

THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: ‘REASONABLE ADJUSTMENTS’ FOLLOWING THE 2009 AMENDMENTS TO THE *DISABILITY DISCRIMINATION ACT 1992*

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In August 2009, in response to the High Court’s decision in Purvis v New South Wales (2003) 217 CLR 92, there were significant amendments to the Disability Discrimination Act 1992 (Cth) (DDA). However, the Disability Standards for Education 2005 (the Standards) had been formulated at the time of the 2009 amendments and, at least in the case discrimination allegedly occurring in a school setting, might reasonably be expected to address any concerns arising from comments by the High Court in Purvis.

This paper examines whether, in the context of school based discrimination, the amendments were necessary and what additional effect, if any, the amendments have in light of the Standards. Particular focus will be given to examining the obligation imposed by the amended DDA to provide reasonable adjustments to students with disabilities.

I INTRODUCTION

Despite the passage of time, the most significant decision in the area of education discrimination remains *Purvis v New South Wales* (‘*Purvis*’)¹. *Purvis* remains significant because of its discussion about the nature of disability and the relevant comparator where direct discrimination is alleged. Additionally—and more importantly—*Purvis* remains significant because it was the catalyst for changes of the definition of both direct and indirect discrimination in the *Disability Discrimination Act 1992* (Cth) (‘*DDA*’).²

This paper addresses that change and, in the context of the relevant cases, considers whether the change deserves the rhetoric assigned to it.

II LEGISLATIVE BACKGROUND

A *The Disability Discrimination Act 1992 (Cth) (‘DDA’)*

The *DDA* prohibits discrimination in the area of education, including enrolment, access to benefits, expulsion or curriculum requirements.³ A person who complains of disability discrimination in the area of education must demonstrate they have been treated less favourably than someone without their disability would have been treated in the same or similar circumstances,⁴ or that an unreasonable term was imposed, with which they cannot comply, and that the imposition of the term amounts to less favourable treatment.⁵

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For allegations of discrimination occurring after 5 August 2009,⁶ the following definitions of direct and indirect discrimination apply:

5 Direct disability discrimination

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

6 Indirect disability discrimination

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

III *PURVIS V NEW SOUTH WALES*⁷

The facts of *Purvis* are notorious within discrimination law. However, it is worth repeating the following salient facts.⁸

- Daniel Hoggan was, at the time of his enrolment at and exclusion from South Grafton State High School, 13 years old.
- Daniel had a number of complex disabilities arising from an acquired brain injury following a severe encephalopathic illness during his infancy. Daniel's disabilities manifested themselves in, at times, disturbed or difficult behaviour.
- Daniel's enrolment at the School was initially refused, but was subsequently accepted. There were extensive preparations made by the School prior to Daniel's enrolment and during his attendance at the School, including:
 - (i) the establishment of a new Integration Committee at the School to determine the amounts and types of resources and support that the School would need to cater for Daniel;
 - (ii) a 'trial day' for Daniel's familiarisation with the School;
 - (iii) application for State integration program funding for Daniel's attendance at the School;
 - (iv) construction of a special toilet and bathroom;
 - (v) establishment of a case management committee and regular case management meetings to discuss Daniel's behaviour once enrolled;
 - (vi) provision of funding for a teacher's aide and casual teacher, on a full time basis, until the end of Term 2;
 - (vii) a modified welfare and discipline program and modified teaching programs;
 - (viii) consultation with Daniel's foster parents regarding his enrolment and the modified programs;
 - (ix) maintenance of a communication book between the School and Daniel's foster parents; and
 - (x) reports from school counsellors, psychologists employed by the Department of Community Services and special education officers and consultants.
- Daniel attended the School for approximately nine months before he was excluded. Prior to the exclusion, Daniel had been suspended on a number of occasions, often for single days initially, in response to abusive and/or aggressive behaviour towards teaching staff and other students, or behaviour that presented a risk to himself.
- Daniel received one of the highest amounts of departmental funding for a child with a disability in the State.⁹

A Obligation to Make Reasonable Adjustments

1 The Decision in HREOC

At first instance, it was found that in suspending and ultimately excluding Daniel, the School had treated Daniel less favourably and the less favourable treatment was as a result of his disability. Significantly, the School was found to have further treated Daniel less favourably by:

1. failing to consult more broadly in the development of the discipline and welfare policy, including consultation with experts in special education and behaviour management;
2. not being prepared to be more flexible in the application of the discipline and welfare policy, once it was in place and being followed;
3. failing to more generally seek the advice of special education experts; and
4. failing to adequately train, prepare or inform Daniel's teachers about nature of his disability and how to manage it in classrooms.

Commissioner Innes found that had the School taken the above action, Daniel would probably not have misbehaved as he did and would not have been excluded from the School.¹⁰ This leads to a rather circular conclusion: it appears to suggest that Daniel's exclusion was a result of the School's failure to make all necessary adjustments for him, which resulted in the behaviour that led to the exclusion rather than a failure by the School to adjust to or accommodate Daniel's behaviour.

The minority in the High Court accepted the Commissioner's conclusion in relation to the effect of the failure to provide the adjustments. However, they went further in finding that the relevant comparator for less favourable treatment was to be determined by reference to Daniel's circumstances 'upon being given the required accommodation or services', that is, how he would have behaved had the reasonable adjustments been made.¹¹ The implication is that the above actions amounted to reasonable adjustments which the School was obliged to make to avoid a finding it had discriminated against Daniel.

2 *The High Court's Decision*¹²

By a majority of 5:2, the High Court found Daniel had not been unlawfully discriminated against because he had not been treated less favourably than another student, without the disability, in same or similar circumstances. The majority found that the relevant comparator was a student, without the disability, who exhibited the same behaviour or behaved in the same way as Daniel.¹³ As a student who exhibited similar behaviour (for a reason unrelated to a disability) would also have been excluded, the treatment of Daniel was not because of his disability.

The majority also found s 5 of the *DDA* (as it was at the time) did not impose an express or positive obligation on an education provider to provide the necessary different accommodation or services.¹⁴

There have been a number of reasons postulated for the position taken by the majority of the High Court, which was at odds with discrimination jurisprudence at that time.¹⁵ The lack of a general health and safety exemption in *DDA*,¹⁶ and lack of unjustifiable hardship defence at the time once student was enrolled,¹⁷ are the most convincing explanations. However, these explanations are predicated on the premise that, had those provisions been included in the *DDA*, Daniel's complaint would have failed on those grounds.

It must also be recalled that, at the time of the *Purvis* decision, the definition of disability in the *DDA* did not include the characteristics extension found in other discrimination statutes.¹⁸ The definition of disability in the *DDA* has since been amended, the effect of which is that the treatment allegedly on the basis of behaviour that is a symptom or manifestation of a person's disability will amount to treatment on the basis of the person's disability.¹⁹

IV THE RESPONSE TO *PURVIS*

The amendments to the *DDA* were said to be needed because the majority in *Purvis* expressly rejected that the former s 5(2) of the *DDA* imposed an implied obligation to accommodate.²⁰

The amendments to the *DDA* expressly included an explicit and positive duty to make reasonable adjustments to avoid a finding of discrimination on the basis of a person's disability. It is now unlawful to fail to make reasonable adjustments to accommodate a person's disability (whether by the provisions of accommodations or special facilities) where the failure to make reasonable adjustments has the effect of treating a person with a disability less favourably than a person who does not need the adjustments.

V REASONABLE ADJUSTMENTS: NOT A NEW CONCEPT

The *DDA* contains very little guidance or explanation as to what will amount to a reasonable adjustment and when a respondent will have met their obligation to provide any necessary reasonable adjustment. This is disappointing given the significance of the term following the amendments which saw it become an element to the statutory definition.

'Reasonable adjustment' is defined (rather unhelpfully) as 'an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person'.²¹ Neither 'reasonable' nor 'adjustment' is defined in the *DDA*.

Whether an adjustment will impose an 'unjustifiable hardship' on a person will require an assessment of all the relevant circumstances of a particular case, including:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial and other assistance to the first person;
- (e) any relevant action plans given to the Commission under section 64.²²

An 'unjustifiable hardship' is not the same as 'unreasonable' adjustment, although a requested or proposed adjustment will not be required where it is unreasonable.²³

It can be readily appreciated that it is not possible for the *DDA* to contain a prescriptive list of what will and will not amount to a reasonable adjustment in every case. However, the absence of guidance in the legislation creates difficulty for potential respondents in knowing when they will have discharged the obligation to provide a reasonable adjustment or alternatively, when they are lawfully excused from providing a particular adjustment.

This lack of guidance is partly addressed by the *Disability Standards for Education 2005* ('Standards') which are intended to provide 'clarity and specificity for education and training providers and students with disability'.²⁴

VI WERE THE AMENDMENTS TO THE DDA NECESSARY?

A The Disability Standards for Education 2005

The High Court's decision in *Purvis* was handed down in November 2003. The definitions of discrimination in the *DDA* were not amended until August 2009.

In the interim, the *Standards* were formulated under s 31 of the *DDA*.²⁵ The *Standards* impose an express requirement on education providers to make reasonable adjustments to ensure that students or prospective students with disabilities are treated the same way as students (or prospective students) without a disability.

The requirement to make reasonable adjustments arises at all stages of the provision of education, including admission, enrolment, participation in courses or programs, and use of facilities and services.²⁶ The *Standards* do not prescribe what must be done to meet students' needs,²⁷ and it is left to education providers to determine what adjustments can be made to accommodate the needs of a student with a disability. It is also left to education providers to assess whether the making of reasonable adjustments would impose an unjustifiable hardship.

The *Standards* contain definitions of the terms 'reasonable adjustment' and 'unjustifiable hardship' similar to the definitions contained in the *DDA*. The *Standards* also contain the following definitions of 'reasonable' and 'adjustment':

Reasonable adjustments

- (1) For these Standards, an adjustment is **reasonable** in relation to a student with a disability if it balances the interests of all parties affected.²⁸

Adjustments

For these Standards, each of the following is an **adjustment**:

- (a) a measure or action (or a group of measures or actions) taken by an education provider that has the effect of assisting a student with a disability:
 - (i) in relation to an admission or enrolment—to apply for the admission or enrolment; and
 - (ii) in relation to a course or program—to participate in the course or program; and
 - (iii) in relation to facilities or services—to use the facilities or services;on the same basis as a student without a disability, and includes an aid, a facility, or a service that the student requires because of his or her disability; ...²⁹

The requirement to treat a student or prospective student with a disability 'on the same basis' as a student without a disability imports a requirement that reasonable adjustments will be provided.³⁰

Although there is no requirement to make unreasonable adjustments,³¹ it can be seen that the definition of 'adjustment' assumes that (putting the issue of reasonableness to one side), there will always be an available adjustment that will enable student with disability to participate on the same basis as students without a disability. The difficulty with this assumption is that this is not always the case.

B What is a Reasonable Adjustment?

The *Standards* are supported by Guidance Notes which are designed to clarify and make more explicit an education providers obligations under the *DDA*. Between them, these two documents

contain a relatively comprehensive list of the factors and circumstances to be taken into account in determining whether a particular adjustment is reasonable. These are:

- the nature of student's disability;
- the views of the student or the student's associate about whether a proposed adjustment is reasonable and will enable the student with a disability to access and participate on the same basis as students without disabilities
- information about 'preferred' adjustments;
- any information provided by, or on behalf of, the student about how the disability affects the student's ability to participate;
- effect of proposed adjustment on the student, including on their ability to participate in courses and achieve learning outcomes
- the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;
- the costs and benefits of making the adjustment.³²

It is clear that the interests of the particular student are a 'very significant consideration'³³ in identifying an appropriate and reasonable adjustment, as evidenced by the number of factors referable to the particular student. However, it is equally clear that the assessment of whether an adjustment is reasonable involves a balancing act between the needs and rights of the particular student with a disability to participate in education and training, and the interests of other parties who may be affected by the adjustment to be provided, including the education provider, staff and other students.³⁴

An education provider may provide an alternative adjustment to the student's preferred form of adjustment, if the alternative is effective in achieving the purpose of the adjustment.³⁵ This is an important concession for education providers as it can be seen from the cases in this area that complaints most often arise over disputes in the nature or extent of adjustments made, rather than over an alleged refusal to make any adjustment at all.³⁶

C *When Will a Reasonable Adjustment Impose an Unjustifiable Hardship?*

It is a defence to a complaint of discrimination in relation to a failure to provide a reasonable adjustment if the adjustment identified would have imposed an unjustifiable hardship on an education provider.³⁷ As noted above, the *Standards* expressly provide that the concept of unjustifiable hardship is not to be considered when determining whether an adjustment is reasonable.³⁸ The repetition of the unjustifiable hardship exemption in the *Standards* acknowledges that the legislature either cannot, or is not prepared to, afford the cost of every social adjustment necessary to accommodate difference or to impose the cost on individuals or private institutions.³⁹

The following factors are relevant to determining whether an adjustment will impose an unjustifiable hardship on a provider:

- the nature of the student's disability and the effect of the disability on a person concerned;
- his or her preferred adjustment, any adjustments previously provided, and any recommended or alternative adjustments to the one that would impose an unjustifiable hardship;
- the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
- the cost resulting from student's participation in the learning environment, including any

- adverse impact on learning and social outcomes for the student, other students and teachers;
- the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
 - what adjustments can be made without imposing an unjustifiable hardship.⁴⁰

The exception does not wholly excuse a provider from its obligations under the *DDA* and *Standards* as it is a requirement that a provider comply with the *Standards* to the maximum extent not involving unjustifiable hardship.⁴¹ The exception recognises that an adjustment should not create an undue burden on an education provider. However, the exception also recognises that some hardship will be justifiable.

A restricted construction of the unjustifiable hardship exception requires any hardships to be suffered by the provider only.⁴² However, as with anything, the meaning of ‘unjustifiable hardship’ must be determined from the terms of the *Standards* and *DDA*, and also from the relevant context. The provider on whom the hardship is imposed is a provider of educational services and those services are provided to both students with disability and students without disability. The unjustifiable hardship on an education provider may involve any adverse effects on its staff and students, particularly where the adverse experiences flow onto legal consequences for the provider such as, for example, claims for compensation.

It is consistent with the meaning of unjustifiable hardship in the *Standards* and the *DDA*⁴³ for consideration to be given to the impact that the provision of an adjustment may have on others, where the provision impacts on the provider’s capacity to provide a safe environment and high quality of education to all students.⁴⁴

That said, it is conceded that the application of the unjustifiable hardship exception does not require the interests of one person or persons to take precedence over the interests of another person or persons.

Whether a particular adjustment will impose an unjustifiable hardship is a question of fact which can only be considered on a case by case basis.⁴⁵ This makes it difficult for education providers to look at previous decisions for assistance in to determine what is and will not be a reasonable adjustment.

VII WHAT IS AND WHAT IS NOT ‘REASONABLE’?

As noted above, the reasoning given for the amendments to the *DDA* was that it was necessary to make explicit that education providers owed a positive duty to make reasonable adjustments for students with disabilities.

From this, one could be forgiven for thinking that education providers had been failing to make any adjustments for students with disabilities. However, a review of the case law both prior and subsequent to *Purvis* demonstrates that, by and large, education providers were making reasonable adjustments for students with disabilities. That same review also reveals that complaints of discrimination most often arise from a difference in opinion as to whether the adjustments made were sufficient and what, if any, alternative adjustments should have been made.

There had been a number of cases of alleged disability discrimination in the area of education prior to *Purvis*.⁴⁶ In each of the cases, some adjustments (and in some cases, significant adjustments) had been made for the students to enable their participation or attendance at the school.

There were no cases prior to *Purvis* where the complaint had arisen because a school or educational authority refused to make any adjustments at all for the student.⁴⁷ Educational authorities, schools and teachers are very conscious and conscientious about making adjustments so that students with disabilities are able to have greater participation or participation ‘on the same basis’, in their education. This is entirely correct and appropriate given the statutory requirement for all children to attend school.

A *The Usual Suspects – Provision and Policies*

1 *Adjustment to Discipline Policies or Student Behaviour Codes*

It is ‘trite to say’⁴⁸ that schools must be able to have discipline policies or student behaviour codes in place to ensure that students are aware of the expectations of their behaviour, and the consequences which may flow from the breach of the required behaviour.

However, it is also now trite to say that to avoid discrimination a school may have to tailor individual behaviour codes for students with disabilities, taking into account the effects of the student’s particular impairment.⁴⁹ This is so in the case of both direct discrimination and indirect discrimination. To treat a student less favourably because of their failure to comply with an unmodified behaviour code will amount to direct discrimination as a result of the failure to provide a reasonable adjustment to the behaviour code. Similarly, to require a student to comply with an unmodified behaviour code may amount to the imposition of an unreasonable term.

In *M&C*, although the requirement for students to comply with the School’s discipline code was reasonable, it was unreasonable to enforce the disciplinary provisions of the Code in an inflexible fashion to all students irrespective of their particular differences.⁵⁰

It is submitted that it misconstrues the meaning of indirect discrimination to look at the reasonableness of the requirement to have an individual comply with a behaviour or discipline code. The question of reasonableness arises in relation to the term itself, not the reasonableness of any requirement on the individual to comply with the code.⁵¹ For the purposes of this paper, this example demonstrates the blurring of the lines between direct and indirect discrimination as a result of the requirement to provide reasonable adjustments now contained in both definitions.

The requirement to make reasonable adjustments will obviously include adjusting the terms of the policy. However, it is incorrect to conclude that the requirement to make reasonable adjustments for students with disabilities means an educational authority or school cannot require a student with a disability to comply with an adjusted behaviour code. This would go beyond what is ‘reasonable’ because it is likely to result in an unjustifiable hardship for the reasons given in previous cases, including the detriment or cost to other members of the school community, the availability of funding or support, and health and safety concerns.⁵²

This has been confirmed by the decision of *Walker*.⁵³ It was a significant part of the case on behalf of the complainant (Alex) that he should, by reason of his disabilities, have been treated differently from other students in matters of discipline. Alex’s behaviour included offensive and abusive language, and aggression towards teachers and other students. It was found that Alex had been treated differently — and no less favourably — because a student without his disability, who behaved in a similar manner, would not have been given the same flexibility or leniency.

2 *Provision of Full Time Support*

Another frequent complaint involves allegations that a student with a disability should have been provided full-time teaching support to assist their attendance at school. Most often, the complaint relates to the provision of support in addition to that already provided, that is, the failure to provide a full-time teacher aide for all academic subjects⁵⁴ or ‘one on one assistance’.⁵⁵

It was argued in *Walker*, as a complaint of indirect discrimination, that the failure to provide Alex with the exclusive assistance of a full-time teacher’s aide amounted to the imposition of the term that he access his education without ‘one-to-one assistance in his academic subjects from a teacher or teacher’s aide who [was] trained in the management of his disabilities’.⁵⁶ This was despite the fact that, although Alex was not personally assigned a teacher’s aide, there were three aides in his classroom, two of whom worked mainly with Alex.⁵⁷

The court found, after noting the assistance provided to Alex during the course of his education at the school, it was not necessary that Alex receive the exclusive attention of a teacher or teacher aide at all times when he was at the school. The court found further that it was not unreasonable not to provide the level of assistance claimed.⁵⁸

In *Sievwright* a similar claim was made on behalf of the student (Jade). It was alleged that the failure to provide Jade with a full-time teacher’s aide, for all her academic subjects amounted to the denial of a benefit.

This complaint failed on both factual and legal grounds. Firstly, the evidence was that, even without the provision of a full-time teacher’s aide Jade was progressing to an appropriate level, based on her disability.

Although all Jade’s teachers agreed she would have ‘benefitted’ from the provision of a full-time aide, there was no evidence that the provision of a full-time teacher’s aide would have assisted her academic results or performance.⁵⁹ Further, the evidence also demonstrated that the provision of a teacher’s aide would have benefitted the classroom generally, and that all students would ‘benefit’ from one to one tutelage or assistance in class.⁶⁰

The complaint failed because it was not shown that Jade suffered a serious disadvantage in her education.⁶¹ Accordingly, Jade has not been treated less favourably because of any failure to provide her with a reasonable adjustment.

VIII WHEN REASONABLE ADJUSTMENTS ARE STILL NOT ENOUGH?

The *Standards* do not require an educational authority to accommodate the preferences of a student (or their parents)⁶² or to make *all* adjustments; the requirement is to make all reasonable adjustments.⁶³ The fact that there may be a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that the adjustment provided is unreasonable.⁶⁴ The fact that different levels of adjustments may be available and, more importantly, still be reasonable, has been expressly recognised in s 3.6(a) of the *Standards*.

The reasonable adjustments required by the *Standards* (and, by extension, the *DDA*) are adjustments that will enable a student to participate in all aspects of their education, ‘on the same basis’ as a student with a disability. As unpopular an idea as it may be, there will be times when, despite extensive adjustments — at times, beyond what might minimally be required — because of their disability, a student is still not able to participate on the same basis or a comparable way as a student without a disability.⁶⁵

It has been acknowledged that there is a need to act with an ‘appropriate degree of diffidence’ in assessing the actions of an educational provider about which there may be differences of opinion.⁶⁶

In *Minns*, Ryan’s mother agreed — albeit in cross examination — that her basic complaint against the respondent was that it ‘could have done more’ in providing him with an education. This is despite also agreeing that there were a range of special arrangements put in place for Ryan.⁶⁷ These special arrangements included:

- (i) giving Ryan a time out process;
- (ii) allowing him to attend part-time;⁶⁸
- (iii) providing him with the support of a teacher’s aide and support teacher;
- (iv) obtaining the professional assistance of school counsellors, including employees who were psychologists;
- (iv) where possible, responding to incidents involving Ryan without invoking disciplinary procedures.

The court was not convinced that the alternative methods suggested for the management of Ryan’s behaviour were necessary.

Similarly, in *YB v State of Queensland* (‘*YB*’), the complainant stated that ‘he did not have access to the type of learning support that *he considered he needed*’.⁶⁹ This was despite the provision of extensive adjustments to meet his reported disability.

In terms of achievable outcomes for students for whom reasonable adjustments are made, a key question is whether a student with a disability can still meet the learning outcomes by learning in a different format and undertaking different assessments.⁷⁰ In *YB* the Tribunal observed that the complainant’s evidence had been predicated on a desire to explain his disappointing academic achievements as traceable to perceived shortcomings in support provided by the school, and not a failure by himself to make the best of the opportunities made available.⁷¹

Chinchen v NSW Department of Education and Training (‘*Chinchen*’)⁷² is distinguishable from other decisions for two reasons. Firstly, in addition to having a learning disability, Rhys was a gifted student and enrolled in the School’s extension program. Secondly, the complaint was, at least partly, substantiated.

In *Chinchen* the following adjustments had been made for Rhys’s education:

- (i) he was given the exclusive use of a school laptop;
- (ii) he was allowed to do oral presentations in substitution for written one;
- (iii) he was allowed to complete tasks at home;
- (iv) he was able to sit with the teacher so she could write down his ideas before he transferred them to computer; and
- (v) he was allowed to do drafts of work on computer.⁷³

However, it was found that the School had ‘overlooked’ the need to have Rhys assessed by a school counsellor and that, had it done so, it would have been able to obtain expert assistance to address Rhys’s difficulties much earlier.⁷⁴

The case is unusual because it was found that Rhys’s disability was the reason that assistance from the school counsellor was not sought at an appropriate stage, and that such assistance would

have been sought in the case of a student without Rhys's disability. It seems that the combination of Rhys's specific disability and his giftedness was the reason that the assistance was not sought.

IX REQUIREMENT FOR LESS FAVOURABLE TREATMENT DESPITE ADJUSTMENTS

The amendments to the *DDA* have resulted in a, presumably unintended, difficulty for complainants. A complainant must show that, despite any reasonable adjustments that were made by a respondent, they have still been treated less favourably because of their disability.

There is often little difficulty in demonstrating that, for example, a student who is required to attend school on a part-time basis has been treated in a certain way because of their disability.⁷⁵ However, if it is found that the particular treatment or decision was intended to be for the benefit of the student, the complainant may be unable to demonstrate that they have been treated less favourably.

I think that Ryan's treatment was given to him because of his disability. He was known to have ADHD. The treatment was presumably intended to ensure that the best use be made of what little attention span he did have. I am not prepared to say that that treatment was less favourable than the type of disciplinary action which counsel for the applicant suggests. *Faced with the choice between a disciplinary measure and a non-disciplinary measure the school chose a non-disciplinary measure. That is not, to my mind, less favourable treatment.*⁷⁶

Similarly, the adjustments to Alex's attendance in *Walker* were found to be for his benefit, and were not less favourable treatment.⁷⁷

X THE COST OF REASONABLE ADJUSTMENTS

A Non-Financial Costs

Although there are frequent occurrences of physical harm being caused to other students (which should not be tolerated or permitted), the continuing attendance of a student with a disability at a particular school can impose an unjustifiable hardship in less obvious circumstances. It is submitted that it is not necessary for the extreme position taken by High Court at the application for leave to intervene⁷⁸ to exist before a student's behaviour and continued attendance at a school to impose an unjustifiable hardship.

In *Minns*, each of Ryan's classroom teachers gave evidence about having to spend a disproportionate amount of time and attention on Ryan, which meant that they were less able to spend time with other students.⁷⁹

Other teachers referred to Ryan's disruptive behaviour hindering their availability to teach the class and affecting the other students' ability to learn.⁸⁰ The teacher aide who worked mostly with Ryan assessed that he spent 75 per cent of his time on Ryan, and the remaining 25 per cent with all other students in his care.⁸¹

Whilst the legislation requires that reasonable adjustments be made so that a student with a disability can be treated on a comparable basis with a student without a disability, there is no requirement that adjustments be made for one particular student with a disability, at the expense of other students with disabilities. In some cases, because of the limited pool of financial and other resources, the adjustments sought by the parents, if implemented, would result in such an outcome.

B *The 'Bottomless' Pit of Funding*

It has been seen repeatedly that when a respondent is a State or the Commonwealth, they will have little success in arguing that making a particular adjustment is unreasonable because of financial hardship.⁸² As a result of this, in cases involving a State or the Commonwealth, unwarranted emphasis is often placed on the financial costs of adjustments.

However, the concept of proportionality must be recognised when assessing whether an adjustment would impose a financial hardship.⁸³ The adjustments sought in *Minns* would have cost \$27,000.00,⁸⁴ yet the total behaviour program funding for the region was \$20,000.00.⁸⁵ There is clearly a need to balance the needs of a complainant student with a disability against the needs of other students with disabilities in determining whether an adjustment will impose an unjustifiable hardship.

Further, the suggestion that government agencies have endless resources fails to acknowledge that policy decisions place demands already on those resources, and that the resources are prioritised according to those policy decisions. Some recent cases indicate a shift in the acknowledgement of this.⁸⁶

In the very recent case of *Sievwright* there was some recognition of this prioritisation and that the State's resources are indeed 'finite'.⁸⁷ It was noted that if the adjustment sought on Jade was provided (on the basis it was a reasonable adjustment), the respondent would be required to give a similar 'adjustment' to all students who had the same disability and level of functioning as Jade. This would have cost \$975 million, double the level of funding for the entire Program for Students with Disabilities.⁸⁸

Although it may be more difficult for State educational providers to assert, there will be instances where adjustments, as a result of the cost, will not be reasonable.

XI CONCLUSION: WERE THE AMENDMENTS NECESSARY?

A breach of the *Standards* can give rise to a complaint of discrimination. Given the *Standards* impose an express obligation to make reasonable adjustments for students with disabilities and provide extensive guidance to providers in understanding their obligations, the amendments to the definitions of the *DDA* subsequent to the commencement of the *Standards* appear somewhat redundant.

An examination of the cases both prior to and subsequent *Purvis* does not support the apparent need for legislative amendment, but rather demonstrates that the primary issue in future disputes is likely to be whether adjustments were sufficient or reasonable, not whether an education provider has made any adjustments.

As there have been no cases involving complaints of discrimination alleged to have occurred since the amendments to the *DDA*, it is not known what effect, if any, the amendments to the *DDA* will have on determination of whether reasonable adjustments have been given. However, it is the submission of this paper that the amendments will have little impact on the outcome of future cases.

Keywords: disability discrimination; students; disability standards; reasonable adjustment; *Purvis*.

ENDNOTES

- 1 (2003) 217 CLR 92 (*Purvis*).
- 2 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth).
- 3 *Disability Discrimination Act 1992* (Cth) ('DDA') s 22.
- 4 This is known as 'direct discrimination': see s 5 of the *DDA*.
- 5 Indirect discrimination: see s 6 of the *DDA*.
- 6 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).
- 7 (2003) 217 CLR 92 ('*Purvis*').
- 8 See Commissioner Innes's decision of *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47, which contains the most comprehensive factual account.
- 9 *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47, part 5.14 of the decision.
- 10 *Ibid.* This finding was accepted by McHugh and Kirby JJ, the minority in the High Court decision: see [166].
- 11 Kate Rattigan, 'Case Note: *Purvis v New South Wales (Department of Education and Training)* A Case for Amending the *Disability Discrimination Act 1992 (Cth)*' (2004) 28(2) *Melbourne University Law Review* 532, 551.
- 12 Prior to reaching the High Court, the decision had been successfully appealed to the Federal Court, a decision which was confirmed by the Full Court of the Federal Court: see *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69 and *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237 respectively.
- 13 *Purvis*, [222]–[226].
- 14 *Ibid* [217].
- 15 Prior to *Purvis*, courts had found in s 5(2) of the *DDA* (as it was) an implied obligation to make reasonable adjustments for students with disabilities. See *Cowell v A School* [2000] HREOC 40 (unreported, Commissioner McEvoy, 10 October 2000), 5.2.2. See also *Brackenreg v Queensland University of Technology* [1999] QADT 11, 4.2.2.4(iv) which noted s 10(5) of the *Anti-Discrimination Act 1991 (Qld)* imposed an obligation on a respondent to provide special services or facilities (reasonable adjustments) necessary to enable a student with disabilities to be able to undertake their studies.
- 16 Rattigan, above n 11, 533.
- 17 Susan Roberts, 'The Inequality of Treating Unequals Equally: the Future of Direct Discrimination under the *Disability Discrimination Act 1992 (Cth)*?' (April 2005) 45 *ALAL Forum* 20, 30. It is noted that the *DDA* has since been amended to extend the unjustifiable hardship exemption beyond circumstances of a student's enrolment.
- 18 See, eg, *Anti-Discrimination Act 1991 (Qld)* s 8.
- 19 See *DDA* s 4(1) as amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).
- 20 Bronwyn Byrnes, 'Improved Protection of Disability Rights: *Disability Discrimination Act 1992 Amended*' (September 2009) *Law Society Journal* 44, 44; Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 7; *Purvis*, [217] (Gummow, Hayne and Heydon JJ).
- 21 *DDA* s 4.
- 22 *DDA* s 11(1).
- 23 Elizabeth Dickson, 'Disability Standards for Education and the Obligation of Reasonable Adjustment', (2006) 11(2) *Australia & New Zealand Journal of Law & Education* 23, 25.
- 24 See the Ministers' Foreword to the *Disability Standards for Education 2005* ('Standards').
- 25 The *Standards* took effect on 17 March 2005.
- 26 *Standards* Parts 4, 5, 6 and 7.

- 27 Glenda Beecher, ‘Disability Standards: The Challenge of Achieving Compliance with the Disability Discrimination Act’ (2005) 11(1) *Australian Journal of Human Rights* 5.
- 28 *Standards* s 3.4. Underlining added.
- 29 *Ibid* s 3.3.
- 30 *Ibid* s 2.2(2).
- 31 See Note to s 3.4(2) of the *Standards*.
- 32 See s 3.4(2) of the *Standards* and s 4.2 of the Guidance Notes.
- 33 See s 4.2 of the Guidance Notes.
- 34 See s 4.2 of the Guidance Notes.
- 35 See s 3.6 of the *Standards* and s 4.2 of the Guidance Notes.
- 36 *Walker v State of Victoria* [2011] FCA 258 (‘*Walker*’), [257]–[263].
- 37 *Standards* s 10.2(2).
- 38 See note to s 3.4(2) of the *Standards*.
- 39 Elizabeth Dickson, ‘Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the *Anti-Discrimination Act 1991 (Qld)* and in its Interpretation and Application’ (2003) 8(1) *Australia & New Zealand Journal of Law & Education* 47, 51. The definition of unjustifiable hardship in the Queensland legislation is similar to the *DDA*.
- 40 *Standards* s 3.4–3.6, Guidance Notes, s 4.2.
- 41 *Standards* s 10.2(3).
- 42 Dickson, above n 39, 25.
- 43 Section 11(1)(a) of the *DDA* recognises that the benefit or detriment to any person concerned may also be assessed in determining whether an unjustifiable hardship is imposed. ‘Any person concerned’ is not defined in the *DDA*.
- 44 See Guidance Notes s 4.4.
- 45 Joan Squelch, ‘Reasonable Accommodation of University Students with Disabilities’ (2010) *Journal of Applied Law and Policy* 51, 55.
- 46 See, eg, *A School v Human Rights & Equal Opportunity Commission* [1998] FCA 1437; *S on behalf of M&C v Director General, Department of Education and Training* [2001] NSWADT 43 (‘*M&C*’); *Minns v State of NSW* [2002] FMCA 60 (‘*Minns*’).
- 47 Although it can be accepted that the complaints lodged with AHRC represent only a fraction of potential complaints.
- 48 *M&C*, [123].
- 49 Dickson, above n 23, 31.
- 50 To quote from *M&C*, [129].
- 51 *Minns*, [260].
- 52 See *Purvis*, [12] (Gleeson CJ) and [223] (Gummow, Hayne and Heydon JJ); *Minns*, [247]–[250], [263].
- 53 The conduct complained of in *Walker* occurred prior to the amendments to the *DDA* but subsequent to the formulation of the *Standards*. Indeed one of the allegations against the Respondent was that the school had breached the *Standards* by not making reasonable adjustments for the complainant: see [270] ff. On 22 March 2012, the Full Court of the Federal Court dismissed an appeal against the decision: see *Walker v State of Victoria* [2012] FCAFC 38.
- 54 *Sievwright v State of Victoria* [2012] FCA 118 (‘*Sievwright*’).
- 55 *Walker v State of Victoria* [2011] FCA 358.
- 56 *Ibid* [220].
- 57 *Ibid* [88].
- 58 *Ibid* [263].
- 59 *Sievwright*, [89].
- 60 *Ibid* [94].
- 61 *Ibid*.

- 62 Sally Varnham and Patty Kamvounias, 'Unfair, Unlawful, Or Just Unhappy? Issues Surrounding Complaints of Discrimination Made by Students Against Their Universities in Australia' (2009) 14(1) *International Journal of Law & Education* 5, 13.
- 63 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 8–9.
- 64 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 88.
- 65 Varnham and Kamvounias, above n 62, 9. This was recognised in the tertiary education setting in *Huang v University of New South Wales* [2008] FMCA 11, [128]–[129] in which Driver FM noted that the 'causes for [her] failure were personal to her'.
- 66 *Catholic Education Office v Clarke* [2004] FCAFC 197, [116], citing *State of Victoria v Schou* [2001] VSC 321.
- 67 *Minns* at [14].
- 68 It is acknowledged that the part-time attendance was one of the key allegations in the complaint of less favourable treatment.
- 69 *YB v State of Queensland* [2010] QCAT 395 ('YB'), [42].
- 70 Squelch, above n 45, 64.
- 71 *YB*, [72].
- 72 [2006] NSWADT 180.
- 73 *Ibid* [38].
- 74 *Ibid* [44].
- 75 *Minns*, [203].
- 76 *Ibid* (emphasis added).
- 77 *Walker*, [128]–[129].
- 78 The High Court has been criticised for focusing on the 'criminal' nature of Daniel's behaviour: see Ronnit Redman, 'Burning Down the House: Conversations in Law and Disability' (2003) 30(3) *Australian Journal of Communication* 23, 33.
- 79 One teacher described the time she was required to spend on Ryan as 'inordinate': see *Minns* [58].
- 80 *Ibid* [81].
- 81 *Ibid* [106].
- 82 See, eg, *P v Director-General, Department of Education* [1997] QADT 11 (13 March 1997); and Commissioner Innes's comment in *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47, that 'The question of lack of resources cannot be used as a defence by the respondent to the allegations made'.
- 83 See *Cocks v State of Queensland* [1994] QADT 3 which compared the cost of making the premises accessible with the total cost of the construction project.
- 84 *Minns*, [143].
- 85 *Ibid* [140].
- 86 See, eg, *State of Victoria v Turner* [2009] VSC 66, [101].
- 87 *Sievwright*, [214].
- 88 *Ibid* [93].