DISABILITY STANDARDS AND INCLUSIVENESS IN EDUCATION: A REVIEW OF THE AUSTRALIAN LANDSCAPE

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ABSTRACT

This paper examines the potential effects of the Disability Standards for Education 2005 (the Education Standards) on Australian education providers by considering the growth of inclusiveness in Australian education and the effects of the High Court decision in Purvis v. State of New South Wales. The paper observes that the decision in Purvis was a setback for the process of inclusiveness, which has since been addressed to a large extent by the introduction of the Education Standards. In addition, the paper considers the United States experience in relation to inclusiveness in education. It notes that the legislative underpinning of the principle in that jurisdiction has lead to inconsistent approaches by the courts in applying the objectives of inclusiveness. The paper concludes with reflections on whether the Australian approach has converged with the United States experience.

INTRODUCTION

This paper explores the Disability Standards for Education 2005 (the Education Standards) formulated under the Disability Discrimination Act 1992 (Cth) (the DDA) and whether these Education Standards reinforce the principles and practices of inclusiveness in education. According to the Commonwealth Productivity Commission, the DDA is an attempt to provide a clear and comprehensive national mandate for the elimination of discrimination and to bring people with disabilities into the economic and social mainstream of Australian life. The education environment in which the DDA operates has changed over the past decade and a half with ‘de-institutionalisation’, ‘mainstreaming’ and ‘inclusiveness’ exposing many people with disabilities to new opportunities and challenges, and likewise exposing education providers to new challenges. There is now a generation of children with disabilities moving through the mainstream education system who will soon be seeking possible higher education opportunities so that the effects of inclusive policies and practices in primary and secondary school
are now filtering through to tertiary education providers. As part of the focus on education providers, this paper considers the relationship between the DDA, the Education Standards and the concept of inclusiveness in Australian education.

The DDA prevents, among other things, an education provider from discriminating against a student on the grounds of the student’s disability by refusing to enrol the student or by denying or limiting the student’s access to any benefit provided by the educational authority. The DDA allows that an education provider may seek to avoid any obligations under the Act if it can show that the adjustments it might have to make to provide services and facilities for a student with a disability may cause unjustifiable hardship for the provider. This paper will, therefore, explore the relationship between the obligation to make reasonable adjustment as prescribed by the Education Standards and the defence of unjustifiable hardship.

The formulation of the Education Standards, after some considerable delay, is of particular relevance to education providers as they establish broad proactive anti-discriminatory requirements for their institutions. The DDA has been amended since its inception and continues to evolve. Its high level principles operate by making discrimination on the grounds of disability unlawful in certain areas, but it does not provide detail on how the law should be applied in individual cases. In that sense the DDA is a passive tool; it assumes compliance until there is evidence otherwise. However, the Education Standards oblige education providers to make reasonable adjustments in relation to enrolments, student participation, curriculum development, accreditation and delivery, student support services, and harassment and victimisation. In this sense the Education Standards are a proactive anti-discrimination tool and a vehicle for social change.

Case law in relation to the DDA has established a range of important principles. A number of these principles were discussed at length in the High Court Decision of Purvis v. State of New South Wales (Department of Education and Training). Purvis touched on the issue of the definition of disability, the requirement of comparison between the applicant and a suitable comparator, and the issue of reasonable adjustment. Therefore, considerable attention is devoted to Purvis despite it being the subject of significant attention and commentary elsewhere.

This paper is divided into four parts. Part 1 covers the preliminary issues relating to discrimination in the Australian education context, the definition of disability and the application of the DDA and Education Standards to education providers. Part 2 examines the issues of inclusiveness in education and includes a survey of the application of the concepts in the United States. Part 3 discusses in
some detail the important case of *Purvis*, looking at the court’s determination of the issues of reasonable adjustment. Part 4 considers the requirement for reasonable adjustment in the context of the *Purvis* decision and the Education Standards.

**PART 1: DISCRIMINATION IN THE AUSTRALIAN EDUCATION CONTEXT**

Generally speaking, discrimination is any practice that makes distinctions between individuals or groups so as to disadvantage some and advantage others. Motive and intention to discriminate are irrelevant to the fact of discrimination.⁸ In the education context this principle was illustrated in *Hills Grammar School v. Human Rights and Equal Opportunity Commission (HREOC)*,⁹ where the appellant education provider admitted directly discriminating against a student, Scarlett Finney, who suffered from spina bifida, by refusing to enrol her. The school sought to apply the defence of unjustifiable hardship on the grounds that the accommodations and adjustments that were necessary to support the student’s enrolment would constitute such hardship on the school. In making this assessment, the school’s administration made enquiries about the needs of children with spina bifida generally, but did not look at the specific needs of Scarlett Finney herself. It was held that this approach was incorrect, and that the school should have considered the needs of the individual student in consultation with her and her parents. The effect of this defective approach by the school was that it discriminated against Scarlett. By failing to look at the specific needs of the particular student with a disability, the defence of unjustifiable hardship also failed because it could not be said that the school had made a proper assessment of the needs of the student in order to make out the defence.

This issue was also tested in the case of *X v. McHugh, Auditor General for the State of Tasmania*¹⁰ where the HREOC found that the dismissal of an employee suffering from paranoid schizophrenia constituted discrimination on the grounds of disability, notwithstanding that the employer was unaware of the complainant’s disability. The Commission found:

> Intention or motive is not required, as the High Court has said. The objective of the Act is to eliminate, as far as possible, discrimination against persons on the ground of disability in areas of public life; it therefore proscribes, not merely deliberate discrimination, but thoughtless discrimination as well. Employers are required to be vigilant in their regard for circumstances affecting the interests of their employees, I agree, at least in the circumstances of this case
with the interpretation of the Act advanced by Counsel for the respondent, namely, that section 5 is about objective discrimination. It is not necessary that an employer knows of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability.\textsuperscript{11}

It follows that the essence of discrimination is that it requires some type of comparison between the applicant who has a disability and another person. The status of the comparator is a complex question as was shown in the decision in \textit{Purvis}, discussed in detail below. The onus of proving discrimination rests with the complainant.\textsuperscript{12} Once it has been established that discrimination has occurred, the onus moves from the complainant to the respondent who may seek to prove that the discrimination can be excused through limited defence under the Act.\textsuperscript{13}

\section*{THE DDA DEFINITION OF THE TERM DISABILITY}

The DDA has a comprehensive definition of the term ‘disability’. Unlike some counterpart State legislation,\textsuperscript{14} the DDA defines disability so as to include people who currently have a disability, people who previously had but no longer have a disability (e.g. having a medical history of severe asthma which is now under control), people for whom a disability may exist in the future (e.g. being a member of a family which has a history of heart disease), and people to whom a disability is imputed (e.g. assuming that a gay man has AIDS when he is in fact quite healthy).\textsuperscript{15} Section 4 of the DDA defines disability as:

(a) Total or partial loss of the person’s bodily or mental functions (e.g. being paraplegic, having epilepsy).
(b) Total or partial loss of a part of the body (e.g. amputation).
(c) The presence in the body of organisms causing disease or illness (e.g. having AIDS or hepatitis).
(d) The presence in the body of organisms capable of causing disease or illness (e.g. being HIV positive but not having full-blown AIDS).
(e) The malfunction, malformation or disfigurement of a part of the person’s body (e.g. having a sight impairment, club foot, harelip).
(f) A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction (e.g. being dyslexic).
(g) A disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement or
that results in disturbed behaviour (e.g. having schizophrenia, Alzheimer’s disease or psychiatric conditions).

THE APPLICATION OF THE DDA AND THE EDUCATION STANDARDS TO EDUCATION PROVIDERS

Education providers are bound by the DDA under section 22 of the Act, which provides that it is unlawful for an educational authority to discriminate against a person on the ground of the person’s disability in relation to admission and access to services. The DDA also prohibits harassment on the grounds of disability.

However, section 22(4) of the DDA provides that it is not unlawful to refuse or fail to accept a person’s application for admission as a student at an educational institution where the person would require services or facilities not required by students who do not have a disability, and the provision of such services would impose ‘unjustifiable hardship’ on the educational institution. The Education Standards illuminate the concept of unjustifiable hardship by providing for the positive obligation to make reasonable adjustments. Section 31(1A) of the DDA provides for the purpose of clarity that a person or body dealing with persons with disabilities may be required under the Education Standards to put in place reasonable adjustments to eliminate as far as possible discrimination. The Education Standards now impose, at least in part, some positive responses to disability rather than reactive responses. The Education Standards cover enrolment, participation, curriculum development, accreditation and delivery, student support services, and elimination of harassment and victimisation.

Section 34 of the DDA specifically excuses education providers from the unlawful discrimination provisions of the DDA where the education provider can show compliance with the Education Standards. In other words, if there is non-compliance with an Education Standard the unlawful discrimination provision may be reactivated, so that the defence of unjustifiable hardship may also be relevant. In other words, consideration of these issues is a two-step process. Firstly, does the student with a disability require some form of adjustment to be made to facilities or services from an education provider, and if so is that adjustment reasonable. Secondly, if the adjustment is reasonable but the education provider has not made the adjustment, the provider may have a defence of unjustifiable hardship. As is noted below, despite the apparent separation of these concepts there is likely to be some overlap between the two, particularly as the obligation for reasonable adjustment does require consideration of the cost of any adjustment.
which is also a consideration for the defence of unjustifiable hardship.

The Education Standards include a statement of student rights and education provider obligations. Clause 1.3 of the Education Standards provides *inter alia* that the objects of the Education Standards are to ensure that persons with disabilities have the same rights to education, and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community. These objects imply a principle of inclusiveness in education. This aspect is discussed in more detail below. Importantly, clause 2.2 provides that students with disabilities are to be treated 'on the same basis' as a prospective student. The meaning of 'on the same basis' is set out in clause 2.2(2) which requires the education provider to make any decisions about admission or enrolment on the basis that 'reasonable adjustments' will be provided. Clause 2.3 provides that participation in education must also be on the same basis as a student without a disability.

Prior to the formulation of the Education Standards, the DDA did not specify the types of adjustments required to remove discrimination. In fact, as will be noted below in the discussion of *Purvis*, the issue of reasonable adjustment was, at the time of hearing of that case, a vexed issue. The Education Standards now provide some guidance on this issue. For the purposes of the Education Standards, the following matters are taken into account when considering what a reasonable adjustment is:

1. The student’s disability.
2. The views of the student or the student’s associate.
3. The effect of the adjustment on the student, including the effect on the student’s ability to achieve learning outcomes, ability to participate in courses or programs and the student’s independence.
4. The effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students.
5. The costs and benefits of making the adjustment.17

The Education Standards anticipate that a detailed assessment by an independent expert may be necessary in order to assess what reasonable adjustments are necessary. When an assessment has been made, the education provider must consult with the student, or an associate of the student, about whether the adjustment is reasonable, whether there are alternatives and whether the adjustment may need to be changed over time.18 As to enrolment of students, the Education Standards likewise require consultation with the student as to whether any adjustments are needed in order that a student with a
disability can be treated on the same basis as a student without a disability. In particular, a student with a disability must be supplied with information to allow enrolment to take place without undue difficulty, and which must address the needs of the student and provide a choice of course or programs which enables the student to make informed choices.19

Significant requirements are attached to the standards for participation and represent the most proactive provisions of the Education Standards. Clause 5.2, consistent with the theme of the other standards, requires consultation with a student with a disability in order that any necessary adjustments can be made so as to allow the student to participate in a course or program. Clause 5.3 sets out the measures which may be taken to allow the student with a disability to participate. These include making sure the course or programs is sufficiently flexible for the student to participate in, which includes activities which have been negotiated and agreed with the student and provision of additional support to allow the student to participate. Importantly, the Education Standards include a requirement for the education provider to consider implementation of alternative activities as a reasonable substitute where the student with a disability cannot participate, and design extra-curricular activities so as to include a student with a disability.

Similar requirements in relation to curriculum development, accreditation and delivery appear in clauses 6.2 and 6.3 of the Education Standards. Of note are the requirements under clause 6.3 to provide materials in an appropriate format, and bridging or enabling courses or programs for the development of skills. In addition, assessment procedures should be adapted to enable the student to demonstrate the appropriate knowledge, skills and competencies. These clauses of the Education Standards need to be read in conjunction with clause 3.4(3), which notes that in making adjustments to accommodate a student with a disability the education provider is entitled to maintain the academic requirements of the course or program and other requirements or components that are inherent in or essential to its nature. These provisions when read together raise two issues. Firstly, what are the inherent requirements of a course or program, and secondly, what is meant by academic requirements? Some pre-Education Standards cases assist in this regard.

In Brakenberg v. Queensland University of Technology,20 a student enrolled with the respondent education provider suffered from syringomyelia, cervical cancer and Attention Deficient Hyperactivity Disorder, which significantly affected her studies to the extent that she failed a number of units in her degree program. She was excluded from continuing studies and applied for an order
from the Queensland Administrative Decisions Tribunal for reinstatement. The tribunal held that the University had made all reasonable adjustments in assisting the student with her studies, but that the University did not have to confer a degree on a student who could not meet the academic standards of the program. It would also seem clear from the decision in *W v. Flinders University*\(^21\) that the academic standards which the DDA did not require to be changed will include standards which are connected with subsequent fitness to practice a profession.

There is no imposition under the DDA of a disconnection between academic courses and their professional application if genuine academic requirements are structured around professional requirements. That is, if a course is designed to teach and test abilities based on the entry requirements for a profession, the DDA does not require changes to the course requirements, even though a less professionally focused course might have been open to a wider range of students with disabilities. However, as noted above, clause 3.4 refers to the inherent requirements of the course or program and read narrowly this might exclude extra requirements for professional accreditation. Such an interpretation might be counterintuitive, particularly in respect of vocational degrees such as law and medicine.

Student support is covered under clause 7 of the Education Standards. These provisions require support staff to be adequately trained,\(^22\) for specialised equipment to be provided where necessary,\(^23\) the student be consulted on any reasonable adjustment required,\(^24\) the student supplied with adequate information in order for them to access support services,\(^25\) and that reasonable steps are taken to adjust access to support services if needed.\(^26\)

Part 8 of the Education Standards deals with the issues of harassment and victimisation, which will not be dealt with in detail here, however, it is noteworthy that these issues have been recorded as of some importance in the literature which is discussed below.

Finally, clause 10 of the Education Standards addresses the issue of unjustifiable hardship. Clause 10.2(3) mandates compliance with the Education Standards to the maximum extent, and this clause should be read in conjunction with section 32 of the DDA which make it unlawful to contravene a disability standard. Clause 10.2(2) preserves the defence of unjustifiable hardship, so that it is a defence for an education provider to assert that compliance with an Education Standard will impose unjustifiable hardship.\(^27\) Interestingly, clause 10.4 allows an education provider to isolate or discriminate against a student with a disability if the disability 'is an infectious disease or other condition' and it is reasonably necessary to isolate or discriminate to protect the health and welfare of the
student with a disability ‘or the health and welfare of others’. The breadth of this provision touches on some of the issues raised in the Purvis case discussed below.

**PART 2: ANTI-DISCRIMINATION LAWS AND THE PRINCIPLES OF INCLUSIVENESS IN EDUCATION**

Inclusive education is based on the concepts of access and participation in a social justice context. Notably, Kirby and McHugh JJ said in *Purvis* that the case:

...concerns the failure of an educational authority to treat him [Daniel] equally with other students by taking steps that would have eliminated or substantially reduced his disruptive behaviour and allowed him to enjoy the same quality education as his fellow students enjoyed.28

The thesis of the minority judgment in *Purvis* is that the a student has a right to equal treatment in education and that if that student has a disability there is an obligation on the education provider to do what is necessary to *include* that child fully in the education process. This approach to the case was not adopted by the majority of judges in *Purvis*. The majority decision is examined below.

Inclusiveness in education is a rights based humanitarian approach to education, i.e. the right of a student to have equal access to education. Its proponents argue that inclusion is concerned with the protection of human rights for all students. Inclusion represents a philosophical shift from related practices such as ‘mainstreaming’ and ‘integration’ where the focus is on placing students with disabilities in mainstream settings with the aspiration that all students would benefit from the experience. Inclusion places a focus on the quality of the participation of the student with disabilities and involves welcoming students with disabilities as full members of the group and values that student for their contribution.29

Hodkinson’s extensive survey of the literature base in relation to inclusiveness in education concluded that the concept of disability should not be confined to the medical model, which holds that disability is considered in the context of the effect of impairment upon bodily function. Hodkinson maintains that disability requires consideration of the economy, government policy, state authorities and education providers as part of a social model rather than a medical model of disability.30 In the context of disability discrimination, inclusiveness embraces the notion that separation of students by reason of differences arising out of their disability is detrimental not only to the student with a disability but also to all other participants in the education institution as well.
In Australia this principle was arguably not specifically enshrined in law until the formulation of the Education Standards in 2005. Prior to the decision in *Purvis* in 2003, Forlin and Forlin opined that the legislative framework for special education in Australia did not provide for inclusion of rights despite the fact that there are current policies for inclusion and integration. They also observed that at the time of writing in 1998 there was very little established practice in Australia providing for inclusive education. Lindsay likewise asserted that the Australian legislative framework was not supportive of inclusive education practices. However, writing just over five years after Forlin and Forlin, Lindsay came to the conclusion, after her survey of educational practices in Australia, that education policy and practice in Australia substantially incorporated principles of inclusion.

More recently, Anderson *et al.* along with Pearce and Forlin support the findings of Lindsay and observe that Australian schools had moved gradually towards inclusive policies and practices which were entering into the later stages of implementation. Pearce and Forlin also observed that increasing numbers of parents were committing to the inclusion philosophy. The adoption of the principle that a student with a disability should be treated on the same basis as a student without a disability and the mandatory compliance with the standards generally points to an inclusive approach. Tertiary institutions have also been more proactive in adopting inclusive practices and policies, at least since the formulation of the Education Standards.

The issue of inclusiveness includes more than just how students are to be included in classes and programs. Teachers and lecturers are a key element in the process and some commentators have noted that teachers and lecturers might not embrace programs which aim at inclusiveness in the provision of education because they fear the poor quality of work that may be produced by students with disabilities, the extra time those students might require (possibly to the detriment of other students), and the adequacy of class resources. Teachers act as mediators between students with disabilities and members of the student’s social and education circle. The attitude and training of teachers is, therefore, critically important to this issue of inclusiveness. Teachers are responsible for much of the day-to-day implementation of inclusive policies. One survey found that:

Teachers recognised the appeal of including previously excluded students in the classrooms, but were often ambivalent or angry about problems associated with the day-to-day classroom practice of inclusion. Teachers were concerned about their lack of expertise in working with children with disabilities . . . Yet in spite of significant
concerns about lack of training and lack of adequate support, many teachers conveyed a willingness to move towards greater inclusive practices, provided the education department responded to their perceived needs.\(^{41}\)

This is by no means a small issue. There are cost implications arising out of the training and development of staff. The Guidance Notes to the Education Standards are sensitive to the challenges of professional development and awareness training and make special reference to these aspects. Notably, research by Allen Consulting concluded that the main costs of introducing the Education Standards related to professional development because staff will require awareness training in relation to the rights and obligations set out under the standards.\(^{42}\) Pearce and Forlin asserted:

> The inclusion of students with disabilities will, undoubtedly, highlight inadequacies in education systems. As more students with disabilities are included and student populations become increasingly more diverse, there is little doubt that they will force systems to change even though they themselves may not experience all the benefits.\(^{43}\)

In addition, Hodkinson asserts that in order for inclusive policies and practices to succeed it is necessary to have regard for the attitudes of non-disabled children in the process of inclusiveness. His review of the literature noted the tendency for students with disabilities to be subject to isolation and bullying.\(^{44}\) This observation is embraced in part 8 of the Education Standards, which attempts to provide explicit protection from harassment and victimisation for students with disabilities. It follows that while there has been a trend in policy, practice and legislation towards inclusiveness in Australia, there are still challenges to its success. It is worthwhile, therefore, to consider the outcomes of the policies of inclusion in the United States, which has had legislative underpinning of the concept for over thirty years.

**INCLUSIVENESS AND THE INTEGRATION PRESUMPTION IN THE UNITED STATES**

Inclusiveness in education is a concept that has widespread international recognition, although internationally the implementation of inclusive policies is patchy. Often the international emphasis on inclusiveness has been focused on racial aspects rather than disability.\(^{45}\) In the United States the concept of inclusiveness in education has been enshrined in legislation for over thirty years and specifically includes an ‘integration presumption’. Forlin and Forlin observe:
In the United States inclusion is considered to be *a right* rather than a privilege as defined in IDEA’s (*Individuals with Disabilities Education Act*) requirement to prohibit the placement of a child with a disability outside a regular class if inclusion with appropriate support services can be achieved satisfactorily.\(^{46}\)

However, some American commentators now question whether the policy of inclusiveness as prescribed by the ‘integration presumption’ is still valid. For example, Colker notes in her detailed survey that integration of disabled students in schools is not constitutionally mandated, in contrast to the constitutional imperative for racial integration.\(^{47}\) Colker maintains that the impetus for the integration presumption in the United States was the desire to close disability-only institutions, which were simply warehouses for children with disabilities that did not provide for the education needs of the children. She observes that the presumption has not been applied uniformly by the courts, with some courts allowing the presumption to be rebutted upon evidence that the child would not benefit from mainstream education. She noted in *Daniel R R v. State Board of Education*,\(^{48}\) that in allowing the presumption to be rebutted, the court took into account the efforts which the state had made in accommodating the child, the benefit the child would receive from the ‘regular’ education and what effect the child’s presence would have on the other students.

On the evidence in *Daniel R R* it was found that there was no benefit to the child who suffered from severe mental disability (due to Down’s Syndrome which left him with speech impairment and mental retardation) to attend at the ‘regular’ classrooms as he was unable to participate in activities, although the possibility of associating with other children was available. The court noted that the child was in fact exhausted by the interactions and in any event his presence harmed other students. It should be noted that the school in question had a full range of special education programs. Other decisions have shown that the presumption has been rebutted by evidence that the costs of putting in place suitable programs would be detrimental to other students who would be affected by the withdrawal of funds from their programs.\(^{49}\) Colker notes that the integration presumption has been a vehicle for structural change in education but this has been affected by uneven application of the integration presumption.

Colker’s careful survey includes an extensive analysis of empirical data relating to the educational outcomes of inclusive programs. This part of the review established that the overwhelming bulk of research into the effects of inclusive education in the United States showed that inclusive education programs produced unimpressive results in terms of improved educational outcomes and
did not establish that inclusive programs should be universally applied to all children/students. There was also evidence that in some cases special education programs could be more supportive and enjoyable for children with disabilities. Colker noted that, as well as other children not accepting a child with a disability, teachers may also not be equipped to accept a child with a disability in the classroom. Colker maintains that the integration presumption has been a significant force for social and educational change the United States, but that reconsideration of the principle is needed. She advocates that there should be increased emphasis on a continuum of services within educational facilities that provide for a range of services for all children. If an array of options exists then it is the court’s function to assess whether the state has selected an appropriate option for the child. She proposes a checklist of features in order to determine whether the options are appropriate, which would lead to an individualised program for each child. Given this background it is now useful to consider the Australian High Court decision in Purvis. It is noteworthy that at the time of the decision in Purvis the Education Standards had not been formulated.

PART 3: THE PURVIS CASE – BEHAVIOUR AS A MANIFESTATION OF DISABILITY

A contentious issue in relation to the definition of disability is the interpretation of paragraph (g) of section 4 of the DDA (which is set out above) with reference to the extent to which a distinction is drawn between a disability and its manifestations. The issue seems to have been settled for now as a result of the High Court decision in Purvis, where the court considered whether the definition of disability in paragraph (g) refers only to the underlying disorder suffered, or whether it includes the behavioural manifestations of that disorder. The Chief Justice, as one of the majority judges in Purvis, observed that the problem with regard to the definition of disability arose partly because:

paragraph (g) begins by reference to physical conditions and then adds a reference to a consequence (‘disturbed behaviour’) of a condition. It is necessary to relate paragraph (g), with its added reference to resulting behaviour, to the provisions of section 5 as to what amounts to discrimination.

This important case involved Daniel Hoggan, the foster child of Mr and Mrs Purvis. Daniel was enrolled in a mainstream Year 7 class at Grafton High School in New South Wales in 1997. Daniel had multiple complex disabilities due to a severe brain injury received
as an infant. During 1997 he was disciplined and suspended on several occasions for verbal and physical abuse of teachers, teachers' aides and other students. The school recommended Daniel be moved to a special education unit. The NSW Department of Education rejected an appeal from Mr and Mrs Purvis against the move to a special education unit. The Purvises made a disability discrimination complaint to the HREOC where Commissioner Innes found in their favour. However, the case then proceeded through the courts on appeal. The steps in this appeals process show a range of views on the key issues and were as follows:

- HREOC found the Department of Education had discriminated against Daniel on the grounds of his behaviour and, therefore, on the grounds of his disability. Commissioner Innes compared Daniel's behaviour to that of a student who exhibited similar behaviour but did not have a disability, and found he had been treated less favourably because no other child in the same year in the school had been excluded or suspended. He also found that the school had not made a 'reasonably proportionate response' to Daniel's disability.\(^5^3\)

- The Federal Court at first instance disagreed with the HREOC. Emmett J held that the proper comparator was a student who exhibited similar conduct to Daniel. He also said 'the behaviour of the complainant is not ipso facto a manifestation of a disability within the meaning of the Act', and hence not discrimination on the grounds of disability.\(^5^4\)

- The Full Court of the Federal Court agreed with the Federal Court at first instance and dismissed the appeal. The Full Court said that Daniel's 'conduct was a consequence of the disability rather than any part of the disability within the meaning of section 4 of the Act'. That is, Daniel's behaviour was separate to his disability, even though it was caused by his disability. Therefore, there had not been discrimination on the grounds of disability. The Full Court also criticised the Commissioner's reference to an obligation upon the school to reasonably accommodate Daniel.\(^5^5\) The applicant appealed to the High Court.

The High Court essentially had three issues to consider. Firstly, did the behaviour of Daniel fall within the definition of disability? Secondly, if so, which students should be used as comparator and what circumstances should be attributed to a person without a disability? Thirdly, if Daniel had been treated less favourably, was this treatment related to his disability? The majority of the High Court held that Daniel's conduct was part of his disability for the purposes of the DDA because it was 'disturbed behaviour' under part (g) of the definition. Gummow, Hayne and Heydon JJ, forming
part of the majority, said the Federal Court had erred in distinguishing between a condition and its behavioural manifestations:

...to focus on the cause of the behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person different in the eyes of others.\(^5\)

That is, direct discrimination on the grounds of a behaviour that is a consequence of a disability is discrimination on the grounds of the disability. In other words, there was no need for sharp distinctions between cause and effect.\(^5\) A similar approach to the interpretation of the definition of disability had been taken in an earlier decision in Randell v. Consolidated Bearing Company (SA) Pty Ltd.\(^5\) 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. Magistrate Raphael stated:

In my view there is no distinction between this applicant’s ‘disability’ and its ‘manifestation’. His ‘disorder’ resulted in his ‘learning differently’. He learned more slowly. He was dismissed because he was learning too slowly.\(^5\)

Raphael FM found that the failure of the respondent to provide the assistance to the applicant that was available to staff in the past, along with his subsequent dismissal, constituted disability discrimination. This decision was referred to with approval by the minority McHugh and Kirby JJ in the Purvis case in finding that the HREOC was correct in determining that Daniel Hoggan’s behaviour was a manifestation of his disability and, therefore, part of his disability for the purposes of section 4. In essence the High Court (perhaps with the exception of Callinan J) was in agreement that the Full Federal Court had erred in making a distinction between the disability and the behaviour. The High Court on this point held that the definition of disability should be given a broad interpretation.

However, in dealing with the second issue, the comparator issue, the majority of the High Court went on to find that the Department of Education had not unlawfully discriminated against Daniel because of his disability when it suspended and then expelled him from school by reason of his behaviour (also see ‘requirement to compare’ below with regards to this case). In particular, Gleeson CJ said:

It may be accepted...that the term ‘disability’ includes functional disorders, such as incapacity, or a diminished capacity to control behaviour. And it may be also accepted...that the disturbed behaviour of the pupil that resulted from his disorder was an aspect of his disability. However, it is necessary to be more concrete in relating paragraph (g) of the definition of disability to section 5. The circumstances that gave
rise... to the treatment, by way of suspension and expulsion, of the pupil, was his propensity to engage in serious acts of violence towards other pupils and members of the staff. In his case, that propensity resulted from a disorder; but such a propensity could also exist in pupils without any disorder. What, for him, was disturbed behaviour, might be, for another pupil, bad behaviour... The circumstances are relevantly the same, in terms of treatment, when that person engages in violent behaviour... There are pupils who have no disorder, and are not disturbed, who behave in a violent manner towards others. They would probably be suspended, and, if the conduct persisted, expelled, in less time than the pupil in this case.60

In making these comments Gleeson CJ gives clear priority to the duty which he found the school had for the safety of other students and staff in the school when faced with potential harm through violent behaviour. Rattigan asserts that 'in construing the appropriate comparator, the majority of the High Court appears to have imported considerations of health and safety into the substantive definition of direct discrimination'.61 She also asserts that this approach was taken because of the absence at the time of the hearing of Purvis of the defence of unjustifiable hardship in respect of post-admission events.62 Notably, since Purvis the defence of unjustifiable hardship as been extended by the combination of revisions to sections 11 and section 15(4)(b) of the DDA.63 The Education Standards also makes it clear that unjustifiable hardship applies to all aspects of post-admission activity except for harassment and victimisation.

The minority, Kirby and McHugh JJ, parted company with the majority on the comparator issue, holding that the proper comparator was a person who did not engage in like conduct, and in so finding they agreed with Commissioner Innes on this point; that the circumstances of the aggrieved person which are related to the proscribed ground are excluded from the circumstances of the comparator. This is a broader view of the objects of the Act which was supported by a considerable body of authority. The minority argued that if the comparator was a person suffering from the disabilities, the subject of the application would greatly narrow the operation of the DDA.64 The essence of this aspect of the minority judgment is that if the school had made some accommodation for Daniel’s disability, his behaviour would have been modified or would not have arisen. In doing so, the minority found support in the authorities that there was a requirement to accommodate disabilities of a disabled person.65

As to the third issue of causation the majority did not address this in detail. Gleeson CJ held that the Act did not prohibit consideration of the desire by the respondent to remove threats to safety, thus allowing for the stated intention of the school to be accepted in this
case. In other words, he accepted that the school’s actions were motivated by Daniel’s violent behaviour and not his disability. Again, on this aspect the minority took a different view holding that it was necessary to establish the ‘real reason’ for the behaviour of the alleged discriminator. This was not a subjective test as proposed by Gleeson CJ. The minority held that where it is found that the reason for the alleged discriminatory act was due to a manifestation of the disability evidenced by the behaviour of the applicant, then the act was ‘because of’ the disability.\textsuperscript{66}

**THE ISSUE OF REASONABLE ADJUSTMENT IN PURVIS**

At first instance, Commissioner Innes had held that the school should have made more effort to provide a ‘reasonably proportionate response’ to Daniel’s disability. This part of the judgment is a reference to determining whether circumstances are ‘not materially different’ for the purposes of section 5(1) of the DDA. It has been asserted in a number of cases that an adjustment must be made for any accommodation or services required by a person with a disability so that the disabled person can participate in the particular activity. Section 5(2) of the DDA provides that for the purposes of the comparison required by section 5(1), the circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability. Sir Ronald Wilson opined in one judgment that persons with disabilities may require different treatment in order to achieve equality:

It will be remembered that section 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.\textsuperscript{67}

In the context of education, the HREOC prior to *Purvis* had interpreted section 5(2) of the DDA to mean that institutions must provide ‘different accommodations or services’ to enable a person to participate in a course of study or gain access to educational goods and services of facilities. The provision of these different accommodations or services for people with disabilities is often referred to as making ‘reasonable adjustment’. Failure to respond adequately to a request for an adjustment might result in a claim of discrimination.\textsuperscript{68} A number of other decisions also implied a term for reasonable adjustment.\textsuperscript{69} This interpretation of the DDA was contentious because the term ‘reasonable adjustment’ did not
appear in the DDA prior to the formulation of the Education Standards and thus the obligation to make reasonable adjustments was been questioned in several cases, most notably in the Purvis case. The Purvis case clarified that the DDA creates no general obligation upon organisations to make reasonable adjustments to accommodate the needs of people with disabilities. Interestingly, the minority in Purvis, McHugh and Kirby JJ, rather cryptically stated:

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

Thus the High Court decision of Purvis questioned the presumption that the DDA implies that reasonable adjustments must be made in order to avoid discriminating against people with disabilities, and the Court appears to have narrowed significantly the protection that the Act was thought to provide. As Campbell concluded:

The decision in Purvis gives little encouragement to people with disabilities. The decision simply reinforces the idea that disability is an individual problem, so that it is up to the individual to adapt to an environment or a community rather than the other way around. It carries a message of exclusion rather than inclusion, which undermines the usefulness of the Act as a mechanism for social change. An approach that recognised that the greatest challenges to the equal participation of people with disabilities comes from externally imposed barriers would assist courts in applying the law so that it could work to include them, and not exclude them as ‘aberrant’, ‘abnormal’ or ‘dangerous’.

That said, to a large extent the introduction of the Education Standards and the revision of the defence of unjustifiable hardship redresses the outcome in Purvis on this issue by mandating a requirement for reasonable adjustment in all aspects of education provision.

PART 4: REASONABLE ADJUSTMENTS IN THE EDUCATION CONTEXT

What constitutes ‘reasonable adjustments’ in the context of the Education Standards will be determined on a case by case basis
and is dependent on the particular circumstances. The Education Standards at clause 3.4 (as noted above) now set out a list of matters that must be considered in relation to reasonable adjustment. Even having regard for the factors that must be considered in clause 3.4, reasonableness is a question of fact to be determined with consideration to all the factors in the cases. It is worth reviewing one of the leading cases (dealing with the use of public transport by persons with disability) as a guide to what might be relevant in relation to the Education Standards. As Dawson and Toohey JJ said in *Waters v. Public Transport Corporation*:

...the ability of the respondent to meet the costs, both in financial terms and in terms of efficiency, of accommodating the needs of impaired persons who use trams was relevant in relation to reasonableness of the requirements or conditions which it imposed and in relation to the reasonableness of the special manner in which the appellants required the respondents to perform its service. Another relevant factor would be the availability of alternative methods which would achieve the objectives of the Cabinet resolution [to alter the trams service to introduce scratch tickets which the appellants argued indirectly discriminated against persons with a disability] but in a less discriminatory way. Other factors that might be relevant are the maintenance of good industrial relations, the observance of health and safety requirements, the existence of competitors and the like.\(^7^4\)

Patmore observes that the interpretation of the DDA giving rise to the requirement for reasonable adjustment (prior to *Purvis*) was inconsistently interpreted. He notes that *Waters v. Public Transport Corporation* was a decision made in relation to the *Equal Opportunity Act 1984* (Vic) rather than the DDA and that there was division over this issue in the High Court. As noted above, Dawson and Toohey JJ considered that financial and economic factors were relevant to the determination of the issue. Dissenting justices Mason and Gaudron, however, argued (at page 364) that it was inappropriate to take into account financial and economic factors.\(^7^5\) The Education Standards now make it clear that the costs and benefits of making an adjustment are a factor for consideration.\(^7^6\) The decision of the majority in *Waters* seems to have been taken into account in the Education Standards. The imposition of reasonable adjustment upon the education provider is central to the adoption of a more inclusive approach to Australian education. It may be that the effect of *Purvis* was to diminish the thrust of inclusiveness in Australian education because the majority held that reasonable adjustment was not to be read into the DDA. The Education Standards go a long way to addressing that setback but much depends on how the Education Standards are applied. Dickson noted that *Purvis* was
dealt with as a direct discrimination case. In considering the issue of reasonableness she reviewed a number of cases framed as indirect discrimination matters. Those cases require consideration of whether a condition placed upon an applicant is reasonable. After a review of a number of cases she observed:

Many anti-discrimination decisions continue, however, to resonate outmoded understandings of people with disabilities as having 'needs' rather than 'rights'. They resonate a belief that people with disabilities should be stoically grateful for what they are given instead of agitation for more. They resonate a belief that the goal of inclusion is not to reduce the functional limitation of disability but reduce 'difference' by 'normalising' the behaviour of people with disability. Their different attitudes and beliefs are clearly reflected in their findings as to what is, and what is not 'reasonable' treatment of people with disabilities. 77

Dickson pessimistically concluded that the Education Standards may not deliver much if the trend in decisions of the courts and tribunals is continued. 78 To date there has not been a decision on the direct application of the requirement for reasonable adjustment under the Education Standards.

UNJUSTIFIABLE HARDSHIP

An educational provider may avoid a finding of unlawful discrimination if it can demonstrate that to comply with the DDA and the Education Standards an unjustifiable hardship would be imposed upon the institution. The appropriate approach by a court to the concept of unjustifiable hardship is first to determine whether or not the respondent has discriminated against the complainant and then determine whether or not the respondent is able to make out the defence of unjustifiable hardship. 79 Where this defence is raised, the tribunal or court must undertake an individualised investigation. 80

Section 22(4) of the DDA provides that it is not unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of such would impose 'unjustifiable hardship' on the educational authority. Thus, although the DDA does not expressly require that 'reasonable adjustments' are to be made by education providers (as discussed above), it does limit the different accommodation or services that an educational institution must take into account to a level at which an unjustifiable hardship would be
imposed upon the institution.\textsuperscript{81} The defence of unjustifiable hardship as set out in the DDA has the effect of ‘capping’ the obligation to make adjustments so that the response is reasonably proportionate to the circumstances of the case. The Education Standards now make it clear that the defence of unjustifiable hardship will only operate when attempts at reasonable adjustment have been made, and that these attempts are to be made in consultation with the student or their associate.

Section 11 of the DDA provides that in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account. The \textit{Hills Grammar School} case provides an excellent illustration of the application of section 11. As noted above, Scarlett Finney had spina bifida. Her parents had applied to enrol her in kindergarten at the Hills Grammar School, which refused the enrolment based on unjustifiable hardship grounds. The majority of the evidence submitted by both parties concerned whether the provision of services or facilities required by Scarlett would impose unjustifiable hardship. The school admitted directly discriminating against Scarlett on the ground of her disability, but claimed that inadequate school resources would result in the school being unable to meet Scarlett’s needs. The HREOC considered a large number of possible factors relevant to the situation, including additional training of teachers, teachers’ aides, classroom assistance, curriculum modifications, school accessibility, excursions, toiletry needs and modifications, the availability of funding and the school’s financial circumstances. Commissioner Innes weighed the benefits and detriments (as required by section 11 of the DDA) for Scarlett, the Finney family, the school and the community if Scarlett were not able to attend the school. On balance the Commissioner found that it would not have caused unjustifiable hardship to the school to have enrolled Scarlett in kindergarten.

This case highlights the fact that no single factor alone is likely to constitute grounds for claiming unjustifiable hardship. All relevant factors are weighed up to determine, in the circumstances, whether unjustifiable hardship exists. The Education Standards do not affect the manner in which the factors are weighed and assessed for the purposes of determining unjustifiable hardship, and in fact, unlike the consideration of reasonable adjustment, do not prescribe which factors should be considered in coming to a determination of the issue. Interestingly, the Guidance Notes to the Education Standards do include (at paragraph 4.4) a discussion of the factors that an education provider might take into account in seeking to apply the defence of unjustifiable hardship. These notably include the costs of provision of services and adjustments but also the benefits of making those adjustments. This includes:
Benefits deriving from the student’s participation in the learning environment, including positive learning and social outcomes for the student, other students and teachers, and any financial incentives, such as subsidies or grants, available to the provider as a result of the students participation.

Thus the Guidance Notes, which do not have any statutory force but which might be an aid to implementation of policy and practice, articulate an inclusive approach, albeit imbedded in that part of the notes which address the issue of a defence to discriminatory behaviour. In fairness, the Guidance Notes are consistent with the objects of the Education Standards as promoting ‘recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as rest of the community’, although paragraph 4.4 adds the dimension of taking into account the benefits derived from tolerance and accommodation of difference.

CONCLUSION

The definition of disability under the DDA is comprehensive and ensures that all types of disabilities are covered, so that the focus is not on the nature of the person’s disability but on the alleged act of the discriminator. However, the spotlight was put firmly back onto the definition of disability in the case of Purvis, which confirmed that a manifestation of disturbed behaviour resulting from an underlying disorder is a part of and satisfies the definition of disability for the purposes of the Act. Any departure from this approach would probably require legislative amendment. Nothing in the Education Standards could or does detract from this part of the Purvis decision.

However, consequent upon the formulation of the Education Standards, education providers must make reasonable adjustments to accommodate students with disabilities. This proactive requirement clarifies the ambiguous position following Purvis and makes the position and obligations of education providers clearer. What is ‘reasonable’ can only be determined by the particular circumstances of the case.

The provision of reasonable adjustments in the education context is subject to the defence of unjustifiable hardship. Previously this defence was only available at enrolment; however, with amendment to the DDA it will apply to post-enrolment stages also. In determining what constitutes unjustifiable hardship, all relevant circumstances of the case must be taken into account. The Hills Grammar School case highlights that assessment based on general
assumptions is not acceptable and that the person with the disability must be individually assessed as to the level of adjustments required. Additionally, unjustifiable hardship is not simply a question of financial hardship; as noted in Purvis, safety considerations of other students and teachers was taken into account when weighing up the nature of the determents likely to be suffered by any person concerned. This later aspect is possibly supported by clause 10.4, which allows an education provider to isolate or discriminate against a student with a disability if the disability ‘is an infectious disease or other condition’ and it is reasonably necessary to so isolate or discriminate to protect the health and welfare of the student with a disability ‘or the health and welfare of others’. The use of the words ‘or other condition’ might well be construed to include a condition which results in disturbed behaviour, which would allow an education provider to exclude a student on the basis of this behaviour if it was affecting the ‘health and welfare’ of others, namely other students and/or staff. Whether this clause was designed to account for the majority view in Purvis is not clear, nor is it clear that it would be used or interpreted in this manner, but a literal reading of clause 10.4 would allow scope for such a view. Arguably the most contentious aspect of the majority decision in Purvis is not affected by the Education Standards. If this is so, then it represents a limit on the ideals of inclusiveness as it retains a mechanism by which education providers may exclude a student with a disability whose behaviour affects the welfare of others. As Rattigan has asserted, had the defence of unjustifiable hardship been available to the respondent in Purvis it might have been open for the court to find that, notwithstanding reasonable accommodation of Daniel, the education provider was put to an unjustifiable hardship through the disruption of classes and costs of professional development of staff required to provide services to Daniel.

As the United States experience suggests, it may not always be practical or ideal to facilitate the full adoption of inclusiveness in education, as studies in that country have shown that better social and educational outcomes may be obtained from special programs for students with disabilities, particularly at primary and secondary levels. It is possible to assert that the positions in Australia and the United States are beginning to converge from different trajectories. Australian policy and practices have been building inclusiveness into its programs of education after tentative beginnings and little legislative underpinning. The introduction of the Education Standards provides a measured response to the decision in Purvis and recognises the need for a proactive response to disability if inclusiveness is to be progressed. On the other hand, the United States experience suggests two key findings.
Firstly, policies and legislation underpinning inclusiveness remain a matter of interpretation for the courts, as has been observed in the Australian setting by Dickson, and secondly, that allowing some scope for special education programs may also be in the best interests of some students with disabilities. The retention of the defence of unjustifiable hardship in Australia allows scope for this approach.

NOTES

* Curtin University of Technology – Western Australia.

2 This refers to a shift from institution to community based care of people with disabilities.
3 This refers to a shift from services that cater separately and exclusively for people with particular types of disability to those that cater for the 'mainstream' population.
4 The term education providers has been used throughout the paper, as it is consistent with clause 2.1 of the Education Standards and includes an educational authority, an educational institution or an organisation whose purpose is to develop or accredit curricula or training courses used by education providers.
8 See *Waters v. Public Transport Corporation* [1991] HCA 49; (1992) 173 CLR 349. Also see *Garity v. Commonwealth Bank of Australia* (1999) EOC 92-966 where Commissioner Nettlefold stated: ‘The effect of an impugned practice, not the underlying intent, is the governing factor in determining whether the practice gave rise to discrimination. Intent to discriminate is not a necessary element of discrimination... The task is to determine whether the ‘true’ basis of the employer’s conduct is or was grounded on the prescribed consideration... The test to be applied is objective, in the sense that it is necessary to show no more than that, because of the aggrieved person’s disability, she received the less favourable treatment’. p. 79–129.

14 Victoria, South Australia, Western Australia, Queensland and Northern Territory do not provide for the ‘future existence’ of disabilities.

15 All examples are taken from *Australian and New Zealand Equal Opportunity Law and Practice* (2002) CCH Australia Ltd., Vol. 1 344.940 at 7.422.

16 Education Standards clauses 3.4 and 10.2.

17 Education Standards part 3 section 3.4(2).

18 Education Standards clauses 3.5 and 3.6.

19 Education Standards clause 4.2 (1)–(4) and clause 4.3.


22 Clause 7.3(d).

23 Clause 7.3(c).

24 Clause 7.2(5)–(8).

25 Clause 7.3(a).

26 Clause 7.2(1)–(4).

27 The Guidance Notes to the Education Standards provide additional context for this defence.

28 Kirby and McHugh JJ at para. 15.


32 Ibid., p. 208.

Universities appreciate these differences and embrace inclusiveness as a principle underpinning all aspects of tertiary education.


35 Ibid., p. 95.

36 Lindsay, K., op. cit.


43 Pearce, M. and Forlin, C., op. cit., p. 103.

44 Hodkinson, A., op. cit., p. 60.


48 874 F.2d 1036 (Fifth Circuit 1989).


52 Gleeson CJ at para. 4.

56 Gummow, Hayne and Heydon JJ at para. 212.
58 [2002] FMCA 44.
60 Gleeson CJ at 11.
62 Rattigan, K., op. cit., p. 20.
64 Rattigan, K., op. cit., p. 8.
65 Kirby and McHugh JJ at para. 154–159.
70 Productivity Commission Report, loc. cit.
71 Italics added.
75 Patmore, G., op. cit., p. 545.
76 Education Standards clause 3.4.
78 Dickson, E., op. cit., p. 38.
80 Basser, L. and Jones, M., op. cit., p. 271.
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