THE INEQUALITY OF TREATING UNEQUALS EQUALLY: THE FUTURE OF DIRECT DISCRIMINATION UNDER THE DISABILITY DISCRIMINATION ACT 1992 (CTH)?

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Introduction

It is over twelve years since the *Disability Discrimination Act 1992* (Cth) ('DDA') was enacted in Australia with the object of eliminating discrimination against persons on the ground of disability.[1] During that time many issues have challenged the bodies hearing and deciding complaints of unlawful discrimination made pursuant to the DDA[2] and the superior courts hearing appeals from those decisions.

One recurring theme in disability discrimination has been how to interpret discrimination in a context that is predicated on difference. The gravaman of the legal test of discrimination on the basis of race or sex is that there is no inherent difference between genders or races, only perceived difference. In contrast, implicit in the concept of disability discrimination is actual (or imputed) difference, namely the existence (or imputation) of the relevant disability and the consequences that it may have or be perceived as having for the physical, intellectual or emotional functioning of the person with the disability.

A recent decision of the High Court, *Purvis (on behalf of Daniel Hoggan) v New South Wales (Department of Education and Training*)[3] ('*Purvis*') has examined the issue of how the direct discrimination provision of the DDA is to be interpreted and applied. It also provides a convenient framework in which to consider the inadequacies of the test for direct discrimination as it exists in the DDA and the difficulties in proving an allegation of direct discrimination under the DDA.

In summary this paper considers:

(a) the definitional requirements of direct discrimination;
(b) the consideration of the legal test for direct discrimination by the majority and dissenting members of the High Court in *Purvis*;
(c) the inadequacies of the characterization of direct discrimination as defined by the DDA; and
(d) the practical consequences of the interpretation of the direct discrimination that is now binding precedent as a result of *Purvis*.

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The tests for discrimination under the DDA

There are two types of discrimination provided for in the DDA: direct discrimination and indirect discrimination.

The consideration of direct or indirect discrimination under the DDA is in relation to work[4]; education[5]; access to premises[6]; goods, services and facilities[7]; accommodation[8], land[9]; clubs and incorporated associations[10]; sport[11]; Commonwealth laws and programs[12]; and requests for information.[13]

Direct discrimination

The concept of direct discrimination refers to a comparison of the way in which a person with a disability is treated with the way a person without that disability (known as the 'comparator') is treated in the same or similar circumstances. The complainant must then establish a casual link between the disability and any less favourable treatment. Section 5 of the DDA contains the legal test for direct discrimination. Section 5(1) 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, 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.

Two related elements arise when considering section 5(1) of the DDA[14]. They are:

(a) *a conduct element*: that 'the discriminator treats… 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 with the disability'; and

(b) *a causation element*: the conduct occurs 'because of the aggrieved person's disability'.

Some clarification of the term 'circumstances that are the same or are not materially different' is provided by section 5(2):

> For the purpose of subsection 5(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.

It should be noted that the reference to 'accommodation' in section 5(2) means 'the making of suitable provision for the disabled person'[15] in the sense of an adjustment or adaptation.

The fact that direct discrimination focuses on the equality of treatment (rather than equality of outcome) is said to reflect the concept of 'formal equality' which is discussed below.

Indirect discrimination

Indirect discrimination refers to a situation where the same treatment applies to people with and without a disability but the effect of such treatment is to disadvantage or exclude people with a disability in a way which is not reasonable. For example, stairs are the same for everyone but some people cannot use them; print on paper is the same for everyone but some people cannot read it.

Section 6 of the DDA relates to indirect discrimination and 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; and
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

As the focus of indirect discrimination is on the outcome of the same treatment, it is said to reflect the concept of 'substantive equality'.

Unjustifiable hardship

In most but not all[16] of the areas of life covered by the DDA, an alleged discriminator may claim the defence of 'unjustifiable hardship' in response to a finding of less favourable treatment under section 5 or indirect discrimination under section 6.[17] The 'unjustifiable hardship' defence allows for discrimination to occur if the alleged discriminator can prove that to provide the services or facilities required to accommodate the needs of the person with the disability would impose a hardship that cannot (after the consideration of certain matters contained in section 10 of the DDA) be justified.

Formal vs substantive equality

As mentioned above, generally speaking, direct discrimination is concerned with formal equality (being, equality of treatment) and indirect discrimination with substantive equality (being, equality of outcome). By way of explanation:

> The notion that different treatment may be required to prevent or compensate for disadvantage involves the concept of what has come to be referred to as 'substantive equality'… different treatment is said, in some circumstances, to be necessary to achieve those goals or outcomes… 'formal equality'… insists upon equal treatment to the extent the people should be assessed without regard to certain characteristics (or 'grounds' of discrimination) such as sex and race.[18]

In Australia, the objects of the DDA include objectives 'to eliminate, as far as possible, discrimination against persons on the ground of disability' and 'to ensure, as far as practicable, that persons with disabilities have same rights to equality before the law as the rest of the community'.[19] The majority of the High Court in *Purvis* (being Gummow, Hayne and Heydon JJ) and the dissenting judges (McHugh and Kirby JJ) came to different conclusions as to whether direct discrimination in the DDA embodies the concept of formal or substantive equality. As will be seen below, this informed the different approaches that were taken by them to the interpretation of the direct discrimination provision in the DDA.

Purvis' case

Purvis concerned the schooling of Daniel Hoggan who has an intellectual disability that manifests itself in Daniel learning differently and displaying disturbed, and at times aggressive, behaviour.

Daniel was enrolled at a State school and the proceedings, which were brought by his foster father, Mr Purvis, focused on his suspension and ultimate exclusion from that school because of incidents involving verbal abuse and punching and kicking. An element of the complaint was the manner in which the school sought to manage Daniel's behaviour and what the complainant asserted were inadequacies in the accommodation of his disability.

It was alleged that Daniel's treatment by the school constituted a breach of section 22(2) of the DDA. This section provides that it is unlawful for an educational authority to discriminate against a student on the ground of the student's disability by among other things expelling the student or subjecting the student to any other detriment.

The case was argued as one of direct discrimination. The complainant's case was that Daniel had been treated less favourably than other students in a materially similar position because of his disability.

Purvis could have been argued as an indirect discrimination case under section 6 of the DDA. If it had, it could have been framed in the following way:

(a) it was a requirement or condition of attending the school that one not exhibit violent behaviour; and
(b) this was a requirement or condition with which a substantially higher proportion of persons without Daniel's disability were able to comply and Daniel could not comply with.

Establishing, however, that the requirement or condition was unreasonable would have created difficulties for Daniel's case.[20] This limb of section 6 creates an objective test of reasonableness in all the circumstances of the case[21] with the onus on the complainant to establish unreasonableness. The concept of reasonableness is not present in section 5.

The defence to a claim of discrimination against an educational authority that 'unjustifiable hardship'[22] would be imposed upon a respondent in order for them to avoid a finding of unlawful discrimination is limited to the admission process of the student and does not extend to situations where the student is a member of the student body.[23]

Pleading the facts as an allegation of unlawful direct discrimination by an educational authority avoided a consideration of reasonableness as well as the application of the defence of unjustifiable hardship.

The complaint was upheld by the Human Rights and Equal Opportunity Commission ('the Commission'), sitting as it then did as a tribunal.[24] That decision was found to be wrong in law on review in the Federal Court by Emmett J.[25] The decision of Emmet J was affirmed on appeal by both the Full Court of the Federal Court[26] and the High Court (McHugh and Kirby JJ dissenting).

I will now consider in detail the meaning of the elements of direct discrimination as set out in section 5 in light of the High Court's decision in *Purvis*.

The elements of direct discrimination under the DDA as decided in *Purvis*

As stated above, the elements to be considered when applying section 5 of the DDA are:

(a) the conduct element which focuses on comparing the treatment of a person with a disability to that of a person without a disability in the same or not materially different circumstances so as to determine whether the person with the disability was treated less favourably; and

(b) if the person with the disability was treated less favourably, then it is necessary to consider the causation element: was the person treated less favourably because of their disability?

The operation of each of these elements of direct discrimination depend on the complainant's 'disability'. Section 4 of the DDA provides a definition of the term but does not expressly state whether the functional limitations that may result from a disability are included within the meaning of 'disability'.

All of the members of the High Court (other than Callinan J who did not express a view) rejected the approach of the Full Federal Court below that the definition of disability contemplated distinguishing between the disability and the conduct that it causes.[27] The majority of the Court (being Gummow, Hayne and Heydon JJ) held that the term 'disability' includes the behaviour that flows from the disability. They stated,

> 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.[28]

McHugh and Kirby JJ went beyond a consideration of behaviour. They concluded that the definition of 'disability' included 'the functional limitations that result from the underlying condition'.[29]

The conduct element

The conduct the subject of comparison is the treatment of the person with the disability (on the one hand) and the treatment that would have been given to a person without the disability in the same or similar circumstances (on the other). The person without the disability can be real or notional.[30] Formulating the characteristics of this comparator underscores the interplay between the definitional requirement that the person be without the disability of the aggrieved person but be in the same or similar circumstances as the person with the disability.

The dissenting judges on the one hand and the majority (and Gleeson CJ) on the other came to a different conclusion as to the proper construction of section 5 and the formulation of the comparator.

The majority's approach

The majority laid the foundations for their approach to the conduct element of direct discrimination by acknowledging that legislation in other jurisdictions such as the United Kingdom,[31] European Union[32] and United States,[33] expressly obliges persons to treat people with disabilities differently from others in the community.[34] They did not see, however, that this is the case with the DDA. Their Honours stated that 'the principal focus of the [DDA]… is on ensuring equality of treatment..[i]n this respect it differs significantly from other, more recent, forms of disability discrimination'.[35]

Their Honours identified two consequences of the focus on equality of treatment in the DDA.

Firstly, if the purpose of the legislation is to ensure equality of treatment then the 'focus of inquiry' to be made in undertaking a comparison as contemplated by a provision such as section 5 'will differ from the inquiry that must be made if the relevant purposes include ensuring equality in some other sense, for example, economic, social or cultural equality'.[36] They stressed that section 5 by requiring a comparison between the treatment given to the person with the disability with the treatment that would be given to a person without a disability, involves 'a comparison which is very different from the comparisons required by other forms of disability discrimination legislation'.[37]

This flows into what the majority saw as the second consequence of the unique focus of the DDA namely that 'considerable care' should be taken in applying what is said about other forms of disability discrimination legislation in other jurisdictions to the construction of the DDA.[38] This recognizes the fact that in some legislative schemes, direct disability discrimination embodies a concept of substantive equality. The DDA, in the majority's view, does not.

In identifying the relevant comparator for the purposes of section 5, their Honours focused on what is meant by the 'same or not materially different circumstances'. Their Honours stated that section 5(2) assists in identifying one circumstance which does *not* prevent the circumstances from being the same or similar: the aggrieved person's need for different accommodation or services.[39] They were of the view that section 5(2) does not create a requirement or positive obligation for the respondent to provide the accommodation or services but in the event that they are needed by the aggrieved person those needs will not render the circumstances materially different.[40]

The appellant argued that an identification of these circumstances should not include any circumstance that related to the disability of the complainant. Their Honours responded:

> It may be readily accepted that the necessary comparison to make is with the treatment of a person without the relevant disability. Section 5(1) makes that plain. It does not follow, however, that the 'circumstances' to be considered are to be identified in the way the appellant contended. Indeed to strip out of those circumstances any and every feature which presents difficulty to a disabled person would truly frustrate the purposes of the [DDA]… The appellant's contention… sought to refer to a set of circumstances that were wholly hypothetical – circumstances in which no aspect of disability intrudes. That is not what the [DDA] requires.[41]

Their Honours held that the circumstances referred to in section 5(1) are:

> all of the objective features which surround the actual or intended treatment of the disabled person by the [respondent]. It would be artificial to exclude (and there is not 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.[42]

Applied to the facts of *Purvis*, it was held that the circumstances in which Daniel was treated included that he had acted violently towards teachers and others. The questions then to be asked were formulated[43] by the majority as being:

(a) how in those circumstances would the school have treated a person without Daniel's disability: that is, how would the school have treated another student without Daniel's disability but with his violent actions; and

(b) if Daniel's treatment was less favourable was that because of Daniel's disability.

The majority did not proceed to answering these questions as it found that Commissioner Innes had erred in not applying section 5 in the way they had described. He had not made the relevant determinations required by those questions.

Gleeson CJ (who also dismissed the appeal) did proceed to consider what the answer to the first question may have been:

> such a comparison requires no feat of the imagination. There are students who have no disorder, and who 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.[44]

To support their construction of section 5, the majority argued that it:

(a) gives proper operation to all aspects of section 5, in particular the requirement in the section that the circumstances be the same or similar;[45]

(b) still gives effective operation of the indirect discrimination provisions which can be engaged if the discriminator requires compliance with a requirement or condition which is not reasonable;[46]

(c) permits for the proper intersection between the operation of the DDA and State and federal criminal law by making the violent actions (which may have constituted assaults) as a matter that can be taken into account and enables an alleged discriminator, for example an educational authority or employer, to require that its students or employees to comply with the criminal law;[47] and

(d) still enables section 5(1) to do 'important work by preventing the different treatment of persons with the disability'.[48]

Analysis of majority's approach

The reasons for and consequences of the majority's approach are discussed in detail below. For the moment, it is sufficient to illustrate the difficulties arising from their approach by applying their construction of the conduct element to another factual context.

For example, what if a blind woman is denied access to a china shop on the basis that to admit him or her will or is likely to result in damage to fragile and valuable stock. The blind woman brings a complaint under section 5 alleging less favourable treatment on the ground of being blind. She alleges that a person who was not blind would have been granted entry to the shop and she was not because of her disability. On the majority's construction of section 5, the treatment afforded to the blind woman is to be compared to the treatment that would be afforded to a person who was not blind in the same or not materially different circumstances. The formulation of the relevant circumstances would include the fact that the complainant is unable to see where she is going. It does not matter on the approach taken by the majority that this is a consequence of being blind.

The comparator could then be identified as someone who is not blind but unable to see (for example, because they are wearing a blindfold or may have their eyes closed). A comparison would then be made between the manner in which the complainant was treated and how the comparator would be treated if they tried to enter the shop. It is most likely (for reasons that will be expanded upon below) that it would be found that there was no less favourable treatment because the comparator would be excluded from the shop in the same way that the complainant had been.

This simple example illustrates that on the majority's approach it will be very difficult for a complainant to establish less favourable treatment under section 5.

The dissenting view

McHugh and Kirby JJ found that Daniel was treated less favourably than a student without his disability in the same or similar circumstances and that this was because of his disability. Their Honours' approach to the conduct element had its foundation in their view that the elimination of disability discrimination is more likely that sex and race discrimination to require different, rather than equal, treatment. Their Honours stated:

> Disability discrimination is different from other types of discrimination, such as sex or race discrimination in that its elimination is more likely to require affirmative action than is the case with sex and race discrimination. Disability discrimination is also different from sex and race discrimination in

> that the forms of disability are various and personal to the individual while sex and race are attributes that do not vary. The elimination of discrimination against people with disabilities is not furthered by 'equal' treatment that ignores their individual disabilities. The Act imposes a *prima facie* requirement on persons falling within its terms to accommodate the disabilities of each disabled person in order to achieve real – not notional – equality.[49]

McHugh and Kirby JJ found the requirement (they stress that it is not an obligation[50]) to accommodate in section 5(2) of the DDA. As stated above, section 5(2) provides that in relation to section 5(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'. Their Honours stated that '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'.[51] The effect given to section 5(2) by McHugh and Kirby JJ, however, extends beyond this and its significance will be seen shortly.

Turning to the construction of the comparator in section 5(1), McHugh and Kirby JJ took the view that for the comparator to be a person without a disability then there should not be imputed to the comparator any characteristic or behaviour that is a manifestation of the complainant's disability.[52] This is consistent with the approach taken by their Honours that the definition of disability includes the functional limitations that result from the disability. McHugh and Kirby JJ commented that:

> if the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations.[53]

This approach is also consistent with the interpretation adopted by some decision makers in the past in relation to the issue of the comparator under the *Sex Discrimination Act 1984* (Cth)[54] and in relation to disability discrimination.[55] That line of authority holds that the comparator should not be imputed with the characteristics of the complainant because to do so would 'fatally frustrate the purposes' of the relevant discrimination legislation.[56]

The comparator on McHugh and Kirby JJ's analysis is a student who did not have Daniel's disability (including its functional limitations): that is, a student who did not have behavioural problems – a student who behaved.[57]

McHugh and Kirby JJ then proceeded to compare the treatment received by Daniel to the treatment that would have been received by the comparator in the same or not materially different circumstances. Their Honours relied upon Commissioner Innes' findings that:

(a) Daniel was denied access to the benefits of an education at the school and was subjected to detriments by being suspended and ultimately expelled;[58]

(b) in order to access the benefits of an education at the school Daniel 'required' accommodation in various ways including the adjustment of policies to suit his needs, the provision of teachers with the skills to deal with his behavioural problems and obtaining expert assistance to formulate proposals to overcome his problems;[59] and

(c) if the accommodation had been made then it is likely that the school would not have denied the benefits to Daniel or subjected him to detriments because it is likely that he would have behaved.[60]

The significance of section 5(2) to the dissenting judgement becomes apparent again when it is used to construct the 'same or not materially different circumstances'.

Section 5(2) recognizes, if it does not imply, that the comparison of 'material circumstances' may require the injection into the equation of all those matters and things that the disabled person requires to compete on equal terms with the able bodied comparator. So in this case, s 5(2) required the issue of less favourable treatment to be determined by reference to [Daniel's] circumstances upon being given the required accommodation or services. On the Commissioner's findings, it is probable that he would not have misbehaved. So… the correct comparator was a student who did not misbehave, not a student who misbehaved. When that comparison is made, it is plain that the student comparator would not have been treated as unfavourably in respect of the benefits and detriments as [Daniel] was actually treated.[61]

It is their Honours' interpretation and application of section 5(2) that determines the nature of the comparator rather than a strict application of the past line of authority that the characteristics of the person with the disability should not be imputed to the comparator. This is evident from a hypothetical example given by McHugh and Kirby JJ:

> Suppose a person suffering from dyslexia is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. The proper comparator is not a person without the disability who cannot spell. Section 5(2) of the [DDA] requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell checker. When that comparison is made the employer will be shown to have breached the [DDA] unless it can make out a case of unjustifiable hardship as defined in section 11 of the [DDA].[62]

The comparator, therefore, becomes the non-disabled equivalent of the person with the disability with their needs for different accommodation or services met.

On their construction of section 5, McHugh and Kirby JJ concluded that Daniel was treated less favourably than a student without his disability in same or not materially different circumstances and that the less favourable treatment was because of his disability (see below for the construction of the causation element).

Analysis of the dissenting approach

McHugh and Kirby JJ use section 5(2) to inject into the test in section 5(1) all of the accommodation or services that the person with the disability needs in order to be on equal terms with the comparator. This essentially treats a requirement to accommodate as existing in section 5(2). With respect, it does not. The sub-section refers to the different accommodation or services that *may be required* by the person with the disability. Its effect is that in the event that the complainant *needs* different accommodation or services than a person without a disability then that need will not render the circumstances materially different. It does not require the accommodation to be given nor does it provide that not to give that accommodation constitutes less favourable treatment.

The approach of McHugh and Kirby JJ, with respect, strains the wording of the section. Effect is given to section 5(2) that is not present in its terms. The sub-section is used to change the characterization of the complainant. The complainant becomes a person with a disability but with their functional limitations neutralized as it is assumed that their needs for accommodation have been met. The comparator becomes the non-disabled equivalent of the person with the disability with their needs met. The complainant is then placed on a equal footing with the comparator. On this construction of section 5, it is difficult for an alleged discriminator to avoid a finding of less favourable treatment.

The causation element

If it is determined from a consideration of the conduct element of section 5 that the person with a disability has been treated less favourably, the next question to ask is whether that

was because of the complainant's disability. The decisions of the majority and the dissenting judges on this element are similar and uncontroversial.

Given their findings on the conduct element, there was no need for the majority in *Purvis* to make a finding on the causation element nor to consider the test for causation in detail. There is some disagreement between the majority and dissenting judges as to the relevance of motive or purpose to causation. The majority indicate that they may have some relevance[63] whereas McHugh and Kirby JJ quote from authorities that find motive, intention and purpose to be largely irrelevant.[64]

There is, however, agreement between the majority, Gleeson CJ and the dissenting judges that the correct test to be applied is a 'but why' test. The question to be asked is '*why* was the aggrieved person treated as he or she was.'[65] Such a test focuses on the mental state of the alleged discriminator and the 'real reason'[66] or 'true basis'[67] for the alleged discriminator's conduct.

Why is the interpretation of section 5 problematic?

As indicated above, both the approaches adopted by the majority and the dissenting judges are undesirable. The consequences of each approach are at the opposite ends of the spectrum. The majority's approach restricts the likelihood of establishing less favourable treatment to very limited circumstances considered below. The approach of McHugh and Kirby JJ is not supported by an interpretation of section 5(2) and skews the test in favour of the complainant.

There are two primary reasons for the decision in *Purvis* producing two different but equally problematic interpretations of direct discrimination. They are:

(a) the uniquely difficult circumstances present in *Purvis*; and

(b) more problematically, that the direct discrimination provision of the DDA is a strange legislative creature that is out of step with equivalent provisions in other legislative schemes.

Hard cases make bad law

The factual scenario in *Purvis* was extreme. Daniel was displaying violent behaviour in a classroom setting. Accordingly, the case gave rise to a balancing of legal and policy issues in a manner that has not been seen previously in a case decided under the DDA. There was possible criminal behaviour (which raised the issue of the intersection of the DDA and state and federal criminal law[68]) in a setting that found agents of the State having to consider duties of care to children (Daniel's fellow students) and employees (teachers).

Gleeson CJ, in particular, appeared to be concerned with these competing considerations:

> If the person without the disability is simply a pupil who is never violent, then it is difficult to know what context is given to the requirement that the circumstances be the same. Furthermore, if the appellant's argument is correct, the [DDA] places a school authority in a position of conflict between its responsibilities towards a child who manifests disturbed behaviour and its responsibilities towards other children who are in its care, and who may become victims of that behaviour. The language of the [DDA] does not require such a result. In characterizing the actions of the [State] for the purpose of applying a law against unjust discrimination by making the comparison required by section 5 of the [DDA], 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 [State's] legal responsibilities towards the general body of pupils.[69]

It should be remembered that the defence of 'unjustifiable hardship' was not available to the respondent in this case. Its operation in relation to educational authorities is limited to where a student is allegedly treated less favourably in relation to their admission. If the defence had been available then these issues could have been considered in that context. Indeed McHugh and Kirby JJ held that the defence:

> … would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides… the [DDA] provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff. This provision also allows for consideration of the duty of care owed by the educational authority to the other pupils..[and]… also permit consideration of the possibility that behaviour of the proposed student would violate the criminal law.[70]

The fact that these matters could not be considered via the defence of 'unjustifiable hardship' may well have persuaded the majority and Gleeson CJ to adopt the construction of section 5 they did. It permitted the duties of carers to be taken into account (in the case of Gleeson CJ as mentioned above) as well as consideration to be given to the operation of the criminal law (in the case of the majority[71]). As one commentator has observed in relation to *Purvis*, 'in this scenario, disability is seen very much as a risk management issue as opposed to a human rights concern.[72]

It could be argued that the construction of section 5 was arrived at by working backwards from the desired outcome: it has to be possible for policy reasons for a school to be able to exclude a student who is seen as being a danger to others so what legal construct of section 5 has to exist for this to be achieved? This may explain the inconsistency of the majority's approach to the meaning of 'disability'. The manifestation of a disability is seen as being part of the disability for the purposes of determining the definition of 'disability'. However, that characteristic or behaviour is separated out from the disability and imputed to the non-disabled comparator when it comes to identifying what constitute the same or similar circumstances.

Purvis was not the best factual vehicle for a consideration by the High Court of section 5: particularly given that it may have been more appropriately pleaded as a case of indirect discrimination. A more straightforward case may have better highlighted some of the consequences that would flow from the construction adopted (as shown by the example of the blind woman above).

It can equally be suggested, however, that both approaches are the product of the direct discrimination provision of the DDA being inherently deficient. This is particularly evident when it is compared to disability discrimination legislation in other jurisdictions.

Is it a hard case or just bad legislation?

The philosophical basis for eliminating disability discrimination is different from that inherent in legislation relating to other forms of discrimination such as sex and race. In the case of people with disabilities, the elimination of discrimination is not furthered by 'equal' treatment that ignores their individual disabilities.[73] Rather the aim of achieving real equality for people with disabilities starts from the premise that 'in order to treat some persons equally, we must treat them differently'.[74] As discussed above, such concepts are embodied in formal and substantive equality.

The point was made by the Supreme Court of Washington in *Holland v Boeing Co*[75] as follows:

> Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.

> The physically disabled employee is clearly different from the non-handicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment **fails** to take into account the unique characteristics of the handicapped person. … Identical treatment may be a source of discrimination in the case of the handicapped, whereas **different** treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

The perceived need for different treatment in order to eliminate discrimination is manifested in some disability legislation by provisions that require the alleged discriminator to treat people with disabilities differently by expressly obliging them to make reasonable adjustments or give reasonable accommodation to persons with disabilities.[76]

Unlike other jurisdictions such as the UK,[77] European Union[78] and United States[79], the DDA does not expressly oblige persons to treat people with disabilities differently from others in the community. There is no express obligation in the DDA to accommodate or make adjustments so that the needs of persons with disabilities are met. McHugh and Kirby JJ by seeking to read a notion of different treatment as opposed to equal treatment into the direct discrimination provision of the DDA, were forced to construe section 5(2) as including a requirement to accommodate that does not exist.[80] Some decision makers and commentators have gone further, locating a positive obligation to make reasonable accommodation in section 5(2) or finding it to exist in the defence of unjustifiable hardship.[81] It may be argued that one exists in relation to indirect discrimination in section 6.[82] It is clear that one cannot be found within the concept of direct discrimination as defined by the DDA.

Another way to define direct discrimination is to avoid comparing the treatment of a person with a disability with the treatment of a person without a disability. The definition of discrimination in the *Disability Discrimination Act 1995* (UK):

> does not contain an express provision requiring the comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the 'reason' for the treatment of the disabled employee and the comparison to be made is with the treatment of 'others to whom that reason does not or would not apply'. The 'others' with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons 'to whom that reason does not or would not apply.[83]

The majority in *Purvis* were correct when they reminded the reader on several occasions that the DDA is different in its approach to direct discrimination than other jurisdictions.[84] It is very different. Direct discrimination in the DDA does not relate to equality of outcome: it only provides for equality of treatment between a person with a disability and one without a disability.

The fact that section 5 requires a comparison of treatment and there is no express obligation to accommodate permits the construction given to the section by the majority. The difficulties associated with direct discrimination that will be considered below are as a much a result of the wording of section 5 as they are a result of the majority decision in *Purvis*.

The difficulty of proving direct discrimination

The consequences of the manner in which section 5 is formulated and its interpretation by the majority will now be considered.

In summary, the problems are:

(a) the evidentiary burden of establishing direct discrimination will be so onerous that few cases will succeed;

(b) the differences inherent in the concept of disability will be ignored; and

(c) the focus on equality of treatment will reward stereotypic assumptions.

The evidentiary burden of establishing direct discrimination

Traditionally, direct discrimination has been considered less challenging to establish than indirect discrimination as 'the propositions to be asserted are in distinct categories and do not raise the range of circumstances which are essential to address an indirect discrimination case'.[85] This may no longer be true now that *Purvis* has highlighted the evidentiary burden that has to be discharged in order to establish less favourable treatment under section 5.

The majority stated that their construction of section 5 meant 'the provision still has very important work to do by preventing the *different* treatment of persons with disability'.[86] This is true in a limited compass: for example, it may be possible to prove less favourable treatment where an employee is told, 'You are fired because you have a disability'.

Section 5 has operated to this effect in a case decided since *Purvis* albeit in unusual circumstances. In *Power v Aboriginal Hostel's Limited*,[87] Brown FM found that the complainant had been discriminated against on the basis of his disability even though there had been issues as to his absences from work and the potential for further absences. On appeal,[88] it was held that Brown FM had not applied the relevant comparison as required by *Purvis*. This did not result in the success of the appeal for the following reason:

> There was some evidence before the Federal Magistrate that would appear to have supported an argument that the respondent would have terminated the appellant's employment whether or not he had a disability (whether real or imputed). However, Ms Henderson, who appeared for the respondent, declined to make any submission to that effect. Instead, she informed me that her client only dismissed the appellant because of her client's understanding that the appellant had a disability that meant that he could not perform the duties of the position. She said her client would not have dismissed the appellant merely for his absences from work. These concessions seemed to me to go considerably further than the evidence required or than the findings made by the learned Federal Magistrate. Nevertheless, having been made, it seems to me that they answer the requirements for discrimination as identified by the High Court in *Purvis*. Given that this is an appeal by way of rehearing, it is appropriate for me to take account of these concessions. On the basis of the concessions made by the appellant, it can be accepted that, in dismissing the appellant, the respondent discriminated against him by reason of a disability.[89]

While it is still very important and necessary to be able to find such different treatment to be unlawful, discrimination against persons with disabilities is often less obvious than in that example.

It appears now that the best chance that a complainant has of establishing direct discrimination under section 5 will be for there to be evidence (or a concession by counsel) that there was no other reason for the less favourable treatment than the fact that the complainant had a disability. It is necessary and important that such blatant discrimination be found to be less favourable treatment under section 5. It has to be asked though how often will such evidence exist or such a concession occur.

Rather than being told that he or she is being dismissed because they have a disability, a person with a disability is more likely to be told that they are being dismissed because, for example, inadequate interpersonal skills,[90] unacceptable work performance[91] or absences from work.[92] On the majority's construction of section 5, it does not matter that these reasons may be manifestations of the person's disability such as paranoid schizophrenia, dyslexia or depression. The reason for the dismissal will be added into the same or not materially different circumstances considered under section 5. The person with the disability will be compared to a person without a disability who also had inadequate interpersonal skills,

unacceptable work performance or a poor attendance record. The complainant will then have the onus of proving that they were treated less favourably than the comparator would have been and if they were then that was because of their disability.

Another evidentiary problem is that in many instances there is only a notional comparator. The fact that a complainant's chances of discharging the evidentiary burden of proving less favourable treatment will be considerably enhanced if a real comparator exists is illustrated in *Randell v Consolidated Bearing Company*[93]('*Randell's* case'). This decision of the Federal Magistrates Court was decided before *Purvis* but the construction adopted of section 5 was similar to that of the majority. The applicant, who had a mild dyslexic learning difficulty, was dismissed from his traineeship sorting and arranging stock on the basis of his poor work performance. Raphael FM found that the appropriate comparator was other trainees employed by the respondent who had performance difficulties. The evidence established that in the past the respondent had sought assistance from Employment National with such trainees but in the case of the applicant, it did not do so before he was dismissed and he was therefore treated less favourably.

Randell's case is one of the few (if not the only) case decided under section 5 where a comparator existed. The comparator is usually notional. This requires a degree of speculation as to how the respondent *would* have treated the comparator. Relevant witnesses for the respondent may try to predict how the comparator would have been treated. Evidence from the respondent may be that the comparator would have been treated no differently. In reality it may be the case that the person with the disability would have been treated less favourably. Stereotypic assumptions that because their behaviour or the relevant characteristic was part of a larger 'problem', being a disability, may have resulted in special assistance not being considered as a possible option as there may have been doubt as to whether behaviour could in fact be changed or improved.[94] Proving this though will not be easy for the complainant.[95]

A further consequence of the decision in *Purvis* is that proving discrimination pursuant to section 5 will require the rigorous factual inquiries (through subpoenas and the process of discovery) that are usually associated with indirect discrimination.[96] As stated above, indirect discrimination puts the onus of the complainant to prove that the requirement or condition was unreasonable and this may prove difficult to establish because much of relevant evidence will be in the possession of the respondent. The same difficulties will confront the complainant seeking to establish under section 5 that the respondent would have treated him or her less favourably than the notional comparator. Most of the relevant evidence will not be in the complainant's hands and obtaining it will depend upon knowing whether it exists or the correct questions to ask. The pursuit of a complaint of direct discrimination through the relevant court will, therefore, take longer and require considerable resources.

Section 5 fails to appreciate unique features of disability

The majority's approach to defining the comparator can be seen as seeking to simplify or normalize disability by suggesting that a characteristic or behaviour that is part of a disability can be equated with that characteristic or behaviour existing in a person without a disability.

Sopinka J of the Canadian Supreme Court has stated:

> It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment.[97]

Is it possible to say, for instance, that the lack of interpersonal skills exhibited by a person with paranoid schizophrenia[98] are akin to the poor communication skills that may exist in someone without a disability?

The facts of *Purvis* make the creation of the comparator appear easier than it actually is. As Gleeson CJ comments 'the law does not regard all bad behaviour as disturbed behaviour; and it does not regard all violent people as disabled'.[99] Similarly, other behaviour such a poor communications skills or aggressive behaviour while playing sport[100] can be features of persons without a disability.

What happens with characteristics or behaviour that are unique to the disability and do not occur in the absence of a disability? For example, being contagious or infectious. Similarly, as one commentator has noted in relation to people with intellectual impairments 'it is virtually impossible to establish comparability with a real or hypothetical intellectually normal person'.[101] . In such cases, it is arguable that if the characteristic can only exist because of a disability, it is nonsensical to impute it to a person without the disability. It would follow that discrimination on the ground of that characteristic would be discrimination on the ground of a disability.

In *City of Perth City v DL (representing the Members of People Living with AIDS (WA) Inc* ('*City of Perth* case'),[102] the Full Court of the Supreme Court of Western Australia adopted an approach similar to that of the majority in *Purvis* to the construction of the relevant direct discrimination provision in the *Equal Opportunity Act 1984* (WA). The Court, however, made the caveat that the imputation of the characteristic to the comparator would occur if the characteristic was not unique to people with such an impairment.[103]

The majority's analysis in *Purvis* of section 5 does not contain any such caveat. It would appear that the characteristic or manifestation of the disability is considered as part of the same or not materially different circumstances whether it could in reality exist independently of a disability or not. This increases the likelihood of the comparator being notional given that a real comparator *without* the relevant disability but *with* the manifestations of the disability will never exist. The use of a notional comparator creates the evidentiary issues referred to above.

The approach rewards stereotypic assumptions

The majority's construction of section 5 may reward the adoption of stereotypical and prejudicial assumptions. It enables a discriminator to be found not to have treated a person with a disability less favourably if it is established that he or she treats all people displaying that particular characteristic or behaviour in the same prejudicial manner.[104] As was stated in the *City of Perth* case:

> … if the comparison involves a notional person who has the very same characteristics generally imputed to the impaired person, anomalous consequences might arise. If, say a hotelier refuses services to an impaired person because of characteristics that are generally imputed to such persons, and the hotelier can prove that he treats or would treat in the same way other persons, not being so impaired, but to whom the same characteristics are generally imputed, he would not have performed a discriminatory act.. Thus the less favourably disposed the notional hotelier is against persons to whom these characteristics are generally imputed, the easier it would be for him to prove that there has not been an unlawful discrimination...This would be a consequence of some irony.[105]

With respect it would not only be an ironic consequence of the majority's construction of section 5 but another reason why an approach to direct discrimination predicated on equality of treatment can be ineffectual.

The future of direct discrimination law

The true limitations of section 5 have now been revealed in the case of *Purvis*. The opportunities for proving less favourable treatment under section 5 for the purposes of establishing direct discrimination under DDA are now limited to:

(a) those rare cases where there will be irrefutable evidence that the less favourable treatment was on the ground of the person's disability (as in *Power's* case);

(b) those rare cases where there is a real comparator and the evidence is available to prove that the comparator was actually treated differently (as in *Randell's* case); or

(c) in the case of a notional comparator, the existence of evidence available to the complainant that proves that the comparator would have been treated differently from the the person with the disability.

As mentioned above, the limited role that direct discrimination can play is due to section 5 providing for the equality of treatment between persons with and without disabilities. The interpretation by the majority only compound the difficulties inherent in the legislature's construction of section 5. A likely result is that few cases in the future will be pleaded as direct discrimination and a claim of indirect discrimination will be pursued instead.

Does indirect discrimination save the day?

The majority in *Purvis* emphasised on a number of occasions that their interpretation of direct discrimination does not detract from 'the importance of giving full effect to the indirect disability discrimination provisions of the DDA'.[106]

The definition of indirect discrimination has been described as 'complex' and requiring 'a substantially different approach to presenting the factual material in a complaint than with complaints of direct discrimination'.[107] As mentioned above, establishing indirect discrimination requires the complainant to prove the unreasonableness of the relevant requirement or condition. Furthermore, 'one of the overwhelming difficulties with the proof of indirect discrimination is that it can require complex statistical or other technical evidence'.[108]

Other commentators, however, have warned that 'it is important not to overrate the frequently asserted difficulties of proving indirect discrimination'.[109] Indeed, it could be argued that indirect discrimination does 'not involve some of the notorious problems encountered in trying to prove direct discrimination'. Proof of less favourable treatment in the same or not materially different circumstances is not a separate element of indirect discrimination nor does the causal link need to be established between the less favourable treatment and the disability. Furthermore, it is clear that motive or intention is not relevant to indirect discrimination.[110]

In the end, it will depend upon the courts' application of the requirements of indirect discrimination that will determine if proving a matter under section 6 is any more onerous than attempting to prove less favourable treatment under section 5. The court's approach will determine if the test for indirect discrimination is viewed as being highly complex and burdensome[111] or a test that can be approached in a straightforward and commonsense manner.[112]

Conclusion

The complainant who has little chance of succeeding under a claim for direct discrimination, may succeed if the proper approach to indirect discrimination is taken by the decision-maker.

It is unfortunate though that the application of one type of discrimination under the DDA is limited to rare circumstances. Without legislative reform, the effect of section 5 will be to treat unequals as equals.[113] The inequality that flows from such equal treatment does not achieve the object of the DDA to eliminate discrimination against persons with disabilities. Rather it perpetuates the discrimination.

Endnotes

1 Section 3(a) of the DDA.

2 The Human Rights and Equal Opportunity Commission heard and determined complaints of unlawful discrimination as a tribunal from 1986 until the Federal Court assumed responsibility for the unlawful discrimination jurisdiction on 13 April 2000 when the substantive provisions of the Human Rights Legislation Amendment Act No. 1 1999 (Cth) (HRLA Act) (passed by Parliament on 23 September 1999) commenced operation. The relevant provisions of the Federal Magistrates (Consequential Amendments) Act 1999 (Cth) also commenced operation on that day and amended the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (as amended by the HRLA Act) so as to extend the jurisdiction for the hearing of proceedings arising out of complaints of unlawful discrimination to the Federal Magistrates Court.

3 (2003) 78 ALJR 1.

4 Division 1 of the DDA.

5 Section 22 of the DDA.

6 Section 23 of the DDA.

7 Section 24 of the DDA.

8 Section 25 of the DDA.

9 Section 26 of the DDA.

10 Section 27 of the DDA.

11 Section 28 of the DDA.

12 Section 29 of the DDA.

13 Section 30 of the DDA.

14 This dichotomy was adopted by the appellant in *Purvis*.

15 *Purvis* 16 [86].

16 The exception is not provided for in relation to qualifying bodies (s 19), registered organisations under the *Workplace Relations Act 1996 (Cth)* (s 20), employment agencies (s 21), land (s 26), sport (s 28) and the administration of Commonwealth laws and programs (s 29). The exception does apply to educational authorities but only in relation to the admission of a student (s 22(4).

17 Though such matters are often already covered by the issue of reasonableness.

18 See paper by Craig Lenehan referred to in fn 1 at 11.

19 Paragraphs 3(a) and (b) of the DDA.

20 A difficulty noted by Gleeson CJ in *Purvis* at 3 [3].

21 *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621, 623.

22 Section 11 of the DDA.

23 Section 22(4) of the DDA.

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

25 *New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission* [2001] 186 ALR 69.

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

27 Ibid 248 [28].

28 *Purvis* 38 [212].

29 Ibid 14 [67].

30 *Commonwealth v HREOC* (1997) 147 ALR 469 at 493.

31 *Disability Discrimination Act 1995* (UK).

32 The EC Directive, (2000) *Official Journal of the European Communities* L303/19.

33 *Americans with Disabilities Act 1990*.

34 *Purvis* 36 [203].

35 Ibid. Their Honours do imply on a number of occasions though that the indirect discrimination provisions of the DDA may provide some scope for the operation of substantive equality concepts: see 37 [207] and 40 [226].

36 Ibid 36 [201].

37 Ibid 38 [214].

38 Ibid 37 [206].

39 Ibid 39 [217].

40 Ibid 39 [218].

41 Ibid 39 [222].

42 Ibid 40 [224].

43 Ibid 40 [225].

44 Ibid 5 [11].

45 Ibid 5 [12].

46 Ibid 40 [226].

47 Ibid 40 [227]-[228].

48 Ibid 40 [229].

49 Ibid 17 [86].

50 Ibid 20 [104]. Cf *Mrs J v A School* [1998] EOC 92-948 at 78,313 per Sir Ronald Wilson; *Cowell v School* Unreported, HREOC, Commissioner McEvoy, 10 October 2000 at [5.2.2].

51 *Purvis* 20 [104].

52 Ibid 24 [130].

53 Ibid 23-24 [119] - [130].

54 *Sullivan v Department of Defence* [1992] EOC 92-421 at 79,005; *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC 92-417 at 78,980; *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 at 209; *Human Rights and Equal Opportunity Commission v Mount Isa Mines* (1993) 46 FCR 301 at 307, 327

55 *IW v City of Perth* (1997) 191 CLR 1 at 33-34 and 66-67; *Humphries & Ors v DEETYA* Unreported, HREOC, Commissioner Charlesworth, (1997) HREOCA 66 (19 December 1997); *Garity v Commonwealth Bank of Australia* [1999] EOC 92-966 at [6.5]; *Purvis v State of New South Wales*, Unreported, HREOC, Commissioner Innes, 13 November 2000.

56 *Dopking v Department of Defence*, Unreported, HREOC, Sir Ronald Wilson, 13 March 1992 at 9.

57 *Purvis* 25 [136].

58 Ibid 25 [134].

59 Ibid 25-26 [136].

60 Ibid.

61 Ibid 26 [137].

62 Ibid 25 [130].

63 Ibid 41 [236].

64 Ibid 29-30[158] - [165].

65 Ibid 41 [236].

66 Ibid 30 [166].

67 Ibid 5-6 [13].

68 Ibid [227] 40.

69 Ibid [12] 5.

70 Ibid [93] 18.

71 Ibid [227] – [228] 40.

72 Ronni Redman, *'Burning down the House: Conversations in Law and Disability'* DSARI Seminar Paper, 13 February 2004.

73 Ibid [86] 154.

74 *Regents of University of California v Bakke* (1978) 438 US 265 at 407 per Blackmun J.

75 (1978) 583 P2d 621 at 623.

76 See section 28B-28G of the *Disability Discrimination Act 1995* (UK).

77 *Disability Discrimination Act 1995* (UK).

78 The EC Directive, (2000) *Official Journal of the European Communities* L303/19.

79 *Americans with Disabilities Act 1990*.

80 As did the decision makers in *Mrs J v A School* [1998] EOC 92-948 at 78,313 per Sir Ronald Wilson and *Cowell v School* (unreported, Human Rights and Equal Opportunity Commission, 10 October 2000) at [5.2.2]. Cf *Clark v Internet Resources* Unreported, HREOC, Commissioner Mahoney, 20 July 2000 and *Cth of Australia v Humphries* [1998] 1031 FCA where no such positive obligation was found.

81 Productivity Commission Report at 187-188.

82 *Catholic Education Office v Clarke* (2004) 81 ALD 66.

83 *Clark v TDG Ltd* [1999] 2 All ER 977 at 983.

84 *Purvis* 36 [203], 38 [214] and 40 [229].

85 C Ronalds and R Pepper, *Discrimination Law and Practice*, (2004) at 42.

86 *Purvis* 40 [229].

87 [2003] FMCA 42 at first instance and [2004] FMCA 452 on remittal.

88 [2003] FCA 1475.

89 Ibid [9], [10].

90 *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92-623

91 *Randell v Consolidated Bearing Company* [2002] FMCA 44.

92 *Forbes v Australian Federal Police (Cth)* [2004] FCAFC 95.

93 [2002] FMCA 44.

94 Cf Gleeson CJ's comment in *Purvis* that Daniel's behaviour was tolerated longer than it would have been from another student because Daniel had a disability: 5 [11].

95 By analogy, see a consideration of the difficulties of proving racial discrimination in J Hunyor, 'Skin Deep: Proof and Inferences of Racial Discrimination in Employment', (2003) 24 *Syd L Rev XXX*.

96 See the matters considered under indirect discrimination below.

97 *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at 272-273 [67].

98 See facts of *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92-623.

99 *Purvis* 5 [11].

100 *Tate v Rafin* [2000] FCA 1582.

101 M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (1990) at 79.

102 (1996) EOC 92-796. This case arose under the direct discrimination provision of the *Equal Opportunity Act 1984* (WA) where an organisation consisting of members who were HIV positive had an application to establish a drop-in centre rejected for reasons that included concerns about the spread of AIDS.

103 See consideration of issue by Kirby J in *IW v City of Perth* (1997) 191 CLR 1 at 66-67.

104 R Dubler, 'Direct Discrimination and a Defence of Reasonable Justification' (2003) 77 *ALJ* 514 at 522.

105 Above n 103, at 78,869-78,870.

106 *Purvis* 37 [207] and 40 [226].

107 C Ronalds and R Pepper, op cit n 86 at 42.

108 Ibid at 48.

109 R Hunter, *Indirect Discrimination in the Workplace*, (1992) at 191.

110 Ibid 191-192.

111 For example, *Hinchcliffe v University of Sydney* [2004] FMCA 85.

112 For example, *Clarke v Catholic Education Office* (2003) 202 ALR 340.

113 'It was a wise man who said there is no greater inequality than the equal treatment of unequals' *Dennis v United States* 339 US 162 at 184 per Frankfurter J.