SUBMISSION TO PRODUCTIVITY COMMISSION ON DRAFT REPORT
REVIEW OF THE *DISABILITY DISCRIMINATION ACT 1992*

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Impact of *Purvis v NSW (Department of Education and Training) 2003* HCA 62

The recent decision of *Purvis v NSW (Department of Education and Training)* impacts on the draft report in four important areas:

- Definition of disability
- Identifying the comparator for the purposes of section 5
- The requirement to make 'reasonable adjustments' under the DDA
- 'Unjustifiable hardship'

Definition of disability

The High Court decision clarifies and affirms the breadth of the definition of disability in the DDA. Both the majority of the High Court (Gummow, Hayne and Heydon JJ)[1] and the minority judges (McHugh and Kirby JJ)[2] agreed that the definition of disability in section 4 is an inclusive one and has to be read as a whole, not as a list of mutually exclusive criteria. They rejected the distinction drawn by the NSW Department of Education and Training between a disability and behaviour which is a manifestation of the disability. Consequently no further clarification of the definition of disability is required in the Act. The High Court has made it clear that behaviour which is a consequence or manifestation of a disability is included in the Act.

The 'comparator' for the purposes of section 5

The Draft Report identified the problem of establishing an appropriate comparator for the purposes of section 5 in draft recommendation 9.2. The *Purvis* decision further highlights the need for further clarification. The majority of the High Court (Gummow, Hayne and Heydon JJ) held that the appropriate comparator was a person without a disability who exhibited similar behaviour. The use of such a comparator seriously undermines the operation of the Act, especially in the absence of any positive duty to accommodate (see below). By contrast the approach of the minority judges is one which is consistent with the objects of the DDA. The minority (McHugh and Kirby JJ) held that the appropriate comparator is a person without the complainant's disability.

The approach of the minority is consistent with section 5 when read as a whole. Unusually for a provision on direct discrimination, section 5 includes a provision that circumstances are not materially different merely because the person with a disability requires 'different accommodation or services'. Section 5(2) recognises that people with disabilities may require accommodations to enable them to participate on an equal

1 Paras 209 - 212
2 paras 60 - 80, especially 78 - 80

footing with their non-disabled peers. Using a comparator who does not have the complainant's disability is consistent with this approach and with the objects of the DDA. Recommendation 9.2 should therefore adopt a comparator which is consistent with the objects of the DDA and therefore should make it clear that the appropriate comparator is a person without the complainant's disability.

Duty to make reasonable adjustments

There is no express duty to accommodate or duty to make reasonable adjustments in the DDA. The duty is implied from the terms of various provision of the DDA including sections 5, 6, 11, 15 and 22. The Draft Report recommends against a specific section mandating the duty to accommodate, recommending instead clarification of section 5 (see Draft recommendation 9.2 seeks an amendment to the DDA to 'make failure to provide 'different accommodations or services'... 'less favourable treatment') and an extension of the defence of unjustifiable hardship to all substantive areas covered by the DDA. However, following the Purvis decision it is my submission that the final Report should recommend amendment of the DDA to include an express duty to make reasonable adjustments. This would be coupled with an extension of the defence of unjustifiable hardship to all substantive areas.

While the majority of judges in the High Court, in *Purvis*, did not consider the duty to make reasonable adjustments in any detail, the minority considered the issue in some detail. In obitur dicta McHugh and Kirby M held there is no implied positive duty to make reasonable adjustments under the DDA. Rather, they held that, in the absence of an express duty to make reasonable adjustments, the Act operates in a negative fashion. According to McHugh and Kirby JJ there is no obligation to make adjustments or accommodations but a failure to make reasonable adjustments may lead to a finding of unlawful discrimination. With respect, such an approach seriously undermines the objectives of the DDA and the operation of the Act. It is therefore necessary, in my submission, to amend the DDA to include an express duty to make reasonable adjustments. The definition of the term 'reasonable adjustments' or 'reasonable accommodation' should be very broad to allow the necessary case by case assessment.

'Unjustifiable hardship'

The duty to make reasonable adjustments should be to the point of 'unjustifiable hardship'. The defence of 'unjustifiable hardship' should, therefore, be extended to all substantive areas under the DDA, as recommended in the Draft Report.

The factors to be taken into account in assessing 'unjustifiable hardship' were consider by McHugh and Kirby JJ in *Purvis*. Their Honours make it clear that an assessment of 'unjustifiable hardship' under section 11 must take into account the benefit and detriment to all persons concerned in the case. The earlier case law makes it clear that in particular cases it may be necessary to include an assessment of community wide costs and benefits. However, the Draft Report goes further and recommends that section 11 be amended to 'clarify that community-wide benefits and costs should be taken into account'. While on the face of it this is an attractive proposal, in my submission it has the potential to seriously undermine the DDA. At present it is clear that each situation is

judged on its own merits. The defence, as it stands, allows distinctions to be made between the ability of a small business to make accommodations/adjustments and that of a large employer. If community wide costs and benefits are to be taken into account in every case it is possible that the duty to make reasonable adjustments could be severely undermined to the detriment of the most vulnerable in the community. At present community wide costs and benefits can be taken into account where they are relevant but otherwise need not be taken into account. Broadening the defence of unjustifiable hardship to all substantive areas covered by the DDA is a sufficient expansion of the defence and in my submission it is unnecessary and potentially counter productive to extend the criteria in section 11 as set out in Draft Recommendation 10.2.

Conclusion

In my submission the DDA should be amended to include a positive duty to make reasonable adjustments. It should also be amended to extend the defence of 'unjustifiable hardship' to all substantive areas covered by the Act. Section 11 does not however, require any farther amendment to mandate the inclusion of a community wide cost benefit analysis.