HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

ALEXANDER PURVIS on behalf of DANIEL HOGGAN APPELLANT

AND

STATE OF NEW SOUTH WALES (DEPARTMENT OF EDUCATION AND TRAINING) & ANOR RESPONDENTS

Purvis v New South Wales (Department of Education and Training)
[2003] HCA 62
11 November 2003
S423/2002

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

S J Gageler SC with K L Eastman for the appellant (instructed by Legal Aid Commission of New South Wales, Coffs Harbour Regional Office)

M G Sexton SC, Solicitor-General for the State of New South Wales with C A Ronalds for the first respondent (instructed by Crown Solicitor for the State of New South Wales)

J Basten QC for the second respondent (instructed by Human Rights and Equal Opportunity Commission)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with M A Perry intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

G J Williams intervening on behalf of People with Disabilities (NSW) Inc (instructed by New South Wales Disability Discrimination Legal Centre Inc)

CATCHWORDS

Purvis v New South Wales (Department of Education and Training)

Discrimination law – Disability discrimination – Suspension and subsequent exclusion from school of pupil who repeatedly assaulted teachers and other pupils – Where pupil's behaviour a consequence of brain damage – Whether pupil discriminated against on the ground of disability – Meaning of "disability" – Whether obligation to provide reasonable accommodation or make reasonable adjustments for persons with a disability – Whether treatment of pupil was less favourable than treatment that would be given to a person without the disability in "circumstances that are the same or are not materially different" – Whether comparator is a person who does not engage in violent behaviour – Whether pupil received less favourable treatment "because of" his disability – *Disability Discrimination Act* 1992 (Cth), s 5(1).

Words and phrases – "disability", "circumstances that are the same or are not materially different", "because of".

Disability Discrimination Act 1992 (Cth), ss 3, 4, 5, 10, 12, 22.

1 GLEESON CJ. The issue in this appeal is whether the suspension, and subsequent exclusion, from a State high school, of a pupil who repeatedly assaulted other pupils and teachers, and whose behaviour was a consequence of brain damage suffered in infancy, contravened the *Disability Discrimination Act* 1992 (Cth) ("the Act"). The Human Rights and Equal Opportunity Commission ("the Commission") found that there had been a contravention. That decision was set aside by Emmett J in the Federal Court of Australia[1]. The Full Court of the Federal Court dismissed an appeal from Emmett J[2]. The appellant contends that the decision of the Commission was correct, and that the judges of the Federal Court were in error.

2 The facts, and the relevant legislative provisions, are set out in the reasons for judgment of Gummow, Hayne and Heydon JJ. The chronology appended to the reasons of Callinan J sets out the history of the pupil's conduct, and of attempts by the school authorities to deal with the problems it created. In the end, the principal of the school, referring to the pupil's "very violent behaviour", and to his own responsibility for the health and safety of other pupils and members of the school staff, decided upon exclusion of the pupil. That, it is said, amounted to unlawful discrimination contrary to s 22 of the Act, because the educational authority excluded the pupil on the ground of his disability.

3 The case was not argued as one of "indirect disability discrimination" of a kind covered by s 6 of the Act. If it had been, then s 6(b) would have created a difficulty for the appellant. Rather, the case was said to fall within s 5, read in the light of the definition of "disability", in s 4, as including:

> "(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".

4 The definition of "disability" lists a series of physical conditions. The problem in the case arises partly because par (g) begins by reference to physical conditions and then adds a reference to a consequence ("disturbed behaviour") of a condition. It is necessary to relate par (g), with its added reference to resulting behaviour, to the provisions of s 5 as to what amounts to discrimination.

5 The reference to "disturbed behaviour" in par (g) is plainly apt to cover the conduct of the pupil in this case. In considering the wider issue of the

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1 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.

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

relationship of par (g) and s 5, it is necessary to bear in mind the width of that expression. It could include behaviour that is grossly anti-social, dangerous, and criminal. A person who suffers from a disorder that results in disturbed behaviour does not necessarily lack the mental capacity to be guilty of a crime. In some Australian jurisdictions, for example, homicide may be reduced from murder to manslaughter by reason of diminished responsibility, but it is still a serious crime. A person ordinarily cannot escape a conviction for arson by demonstrating that he or she is pyromaniac. Disturbed behaviour may take many forms, and may involve varying degrees of threat to the safety, or the property, of others. From the point of view of other pupils and staff, the conduct of the pupil in the present case was serious. Counsel for the appellant acknowledged that, in principle, his argument would have to be the same even if the conduct had been life threatening.

6 Section 12 of the Act, which addresses the sources of Commonwealth power to enact the legislation, refers, in connection with the external affairs power, to particular treaties, and generally to "matters of international concern". Those matters include the rights of disabled people in general, and disabled children in particular. In the context of the present case, they also include the rights of the other children in the school. Article 3 of the Convention on the Rights of the Child requires State Parties to undertake to ensure the child such protection and care as is necessary for his or her well-being. Article 19 obliges State Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical violence. The present case illustrates that rights, recognised by international norms, or by domestic law, may conflict. In construing the Act, there is no warrant for an assumption that, in seeking to protect the rights of disabled pupils, Parliament intended to disregard Australia's obligations to protect the rights of other pupils. Furthermore, a contention that the legislative power of the Commonwealth Parliament extends to obliging State educational authorities to accept, or continue to accommodate, pupils whose conduct is a serious threat to the safety of other pupils, or staff, or school property, would require careful scrutiny.

7 The Act deals with discrimination in a normative, not a value-free, context. Section 22, with which this case is concerned, proscribes discrimination "against" a person on the ground of the person's disability. In some contexts, discrimination may be regarded, in terms of values, as neutral, or even positive; but not in this context. The Act is concerned with discrimination of a kind that the legislature regards as unjust, and makes unlawful. The question is whether the Act treats certain action taken in respect of conduct that affects, not only the person said to be the victim of the discrimination, but other persons whom the alleged discriminator is obliged by law to protect, as unjust and unlawful discrimination. The first respondent owed a duty of care towards its pupils and

its staff[3]. That is part of the legal background to the operation of the provisions of the Act dealing with education. In its application to educational authorities, the Act enters an area of relationships governed by legal obligations designed to protect the young and vulnerable. In the development of common law principle, it is appropriate, and sometimes necessary, for a court to take account of the need for coherence in the law. For example, in *Sullivan v Moody*[4], the Court asked how a duty of care of the kind there under consideration could be related rationally to the functions, powers and responsibilities of the persons and authorities said to owe that duty. In construing legislation, it may be appropriate to ask a similar question. The obligations which arise from the Act have to be related to the functions, powers and responsibilities of the first respondent. Furthermore, the conduct of the first respondent can only be evaluated fairly in the light of an understanding of those functions, powers and responsibilities. The Act, in its application to educational authorities, and in its prohibition of discrimination against persons on the ground of a disability, requires a judgment both as to alleged differential treatment and as to the ground upon which action was taken. In both respects, it is impossible to ignore the context in which the first respondent, by its officers, was acting. It was charged with the care and protection of all the pupils in the school in question. The first respondent showed concern and sensitivity in its dealings with the pupil. It also recognised its legal responsibilities to the other pupils and to the school staff. If there is a reasonable construction of the Act which avoids a conflict between those responsibilities and the obligations imposed by the Act, then that construction should be preferred. And in the practical application of the Act in an evaluation of the conduct of the first respondent, those responsibilities should be kept in mind.

8 Section 5 of the Act relevantly provides that a person, the discriminator, discriminates against an aggrieved person on the ground of a disability if, because of the aggrieved person's disability, the discriminator treats the aggrieved person less favourably than the discriminator would treat a person without the disability in the same circumstances. Two related questions arise. First, in comparing the treatment of the aggrieved person (here, the pupil) with the treatment that would be given to a person (another pupil) without the disability in the same circumstances, what, if anything, is the other pupil to be assumed to have done? On the appellant's argument, the answer is – nothing. Secondly, was the supposedly less favourable treatment of the pupil because of (on the ground of) the disability? The relationship between those two questions, on the facts of this case, and the dispute to which they have given rise, exists because the pupil's disability is not merely a physical condition, but a physical condition that results in disturbed behaviour.

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3 *New South Wales v Lepore* (2003) 77 ALJR 558; 195 ALR 412.

4 (2001) 207 CLR 562 at 581 [55], [56].

9 The appellant contends that, since the pupil's disability is a disorder that results in disturbed behaviour, and since the disturbed behaviour took the form of violent conduct, then a person without the disability in the same circumstances must be taken to be a person who does not engage in violent conduct. On that approach, the comparison required by the Act is between the treatment received by the pupil (suspension and expulsion) and the treatment that would be received by a pupil who did not assault other pupils. The disturbed behaviour being an aspect of the disability, the treatment that would be received in the same circumstances by a person without the disability is the treatment that would be received by a pupil who did not misbehave.

10 The corollary in relation to the ground of the first respondent's action against the pupil is said to be clear. The appellant points out that an aspect of the pupil's disability was his disturbed behaviour. Since he was suspended and expelled because of his disturbed behaviour, it is said that he was suspended and expelled because of his disability. The same would apply if the disturbed behaviour resulting from a pupil's disorder had taken the form of attempting to burn a school down, or attempting to kill somebody. On the appellant's argument, to suspend or expel such a pupil because of his or her behaviour would be to treat the pupil in that way because of his or her disability.

11 It may be accepted, as following from pars (f) and (g) of the definition of disability, that the term "disability" includes functional disorders, such as an incapacity, or a diminished capacity, to control behaviour. And it may also be accepted, as the appellant insists, that the disturbed behaviour of the pupil that resulted from his disorder was an aspect of his disability. However, it is necessary to be more concrete in relating par (g) of the definition of disability to s 5. The circumstance that gave rise to the first respondent's treatment, by way of suspension and expulsion, of the pupil, was his propensity to engage in serious acts of violence towards other pupils and members of the staff. In his case, that propensity resulted from a disorder; but such a propensity could also exist in pupils without any disorder. What, for him, was disturbed behaviour, might be, for another pupil, bad behaviour. Another pupil "without the disability" would be another pupil without disturbed behaviour resulting from a disorder; not another pupil who did not misbehave. The circumstances to which s 5 directs attention as the same circumstances would involve violent conduct on the part of another pupil who is not manifesting disturbed behaviour resulting from a disorder. It is one thing to say, in the case of the pupil, that his violence, being disturbed behaviour resulting from a disorder, is an aspect of his disability. It is another thing to say that the required comparison is with a non-violent pupil. The required comparison is with a pupil without the disability; not a pupil without the violence. The circumstances are relevantly the same, in terms of treatment, when that pupil engages in violent behaviour. The law does not regard all bad behaviour as disturbed behaviour; and it does not regard all violent people as disabled. The fallacy in the appellant's argument lies in the contention that,

because the pupil's violent behaviour was disturbed, and resulted from a disorder, s 5 always requires, and only permits, a comparison between his treatment and the treatment that would be given to a pupil who is not violent. Rather it requires a comparison with the treatment that would be given, in the same circumstances, to a pupil whose behaviour was not disturbed behaviour resulting from a disorder. Such a comparison requires no feat of imagination. There are pupils who have no disorder, and are not disturbed, who behave in a violent manner towards others. They would probably be suspended, and, if the conduct persisted, expelled, in less time than the pupil in this case.

12 If the appellant's argument is correct, the comparison required by the Act is purely formal. If the person without the disability is simply a pupil who is never violent, then it is difficult to know what context is given to the requirement that the circumstances be the same. Furthermore, if the appellant's argument is correct, the Act places a school authority in a position of conflict between its responsibilities towards a child who manifests disturbed behaviour and its responsibilities towards the other children who are in its care, and who may become victims of that behaviour. The language of the Act does not require such a result. In characterising the actions of the first respondent, for the purpose of applying a law against unjust discrimination by making the comparison required by s 5 of the Act, and in considering all the circumstances in which the school principal acted, to compare the treatment of the pupil with the treatment of some other pupil who, without any disability, behaved violently permits due account to be taken of the first respondent's legal responsibilities towards the general body of pupils.

13 Similar considerations arise in respect of the related issue of identifying the ground of the first respondent's action, which is to be considered in the light of both s 5 and s 10 of the Act. The fact that the pupil suffered from a disorder resulting in disturbed behaviour was, from the point of view of the school principal, neither the reason, nor a reason, why he was suspended and expelled. It is the school authority that is the alleged discriminator, and it is the reason or reasons for action of the responsible officers of the school authority that is or are in question. It is their conduct that is to be measured against the requirements of the Act. If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, ss 5, 10 and 22 are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil[5]. In the light of the school

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5 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176-177 per Deane and Gaudron JJ, 184 per Dawson J, 208 per McHugh J; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J, 400 per McHugh J.

authority's responsibilities to the other pupils, the basis of the decision cannot fairly be stated by observing that, but for the pupil's disability, he would not have engaged in the conduct that resulted in his suspension and expulsion. The expressed and genuine basis of the principal's decision was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people.

14 In identifying and considering the basis of, and/or the legitimacy of, a decision, for the purpose of measuring the conduct of an alleged discriminator against the requirements of the Act, it is proper, and may be necessary, to have regard to the objects of the Act as defined in s 3, and to the scope and purpose of the legislation. Even though functional disorders may constitute a disability, and disturbed behaviour may be an aspect of a disability, it is not contrary to the scheme and objects of the Act to permit a decision-maker to identify a threat to the safety of other persons for whose welfare the decision-maker is responsible, resulting from the conduct of a person suffering from a disorder, as the basis of a decision. Just as questions of causation may be affected by normative considerations arising out of the legal context in which they are to be answered[6], a statutory question as to the basis of a person's decision may be affected by similar considerations. There is no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members. It is not incompatible with the legislative scheme to identify the basis of the principal's decision as that which he expressed. On the contrary, to identify the pupil's disability as the basis of the decision would be unfair to the principal and to the first respondent. In particular, it would leave out of account obligations and responsibilities which the principal was legally required to take into account.

Conclusion

15 The appeal should be dismissed. I agree with the orders proposed by Gummow, Hayne and Heydon JJ.

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6 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 269 [37]-[40].

16 McHUGH AND KIRBY JJ. This case is about discrimination on the ground of disability. It concerns the suspensions and later exclusion from school of a disabled student whose disability occasionally led him to violent and abusive behaviour. It concerns the failure of an educational authority to treat him equally with other students by taking steps that would have eliminated or substantially reduced his disruptive behaviour and allowed him to enjoy the same quality education as his fellow students enjoyed.

17 The *Disability Discrimination Act* 1992 (Cth) ("the Act"), reflecting international developments[7], has introduced important protections for disabled people. In certain cases, the Act requires that disabled persons be given equal treatment and it makes it clear that the equal treatment must be real and not notional. To avoid a finding of discrimination against a disabled person, a person may have to take steps that cause expense and inconvenience to that person. But that is what the Act requires unless the expense and inconvenience amounts to unjustifiable hardship.

18 The international developments reflected in the Act have the high object of correcting centuries of neglect of, and discrimination and prejudice against, the disabled. It would be wrong and contrary to the purpose of the Act to construe its ameliorative provisions narrowly. Yet this is the result of the decision in the court below. The learned judges of the Full Court of the Federal Court who heard the case felt driven to adopt the construction they placed on the Act because of what they expressed as an intuitive feeling that reading the Act in the way contended for by the appellant would impose "draconian consequences" on the first respondent.

19 As Dixon CJ once pointed out[8], "once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions ... are matters entirely for the Legislature and not for the Judiciary." The correct path of judicial interpretation – as always – requires that the Act be applied according to its terms and purposes. If its application in a particular case operates or may seem to operate harshly, it is a matter for the Parliament to correct. And it should not be forgotten that construing the Act narrowly because of the consequences in a particular case may lead to injustices in other cases perceived by the judicial mind as more deserving. In matters of anti-discrimination law generally, and disability law in particular, judicial intuition as to what is "draconian" must be kept in firm check, for sometimes it

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7 Dubler, "Direct Discrimination and a Defence of Reasonable Justification", (2003) 77 *Australian Law Journal* 514 at 515-516.

8 *Burton v Honan* (1952) 86 CLR 169 at 179.

will be based unconsciously on the very attitudes that the law is designed to correct and redress[9].

20 It is essential, therefore, that Australian courts give full effect to the language and purpose of the ameliorative provisions of the Act whatever opinion individual judges may have of the justice or wisdom of particular provisions. This is particularly so where, as here, the Act contains novel concepts and beneficial objects and applies to many cases involving circumstances quite different from the present. Moreover, on the findings of the Commissioner who initially heard the complaint and determined it in favour of the appellant, the first respondent probably would not have been forced to choose between educating or expelling the disruptive and disabled student if it had taken steps that were open to it. Although it is not a relevant issue, taking those steps was not so inconvenient or expensive a course that it imposed unjustifiable hardship on the first respondent.

21 In our opinion this appeal must be allowed.

Statement of the case

22 Mr Alexander Purvis and his wife had the foster care of Mr Daniel Hoggan who was born on 8 December 1984. Mr Hoggan sustained severe brain injury when he was 6 or 7 months old. As a result, he suffers from behavioural problems and other disabilities. In 1998, Mr Purvis complained to the Human Rights and Equal Opportunity Commission ("HREOC") that the State of New South Wales (Department of Education and Training) had discriminated against Mr Hoggan on the ground of his disability. He complained that the State had done so by subjecting Mr Hoggan to a "detriment" in his education and by suspending and eventually excluding him from a State school because of his misbehaviour.

23 The Commissioner appointed by HREOC to determine the complaint found that the State through its agents had treated Mr Hoggan less favourably than it would have treated another student in circumstances that were the same or not materially different and had thereby contravened the Act. The Commissioner found that the State had treated him less favourably by failing to:

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9 Where statutory provisions, or the common law, are not designed to alter common attitudes and stereotypes, intuition can sometimes afford a useful check for judicial reasoning: cf *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 642 [164]; *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 77 ALJR 1396 at 1421 [137]; 199 ALR 497 at 531.

- adjust its policies to suit his needs;

- provide him with teachers with the skills to deal with his behavioural problems; and

- obtain expert assistance to formulate proposals to overcome those problems.

The Commissioner also declared that the State should pay compensation of $49,000 to Mr Purvis for the discriminatory treatment of Mr Hoggan.

24 The Federal Court (Emmett J) set aside the declarations made by the Commissioner and remitted the complaint to HREOC "to make findings and recommendations according to law." His Honour held that, because Mr Hoggan had been suspended and excluded from the school by reason of his misbehaviour, the State had not discriminated against him on the ground of disability. His Honour also held that the State had no legal obligation to accommodate the needs of Mr Hoggan and that, in determining whether he had been less favourably treated than other students, the comparator was a student without a disability who had misbehaved in the same way. The Full Court of the Federal Court dismissed an appeal against the orders made by Emmett J in the Federal Court.

25 Subsequently, this Court granted Mr Purvis special leave to appeal against the orders of the Full Court. HREOC and the State are respondents to the appeal. The Attorney-General of the Commonwealth, acting under s 78A of the *Judiciary Act* 1903 (Cth), intervened in the appeal and made submissions to the Court concerning the construction of the Act. The Court granted People with Disabilities (NSW) Inc, the peak cross-disability rights and advocacy organisation in New South Wales, leave to intervene as *amicus curiae* to provide written submissions on the meaning of the term "disability" in the Act.

26 The issues in the appeal are:

1. Does "disability" as defined in s 4(1) of the Act include the behavioural manifestation of a disorder?

2. Does the Act contain an obligation to provide reasonable accommodation for persons with a disability?

3. Does the comparator for determining whether there has been "less favourable" treatment of the disabled person have that person's characteristics?

4. What is the correct test of causation in determining whether a person has been discriminated against "on the ground of" his or her disability?

27 In our opinion, the behavioural manifestation of an underlying disorder or condition is itself a disability for the purposes of the Act. The Federal Court erred therefore in holding that the Act distinguished between the underlying condition and its manifestations. However, the Federal Court correctly held that the Act does not contain an obligation to provide accommodation for persons with disabilities although, in our opinion, it took too narrow a view of what constitutes "accommodation" for the purpose of the Act. Providing accommodation to meet a person's disabilities goes to the issue under s 5 of the Act as to whether the circumstances of the disabled person are materially different from the circumstances of a person who is not disabled. It goes to an issue of evaluation, not obligation. The Federal Court also erred in holding that the comparator for determining whether there has been "less favourable" treatment of the disabled person has that person's characteristics. The circumstances of the person alleged to have suffered discriminatory treatment are excluded from the circumstances of the comparator in so far as those circumstances are related to the prohibited ground. The contrary view would seriously undermine the remedial objects of the Act. The Commissioner did not err, therefore, in holding that the characteristics of the disabled person cannot be imputed to the appropriate comparator. On the factual findings that he made, the Commissioner did not err in holding that the State through its agents had treated Mr Hoggan less favourably than other students. Finally, the Commissioner applied the correct test for determining whether a person has been discriminated against *on the ground* of that person's disability. The Commissioner applied the test: was the disability a reason for the treatment suffered? That is the correct test, although the Commissioner wrongly described it as a "but for" test.

28 It follows that this appeal must be allowed. However, because the decision of the Commissioner contains legal errors, the award of damages cannot stand. The appropriate order is to allow the appeal to this Court and the Full Court of the Federal Court and to direct that the complaint be remitted to HREOC in accordance with the *Human Rights Legislation Amendment Act (No 1)* 1999 (Cth) and the Human Rights Legislation (Transitional) Regulations 2000.

The material facts

29 Mr Hoggan was a ward of the State. He had been in the full time foster care of Mr Purvis and his wife since 1989. Mr Hoggan sustained severe brain injury when he was about 6 or 7 months old as the consequence of an encephalopathic illness. The injury resulted in damage to the parieto-occipital lobes and bilateral damage to the frontal lobes of his brain. As a result of his brain injury, Mr Hoggan suffers from an intellectual disability, visual difficulties, epilepsy and behavioural problems. Dr Graham Wise, a child neurologist, testified at the hearing before the Commissioner that:

> "The major part of [Mr Hoggan's] difficult behaviour would be disinhibited and uninhibited behaviour. That is, your frontal lobes are very important for you to smooth out emotional ups and downs, to cope with emotional crises in a relatively even way. So he would be likely to have flares of temper which he wouldn't be able to control as well as a child of his age and with this degree of intellectual handicap who did not have those particular frontal lesions."

30 Mr Norman Lord, a registered psychologist employed by the New South Wales Department of Community Services, testified that:

> "He acts without a view of consequences or an intent on the behaviour, so he is more prone to strike out ... 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."

31 In the second half of 1996, Mr and Mrs Purvis enquired about enrolling Mr Hoggan at the South Grafton High School ("the High School") for the 1997 school year. At that time, Mr Hoggan was attending another school. Mr and Mrs Purvis felt that his behaviour had regressed as a result of the segregated environment at that school. They met with the then principal of the High School who rejected their application to enrol Mr Hoggan at that school. In December 1996, the Department of Education and Training appointed a new principal, Mr Barry Bartley, to the High School. Following discussions with Mr and Mrs Purvis and the Department, Mr Bartley decided to enrol Mr Hoggan at the school.

32 Before Mr Hoggan attended the High School, a Draft Welfare and Discipline Policy ("DWD Policy") relating to him was formulated by modifying the Department's existing Student Welfare Policy. One session of a staff development day was used to allow Mr Hoggan's teachers to discuss his enrolment, education and participation at the school. The use of a "progress sheet" to monitor his behaviour was also discussed at this meeting. This form required teachers to grade Mr Hoggan on his participation, co-operation, understanding and behaviour at 20-minute intervals during the class. He was also to be provided with a teacher's aide to assist him in class.

33 Mr Hoggan first attended the High School in April 1997. He attended with sporadic interruptions until December 1997 when he was permanently excluded because of his antisocial and violent behaviour. His problems at the school began in April 1997 when he hit one of his aides because he did not want

to attend school. Despite his previous good behaviour, he was given a one-day suspension instead of the warning prescribed by the DWD Policy. Mr Bartley testified at the HREOC hearing that there was "zero tolerance" for such behaviour in the school. At a case management meeting held on 30 April 1997, Mr Purvis suggested that the DWD Policy might have to be adjusted for Mr Hoggan because he might interpret suspension as a reward, rather than a punishment. No adjustment was made.

34 On 7 May 1997, Mr Bartley suspended Mr Hoggan for two days for verbally abusing a teacher's aide and for kicking a fellow student. Mr and Mrs Purvis asserted that this behaviour related to the inexperience of the aide (who had been working with Mr Hoggan for only three days) and her attempt to force him to go to a physical education class. The Commissioner rejected the aide's view that Mr Hoggan's actions were premeditated because that view did not accord with the medical and psychological evidence.

35 On 8 May 1997, Mr and Mrs Purvis spoke to Mr Bartley about the appropriateness of suspension as a behaviour management strategy. They all agreed that Mr Lord should be contacted and that a meeting should be arranged to discuss behaviour management strategies for Mr Hoggan.

36 On 30 May 1997, Mr Hoggan was placed in "time out" because he kicked a desk over, swore and kicked other children and their bags. The communication book noted that Mr Hoggan "is very stressed about Science test (Monday) (that's what upset him)."

37 In mid-June 1997, Mr Lord attended a case management meeting where he offered to observe Mr Hoggan at school and devise a behaviour management plan for him in consultation with Mr Hoggan's teachers at no cost to the school. The school did not accept this offer.

38 Mr Hoggan again misbehaved on 19, 23 and 24 June and 25 July 1997 but was not suspended. On 30 July 1997, however, Mr Hoggan kicked a teacher's aide and was suspended for two days. The Commissioner accepted Mr Bartley's evidence that at this stage any other student would have been expelled from the school.

39 On 8 August 1997, Mr Peter Garrard and Mr Ken Callan, special education consultants with the Department of Education and Training, attended a case management meeting at the school. Later, they prepared a report recommending a number of strategies for the management of Mr Hoggan's behaviour. They provided the report to Mr Ronald Phillips, the District Superintendent, but he withheld it from Mr Bartley and the case management team because he was not satisfied that its content and recommendations would improve the situation at the school. Mr Phillips thought, despite the wide

consultation referred to in the report, that the authors "had failed to widely consult". He also "felt that people with expertise on the ground were needed rather than a set of recommendations."

40 On 2 September 1997, Mr Hoggan was suspended for a further 13 days (subsequently reduced to 8 days) for kicking another student. This incident occurred after a stressful weekend for Mr Hoggan. He returned to school on 15 September 1997. But on 18 September 1997, he was again suspended for 12 days after punching an aide in the back. This incident occurred after he had continually refused, despite encouragement from the aide and others, to go to class. All decisions to suspend Mr Hoggan were made in accordance with the DWD Policy and the general School Discipline Policy. Violent or inappropriate behaviour was the reason recorded for all of his suspensions.

41 During 1997, a number of people unsuccessfully attempted to overcome the causes of Mr Hoggan's behaviour. In September, following a meeting with the teacher's aides, Mr Robert Field, a special education consultant, made a number of recommendations regarding his behaviour. About this time, Mr Bartley prepared his own plan for Mr Hoggan's ongoing attendance at the school. Ms Carrie Brooks, a program officer with the Department of Community Services, also produced guidelines designed to address Mr Hoggan's behaviour by making environmental changes, increasing alternative communication skills and providing opportunities for stress relief. None of those suggestions was adopted by the educational authority.

42 In October 1997, the school counsellor recommended that Mr Hoggan be moved and enrolled in the Support Unit at Grafton High School. At a meeting held in November 1997, Mr Bartley and others decided that it was in Mr Hoggan's best interests to have him enrol at the Support Unit rather than at the High School. On 3 December 1997, Mr Bartley met with Mr and Mrs Purvis and indicated that he would exclude Mr Hoggan from the High School. On the same day, Mr Bartley wrote to the Department of Community Services, Mr Hoggan's legal guardian, informing the Department that he was excluding Mr Hoggan from the High School. Mr Bartley said that "the situation that caused his last suspension for very violent behaviour has not been resolved". In his letter, Mr Bartley expressed concern for the health and safety of the 80 staff and 1,000 students at the school because of Mr Hoggan's violent behaviour.

The legislation

43 The Act is the product of an international consensus that people with disabilities have long been subjected to discrimination in employment, education, access to premises, providing goods and services and many other areas of social and economic life. In 1982, the United Nations General Assembly adopted a World Programme of Action Concerning Disabled Persons outlining measures to

equalise opportunities for people with disabilities. To encourage implementation of this Programme, the General Assembly proclaimed the period from 1983 to 1992 as the United Nations Decade of Disabled Persons[10]. The Act was passed in 1992, the final year of that Decade[11].

44 The structure of the Act, and to a large extent its detail, are drawn from the *Sex Discrimination Act* 1984 (Cth) and *Racial Discrimination Act* 1975 (Cth)[12]. The drafting of the Act also owes a heavy debt to Australian State anti-discrimination laws[13]. The relevant provisions of the Act are:

> "**Objects**
>
> **3.** The objects of this Act are:
>
> (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
>
> (i) ... education ...
>
> (b) 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; and
>
> (c) 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.

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10 Human Rights and Equal Opportunity Commission, Draft Position Paper, *Disability and Human Rights: Needs and Options for Further Protection*, July 1991 at 35 [3.4].

11 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 1992 at 2751.

12 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 1992 at 2752.

13 Hastings, "FounDDAtions: Reflections on the First Five Years of the Disability Discrimination Act in Australia", (1997) published at http://www.hreoc.gov.au/disability_rights/hr_disab/found.html. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 1992 at 2752.

Interpretation

4. **(1)** In this Act, unless the contrary intention appears:

...

'**disability**', in relation to a person, means:

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

(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; or

(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.

...

Disability Discrimination

5. **(1)** For the purposes of this Act, a person ('**discriminator**') discriminates against another person ('**aggrieved person**') on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to

treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

(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.

...

Education

22. (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) it is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:

(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or

(b) by expelling the student; or

(c) by subjecting the student to any other detriment.

...

(4) This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority."

45 The remedial nature of the Act requires that it be given a broad and beneficial construction[14]. In *IW v City of Perth*[15], Kirby J said:

> "[P]rotective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation."

46 So far as the language of the Act permits, courts should construe the Act in a manner that furthers the goal of truly equal treatment for disabled persons.

The Human Rights and Equal Opportunity Commission hearing

47 On 22 March 1998, Mr Purvis (acting on behalf of Mr Hoggan) complained to HREOC that Mr Hoggan had been discriminated against by the State in contravention of the Act. Mr Purvis claimed that, as a result of Mr Hoggan's disability, he was excluded and suspended from the High School and subjected to a detriment in his education by the failure to make reasonable accommodation for him.

48 An attempt to conciliate the complaint was unsuccessful. Subsequently, HREOC referred the complaint to Commissioner Innes for hearing. The Commissioner found[16] that the State, through its agents, had discriminated against Mr Hoggan by failing to accommodate his disability and that this failure led to the suspensions and Mr Hoggan's ultimate exclusion from the school. The Commissioner held that Mr Hoggan's behaviour was so closely connected to his disability that less favourable treatment on the ground of his behaviour was discrimination on the ground of his disability. The Commissioner also held that, to determine the discrimination issue, Mr Hoggan's treatment by the State had to be compared to that of a student without his disability and therefore without his disturbed behaviour. The Commissioner made a declaration that the State pay $49,000 in compensation.

Relevant findings by the Commissioner

49 The Commissioner found that the State had failed to accommodate Mr Hoggan's disability in three ways. He also made findings on the cause of Mr Hoggan's suspensions and exclusion.

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14 *IW v City of Perth* (1997) 191 CLR 1 at 12, 22-23, 27, 39, 58.

15 (1997) 191 CLR 1 at 58.

16 *Purvis obo Hoggan v The State of New South Wales (Department of Education)* (2001) EOC ¶93-117.

Failure to adjust the Draft Welfare and Discipline Policy

50 The Commissioner found that the State should have consulted more broadly in the development of the DWD Policy. People who were very well placed to participate in the formulation process, such as Mr and Mrs Purvis, the teacher's aides, Mr Lord and Mr Field were not consulted. Instead, the policy was largely based on how the school counsellor thought Mr Hoggan might behave; many of the other people involved in its formulation had not even met Mr Hoggan.

51 The Commissioner found that during 1997 the school did not modify its policy despite its experiences with Mr Hoggan. The failure to do so continued even after Mr Purvis proposed modifications and Mr Lord offered to work in this area. The Commissioner was satisfied that the inflexibility of the DWD Policy and the impact that it had in the decisions to suspend and exclude Mr Hoggan, constituted a detriment in terms of s 22(2)(c) of the Act.

Failure to provide teachers with training or an awareness program

52 The Commissioner found that Mr Hoggan was largely taught by teacher's aides, rather than by teachers. He also found that overall Mr Hoggan's teachers had a very poor knowledge of the nature of Mr Hoggan's disabilities and how they affected his learning and behaviour. Teachers' views about Mr Hoggan's disabilities ranged, for example, from one teacher who "thought it was visual" to another who "did not appreciate that he had a vision disability." The Commissioner found that, although various medical reports relating to Mr Hoggan's disabilities were on his file at the school and the principal was aware of his disabilities, Mr Hoggan's teachers were either unaware of the file or did not read it.

53 In particular, the Commissioner found it "quite concerning" that the special teacher for learning difficulties "did not have an understanding of the relationship between [Mr Hoggan's] disability and his behaviour." He also noted that this teacher was given relief time to assist Mr Hoggan, but appeared to have spent little time with him. In addition, the Commissioner found that the strategy of using the "progress sheets" was not successful. First, Mr Hoggan was the only child monitored in this way. Second, most teachers only completed them to report poor conduct. Because of these inconsistencies, the forms were of little use in formulating behaviour management strategies.

54 The Commissioner found that the limited attempts to make training available to Mr Hoggan's teachers constituted a detriment in terms of s 22(2)(c) of the Act. This failure did "not flow to suspensions and exclusion" and was a ground for separate relief.

Failure to obtain the assistance of experts

55 The Commissioner found that the State (through its responsible officers) did not obtain the assistance of experts in special education or behaviour until late in Mr Hoggan's placement and that even then most of their recommendations were not acted upon. This "failure, in part, led to the eventual ending of the placement." The Commissioner said that the implementation of some or all of the proposals in the report provided by Mr Garrard and Mr Callan could have averted the deteriorating situation that developed as the year progressed. He also found that the State had ignored all but one of Mr Field's recommendations and had not acted upon the recommendations in Mr Bartley's plan for Mr Hoggan's ongoing attendance at the school or the strategies proposed by Ms Brooks.

Cause of suspensions and exclusion

56 The Commissioner said that the failure to adjust the DWD Policy and the failure to engage experts led to the decisions to suspend and ultimately exclude Mr Hoggan. In relation to the suspensions the Commissioner said:

> "As already indicated, I am satisfied that Mr Bartley imposed the suspensions in compliance with the policies and as a result of [Mr Hoggan's] behaviour. Whilst I understand Mr Bartley's approach on this point (zero tolerance to what he described as violence) it was the outcome that may have been different if ... more flexibility had occurred. I accept the evidence of Mr Purvis and Mr Lord that [Mr Hoggan] could not make the association between his behaviour and the suspensions. This does not, in my view, indicate an incapacity to cope with the stresses of high school life. It indicates that other management strategies should have been tried before the placement was brought to an end. Mr Purvis requested this, Mr Lord offered to assist, and Messrs Garrard and Callan made recommendations. None of these options were taken up."

57 In commenting on the decision to exclude Mr Hoggan, the Commissioner said:

> "The complainant's view is that some of the strategies used to manage [Mr Hoggan's] behaviour sent him wrong messages, and actually caused the behaviour to worsen. As an example, it was argued that being suspended (and thus sent home) for hitting or kicking could be perceived by [Mr Hoggan] as a reward rather than a punishment. Also, such punishments isolated [Mr Hoggan] further and increased the chances of him 'acting out'. This view is supported by the evidence of John Lord ... and by the recommendations in the Garrard [and] Callan report ...

> On balance, I am inclined to accept the complainant's view on this issue. I am satisfied that ... had [Mr Hoggan] received some different messages his 'acting out' would not have increased. It is unfortunate that the advice of Messrs Lord, Callan and Garrard were not acted upon, as it is my view that had this occurred [Mr Hoggan's] 'acting out' would have diminished. Had this been the case Mr Bartley and the Department may not have formed the views that they did with regard to [Mr Hoggan's] exclusion."

58 The Commissioner found that the suspensions and exclusion constituted a breach of the Act. Because the inflexibility and failure to consult with experts had other effects besides the suspensions and exclusion, they were ground for separate relief.

The Federal Court proceedings

59 The State applied under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) to the Federal Court for an order of review of the decision of the Commissioner. The State alleged errors of law concerning:

- the meaning of discrimination "on the ground of" a disability;
- the application of s 5(2) of the Act;
- the relevant comparator; and
- the meaning of the words "benefit" and "detriment" in s 22(2) of the Act.

The Federal Court (Emmett J) held[17] that the Commissioner had erred in relation to each of these matters. His Honour set aside the decision of the Commissioner and remitted the matter to HREOC "to make findings and recommendations according to law."

60 Mr Purvis appealed to the Full Court of the Federal Court (Spender, Gyles and Conti JJ), which dismissed the appeal[18]. Both Emmett J and the Full Court held that, for the purposes of the Act, a distinction must be drawn between a "disability" and the "conduct which it causes." They also held that the proper

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17 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.

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

comparison for determining whether there had been discrimination within the meaning of the Act was between Mr Hoggan and another student manifesting the same behaviour. Their Honours rejected the Commissioner's finding that to treat Mr Hoggan less favourably because of his behaviour was to discriminate against him because of his disability.

Issue 1: the meaning of "disability"

61 The Commissioner accepted that, in terms of s 4(1) of the Act, Mr Hoggan's disabilities consist of:

(a) an intellectual disability that manifests in unusual individual mannerisms and disturbed behaviour such as rocking, humming, swearing and at times aggressive behaviour such as hitting or kicking;

(b) an intellectual disability that affects Mr Hoggan's thought processes, perception of reality and emotions, and results in disturbed behaviour;

(c) an intellectual disability that results in Mr Hoggan learning differently from a person without the intellectual disability;

(d) a visual disability;

(e) epilepsy; and

(f) a past disability, namely severe encephalopathic illness.

62 The Commissioner found that Mr Bartley made his decisions to suspend and exclude Mr Hoggan *because of Mr Hoggan's behaviour and not because of his disability*[19]. Accordingly, the Commissioner did not equate Mr Hoggan's behaviour with his disability. But the Commissioner found that Mr Hoggan's behaviour was so closely connected with his disability that less favourable treatment on the ground of behaviour would amount to less favourable treatment on the ground of the disability that caused that behaviour. It appears that this finding is relevant to the issue of causation rather than the definition of "disability".

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19 The fact that the Commissioner also found that Mr Hoggan was excluded for broader reasons than just behavioural, including the view that he "could not operate in a regular high school environment as a result of his disability", is discussed at [169].

63 In the Federal Court, Emmett J took a different view. His Honour said:

> "[T]here is a distinction to be drawn between a disability within the meaning of the Act, on the one hand, and behaviour that might result from or be caused by that disability on the other hand. Less favourable treatment on the ground of the behaviour is not *necessarily* less favourable treatment by reason of the disability." (original emphasis)

64 Emmett J said that pars (f) and (g) of s 4(1) are to be read as meaning that only a "disorder or malfunction" or a "disorder, illness or disease" that is manifested in certain symptoms will constitute a disability. Thus, it is the "disorder or malfunction" or the "disorder, illness or disease" that is the disability, not the symptom of that condition.

65 The Full Court held that Emmett J was correct in holding that the Commissioner had misdirected himself as to the proper construction of s 4(1) by regarding Mr Hoggan's conduct as inseparable from his disability. Their Honours said:

> "In our opinion, that conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 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. The same may be said of subs (f). The other subsections do not involve conduct."

66 Mr Purvis contends that Mr Hoggan's behaviour is not the mere consequence of his disability; he submits that the behaviour forms part of the disability. He contends that the term "disability" is concerned fundamentally with functional limitations – the inability of a person to act within what might be thought of as a normal range – not simply the underlying physical or pathological condition. But the State submits that Parliament has expressly drawn a distinction in the Act between the disability and the consequences of the disability. HREOC submits that Parliament has not adopted terminology that allows for precise distinctions to be drawn between physical causes and outward manifestations. It submits that it is not correct to say that the disability is the condition that causes the loss of function. The Attorney-General submits that, although the Full Court correctly construed s 4(1) as excluding the disturbed behaviour resulting from the disorder, its interpretation of "disability" as being merely the underlying condition is too narrow. The Attorney-General submits that disability is intended to include functional disorders, such as an incapacity to control behaviour. People with Disabilities (NSW) Inc also submits that the definition of "disability" includes the functional limitations arising as a result of impairment. It submits that the definition in the Act includes both "impairment"

and "disability" as they were defined internationally at the time the Act was passed.

67 In our view, the Federal Court's characterisation of disability as merely referring to the underlying condition does not accord with the proper construction of s 4(1) of the Act. Disability is defined broadly in s 4(1), the legislative intent being to capture the full range and nature of disabilities. As defined, it includes the functional limitations that result from the underlying condition. This interpretation gives the definition an operation consistent with the ordinary meaning of disability, viz, a "lack of ... physical or mental ability"[20]. The Act's definition draws upon existing definitions in Commonwealth and State legislation, as well as the meaning of disability in the international community[21]. The paragraphs of the definition that arguably apply to Mr Hoggan's behavioural problems are (a), (e) and (g).

Paragraph (a)

68 Paragraph (a) states that disability means the "total or partial loss of the person's bodily or mental functions". The focus of this paragraph is on *loss of functions* rather than the cause of any such loss. The ordinary meaning of the phrase "mental functions" would include the manner in which the mind functions through processes of thought and capacities to learn and control behaviour. Dictionaries define the term "mental" to include "performed by or existing in the mind" or "relating to the intellect"[22] and "done by the mind"[23]. They define "function" to mean "to perform a function; act; serve; operate ... to carry out normal work, activity, or processes."[24]

69 Thus, the definition of disability contained in par (a) applies to Mr Hoggan because he suffers from a partial loss of his adaptive behaviour ability.

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20 *The Macquarie Dictionary*, 3rd ed (1997) at 610.

21 Jones and Basser Marks, "The Limitations on the Use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992 (Cth)", in Hauritz et al (eds), *Justice for People with Disabilities: Legal and Institutional Issues*, (1998) 60 at 65.

22 *The Macquarie Dictionary*, 3rd ed (1997) at 1345-1346.

23 *The Australian Oxford Dictionary*, (1999) at 846.

24 *The Macquarie Dictionary*, 3rd ed (1997) at 859.

Paragraph (e)

70 Paragraph (e) states that disability means "the malfunction ... of a part of the person's body". This paragraph also focuses on functional ability, rather than underlying cause. "Malfunction" is defined in dictionaries to mean "a failure to *function* in a normal or satisfactory manner"[25] (emphasis added) or "failure to *function* properly"[26] (emphasis added). Mr Hoggan's brain malfunctions. His condition therefore falls within the definition of disability in par (e).

Paragraph (g)

71 Paragraph (g) declares that disability means "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour". Mr Purvis contends that the words "that affects" and "that results in" are conjunctive and that the disability includes the "disturbed behaviour".

72 The disabilities referred to in par (g) are confined by the adjectival phrases introduced by the word "that". The words that follow describe the type of disorder, illness or disease encompassed by the Act. The adjectival clauses cannot be definitive of the "disorder, illness or disease"; otherwise the Act would not protect persons who had a condition that did not manifest itself in disturbed behaviour because of the stage of the condition or because it was being effectively treated.

73 The interpretation given to the words "disorder, illness or disease" by the Full Court, however, is too narrow. *The Macquarie Dictionary* defines "disorder" to mean "a derangement of physical or mental health or *functions*"[27] (emphasis added). Thus, Mr Hoggan's behaviour is part of his disability because it includes his incapacity to adapt his behaviour to a standard consistent with the safety of other pupils, teachers and aides. His disability is not confined to his brain damage.

74 International organisations also recognise that the term "disability" includes functional difficulties. When the Act was drafted, the most widely

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25 *The Australian Oxford Dictionary*, (1999) at 816.

26 *The Macquarie Dictionary*, 3rd ed (1997) at 1304.

27 *The Macquarie Dictionary*, 3rd ed (1997) at 617.

accepted classification scheme covering all disability types, both internationally[28] and domestically, was that of the World Health Organisation's *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease* ("the ICIDH"). It recognised that a disability may include functional difficulties. The Act's definition of "disability" incorporates the key terminology of the ICIDH[29]. The ICIDH provides a conceptual framework for "disability" that describes three dimensions – impairment, disability and handicap.

75 Impairment is defined as "any loss or abnormality of psychological, physiological, or anatomical structure or function"[30]. It includes the existence or occurrence of an anomaly, defect or loss in a limb, organ, tissue or other structure of the body, or a defect in a functional system or mechanism of the body, including the systems of mental function.

76 Disability is defined as "any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being"[31]. It is concerned with compound or integrated activities expected of the person or of the body as a whole, such as those represented by tasks, skills and behaviour.

77 Handicap is defined as "a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual"[32]. Handicap focuses, therefore, on the person as a social being and reflects the interaction with, and adaptation to, the person's surroundings.

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28 See *United Nations World Programme of Action concerning Disabled Persons*, (1982) at [6].

29 Madden and Hogan, *The Definition of Disability in Australia*, (1997) at 30.

30 World Health Organisation, *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease*, (1980) at 27.

31 World Health Organisation, *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease*, (1980) at 28.

32 World Health Organisation, *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease*, (1980) at 29.

78 The definition of disability in the Act encompasses both the concept of "impairment" and "disability"[33]. The Draft Position Paper in relation to the Act refers to the ICIDH and states[34]:

> "This approach to definition has been valuable in focussing attention on the fact that for many people with disabilities, restrictions on their ability to participate equally in different aspects of life are not the inevitable, medical consequence of a particular impairment. Rather, in many cases restrictions on equality for people with disabilities result from features of the social or physical environment – features which can be altered, and which in some cases the law can help to change."

79 This statement and the overall structure of the Act show that the Act was aimed at removing the handicaps faced by persons with disabilities that arise from their interaction with their social environment.

80 To construe "disability" as including functional difficulties gives effect to the purposes of the Act. Such a construction accords with the Act's beneficial and remedial nature. In this case, the damage to Mr Hoggan's brain is a "hidden" impairment – it is not externally apparent unless and until it results in a disability. It is his inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person in areas covered by the Act, and gives rise to the potential for adverse treatment. To interpret the definition of "disability" as referring only to the underlying disorder undermines the utility of the discrimination prohibition in the case of hidden impairment[35].

Issue 2: the obligation to provide reasonable accommodation

81 The Commissioner found that the State had an obligation to make a reasonably proportionate response to Mr Hoggan's disability. He held that the State through its agents could have done a number of things that would have been reasonably proportionate to Mr Hoggan's disabilities. He concluded that, if

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33 Jones and Basser Marks, "Disability, Rights and Law in Australia", in Jones and Basser Marks (eds), *Disability, Divers-Ability and Legal Change*, (1999) 189 at 190.

34 Human Rights and Equal Opportunity Commission, *Disability and Human Rights: Needs and Options for Further Protection*, July 1991 at 8 [1.2].

35 See the Disability Advisory Council of Australia's *Report of the National Consultations with People with a Disability*, (1991) at 10 which reflects a concern to prevent people with hidden disabilities "falling through the gaps".

the State had acted differently in these areas, the suspensions and exclusion might not have occurred. If the State had done so, and if the same events had occurred, discrimination would not have taken place. The Commissioner also held that once the school recognised that Mr Hoggan's disability required special services and facilities in order for him to function at the school, and it agreed to provide them, they were benefits for the purposes of s 22(2)(a) of the Act.

82 In the Federal Court, Emmett J rejected these conclusions. His Honour said:

> "This case does not appear to me to have anything to do with 'accommodation' or 'services' in the sense defined. In any event, the Commission does not appear to have relied on s 5(2) in the reasoning process that led to its determination and declarations. Further, I do not read the Commission's reasons as containing a conclusion that s 5(2) imposes a positive obligation on the 'discriminator' ... Thus, s 5(2) does not appear to have any relevant application in the present case."

83 His Honour held that failing to give special treatment to a student is not necessarily subjecting that student to a detriment. He said:

> "If those services and facilities are provided only to a person with a disability, the denial of them does not involve treating the person with a disability less favourably than the educational authority treats or would treat a person without the disability. The denial of a benefit that is not afforded to a person without a disability is not, of itself, discrimination within the meaning of s 5(1)."

84 On appeal, the Full Court agreed with Emmett J on this point. The Full Court said:

> "The findings of discrimination which were made by HREOC in relation to acts or omissions other than expulsion go further and impose positive duties on the school to manage the conduct of the student, presumably regardless of cost or impact upon other school activities, without explaining why such special measures would not involve a breach of s 22(2)(a) or (c)."

85 Mr Purvis, HREOC and the Attorney-General submit that the Act contains an obligation of reasonable accommodation. However, unlike HREOC and the Attorney-General, Mr Purvis does not assert that s 5(2) is the source of that obligation. He submits that the existence of the exemption for unjustifiable hardship indicates that dealing with a person with a disability in a non-discriminatory way may impose a burden on a person or institution. In contrast, the State submits that this case does not involve s 5(2) of the Act. It

contends that s 5(2) does not impose any further or different obligation on a school to provide access to a benefit or not to subject a student to a detriment.

Accommodation

86 Disability discrimination is different from other types of discrimination, such as sex or race discrimination, in that its elimination is more likely to require affirmative action than is the case with sex and race discrimination. Disability discrimination is also different from sex and race discrimination in that the forms of disability are various and personal to the individual while sex and race are attributes that do not vary. The elimination of discrimination against people with disabilities is not furthered by "equal" treatment that ignores their individual disabilities. The Act imposes a *prima facie* requirement on persons falling within its terms to accommodate the disabilities of each disabled person in order to achieve real – not notional – equality. In this context, "accommodation" means the making of suitable provision for the disabled person. It includes, but is not limited to, the provision of residential or business accommodation. It is used in the sense that a banker uses the term when accommodating a customer's application for a loan[36].

87 In the Federal Court, however, Emmett J said the case does not appear to have anything to do with "accommodation" or "services". He referred to the definition of these terms in s 4(1) of the Act. Section 4(1) declares that "accommodation" includes "residential or business accommodation". But this is an inclusive definition. The objects of the Act would be seriously undermined if "accommodation" was confined to residential or business accommodation. It is hardly to be supposed that material circumstances for the purpose of s 5 of the Act do not include the accommodation of the disabled by providing ramps in appropriate cases.

88 The definition of "accommodation" in s 4(1) was probably directed to discrimination in the offering of physical accommodation, an area which s 25 of the Act regulates. "Accommodation" is commonly understood to mean "an adjustment or adaptation to suit a special or different purpose."[37] Once that is accepted, there is no reason, given the objects of the Act, for not extending the notion of "accommodation" to all those things and matters that are necessary to achieve true equality for the disabled. In *Commonwealth v Humphries*[38], Kiefel J

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36 cf *Bills of Exchange Act* 1909 (Cth), s 33.

37 *The Australian Oxford Dictionary*, (1999) at 8.

38 (1998) 86 FCR 324 at 333-334.

correctly rejected a submission that s 5(2) was irrelevant because "accommodation" and "services", as defined, do not refer to equipment. Her Honour said that these terms should be given a broad interpretation, which could include equipment.

89 Moreover, it is a serious mistake to construe the term "accommodation" as equivalent to "reasonable accommodation"[39], a term not used in the Act. Where the Act applies, the alleged discriminator must accommodate the disabilities of the disabled person unless it "would impose unjustifiable hardship", as defined in s 11 of the Act, on the alleged discriminator. This is clear from the Second Reading Speech delivered by Mr Brian Howe, the then Minister for Health, Housing and Community Services. He said that under the Act "employers, providers of accommodation, education, goods and services, clubs and sporting groups would be able to argue that action necessary to accommodate the needs of people with disabilities would impose unjustifiable hardship."[40] Adding the qualification "reasonable" to the requirement of accommodation imposes an unwarranted gloss on the Act – which reconciles the competing interests of the disabled and those with whom they interact by the more stringent standard of "unjustifiable hardship". Substituting the notion of reasonableness for "unjustifiable hardship" is an error.

90 It is true that the Act covers situations where the "defence" of unjustifiable hardship is not available. Thus, s 22(4) of the Act – which enables an educational authority to refuse to accept a student's application for admission on the ground of unjustifiable hardship – does not apply once the student is accepted. But this is no reason for adding the "reasonableness" gloss to s 5 given that the Parliament has specifically defined the circumstances in which the Act's obligations must give way to the hardship imposed on the alleged discriminator.

91 It is also true that the outline to the Explanatory Memorandum to the Disability Discrimination Bill 1992 stated:

> "The Bill also provides that only *reasonable* accommodation needs to be made for people with disabilities, and persons against whom

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39 As suggested by Bourke, "Mental Illness, Discrimination in Employment and the Disability Discrimination Act 1992 (Cth)", (1996) 3 *Journal of Law and Medicine* 318 at 327; McDonagh, "Disability Discrimination Law in Australia", in Quinn et al, *Disability Discrimination Law in the United States, Australia and Canada*, (1993) 117 at 138.

40 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 1992 at 2753.

> complaints are made will be able to argue that the accommodation necessary to be made will involve unjustifiable hardship on that person." (emphasis added)

92 But a statement in an Explanatory Memorandum can no more change the meaning of a legislative enactment than can the Second Reading Speech of the Minister presenting the Bill[41]. The law is expressed in the legislation, not in the Explanatory Memoranda, although of course in cases of ambiguity interpreters may have regard to statements in such memoranda. In any event, in discussing s 5(2), the Memorandum stated:

> "[C]ircumstances will not be regarded as being materially different because the discriminator has to provide different accommodation or services to the aggrieved person. Whether, in fact, the discriminator will be required to provide the different accommodation will be determined when the issue of unjustifiable hardship is dealt with."

Unjustifiable hardship

93 In most[42], but not all[43], areas in which the Act operates there is an exception that allows for discrimination to occur if it would impose "unjustifiable hardship" on the discriminator to provide the services or facilities required by the person with the disability. Section 4(1) declares that "unjustifiable hardship" has the meaning given by s 11. Section 11 states that in determining what constitutes unjustifiable hardship, all relevant circumstances are to be taken into account. They include, relevantly, the nature of the benefit or detriment likely to accrue to, or be suffered by, the persons concerned, the effect of the disability, and "the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship".

94 The nature of the detriment likely to be suffered by *any persons concerned*, if the student was admitted, would comprehend consideration of

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41 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518, 547.

42 The exception is provided in relation to employment (s 15), commission agents (s 16), contract workers (s 17), partnerships (s 18), education (s 22), access to premises (s 23), the provision of goods, services and facilities (s 24), accommodation (s 25) and clubs and incorporated associations (s 27).

43 The exception is not provided in relation to qualifying bodies (s 19), registered organisations under the *Workplace Relations Act* 1996 (Cth) (s 20), employment agencies (s 21), land (s 26), sport (s 28) and the administration of Commonwealth laws and programs (s 29).

threats to the safety and welfare of other pupils, teachers and aides. Any negative impact that may be caused by the presence of a student with a disability in a mainstream class is a proper matter to be considered when making a decision on whether that individual student can be admitted[44]. Thus, the Act provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff. This provision also allows consideration of the duty of care owed by the educational authority to the other pupils[45]. The reference to the *effect of the disability* would also permit consideration of the possibility that behaviour of the proposed student would violate the criminal law.

95 The Commissioner did not assume that the educational authority had infinite resources available to cater for Mr Hoggan's needs. It was the use of the available resources that the Commissioner criticised. He said:

> "[W]hilst substantial amounts of financial and staff resources had been committed to [Mr Hoggan's] inclusion at [the High School], advice of those with special education skills was not sought until later in the process, and then not always taken, and much of the information available ... did not percolate down to the teachers in the classroom."

96 As we have already indicated, the unjustifiable hardship provisions in relation to education operate only in relation to a refusal or failure to accept a student's enrolment and not the way in which that person, once admitted, must be treated[46]. The appropriate course, however, is to accept that the limited operation of s 22(4) is anomalous[47] and requires correction by Parliament, rather than to impose on the definitional provisions an artificial construction in an attempt to resolve the anomaly. As Kirby P pointed out in *North Sydney Brick & Tile Co Ltd v Darvall*[48]:

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44 Ronalds, *Discrimination Law and Practice*, (1998) at 93.

45 *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306 at 320 [54].

46 Section 22(4). See also *A School v Human Rights and Equal Opportunity Commission (No 2)* (1998) 55 ALD 93.

47 However, it can be noted that a similar gap exists in the employment area. See s 15(4) and Bourke, "Mental Illness, Discrimination in Employment and the Disability Discrimination Act 1992 (Cth)", (1996) 3 *Journal of Law and Medicine* 318 at 327.

48 (1986) 5 NSWLR 681 at 683.

> "If in the end, a strained construction strikes the judicial eye as unacceptable, no amount of commonsense or apparent legislative policy will authorise the judge to adopt that construction. To do so would involve a departure from the judge's limited constitutional function."

97 The Supreme Court of Canada has explained why a requirement of accommodation is necessary to achieve true equality for the disabled. In *Eaton v Brant County Board of Education*[49], Sopinka J said:

> "Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual ... Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses 'the attribution of stereotypical characteristics' reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment."

98 With the exception of the qualification "reasonable" – a necessary qualification in Canada which has no statutory qualification of "unjustifiable hardship" – this statement correctly states the rationale for the accommodation requirement in the Act. It is true that the notion of discrimination referred to by the Supreme Court of Canada is wider than that contained in the Act. It is also true, as Brennan CJ and McHugh J pointed out in *IW v City of Perth*[50], that Australian legislatures have avoided the use of general definitions of discrimination such as that given by Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd v South Australia*[51]. Instead, they have confined anti-discrimination legislation to particular fields and particular activities within those fields, making it necessary to analyse the structure and words of the Act to determine whether discrimination has occurred. But this legislative approach only reinforces the

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49 [1997] 1 SCR 241 at 272-273 [67]. See also *Holland v Boeing Co* 583 P 2d 621 (1978) (US); *Southeastern Community College v Davis* 442 US 397 at 412-413 (1979); *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at 673-675 [65].

50 (1997) 191 CLR 1 at 14-15.

51 (1990) 169 CLR 436 at 478.

view that the Act must be applied according to its terms. Parliament has chosen to qualify the accommodation requirement by using a standard of unjustifiable hardship. It is not for the courts to change this standard by treating it as equivalent to reasonableness.

99 The Attorney-General has now formulated Draft Disability Standards for Education 2003, pursuant to s 31 of the Act. The aim of such standards is to clarify and elaborate the legal obligations in relation to education. The Draft Standards provide that reasonable adjustments must be made to allow a student with a disability to apply for admission or enrolment, participate in the course and use the facilities or services on the same basis as a student without a disability, unless such adjustments would impose an unjustifiable hardship on the education provider. If, and in so far as, the Draft Standards indicate that the Act contains an obligation of reasonable accommodation, they misstate the law.

Recognition not obligation of accommodation

100 A number of cases have perceived an implied obligation to provide accommodation, although views as to the source of the obligation vary. In *Mrs J v A School*[52], Sir Ronald Wilson, President of HREOC – although wrongly qualifying the obligation by the notion of reasonableness – said that s 5(2):

> "ensures that it is not just a question of treating the person with a disability in the same way as other people are treated; it is to be expected that the existence of the disability may require the person to be treated differently from the norm; in other words that some reasonable adjustment be made to accommodate the disability."

101 On appeal, Mansfield J rejected the submission that Sir Ronald had erred in holding that s 5 imposed a positive obligation on the educational authority. His Honour said[53]:

> "I do not wish to be taken as accepting that the obligation not to discriminate against a person with a disability under [the Act] does not involve some obligation to take positive action with respect to a disabled person. Sections 7, 8 and 9 recognise circumstances will exist that involve a person with a disability needing to be treated differently. They provide that the treating of a person with a disability less favourably because of

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52 (1998) EOC ¶92-948 at 78,313.

53 *A School v Human Rights and Equal Opportunity Commission (No 2)* (1998) 55 ALD 93 at 103.

> such a need will itself constitute discrimination. The accommodation of that need may well require some positive action to be taken."

And later in his reasons, his Honour said[54]:

> "The determination of what is less favourable treatment for the purposes of s 5(1) must be measured in circumstances that are not 'materially different', and s 5(2) provides that the fact that a person with a disability may require different accommodation or services does not provide a basis for making out that material difference. Thus, it is not necessarily the case that, where [the Act] applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services. To the extent that to do so would produce hardship, the particular provisions seek to make allowance for that, including s 22(4)."

102 On remittal to HREOC, Commissioner McEvoy said[55]:

> "[S]ection 5(2) does not provide just a description of what amounts to material differences: rather, it assists in determining how to make circumstances of disability not materially different. That is, in some circumstances there may be some positive obligation on a respondent to take steps in order to ensure there is no material difference between the treatment accorded to a person with a disability and the treatment accorded to a person in similar circumstances but without a disability ... It is my view that without this interpretation of section 5(2), it would be difficult to establish direct discrimination under the Act, except in the most blatant circumstances, and a person subjected to discriminatory treatment within the intention of the Act would most often have to rely on section 6 and establish indirect discrimination."

103 Similarly, in *Garity v Commonwealth Bank of Australia*[56] Commissioner Nettlefold said:

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54 *A School v Human Rights and Equal Opportunity Commission (No 2)* (1998) 55 ALD 93 at 104.

55 *Cowell v A School* unreported, Human Rights and Equal Opportunity Commission, 10 October 2000 at [5.2.2]. See also *Murphy v State of New South Wales (NSW Department of Education)* (2000) EOC ¶93-095.

56 [1999] HREOCA 2 at [6.4].

> "The proper construction of the Act shows that the principle of reasonable accommodation is contained in it.
>
> There is recognition of it in section 5(2), section 11, section 15(4) and section 55 of the Act ... The use of the word 'favourably' adverts to the notion of giving aid or help. A mere mechanical measure of the aid or help given, which ignores disparate capacities, needs, and circumstances is not sufficient."

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

105 As indicated by the Explanatory Memorandum, s 5(2) recognises rather than imposes the obligation of accommodation. It makes it clear that circumstances will not be materially different for the purpose of s 5(1) because, for example, a student in a wheelchair may require a ramp to gain access to a classroom while other students do not need the ramp. This example also illustrates the unique difficulty that arises in discerning the division between s 5 and s 6 of the Act because s 5(2) brings the requirement for a ramp, normally associated with indirect discrimination, into the realm of direct discrimination.

106 The Commissioner found that a breach of s 5 occurred because of the failure of the High School to obtain expert advice and the failure to apply its policies more flexibly. Given the terms of s 5(2), it was no answer for the educational authority to contend that other students were not provided with this "accommodation". Thus, the failure by the school to provide such accommodation to enable Mr Hoggan to participate in regular school life, so far as possible, on an equal footing led, correctly on the facts of this case, to the finding of less favourable treatment for the purposes of the Act. But in so far as the Commissioner found that the failures to provide the accommodation themselves amounted to the denial of benefits or the subjection to detriments, he erred. There was no duty to provide the accommodation. Even if the Department had agreed to provide the accommodation to Mr Hoggan, the failure to provide it would not have been a *per se* breach of the Act. The failure to provide the required accommodation goes to the issue of materially different circumstances, not obligation.

107 The Commissioner also found that the failure to provide the required accommodation led to the decisions to suspend and exclude Mr Hoggan. Because the suspensions and exclusion were themselves detriments within the meaning of the Act, the Commissioner did not err in finding that the failure to provide the accommodation subsequently led to the denial of benefits and the subjection to detriments. That is to say, if the accommodation had been provided, more probably than not the misbehaviour would not have occurred. A comparable situation arose in *McNeill v Commonwealth of Australia*[57], where an employee who was legally blind was provided with specialised equipment. However, problems with the equipment frequently led to her seeking help from her supervisors and co-workers. She was also subjected to increased monitoring by her supervisor. The employee was ultimately dismissed on the basis of her poor communication and interpersonal skills. Commissioner Jones said:

> "[T]here was a connection between the lack of equipment and intense monitoring and the conduct and communications difficulties displayed by the complainant. The evidence adduced by the complainant satisfied me that much of the complainant's behaviour reflected her frustration at her disability not being reasonably accommodated by the respondent ...
>
> It follows that in dismissing the complainant, the respondent was doing so for reasons brought about by, and hence on the ground of, her disability – namely that her inefficiency and her frustration was caused by her disability not being adequately accommodated and also, in part, for displaying behaviour that was a manifestation of her disability."

Exemptions

108 In addition to the safeguard of "unjustifiable hardship", s 55 of the Act provides that HREOC may grant an exemption from the operation of the Act for a maximum of five years, although renewals may be granted. An exemption may be granted subject to terms and conditions and may be expressed to apply only in specific circumstances, or in relation to specific activities. Such an exemption was not sought in this case.

109 Mr Purvis submits that, if a school could not manage a student, once enrolled, because of the student's violent and antisocial behaviour, the proper and only course open is for the school to make an application under s 55 for an exemption from the operation of the Act. The Commissioner was also of the

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57 (1995) EOC ¶92-714 at 78,367.

view that this was the solution provided by the legislation in a situation such as this[58].

110 In this regard, the Full Court stated:

> "Such a counter-intuitive, indeed extraordinary, result would require a very clear statutory basis. We do not regard s 55 as providing an escape from the otherwise draconian consequences of the construction of s 22 urged upon us on behalf of [Mr Purvis]. The problems inherent in such a discretionary application for exemption are illustrated by this case ... Apart from the time, expense and staff disruption involved, the school would ultimately be subject to a discretionary judgment by a body which does not have the responsibility for managing the student. Even if s 55 can be read as authorising an exemption in the case of an individual student, it is ill-designed to deal with such an issue in a case like the present. Most importantly, what is the position of the school and those at the school whilst the availability of an exemption is being decided? The staff and other students will live with the threat of injury or abuse, may suffer actual injury or abuse, and classes and other educational endeavours will be disrupted. In addition, those affected may be without remedy, as the school authorities are hamstrung by the law in adopting normal measures of control."

111 The State argues that the exemption provision does not provide a practical solution to the problem of an individual student because it only operates in relation to broad categories of persons, rather than individuals. It also submits that the time required to obtain an exemption makes its utility problematic. But the terms of s 55 do not support this submission. The terms of the section indicate that it is flexible enough to apply to situations such as those that arose following the enrolment of Mr Hoggan. Indeed, the section seems wide enough to permit the grant of an exemption from the Act's provisions generally in all cases where the violent behaviour of students with a disability may pose a threat to other pupils or staff. And there is nothing to stop the making of an urgent application in respect of a particular student, if necessary.

112 The Act provides a number of other exemptions. For example, s 47(1)(b) exempts acts done in direct compliance with an order of a court. It may be wide enough to cover cases where, for example, a teacher had obtained an apprehended violence order against a disabled child made under State law. Section 47(2) also provides that anything done by a person in direct compliance

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58 See also *A School v Human Rights and Equal Opportunity Commission (No 2)* (1998) 55 ALD 93 at 104.

with "a prescribed law" is not unlawful. The *Education Act* 1972 (SA) is a prescribed law for this purpose[59]. It allows the Director-General of the Education Department of South Australia to direct that a disabled child be enrolled at a special school if it is in the best interests of that child.

Issue 3: the characteristics of the appropriate comparator

113 Section 5(1) of the Act states that a person discriminates against another person if, because of that person's disability, the discriminator treats the person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats a person without the disability. Section 5(2) provides that the circumstances are not materially different because the person with the disability may require different accommodation.

114 In this case, as in most cases, s 5 requires the construction of a "notional person" whose treatment can be compared to that of Mr Hoggan. The need for such a comparator is open to the criticism that it limits the Act's capacity to deal with cases of direct discrimination. In the United Kingdom, commentators have attempted to reformulate the notion of direct discrimination so as to free it of the shackles of the comparator[60]. One critic has said that a model predicated on comparability is particularly unsuited to the ground of impairment because the complainant simply cannot be said to be similarly situated to an able-bodied person[61].

115 The relevant comparator in this case is a person without Mr Hoggan's disability. But, for the purpose of s 5, what are the *circumstances that are the same or are not materially different*? The Commissioner identified the relevant circumstances as those of a year 7 student at the High School in 1997 without Mr Hoggan's disability and without his disturbed behaviour. The Commissioner pointed out that this does not mean that the student without the disability has been, or would be, treated more favourably than Mr Hoggan. He accepted Mr Purvis' submission that Mr Hoggan was treated less favourably if "when compared to the student without a disability [Mr Hoggan] has been deprived of a choice he values." The Commissioner said that to allow the disability itself to

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59 See Disability Discrimination Regulations 1996 (Cth), reg 2A.

60 Fredman, *Discrimination Law*, (2002) at 96. See also *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 which indicates that the comparator issue falls away once the causation issue is decided.

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

become the basis for determining that there are no same or similar circumstances would circumvent the clear legislative intent to make unlawful discrimination against a person because of a disorder, illness or disease that results in disturbed behaviour.

116 Emmett J held that the Commissioner erred in so far as he did not consider the treatment that would have been accorded to a student *who had engaged in behaviour similar to that of Mr Hoggan*. His Honour said:

> "The requirement that the comparison [must be] between treatment of an aggrieved person and treatment of a person without the disability in circumstances that are the same or are not materially different requires an examination of the treatment that would be accorded to a student without [Mr Hoggan's] disability on the hypothesis that such a student had behaved in the same way as [Mr Hoggan]."

117 On appeal, the Full Court also held it was necessary to assume that the comparator had engaged in like conduct. Their Honours said:

> "The failure to make this comparison led to the capricious result arrived at by HREOC. Each alleged act of discrimination is to be judged in the light of the conduct of [Mr Hoggan] which had taken place up to that time. The question to be answered at each point (including expulsion) is whether the consequence would have been the same (or worse) if the conduct had been that of a pupil not affected by brain damage ... This essential comparison was not carried out by HREOC, which accordingly fell into error of law in the application of s 5 of the Act."

The Full Court held that, if a person who did not engage in the same behaviour as the complainant was taken as a comparator, "a false positive reading of discrimination would result."

118 Mr Purvis submits that the appropriate statutory comparator is that identified by the Commissioner. The State and the Attorney-General submit that the comparator is a person without Mr Hoggan's disability but with the external manifestation of the disability in the form of disturbed behaviour.

The characteristics of the comparator

119 Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to*

the prohibited ground are to be excluded from the circumstances of the comparator. In *Sullivan v Department of Defence*[62], Sir Ronald Wilson said:

> "It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act."

120 Similarly, in *Proudfoot v Australian Capital Territory Board of Health*[63], Sir Ronald Wilson said that the equivalent exemption provisions of the *Sex Discrimination Act*:

> "would be rendered superfluous by such a construction, as presumably all of the circumstances contemplated by those sections would constitute material differences, with the consequence that the actions identified did not even pass through the threshold requirement of constituting discrimination. In my opinion, this construction could not have been intended. I therefore conclude that a difference to be material cannot be referable to the prohibited basis for less favourable treatment, namely sex. The purpose of s 5(1) is to identify less favourable treatment of one sex than the other in essentially the same circumstances, which circumstances are external to the question of sex."

121 In *Commonwealth v Human Rights and Equal Opportunity Commission*[64], Wilcox J, after referring with approval to a statement of Sir Ronald Wilson in the decision under review (which was the same as that given in *Sullivan*), said:

> "To the extent that the Commonwealth argues in this case that there is a material difference between single people and married people in that the former tend not to have 'family' whereas the latter do, the difference is the proscribed discrimination itself."

122 In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*[65], Lockhart J (with whom Black CJ agreed on this point) approved the

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62 (1992) EOC ¶92-421 at 79,005.

63 (1992) EOC ¶92-417 at 78,980.

64 (1993) 46 FCR 191 at 209.

65 (1993) 46 FCR 301 at 307, 327. See also *Commonwealth v Human Rights and Equal Opportunity Commission* (1997) 77 FCR 371 at 395-396.

statements in *Sullivan* and *Proudfoot*. His Honour rejected the view that the matters specified as constituting unacceptable bases for differential treatment can be relied upon to support the conclusion that the circumstances are not "the same" or are "materially different". Lockhart J said[66]:

> "The words ... 'in circumstances that are the same or are not materially different' are not in my opinion directed to the differences between men and women. If differences between men and women are capable of being material ... then the effect of those words would remove from the ambit of discrimination many cases of less favourable treatment occurring by reason of sex."

123 In *The City of Perth v DL (Representing the Members of People Living with AIDS (WA) Inc)*[67], however, Ipp and Scott JJ expressed a contrary view. Ipp J said:

> "[T]he alleged 'discriminator' is not required to ignore characteristics which an aggrieved person in fact has merely because they are characteristics that appertain generally to, or are generally imputed to, persons having the same impairment as the aggrieved person. Accordingly, the comparison to be undertaken by the section is between the treatment of the aggrieved person (who has an impairment as defined by s 4(1)) and a notional person who does not have such an impairment as defined, but who has one or more of the characteristics or the requirement set out in ss 66A(1)(b) to (d). This argument rests on the proposition that the word 'impairment' ... means an impairment in terms of s 4(1), and not any extended meaning brought about by attributing the characteristics or the requirement referred to ... to the meaning of impairment."

124 On appeal to this Court[68], Toohey J rejected the respondents' argument that, although the comparator must be free of the impairment, the comparator nevertheless "retains the characteristics imputed to or which characterise the impaired person." His Honour accepted the appellant's argument that such a construction would frustrate the purpose of the Act. After referring to *Commonwealth v Human Rights and Equal Opportunity Commission* and *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*, his Honour held that, in making the comparison, the characteristics of the person with the disability are to be ignored.

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66 (1993) 46 FCR 301 at 327.

67 (1996) EOC ¶92-796 at 78,869

68 *IW v City of Perth* (1997) 191 CLR 1 at 33-34.

125 Kirby J specifically rejected[69] the views of Ipp and Scott JJ that:

> "the respondents did not discriminate against people with an impairment if the reason for the differential treatment was a characteristic not unique to people with such an impairment and the respondents would have treated all persons with such a characteristic uniformly. All that was forbidden by the Act was discrimination by reference to the impairment."

Although Toohey J and Kirby J were in dissent as to the result in *IW v City of Perth*, their dissent does not affect the validity of the views stated by their Honours.

126 In the present case, the Full Court rejected the reasoning of Toohey and Kirby JJ because the Act in question in that case contained an extended definition of discrimination[70]. However, the principles expounded by Toohey and Kirby JJ were applied to the present Act in *Commonwealth v Humphries*[71] and *Garity v Commonwealth Bank of Australia*[72].

127 Similarly, in *School Board of Nassau County v Arline*[73], despite the absence of an extended definition of discrimination, the United States Supreme Court said that it would be unlawful to discriminate against a person on the basis of contagiousness where it was a characteristic of the person's impairment. Moreover, the presence of the exemption in s 48 of the Act in respect of infectious diseases indicates that, absent the exemption, discrimination on the basis of this characteristic would be unlawful.

128 In this case, as a result of the brain injury he suffered, Mr Hoggan is unable to control his behaviour as well as a "normal" person of his age. The Commissioner accepted the evidence of Mr Lord that the nature of Mr Hoggan's disability means that he has no sense of the cause of his behaviour such that it

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69 *IW v City of Perth* (1997) 191 CLR 1 at 66-67.

70 See also Dubler, "Direct Discrimination and a Defence of Reasonable Justification", (2003) 77 *Australian Law Journal* 514 at 515-516.

71 (1998) 86 FCR 324 at 333.

72 [1999] HREOCA 2 at [6.5].

73 480 US 273 at 282 (1987); cf *Chief Constable of the West Yorkshire Police v Khan* [2001] 1 WLR 1947; [2001] 4 All ER 834 and *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at 61 [108].

can be described as planned or motivated by an evil intent. This makes Mr Hoggan's circumstances materially different from those of a person who is able to control his or her behaviour, but who is unwilling to do so for whatever reason. In Mr Hoggan's circumstances, the behaviour is a manifestation of his disability – for the "normal" person it is an act of free will.

129 The learned judges of the Federal Court erred in holding that the proper comparator was one who exhibited the behaviour that Mr Hoggan did. Indeed, as will later appear, the proper comparator was a student who did not misbehave. The comparator adopted by the Federal Court would be appropriate if the case was one concerned with discrimination on the ground of sex or race. In such a case, the behaviour of the person alleged to have been discriminated against is not related to the prohibited ground. Thus, it would be appropriate to compare the treatment of a man who behaves badly with that of a woman who behaves badly to determine whether the man or woman, as the case may be, had received less favourable treatment on the ground of sex.

130 Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as "proxies" for discriminating on the basic grounds covered by the legislation[74]. But the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations. They would certainly lose it in any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment. And loss of the Act's protection would not be limited to such dramatic cases as the blind and amputees. Suppose a person suffering from dyslexia is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. The proper comparator is not a person without the disability who cannot spell. Section 5(2) of the Act requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell checker. When that comparison is made the employer will be shown to have breached the Act unless it can make out a case of unjustifiable hardship as defined by s 11 of the Act.

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74 Human Rights and Equal Opportunity Commission, Draft Position Paper, *Disability and Human Rights: Needs and Options for Further Protection*, July 1991 at 96 [10.2.8].

131 In so far as the arguments of the State and the Attorney-General and the reasons of the Federal Court judges suggest that the behavioural characteristics of Mr Hoggan must be attributed to the comparator, they are erroneous and must be rejected.

132 The Commissioner also said that, if the school had accommodated Mr Hoggan's disabilities and the same events had occurred, "their actions would have been reasonably proportionate in the circumstances, and discrimination would not have taken place." This proposition is based on the statement by Commissioner McEvoy in *Cowell v A School*[75] that:

> "[T]he substantial effect of section 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing in the provision of appropriate accommodation or other support as may be required as a consequence of the disability, so that in truth the person with the disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances."

133 With respect, nothing in s 5(2) supports this proposition. The issue under that sub-section is not one of reasonable proportionality or reasonableness. It is whether the person with the disability requires "different accommodation or services". If so, the question of whether a failure to provide such accommodation or services has resulted in a breach of s 5 depends on whether the "discriminator" has made out a case of "unjustifiable hardship". The effect of s 5(2) is not to excuse discriminatory treatment so long as reasonable or reasonably proportionate accommodation has been provided. The different accommodation or services required only make the circumstances "not materially different" if they overcome the effects of the disability with the result that the treatment is no longer "on the ground of a disability of the aggrieved person".

The proper comparison

134 Once it is recognised that the appropriate comparator is not a student with behavioural problems, the case becomes a simple one. In his complaint to HREOC, Mr Purvis complained that the High School discriminated against Mr Hoggan "on the ground of a disability" by treating him less favourably than another student in circumstances that were "the same or ... not materially different". That less favourable treatment consisted of the school denying him

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75 Unreported, Human Rights and Equal Opportunity Commission, 10 October 2000 at [5.2.2].

benefits available to other students and subjecting him to detriments not suffered by other students. That the High School denied Mr Hoggan those benefits and subjected him to those detriments is not open to doubt. The educational authority denied, and continues to deny, him access to the benefits of an education at the High School, suspended him from the school on several occasions and ultimately expelled him (or excluded him, if you like) from the school and its facilities.

135 The question then, is whether the educational authority would have denied those benefits to another student or subjected that student to those detriments in the same or similar circumstances. That is necessarily a hypothetical question, but its answer seems plain. The educational authority would not have denied those benefits to, or imposed those detriments on, another student because the educational authority would not have denied the benefits to, or imposed the detriments on, a student who behaved. If the educational authority had made accommodation for Mr Hoggan's disabilities, on the findings of the Commissioner, it is probable that he also would not have misbehaved – at all events to the same extent. On that hypothesis, the circumstances of the notional student and Mr Hoggan would not have been materially different.

136 To obtain access to the benefits of an education at the High School and to overcome his behavioural problems, Mr Hoggan required accommodation. His disabilities required the educational authority to adjust the DWD Policy to suit his needs, to provide teachers with the skills to deal with his special problems and to obtain the assistance of experts to formulate proposals for overcoming those problems. On the findings of the Commissioner, if that accommodation had been made, it is likely that the educational authority would not have denied the benefits to Mr Hoggan or subjected him to the detriments that it did because it is likely that he would have behaved.

137 Once these factual findings were made, the operation of s 5(2) became decisive. It declares that circumstances "are not materially different because of the fact that different accommodation or services *may be required* by the person with a disability." Section 5(2) recognises, if it does not imply, that the comparison of "material circumstances" may require the injection into the equation of all those matters and things that the disabled person requires to compete on equal terms with the able-bodied comparator. So in this case, s 5(2) required the issue of less favourable treatment to be determined by reference to Mr Hoggan's circumstances *upon being given the required accommodation or services*. On the Commissioner's findings it is probable that he would not have misbehaved. So, contrary to the approach of the judges in the Federal Court, the correct comparator was a student who *did not misbehave*, not a student who misbehaved. When that comparison is made, it is plain that the student comparator would not have been treated as unfavourably in respect of benefits and detriments as Mr Hoggan was actually treated.

138 The Commissioner correctly held that the State through its agents had treated Mr Hoggan less favourably, in circumstances that were the same or not materially different, than the State treats or would treat a student without his disability. However, he erred in respect of some of his findings, and those errors affect the proper orders to be made in disposing of the appeal.

Issue 4: discrimination "on the ground of" disability

139 The State filed a notice of contention in this Court arguing that the decision of the Full Court should be affirmed on the following grounds:

1. That the State did not, within the meaning of s 5(1) of the Act, treat Mr Hoggan "because of [his] disability" less favourably than it would have treated a person without such a disability.

2. That the State did not, within the meaning of s 5(1) of the Act, discriminate against Mr Hoggan "on the ground of" his disability.

140 Section 22(2) of the Act states that it is unlawful for an educational authority to discriminate against a student "on the ground of" the student's disability. Section 5(1) states that a person discriminates against another person on the ground of that person's disability if, "because of" the person's disability, the discriminator treats him or her 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.

141 The parties accept that Mr Hoggan was treated "less favourably" by being suspended and ultimately excluded from the school. It is sufficient in this case that Mr Hoggan has been denied a valuable choice, that is, to be enrolled in a mainstream school[76].

142 The Commissioner said that a connection or causal nexus must exist between the treatment suffered by the aggrieved person and the disability of that person. The Commissioner said that the accepted test was, what he incorrectly described as, the "but for test" as stated by Kirby J in *IW v City of Perth*[77] as follows:

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76 *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155 at 1193; *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 at 210.

77 (1997) 191 CLR 1 at 63.

> "The object of the Act is to exclude the unlawful and discriminatory reasons from the relevant conduct. This is because such reasons can infect that conduct with prejudice and irrelevant or irrational considerations which the Act is designed to prevent. Because persons, faced with allegations of discrimination, genuinely or otherwise, assert multiple and complex reasons – and because affirmative proof of an unlawful reason is often difficult – the Act has simplified the task for the decision-maker. It is enough that it be shown that the doing of the act was 'by reason' or 'on the ground' of the particular matter in the sense that the unlawful consideration was included in the alleged discriminator's reason or grounds. It must be a real 'reason' or 'ground'. It is not enough to show that it was a trivial or insubstantial one. But once it is shown that the unlawful consideration truly played a causative part in the decision of the alleged discriminator, that is sufficient to attract a remedy under the Act."

143 The Commissioner said that, because Mr Hoggan's behaviour is so closely connected to his disability, less favourable treatment on the ground of that behaviour constituted discrimination on the ground of the disability. Further, the Commissioner said that, while he was sure that the principal made his decisions for what he saw as Mr Hoggan's best interests, nonetheless they were in breach of the Act.

144 In the Federal Court, Emmett J said that less favourable treatment on the ground of Mr Hoggan's behaviour is not necessarily less favourable treatment by reason of his disability. His Honour said that, while the position might be different where the disability necessarily resulted in the relevant behaviour, that was not the present case.

145 On appeal the Full Court rejected the argument that to give less favourable treatment to a person suffering a mental disorder because of the behaviour resulting from that disorder discriminates against that person because of the mental disorder. The Full Court said:

> "The consequence of the argument for the appellant ... is that, once enrolled, any treatment of the student by the school authorities as a result of conduct caused by his disorder which restricted or disadvantaged him compared with the ordinary student would be discrimination in breach of the Act, no matter how necessary to preserve the discipline of the school and safety of staff and students. On this argument, any exclusion from ordinary classes, or special physical or other restraints imposed as the price of attendance at ordinary classes, would be a breach of s 22(2)(a) or (c), as the antisocial behaviour caused by the brain damage would be the cause of the special and detrimental treatment."

146 Mr Purvis submits that the question of causation is not determined by a rigid or strict application of either the "but for" test or the "but why" test. He submits that such an approach may mask the proper factual inquiry to be undertaken. He contends that in this case the principal by adopting the protected condition as a criterion of action, even for the best of motives, seized upon something that Parliament has said may not be used as a criterion for adverse treatment. HREOC submits that it defies commonsense to say that less favourable treatment on the ground of disturbed behaviour, which flows from a known disability, is not less favourable treatment on the ground of disability because it is the behaviour, rather than the disability, that triggers the response.

147 The State submits that the Commissioner erred in law in applying the "but for" test referred to by Kirby J in *IW v City of Perth*. It submits that the tribunal of fact must determine the "true reason" or "true basis" for the less favourable treatment. In this case, so the State submits, the true reasons for the principal's decisions were the safety and welfare of the other students and staff at the school and Mr Hoggan himself. The State also submits that the statement that the intention or motive of the alleged discriminator is not relevant is not consistent with the principles expounded in the cases. The Attorney-General, on the other hand, submits that a "but why" test is the appropriate test. Even if an alleged discriminator's intentions are benign, the criteria employed for a decision may be inherently discriminatory and thereby reveal that an unlawful consideration formed the true basis of the decision.

148 The words "because of" in s 5(1) of the Act indicate that it is the reason why the discriminator acted that is relevant. This interpretation is also consistent with s 10 of the Act, which refers to an act done for two or more "reasons". In dealing with s 10 the Explanatory Memorandum to the Disability Discrimination Bill also stated that "[i]n relation to direct discrimination the reason that someone has done a particular discriminatory act is very important." However, the cases show differences of opinion concerning the relevance of the alleged discriminator's motive or intention.

149 A "but for" test was applied by Lord Goff of Chieveley in *R v Birmingham City Council; Ex parte Equal Opportunities Commission*[78] where his Lordship said:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate ... is not a necessary

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78 [1989] AC 1155 at 1194.

> condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. [Otherwise] it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but ... because of customer preference, or to save money, or even to avoid controversy."

150 By placing the words "intention" and "motive" together and denying that either is necessary for a finding of direct discrimination, his Lordship opened the way for the submission that direct discrimination does not contain an intention element. However, intention and motive are not the same thing[79].

151 In *James v Eastleigh Borough Council*[80], Sir Nicolas Browne-Wilkinson VC rejected the "but for" test. His Lordship said[81]:

> "[O]ne is looking, not to the causative link between the defendant's behaviour and the detriment to the plaintiff, but to the reason why the defendant treated the plaintiff less favourably. The relevant question is 'did the defendant act on the ground of sex?' not 'did the less favourable treatment result from the defendant's actions?'"

152 His Lordship said "the legally determinant matter is the true reason for the defendant's behaviour, not his intention or motive in so behaving."[82]

153 But on appeal the House of Lords reversed the decision. Lord Goff, together with Lord Bridge of Harwich and Lord Ackner, reaffirmed the objective "but for" test as the relevant test[83]. However, the dissentients, Lord Griffiths and Lord Lowry, criticised the "causative" approach as dispensing with essential statutory criteria[84]. Lord Lowry said[85]:

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79 Gelowitz, "The Mental State for Direct Discrimination", (1989) 18 *Industrial Law Journal* 247 at 249.

80 [1990] 1 QB 61.

81 [1990] 1 QB 61 at 74.

82 [1990] 1 QB 61 at 75.

83 *James v Eastleigh Borough Council* [1990] 2 AC 751 at 765 per Lord Bridge, 770 per Lord Ackner, 774 per Lord Goff.

84 [1990] 2 AC 751 at 768 per Lord Griffiths, 779-780 per Lord Lowry.

85 [1990] 2 AC 751 at 779-780.

> "It can thus be seen that the causative construction not only gets rid of unessential and often irrelevant mental ingredients, such as malice, prejudice, desire and motive, but also dispenses with an essential ingredient, namely, the ground on which the discriminator acts. The appellant's construction relieves the complainant of the need to prove anything except that A has done an act which results in less favourable treatment for B by reason of B's sex, which reduces to insignificance the words 'on the ground of.' Thus the causative test is too wide and is grammatically unsound, because it necessarily disregards the fact that the less favourable treatment is meted out to the victim *on the ground of* the victim's sex." (original emphasis)

154 Since *James*, however, the United Kingdom courts have moved away from the "but for" test. In *Nagarajan v London Regional Transport*[86], Lord Nicholls of Birkenhead held that it is necessary to consider the reason of the alleged discriminator but that his or her motive is irrelevant. His Lordship said:

> "[I]n every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator ...
>
> The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred ... Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign."

155 In *Chief Constable of the West Yorkshire Police v Khan*[87] Lord Nicholls again rejected the "but for" test. He said:

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86 [2000] 1 AC 501 at 510-511. See also at 521-522 per Lord Steyn, 523 per Lord Hutton, 524 per Lord Hobhouse of Woodborough.

87 [2001] 1 WLR 1947 at 1954 [29]; see also at 1958 [43]-[46] per Lord Mackay of Clashfern, 1960-1961 [54]-[60] per Lord Hoffmann, 1964 [77]-[78] per Lord Scott of Foscote; [2001] 4 All ER 834 at 841, 845, 847-848, 850-851.

> "For the reasons I sought to explain in *Nagarajan v London Regional Transport* ... a causation exercise of this type is not required ... The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

156 The House of Lords recently affirmed these principles in *Shamoon v Chief Constable of the Royal Ulster Constabulary*[88]. Lord Hope of Craighead said that in most cases "the reason why" will call for some consideration of the mental processes of the alleged discriminator.

157 These more recent English authorities are consistent with the approach taken by the Australian courts. In *Australian Iron & Steel Pty Ltd v Banovic*[89], Deane and Gaudron JJ said that it is necessary to determine the "true basis" for the act or decision. This indicates that it is the reason for the decision that must be considered. Their Honours referred with approval to Lord Goff's statement in *Birmingham* regarding motive and intent to discriminate. They accepted that genuinely assigned reasons may in fact mask the true basis for the decision. Dawson J also said[90] that the test is not subjective – the mere assertion of a ground that is not sex will not prevent the act from being discriminatory if the "true basis" for the act in question is in fact sex.

158 In *Waters v Public Transport Corporation*[91], Mason CJ and Gaudron J (Deane J agreeing) approved the view of Deane and Gaudron JJ in *Banovic* that motive or intention to discriminate is not required. Their Honours said that it is enough if the difference in treatment is *based on* the prohibited ground, notwithstanding an absence of motive or intention.

159 In *Waters*, McHugh J rejected[92] the statement of Lord Goff in *Birmingham* and the statements of Deane and Gaudron JJ in *Banovic* concerning motive or intention, in so far as they might suggest that it is not a necessary condition of

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88 [2003] 2 All ER 26 at 45 [55].

89 (1989) 168 CLR 165 at 176.

90 (1989) 168 CLR 165 at 184.

91 (1991) 173 CLR 349 at 359.

92 (1991) 173 CLR 349 at 401.

liability that the conduct of the alleged discriminator was actuated by the prohibited ground. His Honour said:

> "The words 'on the ground of' and 'by reason of' require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act ('the victim'). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did."

However, McHugh J's misgivings were more the result of the ambiguous use of the words "intention" and "motive" in *Birmingham* and *Banovic* than any real difference of approach with that of Deane and Gaudron JJ.

160 The reasoning in discrimination cases in this Court is consistent with the view that, while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.

161 Subsequent decisions have applied this approach to the question of causation. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*[93] Lockhart J said:

> "The plain words of the legislation ... necessarily render relevant the defendant's reason for doing an act, that is the reason why the defendant treated the complainant less favourably."

162 His Honour also said[94] that the presence of intention, motive or purpose relating to health does not necessarily detract from the conclusion that there is discrimination on the prohibited ground – in that case, sex.

163 In *University of Ballarat v Bridges*[95], having considered the decisions in *Banovic* and *Waters*, as well as dictionary definitions, Ormiston J concluded that both "ground" and "reason" connote a basis that actuates or moves a person to decide a matter or to act in a particular way. His Honour said[96]:

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93 (1993) 46 FCR 301 at 322.

94 (1993) 46 FCR 301 at 327, Black CJ agreeing at 307.

95 [1995] 2 VR 418 at 438.

96 [1995] 2 VR 418 at 428.

> "[N]otwithstanding that it has been said on many occasions that the Act should be given a broad interpretation, the object of the legislature was to look at the reasoning process behind the decision, conscious and unconscious, at least so far as direct discrimination is concerned."

164 His Honour said that motive and purpose should be treated as largely irrelevant so long as it can be shown that the person charged intended to do an act that in fact amounts to unlawful discrimination[97].

165 It is true that statements of Toohey J and Gummow J in *IW v City of Perth*[98] might appear to support a "but for" test in discrimination cases. Kirby J, after referring to the "reasons for the conduct of the alleged discriminator"[99], said that the "but for" test applied by the House of Lords in *James* and by this Court in *Banovic* and *Waters* was "the correct test"[100]. In *IW v City of Perth*, however, the references to the "but for" test were expressed in relation to a decision of a corporate body that was made by its Councillors casting votes.

166 The weight and course of authority no longer accepts that the "but for" test is the accepted test of causation in the context of anti-discrimination legislation. That is because that test focuses on the consequences for the complainant and not upon the mental state of the alleged discriminator[101]. Although the Commissioner said that he was applying the "but for" test, the extract referred to from the reasons of Kirby J in *IW v City of Perth* is not expressed as a "but for" test. Correctly, it focuses on the "real reason" for the alleged discriminator's act. The Commissioner appears to have wrongly characterised the principle that he applied – which was the correct principle. He correctly held that the benevolent motive of the principal did not excuse the discriminatory treatment of Mr Hoggan.

167 The Commissioner also correctly found that, because Mr Hoggan was treated less favourably because of his behaviour, he was discriminated against on the ground of his disability. Mr Hoggan's behaviour is a *manifestation* of his

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97 [1995] 2 VR 418 at 433.

98 (1997) 191 CLR 1 at 32, 47.

99 (1997) 191 CLR 1 at 63.

100 (1997) 191 CLR 1 at 64.

101 Gelowitz, "The Mental State for Direct Discrimination", (1989) 18 *Industrial Law Journal* 247 at 250.

disability. In *X v McHugh (Auditor-General for the State of Tasmania)*[102], Sir Ronald Wilson said that it is enough if an employer is shown to have discriminated because of a manifestation of a disability. The decision in *X v McHugh* was followed in *Y v Australia Post*[103] where the Commission said:

> "[T]o discriminate against a person suffering a mental disorder because of the behaviour of that person which directly results from that mental disorder, is to discriminate against that person because of the mental disorder."

168 The validity of this principle can be seen by considering situations where the disability manifests itself in ways that society perhaps finds more acceptable than in cases where the disability manifests itself in dangerous conduct. In *Randell v Consolidated Bearing Co (SA) Pty Ltd*[104], for example, an employer was held to have discriminated against an employee on the ground of his disability by dismissing him because of his difficulties with the stock numbering system used in the employer's warehouse. These difficulties were a manifestation of the employee's dyslexia.

169 The Commissioner also found that the reason for Mr Hoggan's exclusion from the school, unlike the reason for his suspensions, included issues other than his behaviour. The Commissioner found that, although Mr Hoggan's behaviour was a factor in his exclusion, it was not the only factor. He found that the principal had also acted because Mr Hoggan was *unable to cope with the stresses of high school life as a result of his disability*. Section 10 of the Act states that, if an act is done for two or more reasons and one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act), the act is taken to be done for that reason. Because the Commissioner found that the decision to exclude Mr Hoggan was made on this basis, the Commissioner's decision can be supported without having to consider issues relating to behaviour.

170 In our view, when the Act is applied according to its true construction, the Commissioner was correct in finding that the State through its agents had discriminated against Mr Hoggan. However, his decision cannot be supported in so far as he found that the failure to provide accommodation constituted breaches of the Act that required awards of damages.

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102 (1994) 56 IR 248 at 257. See also *McNeill v Commonwealth of Australia* (1995) EOC ¶92-714 at 78,367.

103 (1997) EOC ¶92-865 at 77,068. See also *W v P Pty Ltd* [1997] HREOCA 24.

104 (2002) EOC ¶93-216.

171 Although the Commissioner correctly found that the State had discriminated against Mr Hoggan on the ground of his disability, it is impossible to restore the award of damages made in favour of Mr Purvis[105]. The award of $49,000 was the product of three breaches of the Act found by the Commissioner to have occurred. As we have indicated, the Commissioner erred in finding two of these breaches.

172 It is well established that, when an appellate court finds that a general award of damages was made on two or more grounds and one of those grounds is legally insupportable, the award must be set aside. In *Cutts v Buckley*[106], where the evidence did not support each count of a general verdict, this Court held that the general verdict could not stand. The Court ordered a new trial on the count supported by evidence and entered judgment for the defendant on the other count. Dixon J[107] said:

> "A verdict with entire damages upon several counts, which cannot be sustained upon one, cannot be sustained upon any count, because the entire sum is applicable to all the counts".

173 In the same case, however, Evatt J[108] pointed out:

> "There will, upon occasion, arise exceptional cases where the rule need not be applied. For instance, it may appear that the damages awarded by a general verdict for a plaintiff must be the same under each count, or can be reasonably attributed to one count only. In such cases the insufficiency or absence of evidence in support of one or more counts may not prevent the Full Court from exercising its wide powers by setting aside the general verdict, entering a verdict for the plaintiff for the same damages upon the count or counts which are supported by evidence, and for the defendant upon the count or counts which are not."

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105 Although Mr Purvis was the complainant, the complaint was brought on behalf of Mr Hoggan and, in so far as damages were awarded, they should have been awarded to Mr Purvis to hold in trust for Mr Hoggan.

106 (1933) 49 CLR 189. See also *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 255, *Williams v Moore* [1963] SR (NSW) 765, *Morgan v John Fairfax & Sons Ltd [No 2]* (1991) 23 NSWLR 374 at 378-379 and *TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682.

107 (1933) 49 CLR 189 at 198-199.

108 (1933) 49 CLR 189 at 200.

174 However, this is not a case of an entire sum being awarded for the totality of breaches. The Commissioner's reasons show that he awarded individual amounts for each act of discrimination. The amounts wrongly awarded for breaches total $6,000. Accordingly, the justice of the case can be met by reducing the damages awarded by the Commissioner by $6,000, which was awarded for the failures to accommodate.

175 Ordinarily, the proper order would be to allow the appeal to this Court and direct the Full Court to allow the appeal from Emmett J but remit the matter to HREOC to deal with the matter according to law. That would be a formality because the only step required by HREOC would be to reduce the damages by $6,000. The matter is complicated, however, by the enactment of the *Human Rights Legislation Amendment Act (No 1)* and the Human Rights Legislation (Transitional) Regulations made under that Act. Their effect was to deem the original complaint to have been terminated. In accordance with the Regulations, the complaint became subject to a new regime upon the Federal Court remitting the complaint to HREOC. It appears that it is now before the Federal Magistrates Court. However, the effect of the orders that we propose is that a new set of orders under the *Administrative Decisions (Judicial Review) Act* will be made by the Federal Court. In accordance with s 6 of the *Human Rights Legislation Amendment Act (No 1)*, the complaint would be deemed to be lodged under s 46P of the "new" *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) as amended by the Schedule in the *Human Rights Legislation Amendment Act (No 1)* and would have to be dealt with afresh by HREOC in accordance with that legislation. However, when HREOC sent the matter to the Federal Magistrates Court, as it would undoubtedly do, there would be no reason why that Court would not simply affirm the findings of the Commissioner not affected by legal error. In that event, the damages awarded would have to be reduced to $43,000.

Order

176 The appeal should be allowed. The orders of the Full Court of the Federal Court of Australia should be set aside. In their place should be substituted an order that the appeal to that Court from the decision of Emmett J be allowed and that the complaint be remitted to HREOC. The State should pay the costs of Mr Purvis in this Court and in the Federal Court.

177 GUMMOW, HAYNE AND HEYDON JJ. In 1998, the appellant, Mr Purvis, complained to the Human Rights and Equal Opportunity Commission ("the Commission") that, contrary to the *Disability Discrimination Act* 1992 (Cth) ("the Act"), his foster son, Daniel Hoggan, had been discriminated against by the State of New South Wales. Mr Purvis alleged that Daniel had been suspended, and later excluded, from South Grafton High School, a State high school, and had been subjected to various detriments in his education, in each case on the ground of his disability. Section 14 of the Act states that the statute binds the Crown in the right of each of the States, but does not render the States liable to prosecution for an offence.

178 Pursuant to s 71 of the Act, in the form in which it stood at the time, before the amendments[109] made in consequence of this Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*[110], the Commission endeavoured, by conciliation, to effect a settlement of the complaint but no settlement was reached. Accordingly, a Commissioner, Mr Graeme Innes ("the Commissioner"), was appointed to inquire into[111], and determine[112], the complaint. On 13 November 2000, the Commissioner determined the complaint and published reasons for his decision. He found that the State had discriminated against Daniel on the grounds of his disability and declared that, pursuant to s 103(1)(b)(iv) of the Act, the State should pay "the complainant" $49,000 as "compensation". (Presumably reference to "the complainant" was intended as a reference to Mr Purvis, but if that were so, it may be thought that there should have been express provision for Mr Purvis to hold the sum awarded for the benefit of Daniel. In this, and in several other respects, the declarations made by the Commissioner might be open to criticism but since nothing turns on those aspects of the matter, they may be put aside.)

179 Pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), the State sought, in the Federal Court of Australia, an order of review of the decision. The primary judge, Emmett J, held that the decision should be set aside and made other consequential orders[113]. The Full Court of the Federal

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109 *Human Rights Legislation Amendment Act (No 1)* 1999 (Cth).

110 (1995) 183 CLR 245.

111 *Disability Discrimination Act* 1992 (Cth), s 79.

112 s 103.

113 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.

Court (Spender, Gyles and Conti JJ) dismissed Mr Purvis' appeal from these orders[114]. By special leave, Mr Purvis now appeals to this Court.

180 The ultimate question in issue in the litigation between the parties, and thus in the appeal to this Court, was whether the Commissioner had made an error of law in concluding, as he did, that the State had discriminated against Daniel on the ground of his disability (i) by denying or limiting Daniel's access to benefits provided by the State as an educational authority (s 22(2)(a)); (ii) by expelling him (s 22(2)(b)); and (iii) by subjecting him to other detriments (s 22(2)(c)). The particular questions which arose in the appeal to this Court included the following. Did the Commissioner make an error of law in identifying Daniel's disability? Did the Commissioner make an error of law in identifying what must be shown to demonstrate discrimination *on the ground* of that disability? Did the State treat Daniel "less favourably than, in circumstances that are the same or are not materially different, [the State] treats or would treat a person without the disability" (s 5(1))?

181 Each of these particular questions can be answered only by giving consideration to the relevant provisions of the Act, understood, as they must be, in the context of the Act as a whole. Before turning to that task, however, it is necessary to say something more about the facts found by the Commissioner, and about how the particular questions arose.

The facts

182 Daniel was born on 8 December 1984. At about six or seven months of age he suffered severe encephalopathic illness. As a result, he suffered brain damage. He has intellectual disabilities and a visual disability, and he suffers from epilepsy. His intellectual disabilities affect his thought processes, his perception of reality and his emotions, and as a result he learns differently from a person without the disabilities. His disabilities are manifested by unusual individual mannerisms and by behaviour such as rocking, humming and swearing. A neurologist called to give evidence in the inquiry, and whose evidence the Commissioner accepted, said that "[t]he major part of his difficult behaviour would be disinhibited and uninhibited behaviour". At times, so the Commissioner found, Daniel's disability manifested itself in aggressive behaviour such as hitting or kicking. The Commissioner found that this behaviour was not planned or motivated by an ill intent.

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

183 In 1996, Mr and Mrs Purvis sought to have Daniel enrolled as a pupil at South Grafton High School for the 1997 school year. At first, the application was refused, but in late February 1997 the Principal of the school told his staff that he would accept Daniel's application for enrolment. Daniel began school on 8 April 1997. Between 24 April 1997 and 18 September 1997 he was suspended five times. Each suspension was for an act of violence. The first suspension was recorded as being for "violence against staff", the second for kicking a fellow student and swearing, the third for kicking his teacher's aide, the fourth for kicking a fellow student, and the fifth for punching a teacher's aide.

184 Daniel did not return to the school after his suspension on 18 September 1997. On 3 December 1997, after meeting Mr and Mrs Purvis and Daniel, the Principal of the school wrote to Daniel's legal guardian, the Department of Community Services, telling the Department that Daniel would be excluded from the school. The Principal said in his letter that:

> "Following the three meetings that have been held in relation to ... Daniel ... the situation that caused his last suspension for very violent behaviour has not been resolved ... As well as Daniel's education, I am also responsible for over 1000 other students and 80 teaching or SASS staff. The health and safety of all these people are also of great concern ..."

The *Disability Discrimination Act*

185 The Act was evidently drafted using the *Sex Discrimination Act* 1984 (Cth) ("the Sex Discrimination Act") as its model. The Act makes separate and distinct provision for indirect disability discrimination (dealt with in s 6 of the Act) from the provision made for disability discrimination (s 5). The Act defines "disability" (in s 4) and, in Pt 2 of the Act (ss 15-58), deals with the subject of "prohibition of disability discrimination". Division 1 of Pt 2 (ss 15-21) deals with discrimination in work; Div 2 (ss 22-34) deals with discrimination in other areas; and Div 3 (ss 35-40) deals with discrimination involving harassment. In its provisions dealing with the prohibition of disability discrimination the Act employs the formula that "it is unlawful for a person to discriminate against another person on the ground of the other person's disability" (or a disability of any of that other person's associates) by, or in the course of engaging in, certain identified kinds of conduct.

186 Content is given to the clause "to discriminate against a person on the ground of another person's disability" by the provisions of ss 5 and 6 of the Act. Sections 5 and 6 provide:

"**Disability discrimination**

5. (1) For the purposes of this Act, a person **('discriminator')** discriminates against another person **('aggrieved person')** on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

(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.

Indirect disability discrimination

6. For the purposes of this Act, a person **('discriminator')** discriminates against another person **('aggrieved person')** on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

187 In the present case, it is the provisions of the Act prohibiting disability discrimination in education which are of immediate relevance. Section 22 of the Act provides:

"**(1)** It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.

> **(2)** It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:
>
> (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
>
> (b) by expelling the student; or
>
> (c) by subjecting the student to any other detriment.
>
> **(3)** This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.
>
> **(4)** This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority."

188 As noted earlier, it was alleged in this case that s 22(2) had been contravened in each of the three respects identified in pars (a), (b) and (c) of that sub-section. Because the complaints concerned conduct and events that had occurred after Daniel's admission to South Grafton High School it was common ground between the parties that neither s 22(1) nor s 22(4) was engaged. In particular, it was common ground that the questions about unjustifiable hardship for an educational authority, which might arise under s 22(4) in connection with a refusal to admit someone as a student at an institution, did not arise.

189 It was alleged that Daniel had been discriminated against on the ground of his disability because the State had acted contrary to s 22(2) as the operation of that provision was amplified by the *direct* discrimination provisions of s 5 of the Act, not the *indirect* discrimination provisions of s 6. No case of indirect disability discrimination was sought to be made at any stage of the proceedings before the Commissioner. Indeed, the Commissioner recorded that the appellant had submitted "the indirect discrimination model [was] inapplicable". The appellant's central contention has always been that the State, as educational authority, discriminated against Daniel on the ground of his disability because (to adopt and adapt the words of s 5(1)): (i) the State had treated him less favourably than, in circumstances that were the same or were not materially

different, the State had treated or would have treated a person without the disability, and (ii) the State did this "because of" Daniel's disability.

190 In order to apply the provisions mentioned, it is, of course, necessary to take account of the definition of "disability". That definition provides:

> "(a) total or partial loss of the person's bodily or mental functions; or
>
> (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; or
>
> (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 issues in this Court

191 Three issues were argued in the appeal to this Court. First, there was an issue about how the definition of disability applied. The trial judge[115] and the

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115 (2001) 186 ALR 69 at 77 [36]-[38], 79 [45].

Full Court[116] held that the Commissioner had misdirected himself by failing to distinguish between the disability which Daniel suffered from and the conduct or behaviour that resulted from, or was caused by, that disability. In the terms used in par (g) of the definition of "disability", was Daniel's disability to be identified as the *disorder* from which he suffered, as the *disturbed behaviour* that resulted, or as some combination of both elements? Was it to be identified as the "partial loss of [his] ... mental functions" (par (a)), or as "the malfunction ... of a part of [his] body" (his brain) (par (e))?

192 Secondly, the Commissioner concluded that Daniel's behaviour occurred as a result of his disability and that "in this case, Daniel's behaviour is so closely connected to his disability that if ... less favourable treatment has occurred on the ground of Daniel's behaviour then this will amount to discrimination on the ground of his disability". The trial judge[117] and the Full Court[118] held that the Commissioner erred by failing to compare the treatment accorded to Daniel with the treatment that would have been accorded by the State to a student who was not disabled but who had acted as Daniel had acted.

193 Thirdly, what is meant by saying that there was less favourable treatment "because of" a disability? What is the relationship that must be shown to have existed between the disability and the conduct about which complaint is made?

194 Argument in this Court was directed principally to the validity of the conclusions reached, both at trial and on appeal in the Full Court, about these three issues – the "disability" question, the "comparator" question, and the "causation" question. As has been noted above, each is fundamentally a question of statutory construction. It is, therefore, necessary to begin and end the argument by reference to the particular language of the Act. These reasons will seek to demonstrate that the second of the issues, concerning the comparison that must be made, between how Daniel was treated and how the State would have treated a person without the disability, in circumstances that were the same or were not materially different, is determinative.

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116 (2002) 117 FCR 237 at 248 [28].

117 (2001) 186 ALR 69 at 80 [51]-[52].

118 (2002) 117 FCR 237 at 248 [29].

The approach to construction of the Act

195 No doubt the statute must be construed as a whole. No doubt, also, it must be construed having regard to its evident objectives, stated, as they are, in s 3 of the Act as being:

> "(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
>
> (i) work, accommodation, education, access to premises, clubs and sport; and
>
> (ii) the provision of goods, facilities, services and land; and
>
> (iii) existing laws; and
>
> (iv) the administration of Commonwealth laws and programs; and
>
> (b) 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; and
>
> (c) 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."

196 Moreover, account must also be taken of the limits which s 12 of the Act prescribes for the Act's application. For present purposes, the relevant limitation on the operation of s 22 of the Act is that contained in s 12(8) which provides that the "limited application provisions"[119] (of which s 22 is one) have effect in relation to discrimination against a person with a disability to the extent that the provisions have one or more of five characteristics. Those characteristics are described as being that the provisions:

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119 Defined in s 12(1).

"(a) give effect to the Convention[120]; or

(b) give effect to the Covenant on Civil and Political Rights[121]; or

(c) give effect to the International Covenant on Economic, Social and Cultural Rights; or

(d) relate to matters external to Australia; or

(e) relate to matters of international concern."

197 It was no doubt with these limitations in mind that we were taken in argument not only to the particular international instruments mentioned in s 12(8) of the Act, but also to a number of other international instruments dealing with disability discrimination. It was accepted that most, if not all, of these other international instruments were statements of aspiration, rather than international obligation, many of which were made in connection with the United Nations Decade of Disabled Persons. Where, as here, no challenge was made to the valid application of s 22 to the activities of the State which were the subject of the Commissioner's inquiry, it is unnecessary to examine whether, or to what extent, those instruments might reflect matters of international concern[122].

198 In so far as those instruments were said to bear upon the proper construction of the Act, however, it is necessary to notice an important respect in which the subject of disability discrimination differs from some other forms of discrimination. Central to the operation of the Sex Discrimination Act and the *Racial Discrimination Act* 1975 (Cth) ("the Racial Discrimination Act") is the requirement for equality of treatment. A central purpose of each of those Acts is to require that people not be treated differently on the ground of sex or race. Difference in sex or race is identified as a generally irrelevant consideration[123].

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120 The Discrimination (Employment and Occupation) Convention, (1958) adopted by the General Conference of the International Labour Organisation on 25 June 1958, a copy of the English text of which was set out in Sched 1 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

121 The International Covenant on Civil and Political Rights, a copy of the English text of which was set out in Sched 2 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

122 cf *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 486.

123 *Western Australia v Ward* (2002) 76 ALJR 1098 at 1132 [121]; 191 ALR 1 at 48.

199 By contrast, disability discrimination legislation necessarily focuses upon a criterion of admitted difference. The abilities of a disabled person differ in one or more respects from that range of abilities which is identified as falling within the band described as "normal". It follows that disability legislation must be understood from the premise that the criterion for its operation is difference. That has important consequences, not only for the lessons that may be learned from the way in which other legislatures or deliberative bodies have identified the problems that should be considered, but also for the proper understanding of the solutions that have been devised by those other bodies to answer the problems identified.

200 Since the Act was enacted in Australia, legislation enacted in other jurisdictions has sought to give effect not just to a principle requiring equality of treatment but to what is sometimes called a "substantive conception of equality"[124], in which the purpose is "to prevent or compensate for disadvantages"[125]. (Many of the international instruments to which we were taken must also be understood in that way.)

201 Concepts of "difference", "disability" and "disadvantage" all depend upon comparisons. They assume that there is a person, or a group of persons, with whom it is useful and relevant to draw the comparison which is implicit in describing one person as "different", or "disabled", or "disadvantaged"[126]. Obviously, the utility and relevance of the comparison depends upon why it is being made. Different comparisons may have to be drawn according to whether the purpose is limited to ensuring that persons situated similarly are treated alike, or the purpose is wider than that. In particular, if the purpose of legislation is to ensure equality of treatment, the focus of inquiry will differ from the inquiry that must be made if the relevant purposes include ensuring equality in some other sense, for example, economic, social or cultural equality.

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124 Collins, "Discrimination, Equality and Social Inclusion", (2003) 66 *Modern Law Review* 16 at 17.

125 Directive 2000/78/EC of 27 November 2000 ("the EC Directive"), (2000) *Official Journal of the European Communities* L 303/17, Recital (26).

126 Hendriks, "The significance of equality and non-discrimination for the protection of the rights and dignity of disabled persons", in Degener and Koster-Dreese (eds), *Human Rights and Disabled Persons*, (1995) 40 at 43.

202 "Substantive equality" directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that "in order to treat some persons equally, we must treat them differently"[127]. Obviously there are many ways in which "substantive equality" can be defined and there are many different ways in which legislatures may seek to achieve it.

203 The principal focus of the Act, however, is on ensuring equality of treatment. In this respect it differs significantly from other, more recent, forms of disability discrimination legislation. In particular, for present purposes, it is important to notice that, unlike the *Disability Discrimination Act* 1995 (UK) ("the 1995 UK Act"), the *Americans with Disabilities Act of 1990* ("the ADA")[128] or the European Community Directive for "establishing a general framework for equal treatment in employment and occupation"[129], the Act does *not* explicitly oblige persons to treat disabled persons differently from others in the community. The Act does not, for example, contain provisions equivalent to ss 5 and 6 and ss 28B to 28G of the 1995 UK Act which expressly oblige employers and educational authorities to make "reasonable adjustments" to accommodate disabled persons[130].

204 The provisions of the Ontario education legislation[131] considered by the Supreme Court of Canada in *Eaton v Brant County Board of Education*[132] provide a further example. The Minister of Education was required to ensure that there be available special education programmes and services for children with behavioural, intellectual and other "exceptionalities". The decision to place a 12 year old child with cerebral palsy in a special education class, contrary to her parents' wishes that she remain in a regular classroom, did not contravene the right given by s 15(1) of the Canadian Charter of Rights and Freedoms of equality before and under the law and to the equal protection and benefit of the

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

128 §§1-514, 42 USC §§12101-12213.

129 The EC Directive, (2000) *Official Journal of the European Communities* L 303/16.

130 cf the *Americans with Disabilities Act of 1990* §102(b)(5)(A), 42 USC §12112(b)(5)(A); the EC Directive, Art 5, (2000) *Official Journal of the European Communities* L 303/19.

131 s 8 of the *Education Act*, RSO 1990, c E2.

132 [1997] 1 SCR 241.

law "without discrimination based on race, national or ethnic origin, colour, religion, sex, age or *mental or physical disability*" (emphasis added).

205 Sopinka J, who gave the leading judgment, emphasised that with disabled persons the avoidance of discrimination frequently will require distinctions to be made, taking into account the personal characteristics of such persons so as to ameliorate their situation[133]. What Sopinka J described as that form of discrimination inquiry which uses "the attribution of stereotypical characteristics" criterion was inappropriate in considering laws such as the Ontario education legislation[134].

206 Considerable care must be taken, therefore, before applying what has been said about either the aims or the effect of other forms of disability discrimination legislation from other jurisdictions to the construction of the Act. Even more care must be taken before adopting the necessarily general forms of aspirational, as distinct from normative, statements found in international instruments as an aid to resolving the particular questions of construction which now arise. Aspirational statements are commonly concerned to state goals, not to identify the particular methods by which the stated goals will be achieved. Those international instruments to which we were referred took this aspirational form.

207 None of the considerations just mentioned denies the importance of giving full effect to the indirect disability discrimination provisions of the Act. Well before the Parliament's enactment of the Act, the Sex Discrimination Act or the Racial Discrimination Act, it had been recognised in the United States[135] that, in some cases, nominally equal treatment can disguise discrimination. As Gaudron and McHugh JJ were later to point out in *Castlemaine Tooheys Ltd v South Australia*[136], to proceed as if there is no difference, even though there is a relevant difference, may be discriminatory. But as later developments in connection with affirmative action and reverse discrimination legislation in the United States reveal, there is considerable room for debate about when

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133 [1997] 1 SCR 241 at 272.

134 [1997] 1 SCR 241 at 272-273.

135 *Gaston County v United States* 395 US 285 (1969); *Griggs v Duke Power Co* 401 US 424 (1971).

136 (1990) 169 CLR 436 at 478.

apparently "equal" treatment is to be understood as being discriminatory and apparently unequal treatment is not[137].

208 With these considerations in mind, how should the issues of statutory construction which arise in this matter be resolved?

"Disability"

209 It is appropriate to consider first the definition of "disability" in s 4 of the Act. Paragraph (g) of that definition can be divided into two grammatical sections – a group of three nouns ("a disorder, illness or disease") and two adjectival phrases which qualify those nouns. The first adjectival phrase looks to the effects of the disorder, illness or disease on the person – the disorder, illness or disease is one that "affects a person's thought processes, perception of reality, emotions or judgment". The second looks to another kind of effect on the person – the disorder, illness or disease is one that "results in disturbed behaviour". In each case, the disability is defined by reference to cause (disorder, illness or disease) and effect. As has been noted earlier, both the trial judge and the Full Court drew a sharp distinction between cause and effect in applying the definition of disability. The grammatical structure of the definition provides an evident basis for drawing that distinction. There are, however, several reasons why distinguishing between the nouns that are used in par (g) of the definition and the adjectival phrases that qualify them may not be useful or appropriate.

210 First, pars (a) to (g) of the definition of "disability" are not to be read as providing seven mutually exclusive categories of disability. So much is evident from the overlapping operation of the separate paragraphs of the definition. This conclusion is reinforced when regard is had to the temporal amplifications of the definition contained in pars (h), (i) and (j). Daniel's "disability" could fall within any of pars (a), (e) or (g) as being (i) a partial loss of his mental functions (par (a)), (ii) the malfunction of a part of his body being that part of the brain responsible for inhibitions (par (e)), or (iii) a disorder resulting in disturbed behaviour (par (g)). Because the paragraphs have an overlapping operation it may be doubted that the particular grammatical structure used in one of them can be given decisive effect.

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137 See, for example, the consideration by the Supreme Court of the United States of university admission policies in *Regents of University of California v Bakke* 438 US 265 (1978), *Gratz v Bollinger* 156 L Ed 2d 257 (2003) and *Grutter v Bollinger* 156 L Ed 2d 304 (2003).

211 Secondly, it is trite to say that effect must be given to the whole of the definition. It cannot be read as if the adjectival clauses are an unnecessary or ineffective addition to the three nouns that introduce this paragraph of the definition. To identify Daniel's disability by reference only to the physiological changes which his illness brought about in his brain would describe his disability incompletely. His disability is a particular type of disorder, a particular kind of malfunction of his brain, a loss of a particular aspect of his mental functions.

212 Thirdly, and most importantly of all, to debate the meaning and effect of the definition divorced from the provisions in which it is to operate is to invite serious error. In particular, 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. Construction must proceed not only from a consideration of the grammatical structure of par (g) of the definition of disability, but also from a consideration of how the definition of disability is engaged in the other, operative, provisions of the Act. It is as well to turn to that latter task at once and to do so by reference to s 5(1), the provision which was said to be engaged here.

Direct disability discrimination – the comparison to be made

213 Section 5(1) of the Act requires comparison between the treatment which the discriminator gives, or proposes to give, to the aggrieved person and the treatment that the discriminator would give, or would propose to give, to a person without the aggrieved person's disability "in circumstances that are the same or are not materially different". If that comparison reveals that the disabled person was treated less favourably, the further question which must be asked is whether that was because of the disabled person's disability. Section 5(1), therefore, requires equality of treatment between the disabled and those who are not. Attention is invited to how the discriminator "treats or would treat *a person without the disability*" (emphasis added). The "comparator" identified by s 5(1) is "a person without the disability".

214 The comparison that is to be made is of the treatment given or proposed to be given to the disabled person and the treatment of a person without the disability "in circumstances that are the same or are not materially different". Recognising that s 5(1) requires comparison with the treatment that would be given to a person without the disability is critical to the proper application of the Act. It is a comparison which is very different from the comparisons required by other forms of disability discrimination legislation.

215 In the 1995 UK Act, for example, the focus is not upon the cases of different *persons* (one disabled, one not) in the same or not materially different circumstances. As was pointed out in *Clark v TDG Ltd*[138], the focus of the 1995 UK Act is much narrower. It looks only to the *reason* for the treatment of the disabled person and then requires comparison with the treatment of "others to whom that *reason* does *not* or would *not* apply"[139] (emphasis added). That is, it requires identification of why the disabled person was treated as he or she was, and then asks would another, to whom that reason did *not* apply, have been treated in the same way?

216 In *Clark*, Mummery LJ said of the construction of the 1995 UK Act[140]:

> "Contrary to what might be reasonably assumed, the exercise of interpretation is not facilitated by familiarity with the pre-existing legislation prohibiting discrimination in the field of employment (and elsewhere) on the grounds of sex (Sex Discrimination Act 1975) and race (Race Relations Act 1976). Indeed, it may be positively misleading to approach the 1995 Act with assumptions and concepts familiar from experience of the workings of the 1975 and 1976 Acts."

His Lordship added[141]:

> "The definition of discrimination in the [1995 UK Act] does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the 'reason' for the treatment of the disabled employee and the comparison to be made is with the treatment of 'others to whom that reason does not or would not apply'. The 'others' with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons 'to whom that reason does not or would not apply'."

217 What is meant by the reference, in s 5(1) of the Act, to "circumstances that are the same or are not materially different"? Section 5(2) provides some amplification of the operation of that expression. It identifies one circumstance

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138 [1999] 2 All ER 977 at 987 per Mummery LJ.

139 *Disability Discrimination Act* 1995 (UK), s 5(1)(a).

140 [1999] 2 All ER 977 at 983.

141 [1999] 2 All ER 977 at 987.

which does *not* amount to a material difference: "the fact that different accommodation or services may be required by the person with a disability". But s 5(2) does not explicitly oblige the provision of that different accommodation or those different services. Rather, s 5(2) says only that the disabled person's *need* for different accommodation or services does not constitute a material difference in judging whether the discriminator has treated the disabled person less favourably than a person without the disability.

218 The Commission submitted that s 5(2) had greater significance than providing only that a need for different accommodation or services is not a material difference. It submitted that, if a school did not provide the services which a disabled person needed and later expelled that person, the circumstances in which it expelled the person would be materially different from those in which it would have expelled other students. In so far as that submission depended upon construing s 5, or s 5(2) in particular, as *requiring* the provision of different accommodation or services, it should be rejected. As the Commonwealth rightly submitted, there is no textual or other basis in s 5 for saying that a failure to provide such accommodation or services would constitute less favourable treatment of the disabled person for the purposes of s 5.

219 The appellant's argument was not said to depend upon the operation of s 5(2). Rather, it depended upon contentions about the relationship between the application of the definition of disability and the identification of circumstances that are the same or not materially different. The appellant submitted that the decisions to suspend and ultimately exclude Daniel were brought about by his behaviour. It followed, so the argument proceeded, that if it was right to characterise Daniel's disturbed behaviour as part of his disability, Daniel was treated as he was "because of" his disability. And because Daniel's behaviour was brought about by the disorder from which he suffered, it followed, so it was said, that he was treated less favourably than a person without the disability.

220 The appellant's argument thus proceeded from the application of the definition of disability (as a definition requiring reference both to Daniel's disorder and his behaviour) to a comparison with a person (a person without the disability) in circumstances where what differentiated Daniel from others (his disorder *and* his behaviour) were absent. That is, the relevant comparator was said to be Daniel without the disability of his disturbed behaviour. (There are obvious similarities between these propositions advanced by the appellant and the Commissioner's statement, mentioned earlier, that "Daniel's behaviour is so closely connected to his disability that if ... less favourable treatment has occurred on the ground of Daniel's behaviour then this will amount to discrimination on the ground of his disability".)

221 The last step in the appellant's argument was said to follow from the need to exclude, from the identification of the circumstances that are the same or not materially different, all circumstances that constitute the disability in question. Only then, so it was said, would the comparator be in the same position as the person with the disability. Only then would the Act be given an operation that did not "fatally frustrate [its] purposes"[142].

222 It may readily be accepted that the necessary comparison to make is with the treatment of a person without the relevant disability. Section 5(1) makes that plain. It does not follow, however, that the "circumstances" to be considered are to be identified in the way the appellant contended. Indeed, to strip out of those circumstances any and every feature which presents difficulty to a disabled person would truly frustrate the purposes of the Act. Section 5(2) provides that the relevant circumstances are not shown to be materially different by showing that the disabled person has special needs. The appellant's contention, however, went further than that. It sought to refer to a set of circumstances that were wholly hypothetical – circumstances in which no aspect of the disability intrudes. That is not what the Act requires.

223 In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, s 5(1) requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in *those* circumstances if the person concerned was not disabled. The appellant's argument depended upon an inversion of that order of examination. Instead of directing attention first to the *actual* circumstances in which a disabled person was, or would be, treated disadvantageously, it sought to direct attention to a wholly *hypothetical* set of circumstances defined by excluding all features of the disability.

224 The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the "discriminator". It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability. There may be cases in which identifying the circumstances of *intended* treatment is not easy. But where it is alleged that a disabled person *has been* treated disadvantageously, those difficulties do not intrude. All of the circumstances of the impugned conduct can be identified and that is what s 5(1) requires. Once the circumstances of the treatment or intended

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142 *Sullivan v Department of Defence* [1992] EOC ¶92-421 at 79,005.

treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in circumstances that were the same or were not materially different.

225 In the present case, the circumstances in which Daniel was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils. Section 5(1) then presented two questions:

(i) How, in *those* circumstances, would the educational authority have treated a person without Daniel's disability?

(ii) If Daniel's treatment was less favourable than the treatment that would be given to a person without the disability, was that because of Daniel's disability?

Section 5(1) could be engaged in the application of s 22 only if it were found that Daniel was treated less favourably than a person without his disability would have been treated in circumstances that were the same as or were not materially different from the circumstances of Daniel's treatment.

226 To construe the operation of s 5(1) in the way described does not frustrate the proper operation of the Act. First, and very importantly, it is necessary to recall that s 6 will be engaged if a discriminator requires compliance with a requirement or condition which is not reasonable having regard to the circumstances of the case.

227 Secondly, in a case like the present, the construction we have described allows for a proper intersection between the operation of the Act and the operation of State and federal criminal law. Daniel's actions constituted assaults. It is neither necessary nor appropriate to decide whether he could or would have been held criminally responsible for them. It is enough to recognise that there will be cases where criminal conduct for which the perpetrator would be held criminally responsible could be seen to have occurred as a result of some disorder, illness or disease. It follows that there can be cases in which the perpetrator could be said to suffer a disability within the meaning of the Act.

228 It would be a startling result if the Act, on its proper construction, did not permit an employer, educational authority, or other person subject to the Act to require, as a universal rule, that employees and pupils comply with the criminal law. Yet if the appellant's submission is right, the "circumstances" to which s 5(1) refers can include no reference to disturbed behaviour (even disturbed criminal behaviour) if that behaviour is a characteristic of, or consequence of, the

actor's disability. Understanding the operation of the Act in this way would leave employers, educational authorities, and others subject to the Act, unable to insist upon compliance with the criminal law without in some cases contravening the Act.

229 The third point to make about the construction of s 5(1) which we have proffered is that, on that construction, the provision still has very important work to do by preventing the *different* treatment of persons with disability. As pointed out earlier, other legislatures have sought to go further than provide for equality of treatment. But s 5(1) does not take that further step. Rather, it requires comparison with a person without the disability, in the same position in all material respects as the aggrieved person[143].

230 Fourthly, it is a construction of the section which does not depend upon distinguishing between the cause of a person's disability and the effects or consequences of it. Indeed, it is a construction which embraces the importance of identifying (as part of the relevant circumstances) all the effects and consequences of disability that are manifested to the alleged discriminator. What then is asked is: how would that person treat another in those same circumstances?

231 Finally, it is a construction which gives separate and important work to all of the elements of s 5(1). The answer to the question presented by treatment "because of" disability does not determine the separate, comparative, question which must be asked: how would the discriminator treat or have treated a person without the disability in the relevant circumstances?

232 The Commissioner did not apply s 5(1) in the way we have described. Rather, the two separate questions we have identified as being presented by s 5(1) were elided and treated as one. The Commissioner's conclusion about the reason for Daniel's suspensions and exclusion (his disturbed behaviour) was seen as being determinative of the question of less favourable treatment. The circumstances which surrounded Daniel's treatment were not identified. There was no determination of how a person without the disability would have been treated in circumstances that were the same as, or not materially different from, the circumstances surrounding Daniel's treatment.

233 It follows that the appeal must be dismissed.

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143 cf *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at 61 [108], 62 [110] per Lord Scott of Foscote.

234 It is, however, desirable to say something shortly about the third issue argued in the appeal: was there less favourable treatment "because of" disability? The arguments about this aspect of s 5(1) sought to draw distinctions between the motive of the discriminator, the purpose of the conduct and the effect of the conduct, and between objective and subjective criteria of operation. Attention was directed to the drafter's use of the expression "by reason of" in the equivalent provisions of the Sex Discrimination Act[144] rather than the expression "because of" used in s 5(1) and other provisions of the Act[145]. Reference was made to s 10 of the Act and its provision that if an act is done for two or more reasons and one of those is the disability of a person "whether or not it is the dominant or a substantial reason for doing the act" then for the purposes of the Act "the act is taken to be done for that reason".

235 Counsel referred to statements in this Court construing other anti-discrimination statutes where the view was taken that the phrase "on the ground of" did not require an examination of intention or motive[146]. On the other hand, in *James v Eastleigh Borough Council*[147], the House of Lords treated as decisive the aim of the Council in acting as it did.

236 For present purposes, it is enough to say that we doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed "because of" disability. Rather, the central question will always be – *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it "because of", "by reason of", that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression "because of".

237 The appeal should be dismissed with costs. The consequence of that order would ordinarily be that the order of the primary judge, setting aside the Commissioner's decision and remitting it for further hearing, would stand unaffected. It was common ground, however, that by operation of the *Human Rights Legislation Amendment Act (No 1)* 1999 (Cth) and the Human Rights Legislation (Transitional) Regulations 2000 made under that Act, the original

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144 ss 5(1), 6(1).

145 For example, ss 7, 8.

146 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176, 184; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359-360.

147 [1990] 2 AC 751.

complaint made by the appellant is taken to have been terminated by the President of the Human Rights and Equal Opportunity Commission and the appellant was thereupon entitled, as he did, to commence a new proceeding in the Federal Magistrates Court. It is neither necessary nor appropriate to make any reference to those matters in this Court's order.

238 CALLINAN J. The events which gave rise to these proceedings occurred in a State school in the provincial city of Grafton in northern New South Wales. The outcome of the proceedings depends upon the proper construction of the *Disability Discrimination Act* 1992 (Cth) ("the Act"), the constitutional validity of which was not put in issue by any party. Accordingly, the case was conducted at all levels on the basis that the Act was validly enacted under the external affairs power, and on the assumption that it could operate in relation to the events in which the parties were concerned. I would also observe that no attempt was made to reconcile some competing provisions[148] in the international instruments referred to in s 12(8)[149] of the Act.

Facts

239 After a very great investment of time, resources, energy, expertise, money and compassion, on 3 December 1997, the first respondent determined that it could no longer provide a place for Daniel Hoggan within its mainstream classes at the South Grafton High School which it funded and conducted. Some idea of the magnitude of that investment can be obtained from the uncontroversial chronology provided by the appellant and appended to this judgment. The call upon the first respondent's resources did not cease on Daniel's exclusion from the school. As also appears from the chronology, much time and money have been expended on proceedings before the Human Rights and Equal Opportunity Commission ("the Commission"), in the Federal Court, the Full Court of the Federal Court and this Court.

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148 Article 13 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to education. That right could be adversely affected by an insistence that the education to which a disabled person is equally entitled should be provided in circumstances which cause disruption to the education of others.

149 "The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:

(a) give effect to the Convention; or

(b) give effect to the Covenant on Civil and Political Rights; or

(c) give effect to the International Covenant on Economic, Social and Cultural Rights; or

(d) relate to matters external to Australia; or

(e) relate to matters of international concern."

240 Daniel Hoggan is now 18 years old. A severe encephalopathic illness at 6 or 7 months of age damaged his brain and rendered him disabled in several respects. In consequence, he exhibits disinhibited and uninhibited behaviour. He finds it difficult to communicate. This in turn leads to frustration and further behavioural problems. These have included offensive language, lack of self-control and violence. The relevant details are set out in the judgment of Gummow, Hayne and Heydon JJ.

241 Eventually a Commissioner (appointed under the Act) Mr Innes, entertained a complaint about Daniel's exclusion from the school. The complaint was made by his foster father pursuant to s 69(1)(c) of the Act on behalf of Daniel as an aggrieved person. The complaint was of direct discrimination contrary to s 5 of the Act. The only sensible way to read the Act, and in particular s 103 of it which speaks in terms of the relief available to a complainant, is as referring in that respect to the aggrieved person, and not Mr Purvis the person who has initiated the proceedings on his behalf. The Commissioner's conclusion was that Daniel had been subjected to a detriment or detriments within the meaning of s 22(2)(c) of the Act.

242 On 13 November 2000, the Commissioner made a declaration that, in breach of ss 5 and 22(2) of the Act, the first respondent had discriminated against Daniel Hoggan on the grounds of his disability. He also declared that the first respondent should pay the sum of $49,000 to Mr Purvis as compensation.

243 The Commissioner's remarks on compensation were as follows:

> "I am satisfied that damages should be awarded under the following heads:
>
> - the suspensions and exclusion fall under the head of the loss of the environment of attending school with consequent benefits such as access to library, classroom, recreational and other school facilities; access to normal peer interaction which is analogous to loss of enjoyment of normal working environment;
>
> - loss of the opportunity to complete secondary education at school and the affect [sic] of exclusion on life chances including future employment chances and earning opportunities;
>
> - loss of the expectation of receiving a secondary education in a regular and local school environment; and-or
>
> - loss of the right to obtain the benefit of such an education.
>
> ...

I have made the following awards of damages for the various incidents of discrimination based on my appreciation both of the facts and of the appropriate awards of damages in this area.

- For the first two suspensions, which were short suspensions, I have awarded $2000 each.
- For the next three suspensions, which were long suspensions, I have awarded $5000 each.
- For the exclusion, and the consequential loss of opportunity and enjoyment of school environment described above I have awarded $20000.
- For the inflexibility regarding the amendment of Daniel's discipline and welfare policy I award $2000.
- For the diminished opportunity provided to Daniel by the [first] respondent's failure to provide teachers with training or awareness programs I award $4000.
- For the diminished opportunity provided to Daniel by the [first] respondent's failure to consult with experts in special education I award $4000.
- This is a total damages award of $49000 to be paid within 28 days of the date of this decision."

244 Quantum is not in issue but I cannot help observing in passing that the assessment of damages which were, by virtue of s 103(1)(b)(iv)[150] of the Act, required to be compensatory, and not punitive in character, appears to be utterly arbitrary. The Commissioner failed to explain how failure to have access to the library, or other unidentified school facilities, could actually adversely affect Daniel. No attempt was made by him to show how $2000 for a suspension of a couple of days only could bear any relationship to any loss or damage actually sustained by Daniel. The assessment could hardly have been in respect of aggravated damages because, as the evidence showed, Daniel did not regard enforced absence from school as a penalty, or as hurtful to him. Indeed the

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150 Section 103(1)(b) of the Act provides that the Commission may make a determination which includes:

> "(iv) a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent".

evidence suggests that to him it was more in the nature of a benefit or a reward than a punishment. Nor was it any part of the Commissioner's function to award damages to his foster parents in respect of any hurt they may have suffered. The yardsticks that the Commissioner used were assessments of the Commission in two other instances[151], made in respect of entirely different situations. The task that the Act dictated that the Commissioner undertake was of assessing this aggrieved person's, Daniel's, actual loss and damage. It may be that he allowed himself to be distracted by considerations imported from other jurisdictions instead of giving effect to the language of the Act. But whether that is so or not this apparently erroneous approach to the assessment of damages tends to reflect adversely on the Commissioner's approach to the case generally.

245 Following the Commissioner's declarations the first respondent sought an order of review of them under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). Section 5(1) of the ADJR Act provides that a person who is aggrieved by a decision to which that Act applies may apply to a court for an order of review in respect of the decision on any one or more of the grounds set out in s 5(1). The first respondent relied on the ground stated in s 5(1) of the ADJR Act, that the decision involved errors of law.

246 The first respondent's application for review was heard by Emmett J. The core of his Honour's reasoning in allowing the application is to be found in this passage[152]:

> "[T]here is a distinction to be drawn between a disability within the meaning of the Act, on the one hand, and behaviour that might result from or be caused by that disability on the other hand. Less favourable treatment on the ground of the behaviour is not *necessarily* less favourable treatment by reason of the disability. The position might be different in a case where the disability necessarily resulted in the relevant behaviour. That is not the present case. The behaviour of [Daniel] is not ipso facto a manifestation of a disability within the meaning of the Act nor of any disability of [Daniel] within the meaning of the Act." (original emphasis)

247 It was clear, in his Honour's opinion, from the following finding made by the Commissioner that the Commissioner's reasons were based on a conclusion

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151 *Finnery v The Hills Grammar School* unreported, Human Rights and Equal Opportunity Commission, 13 June 2000; *Murphy v State of New South Wales (NSW Department of Education)* (2000) EOC ¶93-095.

152 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69 at 77 [36].

that the principal's decision was made by reason of Daniel's *behaviour* rather than his *disability*[153]:

> "[The principal's] decision was taken as a result of Daniel's behaviour, which [the principal] believed impacted on the safety and welfare of Daniel, other students and staff. It was also taken, in [the principal's] view, as a result of Daniel's inability to cope with the stresses of high school life *as a result of his disability*. Whilst I am sure that [the principal] took this decision for what he saw as Daniel's best interests, nonetheless it was in breach of ss 5 and 22(2) of the Act." (emphasis added by Emmett J)

248 His Honour, after identifying some other errors of law in the Commissioner's reasoning, set aside his decision and remitted the matter for determination according to law.

249 An appeal by the appellant to the Full Court of the Federal Court (Spender, Gyles and Conti JJ) was unanimously dismissed. Their Honours discussed Daniel's behaviour in this way[154]:

> "It must steadily be borne in mind that the expulsion ... followed repetitive anti-social and violent conduct towards other students and staff which was plainly unacceptable in a primary school. It was disturbing to the function of education and threatened the safety of other students and staff. Those responsible for administration of the school owed a duty of care to the other students in the school, the teachers and the teacher's aides, with potential liability for any breach of that duty (*Commonwealth v Introvigne*[155]). The disorder as such was ultimately not relied upon by the school in order to prevent enrolment (cf s 22(1)), notwithstanding the potential for anti-social conduct which it involved. If it had been, then it may be that there would have been discrimination, subject to the operation of s 22(4). We do not need to decide that question. The problem was that, once enrolled, the school was not able to cope with the conduct ... which in fact ensued, despite considerable time and effort."

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153 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69 at 78 [43].

154 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237 at 247 [25].

155 (1982) 150 CLR 258.

250 The Full Court expressly approved the reasoning of Emmett J[156]. Their Honours thought the decision of the Commissioner capricious[157]. They also considered that the Commissioner failed to make a proper comparison between the treatment accorded to Daniel and the treatment ordinarily accorded to a child without his disabilities[158].

The appeal to this Court

251 The appellant has appealed to this Court on two grounds:

> "1. The Full Court erred in construing 'disability' as defined in section 4 of the *Disability Discrimination Act* 1992 (Cth) ... to exclude the behavioural manifestation of a disability.
>
> 2. The Full Court erred in identifying the 'comparator' for the purpose of applying the definition of 'direct discrimination' in section 5 of the Act as a person behaving in the same way as a person whose disability has a behavioural manifestation."

252 It is important to keep in mind that the legislature appreciated that equality in all circumstances was impossible. Accordingly, s 3 of the Act does not state its objects in absolute terms. Two of them are, the elimination, "as far as *possible*" of discrimination against persons on the ground of disability in "education", and the ensuring, "as far as *practicable*" that disabled persons have the same rights to equality before the law as the rest of the community.

253 Section 4 defines "disability" in this way:

> "'**disability**', in relation to a person, means:
>
> (a) total or partial loss of the person's bodily or mental functions; or
>
> (b) total or partial loss of a part of the body; or

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156 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237 at 248 [28].

157 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237 at 248 [29].

158 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237 at 248 [29].

(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; or

(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".

254 Section 5 defines "discrimination":

"**Disability discrimination**

5. (1) For the purposes of this Act, a person **('discriminator')** discriminates against another person **('aggrieved person')** on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

(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."

255 Section 6 has contextual relevance to the case. It provides:

"**Indirect disability discrimination**

6. For the purposes of this Act, a person **('discriminator')** discriminates against another person **('aggrieved person')** on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

256 Section 10 should also be noted:

"**Act done because of disability and for other reason**

10. If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act);

then, for the purposes of this Act, the act is taken to be done for that reason."

257 Sections 15 to 21 make unlawful, discrimination on the ground of disability, in employment, engagement or appointment of agents, of contract workers, in the formation of partnerships, in the granting of qualifications to tradespeople or professionals, and the membership of trade unions and employment agencies[159].

258 Section 22 is expressly concerned with education. It provides as follows:

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159 At the time s 103 of the Act set out the non-binding determinations which the Commission could make in relation to a complaint. From 13 April 2000, the jurisdiction to hear and determine complaints of discrimination was conferred on the Federal Court and then later the Federal Magistrates Court by s 46PO of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). Section 46PO(4) sets out the remedial orders which the Federal Court or Federal Magistrates Court may make if the complaint of discrimination is substantiated.

"**Education**

22. (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:

(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or

(b) by expelling the student; or

(c) by subjecting the student to any other detriment.

(3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.

(4) This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority."

259 For completeness I also set out s 55(1):

"**Commission may grant exemptions**

55. (1) The Commission may, on application by:

(a) a person:

(i) on that person's own behalf; or

(ii) on behalf of that person and another person or other persons; or

(iii) on behalf of another person or other persons; or

(b) 2 or more persons:

(i) on their own behalf; or

(ii) on behalf of themselves and another person or other persons; or

(iii) on behalf of another person or other persons;

by instrument grant to the person or persons to whom the application relates, as the case may be, an exemption from the operation of a provision of Division 1 or 2 (other than section 31 or 32), as specified in the instrument."

The appellant's argument

260 The appellant's argument can be shortly stated. The appellant initially submitted that on its proper construction the meaning of "disability" in pars (f) and (g) of s 4(1) of the Act is not confined to the underlying disorder, malfunction, illness or disease. The "disability" encompasses as well, the effects or results of that underlying disorder, malfunction, illness or disease to the extent specified in those paragraphs. As the argument progressed the appellant also came to rely on par (e) of the definition.

261 The appellant argued that the expressions "that results in" and "that affects" are conjunctive. "Disability" encompasses the whole of the thing described in each paragraph: both cause and effects. As to par (e) the submission was that the behaviour was the, or an aspect of a malfunction of part of Daniel's body, his brain.

262 The argument continued, that to construe the definition as submitted, would be to give it an operation which is consistent with the ordinary meaning of the defined term: a lack of physical or mental ability. The concept of disability generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life.

263 Such a construction is consistent with the way in which the cognate term "incapacity" has been interpreted in workers' compensation legislation: that a symptom, or behavioural manifestation of an injury or disease is not only

inseparable from the injury or disease itself, but is also an aspect of the condition for which compensation for incapacity is payable[160].

264 The appellant then turned to the issue of causation. He submitted that it is unnecessary for the purposes of this case to determine whether the test of causation is a "but for" test, requiring only that the person's disability have a real causative effect in the sense that, but for its presence, the act complained of would not have occurred; or a "but why" test requiring an investigation of the reasons which led the alleged discriminator to accord the less favourable treatment to the person with the disability.

265 On either approach, the appellant contended, attention must be paid to the particular characteristic of the complainant which in fact led to the decision or action of which complaint is made; and it is sufficient if the particular characteristic be the fact of, or an aspect of, the aggrieved person's disability. On either approach, the motive or intention of the discriminator in taking the aggrieved person's disability into account is irrelevant, however benign that motive or intention might be.

The disposition of the appeal

266 Education is not a head of Commonwealth power under s 51 of the Constitution. Nor are the definition, deterrence and punishment of criminal conduct except for crime the subject of legislation which the Commonwealth has power to enact and has enacted. These are essential functions of the States. As early as 1848 the Legislative Council of New South Wales allocated money for the establishment of schools in the Colony and appointed a Board of Commissioners for National Education[161]. Other legislation[162] followed from time to time. Within five years of federation legislation[163] was enacted to make education in public schools free and in 1916 to make it compulsory until age

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160 *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 637 per Windeyer J; *Commonwealth Banking Corporation v Percival* (1988) 20 FCR 176 at 180 per Davies, Sheppard and Ryan JJ; *Tippett v Australian Postal Corporation* (1998) 27 AAR 40; *Re Chami and Secretary, Department of Social Security* (1993) 31 ALD 387.

161 See 11 Vict No 48, *An Act to incorporate the Board of Commissioners for National Education*.

162 For example, 18 Vict 1854, *An Act to incorporate and partially endow the Sydney Grammar School*; and the *Public Schools Act* 1866 (NSW).

163 *Free Education Act* 1906 (NSW).

14[164]. Disruption of a class, violence towards other students and teachers, and departures from the standards which the staff of a school seek to maintain clearly have a capacity to interfere with the provision of education by the State. It is arguable that federal legislation imposing upon a State educational authority the adoption of measures which would appear to require it to tolerate behaviour which is otherwise proscribed as criminal, or is detrimental to the education of the general body of students, or which requires the State to alter the manner in which it ordinarily provides educational services[165], may have a capacity to burden or affect a State government in the performance of its functions[166], or unduly interfere with them. The effect of such legislation could be, as Gaudron, Gummow and Hayne JJ put it in *Austin v Commonwealth*[167], that in substance and operation it may cause in a significant manner "curtailment or interference with the exercise of State constitutional power[s]", here, over the provision of education and the criminal law. Such legislation, even if of general application, may be beyond the legislative power of the Commonwealth. The first respondent offered no arguments against the constitutional validity of the Act. That does not mean however that the matters that I have mentioned are irrelevant to its proper construction. It is right, in my opinion to approach that question on the basis that the Commonwealth was unlikely to have intended that the Act unduly interfere with the operation of the criminal law at least of New South Wales.

267 Before dealing with the specifics of the appellant's argument it is important to identify the stated reason for the principal's decision to exclude Daniel. It is to be found in a letter that he wrote on 3 December 1997:

> "Following the three meetings that have been held in relation to your ward, Daniel Hoggan, the situation that caused his last suspension for very violent behaviour has not been resolved ... As well as Daniel's education, I am also responsible for over 1000 other students and 80 teaching or SASS staff. The health and safety of all these people are also of great concern ...
>
> Based on the above procedures and meetings which have been unresolved, I am moving an exclusion of Daniel from South Grafton High

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164 *Public Instruction (Amendment) Act* 1916 (NSW).

165 See ss 5(2) and 22(2) of the Act.

166 See *Austin v Commonwealth* (2003) 77 ALJR 491 at 497-498 [19]-[20], 500-501 [26] per Gleeson CJ, 527 [166] per Gaudron, Gummow and Hayne JJ; 195 ALR 321 at 328-330, 333, 369-370.

167 (2003) 77 ALJR 491 at 527 [168]; 195 ALR 321 at 370.

> School. Action will be taken to find an alternative placement within ten days."

268 At this point I should also set out what seems to have been the basis of the Commissioner's finding as to the reason for Daniel's exclusion:

> "I find, based on the correspondence and evidence of [the principal], that the reason for Daniel's exclusion was more broadly based than just the last suspension. It related to Daniel's behaviour leading to the five suspensions, and throughout the period of his enrolment at SGHS. It also related to [the principal's] judgement that Daniel could not operate in a regular high school environment as a result of his disability. [The principal's] underlying reasoning – unlike that for his decision on the suspensions – included issues broader than just behavioural. Certainly Daniel's behaviour (and its impact on himself and other students and staff) was a factor, but it was not the only factor. The decision also related to [the principal's] perceptions of Daniel's success socially and educationally."

269 It is not entirely easy to reconcile the passage that I have just quoted with a later finding as to the principal's decision:

> "[The principal's] decision was taken as a result of Daniel's behaviour, which [the principal] believed impacted on the safety and welfare of Daniel, other students and staff. It was also taken, in [the principal's] view, as a result of Daniel's inability to cope with the stresses of high school life as a result of his disability. Whilst I am sure that [the principal] took this decision for what he saw as Daniel's best interests, nonetheless it was in breach of ss 5 and 22(2) of the Act."

270 This latter finding is consistent with the principal's stated reason for Daniel's exclusion. To say, as the Commissioner did, that the principal's decision "related to [his] perceptions of Daniel's success socially and educationally" really adds nothing to, or, is to say nothing different from, what the principal said was the reason for his decision.

271 In my opinion the appellant's appeal must fail. Let me assume for present purposes that the appellant's argument that a person's behaviour in consequence of that person's disorder falls within the definition of disability, or, more specifically, that the behaviour is itself a malfunctioning of part of the body, the brain, within the meaning of par (e) of the definition of disability. Even on that assumption, the Act cannot be sensibly read, in my opinion, as extending to behaviour which constitutes criminal or quasi-criminal conduct. If it were intended to include, as a disability behaviour which was criminal, itself a startling proposition, then the legislation would surely have said so in clear terms, if of course constitutionally it could operate to impose toleration of

criminal conduct on a State educational authority. The conduct in question here was of a criminal or quasi-criminal kind, including as it did, offensive language and assaults. 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 a capacity to injure, indeed even kill someone, or to damage property (by, for example, burning a school down) could be excused, and the first respondent bound to tolerate it, or seek to abate it, no matter how difficult, disruptive, expensive, or ineffectual measures for abatement might be. It is impossible to believe that the legislature intended such a result, particularly as it has acknowledged in s 3 of the Act that its objectives are to achieve what is practicable and possible, and as it may properly be assumed that it would not wish to burden the State significantly in carrying out its educational objectives, or interfere with the due administration of the criminal law of the State.

272 The correctness of the first respondent's argument that "disability", as defined, is different from the behaviour which it produces or of which it is a manifestation, is not a matter upon which therefore I need reach any concluded opinion. A "total or partial loss of the person's bodily or mental functions" (par (a) of the definition) may not be the same as the behaviour which that loss produces. Paragraph (g) internally does appear to distinguish between the disorder, illness or disease and the behavioural results of any of them, perhaps indicating thereby that the condition and the behaviour are different and separate, and that the reference to behaviour is adjectival only. The best of the appellant's argument, in reliance on par (e) of the definition, is that the brain, mouth and limbs are all parts of the body, that behaviour in the form of swearing is a malfunction of the mouth itself, and that behaviour in the form of punching is a malfunction of the limbs. A difficulty to which the argument may give rise, is that par (e) may then have application to people who swear or kick or punch non-compulsively and controllably, and who in consequence therefore would have also to be regarded as "disabled". These questions which it is unnecessary for me to answer do not require any further consideration.

273 The appeal should be dismissed not only for the reasons that I have given but also for the reasons given by Gummow, Hayne and Heydon JJ with respect to the "comparator" issue and the bearing that their Honours' construction of s 5(1) of the Act has on it. I would not wish to be taken however as deciding that the absence of an express statement in the Act requiring the provision of a service, or the expenditure of money by the State, necessarily eliminates the possibility that the Act as a whole, or by reference to sections of it, may impose an unacceptable burden upon, or effect a curtailment of a legitimate constitutional function of a State.

274 The appeal should be dismissed with costs.

CHRONOLOGY

DATE	**EVENT**
8 December 1984	Daniel Hoggan born
Steps taken to enrol Daniel at South Grafton High School	
6 August 1996	Mr and Mrs Purvis attend an interview with principal of South Grafton High School (SGHS) re Daniel's enrolment in 1997.
14 August 1996	Mr Purvis completes an application for Daniel's enrolment.
10 September 1996	SGHS teachers observe Daniel in class at Gillwinga Primary.
7 November 1996	Meeting between Mr and Mrs Purvis and principal SGHS to discuss potential obstacles to Daniel's attending SGHS.
11 November 1996	SGHS refuses enrolment of Daniel. Mr Purvis lodges an appeal.
23 December 1996	Mr Purvis lodges a complaint with the Human Rights and Equal Opportunity Commission (HREOC).
24 December 1996	The District Superintendent advised that the relevant policy has not been fully complied with in Daniel's case.
24 January 1997	Conciliation conference convened by HREOC in relation to the complaint.
February 1997	Integration Committee established at the school to determine the amount and type of resources and support required for Daniel.
4 February 1997	Teacher's Federation Meeting held at SGHS to discuss Daniel's enrolment.
5 February 1997	Integration Committee meeting to discuss Daniel's application for enrolment.

6 February 1997	Integration Committee meet with Daniel's primary school teachers.
7 February 1997	Meeting between principal of SGHS and Mr and Mrs Purvis to discuss action taken in relation to Daniel's enrolment.
11 February 1997	Teacher's Federation meeting with Daniel's primary school teachers.
12-13 February 1997	Discussions about Daniel participating in a trial day at SGHS.
February 1997	The principal prepares a document entitled "Daniel Hoggan's Integration".
20 February 1997	Teacher's Federation meeting to discuss Daniel's enrolment. A motion to approve Daniel's enrolment was deferred.
21 February 1997	The principal applied for integration programme funding for Daniel.
26 February 1997	Teacher's Federation meeting to discuss Daniel's integration. The principal explained the proposed programme. A motion was passed to reject Daniel's enrolment.
27 February 1997	Extraordinary Staff Meeting SGHS to discuss the motion rejecting the enrolment.
28 February 1997	The principal informs the staff that he will accept Daniel's application for enrolment.

Preparation for Daniel's attendance at SGHS

3 March 1997	Meeting between the principal and Mr and Mrs Purvis to discuss Daniel's enrolment and the establishment of a case management committee.
7 March 1997	Teacher's Federation Meeting to discuss Daniel's enrolment.
7 March 1997	Special Education Directorate approves funding of an amount equivalent to a Teacher's Aide (Special) for

	77 days (6 1/4 hours per day) and a Casual Teacher for 20 days (6 hours per day), until the end of Term 2.
12 March 1997	Principal and staff met with Mr Purvis. The issues of a welfare and discipline policy with appropriate sanctions for inappropriate behaviour were also discussed.
19 March 1997	Case management meeting to formulate welfare and discipline policy for Daniel.
24 March 1997	Principal prepared a document entitled "Enrolment of Daniel Hoggan to South Grafton High School (Student with special needs)".
25 March 1997	Case management meeting held with principal, staff and Mr Purvis.

Daniel's attendance at SGHS

8 April 1997	Daniel commences at SGHS in Year 7.
24 April 1997	**First Suspension:** Daniel suspended for 1 day. The reasons for the suspension are not clear but recorded in the Suspension Register as "violence against staff".
30 April 1997	Case management meeting held to discuss Daniel's progress, the effect of his presence in the class and modifications to the Draft Welfare and Discipline Policy which had been prepared for Daniel.
6 May 1997	Mr and Mrs Purvis meet with a psychologist to discuss strategies for getting Daniel to school.
7 May 1997	**Second Suspension:** Daniel suspended for 2 days for kicking a fellow student and swearing.
7 May 1997	Psychologist prepares a report on possible supports for Daniel.
29 May 1997	Principal meets with psychologist and Department of Community Services to discuss behaviour management strategy.
30 May 1997	Daniel kicked a desk over, kicked other students, kicked bags and swore.

18 June 1997	Case management meeting attended by psychologist, behaviour management strategies discussed.
19, 23, 24 June 1997	Reports of Daniel kicking and swearing.
26 June 1997	Distance Education report – Daniel has settled down and "things going well".
30 July 1997	**Third Suspension:** Daniel suspended (2 days) for kicking his teacher's aide.
8 August 1997	Case management meeting attended by special education consultants.
August/ September 1997	Special education consultants prepare the "programme review" which is an assessment of Daniel's placement at SGHS. Among a number of recommendations, they said Daniel's current placement at SGHS should continue with appropriate ongoing support.
2 September 1997	**Fourth Suspension:** Daniel suspended for 13 days for kicking a Year 10 student in the leg. The suspension was later reduced to 7 days.
18 September 1997	**Fifth Suspension:** Daniel suspended for 12 days for punching the teacher's aide in the back.
18 September 1997	The principal prepared a draft recommendation in relation to Daniel's future education. He recommended that his teachers' aides through Distance Education deliver Daniel's academic education at home, and that his aides have access to the full support and resources of the school. The principal recommended that Daniel join sports lessons and school excursions, and that a social group or circle of friends be established to meet with Daniel on a regular basis.
26 September 1997	The principal writes to Mr and Mrs Purvis outlining his concerns and strongly suggesting that they explore the option of enrolling Daniel in the Special Unit at Grafton High School.

15 October 1997	Case management meeting during which various options were discussed about Daniel's return to SGHS.
25 October 1997	School Counsellor prepared a report recommending that Daniel be enrolled at the Special Unit at Grafton High School.
28 October 1997	Principal prepared an application for integration funding for Daniel in Year 8, 1998.
4 November 1997	Teacher's Federation pass a resolution rejecting Daniel's inclusion at SGHS.
5 November 1997	Case management meeting.
6 November 1997	Meeting to develop revised educational plan attended by teacher's aide, Department of Community Services and parents.
7 November 1997	Submission regarding proposed new programme faxed to principal.
8 November 1997	Meeting held at SGHS to establish Daniel's needs.
20 November 1997	Mr Purvis visits GHS Support Unit.
2 December 1997	Mr Purvis advises SGHS of Daniel's intention to return.
3 December 1997	**Daniel excluded from SGHS.**
7 December 1997	Appeal against exclusion.
8 December 1997	School Counsellor's report on Daniel.
15 December 1997	State Integration Funding approved for Daniel for the school year 1998.
22 March 1998	Complaint lodged with HREOC.
15 October 1998	Acting Disability Discrimination Commissioner refers the complaint for hearing before the Commissioner.

24 May 1999 to 10 November 1999	Hearing of the complaint in Grafton (over 23 days) before Commissioner Graeme Innes.
13 April 2000	Amendments to the Act take effect.
13 November 2000	Commissioner delivers decision.
25 July 2001	First Respondent files amended application for judicial review in the Federal Court.
29 August 2001	Justice Emmett upholds the application for review and remits the matter to the Commission.
19 September 2001	Appellant files an appeal in the Federal Court.
12 October 2001	Application commenced in the Federal Magistrates Court.
24 April 2002	Full Court dismisses the appeal.
5 November 2002	Special leave to appeal granted.