

# Chapter 5

## The Disability Discrimination Act

### Contents

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<b>5.1</b>	<b>Introduction to the DDA</b>	<b>139</b>
5.1.1	Scope of the DDA	139
5.1.2	Limited Application Provisions and Constitutionality	141
5.1.3	Retrospectivity of the DDA	143
<b>5.2</b>	<b>Disability Discrimination Defined</b>	<b>144</b>
5.2.1	'Disability' Defined	144
5.2.2	Direct Discrimination under the DDA	146
	(a) Issues of causation, intention and knowledge	146
	(i) Causation and intention	146
	(ii) Knowledge	149
	(b) The 'Comparator' under s 5 of the DDA	150
	(c) 'Accommodation' under s 5(2) of the DDA	156
5.2.3	Indirect Discrimination under the DDA	159
	(a) The relationship between 'direct' and 'indirect' discrimination	160
	(b) Defining the 'requirement or condition'	162
	(c) Comparison with persons without the disability	167
	(d) Reasonableness	169
	(e) Inability to comply with a requirement or condition	174
5.2.4	Other Grounds: Aids, Assistants and Assistance Animals	176
5.2.5	Disability Standards	177
<b>5.3</b>	<b>Areas of Discrimination</b>	<b>178</b>
5.3.1	Employment (s 15)	178
	(a) Meaning of 'employment'	179
	(b) 'Arrangements made for the purposes of determining who should be offered employment'	180
	(c) 'Benefits associated with employment' and 'any other detriment'	180
	(d) Inherent requirements	181
5.3.2	Education	186

## Federal Discrimination Law 2005

5.3.3	Access to Premises	188
5.3.4	Provision of Goods, Services and Facilities	189
	(a) Defining a 'service'	189
	(b) 'Refusal' of a service	192
<b>5.4</b>	<b>Ancillary Liability</b>	<b>193</b>
5.4.1	Vicarious Liability	193
5.4.2	Permitting an Unlawful Act	194
<b>5.5</b>	<b>Unjustifiable Hardship and other Exemptions</b>	<b>196</b>
5.5.1	Unjustifiable Hardship	196
	(a) 'More than just hardship'	197
	(b) 'Any persons concerned'	198
	(c) Other factors	200
5.5.2	Other Exemptions to the DDA	201
	(a) Annuities, insurance and superannuation	201
	(b) Defence force	203
	(c) Compliance with a prescribed law	204
	(d) Special measures	205

# Chapter 5

## The Disability Discrimination Act

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### 5.1 Introduction to the DDA

#### 5.1.1 Scope of the DDA

The DDA covers discrimination on the ground of disability, including discrimination because of the use of a therapeutic device or aid;<sup>1</sup> accompaniment by a carer or assistant;<sup>2</sup> or accompaniment by an assistance animal.<sup>3</sup>

'Disability' is broadly defined and includes past, present and future disabilities as well as imputed disabilities.<sup>4</sup>

The definition of discrimination includes both direct<sup>5</sup> and indirect<sup>6</sup> disability 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>7</sup>
- education;<sup>8</sup>
- access to premises;<sup>9</sup>
- the provision of goods, services and facilities;<sup>10</sup>

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1 See s 7 which extends the definition of discrimination to include less favourable treatment because of the fact that a person is accompanied by, or possesses a palliative or therapeutic device or an auxiliary aid. Note that 'disability discrimination' is defined in s 4 as having 'the meaning given by sections 5 to 9 (inclusive)'.

2 See s 8 which extends the definition of discrimination to include less favourable treatment because of the fact that a person is accompanied by an interpreter, reader, assistant or carer who provides interpretive, reading or other services to that person.

3 Section 9.

4 Section 4.

5 Section 5.

6 Section 6.

7 Section 15.

8 Section 22.

9 Section 23.

10 Section 24.

## Federal Discrimination Law 2005

- the provision of accommodation;<sup>11</sup>
- the sale of land;<sup>12</sup> and
- the administration of Commonwealth laws and programs.<sup>13</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>14</sup> education<sup>15</sup> and the provision of goods and services.<sup>16</sup>

The DDA contains a number of permanent exemptions (see 5.5 below).<sup>17</sup> The DDA also empowers HREOC to grant temporary exemptions from the operation of certain provisions of the Act.<sup>18</sup>

The DDA does not make it an offence per se to do an act that is unlawful by reason of a provision of Part II.<sup>19</sup> The DDA does, however, create the following specific offences:

- Committing an act of victimisation,<sup>20</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 HREOC Act;
  - has brought, or proposes to bring, proceedings under those Acts;
  - has given, or proposes to give, any information or document 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>21</sup>
- Inciting, assisting or promoting the doing of an act that is unlawful under a provision of Divisions 1, 2 or 3 of Part II.<sup>22</sup>

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11 Section 25.

12 Section 26.

13 Section 29.

14 Sections 35 and 36.

15 Sections 37 and 38. Note that harassment in education is in the context of harassment by a member of staff of a student or prospective student.

16 Sections 39 and 40.

17 See Part II, Division 5.

18 Section 55.

19 Section 41.

20 Section 42(1).

21 Section 42(2). Note that the offence also occurs if a person is subjected to a detriment on the ground that the 'victimizer' believes that the person has done, or proposes to do, any of the things listed.

22 Section 43.

- 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>23</sup>
- 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 HREOC.<sup>24</sup>

Note that conduct constituting such offences is also included in the definition of 'unlawful discrimination' in s 3 of the HREOC Act (see 1.2.1 above), allowing a person to make a complaint to HREOC in relation to it.

### 5.1.2 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>25</sup>

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 and 3 of Part 2 other than sections 20, 29 and 30.

(2) Subject to this section, this Act applies throughout Australia. ...

(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
- (c) give effect to the [ICESCR]; or
- (d) relate to matters external to Australia; or
- (e) relate to matters of international concern.

HREOC considered the operation of s 12(8) in *Allen v United Grand Lodge of Queensland* ('*Allen*').<sup>26</sup> In that case, the applicant, a person with reduced mobility, complained that he was not able to access the respondent's premises because those premises could only be accessed by stairs. The applicant alleged that this constituted disability discrimination pursuant to s 23 of the DDA.

In considering whether s 23 related to 'matters of international concern', Commissioner Carter QC considered the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which were adopted by a Resolution of the General Assembly of the United Nations in 1994. Rule 5

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23 Section 44.

24 Section 107.

25 Second reading speech, Disability Discrimination Bill 1992, House of Representatives Hansard, 26 May 1992, p 2750.

26 Unreported, HREOC, Commissioner Carter QC, 12 April 1999, extract at (1999) EOC 92-985. See also *Maguire v Sydney Organising Committee for the Olympic Games* (Unreported, HREOC, Commissioner Carter QC, 18 November 1999), extract at (2000) EOC 93-041.

## Federal Discrimination Law 2005

identifies access to the physical environment as one of the target areas for equal participation by disabled persons. Commissioner Carter QC concluded that s 23 has a 'direct relationship' with this Rule, it relates to a matter of international concern. He stated:

Clearly the United Nations Resolution and the Rules annexed evidence the joint concern of Member States to promote the equalisation of opportunities for persons with disabilities. The corollary of that proposition is that discrimination by one person against another on the ground of the latter's disability has to be rejected. The equalisation of opportunities for the disabled is the very antithesis of a regime which condones discrimination on the ground of one's disability. Therefore one can only conclude that the equalisation of opportunities for the disabled and the avoidance of discrimination on the ground of disability has become a matter of international concern and one manifestation of that concern is the United Nations Resolution referred to in some detail above.<sup>27</sup>

The operation of the limited application provisions of the DDA was raised in the Federal Court in *Court v Hamlyn-Harris*<sup>28</sup> ('Court'). In that case, the applicant, who has a vision impairment, alleged that the respondent, his employer, had unlawfully discriminated against him by dismissing him. The respondent, Mr Hamlyn-Harris, 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(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>29</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 [HREOC Act] 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>30</sup>

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27 Unreported, HREOC, Commissioner Carter QC, 12 April 1999, 7, extract at (1999) EOC 92-985.

28 [2000] FCA 1870.

29 (1990) 169 CLR 594.

30 [2000] FCA 1870, [14]-[15].

It does not appear that Heerey J in *Court* was referred to other sub-sections of s 12, such as s 12(8), or to the decision in *Allen* to overcome the perceived 'jurisdictional issue' in this case.

In *O'Connor v Ross (No.1)*,<sup>31</sup> the applicant complained of discrimination contrary to s 25 of the DDA in the terms and conditions upon which accommodation was offered. Driver FM stated that 'it is sufficient for the application to come within the purview of the DDA if discrimination in relation to accommodation for disabled persons can be found to be a matter of international concern'.<sup>32</sup> His Honour found that equal access to accommodation for people with disabilities was a matter of international concern and adopted the views expressed by HREOC in *Allen*.<sup>33</sup>

In *Souliotopoulos v La Trobe University Liberal Club*,<sup>34</sup> Merkel J also considered the limited application provisions of the DDA. His Honour was satisfied that the prohibition of disability discrimination was a matter of international concern. His Honour held that the limited application provisions in Divisions 1, 2 and 3 of Part 2 of the DDA, but in particular s 27(2), have effect by reason of s 12(8)(e). His Honour also noted that his decision was consistent with that of HREOC in *Allen*.

His Honour held that, when considering 'matters of international concern' to which the limited application provisions of the DDA purport to give effect, 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 stated:

The 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>35</sup>

The decision of Merkel J was cited with approval and the same approach taken by Raphael FM in *Vance v State Rail Authority*.<sup>36</sup>

### 5.1.3 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>

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31 [2002] FMCA 210.

32 Ibid [7].

33 Ibid [9].

34 (2002) 120 FCR 584.

35 Ibid 592 [31].

36 [2004] FMCA 240.

37 [2000] FCA 1688.

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

## 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; or
- (k) is imputed to a person.

An issue of contention in interpreting paragraphs (f) and (g) of this definition has been whether, and to what extent, a distinction is to be drawn between a disability and its manifestations.

The issue has been settled as a result of the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*.<sup>39</sup> The appellant in that matter alleged that his foster son ('the student') was discriminated against on the ground of his disability when he was expelled from a school run by the respondent.

The student suffered from behavioural problems and other disabilities resulting from severe brain injury sustained when he was six or seven months old. He was permanently excluded from his school because of incidents of 'acting out' which included verbal abuse and incidents involving kicking and punching.

The appellant claimed that the respondent had discriminated against the student by subjecting him to a 'detriment' in his education and by suspending and eventually excluding him from the school because of his misbehaviour.

The Court considered whether the definition of disability in paragraph (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') refers only to the underlying disorder suffered by the student, that is, his brain injury, or whether it includes the behavioural manifestations of that disorder.<sup>40</sup>

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39 (2003) 202 ALR 133.

40 Kirby and McHugh JJ at [68-70] and Gummow, Hayne and Heydon JJ at [210] also considered that the student's disability could fall within paragraphs (a) and (e).



The former approach had been taken by the Full Federal Court which held:

In our opinion, [the student's] conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes...<sup>41</sup>

Such an approach was rejected by the High Court. All members of the Court (apart from Callinan J who did not express a view)<sup>42</sup> found that the definition of disability in s 4 of the DDA can include the functional limitations that may result from an underlying condition.

Kirby and McHugh JJ noted:

It is [the student's] inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person in areas covered by the Act, and gives rise to the potential for adverse treatment. To interpret the definition of 'disability' as referring only to the underlying disorder undermines the utility of the discrimination prohibition in the case of hidden impairment.<sup>43</sup>

Gummow, Hayne and Heydon JJ held that the paragraphs of the definition of 'disability' are not to be read as 'mutually exclusive categories of disability' and have an 'overlapping operation'.<sup>44</sup> They also noted that to identify the student's disability by reference only to the physiological changes which his illness brought about in his brain, and not the behaviour it causes, would describe his disability incompletely.<sup>45</sup> Furthermore, they stated that:

[T]o focus on the cause of the behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person 'different' in the eyes of others.<sup>46</sup>

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.

A similar approach to the definition of disability was taken in an earlier decision of Raphael FM: *Randell v Consolidated Bearing Company*.<sup>47</sup> In that matter, the applicant had a mild dyslexic learning difficulty and complained of discrimination when he was dismissed as a result of poor work performance. His Honour stated:

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41 *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 248 [28].

42 (2003) 202 ALR 133, 196-7 [272].

43 *Ibid* 152-3 [80]. See also 137 [11] (Gleeson CJ).

44 *Ibid* 182 [210].

45 *Ibid* 182 [211].

46 *Ibid* 182-3 [212].

47 [2002] FMCA 44. The decision was referred to with approval by McHugh and Kirby JJ in *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133, 172 [168].

## Federal Discrimination Law 2005

In my view there is no distinction between this applicant's 'disability' and its 'manifestation'. His 'disorder' resulted in his 'learning differently'. He learned more slowly. He was dismissed because he was learning *too slowly*.<sup>48</sup>

Raphael FM found in that case that the failure of the company to provide the assistance to the applicant which was available to improve his work performance and which had been made available to staff in the past, and his subsequent dismissal, constituted disability discrimination.

### 5.2.2 Direct Discrimination under the DDA

Section 5 of the DDA defines what is generally known as 'direct' discrimination. It provides:

- (1) For the purposes of this Act, a person (**discriminator**) discriminates against another person (**aggrieved person**) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.
- (2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

Three significant issues have arisen in relation to this definition of discrimination:

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

#### (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>49</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>50</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

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48 [2002] FMCA 44, [48].

49 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.

50 (1991) 173 CLR 349.

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>51</sup>

In *Purvis v New South Wales (Department of Education and Training)*<sup>52</sup> ('*Purvis*', see 5.2.1 above) 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>53</sup>

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

[W]e 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 – 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>54</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>55</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 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

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51 Ibid 359, McHugh J agreeing, 382. Cited with approval for the purposes of the DDA in *Travers v New South Wales* (2001) 163 FLR 99, 114-15 [65].

52 (2003) 202 ALR 133.

53 Ibid 171 [160].

54 Ibid 187 [236]. See also at 138-9[13]-[14] (Gleeson CJ).

55 Ibid 171-2 [166].

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>56</sup>

It is important to note, however, 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:

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.

In *Forbes v Australian Federal Police (Commonwealth of Australia)*<sup>57</sup> ('*Forbes v AFP*') the Full Federal Court considered an appeal and cross-appeal from the decision of Driver FM.<sup>58</sup> The appellant's case was that the Commonwealth, through the Australian Federal Police ('AFP') had discriminated against her on the basis of her disability, namely a depressive illness. It was alleged that the AFP had discriminated against her by refusing to re-employ her at the conclusion of her fixed-term contract. It was further argued that the AFP had discriminated against her by withholding information about her medical condition from the review panel which had been convened to consider her re-employment.

Driver FM had held that the AFP had discriminated against the appellant by withholding the information from the review panel. A relevant issue for the review panel was the apparent breakdown in the relationship between the applicant and AFP. The information relating to her disability explained the breakdown in the relationship. Driver FM considered that the AFP was under an obligation to put before the review panel information concerning the applicant's illness as its failure to do so left the review panel 'under the impression that [the appellant] was simply a disgruntled employee'.<sup>59</sup> The AFP was found to have *not* discriminated against the appellant in its decision not to appoint her as a permanent employee, as the decision of the review panel was based on its view that the employment relationship between the appellant and the AFP had irrevocably broken down.

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56 Ibid 138 [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.

57 [2004] FCAFC 95.

58 *Forbes v Commonwealth* [2003] FMCA 140.

59 Ibid [28].

On the cross-appeal by the AFP, 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 v New South Wales* (2003) 202 ALR 133], 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>60</sup>

## (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 (the aggrieved 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>61</sup>

A similar approach was taken by Wilcox J in *Tate v Rafin*.<sup>62</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

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60 [2004] FCAFC 95, [68]-[70].

61 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 77 [35].

62 [2000] FCA 1582.

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>63</sup>

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'. This issue is considered in the next section.

### (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 a person with a disability is treated (or it is proposed they be treated) and the way in which a person 'without the disability' is treated or would be treated in circumstances that are the same or not materially different. That other person, whether actual or hypothetical, is often referred to as the 'comparator'.

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.

The focus of much of that controversy has centred around the identification of the circumstances which are the same or not materially different. In a number of matters, respondents have suggested that this element of the definition requires either:

- (a) that the characteristics of the person with the disability be imputed to the comparator so as to make the circumstances 'equivalent'; or
- (b) that the court or tribunal simply conclude that those characteristics constitute a material difference between the circumstances of the complainant and the comparator, with the consequence that there can be no meaningful comparison and thus no discrimination.

A line of authority had held that such arguments should be rejected.

The rationale for this approach was described by Sir Ronald Wilson in *Dopking v Department of Defence*:<sup>64</sup>

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63 Ibid [67]. See also earlier decisions of HREOC in *H v S* (Unreported, HREOC, Commissioner Webster, 23 July 1997); *White v Crown Ltd* (Unreported, HREOC, Commissioner Kenny QC, 24 July 1997); *R v Nunawading Tennis Club* (Unreported, HREOC, Commissioner Dodson, 25 September 1997). Cf *X v McHugh, Auditor-General for Tasmania* (1994) 56 IR 248.

64 Unreported, HREOC, Sir Ronald Wilson, 13 March 1992, extract at (1995) EOC 92-669. Note that this case is also cited as *Sullivan v Department of Defence*.

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.<sup>65</sup>

This approach was approved in *IW v City of Perth*<sup>66</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>67</sup>

A similar approach was adopted by Commissioner Innes in the *Purvis*<sup>68</sup> matter, discussed above.<sup>69</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 it.

This approach was rejected on review by both Emmett J,<sup>70</sup> and the Full Federal Court.<sup>71</sup> The Full Court found that the proper comparison for the purpose of s 5 of the DDA was (emphasis in original):

... 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

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65 Ibid 9.

66 (1997) 191 CLR 1, 33 (Toohey J), 67 (Kirby J). See also *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 327 (Lockhart J); *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191, 209 (Wilcox J). Cf *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13.

67 See, for example, *Commonwealth v Humphries* (1998) 86 FCR 324, 333; and *Garity v Commonwealth Bank of Australia* (1999) EOC 92-966.

68 Unreported, HREOC, Commissioner Innes, 13 November 2000.

69 See 5.2.1 and 5.2.2(a) above.

70 *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69.

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

## Federal Discrimination Law 2005

discriminator treats or proposes to 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>72</sup>

The Full Court 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 Full Court preferred the approach of Clarke JA in *Waterhouse v Bell*<sup>73</sup> and Mahoney JA in *Boehringer Ingelheim Pty Ltd v Reddrop*.<sup>74</sup>

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>75</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

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72 Ibid 248 [29], 249 [32].

73 (1991) 25 NSWLR 99.

74 [1984] 2 NSWLR 13.

75 (2003) 202 ALR 133, 137 [11].



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 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>76</sup>

In *Power v Aboriginal Hostels Ltd*,<sup>77</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. Selway J held:

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 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>78</sup>

The same approach had been taken by the FMC in the earlier case of *Randell v Consolidated Bearing Company*.<sup>79</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>80</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.

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76 Ibid 185-6 [223]-[225]. Callinan J agreed with their Honours’ reasoning on this issue (see 197 [273]).

77 (2003) 133 FCR 254.

78 Ibid 258-259.

79 [2002] FMCA 44.

80 Ibid [48].

## Federal Discrimination Law 2005

In *Minns v New South Wales*,<sup>81</sup> the applicant was 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 expelling him.

In determining whether the allegation of direct discrimination had been made out, Raphael FM applied the reasoning of Emmett J at first instance in *Purvis*. 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>82</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>83</sup>

In *Forbes v AFP* (see 5.2.2(a) above), 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 (emphasis in original):

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 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>84</sup>

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81 [2002] FMCA 60.

82 *Ibid* [197].

83 *Ibid* [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]).

84 [2004] FCAFC 95, [80]-[81].

The Full Court also made the following obiter 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>85</sup>

The decision in *Purvis* was also applied in *Fetherston v Peninsula Health*<sup>86</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;
- (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>87</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>88</sup>

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85 Ibid [76].

86 [2004] FCA 485.

87 Ibid [86].

88 Ibid [89]. His Honour also held that the applicant must fail because the termination was not *because of* the applicant's disability, but his refusal to allow the report of the specialist to be released to his employer: [92]-[93].

## Federal Discrimination Law 2005

In *Trindall v NSW Commissioner for Police*,<sup>89</sup> 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 stated the following approach based on the decision in *Purvis*:

The approach to be adopted is to identify the circumstances of the treatment of the person discriminated against and compare that treatment 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: see for example per Gummow, Hayne and Heydon JJ at [224].<sup>90</sup>

In assessing the applicant's claims of direct disability discrimination, 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;
- (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>91</sup>

His Honour found that there was no discrimination in the initial informal conditions imposed on the applicant pending further medical assessment.<sup>92</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>93</sup>

### (c) 'Accommodation' under s 5(2) of the DDA

Section 5(2) of the DDA provides that for the purposes of the comparison required by subsection (1):

[The] circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

This section has been said to acknowledge that people with disabilities may require different treatment to achieve equality. In *AJ & J v A School (No 1)*,<sup>94</sup> Sir Ronald Wilson stated that:

It will be remembered that s 5(2) of the Act ensures that it is not just a question of treating the person with a disability in the same way as other people are treated; it is to be expected that the existence of the disability may require the person to be treated differently from the norm; in other words that some reasonable adjustment be made to accommodate the disability.<sup>95</sup>

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89 [2005] FMCA 2.

90 *Ibid* [19].

91 *Ibid* [145].

92 *Ibid* [151]-[151].

93 *Ibid* [169]-[170].

94 (1998) EOC 92-948.

95 *Ibid* 78, 313.

On review in the Federal Court in *A School v Human Rights and Equal Opportunity Commission*,<sup>96</sup> the respondent argued that this interpretation of s 5(2) was incorrect as it imposed a positive obligation to treat a person with a disability more favourably than a person without a disability. Mansfield J did not accept the respondent's argument (although he ultimately found that Sir Ronald had erred in other ways). His Honour held that where the DDA applies to a particular relationship or circumstance it is not necessarily the case that there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services.

On remittal to HREOC, Commissioner McEvoy in *AJ & J v A School (No 2)*<sup>97</sup> interpreted Mansfield J's comments as follows:

in some circumstances there may be some positive obligation on a respondent to take steps in order to ensure there is no material difference between the treatment accorded to a person with a disability and the treatment accorded to a person in similar circumstances but without a disability. Mansfield J alludes to this in his judgment in this matter. It is my view that without this interpretation of s 5(2), it would be difficult to establish direct discrimination under the Act, except in the most blatant circumstances, and a person subjected to discriminatory treatment within the intention of the Act would most often have to rely on section 6 and establish indirect discrimination. . . .

It is my view the substantial effect of s 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing in the provision of appropriate accommodation or other support as may be required as a consequence of the disability, so that in truth the person with the disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances.<sup>98</sup>

To the extent that Commissioner McEvoy's interpretation of s 5(2) suggests an obligation is imposed by that subsection to provide accommodation, this has not been accepted. In *Commonwealth of Australia v Humphries*,<sup>99</sup> the complainant, who is visually impaired, alleged that she had been discriminated against on the basis of her disability by her employer as it had failed to provide her with equipment to perform her job. Kiefel J held that there was no general implied obligation on employers to take such steps as were necessary to enable disabled employees to fulfil their employment duties. Her Honour stated:

I do not think the stated objects of the DDA go that far. . . . The obligation on employers, then, is not to discriminate against disabled employees because of their disability. An unreasonable refusal to assist them may amount to wrongful conduct in a particular case. Section 5 however, does not permit the question, as to whether there is discrimination, to be answered in the affirmative on each occasion where an employer has in some way failed to assist a disabled employee.<sup>100</sup>

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96 [1998] 1437 FCA.

97 Unreported, HREOC, Commissioner McEvoy, 10 October 2000.

98 Ibid 31.

99 (1998) 86 FCR 324.

100 Ibid 335.

## Federal Discrimination Law 2005

In *Purvis*, Gummow, Hayne and Heydon JJ expressly rejected a suggestion that s 5(2) imposed an obligation to accommodate or had the effect that a failure to provide accommodation would itself constitute 'less favourable treatment'. They stated:

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>101</sup>

Callinan J agreed with their Honours' reasons with respect to the 'comparator issue',<sup>102</sup> which would appear to extend to their Honours' construction of s 5(2). McHugh and Kirby JJ also rejected the suggestion that s 5(2) imposes an obligation to provide accommodation.<sup>103</sup> However, unlike the majority, their Honours suggested that the effect of s 5(2) was that 'as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination'.<sup>104</sup>

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101 (2003) 202 ALR 133, 184 [217]-[218]. 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 and the approach of Emmett J was rejected by McHugh and Kirby JJ ((2003) 202 ALR 133, 154 [86]-[89]) and also appears to have been implicitly rejected by Gummow, Hayne and Heydon JJ in their joint judgment 184 [217]-[218]). Such an argument was earlier rejected by Kiefel J in *Commonwealth of Australia v Humphries* (1998) 86 FCR 324.

102 *Ibid* [273].

103 *Ibid* [104].

104 *Ibid*. In its *Review of the Disability Discrimination Act 1992* (2004), the Productivity Commission noted the confirmation in *Purvis* that the DDA does not contain any explicit obligation of 'accommodation'. It subsequently recommended that the DDA should be amended to 'include a general duty to make reasonable adjustments' (excluding adjustments that would cause unjustifiable hardship): 185-196, recommendation 8.1.

In *Forbes v AFP*, (see 5.2.2(a) above), the appellant argued that the AFP had refused to act on medical reports in relation to the appellant's disability. The Full Court suggested that this submission may have proceeded on the unstated assumption that ss 5 and 15 of the DDA 'require an employer to provide different or additional services for disabled employees'.<sup>105</sup> The Court commented:

If this were correct, the failure to provide a seriously depressed employee with appropriate counseling services might constitute less favourable treatment for the purposes of s 5(1). *Purvis*, however, firmly rejects such a proposition. It is true that s 5(2) provides that a disabled person's need for different accommodation or services does not constitute a material difference in judging whether the alleged discrimination has treated a disabled person less favourably than a non-disabled person. However, s 5(2) cannot be read as saying that a failure to provide different accommodation or services constitutes less favourable treatment of the disabled person for the purposes of s 5(1): *Purvis*, at 164 [218], per Gummow, Hayne and Heydon JJ; at 158 [104], per McHugh and Kirby JJ.

Similarly, in *Fetherston* (see 5.2.2(b) above) Heerey J applied *Purvis* in holding that a failure to provide aids specifically requested by an employee with a visual disability did not contravene the DDA as the Act 'does not impose a legal obligation on employers, or anyone else, to provide aids for disabled persons'.<sup>106</sup>

### 5.2.3 Indirect Discrimination under the DDA

Section 6 of the DDA provides:

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

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

Note that the onus of showing that the impugned requirement or condition is not reasonable rests on the person aggrieved by it (see 5.2.3(d) below).

The following issues have arisen in the context of indirect discrimination under the DDA:

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105 [2004] FCAFC 95, [85].

106 [2004] FCA 485, [77]. His Honour also discussed, in obiter comments, whether or not there was, for the purposes of indirect discrimination under s 6 of the DDA, a 'requirement' that the applicant perform his duties (such as reading medical reports) without aids. Heerey J stated that the mere non-response to the appellant's requests for aids could not be characterised as a 'requirement or condition' within the meaning of s 6: 'That provision is concerned with some positive criterion or test or qualification or activity with which the disabled person is called on to comply' ([81]). See, however, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J).

## Federal Discrimination Law 2005

- (a) the relationship between 'direct' and 'indirect' discrimination;
- (b) defining the 'requirement or condition';
- (c) section 6(a) – comparison with persons without the disability;
- (d) section 6(b) – 'reasonableness'; and
- (e) section 6(c) – inability to comply with a requirement or condition.

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

In *Waters v Public Transport Corporation*<sup>107</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>108</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>109</sup>

In *Minns v New South Wales*<sup>110</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>111</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>112</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>113</sup>

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107 (1991) 173 CLR 349.

108 (1989) 168 CLR 165, 184, 171.

109 (1991) 173 CLR 349, 393.

110 [2002] FMCA 60.

111 (1996) 68 FCR 46.

112 [2002] FMCA 60, [173].

113 *ibid* [245].



His Honour relied upon the approach of Emmett J at first instance in *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis*<sup>114</sup> and that of Wilcox J in *Tate v Rafin*<sup>115</sup> to suggest that 'the same facts can be put to both tests'.<sup>116</sup>

Similarly, in *Hollingdale v Northern Rivers Area Health*,<sup>117</sup> a case under the DDA, 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>118</sup>

Before the High Court in *Purvis v New South Wales (Department of Education and Training)*<sup>119</sup> ('*Purvis*') (see 5.2.1 and 5.2.2 above), the case was argued only as one of direct discrimination and the question of the relationship between direct and indirect discrimination was not argued. 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 s 5(2) of the DDA.<sup>120</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 s 5(2) makes clear that the circumstances of that student are not materially different for the purposes of 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>121</sup>

In *Catholic Education Office v Clarke*<sup>122</sup> ('*CEO v Clarke*') (see 5.2.3(b) below), a case argued as indirect discrimination, the Full Federal Court rejected a submission made by the appellants to the effect that the applicant at first instance was seeking 'positive discrimination', something that was not required under the DDA. The Court (Sackville and Stone JJ, with whom Tamberlin J agreed) suggested that the submission 'appears to have been inspired by certain comments made in the joint judgment of Gummow, Hayne and Heydon JJ in *Purvis*'.<sup>123</sup>

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114 (2001) 186 ALR 69.

115 [2000] FCA 1582, [69].

116 [2002] FMCA 60, [245].

117 [2004] FMCA 721.

118 Ibid [19].

119 (2003) 202 ALR 133.

120 See generally 5.2.2(c) above.

121 (2003) 202 ALR 133, 159 [105].

122 [2004] FCAFC 197.

123 Ibid [87]-[93].

## Federal Discrimination Law 2005

The Court noted that *Purvis* was not argued as a case of indirect discrimination under s 6 of the DDA and stated:

The reasoning in the joint judgment in *Purvis* does not support the proposition that the appellants appeared to be urging, namely that the DD Act should be construed so as to preclude any requirement that an educational authority 'discriminate positively' in favour of a disabled person. The concept of 'positive discrimination' is itself of uncertain scope and does not provide a sure guide to the construction of the statutory language, in particular to s 6 of the DD Act.<sup>124</sup>

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

The words 'requirement or condition' should be construed broadly 'so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision'.<sup>125</sup>

In *Fetherston v Peninsula Health*,<sup>126</sup> Heerey J discussed, in obiter comments, whether or not there was, for the purposes of indirect discrimination under s 6 of the DDA, a 'requirement' that the applicant perform his duties (such as reading medical reports) without aids. Heerey J stated that the mere non-response to the appellant's requests for aids could not be characterised as a 'requirement or condition' within the meaning of s 6: 'That provision is concerned with some positive criterion or test or qualification or activity with which the disabled person is called on to comply'.<sup>127</sup>

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 relevant goods or services. In *Waters*, Mason CJ and Gaudron J noted:

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>128</sup>

In *Clarke v Catholic Education Office*<sup>129</sup> ('*Clarke*'), the applicant contended that his son ('the student'), who was deaf, was subjected to indirect discrimination by virtue of the 'model of learning support' put forward by the respondents as part of the terms and conditions upon which the offer of his admission to their school was made. It was claimed that the 'model of learning

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124 Ibid [93].

125 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-07 (McHugh J); *Catholic Education Office v Clarke* [2004] FCAFC 197, [103]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110]; *Hinchliffe v University of Sydney* [2004] FMCA 85, [107]; *Trindall v NSW Commissioner for Police* [2005] FMCA 2, [175].

126 [2004] FCA 485.

127 Ibid [81]. See, however, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J).

128 (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).

129 (2003) 202 ALR 340.

support' did not include the provision of Australian Sign Language ('Auslan') interpreting assistance and instead relied upon the use of note-taking as the primary communication tool to support the student in the classroom. It was alleged that this would not allow the student to adequately participate in and receive classroom instruction.

Madgwick J referred to the principles set out in *Waters* and noted that the DDA is beneficial legislation which is to be broadly construed: 'it would defeat the purpose of the DDA if a narrow interpretation [of the expression "requirement or condition"] were to be taken'.<sup>130</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>131</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>132</sup>

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130 Ibid 351 [44].

131 Ibid 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.

132 Ibid.

## Federal Discrimination Law 2005

His Honour's decision was upheld on appeal.<sup>133</sup>

In *Vance v State Rail Authority*,<sup>134</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 allowed insufficient time to do so and closed 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.

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>135</sup> His Honour also appeared to find that there was no warning that the doors were to be closed.<sup>136</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 which included a requirement that they make an announcement 'stand clear, doors closing' and ensure that all passengers are clear of the doors prior to closing them and prior to giving the signal to the driver to proceed. In these circumstances, Raphael FM asked (emphasis in original):

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. After some discussion about the status of [the respondent] it was agreed that the appropriate section was s 123(2) which is in the following form:

**[123(2)]** *Conduct by directors, servants and agents*

*(2) 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.*

Although I accept the applicant's submission that the conduct engaged in by the guard was engaged in within the scope of his actual or apparent authority and therefore was conduct engaged in by the respondent that is not the end of the matter. It ignores the proviso. I am satisfied that the SRA did take reasonable

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133 *Catholic Education Office v Clarke* [2004] FCAFC 197.

134 [2004] FMCA 240.

135 *Ibid* [45], [47].

136 *Ibid* [44].

precautions and exercise due diligence to avoid the guard conducting himself in the manner in which it is alleged he conducted himself by Mr and Mrs Vance...

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>137</sup>

Raphael FM accordingly dismissed the application under the DDA.<sup>138</sup>

*Hinchliffe v University of Sydney*<sup>139</sup> ('*Hinchliffe*'), was a case involving a complaint brought against the respondent university by a student with vision impairment. Driver FM did not accept the applicant's characterisation of the relevant requirement or condition as a requirement or condition that:

[the applicant] undertake her university studies without all of her course materials being provided in an alternative format, either at all or at the same time as other students received their course materials.<sup>140</sup>

His Honour noted that the relevant requirement or condition must be one imposed upon not only the applicant but also on the class of other persons to whom the applicant is to be compared.<sup>141</sup>

His Honour did not accept that the relevant requirement or condition was the requirement or condition as proposed by the respondent that:

[the applicant] achieve a pass grade in the subjects in which she was enrolled in order to meet the requirements to graduate with a Bachelor of Applied Science (Occupational Therapy).<sup>142</sup>

Driver FM stated:

it is also a mistake to restrict consideration to formal or absolute requirements such as the requirement that students enrolled in the occupational therapy course complete course requirements by achieving a pass grade.<sup>143</sup>

His Honour adopted the view expressed by Drummond J in *Sluggett v Human Rights and Equal Opportunity Commission*<sup>144</sup> ('*Sluggett*'), that 'the concept of a "requirement or condition" with which the aggrieved person is required to comply involves the **notion of compulsion or obligation**' (emphasis in original).<sup>145</sup>

Driver FM held the relevant requirement or condition to be:

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137 Ibid [54].

138 Ibid [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]). Raphael FM awarded compensation of \$5,000 ([71]).

139 [2004] FMCA 85.

140 Ibid [105].

141 Ibid [106]. Note, however, the requirement or condition preferred by the applicant, which was similar to the one found to be imposed in *Clarke*, could be said to be imposed upon all students.

142 Ibid [105].

143 Ibid [106].

144 (2002) 123 FCR 561, 577 [56].

145 [2004] FMCA 85, [106].

## Federal Discrimination Law 2005

the requirement or condition imposed by the university that students deal with course materials provided by the university in a single or standard format that the university chose to provide to all students. In other words, students were generally expected to either read course materials in the format that they were given to them or seek themselves to convert those materials into a different format which was preferred by them.<sup>146</sup>

Driver FM noted that this was a requirement that was facially neutral and was imposed upon the applicant and a class of persons who are not disabled, as well as the applicant. In this respect, his Honour drew a parallel with the facts in *Waters*, in which the Public Transport Corporation had sought to introduce a 'scratch' ticket system and remove conductors from trams. His Honour also noted that, as with *Waters*, it was a requirement which potentially might impact adversely upon the applicant by reason of her disability.<sup>147</sup>

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*<sup>148</sup> ('*Access for All Alliance (Hervey Bay)*'), 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 the following requirements or conditions to have been imposed:

In relation to the community centre:

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>149</sup>

In relation to the picnic tables:

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>150</sup>

In relation to the public toilets:

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>151</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(d) and (e) below).

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146 Ibid [108].

147 Ibid [109].

148 [2004] FMCA 915.

149 Ibid [20].

150 Ibid [21].

151 Ibid [22].

In *Trindall v NSW Commissioner for Police*<sup>152</sup> ('*Trindall*', see 5.2.2.(b) above), the applicant, who had a condition known as 'single cell trait', complained of disability discrimination in his employment as a NSW police officer. Driver FM followed the approach taken in *Hinchliffe* and held:

The requirement to provide a medical assessment on the appropriateness of work restrictions imposed by the employer is plainly, in my view, a condition, requirement or practice for the purposes of s 6 of the DDA.<sup>153</sup>

### (c) Comparison with persons without the disability

Section 6(a) of the DDA requires a consideration of whether or not a substantially higher proportion of persons without the disability of the aggrieved person comply or are able to comply with an impugned requirement or condition. Accordingly, in any indirect discrimination claim, an applicant must identify of a pool of persons with whom the aggrieved person can be compared.

In the context of sex discrimination cases brought under state legislation and the former provisions of the SDA,<sup>154</sup> a number of decisions have considered the manner in which such comparison is to take place. In *Banovic*, a majority of the High Court held that it was necessary to first identify a 'base group' or 'pool' which will then 'enable the proportions of complying men and women to be calculated'.<sup>155</sup> As Dawson J expressed it:

a proportion must be a proportion of something, so that it is necessary to determine the appropriate grouping or pool within which to calculate the proportions which are to be compared.<sup>156</sup>

Determining the appropriate 'pool' will vary according to the nature and context of the case.<sup>157</sup> Few cases have considered this issue in the context of the DDA. One reason for this may be that in the context of physical disability particularly, compliance or non-compliance with a requirement or condition (such as the use of stairs) is a matter easily accepted without the need for complex comparisons or statistical information.

In *Daghlian v Australian Postal Corporation*<sup>158</sup> ('*Daghlian*'), for example, Conti J considered a requirement or condition imposed by the respondent upon its employees that they not be seated at the retail counter of one of its offices during work hours. His Honour stated:

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152 [2005] FMCA 2.

153 *Ibid* [176].

154 Note that the provisions of the SDA and the DDA were previously in the same terms in relation to indirect discrimination. However, the SDA was amended to insert the current s 5(2) by the *Sex Discrimination Amendment Act 1995* (Cth). See 4.3 for further discussion of the amended provisions.

155 (1987) 168 CLR 165, 178 (Deane and Gaudron JJ).

156 *Ibid* 187.

157 *Ibid* 177-78 (Deane and Gaudron JJ), 187 (Dawson J). See also *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 118-121 (Sackville J); *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 259-63 (Bowen CJ and Gummow J).

158 [2003] FCA 759.

## Federal Discrimination Law 2005

No issue arises in relation to ss6(a) or 6(c) of the DD Act, since there is no evidence that for instance any Manly Post Office employee, other than the applicant, was not able to comply with Australia Post's so-called chair policy.<sup>159</sup>

Raphael FM in *Minns* suggested that the 'complex comparisons' proposed in cases such as *Banovic* may not be appropriate or necessary in the context of disability discrimination cases. His Honour noted that such an approach is 'required in cases where it is necessary to tease out actual discrimination which is not evident at first blush'. He also noted that the cases 'in support of the complex comparisons are sex discrimination cases', not disability discrimination cases.<sup>160</sup>

While his Honour accepted that 'it is for the applicant to prove his case and if that requires a complex, time consuming and undoubtedly expensive exercise in comparisons then it must be undertaken', he cited the comments of Emmett J (in obiter comments) at first instance in the *Purvis* matter<sup>161</sup> and suggested that his Honour 'did not appear to be troubled by fitting the applicant into a pool'.<sup>162</sup>

As discussed above,<sup>163</sup> the applicant in *Minns* alleged that a State high school had indirectly discriminated against him on the basis of his disability by requiring that he comply with its disciplinary policy and subsequently suspending and expelling him. He claimed that he was, by virtue of his disabilities (Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder), unable to comply with the requirement or condition imposed in the form of this disciplinary policy.

Having considered the authorities on the issue of the comparison required by s 6(a), Raphael FM found:

There is no evidence in this case that any one else suffered [the student]'s disabilities although it is known from the evidence of the teachers and of the school records placed in evidence that the majority of students in [the student]'s classes did comply with the policies. No evidence was produced by the respondent that any members of [the student]'s classes were unable to comply with the policies apart from [the student].<sup>164</sup>

In *Clarke*, however, Madgwick J followed the approach in *Banovic*. As outlined above,<sup>165</sup> the case concerned the complaint that a student, who was deaf, was indirectly discriminated against by virtue of the 'model of learning support' put forward by the respondents as part of the terms and conditions upon which the offer of admission to their school was made. His Honour stated:

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159 Ibid [110]. Note, however, that the onus is on an applicant to make out indirect discrimination.

160 [2002] FMCA 60, [250]-[253].

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

162 [2002] FMCA 60, [253]-[254].

163 See 5.2.2(b).

164 [2002] FMCA 60, [254].

165 See 5.2.3(b).



To determine whether there has been discrimination it is necessary to identify an “appropriate base group” with which to compare the individual claiming discrimination, and to decide whether a substantial proportion of those individuals in the base group are able to comply with the relevant requirement or condition: *Australian Iron & Steel Pty Ltd v Banovic* (1987) 168 CLR 165 at 178-79; 187. The applicant defines the relevant base group for comparison with [the student] as either those students attending year seven at the College in 2000 or all students enrolling in classes at the College in 2000. It is submitted, on either definition, that a substantial proportion of the base group is able to meet the requirement or condition (to participate and receive classroom instruction without an interpreter).

Counsel for the respondents concedes that, if the applicant’s characterisation is accepted, then the requirements of s 6(a) of the DDA will be met. However, the respondents submit that the applicant’s choice of a base group is legally inappropriate, as students without [the student]’s disability would not, as a matter of law, have been “provided with”, that is: made subject to, the model of support...

The respondent’s contentions as to the appropriateness of the base group really involve the re-assertion, in another guise, of its proposed characterisation of the essential nature of the relevant service, which, as indicated, I reject.<sup>166</sup>

On appeal, the Full Federal Court in *CEO v Clarke* upheld this approach. The Court rejected the submission that it was not possible to make such a comparison ‘simply because the alleged discriminator claims to have provided a benefit or service not generally available to non-disabled persons.’ Once an aggrieved person established that they were required to comply with a ‘requirement or condition’, the Court is required to make the appropriate comparison against an appropriately defined base group.<sup>167</sup>

In *Trindall*, Driver FM cited *CEO v Clarke* as authority for the comparison required by s 6(a) being not with the applicant personally, but with a class of persons with the applicant’s disability, which could be a hypothetical class.<sup>168</sup> As outlined above,<sup>169</sup> the applicant in *Trindall* asserted that because of this condition, sickle cell trait, he was placed upon restricted duties and unnecessary and unreasonable restrictions were placed upon his employment. His Honour was satisfied that a higher proportion of persons without the sickle cell trait would be able to comply with the requirement that they demonstrate their fitness for service by obtaining a medical assessment of the appropriateness of any restrictions upon their service.<sup>170</sup>

### (d) Reasonableness

Section 6(b) of the DDA requires that the relevant requirement or condition be ‘not reasonable having regard to the circumstances of the case’. Unlike the SDA,<sup>171</sup> the DDA does not provide guidance on the matters to be taken into

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166 (2003) 202 ALR 340, 352 [46]-[48].

167 [2004] FCAFC 197, [113].

168 [2005] FMCA 2, [173].

169 See 5.2.2(b).

170 [2005] FMCA 2, [178].

171 Section 7B of the SDA.

## Federal Discrimination Law 2005

account in deciding whether the relevant requirement or condition is reasonable in the circumstances.<sup>172</sup>

In *Sluggett*, Drummond J cited<sup>173</sup> with approval the following statement of McHugh J in *Waters* in which the High Court had considered a provision in the *Equal Opportunity Act 1984* (Vic) that was similar to s 6(b) of the DDA:

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>174</sup>

In *Minns*, Raphael FM approved the test of reasonableness articulated by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*<sup>175</sup> as follows:

The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discretionary effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All of the circumstances of the case must be taken into account.<sup>176</sup>

Raphael FM noted that this passage was approved in *Waters*, in the context of the *Equal Opportunity Act 1984* (Vic) by Dawson, Toohey and Deane JJ.<sup>177</sup>

Raphael FM stated that it is not sufficient that reasonableness be considered only from the perspective of the applicant. It must be looked at in the context of all persons to whom the condition or requirement might apply.<sup>178</sup> 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>179</sup>

In *Travers v New South Wales*<sup>180</sup> ('*Travers*'), Raphael FM considered a requirement or condition that students in a particular class utilise the toilet in another building, rather than a toilet outside her classroom (which was available to another student with a disability). This was a requirement with

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172 See discussion at of 'reasonableness' under the SDA at 4.3.3 above.

173 (2002) 123 FCR 561, 574 [46].

174 (1991) 173 CLR 349, 411.

175 (1989) 88 ALR 621, 263, affirming the test applied by Wilcox J at first instance; *Styles v Secretary, Department of Foreign Affairs & Trade* (1988) 84 ALR 408, 429.

176 [2002] FMCA 60, [258].

177 (1991) 173 CLR 349, 395-96 (Dawson and Toohey JJ), 383 (Deane J). Raphael FM also cited with approval a similar statement by Harper J in *Victoria v Schou* (2001) 3 VR 655 under the *Equal Opportunity Act 1995* (Vic).

178 [2002] FMCA 60, [260].

179 *Ibid* [263].

180 (2001) 163 FLR 99.

which the applicant, a student with a disability that caused incontinence, could not comply.<sup>181</sup> Raphael found the requirement or condition to be unreasonable, having considered the perspective of the applicant, the school and other students.

In *Clarke*, Madgwick J stated as follows:

Following *Secretary, Department of Foreign Affairs and Trade v Styles and Anor* (1989) 23 FCR 251, *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 80 FCR 78, the following may be stated as settled propositions of law:

- (1) The onus of showing that the impugned requirement or condition is not reasonable rests on the person aggrieved by it.
- (2) Reasonableness is to be determined having regard to all the circumstances of the case. These include, but are not limited to:
  - the nature and extent of the effect of the discriminatory requirement or condition;
  - the reasons advanced in favour of it;
  - the possibility of alternative action; and
  - matters of “effectiveness, efficiency and convenience”.
- (3) The test is an objective one – neither the preferences of the aggrieved person nor the mere convenience of the service supplier can be determinative, though both may be relevant factors.
- (4) The test of reasonableness is “less demanding than one of necessity, but more demanding than a test of convenience”. Thus, if the aggrieved person can show that it may have been convenient for the discriminator to impose the requirement or condition but it was not reasonable in all the circumstances, that will suffice. Likewise, if it appears that although it was not necessary for the discriminator to impose the requirement or condition, but the aggrieved person does not establish that it was unreasonable to do so, there is no indirect discrimination, as statutorily defined.
- (5) The test is reasonableness not correctness; that is, a decision of the putative discriminator to impose the requirement or condition, may be a reasonable one although not everyone, or even most people, would agree with it.<sup>182</sup>

On balance in the case before him, his Honour found that the unwillingness of the respondent school to make Auslan interpretation available to a deaf student (see 5.2.3(b) above) was unreasonable.

Madgwick J’s decision was upheld on appeal in *CEO v Clarke*, Sackville and Stone JJ (with whom Tamberlin J agreed) restating the established principles for determining reasonableness as follows:

- (i) The person aggrieved bears the onus of establishing that the condition or requirement was not reasonable in the circumstances: *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, at 111, per Sackville J (with whom Davies and Beaumont JJ agreed), and the authorities cited there.

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181 See 5.2.3(e) below on the issue of the ability to comply with a requirement or condition.

182 (2003) 202 ALR 340, [51].

## Federal Discrimination Law 2005

(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 Commission*, 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.

(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>183</sup>

The potentially broad scope of considerations relevant to the question of 'reasonableness' was confirmed by the approach of Conti J in *Daghlian*. In that matter, the respondent's 'no chair' policy, preventing 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. The applicant had physical disabilities which limited her ability to stand for long periods.

In finding that the requirement or condition was not reasonable, his Honour considered a 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);

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183 [2004] FCAFC 197, [115]. Note that earlier decisions of HREOC had 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 (Sir Ronald Wilson); *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92-903, 77,450-51 (Commissioner Innes).

- 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>184</sup>

In *Hinchliffe* (see 5.2.3(b) above), Driver FM held that, with the exception of certain course material that could not be reformatted by the applicant or those assisting her, the applicant could comply with university's condition that she use the course materials provided to her (see 5.2.3(e) below). His Honour held that the existence of the position of disability services officer who was available to deal with occasional problems in reformatting course materials was sufficient and adequate and, accordingly, rendered the university's requirement reasonable. Driver FM found it impossible to believe that had the disability services officer or her successors been informed that the applicant had been provided with course material which could not be reformatted into an acceptable format that they would not have taken steps to ensure better quality material was provided.<sup>185</sup>

In *Access for All Alliance (Hervey Bay)* (see 5.2.3(b) above), members of the applicant organisation alleged that certain premises were inaccessible to people with disabilities. His Honour followed the approach of Madgwick J in *Clarke* in considering all of the circumstances of the case and found that the conditions for access to the community centre and picnic tables were reasonable.<sup>186</sup> However, his Honour found that the requirement or condition relating to the public toilets, namely that members of the applicant are required to use toilet facilities where wash basins are not concealed from public view, was not reasonable. Baumann FM was satisfied 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'. His Honour then went on to find that justifications for the placement of the basins outside the toilets were 'offset by the community expectation that persons with a disability should be entitled to complete a toileting regime in private'.<sup>187</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 regarded by his Honour as 'inadequate'.<sup>188</sup>

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184 [2003] FCA 759, [111].

185 [2004] FMCA 85, [122].

186 [2004] FMCA 915, [76]-[78] (in relation to the community centre), [79-80] (in relation to the picnic tables).

187 *Ibid* [81].

188 *Ibid*.

Baumann FM also considered the relevance of the Building Code of Australia ('BCA') and the Australian Standards to the DDA and 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>189</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>190</sup> In relation to the toilet facilities, Baumann FM found that the lack of any requirement under the Australian Standards of the BCA to provide an internal wash basin did not alter his finding as to unreasonableness.<sup>191</sup>

In *Trindall* (see 5.2.3(b) above), Driver FM held that it was not reasonable to impose a requirement that the applicant obtain further medical opinion justifying the removal of work restrictions placed upon him because of his sickle cell trait. Therefore the claim of indirect disability discrimination was established under ss 15(2)(a) and 15(2)(d).<sup>192</sup>

### (e) Inability to comply with a requirement or condition

In *Travers*, the Federal Court considered the test for indirect discrimination and held that a 'reasonably liberal' interpretation of the phrase 'is not able to comply' in s 6(c) of the DDA is required.<sup>193</sup> As discussed above,<sup>194</sup> the applicant in that case 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 an accident.<sup>195</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. Similarly, 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>196</sup> In concluding that

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189 Ibid [13]-[14].

190 Ibid.

191 Ibid [81].

192 [2005] FMCA 2, [179]-[182].

193 [2000] FCA 1565, [17].

194 See 5.2.3(d).

195 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; and, *Styles v Secretary, Department of Foreign Affairs and Trade* [1988] EOC 92-239, 77,238.

196 (2003) 202 ALR 340, 352-53 [49].

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>197</sup>

In *Hinchliffe* (see 5.2.3(b) above), Driver FM held that the standard necessary to establish an inability to comply with the university's requirement or condition 'requires that the applicant prove a "serious disadvantage" with the result that the applicant could not "meaningfully participate" in the course of study for which she had been accepted'.<sup>198</sup> His Honour held that to the extent that the applicant and those assisting her were able to reformat the course materials she was able to comply with the university's condition that she use the course materials provided to her. He held that the inability to comply with the university's requirement was limited to certain material that was not capable of being reformatted into an acceptable format (a requirement which his Honour found was 'reasonable' in all of the circumstances of the case: see 5.2.3(d) above).<sup>199</sup>

In *Access for All Alliance (Hervey Bay)*, 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 reasonable-ness.<sup>200</sup>

In that matter (see 5.2.3(b) above), his Honour found the condition that members of the applicant use toilet facilities where wash basins are not

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197 Ibid. This finding was upheld on appeal: *Catholic Education Office v Clarke* [2004] FCAFC 197.

198 [2004] FMCA 85, [115].

199 Ibid [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' ([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]).

200 [2004] FMCA 915, [9].

concealed from view could not be complied with by people with disabilities who were 'required to undertake a careful toileting regime... which reasonably requires use of wash basins out of public view and in private'.<sup>201</sup>

### 5.2.4 Other Grounds: Aids, Assistants and Assistance Animals

In addition to prohibiting discrimination in relation to the use of an aid<sup>202</sup> and an assistant,<sup>203</sup> the DDA covers discrimination in relation to the use of an assistance animal.<sup>204</sup>

Section 9 of the DDA provides that a person will be taken to have discriminated against an aggrieved person with a disability, if the aggrieved person is treated less favourably because he or she is accompanied by a guide dog, hearing assistance dog or any other animal 'trained to assist the aggrieved person to alleviate the effect of the disability'.

Early cases decided by HREOC in relation to s 9 involved persons with visual or hearing disabilities and their appropriately trained guide or hearing dogs. For example, in *Jennings v Lee*,<sup>205</sup> the respondent was found to have discriminated against the applicant, who has a visual impairment, under s 9 of the DDA 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>206</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>207</sup>

Before Raphael FM in *Sheehan v Tin Can Bay Country Club*<sup>208</sup> ('*Sheehan*'), the respondent club was found to have discriminated unlawfully against the applicant, who suffers from an anxiety disorder, when it refused to permit the applicant's unleashed dog on the premises. His Honour gave s 9 a wide application, finding:

The symptoms of Mr Sheehan's disability include a concern about meeting people and a concern about the way in which people will react to him. He therefore sought, in approximately 1997, to relieve these symptoms by training a dog to be an animal assistant. He thought that utilising the dog to break the ice between himself and people he would meet for the first time would enable him to overcome the concerns which he felt. The use of the dog in this manner would qualify the dog to be an 'assistance dog' within s9 of the Act, see s 9(1)(f):

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201 Ibid [81].

202 Section 7.

203 Section 8.

204 Section 9.

205 Unreported, HREOC, Commissioner Nader, 1 October 1996.

206 *Brown v Birss Nominees Pty Ltd* (Unreported, HREOC, Commissioner Innes, 3 July 1997).

207 *Govenor v Eldridge* (Unreported, HREOC, President Tay, 18 December 1998).

208 [2002] FMCA 95.



'... any other animal trained to assist the aggrieved person to alleviate the affect of the disability, or because of any matter related to that fact.'

Mr Sheehan trained the dog Bonnie himself and he described to the Court a number of ways in which the dog assisted him, both as I have previously described and also in other matters.<sup>209</sup>

The decision in *Sheehan* has highlighted the fact that s 9 does not prescribe any regime or test to determine whether and when assistance animals come within the scope of that section. In particular, there is no express requirement in s 9 that the animal be trained by a recognised agency. Nor is it necessary to show that the training of the animal extends (as guide dog and hearing dog training does) to appropriate behaviour and health standards in the animal, such that it can be safely admitted where dogs or other animals are not otherwise permitted.

The Acting Disability Discrimination Commissioner ('the Commissioner') has suggested that *Sheehan* 'creates an unsustainable position for service providers and other members of the public while not giving surety of access rights to users of appropriate assistance animals' and has suggested to the Attorney-General that an amendment to this section may be appropriate.<sup>210</sup> The Commissioner has also suggested that a different approach to the exemption may be arguable in future cases.<sup>211</sup>

### 5.2.5 Disability Standards

The DDA provides that the Minister may formulate 'disability standards' in relation to:

- the employment of persons with a disability;<sup>212</sup>
- the education of persons with a disability;<sup>213</sup>
- the accommodation of persons with a disability;<sup>214</sup>
- the provision of public transportation services and facilities to a person with a disability;<sup>215</sup>
- the administration of Commonwealth laws and programs in respect of persons with a disability;<sup>216</sup> and
- the access to or use of premises by persons with a disability.<sup>217</sup>

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209 Ibid [2].

210 See HREOC, *Disability Rights Update* (2002) [www.humanrights.gov.au/disability\\_rights/update/1002.htm](http://www.humanrights.gov.au/disability_rights/update/1002.htm).

211 See HREOC, *Discussion Paper on Assistance Animals Under the Disability Discrimination Act* [http://www.hreoc.gov.au/disability\\_rights/inquiries/animal03/discuss.htm](http://www.hreoc.gov.au/disability_rights/inquiries/animal03/discuss.htm).

212 Section 31(1)(a).

213 Section 31(1)(b).

214 Section 31(1)(c).

215 Section 31(1)(d).

216 Section 31(1)(e).

217 Section 31(1)(f).

## Federal Discrimination Law 2005

It is unlawful for a person to contravene a disability standard.<sup>218</sup> The exemption provisions (Part II Division 5) generally do not apply in relation to a disability standard.<sup>219</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>220</sup>

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>221</sup> There has been no decided case in relation to the Transport Standards as at the date of publication.

### 5.3 Areas of Discrimination

#### 5.3.1 Employment (s 15)

Section 15 of the DDA provides:

##### 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 or a disability of any of that other person's associates:
  - (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 or a disability of any of that employee's associates:
  - (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.

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218 Section 32.

219 Section 33.

220 Section 34. Note, however, the comment on the HREOC Disability Rights web page 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: [http://www.humanrights.gov.au/disability\\_rights/faq/stanfaq/stanfaq.html#gap](http://www.humanrights.gov.au/disability_rights/faq/stanfaq/stanfaq.html#gap).

221 See further: <http://www.ag.gov.au/DSFAPT/Welcome.html>.

- (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.
- (4) Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person 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.

This section considers the following issues that have arisen under s 15 of the DDA:

- (a) the meaning of 'employment';
- (b) 'arrangements made for the purposes of determining who should be offered employment';
- (c) 'benefits associated with employment' and 'any other detriment'; and
- (d) inherent requirements.

Note that the issue of unjustifiable hardship which arises in s 15(4)(b) and elsewhere in the DDA is considered separately below: see 5.5.1.

### (a) Meaning of 'employment'

In *Ryan v Presbytery of Wide Bay Sunshine Coast*,<sup>222</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 'demissioning', 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 HREOC 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

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222 [2001] FMCA 12.

## Federal Discrimination Law 2005

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>223</sup>

### (b) 'Arrangements made for the purposes of determining who should be offered employment'

In *Y v Human Rights and Equal Opportunity Commission*,<sup>224</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, for which it is *not* a defence under s 15(4) that a person would be unable to carry out the inherent requirements of the particular employment. 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>225</sup>

### (c) 'Benefits associated with employment' and 'any other detriment'

In *McBride v Victoria (No 1)*,<sup>226</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>227</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>228</sup> He further held that the conduct was sufficient to constitute 'any other detriment' under s 15(2)(d).

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223 Ibid, [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.

224 [2004] FCA 184.

225 Ibid [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' defence available in such cases.

226 [2003] FMCA 285.

227 Ibid [48].

228 Ibid [55], [61]. The applicant relied upon *R v Equal Opportunity Board; Ex parte Burns* (1985) VR 317.

**(d) Inherent requirements**

Section 15(4) provides a defence to a claim of unlawful discrimination in circumstances where a person is unable to 'carry out the inherent requirements of the particular employment'. The onus of proving the elements of the defence is on the respondent.<sup>229</sup>

In *Qantas Airways Ltd v Christie*,<sup>230</sup> Mr Christie 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 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>231</sup>

Gaudron J held that an 'inherent requirement' was something 'essential to the position'<sup>232</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>233</sup>

In *X v Commonwealth*,<sup>234</sup> the High Court considered s 15(4) of the DDA. 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.

When the matter was before HREOC,<sup>235</sup> it was held that 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

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229 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76, 87-8 (Cooper J); *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254, [19] (Selway J); *Williams v Commonwealth* [2002] FMCA 89, [144] (McInnis FM).

230 (1998) 193 CLR 280.

231 *Ibid* 284 [1].

232 *Ibid* 294 [34].

233 *Ibid* 295 [36].

234 (1999) 200 CLR 177.

235 *X v Department of Defence* (1995) EOC 92-715.

## Federal Discrimination Law 2005

employment. In the present case, the employee was able to perform the requisite tasks and on this basis, the complaint was upheld. The inability to deploy the complainant was found to result not from the personal consequence of the complainant's disability, but from the policy of the ADF. Judicial review of that decision was sought in the Federal Court. That application was initially dismissed<sup>236</sup> and then, on appeal to the Full Court, upheld.<sup>237</sup> On appeal to the High Court, the Court found that the decision of HREOC was wrong in law and allowed the appeal, remitting the matter to HREOC to be determined according to law. 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>238</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>239</sup>

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>240</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>241</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. His Honour stated:

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236 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

237 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

238 (1999) 200 CLR 177, 181-82 [11].

239 *Ibid* 208 [103].

240 *Ibid* 189-90 [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]).

241 *Ibid* 189 [37].

Section 15(4) must be read as a whole. When it is so read, it is clear enough that the object of the sub-section is to prevent discrimination being unlawful whenever the employee is discriminated against because he or she is unable either alone or with assistance to carry out the inherent requirements of the particular employment. If the employee can carry out those requirements with services or facilities which the employer can provide without undue hardship, s 15(4) does not render lawful an act of discrimination by the employer that falls within s 15. For discrimination falling within s 15 to be not unlawful, therefore, the employee must have been discriminated against because he or she was:

- (a) not only unable to carry out the inherent requirements of the particular employment without assistance; but was also
- (b) able to do so only with assistance that it would be unjustifiably harsh to expect the employer to provide.<sup>242</sup>

Note, however, that this does not mean that an employer is required to modify the nature of a particular employment, or its inherent requirements, to accommodate a person with a disability:

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>243</sup>

This point was central to the decision in *Cosma v Qantas Airways Limited*<sup>244</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 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 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>245</sup>

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242 Ibid 190 [39]. Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) noted their agreement with McHugh J on this point, 208-09 [104].

243 Ibid 208 [102] (Gummow and Hayne JJ, with whom Gleeson CJ and Callinan J agreed).

244 [2002] FCA 640.

245 Ibid [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.

## Federal Discrimination Law 2005

The decision in *Cosma* was distinguished in the case of *Barghouthi v Transfield Pty Limited*,<sup>246</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>247</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.

In *Williams v Commonwealth*,<sup>248</sup> the applicant was discharged from the RAAF on the ground of his disability, namely insulin dependent diabetes ('IDD'). 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 Commonwealth argued that the applicant was unable to carry out these 'inherent requirements' by virtue of his IDD. This was due to problems with ensuring a regular supply of insulin, potential complications relating to IDD 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>249</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

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246 (2002) 122 FCR 19.

247 *Ibid* 27 [24].

248 [2002] FMCA 89.

249 (1999) 200 CLR 177.



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>250</sup>

The decision of McInnis FM was overturned by the Full Federal Court in *Commonwealth v Williams*<sup>251</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.

In *Power v Aboriginal Hostels Ltd*,<sup>252</sup> the applicant had been dismissed from his employment after the respondent had determined that his disability, depression, rendered him unable to perform the inherent requirements of the position of assistant manager at one of its hostels. At first instance, Brown FM considered whether or not the termination was justified, in the context of s 15(4) of the DDA. His Honour concluded that '[i]n essence, the respondent was entitled to consider that Mr Power was not cut out for the particular job...'.<sup>253</sup>

On appeal, Selway J held that the learned Federal Magistrate 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 relevant to that determination to consider whether the termination may have been justifiable for other reasons or not.<sup>254</sup>

On remittal from the Federal Court,<sup>255</sup> Brown FM considered whether, in conducting the investigation for the purposes of s 15(4), the Court should consider the imputed disability or the actual disability of the applicant.<sup>256</sup> 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 found that it was the actual disability that was to be considered, stating that 'it would be absurd if the exculpatory provisions of section 15(4) were to be implied to the imputed disability per se'<sup>257</sup> such that an employer could lawfully dismiss an employee on the basis of a disability that they did not have.

Applying *X v Commonwealth*,<sup>258</sup> 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>259</sup> His Honour noted that whilst the applicant may have found it difficult

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250 [2002] FMCA 89, [146].

251 (2002) 125 FCR 229.

252 (2003) 133 FCR 254.

253 [2003] FMCA 42, [119].

254 (2003) 133 FCR 254, 262.

255 *Power v Aboriginal Hostels Ltd* [2004] FMCA 452.

256 *Ibid* [18]-[22].

257 *Ibid* [65].

258 (2000) CLR 177, 208.

259 [2004] FMCA 452, [23].

to perform the tasks of the position of assistant manager of the hostel, 'difficulty' is not sufficient for the purposes of s 15(4): '[r]ather it must be shown that the person's disability renders him or her incapable of performing the tasks required of the position'.<sup>260</sup>

Again applying *X v Commonwealth*, Brown FM noted that 'such inability must be assessed in a practical way'.<sup>261</sup> In his view the only practical way to make the assessment in this case was to examine the medical evidence.<sup>262</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 s 15(4) had no application.<sup>263</sup>

### 5.3.2 Education

A number of significant cases under the DDA have related to disability discrimination in education.<sup>264</sup> Section 22 of the DDA provides:

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

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260 Ibid [57].

261 Ibid [58].

262 Ibid [58], [68].

263 Ibid [65] and [68]-[69].

264 See, for example, *Purvis v New South Wales (Department of Education & Training)* (2003) 202 ALR 133; *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237; *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69; *Minns v New South Wales* [2002] FMCA 60; *Clarke v Catholic Education Office* (2003) 202 ALR 340; *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), extract at (1999) EOC 93-020; *Travers v New South Wales* (2001) 163 FLR 99; *AJ & J v A School (No 2)* (Unreported, HREOC, Commissioner McEvoy, 10 October 2000).

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

It should be noted that the defence of unjustifiable hardship in s 22(4) applies only to admission of students to educational institutions.<sup>265</sup> The defence is not available in relation to the treatment of students once they have been admitted. However, it has been observed that:

this does not necessarily mean that an educational institution has no protection whatsoever. Once a student has been enrolled in an educational institution, any subsequent inability of the School to provide its services to the student is likely to raise issues relating to indirect, rather than direct discrimination. That being the case, a school in such a position can rely upon the reasonableness requirement contained in s 6(b) of the [DDA].<sup>266</sup>

*Purvis v New South Wales (Department of Education and Training)*,<sup>267</sup> involved the expulsion of a child with behavioural problems from a school (see 5.2.1 above). Gleeson CJ noted that difficult issues are raised in the context of education where a school has a duty of care to all of its pupils and staff. His Honour stated:

The Act, in its application to educational authorities, and in its prohibition of discrimination against persons on the ground of a disability, requires a judgment both as to alleged differential treatment and as to the ground upon which action was taken. In both respects, it is impossible to ignore the context in which the first respondent, by its officers, was acting. It was charged with the care and protection of all the pupils in the school in question. The first respondent showed concern and sensitivity in its dealings with the pupil. It also recognised its legal responsibilities to the other pupils and to the school staff. If there is a reasonable construction of the Act which avoids a conflict between those responsibilities and the obligations imposed by the Act, then that construction should be preferred. And in the practical application of the Act in an evaluation of the conduct of the first respondent, those responsibilities should be kept in mind.<sup>268</sup>

Gleeson CJ applied this approach to the question of whether or not the respondent had treated its student less favourably 'because of' his disability when it expelled him by reason of behaviour which formed a part of his disability. His Honour concluded that the 'true basis' for the 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>269</sup> His Honour also applied this approach for purposes of the comparator analysis:

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265 See 5.5.1 below on the issue of unjustifiable hardship.

266 This statement was made by counsel for the applicant in *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), 35, and accepted by Commissioner Innes, 51. Extract of case appears at (1999) EOC 93-020.

267 (2003) 202 ALR 133.

268 *Ibid* 135-136 [7].

269 *Ibid* 138 [13]. See discussion at 5.2.1 and 5.2.2(a) above.

## Federal Discrimination Law 2005

In characterising the actions of the first respondent, for the purpose of applying a law against unjust discrimination by making the comparison required by s 5 of the Act, and in considering all the circumstances in which the school principal acted, to compare the treatment of the pupil with the treatment of some other pupil who, without any disability, behaved violently permits due account to be taken of the first respondent's legal responsibilities towards the general body of pupils.<sup>270</sup>

In *Clarke v Catholic Education Office*,<sup>271</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>272</sup> His Honour upheld the application, although it is not made clear under which specific provision the discrimination was found to be unlawful.<sup>273</sup>

### 5.3.3 Access to Premises

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)).

Section 23 of the DDA makes it unlawful to discriminate against a person on the ground of that person's disability or a disability of any of that person's associates in (amongst other things) 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.

In *Haar v Maldon Nominees*,<sup>274</sup> the FMC considered the scope of the expression 'terms and conditions' for the purposes of s 23. 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>275</sup>

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270 Ibid 138 [12].

271 (2003) 202 ALR 340.

272 Ibid 349-50 [39]. Cf *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306 in the context of the SDA.

273 [2003] 202 ALR 340.

274 (2000) 184 ALR 83.

275 Ibid 94 [68].

In *Sheehan v Tin Can Bay Country Club*,<sup>276</sup> (see 5.2.4 above) Raphael FM decided that a man with an anxiety disorder that required him to have an assistance dog in social situations was deemed to have been discriminated against under s 23(1)(b) and (e) of the DDA when his local club imposed the condition that his dog not be allowed into the club unless it was on a leash.<sup>277</sup>

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>278</sup> (see 5.2.3(b), (d) above) 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 three areas the subject of the application all fell within the definition of 'premises' for the purposes of s 4 of the DDA.<sup>279</sup>

### 5.3.4 Provision of Goods, Services and Facilities

Section 24 of the DDA provides:

- (1) 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 or a disability of any of that other person's associates:
  - (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.
- (2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

#### (a) Defining a 'service'

In *IW v City of Perth*<sup>280</sup> ('IW'), the High Court considered the meaning of 'services' in s 4(1) of the *Equal Opportunity Act 1984* (WA).<sup>281</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.

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276 [2002] FMCA 95.

277 Ibid [24].

278 [2004] FMCA 915.

279 Ibid [75].

280 (1997) 191 CLR 1.

281 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.'

## Federal Discrimination Law 2005

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 government rather than a provider of services and its actions will be outside the scope of the Act'. They stated:

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>282</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>283</sup> Similarly, Gummow J said that the council was providing 'services' when it granted or refused a particular application for consent.<sup>284</sup> Toohey J said the 'service' in this case could be seen as the consideration and disposition of the application for planning approval.<sup>285</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>286</sup>

The applicant in *Rainsford v Victoria (No 2)*<sup>287</sup> was a prisoner at Port Philip Prison who suffered a back condition. 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 the Charlotte Management Unit of Port Philip Prison for 23 hours a day for 9 days and was unable to access exercise facilities. The applicant alleged this treatment constituted unlawful discrimination contrary to the DDA. Raphael FM considered whether the first respondent, in transporting the applicant between prisons provided a 'service' to the applicant as that word is properly construed in the DDA, and whether the second respondent, Group 4 Correction Services Pty Ltd, provided a 'service' in relation to the placing of the applicant in cell accommodation at the Charlotte Management Unit.

His Honour concluded that, on the analysis of the cases, the respondents had not provided a service.<sup>288</sup>

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282 (1997) 191 CLR 1, 15.

283 *Ibid* 23-24.

284 *Ibid* 44-45.

285 *Ibid* 28.

286 *Ibid* 72.

287 [2004] FMCA 707.

288 *Ibid* [26].

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>289</sup>

By contrast, the provision of certain other benefits to a prisoner, such as the provision of library books or visiting days, could be restricted or denied yet the statutory duty to incarcerate could still be effected.<sup>290</sup>

His Honour referred to *IW*, authorities reviewed therein<sup>291</sup> and other Australian authorities<sup>292</sup> and stated:

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 complainant then it can be seen that the decided cases are consistent.<sup>293</sup>

His Honour noted that the Canadian decisions which consider whether a governmental activity is a service relate to situations where the government department is able to exercise a measure of discretion. His Honour noted the clear distinction between a government authority acting under the authority of statute deciding whether or not to extend a service to an individual and 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>294</sup>

The applicant in *Vintila v Federal Attorney General*<sup>295</sup> sought to challenge a Regulation Impact Statement ('RIS') prepared by the Commonwealth Attorney-General for Cabinet in relation to draft disability standards for public transport. He argued that the RIS could be viewed as a 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:

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289 Ibid [20].

290 Ibid.

291 Ibid [11]-[15], [19]: *Attorney General (Canada) v Cumming* (1980) 2FC 122 at [131] to [132]; *Savjani v Inland Revenue Commissioners* (1981) QB 458; *R v Entry Clearance Officer; Ex parte Amin* (1983) 2 AC 818; and *Farah v Commissioner of Police of the Metropolis* (1998) QB 65.

292 Ibid [16]-[17]: *Secretary of the Department of Justice and Industrial Relations v Anti Discrimination Commissioner* 11 TASR 324; *Clarkson v The Governor of the Metropolitan Reception Prison and Anor* (1986) EOC 92-153; *Henderson v Victoria* (1984) EOC 92-027 and (1984) 92-105; *Jolly v The Director General of Corrections* (1985) EOC 92-124; *A Complainant and Anor v The State of Western Australia* (1994) EOC 92-610; *Hobby v Executive Director of the Department of Corrective Services* (1992) EOC 92-397; and *Bandulla v The State of Victoria* [2002] VCAT 91.

293 Ibid [20].

294 Ibid [24].

295 [2001] FMCA 110.

## Federal Discrimination Law 2005

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>296</sup>

In *Ball v Morgan*,<sup>297</sup> the applicant had been at an illegal brothel in Victoria and alleged 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>298</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>299</sup>

### (b) ‘Refusal’ of a service

In *IW*, 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:

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>300</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>301</sup>

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296 Ibid [22].

297 [2001] FMCA 127.

298 Ibid [60].

299 Ibid [64].

300 (1997) 191 CLR 1, 23-24.

301 Ibid 44-45.



In *Tate v Rafin*,<sup>302</sup> Wilcox J rejected an argument 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. His Honour held:

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>303</sup>

In *Ball v Silver Top Taxi Service Ltd*,<sup>304</sup> the applicant, who uses 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>305</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>306</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>307</sup>

## 5.4 Ancillary Liability

### 5.4.1 Vicarious Liability

In *Vance v State Rail Authority*,<sup>308</sup> Raphael FM considered s 123(2) of the DDA<sup>309</sup> which provides as follows:

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.

Raphael FM noted that the section was similar in its operation to provisions in the SDA (s 106), RDA (s 18A) and State legislation. His Honour held:

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*

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302 [2000] FCA 1582.

303 Ibid [53].

304 [2004] FMCA 967

305 Ibid [27].

306 Ibid [45].

307 Ibid [38].

308 [2004] FMCA 240.

309 Ibid [54]-[58].

## Federal Discrimination Law 2005

(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] 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>310</sup>

Raphael FM also cited with approval the decision under the RDA in *Korczak v Commonwealth of Australia*,<sup>311</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>312</sup> In the circumstances of the case before him (see 5.2.3(b) above), his Honour found that the respondent had exercised due care and was not liable under s 123(2) for the actions of its employee.

### 5.4.2 Permitting an Unlawful Act

Section 122 of the DDA provides for 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, or 3 of Part 2 is, for the purposes of this Act, taken also to have done the act.

In *Cooper v Human Rights and Equal Opportunity Commission*,<sup>313</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.

HREOC 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>314</sup> However, in a separate decision in relation to the Council, HREOC held that there was no liability under s 122.<sup>315</sup> The applicant sought review of this latter decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Madgwick J upheld the application and remitted the matter to HREOC for determination according to law.<sup>316</sup> The following principles can be distilled from the decision of Madgwick J:

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310 Ibid [56].

311 (2000) EOC 93-056.

312 [2004] FMCA 240, [56].

313 (1999) 93 FCR 481.

314 *Cooper v Holiday Coast Cinema Centers Pty Ltd* (Unreported, HREOC, Commissioner Keim, 29 August 1997).

315 *Cooper v Coffs Harbour City Council* (1998) EOC 92-962.

316 (1999) 93 FCR 481, 496 [52].

- 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>317</sup>
- To find that a person has permitted a particular act, it is necessary to show that they were able to prevent it.<sup>318</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>319</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>320</sup> It is not necessary for an applicant to show that the permitter 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>321</sup>
- It will be an exception to s 122 for a permitter to show that an act was permitted based on an honest and reasonable mistake of fact.<sup>322</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>323</sup>

On remittal to HREOC, the Council was found to be liable under s 122 for having approved the redevelopment without wheelchair access. 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.

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>324</sup>

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317 Ibid 490 [27]. The liability of the principal had been established in *Cooper v Holiday Coast Cinemas* (Unreported, HREOC, Commissioner Keim, 29 August 1997) and was not an issue in the proceedings before Madgwick J.

318 Ibid 494 [41], citing with approval *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (1928) 40 CLR 481, 490-91 (Isaacs J). *Cooper v Human Rights and Equal Opportunity Commission* was cited with approval in *Elliott v Nanda* (2001) 111 FCR 240; followed in *Oberoi v HREOC* [2001] FMCA 34, [27]-[29]; *Phillips v Australian Girls' Choir* [2001] FMCA 109, [24].

319 (1999) 93 FCR 481, 493 [37]-[39].

320 Ibid 494 [41].

321 Ibid 493-94 [40]-[41].

322 Ibid 495-96 [46]-[49].

323 Ibid 496 [51].

324 *Cooper v Coffs Harbour City Council* (Unreported, HREOC, Commissioner Carter, 12 May 2000), 13.

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>325</sup>

## 5.5 Unjustifiable Hardship and other Exemptions

### 5.5.1 Unjustifiable Hardship

It is a defence to a claim of discrimination in many of the 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>326</sup> For example, s 15(4) provides that it will not be unlawful for an employer to discriminate against a person on the ground of the person's disability:

if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person 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.<sup>327</sup>

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325 Ibid 14.

326 See ss 15, 16, 17, 18, 22, 23, 24, 25 and 27.

327 Note that s 15(4) only applies to s 15(1)(b), 'determining who should be offered employment', and s 15(2)(c), 'dismissing the employee'.

'Unjustifiable hardship' is defined by s 11 of the DDA as follows:

For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities, an action plan given to the Commission under section 64.

The appropriate approach by a court to the concept of unjustifiable hardship is first to determine whether or not the respondent has discriminated against the complainant and then determine whether or not the respondent is able to make out the defence of unjustifiable hardship.<sup>328</sup>

The onus is on the respondent to establish unjustifiable hardship by way of defence: 'the essential elements of the principal discriminator's liability do not include the negative proposition that there be no unreasonable hardship to such discriminator'.<sup>329</sup>

### (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>330</sup>

In *Francey v Hilton Hotels of Australia Pty Ltd*,<sup>331</sup> 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

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328 *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 568 [24]-[25] (Drummond J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [113]-[114] (Conti J).

329 *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481, 492 [32] (Madgwick J); cited with approval in *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 567-568 [23]-[24] (Drummond J).

330 *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), 53, extract at (1999) EOC 93-020. Affirmed on review in *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306, 318 [48] (Tamberlin J); *Access for All Alliance (Hervey Bay) v Hervey Bay City Council* [2004] FMCA 915, [84].

331 (1997) EOC 92-903.

## Federal Discrimination Law 2005

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>332</sup>

This approach was cited with approval in *Access for All Alliance (Hervey Bay) v Hervey Bay City Council*<sup>333</sup> ('*Access for All Alliance (Hervey Bay)*') 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(b) above) within nine months.

### (b) 'Any persons concerned'

A number of cases have considered s 11(a) which requires consideration be given to 'the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned'. It has been held that the group of 'any persons concerned' extends beyond the immediate complainant and respondent.

In *Access for All Alliance (Hervey Bay)*, Baumann FM 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>334</sup>

In *Francey v Hilton Hotels of Australia Pty Ltd*,<sup>335</sup> 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>336</sup>

In *Cooper v Holiday Coast Cinemas*,<sup>337</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:

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332 Ibid 77, 453.

333 [2004] FMCA 915, [85].

334 [2004] FMCA 915, [87], citing with approval *Scott v Telstra Corporation Ltd* (1995) EOC 92-117, 78,401.

335 (1997) EOC 92-903.

336 Ibid 77, 452.

337 Unreported, HREOC, Commissioner Keim, 29 August 1997.

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>338</sup>

In *Scott v Telstra Corporation Ltd*,<sup>339</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:

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>340</sup>

In *Williams v Commonwealth*,<sup>341</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 ('IDD'). 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 IDD and also raised the issue 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>342</sup>

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338 Ibid 7.

339 (1995) EOC 92-717, 78,402.

340 Ibid, 78,402. See also *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), 52, extract at (1999) EOC 93-020. Decision affirmed on review in *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306, 318 [43]-[45] (Tamberlin J).

341 [2002] FMCA 89.

342 Ibid [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.

### (c) Other factors

It is clear from s 11 that 'all relevant circumstances' are to be taken into account in determining unjustifiable hardship.

In *Access for All Alliance (Hervey Bay)*, Baumann FM accepted that the Australian Standards and the Building Code of Australia were 'relevant and persuasive' in determining whether or not any hardship faced by the respondent in effecting an alteration to premises is 'unjustifiable'.<sup>343</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(b), (d) 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 standards precludes me from finding either unlawful discrimination or that there is no 'unjustifiable hardship'.<sup>344</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>345</sup>

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343 [2004] FMCA 915, [13]-[14].

344 *Ibid* [86].

345 *Ibid* [87]-[88].



## 5.5.2 Other Exemptions to the DDA

### (a) Annuities, insurance and superannuation

Section 46 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, 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.

In *Xiros v Fortis Life Assurance Ltd*,<sup>346</sup> Driver FM considered s 46(1). The applicant had been diagnosed HIV positive. It was not disputed that he had been discriminated against on that basis 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', the consideration of 'reasonableness' in the context of the indirect discrimination (see 5.2.3(d) above) by the High Court in *Waters v Public Transport Corporation*<sup>347</sup> ('*Waters*') and the Federal Court in *Secretary, Department of Foreign Affairs and Trade v Styles* ('*Styles*').<sup>348</sup>

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>349</sup>

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346 (2001) 162 FLR 433.

347 (1991) 173 CLR 349.

348 (1989) 23 FCR 251.

349 (2001) 162 FLR 433, 439-40 [16]-[18].

## Federal Discrimination Law 2005

The same approach to 'reasonableness' was taken by Raphael FM in *Bassanelli v QBE Insurance*.<sup>350</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>351</sup>

His Honour noted that the onus is on the respondent to establish 'reasonableness' in this context<sup>352</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, sitting as a single judge, in *QBE Travel Insurance v Bassanelli*.<sup>353</sup> Mansfield J commented that the exemptions in ss 46(1)(f) and 46(1)(g) of the DDA are 'not simply alternatives'<sup>354</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).

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350 [2003] FMCA 412.

351 *Ibid* [37].

352 *Ibid* [52].

353 [2004] FCA 396.

354 *Ibid* [28].

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>355</sup>

In the circumstances of the case, however, the parties approached 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>356</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>357</sup> He further held that the assessment of what is 'reasonable' is to be determined objectively in light of all relevant matters, citing with approval<sup>358</sup> the decisions in *Waters* and *Styles*.

### (b) Defence Force

Section 53(1) of the DDA provides:

This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability 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.

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355 Ibid [33]-[34].

356 Ibid [36].

357 Ibid [37].

358 Ibid [51]-[54].

## Federal Discrimination Law 2005

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>359</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>360</sup>

This decision was overturned on appeal by the Full Federal Court in *Commonwealth v Williams*.<sup>361</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 in support of' such forces within the meaning of regulation 4(b). Therefore Mr Williams was not covered by the operation of the DDA due to s 53.<sup>362</sup>

The Full Court noted that 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. They 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 caught by the section.<sup>363</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>364</sup>

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359 [2002] FMCA 89.

360 *Ibid* [154]. See 5.3.1(d) above for general discussion on the issue of inherent requirements.

361 (2002) 125 FCR 229.

362 *Ibid* 237 [32]-[33].

363 *Ibid* [34].

364 'Prescribed laws' are those for which regulations have been made by the Governor-General pursuant to s 132 of the DDA.

Section 47(3) further provides that Part 2 does not render unlawful 'anything done by a person in direct compliance with another law' for 3 years from the commencement of the section (1 March 1993).

In *McBride v Victoria (No 1)*,<sup>365</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>366</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 ss 47(2) and (3) should be taken.<sup>367</sup>

On this view, it is not sufficient for a respondent to show that it was acting generally in pursuance of its statutory authority. 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 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>368</sup>

### (d) Special measures

Section 45 of the DDA provides:

#### **45 Special measures**

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

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365 [2003] FMCA 285.

366 Ibid [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)).

367 Ibid [46].

368 Ibid.

## Federal Discrimination Law 2005

- (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; and
  - (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.

In *Catholic Education Office v Clarke*,<sup>369</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, Jacob, indirectly discriminated against the student on the ground of his disability (see 5.2.3(b) above).<sup>370</sup> Before the Full Federal Court, 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 s 45(b).<sup>371</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>372</sup> The Court noted, in this regard, Finkelstein J's observation in *Richardson v ACT Health and Community Care Service*,<sup>373</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 State of Victoria*<sup>374</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'.

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369 [2004] FCAFC 197.

370 *Clarke v Catholic Education Office* (2003) 202 ALR 340.

371 [2004] FCAFC 197, [127].

372 *Ibid* [129].

373 (2000) 100 FCR 1, 5 [24].

374 [1998] 3 VR 759, 771.

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 Jacob, but rather the appellants' offer of a place subject to a term or condition that Jacob participate in and receive classroom instruction without an interpreter. This could not be said to be 'reasonably intended' to meet Jacob's special needs for the purposes of s 45.<sup>375</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>376</sup>

See also the discussion of special measures under the RDA at 3.3 above and under the SDA at 4.4 above.

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375 [2004] FCAFC 197, [131].

376 *Ibid* [132].

