b)). The aspects of his Honour's decision relating to unjustifiable hardship were not considered.

<sup>570</sup> [2004] FMCA 915, [13]-[14].

standards precludes me from finding either unlawful discrimination or that there is no 'unjustifiable hardship'.<sup>571</sup>

Relevant to his Honour's conclusion was the potential effect of the discrimination on people with disabilities who may need to use the toilets, and the benefits of alterations being made:

The evidence in my view overwhelmingly supports a finding that the benefits for those persons with a combination of mobility and toileting regime challenges... are real and important. Without the alterations, many persons may lose the benefit of this engaging in the foreshore experience and amenity. This, of course, not only extends to local residents but because of the renown attractions of this area to tourists, it also extends to visitors to the area (see *Scott v Telstra* (1995) EOC 92-117 per Wilson P at 78,401).

It is hard to imagine a more embarrassing or undignified experience than to be forced to endure a stream of Wet Ones, wash cloths and the like from the outside running water basin to the privacy of the accessible toilet if one had an 'accident'. Those self-catheterising are also entitled to complete the usual regime with the basic support an internal wash basin would provide to them.<sup>572</sup>

## 5.5.2 Other exemptions to the DDA

### (a) Annuities, insurance and superannuation

Section 46(1) of the DDA creates an exemption from the DDA in relation to annuities, insurance and superannuation, as follows:

- (1) This Part does not render it unlawful for a person to discriminate against another person, on the ground of the other person's disability, by refusing to offer the other person:
  - (a) an annuity; or
  - (b) a life insurance policy; or
  - (c) a policy of insurance against accident or any other policy of insurance; or
  - (d) membership of a superannuation or provident fund; or
  - (e) membership of a superannuation or provident scheme;if:
  - (f) the discrimination:
    - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
    - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
  - (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

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<sup>571</sup> [2004] FMCA 915, [86].

<sup>572</sup> [2004] FMCA 915, [87]-[88].



In *Xiros v Fortis Life Assurance Ltd*,<sup>573</sup> it was not disputed that the applicant had been discriminated against on the basis of being HIV positive when his claim was declined under an insurance policy which excluded 'all claims made on the basis of the condition of HIV/AIDS'.

Driver FM considered the meaning of the term 'reasonable' in the context of s 46(1)(f)(i). His Honour described as a 'useful guide',<sup>574</sup> the consideration of 'reasonableness' in the context of indirect discrimination (see 5.2.3(f) above) by the High Court in *Waters v Public Transport Corporation*<sup>575</sup> ('Waters') and the Federal Court in *Secretary, Department of Foreign Affairs & Trade v Styles*<sup>576</sup> ('Styles').

His Honour concluded that 'all relevant circumstances', including statistical data that is available, should be taken into account. In the matter before him, his Honour held that it was reasonable for the respondent to maintain its 'HIV/AIDS exclusion', based upon the statistical information and actuarial advice available.<sup>577</sup>

The same approach to 'reasonableness' was taken by Raphael FM in *Bassanelli v QBE Insurance*.<sup>578</sup> In that matter, the applicant sought travel insurance for an overseas trip. She was denied the insurance on the basis of her disability, being metastatic breast cancer. The applicant's evidence was that she did not expect insurance for her pre-existing medical condition but rather other potential losses such as theft, loss of luggage, other accidental injury or injury or illness to her husband.

The respondent conceded that there was no actuarial or statistical data relied upon in making the decision to refuse insurance but maintained that their conduct was 'reasonable' and therefore fell within s 46(1) of the DDA.

While the applicant was able to obtain insurance through another insurer, Raphael FM noted that

the fact that one insurer may provide cover for a particular risk does not mean that it is unreasonable for another insurer to decline it. The court must first look, objectively, at the reasons put forward by the insurer for declining the risk and consider the evidence brought to justify that decision. The reasonableness or otherwise of that evidence can be tested against the conduct of other insurers who are offered the same risk.<sup>579</sup>

His Honour noted that the onus is on the respondent to establish 'reasonableness' in this context<sup>580</sup> and found that the decision by the respondent was not reasonable in all of the circumstances of the case.

His Honour's decision was upheld on appeal by Mansfield J in *QBE Travel Insurance v Bassanelli*.<sup>581</sup> Mansfield J commented that the exemptions in ss

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<sup>573</sup> (2001) 162 FLR 433.

<sup>574</sup> (2001) 162 FLR 433, 439 [16].

<sup>575</sup> (1991) 173 CLR 349.

<sup>576</sup> (1989) 23 FCR 251.

<sup>577</sup> (2001) 162 FLR 433, 439-440 [16]-[18].

<sup>578</sup> [2003] FMCA 412.

<sup>579</sup> [2003] FMCA 412, [37].

<sup>580</sup> [2003] FMCA 412, [52].

<sup>581</sup> (2004) 137 FCR 88.

46(1)(f) and 46(1)(g) of the DDA are ‘not simply alternatives’<sup>582</sup> – only one can apply in any particular case. His Honour stated:

I consider that, on its proper construction, the exemption for which s 46(1)(g) provides is only available if there is no actuarial or statistical data available to, or reasonably obtainable by, the discriminator upon which the discriminator may reasonably form a judgment about whether to engage in the discriminatory conduct. If such data is available, then the exemption provided by s 46(1)(g) cannot be availed of. The decision made upon the basis of such data must run the gauntlet of s 46(1)(f)(ii), that is the discriminatory decision must be reasonable having regard to the matter of the data and other relevant factors. If the data (and other relevant factors) do not expose the discriminatory decision as reasonable, then there is no room for the insurer to move to s 46(1)(g) and thereby to ignore such data. If such data were not available to the insurer but were reasonably obtainable, so that its discriminatory decision might have been measured through the prism of s 46(1)(f), again there would be no room for the insurer to invoke the exemption under s 46(1)(g).

Hence, if the exemption pathway provided by s 46(1)(f) ought to have been followed by the insurer, whatever the outcome of its application, the exemption pathway provided by s 46(1)(g) would not also be available. It is only if there is no actuarial or statistical data available to, or reasonably obtainable by, the insurer upon which it is reasonable for the insurer to rely, that s 46(1)(g) becomes available. The legislative intention is that the reasonableness of the discriminatory conduct be determined by reference to such data, if available or reasonably obtainable, and other relevant factors. That conclusion is consistent with the Explanatory Memorandum to the Disability Discrimination Bill 1992 (Cth) concerning the superannuation and insurance exemption.<sup>583</sup>

In the circumstances of the case, however, the parties conducted the application at first instance as if the exemption provided under s 46(1)(g) of the DDA was available to the appellant insurer and Mansfield J was of the view that Mr Bassanelli was bound by that conduct.<sup>584</sup>

Nevertheless, Mansfield J upheld the decision of Raphael FM at first instance, confirming that the onus of proof is on an insurer to qualify for an exemption under s 46 of the DDA.<sup>585</sup> He further held that the assessment of what is ‘reasonable’ is to be determined objectively in light of all relevant matters, citing the decisions in *Waters* and *Styles*.<sup>586</sup>

## **(b) Defence force**

Section 53(1) of the DDA provides:

- (1) This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person’s disability

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<sup>582</sup> (2004) 137 FCR 88, 94 [28].

<sup>583</sup> (2004) 137 FCR 88, 95-96 [33]-[34].

<sup>584</sup> (2004) 137 FCR 88, 96 [36].

<sup>585</sup> (2004) 137 FCR 88, 96 [37].

<sup>586</sup> (2004) 137 FCR 88, 99 [51]-[54].

in connection with employment, engagement or appointment in the Defence Force:

- (a) in a position involving the performance of combat duties, combat-related duties or peacekeeping service; or
- (b) in prescribed circumstances in relation to combat duties, combat-related duties or peacekeeping service; or
- (c) in a position involving the performance of duties as a chaplain or a medical support person in support of forces engaged or likely to be engaged in combat duties, combat-related duties or peacekeeping service.

Pursuant to the regulation-making power conferred by s 53(2) and s 132 of the DDA, 'combat duties' and 'combat-related duties' were defined in the *Disability Discrimination Regulations 1996* (Cth) (the 'Regulations'). Regulation 3 defines 'combat duties' as:

duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict.

Regulation 4 defines 'combat-related duties' as:

- (a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties; or
- (b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties.

In *Williams v Commonwealth*,<sup>587</sup> McInnis FM at first instance held that this exemption did not apply to the applicant who had been employed as a Communications Operator with the RAAF for over ten years and, apart from some training, could not be said to have been involved in combat duties or combat-related duties. His Honour stated that:

To apply a 'blanket' immunity from the application of the DDA simply on the basis of a general interpretation of combat related duties would be inconsistent with the day to day reality of the Applicant's inherent requirements of his particular employment ... If that were the case then s 53 would only need to say that this part does not render it unlawful for a person to discriminate against another person who is employed, engaged or appointed in the Defence Forces. The section clearly contemplates the distinction between combat and non combat personnel ...<sup>588</sup>

This decision was overturned on appeal by the Full Federal Court in *Commonwealth v Williams*.<sup>589</sup> The Full Court held that s 53 of the DDA, when read in conjunction with the relevant definitions in the Regulations, covers duties which are likely to require (as distinct from actually require) the commission of an act of violence in the event of armed conflict. The Full Court found that Mr Williams, employed in a position providing 'communications and information systems support to deployed forces', was clearly performing 'work

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<sup>587</sup> [2002] FMCA 89.

<sup>588</sup> [2002] FMCA 89, [154]. See 5.3.1(d) above for general discussion on the issue of inherent requirements.

<sup>589</sup> (2002) 125 FCR 229.

in support of' such forces within the meaning of reg 4(b). Therefore Mr Williams' alleged discrimination was not covered by the operation of the DDA due to s 53.<sup>590</sup>

The Full Court noted that this did not mean that all members of the Australian Defence Force were, for the purposes of matters connected with their employment, unable to invoke the DDA. The Court stated that s 53 and the regulations require an element of directness and, accordingly, staff in a recruiting office or in public relations may not be excluded by the section.<sup>591</sup>

### (c) Compliance with a prescribed law

Section 47(2) provides that Part 2 of the DDA, which contains the specific prohibitions against discrimination, 'does not render unlawful anything done by a person in direct compliance with a prescribed law'.<sup>592</sup>

In *McBride v Victoria (No 1)*,<sup>593</sup> McInnis FM considered issues surrounding the return to work in 1994 of an employee with a disability which resulted from a workplace injury. The applicant was employed in a prison. The respondent submitted that some of the conduct complained of was done in direct compliance with the *Corrections Act 1986* (Vic) so it could therefore not be unlawful by reason of s 47 of the DDA.<sup>594</sup> While finding that there was no unlawful discrimination arising out of the allegations relating to the applicant's return to work, his Honour indicated, in obiter remarks, that a narrow interpretation of the expression 'in direct compliance' as it appears in s 47(2) (and the now repealed s 47(3))<sup>595</sup> should be taken.<sup>596</sup> His Honour stated:

The general nature of the conduct, whilst no doubt complying with the requirements of the Respondent to properly administer prisons as a public correctional enterprise and service agency within the Department of Justice of the State of Victoria, does not of itself provide a sufficient basis which would enable s 47(3) to apply to this application. I am mindful of the fact that the *Corrections Act 1986* and regulations made thereunder place upon the Governor of the prison duties and obligations which relate to security and welfare and officers, subject to directions (see ss 19, 20 & 21). However compliance with that Statute as indeed the Respondent is required to comply with the *Accident Compensation Act 1985* does not of itself constitute direct compliance with a law which would otherwise attract the operation of s 47(2) and (3). To do so would be to ignore the reality of the general nature of the allegations in this matter though of course if part of the response in the matter includes compliance with the law then that would be relevant but not determinative of the merits of the application. Where part of the conduct of a

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<sup>590</sup> (2002) 125 FCR 229, 237 [32]-[33].

<sup>591</sup> (2002) 125 FCR 229, 237-238 [34].

<sup>592</sup> 'Prescribed laws' are those for which regulations have been made by the Governor-General pursuant to s 132 of the DDA.

<sup>593</sup> [2003] FMCA 285.

<sup>594</sup> [2003] FMCA 285, [26]. Note, however, the *Corrections Act 1986* (Vic) is not a law that has been prescribed for the purposes of s 47(2). (Nor does s 47(3) have application as that section only applies for 3 years from the commencement of the section (1 March 1993)).

<sup>595</sup> See *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 72.

<sup>596</sup> [2003] FMCA 285, [46].

Respondent may be said to be compliance with the law but forms only part of the overall conduct then it would be inappropriate to then excuse all of the conduct of the Respondent in a claim for unlawful discrimination.<sup>597</sup>

On this view, it is not sufficient for a respondent to show that it was acting generally in pursuance of its statutory authority.

#### **(d) Special measures**

Section 45 of the DDA provides an exemption in relation to 'special measures', as follows:

##### **45 Special measures**

- (1) This Part does not render it unlawful to do an act that is reasonably intended to:
  - (a) ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act; or
  - (b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:
    - (i) employment, education, accommodation, clubs or sport; or
    - (ii) the provision of goods, services, facilities or land; or
    - (iii) the making available of facilities; or
    - (iv) the administration of Commonwealth laws and programs; or
    - (v) their capacity to live independently; or
  - (c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:
    - (i) employment, education, accommodation, clubs or sport; or
    - (ii) the provision of goods, services, facilities or land; or
    - (iii) the making available of facilities; or
    - (iv) the administration of Commonwealth laws and programs; or
    - (v) their capacity to live independently.
- (2) However, subsection (1) does not apply:
  - (a) in relation to discrimination in implementing a measure referred to in that subsection if the discrimination is not necessary for implementing the measure;
  - (b) in relation to the rates of salary or wages paid to persons with disabilities.

Note: For discrimination in relation to the rates of salary or wages paid to persons with disabilities, see paragraphs 47(1)(c) and (d).

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<sup>597</sup> [2003] FMCA 285, [46].

The 2009 changes to the DDA inserted subsection 2, which limits the discrimination in the special measures exemption to discrimination ‘necessary’ to implement the measure for the benefit of the person with the disability.<sup>598</sup>

Former s 45 was examined in *Clarke v Catholic Education Office*.<sup>599</sup> The primary judge had found that the ‘model of learning support’ put forward by a school as part of the terms and conditions upon which an offer of admission was made to a deaf student indirectly discriminated against the student on the ground of his disability (see 5.2.3(c) above). Before the Full Federal Court,<sup>600</sup> the appellant challenged this finding, arguing that its acts were reasonably intended to afford the student, as a person with a particular disability, access to services to meet his special needs in relation to education. The Court viewed this submission as seeking to rely on former s 45(b).<sup>601</sup>

The Court stated that two points should be made about s 45. First, the section ‘should receive an interpretation consistent with the objectives of the legislation’.<sup>602</sup> The Court noted, in this regard, Finkelstein J’s observation in *Richardson v ACT Health & Community Care Service*<sup>603</sup> that ‘an expansive interpretation of an exemption in anti-discrimination legislation may well threaten the underlying object of the legislation’. Secondly, s 45 ‘refers to an act that is “reasonably intended” to achieve certain objects’. The Court agreed with the observation of Kenny JA in *Colyer v Victoria*<sup>604</sup> that s 45 ‘incorporates an objective criterion, which requires the Court to assess the suitability of the measure taken to achieve the specified objectives’.<sup>605</sup>

In rejecting the appellants’ submission, the Court said that the ‘act’ rendered unlawful by the DDA was not the offer of a ‘model of support’ which provided benefits to the student, but rather the appellants’ offer of a place subject to a term or condition that the student participate in and receive classroom instruction without an interpreter. This could not be said to be ‘reasonably intended’ to meet the student’s special needs for the purposes of s 45.<sup>606</sup>

In any event, the test of whether or not something is ‘reasonably intended’ to achieve the purposes set out in s 45 is an objective one. Sackville and Stone JJ concluded:

[The primary judge] found that any adult should have known that the withdrawal of Auslan support would cause Jacob distress, confusion and frustration and that, in the absence of an Auslan interpreter, Jacob would not have received an effective education. Whatever the subjective intentions of the appellants’ officers, it could not be said that the particular act otherwise rendered unlawful satisfied the objective standard incorporated into s 45.<sup>607</sup>

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<sup>598</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 71.

<sup>599</sup> (2003) 202 ALR 340.

<sup>600</sup> *Catholic Education Office v Clarke* (2004) 138 FCR 121.

<sup>601</sup> (2004) 138 FCR 121, 148 [127].

<sup>602</sup> (2004) 138 FCR 121, 149 [129].

<sup>603</sup> (2000) 100 FCR 1, 5 [24].

<sup>604</sup> [1998] 3 VR 759, 771.

<sup>605</sup> (2004) 138 FCR 121, 149 [130].

<sup>606</sup> (2004) 138 FCR 121, 149 [131] (Sackville and Stone JJ).

<sup>607</sup> (2004) 138 FCR 121, 149 [132]. See also the obiter comments of Gray J in *Nojin v Commonwealth of Australia* [2011] FCA 1066.

After 5 August 2009, respondents will need to show that a special measure is both 'reasonably intended' to achieve one of the designated purposes and that its discriminatory effect is 'necessary for implementing the measure'.

Although it was in fact unnecessary to deal with s 45, Gray commented on the element of reasonableness in *Noijin v Commonwealth of Australia*.

See also the discussion of special measures under the RDA at 3.3.1 above and under the SDA at 4.4 above.

## 5.6 Victimization

Section 42 of the DDA prohibits victimisation, as follows:

### 42 Victimization

- (1) It is an offence for a person to commit an act of victimisation against another person.

Penalty: Imprisonment for 6 months.

- (2) For the purposes of subsection (1), a person is taken to commit an act of victimisation against another person if the first-mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:

- (a) has made, or proposes to make, a complaint under this Act or the *Australian Human Rights Commission Act 1986*; or
- (b) has brought, or proposes to bring, proceedings under this Act or the *Australian Human Rights Commission Act 1986* against any person; or
- (c) has given, or proposes to give, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the *Australian Human Rights Commission Act 1986*; or
- (d) has attended, or proposes to attend, a conference held under this Act or the *Australian Human Rights Commission Act 1986*; or
- (e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the *Australian Human Rights Commission Act 1986*; or
- (f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Australian Human Rights Commission Act 1986*; or
- (g) has made an allegation that a person has done an act that is unlawful by reason of a provision of this Part;

or on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g) (inclusive).

An aggrieved person may bring a civil action for a breach of s 42, notwithstanding that it also may give rise to a separate criminal prosecution.<sup>608</sup> This is because the definition of 'unlawful discrimination' in s 3 of the AHRC

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<sup>608</sup> *Penhall-Jones v New South Wales* [2007] FCA 925, [10].

Act specifically includes conduct that is an offence under Division 4 of Part 2 of the DDA (which includes s 42). As discussed in Chapter 6, the jurisdiction of the Federal Court and FMC in respect of discrimination matters is conferred by s 46PO of the AHRC Act, which requires that the proceedings must relate to a complaint alleging 'unlawful discrimination' (as defined in s 3) which has been terminated by the President of the Australian Human Rights Commission.

The two main issues that have arisen in relation to s 42 include the following:

- (a) the test for causation as to whether certain conduct is 'on the ground that' the aggrieved person has done or proposes to do one of the matters contained in s 42(2)(a)-(g); and
- (b) the meaning of the phrase 'threatens to subject... to any detriment' in s 42(2).

### **(a) Test for causation**

Pursuant to s 10 of the DDA, if an act is done for two or more reasons, and one of those reasons is the aggrieved person's disability, then for the purposes of the DDA the act is taken to be done for that reason even if the person's disability is not the dominant or a substantial reason.

However, in *Penhall-Jones v New South Wales* ('*Penhall-Jones*'),<sup>609</sup> Buchanan J held that, when considering whether certain alleged acts of victimisation were done 'on the ground that' the aggrieved person had done or proposed to do one of the matters listed in s 42(2)(a)-(g), s 10 has no application:

Section 10 does not address the assessment of grounds or reasons which form part of an act of victimization, but only acts of discrimination in an earlier part of the Act in which s 10 appears. Section 10, therefore, does not establish, in favour of Ms Penhall-Jones' case, any proposition that existence of one of the conditions for the engagement of s 42 might be an insubstantial reason.<sup>610</sup>

After reviewing a number of authorities,<sup>611</sup> Buchanan J concluded that the appropriate test for causation in relation to s 42 was as follows:

Accordingly the authorities are unified in their approach that the ground or reason relied upon to establish a breach of the relevant legal obligation need not be the sole factor but it must be a substantial and operative factor. At least one circumstance from the list in s 42(2) of the Act must be a reason for the alleged detriment or threatened detriment. It must afford a rational explanation, at least in part, 'why' an action was taken. The connection cannot be made by a mere temporal conjunction of events, by an incidental but non-causal relationship or by speculation. The establishment of the suggested ground is as much a matter for proper proof as any other factual circumstance.<sup>612</sup> (emphasis added)

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<sup>609</sup> [2007] FCA 925.

<sup>610</sup> [2007] FCA 925, [69].

<sup>611</sup> [2007] FCA 925, [68]-[84].

<sup>612</sup> [2007] FCA 925, [85]. See also *Damiano v Wilkinson* [2004] FMCA 891.



**(b) Threatens to subject to any detriment**

The meaning of the phrase ‘threatens to subject the other person to any detriment’ for the purposes of s 42(2) also arose for consideration in *Penhall-Jones*. The applicant alleged that she had been victimised by her employer, the NSW Ministry of Transport (‘the Ministry’), in response to her complaint of discrimination to the then Human Rights and Equal Opportunity Commission. Specifically, she pointed to the following conduct alleged to constitute victimisation:

- being ‘verbally abused’ by her supervisor after she failed to attend a scheduled meeting;
- a ‘programme of bullying’ by her supervisor;
- proposals made by the Ministry during a conciliation conference that she discontinue her claim and resign from her employment in return for a sum of money; and
- a letter from the Acting Director-General of the Ministry, Mr Duffy, indicating that a continuation of her conduct of making false and vexatious complaints against the Ministry might lead to the termination of her employment on the basis that such conduct was contrary to the duties of fidelity, trust and good faith owed by an employee to an employer.

At first instance,<sup>613</sup> in relation to the first claim, Driver FM held that verbal abuse in the workplace, particularly by a supervisor, can be a ‘detriment’ for the purposes of s 42 of the DDA.<sup>614</sup> However, his Honour held that the supervisor’s conduct was not linked to the applicant’s complaint to the Commission.<sup>615</sup>

In relation to the second claim, Driver FM held that, when viewed in the context of the prior animosity between the applicant and her supervisor, her supervisor’s attitude and behaviour towards the applicant was not victimisation but arose out of her ‘growing dislike’ for the applicant.<sup>616</sup>

Driver FM dismissed the applicant’s third claim as ‘ridiculous’,<sup>617</sup> stating:

It was reasonable for the respondent to seek to limit its liability to Ms Penhall-Jones by securing the cessation of her employment in return for adequate compensation. Ms Penhall-Jones did not regard the monetary offer as adequate but she did not have to accept it. The HREOC conciliation process is non binding and no one is forced to agree to anything. The attempt by Ms Penhall-Jones to use the private conciliation conference to support her claim of victimisation is most unfortunate. If such a tactic were to become common it would imperil the conciliation role of HREOC as respondents would be reluctant to participate in conciliation for fear of the process then being used against them.<sup>618</sup>

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<sup>613</sup> *Penhall-Jones v New South Wales (No 2)* [2006] FMCA 927.

<sup>614</sup> [2006] FMCA 927, [125].

<sup>615</sup> [2006] FMCA 927, [126].

<sup>616</sup> [2006] FMCA 927, [127].

<sup>617</sup> [2006] FMCA 927, [129].

<sup>618</sup> [2006] FMCA 927, [128]-[129].

Driver FM also dismissed the applicant's fourth claim, in relation to the letter from Mr Duffy, stating:

the threat, in my view, falls short of victimisation. That is because the threat was a consequence not of the fact of the complaint of unlawful discrimination made by Ms Penhall-Jones, or her participation in the conciliation conference on 28 September 2004. Rather, the threat was a consequence of the intemperate and continuing allegations by Ms Penhall-Jones which Mr Duffy, on advice, genuinely viewed as unfounded, false and vexatious, to the extent of probably constituting a breach of the duty of trust and confidence necessary to the continuation of the employment relationship.<sup>619</sup>

The above findings of Driver FM were upheld on appeal.<sup>620</sup> In relation to the fourth claim, Buchanan J even expressed doubt as to whether the relevant letter from Mr Duffy amounted to a 'threat' within the meaning of s 42(2):

I find it hard to see the letter as a 'threat' notwithstanding the view expressed by the Federal Magistrate. Some indication of the seriousness with which Ms Penhall-Jones' accusations were viewed and, in particular, that they were regarded as inappropriate was not only natural but necessary if, in response to a continuation of allegations of that kind, the [respondent] wished to take action as a result. ... A failure to indicate the seriousness with which the allegations were viewed would require explanation if disciplinary action followed. A lack of candour and a failure to provide an unvarnished statement of the implications for Ms Penhall-Jones' employment would not be justified simply by a desire to avoid what might later be construed as threatening behaviour. All warnings, which are often an integral and necessary part of fair treatment and proper notice, contain an element of explicit or implicit menace by their very nature.<sup>621</sup>

The meaning of 'threatens to subject ... to any detriment' was also considered by Baumann FM in *Damiano v Wilkinson*.<sup>622</sup> The applicants alleged that, after lodging a claim of disability discrimination on behalf of their son with the Commission, the principal of the school victimised them by:<sup>623</sup>

- failing to return three phone calls made by the parents;
- shouting at the parents during a phone conversation, including shouting that he would speak to the mother 'only when he was ready to do so'; and
- making statements to the local paper that:
  - the complaint was 'trivial, vexatious, misleading or lacking in substance';
  - the matter had been taken 'to the highest authority and thrown out'; and
  - the school 'is currently investigating what legal recourse we have in terms of taking action against

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<sup>619</sup> [2006] FMCA 927, [136].

<sup>620</sup> [2007] FCA 925.

<sup>621</sup> [2007] FCA 925, [63].

<sup>622</sup> [2004] FMCA 891.

<sup>623</sup> Note that other conduct alleged by the applicants was found not to have formed part of the complaint to the Commission and was excluded from consideration by virtue of s 46PO(3) of the then *Human Rights and Equal Opportunity Commission Act 1986* (Cth): [2004] FMCA 891, [39].

people who are guilty of these sorts of complaints, because there is a high degree of harassment we want investigated’.

In relation to the meaning of ‘detriment’, his Honour held that, whilst the term is not defined in the DDA, it involves placing a complainant ‘under a disadvantage as a matter of substance’,<sup>624</sup> or results in a complainant suffering ‘a material difference in treatment’<sup>625</sup> which is ‘real and not trivial’.<sup>626</sup>

Baumann FM upheld the application for summary dismissal by the respondent on the basis that the allegations in relation to the phone calls were ‘trivial’ and lacking in particularity.<sup>627</sup> The claims relating to the comments made to the newspaper were also rejected as either accurate, understandable or not constituting a threat.<sup>628</sup>

In *Drury v Andreco Hurl Refractory Services Pty Ltd (No 4)*,<sup>629</sup> the respondent was found to have made a decision not to re-employ the applicant because of his previous complaint to the Commission and subsequent proceedings in the Federal Court and because he had threatened in correspondence to repeat that action were he not given employment. Raphael FM stated:

I can understand that the company might have been disturbed by [the applicant’s] correspondence with them. But that correspondence when read in context and as a whole is no more than a firm assertion of [the applicant’s] rights. The Act does not excuse the respondent to a victimisation claim because the proposal to make a complaint to HREOC is couched in intemperate words. In this particular case, and again reading the correspondence as a whole, I do not think that it could be so described. Certainly [the applicant] says that if he is not offered work he will take the matter up again with HREOC and certainly he suggests he will be calling witnesses and requiring documents to be produced, but he also says that he doesn’t want to go to court and he wants to settle the matter by getting back his job and by using the money earned from that job to repay the company the costs he owes them for the previously aborted proceedings before Driver FM.<sup>630</sup>

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<sup>624</sup> [2004] FMCA 891, [23], citing *Bogie v University of Western Sydney* (1990) EOC 92-313.

<sup>625</sup> [2004] FMCA 891, [23], citing *Bailey v Australian National University* (1995) EOC 92-744.

<sup>626</sup> [2004] FMCA 891, [23], citing *Sivanathan v Commissioner of Police (NSW)* (2001) NSWADT 44.

<sup>627</sup> [2004] FMCA 891, [24].

<sup>628</sup> [2004] FMCA 891, [28]-[29].

<sup>629</sup> [2005] FMCA 1226.

<sup>630</sup> [2005] FMCA 1226, [31].