

**USING ANTI-DISCRIMINATION LAW AS A TOOL OF EXCLUSION:
A CRITICAL ANALYSIS OF THE *DISABILITY DISCRIMINATION ACT*
1992 AND *PURVIS v NSW***

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I INTRODUCTION

Over the past quarter of a century, the issue of rights and equality for people with disabilities has enjoyed increasing prominence on the political agenda. For example, the UN International Decade of Disabled Persons from 1983-1992 was instrumental in bringing the issue to greater light. At the end of that decade, the Australian federal parliament passed the *Disability Discrimination Act* 1992 (DDA). This legislation, like the race and sex discrimination laws before it,¹ aimed to promote the equality of people with disabilities in Australian society. However, the promises of equality in the Act are not necessarily matched by reality in its implementation.

There is an apparent trend in appeal cases in certain areas of Australian disability discrimination law for decisions in favour of applicants at the initial tribunal stage to be reversed by later court decisions, particularly when they reach the High Court.² Nor has this trend been limited to disability discrimination law; it has affected all anti-discrimination cases in the High Court.³ Thus, people who are ostensibly protected by anti-discrimination laws and who are initially found to have been discriminated against are denied protection. In the area of disability, I will argue, the failure of anti-discrimination legislation to adequately protect people with disabilities stems largely from a reliance on, and application of, problematic understandings of disability by those applying the law.

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¹ *Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1984 (Cth).

² See particularly *I W v City of Perth* (1997) 191 CLR 1; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

³ Justice Kirby in the High Court has been particularly critical of this trend. See his comments in the recent case of *New South Wales v Amery* [2006] HCA 14, [86]-[91].

The basis of these problematic understandings has been exposed by sociologists and philosophers of disability who advocate a 'social theory' of disability. They argue that disability needs to be reconceptualised from a problem caused by deficiencies inherent in the disabled individual to a problem that is largely caused by socially imposed barriers. This theorising has challenged traditional understandings of disability such as that evident in Australian legal discourses. The first section of this paper will examine the arguments put forward by these sociologists, explaining why the understanding of disability that they advocate is preferable as a framework for analysis. Further, I will indicate some of the ways that the law, as it currently stands, fails to take the observations of the social theorists of disability into account.

Having sketched this analytical framework, I will investigate some of the discursive effects of Australian disability law, through an analysis of the High Court majority judgment in *Purvis v NSW* ('*Purvis*')⁴ I will examine how an alternative interpretive approach that took seriously the insights of the social theorists of disability would have been preferable to the approach that the majority did take, which fell back on individualised and stereotyped understandings of disability and which, ultimately, will perpetuate the social exclusion of people with disabilities.

II THE SOCIAL THEORY OF DISABILITY

Much work by feminist scholars aims to demonstrate that concepts such as gender and sex roles constitute a form of oppression, of masculine domination over women.⁵ Similarly, a number of scholars of disability have attempted to recast understandings of disability to show that the disadvantage suffered by people with disabilities does not stem from deficiencies inherent in themselves but is also a form of oppression caused by a society that privileges the needs of those without disabilities over those with them. In spite of the work done by disability theorists, the traditional understandings of disability remain dominant.

These traditional understandings of disability have several aspects but centrally they see disability as an individual, medical problem that requires treatment and management by medical professionals. Further, the loss or defect of physical or mental impairment must be dealt with, adjusted to or overcome by the individual. These understandings are widely supported by cultural representations of disability.⁶ People with disabilities are often represented as heroic, struggling to overcome the personal tragedy or loss of their disability; as objects of pity, needing the charity of 'normal' people to make their lives bearable; as evil or bad, their

⁴ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

⁵ See for example Marilyn Frye, *The Politics of Reality* (1983) 1; Sandra Lee Bartky, 'Foucault, Femininity, and the Modernisation of Patriarchal Power' in Irene Diamond and Lee Quinby (eds), *Feminism and Foucault: Reflections on Resistance* (1988) 61.

⁶ See Colin Barnes, *Disabling Imagery and the Media: an Exploration of the Principles for Media Representations of Disabled People* (1992); Mike Oliver, *The Politics of Disablement* (1990) 98-100.

disabilities the external manifestation of inner evil; as sexless; as dependent; or as possessing a combination of these characteristics.

Disability studies scholars have developed the so-called ‘social theory of disability’ or ‘social model theory’.⁷ This theory makes a distinction between ‘impairment’ and ‘disability’. ‘Impairment’ is the brute physical fact – a missing leg, or a paralysed spine – while ‘disability’ is the socially imposed restriction which is imposed on the impaired by an abled society⁸ through, for example, inaccessible urban or industrial design. Disability is characterised as a form of social oppression⁹ similar to racism, sexism or homophobia. Thus, to end the social oppression that is disability, structural change is required, so that people who have impairments do not continue to suffer social disadvantage. The social theory of disability draws on historical analyses which describe the creation of categories of identity that are ascribed to those who exhibit particular physical or intellectual characteristics. One major example of such scholarship is Michel Foucault’s work on madness and the pathologisation of insanity in the eighteenth and nineteenth centuries.¹⁰ Likewise Deborah Stone argues that ‘disability’ was created as an administrative category to mediate between the spheres of work and welfare - that is, to facilitate the removal of those deemed legitimately unable to work into state support programmes.¹¹ In most cases, the emergence of a disabled identity is tied to changes in the mode of production: as industrial society increasingly required able-bodied workers, those seen as unable to contribute were excluded from the mainstream of society through the creation and application of categories such as ‘disabled’.

What the social theory demonstrates is that disability as an identity is not fixed but contingent, created through the operation of various external factors such as social policy, people’s attitudes and the physical structure of our society. For example, many social model theorists would argue that a person who uses a wheelchair because their legs do not work is not disabled because they are physically incapable of using their legs but because our society is designed for those who can walk: buildings with stairs and no ramps or lifts, public transport that is not accessible, public toilets that are too small to accommodate a wheelchair, and so on.

While the division between ‘disability’ and ‘impairment’ is far from perfect - in fact there have been criticisms that it ignores the importance of impairment in the lives of people with disabilities¹² – the social model is an important development in

⁷ For an introduction to the social theory of disability and its application in sociology see Colin Barnes, Geof Mercer and Tom Shakespeare, *Exploring Disability: a Sociological Introduction* (1999); also Len Barton (ed), *Disability and Society: Emerging Issues and Insights* (1996).

⁸ Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability* (1976), quoted in Oliver, above n 6, 33-4.

⁹ See eg Vic Finkelstein, *Attitudes and Disabled People* (1980) 1.

¹⁰ See particularly Michel Foucault, *Madness and Civilisation* (trans 1988); also his *The Birth of the Clinic* (trans 1994) and *Discipline and Punish* (trans 1979).

¹¹ Deborah Stone, *The Disabled State* (1984).

¹² See eg Mairian Corker and Sally French, ‘Reclaiming Discourse in Disability Studies’ in Mairian Corker and Sally French (eds), *Disability Discourse* (1999) 1; Liz Crow, ‘Including

thinking about disability because it highlights the significance of social conditions in causing much of the disadvantage experienced by people with disabilities. The idea, in particular, that disability should be thought of not as a problem inhering in the individual but as socially caused begins to provide a framework with which we can critique the model of disability in the DDA and its application in cases like *Purvis*. Importantly, if there is a significant social component to disability, then this should be recognised in any law that purports to define disability.

III THE LEGAL FRAMEWORK

A *The Relevant Provisions*

The DDA sets out its objects in section 3. They are ‘to eliminate, as far as possible, discrimination against persons on the ground of disability’ in various areas of public life, including work, accommodation, education, access to premises, and clubs and sport.¹³ Further, the Act aims ‘to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community’.¹⁴ Finally, the Act aims ‘to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community’.¹⁵

The main Part of the Act attempts to achieve these objects by setting out the circumstances in which discrimination will be unlawful. Other Parts of the Act attempt to promote equality by creating a mechanism whereby ‘disability standards’ may be formulated which set standards for compliance and clarify obligations in a range of areas such as education and public transport.¹⁶ The standards operate as subordinate legislation. Also, the Act promotes the adoption of ‘Disability Action Plans’ by public and private sector service providers. Action plans set out a service provider’s policies and programs aimed at identifying and eliminating discriminatory practices to achieve the objects of the Act.¹⁷ An action plan does not place any specific legal obligations on a service provider, although the adoption of one may be relevant when defending against a complaint of discrimination.¹⁸

Disability, for the purposes of the Act, is defined in s 4:

disability in relation to a person, means:

- (a) total or partial loss of the person’s bodily or mental functions; or

¹³ All of Our Lives’ in Colin Barnes and Geof Mercer (eds), *Exploring the Divide* (1996) 55.
DDA s 3(a)(i). Areas which are also covered are: the provision of goods, facilities, services and land (s 3(a)(ii)); existing laws (s 3(a)(iii)); and the administration of Commonwealth laws and programs (s 3(a)(iv)).

¹⁴ DDA s 3(b).

¹⁵ DDA s 3(c).

¹⁶ DDA ss 31-4.

¹⁷ DDA ss 59-65.

¹⁸ DDA s 11.

- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body;
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

The DDA prohibits discrimination only in certain areas of life, referred to above, such as employment, education, and access to services. In these areas, however, it prohibits both direct and indirect discrimination. Section 5 defines direct disability discrimination:

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

The application and interpretation of s 5 and some of the problems arising out of it will be discussed below.

Section 6 defines the criteria for establishing indirect discrimination. In essence, s 6 makes unlawful the imposition of a requirement or condition with which a higher proportion of people without a particular disability are able to comply than those

with the disability and which is not reasonable. This provision covers situations where a facially neutral (hence ostensibly 'fair') policy is imposed, but that policy has an unfairly disproportionate effect on individuals belonging to a particular group.

Finally, the DDA offers several defences to a complaint of discrimination. In particular, the defence of 'unjustifiable hardship' allows an alleged discriminator to avoid a finding of unlawfulness by arguing that to take a course of action that did not discriminate against the complainant would have caused them unjustifiable hardship.¹⁹ In *Purvis*, unjustifiable hardship was not directly relevant since the DDA allowed educational institutions to argue the defence only if the discrimination alleged occurred prior to a student's admission.²⁰ However, the absence of the defence was perhaps partly responsible for the problematic approach that the High Court ultimately took. The provision has subsequently been amended in response to the problems raised by *Purvis*.

B *The Construction of Disability in the Act*

The DDA represents disability as if it is static – discernible by reference only to a list of impairments. This 'impairment based' view of disability, however, is problematic because it ascribes a particular identity to a person simply on the basis that they possess certain physical or mental/intellectual characteristics. As Ronnit Redman describes, the DDA sees disability as a yes/no question.²¹ That is, in the scheme of the Act, either a person is disabled or they are not. In one respect this is positive, since it provides protection to a potentially wide group of people,²² only requiring them to prove the existence of an impairment for the Act to apply. However, the broader discursive effects of such a narrow understanding of disability are potentially problematic.

The fact that disability is described only in terms of impairment has several important consequences. First, disability is understood almost exclusively in medical terms. Consequently, testimony of a doctor is all that is required to demonstrate 'disabled' status. The problem with accepting a medical view of disability is that it legitimates and reinforces a medical hegemony over people with disabilities. This perpetuates the situation of disadvantage in which people with disabilities have historically found themselves, particularly the fact that medical professionals have had control over many if not all of the aspects of life for many people with disabilities.²³

¹⁹ DDA ss 11, 15(4)(b), 16(3)(b), 17(2)(b), 18(4)(b), 22(4), 23(2)(b), 24(2), 25(3)(c) and 27(3).

²⁰ DDA s 22(4)

²¹ Ronnit Redman, 'Burning Down the House: Conversations in Law and Disability' (2003) 30(3) *Australian Journal of Communication* 23, 24.

²² Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 19 *Melbourne University Law Review* 211, 220.

²³ See eg Oliver, above n 6, 81.

Further, disability is understood in individual terms. That is, the impairment is a problem attaching only to the individual person – that disability might have some wider social meaning is ignored.²⁴ This individualising of disability also reinforces a normal/abnormal dichotomy. Locating the problem within the individual reinforces the impression that people with disabilities are somehow ‘objectively’ different from those without impairments.

It might be suggested that subsection (k) of the definition of disability, which covers cases of ‘imputed’ disability, moves beyond an understanding of disability in binary yes/no terms. For example, by including those situations where a person does not have a disability but is treated as if they have a disability, the Act could be said to move beyond disability conceived in medical terms, and to look to the assumptions made by a respondent which motivated their discriminatory behaviour, rather than looking solely at whether an ‘impairment’ (as set out in (a)-(g)) existed at the time of the disputed treatment. The provision is certainly necessary in the scheme of the Act, as it prevents disability discrimination occurring even when there is no ‘actual’ disability. However, the imputation provision in subsection (k) does very little to offset the discursive consequences of the definition set out above. It does not displace the idea that a ‘real’ disability is *in* the individual. That is, the imputation is not seen as the disability (in social model terms you could argue that an assumption about a person’s presumed impairment would constitute the ‘disability’), but simply as an error (the imputation of disability) giving rise to an action under the DDA.²⁵

The understanding of discrimination with which the Act operates is one in which individuals, acting arbitrarily, cause disadvantage to those who are labelled disabled.²⁶ The direct discrimination model used in the DDA (and other anti-discrimination legislation) does not recognise the possibility that the disadvantage of people with disabilities could be, and often is, entrenched structurally. It might be suggested that my focus on the direct discrimination provisions of the DDA unfairly ignores other mechanisms in the Act that aim at remedying structural or systemic disadvantage and discrimination. For example, as indicated above, the Act prohibits indirect discrimination which, in simple terms, occurs when a facially neutral, but unreasonable, policy has a disproportionately disadvantageous effect on members of a particular group, because those individuals who are part of that group are unable to comply with the policy. Thus, the prohibition of indirect discrimination aims to address structural discrimination caused by policies that keep people with disabilities from, for example, participating equally in workplaces or

²⁴ M Jones and L A Basser Marks, ‘The Limitations on the Use of Law to Promote Rights: an Assessment of the *Disability Discrimination Act 1992* (Cth)’ in Marge Hauritz, Charles Sampford and Sofie Blencowe (eds), *Justice for People with Disabilities: Legal and Institutional Issues* (1998) 60, 64-5.

²⁵ The judgment of Selway J in *Power v Aboriginal Hostels Ltd* [2004] FCA 1475, [18] seems to lend some support to this point.

²⁶ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 102-7, makes a similar point in relation to the operation of sex discrimination legislation and its ability to secure equality for women.

gaining access to services – unlike the prohibition of direct discrimination, which aims at preventing discriminatory actions caused by a person's disability.

Unfortunately, in spite of the promise for responding to systemic discrimination that the indirect discrimination mechanism offers, the real extent of social change possible may be constrained by the remedies available to the courts and tribunals applying the Act. Firstly, a 'substantial proportion' of complaints under the DDA are resolved in confidential conciliations.²⁷ As a result, discrimination is not exposed as a general social issue but instead becomes something for private parties to resolve behind closed doors. Secondly, where complaints do reach the stage of a public finding of discrimination by a court, the remedies available - such as the provision of an apology or an award of damages²⁸ - are limited to the individual complainant. Thus, the remedies that support the operation of the Act tend to reinforce the idea that disability is a problem of the individual rather than a broader problem requiring cultural change.

The existence of mechanisms other than the prohibition of direct discrimination which might take into account structural discrimination – such as the prohibition of indirect discrimination – does not mean that an analysis of a situation of direct discrimination should not take the social context into account. In fact, an approach that looked to social context would seem to be almost essential given, precisely, the individualistic focus of the Act. Determining whether direct discrimination has occurred can and will depend on whether the complainant has received less favourable treatment when compared with somebody without the disability. The social context will often be very relevant in determining whether particular treatment was indeed 'less favourable'. I am not advocating, for example, a definition of disability that defines it in terms of social disadvantage, as that would threaten to become uselessly circular – although it is not such a bad gateway provision for determining who gains the protection of the Act.²⁹ However, regardless of how effective the DDA might be, for the reasons discussed above it represents disability as a problem belonging to individuals, removed from any wider social conditions. So, when applying the Act, courts are able to ignore wider social or structural issues when determining whether discrimination has occurred.³⁰ The High Court decision in *Purvis* gives a good illustration of how neglect of structural issues and a focus on disability as a problem of the individual can have problematic results.

²⁷ HREOC, *Conciliated Settlements* (2006) Human Rights and Equal Opportunity Website: Disability Rights, <http://www.humanrights.gov.au/disability_rights/decisions/conciliation.html> at 6 August 2006.

²⁸ The remedies available to a successful complainant are set out in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PO(4).

²⁹ For example, the definition in the *Americans with Disabilities Act* 42 USC §12102(2)(a) (1992) defines disability as 'a physical or mental impairment that substantially limits one or more major life activities', which limits somewhat the range of disabilities to which it will apply and raises the question: what constitutes a major life activity or a limit to it?

³⁰ Alan D Freeman, 'Anti-Discrimination Law: a Critical Review' in David Kairys (ed), *The Politics of Law: a Progressive Critique* (1982) 96, 98-9.

IV CRITIQUING CONTEMPORARY LEGAL APPROACHES TO DISABILITY

A *Purvis v NSW*

The following facts represent a highly condensed version of the 28 pages of facts and history in the Inquiry Commissioner's decision.³¹

Daniel Hoggan was a ward of the state. As a baby he had sustained severe brain injury as a result of encephalopathic illness. As a result of that illness, Daniel now has visual impairments and an intellectual disability. The intellectual disability manifests in 'disinhibited and uninhibited' behaviour. A psychologist described the behaviour:

He acts without a view of consequences or an intent on the behaviour, so he is more prone to strike out, to become – it's probably as a last resort. Initially he may withdraw. As he becomes frustrated he may start talking to himself, he may start sort of using offensive words, to isolate himself or – he may isolate himself and use offensive words – become aggressive and push somebody away, strike out at somebody who is not involved, all as a sense of not being able to articulate what the problem is that he's having with his feelings.³²

An assessment completed by the Department of Community Services listed specific behaviours including 'swearing, kicking wall and furniture, hitting people, refusing to attend school and deliberately wetting himself, refusal to attend class, physical aggression against school staff'.³³

Towards the end of his primary schooling Daniel's guardians, Alexander and Clemency Purvis, had enrolled him in a mainstream primary school, which had been successful. When the time came to send him to high school they approached South Grafton High School (SGHS), their local high school, rather than send him to a 'special' school, believing that the opportunity to participate in a 'normal' school environment would benefit Daniel developmentally. Such a view was supported by at least one witness: '[Daniel's] contact with peers who are not diagnosed with disability is essential for Daniel to develop appropriate behavioural norms and social integration'.³⁴

Initially, the school rejected the proposed enrolment. However, after the appointment of a new principal, Daniel was allowed to enrol. After seven months of preparation and negotiation between the Purvises and the school, teachers, the Teachers Federation, the Distance Education unit of the Department of Education

³¹ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75,110-75,138 (Commissioner Innes).

³² Norman Lord, quoted in *ibid*.

³³ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75,132 (Commissioner Innes).

³⁴ *Ibid*.

and Training, and the Department of Community Services, Daniel commenced at SGHS in early April 1997. He was assisted in classes by teachers' aides.

Between April and September 1997 Daniel was suspended five times for his behaviour, which included swearing and kicking students, and hitting his aide. There were also other instances of inappropriate behaviour recorded, including the kicking, punching and biting of his aide, swearing and pushing other students. The suspensions were given on the basis of a Draft Welfare and Discipline Policy developed to 'cater for the special needs of Daniel Hoggan'. The Policy set out a list of behaviours and the consequences that would attach to each. In spite of the problems listed, there are indications that Daniel was benefiting; he was making friends and participating in school life.

Subsequent to the final suspension in September 1997, in December Daniel was excluded from the school on the basis that 'the situation that caused his last suspension for very violent behaviour [had] not been resolved'. Also, the health and safety of the staff and students were identified as matters of 'great concern',³⁵ the implication being that Daniel posed an unacceptable threat to them.

Alexander Purvis made a complaint on behalf of Daniel to the Human Rights and Equal Opportunity Commission (HREOC), alleging that the treatment Daniel had received at SGHS, which had concluded with his exclusion from the school, amounted under the DDA to direct discrimination on the ground of his disability. To prove direct discrimination, it was necessary to show that Daniel received less favourable treatment because of his disability when compared with a person without his disability in the same, or not materially different, circumstances.

The Inquiry Commissioner, Graeme Innes, upheld the complaint, finding that Daniel had been subjected to less favourable treatment (than other students in Year 7 at the school) because of his disability. Commissioner Innes found that Daniel had a disability for the purposes of the Act.³⁶ Difficulties arose because this disability manifested in anti-social behaviour. Although it was argued that Daniel received the treatment that he did because of his behaviour (not his disability), Commissioner Innes held that Daniel's disability and the behaviour were so closely connected that they should be treated as the same thing.³⁷ Under the test for direct discrimination in s 5, the comparator is a person in the same, or not materially different, circumstances, without the disability. Because Commissioner Innes had determined

³⁵ Letter from the Principal of SGHS to DOCS regarding the decision to exclude Daniel from the school, quoted in *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75, 125.

³⁶ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75,146 (Commissioner Innes). In fact Commissioner Innes identified six different ways in which Daniel had a disability for the purposes of the Act.

³⁷ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75,166-7 (Commissioner Innes), cites several cases supporting this approach, including *X v McHugh* (1994) EOC ¶92-623; *L v Minister for Education* (1996) EOC ¶92-787; *Y v Australia Post* (1997) EOC ¶92-865.

that in Daniel's case the behavioural manifestation constituted the disability for the purposes of the Act, he found that the correct comparator was a student in Year 7 who did not have the disability. But, because of the indivisible nature of the behaviour and the disability, the comparator was a student without the disability who had not behaved in the same way as Daniel.³⁸ No other students in Year 7 had been suspended or excluded, for any reason, so this was enough to conclude that Daniel had received less favourable treatment.

The NSW Department of Education and Training appealed this decision to the Federal Court. Justice Emmet upheld the appeal, finding that HREOC had erred, and remitted the case to HREOC for redetermination.³⁹ Central to his finding was a rejection of the way that Commissioner Innes had understood disability and the comparator that he had chosen for the discrimination test. Emmet J held that subsection (g) makes a logical distinction between the disability and its manifestation, and that where there is no necessary connection between a disability and particular behaviour, as he held to be the case in these circumstances, treatment that was on the basis of that behaviour, rather than on the basis of the disability, would not be discriminatory.⁴⁰ This was because the correct comparator would in fact be someone who manifested the behaviour but who did not have the disability.

Mr Purvis appealed Emmet J's decision to the Full Court of the Federal Court. The Full Court upheld Emmet J's decision and affirmed his reasoning in several areas, particularly in relation to the correct interpretation of the definition of disability, as it applied to Daniel and also in relation to the correct comparator to be used in the direct discrimination test. Like Emmet J, the reasoning of the Federal Court judges separated out the cause from its effect, the impairment from its manifestation. This separation was justified on the basis that subsection (g) of the definition of disability makes a distinction between conduct that is a *consequence* of the disability and the disability itself. Thus Daniel's behaviour

was a consequence of the disability rather than any part of the disability within the meaning of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes.⁴¹

³⁸ In *I W v City of Perth*, above n 1, Toohey J – citing Lockhart J in *HREOC v Mt Isa Mines* (1993) 46 FCR 301 – suggests that to separate the disability from a characteristic attaching to or imputed to that disability could frustrate the purposes of anti-discrimination legislation, because it could be used to argue that the circumstances are materially different. However, both *I W* and *Mt Isa Mines* were distinguished by the full Federal Court on the basis that they related to 'a different issue in a different statutory setting': *Purvis obo Hoggan v State of NSW (Dept of Education)* [2002] FCAFC 106, [24] (Spender, Giles and Conti JJ).

³⁹ *State of NSW (Dept of Education) v HREOC & Purvis obo Hoggan* (2001) EOC ¶93-171, 75,605 (Emmet J).

⁴⁰ *State of NSW (Dept of Education) v HREOC & Purvis obo Hoggan* (2001) EOC ¶93-171, 75,604-5 (Emmet J). At ¶75,604 Emmet J stated: 'Thus, it is the disorder or malfunction or disorder, illness or disease that is the disability. It is not the symptom of the condition that is the disability.'

⁴¹ *Purvis obo Hoggan v State of NSW (Dept of Education)* [2002] FCAFC 106, [28] (Spender,

The rather unnatural distinction between disability and manifestation allowed the Court to say that the treatment Daniel received was on the basis of his behaviour. As indicated above, this means that the correct comparator is no longer a student without the disability in the same year without the behaviour, but a hypothetical student who had behaved in the same way. Since any student who had behaved as Daniel did would have received the same treatment, there had been no discrimination and the full Federal Court rejected the appeal.

Mr Purvis took his appeal to the High Court.⁴² Here, a majority⁴³ rejected his appeal, but on slightly different grounds from those of the Federal Court. They did recognise that to separate the disability from the manifestation could lead to problems:

to focus on the cause of 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. Such a construction of the Act should be adopted only if its language requires it.⁴⁴

However, the interpretive approach that they took meant that, while they purportedly recognised the problems of the Federal Court's approach, ultimately their reasoning produced the same effect. In essence the majority held that under the direct discrimination test in s 5 the circumstances – 'all of the objective features which surround the actual or intended treatment of the disabled person by [the discriminator]'⁴⁵ – must be taken into account. This was because

[i]t would be artificial to exclude (and there is no basis in the text for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability⁴⁶

This led to the conclusion that the circumstances included Daniel's behaviour, and the way that he had acted: 'His violent actions towards teachers and other formed part of the circumstances in which it was said that he was treated less favourably than other pupils'.⁴⁷ Now that the circumstances were to be taken into account, however, the comparator to be used was to be a student without the disability but

Giles and Conti JJ).

⁴² *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

⁴³ Justices Gummow, Hayne and Heydon with Chief Justice Gleeson and Justice Callinan agreeing in separate judgments.

⁴⁴ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [212] (Gummow, Hayne and Heydon JJ).

⁴⁵ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [224] (Gummow, Hayne and Heydon JJ).

⁴⁶ *Ibid.*

⁴⁷ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [225] (Gummow, Hayne and Heydon JJ).

who acted in the same way. This allowed the majority to conclude that there was no less favourable treatment of Daniel, because any student without the disability who had hit or kicked teachers or other students would have been treated in the same way as Daniel was. Thus, the school had not discriminated against Daniel, and the appeal was rejected.

Justices Kirby and McHugh joined in a dissenting judgment. They rejected the Federal Court's approach, but also disagreed with the majority. They held that the definition of disability in the DDA extended to functional limitations resulting from an underlying condition, which included Daniel's behaviour.⁴⁸ Also, they held that the correct comparator was not a student with behavioural problems, but a student without the disability and without the behaviour and that Daniel was treated less favourably by denying him benefits and subjecting him to detriments that he would not have experienced that treatment.⁴⁹ Finally, they held that Daniel would not have suffered less favourable treatment had he been provided with accommodations or adjustments that took his disability into account.⁵⁰ This recognition was significant since the DDA, unlike most other pieces of disability specific discrimination legislation, does not impose any explicit obligation on respondents to provide services or facilities which meet the special needs of a person with a disability.⁵¹ The concept of adjustments allows an 'equal comparison' between the person with the disability and the comparator without the disability. The absence of an explicit requirement in the DDA can explain some of the difficulties encountered in applying the comparative test in *Purvis*.

While the recognition by Kirby and McHugh JJ that people with disabilities will require provision of special adjustments which take their differing needs into account is certainly a positive step, their treatment of the issue leaves something to be desired. They held that, while the DDA does not impose any *legal* obligation on a respondent to provide accommodations for a complainant with a disability, the provision of accommodation may be required as a matter of *fact* to avoid a finding of accommodation. Thus, they suggest that the Act contains a 'recognition' of the need for their provision,⁵² but stop short of implying a legal obligation into the Act. The problem with this approach is that it does not provide any guidance to potential discriminators as to the circumstances in which they might have to provide

⁴⁸ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [67], [80] (Gummow, Hayne and Heydon JJ).

⁴⁹ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [134]-[136] (Gummow, Hayne and Heydon JJ).

⁵⁰ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [136] Gummow, Hayne and Heydon JJ).

⁵¹ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [203] (Gummow, Hayne and Heydon JJ). For a paradigmatic example of an accommodation requirement, see the *Americans with Disabilities Act* 42 USC §12112(5)(A) (1992).

⁵² *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [105] (Gummow, Hayne and Heydon JJ). For a paradigmatic example of an accommodation requirement, see the *Americans with Disabilities Act* 42 USC §12112(5)(A) (1992).

accommodations. Thus, the vagueness of this formulation tends to undermine the positive nature of their suggestion.

B *The Consequences of the Majority Approach in Purvis*

Both the Federal Court and the High Court majority focused very closely on the correct interpretation of the Act. In doing so, their focus was on Daniel, his impairments and his behaviour. Very little attention was paid to any wider social context. Where it was considered, it was only in terms of how Daniel's 'violence' threatened the safety of the wider community of students and staff. Again, the problem was located firmly within the individual. A preferable approach would have been to examine the wider social context as it relates to education and people with disabilities. For example, central to the Purvises' decision to send Daniel to SGHS was the belief that attending an ordinary school would aid his social and intellectual development. This coincides with an explicit goal of many who support disability rights: 'mainstreaming'. They advocate the integration of children with disabilities into mainstream school classrooms, rather than forcing them into segregated schooling.⁵³

Practices of segregated education, where special institutions dedicated to instructing the deaf, blind or 'mentally deficient' began to become common in Europe and Australia during the mid-nineteenth century.⁵⁴ The first State-run school for 'feeble-minded' children was opened in Victoria,⁵⁵ but it was not until 1974 that the Education Department of New South Wales took over responsibility for the education of students with disabilities.⁵⁶ Until quite recently, therefore, people with disabilities in New South Wales had been practically and symbolically excluded from 'normal' education. More recently, however, an explicit discourse of inclusion and integration, in the form of the 'mainstreaming' principle, has resulted in more students with disabilities being included in regular classroom settings, rather than being relegated to 'special' schools.

The Federal Court and High Court majority decisions give implicit support to the idea that segregated or 'special' schools are acceptable. Further, they perpetuate an individualised model of disability by not addressing the need for change within a

⁵³ See Gerard Quinn, Maeve McDonagh and Cliona Kimber, *Disability Discrimination Law in the United States, Australia, and Canada* (1993), particularly the Introduction. This book was cited in support of the principle in *Dalla Costa v The ACT Department of Health* (1994) EOC ¶92-663, which in turn was quoted at length by Commissioner Innes in his decision in *Purvis*, above n 31, ¶75,164.

⁵⁴ John Lewis, 'Integration in Victorian Schools: Radical Social Policy or Same Old Wine?' in Roger Slee (ed), *Is There a Desk With My Name On It? The Politics of Integration* (1993) 9, 9-10.

⁵⁵ *Ibid* 16.

⁵⁶ Tony Vinson, *An Inquiry into the Provision of Education in New South Wales Third Report: Chapter 9 – The Inclusion of Students with Disabilities in Mainstream Classes* (2003) NSW Public Education Inquiry, <http://www.pub-ed-inquiry.org/reports/final_reports/hapter_9.pdf> at 2 February 2006, 31.

mainstream school, focusing instead on Daniel and his ‘violence’ as the problem. Commissioner Innes explicitly recognised that SGHS had failed to access adequately resources that would have been beneficial for Daniel’s integration into the school,⁵⁷ implying that greater institutional change was possible and would have assisted. The appeal decisions make no reference to the possibility of institutional change, apparently seeing this as irrelevant to the question at hand. Given that Daniel was unable to fit into the school without some flexibility to take account of his disability, unless he conformed he was going to be excluded. This implicitly legitimates the status quo, in which ‘normal’ children are educated at ‘normal’ schools while those who are identified as abnormal are excluded. By locating the problem within the student, the solution becomes limited to dealing with that problem in individual terms. Since it is easier to remove a single, ‘abnormal’, person than to consider changing the system, the exclusion experienced by students with disabilities inevitably continues.

In Daniel’s case disability was reduced to individual, pathological behaviour and that behaviour was, in turn, reduced to violence and threat. The members of the High Court majority were concerned with the threat that Daniel posed to the rest of the school. For example, Justice Callinan was most explicit as to how he saw the relationship between disability and behaviour:

The definition of disability is not to be read as covering criminal or quasi-criminal behaviour. And by criminal behaviour I do not mean only behaviour not excusable by reason of an absence of mens rea. Whether there may or may not be such a defence available is a different matter from the nature of the physical acts which, on their face, involve unlawful behaviour. If it were otherwise, behaviour with the capacity to injure, indeed even kill someone, or to damage property (by, for example, burning a school down) could be excused, and the [Department of Education and Training] bound to tolerate it, or seek to abate it, no matter how difficult, disruptive, expensive, or ineffectual measures for abatement might be.⁵⁸

The rest of the majority were a little more guarded in their written judgments – for example, Chief Justice Gleeson described Daniel’s actions as ‘violence’ or ‘violent’,⁵⁹ while Justices Gummow, Hayne and Heydon stated that ‘Daniel’s actions constituted assaults’.⁶⁰ Redman’s analysis of the Special Leave Application before the High Court illustrates well their fears.⁶¹

That was not the true basis here, on one view of it anyway (for Daniel’s treatment) ... It was the violence. (Gummow J)

⁵⁷ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75,155.

⁵⁸ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 [271].

⁵⁹ See eg *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [11].

⁶⁰ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [227].

⁶¹ The statements below are listed by Redman, above n 21, 33.

Now if his behaviour had included repeated attempts to burn down the school, could he have been excluded lawfully? (Gleeson CJ)

It is my question too: could this kid have been excluded if he had burned down the school? (Gummow J)

But does that mean that on the true construction of this Act, if the child repeatedly tried to burn down the school, the school should not have excluded him. (Gleeson CJ)

Well it is a pretty huge flaw if you are right because you can think of any number of examples. If, for example, a child's disturbed behaviour consists not of punching the boys but of sexually assaulting the girls, exactly the same problem would arise. (Gleeson CJ)

Redman's discussion also demonstrates well some of the problematic consequences of focusing on the individual as the source of the problem, or in this case, 'threat'. As she indicates, the High Court justices are not actually suggesting that Daniel did those things,⁶² but their reasoning is problematic because it does not distinguish between what occurred (the 'real' risk or threat) and these extreme hypotheticals. She points out that

by describing the behaviour as 'violence' and using examples of clearly criminal activities, [the description as 'violence'] takes it altogether out of the realm of the inappropriate behaviour that children get up to at school.⁶³

The examples given bear little relation to the incidents which occurred in Daniel's case, which would probably have gone unnoticed in many other cases, save for the fact that there was a heightened level of scrutiny around Daniel because he had been labelled 'disabled'. For example, Daniel's aides used a reporting mechanism called a Communication Book to keep track of his behaviour. This record, specific to Daniel, meant that all of Daniel's actions – 'good' behaviour and 'bad' behaviour – were subject to continual scrutiny. As Redman explains: 'Daniel is always being treated as if he has a disability, all his actions are seen through that filter, and the complexity of his experience is ignored'.⁶⁴

A significant aspect of the experience being ignored was that, as indicated above in the evidence presented by Commissioner Innes, Daniel seemed to be benefiting from his exposure to 'normal' kids in a 'normal' classroom. However, such information was not seen to be relevant to the situation by the High Court majority, which preferred to focus on the school's response to the 'problem' created by Daniel and his (bad) behaviour. The majority advocated an approach that took into account all the objective features surrounding the allegedly discriminatory treatment. However, they took a rather restricted view of what constituted those

⁶² Ibid.

⁶³ Ibid 33-4.

⁶⁴ Ibid 34.

features, limiting their concern to the manifestation of Daniel's disability in behaviour and how that would have been dealt with in another child. Thus, all the features or all the circumstances seem to be directly related to Daniel as the problem that needs to be addressed. However, there seems to be an equally legitimate argument for looking to all the circumstances surrounding the incident and asking: what did the school do or not do to assist Daniel? The evidence suggests, as indicated above, that the school did not do everything that it could have done to access the resources that were available to it to assist Daniel and to manage his behaviour. Commissioner Innes listed numerous ways in which the school had failed to adequately provide for Daniel's needs including a failure by the school to access advice from specialists in special education,⁶⁵ to consult broadly in the development of the Draft Welfare and Discipline policy⁶⁶ to adjust the policy in light of Daniel's actual needs⁶⁷ or to adequately train, prepare or inform Daniel's teachers about the nature of his disability and how to manage it in their classrooms.⁶⁸ If the school had not provided adequate support, Daniel can hardly be 'blamed' for not adapting to the school environment.

When Daniel and his disability are seen as the source of the 'problem', as the school obviously originally did, and as the High Court majority did, then the logical result seems to be removal. However, if the 'problem' is seen in a wider context – taking into account the gradual shift in education from segregation to inclusion, the Purvises' desire to have Daniel educated in a mainstream setting and the benefits that Daniel was gaining from his exposure to 'normal' students – then the school's failure to provide support for his needs can be seen as discriminatory. Daniel was treated less favourably than other students at the school, not just because he was expelled and no-one else was, but because his educational needs were not provided for and those of the other students, without his disability, were.⁶⁹

I am not suggesting that the Court needed to engage itself in debates about educational inclusion, although those debates might well have been instructive and, in fact, handing down the *Purvis* decision brought the Court within the scope of those debates anyway. I am simply arguing that looking to the wider context in which allegedly discriminatory treatment occurred, rather than focusing on the individual, is an approach that offers greater scope for achieving the objects of the Act.

V CONCLUSION: HARD CASE OR ... ?

⁶⁵ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75, 174.

⁶⁶ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75, 174.

⁶⁷ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75, 175.

⁶⁸ *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 75, 176.

⁶⁹ My conclusions here are not unlike the approach that was originally taken by Commissioner Innes in his determination of the complaint before HREOC. See *Purvis obo Hoggan v NSW (Dept of Education)* (2001) EOC ¶93-117, 74, 174-177.

In a very thorough examination of the High Court's decision in *Purvis*, Susan Roberts conjectures that the case is an example of the aphorism 'hard cases make bad law'. She suggests that 'the factual scenario in *Purvis* was extreme ... [t]he case gave rise to a balancing of legal and policy issues in a manner that has not previously been seen in a case decided under the DDA.⁷⁰ Further, due to what Justices Kirby and McHugh identified as an 'anomaly' in the drafting of the legislation, the school was precluded from arguing the defence of unjustifiable hardship. It was not able to attempt to excuse its actions by arguing that taking a course of action that was not discriminatory would have caused it hardship.⁷¹ As Roberts points out, it is in the determination of unjustifiable hardship that the school could have raised issues such as its duty of care to other students and to staff – issues that it was precluded from arguing in the absence of the unjustifiable hardship defence. As a result, she suggests, the majority may have arrived at its construction of s 5 '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?'⁷² She argues that such an approach could explain the adoption of the problematic interpretation of the definition of 'disability' that the majority applied, in particular their decision to separate the manifestation from its cause. These two factors lead Roberts to contend that '*Purvis* was not the best factual vehicle for a consideration by the High Court of section 5'.⁷³

However Roberts's arguments, and those of the majority in the High Court if her analysis of the reasons underlying their approach is correct, seem to rest on an assumption: that the facts in the *Purvis* case were indeed 'extreme'; so that Daniel did in fact pose an uncontrollable threat to the life and safety of the other members of the school community. Given the way in which the facts were represented by the High Court majority, it would be easy to accept that Daniel was violent and that consequently the school was justified in removing him. However, as Redman's analysis indicates, the High Court's concerns about the risk of 'violence' seem to rest on stereotyped understandings of behavioural disability. Further, Redman brings into question whether the response would have been the same had Daniel's actions not occurred within a framework of 'behavioural disability' and the heightened scrutiny that this carried with it. Daniel's behaviour did not involve the arson, serious damage to property or sexual assault that the High Court majority referred to, and which could legitimately be designated as 'extreme' cases. Therefore I would dispute that *Purvis* does actually constitute a 'hard' case within

⁷⁰ Susan Roberts, 'The Inequality of Treating Unequals Equally: the Future of Direct Discrimination under the Disability Discrimination Act 1992 (Cth)?' (2005) 45 *AIAL Forum* 20, 29.

⁷¹ As indicated earlier, the defence would have been available had the discrimination occurred prior to Daniel's enrolment at the school. The DDA, however, was drafted such that the defence was not available once a student had been enrolled.

⁷² Roberts, above n 70, 30. Kate Rattigan makes a similar argument: '*Purvis v New South Wales (Department of Education and Training): a Case for Amending the Disability Discrimination Act 1992 (Cth)*' (2004) 28 *Melbourne University Law Review* 532, 544.

⁷³ Roberts, above n 70, 30.

the disability sphere. Rather, it raises the challenges that exist in many, if not all, situations involving people with behavioural disability and the quest to include them into mainstream structures and institutions. Granted, *Purvis* exposes some deficiencies in the drafting of the legislation, particularly in relation to the omission of an explicit accommodation requirement and the absence of unjustifiable hardship defence.⁷⁴ Nevertheless, by employing the insights of the social model theorists it is possible to identify an alternative basis for approaching the case, in spite of the limitations imposed by poor drafting.

Rather than immediately focusing on the individual and the problem he posed for the school, the majority could as easily have commenced by examining the barriers to participation imposed by the school. Had the majority taken account of SGHS's failure to properly determine Daniel's needs, or the best ways to respond to those needs and his difficult behaviour, their application of the direct discrimination test could have been radically different. Had the majority inquired into whether barriers imposed by the school had resulted in Daniel receiving less favourable treatment compared to a student without his disability, they may well have concluded that he had and that discrimination had occurred.

Apart from the individualised framework of the Act discussed in Part III above, there is nothing in the Act that necessarily dictates the highly individualised focus that the majority adopted. At the same time, there is nothing in the Act to prevent an interpretive approach that recognises that disability is largely a result of social processes and barriers. In fact, such an approach is, in my opinion, more likely to achieve the objects of the Act. While it might require a broader and more flexible construction of the legislation than the majority demonstrated in *Purvis*, the High Court has previously held that anti-discrimination legislation should be broadly construed where that would assist in obtaining its objectives.⁷⁵

Unfortunately, as indicated at the beginning of this paper, this case is another in a line of increasingly restrictive interpretations of Australian anti-discrimination laws. Instead of attempting to find an approach that would further the objects of the Act, the majority in *Purvis* settled on one that justified the exclusion of Daniel Hoggan and that has the potential to exclude many other people with disabilities. It is possible that in this area we will never again see a case as problematic as *Purvis*, given that the DDA has been amended to extend the availability of the unjustifiable hardship defence and to bring the Act into line with the recently introduced Disability Standards for Education which place an explicit obligation on educational institutions to make reasonable adjustments for a student's needs.⁷⁶

⁷⁴ For discussions of these deficiencies see Roberts, above n 70, 30-5; Rattigan, above n 72, 555-8; Samantha Edwards, 'Purvis in the High Court: Behaviour, Disability and the Meaning of Direct Discrimination' (2004) 26 *Sydney Law Review* 639, 649-50.

⁷⁵ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *I W v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-3 (Gaudron J), 27 (Toohey J), 39, 41-2 (Gummow J) and 58 (Kirby J); *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J).

⁷⁶ See *Disability Standards for Education* 2005, ss 3.4, 3.5. The recently inserted DDA s 31(1A)

Nevertheless, the basic facts giving rise to *Purvis* are by no means isolated⁷⁷ and similar situations are likely to arise again. In spite of the obligation to provide reasonable adjustments that now exists, any examination of whether an educational institution's response to a student's disability was 'reasonable' is likely to be influenced by the highly individualised approach demonstrated by the High Court majority. That is, what will be considered a 'reasonable' adjustment will be substantially circumscribed because the majority in the High Court provided no indication that structural issues might be relevant in cases involving disability and education. Thus a 'reasonable adjustment' is likely still to focus on what can be provided for or to the individual and not on how the wider institutional structure might be changed to alleviate its disadvantaging nature.

It is also important to note that the decision in *Purvis* has relevance for cases outside the education arena, and particularly in that of employment, because the majority's interpretation of the direct discrimination test in s 5 is applicable to all areas of life in which the DDA prohibits discrimination. For example, there is no obligation on employers to provide employees with reasonable adjustments. There is a real possibility that courts will approach direct disability discrimination in the employment context in a very similar way to the way the High Court approached the issues in *Purvis*, ignoring the fact that people with disabilities often require adjustments to enable them to participate equally and focusing on the way that the individual failed to fit into established employment structures courts ultimately justifying disadvantageous treatment by employers.

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

makes it clear that standards can include reasonable adjustments requirements. In the absence of such clarification, there was a risk that the Standards would have been invalid due to extending beyond the scope of the DDA. For such a view see Glenda Beecher, 'Disability Standards: the Challenge of Achieving Compliance with the *Disability Discrimination Act*' (2005) 11 *Australian Journal of Human Rights* 139, 144-145.

⁷⁷

See eg *Mimms v State of NSW* [2002] FMCA 60.