DISABILITY DISCRIMINATION, THE DUTY TO MAKE ADJUSTMENTS AND THE PROBLEM OF PERSISTENT MISREADING

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The statutory duty to make adjustments contained in the Disability Discrimination Act 1992 *(Cth) is one mechanism to promote substantive equality in Australia. In theory, it requires duty-bearers to adjust existing practices to accommodate a person's needs. However, in* Sklavos v Australasian College of Dermatologists*, it was established that a duty-bearer is only required to make adjustments for persons with disabilities where the reason for the refusal to make adjustments is based on the disability itself. This removes the positive aspect of the duty from the requirement and makes it almost impossible for a claimant to prove their claim. This is not the first time that an Australian appellate court has effectively removed the positive duty aspects of the duty to make adjustments. This article will consider the reasons why higher courts in Australia appear to struggle to give meaning to such a duty. It will outline the purpose of the duty to make adjustments, before considering the approach of Australian courts to the duty. It will conclude by considering the different approaches adopted to such a duty in comparable jurisdictions and suggest reforms to the current Australian approach.*

I INTRODUCTION

Reasonable accommodation has been a foundational concept of discrimination law for many decades. In a well-known and often cited speech, the former Chief Justice of Canada, Madam Chief Justice Beverley McLachlin concluded:

> Diverse societies face two choices. They can choose the route of no accommodation where those with power set the agenda and the majority rules prevail. The result is the exclusion of some people from useful endeavours on irrelevant, stereotypical grounds and the denial of individual dignity and worth. …
>
> The other route is the route of reasonable accommodation. It starts from the

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> premise of each individual's worth and dignity and entitlement to equal treatment and benefit. It operates by requiring that the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends.[1]

Australian higher courts have, more often than not, chosen the former route. Most recently in 2017, the Full Court of the Federal Court considered the nature of the duty to make adjustments contained in the *Disability Discrimination Act 1992* (Cth) ('*DDA*') with respect to both direct and indirect discrimination in *Sklavos v Australasian College of Dermatologists* ('*Sklavos*').[2] In *Sklavos*, the complainant requested that the examination provisions of the respondent be adjusted to accommodate his psychiatric disability. The Court's decision demonstrated little evidence that the rationale for incorporating a duty to accommodate disabilities was understood. The decision could significantly limit the effectiveness of the duty contained in the *DDA*. This was not the first time that an Australian appellate court effectively removed the positive obligation from the duty to make adjustments.[3] The approach of the Australian higher courts can be contrasted with the far less limiting approaches taken in comparable jurisdictions such as Canada and the United Kingdom to the same duty.[4]

This article will analyse the approach of the Australian higher courts to the duty to make adjustments. This article will argue that the courts' continued and often express reliance on the concept of formal equality or equality of treatment consistently stymies the effectiveness and underlying purpose of the duty to make reasonable adjustments.[5] The interpretation based on formal equality conceives anti-discrimination law's purpose as only requiring persons in similar circumstances be treated the same, even if they require different treatment to have the possibility of equal outcomes. This article will further argue that to be an effective mechanism to combat disability discrimination, at a minimum, the duty to make adjustments needs to be understood to accept a social model of disability, require asymmetric operation as well as positive actions by the duty-bearer.

The article will make this argument in four parts. Part II will begin by considering the rationale for the duty to make adjustments and argue that to be a useful tool

1 Justice Beverley McLachlin, 'Reasonable Accommodation in a Multicultural Society' (Address to the Canadian Bar Association Continuing Legal Education Committee and National Constitutional and Human Rights Section, Calgary, Alberta, 7 April 1995).

2 (2017) 256 FCR 247 ('*Sklavos*').

3 This is discussed further with respect to *Purvis v New South Wales* (2003) 217 CLR 92 ('*Purvis*') and discussed in Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 30 April 2004) ('*Review of the Disability Discrimination Act 1992*').

4 See, eg, *Archibald v Fife Council* [2004] 4 All ER 303 ('*Archibald*'); *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* [1999] 3 SCR 3 ('*Meiorin*'). These cases will be discussed in more detail in Part V.

5 I note that there are adjustment duties contained in both the *Equal Opportunity Act 2010* (Vic) and the *Discrimination Act 1991* (ACT). However, the interpretations of these provisions have not been considered by higher courts.

to combat disability discrimination it needs to be understood as embedding a concept of substantive equality. In Part III, it will outline the legislative history of the duty to make adjustments in the Australian context. It will contend that since its original inception, the Commonwealth legislature has assumed the existence of accommodation duties in Australian disability discrimination law. Part IV will consider the Australian courts' approach to this duty, focusing on the High Court decision in *Purvis v New South Wales* ('*Purvis*'),[6] the Federal Court decision in *Watts v Australian Postal Corporation* ('*Watts*'),[7] and the Full Court of the Federal Court decision in *Sklavos*.[8] It will highlight that the case law rarely adopts an approach consistent with substantive equality and instead adopts an interpretation which requires 'like' treatment in almost all circumstances. In Part V, it will consider some of the alternative approaches adopted in comparable jurisdictions, focusing on the approaches adopted in the United Kingdom and Canada. Interestingly, the strictly formal approach adopted in much of the Australian case law is not apparent in comparable jurisdictions and this article will consider possible reasons for this difference in approach.

At the outset, it is noted that duties to accommodate persons with disabilities is also contained in the accommodation duties in the *Convention on the Rights of Persons with Disabilities* ('*CRPD*').[9] There is significant scholarship on the interpretation of the accommodation duties in the *CRPD*.[10] There could be an argument that the approach to reasonable accommodation or the duty to make adjustments taken in the federal courts is in tension with the protections provided in the *CRPD* but this is not the focus of this article.

II THE RATIONALE FOR THE DUTY TO MAKE ADJUSTMENTS

Generally, a duty to make adjustments requires a duty-bearer to make adjustments or accommodations to existing practices to accommodate a person's disability up until the point of unjustifiable hardship.[11] It can involve the adjustment of a rule, practice or condition to accommodate the specific needs of an individual or a group. The accommodation or adjustment can require many different actions including making a building accessible, providing interpretation or communication aids or

6 *Purvis* (n 3).

7 (2014) 222 FCR 220 ('*Watts*').

8 *Sklavos* (n 2).

9 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

10 A recent example which considers domestic approaches to the *CRPD* is Lisa Waddington and Anna Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (Oxford University Press, 2018).

11 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 358.

varying eligibility requirements.

A duty to make adjustments, or a duty to accommodate is ostensibly the same duty. In the British and Australian statutes and literature, this duty is referred to as a 'duty to make adjustments' and in the North American case law, statutes and scholarship such a duty is referred to as a 'duty to accommodate'. This paper generally utilises the term 'duty to make adjustments' unless specifically discussing the North American position.

This Part will consider the rationale for incorporating such a duty into discrimination law. It will emphasise that the purpose of the duty to make adjustments is designed to implement a social model of disability through asymmetrical operation focused on the elimination of socially constructed inequalities which are associated with difference and disability. These two features, the implementation of a social model of disability and asymmetrical operation, make the duty to make adjustments distinctive to other concepts found in Australian discrimination law such as direct and indirect discrimination.[12]

In a disability context, the duty to make adjustments emphasises an approach to disability discrimination that adopts a social model of disability.[13] A social model of disability can be contrasted from a medical model of disability. A medical model of disability locates the source of the 'problem' within the individual who has a physical, sensory, intellectual or psycho-social impairment.[14] Solutions adopting a medical model of a disability therefore focus on how one can change the individual through medical or mechanical intervention.[15] As Anna Lawson acknowledges, while these medical interventions can be important in allowing persons with disabilities to maximise their independence, an exclusive focus on such interventions ignores many of the ways in which disability is experienced.[16] In contrast, a social model of disability focuses on the social constructs that exist to continue to cause disadvantage to persons with disabilities.[17] Utilising a social model of disability requires consideration and removal of social barriers that exist to prevent persons with disabilities from participating fully in society.[18] These barriers can be physical or architectural (for example, a lack of access to buildings or high kerbs), organisational (lack of flexibility around scheduling or the failure

12 Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *The Modern Law Review* 16, 35.

13 Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart Publishing, 2008) 11.

14 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 95.

15 Lawson (n 13) 10–11.

16 Ibid 11.

17 Carol Thomas, 'How is Disability Understood? An Examination of Sociological Approaches' (2004) 19(6) *Disability & Society* 569, 570. See also Claire Tregaskis, 'Social Model Theory: The Story So Far' (2002) 17(4) *Disability & Society* 457, 457; Angharad E Beckett and Tom Campbell, 'The Social Model of Disability as an Oppositional Device' (2015) 30(2) *Disability & Society* 270, 271; Deborah A Stone, *The Disabled State* (Temple University Press, 1984).

18 Lawson (n 13) 11.

to provide appropriate equipment and facilities) or legal (such as the ineligibility of deaf persons to participate in criminal trials as jurors).[19] It is the disabling effect of these barriers which makes an impairment a 'disability' rather than the personal characteristic of the person.[20] A requirement to make adjustments addresses some of these barriers by requiring an adjustment to practice in order to facilitate better access and participation for those with disabilities.[21] In addition, this understanding of the purpose of the duty to make adjustments focuses on the limiting nature of the barriers of access and the conduct of the duty-bearer rather than focusing on an individual complainant.[22] This is important because many of the institutional, structural and organisational barriers that exist in society affect a diverse range of people rather than merely a single individual.

Not only does a duty to make adjustments adopt a social model of disability, it also requires an understanding of discrimination law to achieve some form of substantive or transformative equality. It does so by requiring a consideration of the manifestation of systemic barriers and requiring their removal. In contrast to other non-discrimination provisions, such as direct discrimination, the duty to accommodate is explicitly asymmetric in character.[23] The duty is asymmetric in character because it expressly requires different and possibly more favourable treatment of some persons in order to redress disadvantage that would otherwise exist. This can be contrasted with the concept of direct discrimination which is generally interpreted to provide for a symmetry of treatment.[24] The duty to make adjustments can also be contrasted with indirect discrimination because it not only focuses on the removal of conditions or requirements which cause disproportionate outcomes but also requires affirmative or positive actions to achieve some kind of equal outcome.

Further, the duty to make adjustments does go some way to achieving discrimination law's more transformational aims. It does so by requiring the removal of barriers of access and facilitating participation in society economically and socially.[25] However, the understanding of an 'adjustment' or 'accommodation' as the removal of a singular barrier for an individual has been criticised.[26] Long ago, Shelagh Day and Gwen Brodsky argued that the duty to accommodate, rather than addressing systemic inequalities can instead remanufacture those inequalities by focusing on a singular, individual remedy or accommodation

19 Ibid.

20 Ibid.

21 Ibid.

22 Paul Harpur, 'Sexism and Racism, Why Not Ableism: Calling for a Cultural Shift in the Approach to Disability Discrimination' (2009) 34(3) *Alternative Law Journal* 163, 166.

23 Fredman (n 14) 215–16.

24 Ibid 166–7.

25 Ibid.

26 Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit?' (1996) 75(3) *Canadian Bar Review* 433, 462.

for a single person or group rather than challenging the validity of the existing barrier.[27] As they persuasively argued:

> The difficulty with this [accommodation] paradigm is that it does not challenge the imbalances of power, or the discourses of dominance … which result in a society being designed … for some and not for others. It allows those who consider themselves 'normal' to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are 'accommodated'. … Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply 'accommodate' those who do not quite fit. We make some concessions to those who are 'different', rather than abandoning the idea of 'normal' and working for genuine inclusiveness. … In short, accommodation is assimilationist. Its goal is to try to make 'different' people fit into existing systems.[28]

Understood in the way Day and Brodsky advocate, the duty to make adjustments requires an adjudicator to question and challenge the existing standards or practices in place to question whether the standard *itself* can be adjusted to ensure that it accommodates as many differences as possible. This approach can be contrasted to simply making individual exceptions to the standard.[29] By understanding the duty to make adjustments in this way, there is a focus on what is wrong with the standard rather than the person. In this way, it is not focused on accommodating the individual but ensuring fairer access for everyone.

III THE DUTY TO MAKE ADJUSTMENTS IN THE *DDA*: A SHORT LEGISLATIVE HISTORY

The duty to make adjustments or accommodations first emerged in North America.[30] It was initially associated with a duty to accommodate an employee's religious practice or observance.[31] It was often used to prevent employers from requiring people to work on the Sabbath in contravention of their religious observance.[32] In the United States, duties to make adjustments for persons with

27 Ibid.

28 Ibid.

29 See Fredman (n 14) 30.

30 Ravi Malhotra, 'The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective' (2007) 23(1) *Washington University Journal of Law & Policy* 1, 18.

31 Ibid.

32 See, eg, *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 536 ('*Simpsons-Sears*').

disabilities were first incorporated into the *Rehabilitation Act of 1973*[33] through accompanying interpretative regulations.[34] It was then explicitly defined as a duty and expanded to the private sector through the *Americans with Disabilities Act of 1990*.[35] It has since been incorporated into discrimination regimes in many other jurisdictions including in Australia, the United Kingdom and the European Union.[36]

In Australia, when the *DDA* was first introduced it was hailed as a landmark for disability rights.[37] Like all Australian discrimination legislation, it involved a degree of compromise.[38] However, despite this compromise, this Part will demonstrate that there was also an assumption that it incorporated a need to accommodate persons with disabilities. In the initial legislation, a need for accommodation existed where a protected person required the use of palliative or therapeutic devices, interpreters or assistants, or other 'reasonable accommodation'.[39]

Evidence of the assumption as to the existence of a duty to accommodate are peppered throughout the legislative materials and second readings speeches which accompanied the initial bill. For instance, the Explanatory Memorandum accompanying the Disability Discrimination Bill 1992 (Cth) stated that:

> The Bill also provides that only *reasonable accommodation* needs to be made for people with disabilities, and persons against whom complaints are made will be able to argue that the accommodation necessary to be made will involve unjustifiable hardship on that person.[40]

In the second reading speech, the Minister introducing the legislation, Brian Howe, emphasised that the legislation was inspired by a

33 *Rehabilitation Act of 1973*, 29 USC § 701 (1973).

34 Robert L Burgdorf Jr, 'The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute' (1991) 26(2) *Harvard Civil Rights-Civil Liberties Law Review* 413, 428.

35 *Americans with Disabilities Act of 1990*, 42 USC § 12101 (1990); Barbara A Lee, 'Reasonable Accommodation under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent' (1993) 14(2) *Berkeley Journal of Employment and Labor Law* 201, 202.

36 In Australia, see *Disability Discrimination Act 1992* (Cth) ss 5(2), 6(2) ('*DDA*'); in the United Kingdom, see *Equality Act 2010* (UK), s 20; in the European Union, see *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16, art 5.

37 See Lee Ann Basser and Melinda Jones, 'The *Disability Discrimination Act 1992* (Cth): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26(2) *Melbourne University Law Review* 254, 258.

38 For discussion of the compromises made in discrimination legislation more generally, see Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085, 1086.

39 Margaret Thornton, 'Domesticating Disability Discrimination' (1993) 2(3) *International Journal of Discrimination and the Law* 183, 189; Peter Handley, '"Caught Between a Rock and a Hard Place": Anti-Discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act' (2001) 36(3) *Australian Journal of Political Science* 515; Basser and Jones (n 37) 269–70.

40 Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) 2 [5] (emphasis added) ('Explanatory Memorandum, Disability Discrimination Bill 1992').

> vision [of] a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights … where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society *accommodates* such difference.[41]

In addition, many of the speakers in the second reading debates seem to assume the existence of a duty of accommodation.[42] This was one of the key criticisms of the Bill by the conservative Liberal/National opposition. For example, Chris Miles considered that the standard for reasonable accommodation was too vague to be practicable:

> [T]he Bill also provides for things like reasonable accommodation needs [sic]. Who determines what is reasonable? Is there a community standard as to what reasonable accommodation is? Is reasonable accommodation in northern Australia the same as in southern Australia? There is a great diversity. If we are going to put into place legislation that addresses these things, we will have to have a lot more clarity than is provided by generalised terms such as 'reasonable accommodation'.[43]

This assumption is present in references to a duty to accommodate, as well as references to an exception to measures which would otherwise be unlawful discrimination where the provision of accommodation would impose unjustifiable hardship.

Unfortunately, while the existence of such a duty was assumed, it was also poorly drafted in two important ways. First, the reasonable accommodation requirement was implicit in the definitions of direct and indirect discrimination and through the defence of unjustifiable hardship rather than explicitly required.[44]

Second, it was unclear who held the burden of proof with respect to unjustifiable hardship.[45] Was it for the complainant to prove on the balance of probabilities that the failure to provide accommodation was discrimination *and* that it would not have caused unjustifiable hardship to provide such accommodation? Or did the unjustifiable hardship provision operate as a defence? The initial legislation was

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2755 (Brian Howe, Minister for Health, Housing and Community Services) (emphasis added).

42 Two examples of this assumption can be found in Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1309 (Grant Tambling); Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1315 (Meg Lees).

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, 151 (Chris Miles).

44 *DDA* (n 36) ss 5(2), 6(2), later amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) s 17.

45 Melissa Conley Tyler, 'The *Disability Discrimination Act 1992*: Genesis, Drafting and Prospects' (1993) 19(1) *Melbourne University Law Review* 211, 223.

left open and indeterminate in this regard.[46]

The legislation was amended in 2008 after the High Court's decision in *Purvis* (discussed below in Part IV) brought into question whether the previous iteration of the *DDA* contained any distinctive duty to accommodate a disability.[47] The amendments were based on the Productivity Commission's recommendation that an explicit duty to make adjustments be incorporated into the *DDA*:

> Until recently, it had been presumed that the *DDA* obliged affected organisations to make 'reasonable adjustments' to accommodate the needs of people with disabilities. Although the term 'reasonable adjustment' does not appear in the *DDA*, various features of the Act seemed to imply such an obligation. However, a recent High Court decision questioned this presumption and appears to have narrowed significantly the protection that the Act was previously thought to provide.
>
> The Commission considers that substantive equality is a sound basis for disability discrimination legislation. It therefore endorses the concept of reasonable adjustment as a means to this end, and recommends that it be included explicitly in the Act ...[48]

The Labor-Rudd Government accepted these recommendations and passed amending legislation incorporating a duty to make adjustments into the *DDA* in 2009.[49]

The new duty is contained in ss 5(2) and 6(2) of the *DDA*. Section 5(2) provides that direct discrimination on the grounds of disability occurs where the duty-bearer does not make, or proposes not to make, adjustments for a person with a disability and the failure to make the reasonable adjustment has the effect that the aggrieved person is treated less favourably than a person without the disability would be treated in the circumstances. The exact wording is as follows:

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

46 Ibid.

47 Although it was still considered to be implicit in the definition of indirect discrimination. On this point, see Lawson (n 13) 3; Bruce Arnold et al, 'It Just Doesn't Add Up: ADHD/ADD, the Workplace and Discrimination' (2010) 34(2) *Melbourne University Law Review* 359, 380.

48 *Review of the Disability Discrimination Act 1992* (n 3) xl.

49 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

> (2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.[50]

Section 6(2) of the *DDA* provides that that where the discriminator requires a person to comply with a requirement or condition and the person could comply with such a condition only if reasonable adjustments were made but those adjustments are, in fact, not made, this failure to make adjustments constitutes indirect discrimination.[51]

In introducing the Amendment Bill, the then Attorney-General, Robert McClelland, stated that the purpose of the amendment was to 'introduce an explicit and positive duty to make … adjustments for people with disabilit[ies].'[52] He explicitly outlined that when passing the original Bill, the drafters accepted that positive action may be required to avoid disability discrimination but the necessity of positive action was brought into doubt by the decision in *Purvis*.[53] The incorporation of a duty to make adjustments recognises and acknowledges that equal treatment can and will lead to inequitable outcomes. Consequently, positive duties to remove barriers of access are required.[54] The Explanatory Memorandum accompanying the amending legislation in 2009, illustrates that the Federal Parliament accepted that the *DDA* should require some form of

50 *DDA* (n 36) s 5.

51 The precise wording of *DDA* (n 36) s 6(2) is:

> (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
>
> (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

52 Commonwealth, *Parliamentary Debates,* House of Representatives, 3 December 2008, 12292 (Robert McClelland, Attorney-General).

53 Ibid.

54 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 125.

substantive equality.[55] What this more 'substantive' form of equality involves was discussed in Part II.

IV THE AUSTRALIAN COURTS' APPROACH TO THE DUTY TO MAKE ADJUSTMENTS

When the *DDA* was first introduced, it was assumed by the legislature that it incorporated a duty to make adjustments. This assumption was put to rest in *Purvis*.[56] This Part will outline Australian higher courts' approach to the duty to make adjustments since *Purvis* in both its former and current iterations. It will argue that despite evidence from the accompanying legislative materials — that the duty to make reasonable adjustments was designed to operate as a positive and substantive duty — the courts have generally approached it utilising a framework of formal equality, or treating 'like' alike. This has limited the effectiveness of the duty. Where courts have acknowledged that the duty is meant to provide for substantive equality, the impact has been lessened due to the fact that what substantive equality would entail has been left undefined and under-explored.

A Purvis

The High Court of Australia first considered the duty to accommodate in *Purvis*.[57] *Purvis* involved the expulsion of a high school student because of his anti-social behaviour towards staff and other students. The anti-social behaviour was allegedly the result of a brain injury he acquired as an infant. The appellant argued that the student's expulsion was direct discrimination because of his disability. It was common ground that the brain injury constituted a disability pursuant to s 4 of the *DDA*. A majority of the High Court concluded that the expulsion was not direct discrimination because the student had been treated in the same way as any other student who had behaved in the manner in which the student had behaved where that student did not have a brain injury.[58] The case has been the subject of extensive critique and commentary but the focus of much of

55 Explanatory Memorandum, Disability Discrimination Bill 1992 (n 40) 2 [5]–[6]; Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 7 [35].

56 *Purvis* (n 3).

57 This decision has been discussed in extensive detail previously. See, eg, Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111; Kate Rattigan, 'Case Note: *Purvis v New South Wales* (Department of Education and Training): A Case for Amending the *Disability Discrimination Act 1992* (Cth)' (2004) 28(2) *Melbourne University Law Review* 532; Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21(1) *Australian Journal of Labour Law* 3 ('*Wardley* to *Purvis*'); Samantha Edwards, '*Purvis* in the High Court Behaviour, Disability and the Meaning of Direct Discrimination' (2004) 26(4) *Sydney Law Review* 639; Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1 ('Disabling Discrimination Legislation').

58 *Purvis* (n 3) 161 (Gummow, Hayne and Heydon JJ).

this commentary has been confined to the Court's consideration of the appropriate comparator for the purpose of direct discrimination.[59] What this article seeks to outline instead is the approach adopted in relation to the understanding of reasonable accommodation.[60]

In their joint judgment, Gummow, Hayne and Heydon JJ emphasise that the purpose of the *DDA* is to provide for equality of *treatment* rather than equality of outcome.[61] As such, the *DDA* was not to be understood as requiring or even attempting to achieve substantive equality.[62] In this way, the *DDA* was distinctive from the legislation in place in other jurisdictions such as the *Disability Discrimination Act 1995* (UK) in the United Kingdom and the *Canadian Charter of Rights and Freedoms*[63] in Canada.[64] The operation of s 5(2) (the accommodation requirement) was limited to identifying one circumstance which was not a material difference for the purposes of comparing treatment:

> 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 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.[65]

In their judgment, the plurality rejects that the *DDA* in any sense requires or obliges a duty-bearer to accommodate a disabled person's differences. Instead, the requirement for accommodation is merely a 'circumstance' to be considered.[66] In their dissenting judgment, whilst McHugh and Kirby JJ reject the plurality's application of s 5(2), they also accept that the provision did not impose a positive obligation on duty-bearers to make adjustments.[67] It was these statements, in part, that led to the Labor Government's amendments to the *DDA* in 2009, as explained

59 See, eg, Campbell (n 57).

60 The adjustment issues were considered in Elizabeth Dickson, 'Disability Standards for Education and the Obligation of Reasonable Adjustment' (2006) 11(2) *Australian & New Zealand Journal of Law & Education* 23; Elizabeth Dickson, 'Disability Standards for Education and Reasonable Adjustment in the Tertiary Education Sector' (2007) 12(2) *Australian & New Zealand Journal of Law & Education* 25, but were focused on the implications in education rather than generally.

61 *Purvis* (n 3) 155.

62 Ibid 154–5 (Gummow, Hayne and Heydon JJ).

63 *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').

64 *Purvis* (n 3) 155 (Gummow, Hayne and Heydon JJ).

65 Ibid 159 (emphasis added).

66 Ibid.

67 Ibid 127.

above in Part II to clarify that the duty to make adjustments *did* require positive action and *was* intended to produce substantive outcomes.

B Watts

The first higher court decision to explore the nature of the reformulated duty to make adjustments was *Watts*.[68] In *Watts*, the complainant argued that the respondent's conduct in managing her return to work where she had a psychiatric condition was unlawful discrimination.[69] In organising her transition back to her previous work, the respondent had refused to allow the complainant to return to work from sick leave because it argued that there were no modifications or restrictions reasonably available for her to do so.[70] Mortimer J accepted that the respondent's conduct amounted to discrimination on the basis of a failure to make reasonable adjustments.[71] The consequence of that failure was that the complainant was denied the ability to attend work, exercise her skills and have a choice as to how she used her sick and recreational leave.

In considering the disability discrimination claim, Mortimer J considered, in some detail, the operation of s 5(2) of the *DDA*. In considering the operation of the reasonable adjustments provision, her Honour acknowledged that the term 'reasonable adjustment' was drawn from the *CRPD* to which Australia was a party.[72] She further accepted that while the provision used the term 'reasonable', the *DDA* had defined 'reasonable' to mean all adjustments up until the point of undue hardship with no scope for the Court or the duty-bearer to assess the 'reasonableness' of the adjustment outside the context of undue hardship. As Mortimer J articulated:

> The somewhat absolute nature of the definition of reasonable adjustments has tangible consequences for potential discriminators. There is no room in the operation of s 5(2) for a discriminator, or a court, to assess conduct, or modifications, by reference to notions of reasonableness. The statute removes that capacity. Unless a modification involves unjustifiable hardship, it will by operation of s 4 be a reasonable adjustment and the discriminator must make it 'for' the person, to avoid the consequences [of] s 5(2) … One consequence is that what constitutes 'hardship' and the circumstances in which it might be 'unjustifiable' may be broader than if the statute used reasonableness as a

68 *Watts* (n 7).

69 Ibid 223–4 (Mortimer J).

70 Ibid 224.

71 Ibid 224–5.

72 Ibid 227. For a discussion of this aspect of the decision, see Lisa Waddington, 'Australia' in Lisa Waddington and Anna Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (Oxford University Press, 2018) 51, 73–4.

criterion of liability.[73]

What is interesting about Mortimer J's analysis of the operation of s 5(2) of the *DDA* is that there is implicitly a concern that the failure for the discriminator or the court to assess the 'reasonableness' of the adjustment will somehow lead to duty-bearers being required to make unfair or unreasonable adjustments for persons with disabilities. This concern appears to place the needs and preferences of the duty-bearer above those of the disabled person who may, in fact, require adjustments in order to simply live their life. Consequently, her Honour seems to indicate that the term 'unjustifiable hardship' needs to be given a broader definition to offset the perceived imbalance. This is despite the fact that s 11 of the *DDA* also provides guidance on determining what is an 'unjustifiable hardship' without lowering the standard to one of 'reasonableness'.[74] This is, in part, due to Mortimer J's understanding of the *DDA* as a compromise,[75] although there is limited evidence of any further or underlying compromise outside the inclusion of the unjustifiable hardship standard in either the 1992 or 2008 legislative materials.

After a detailed consideration of the evidence of the case, Mortimer J considered the operation of s 5(2) of the *DDA*. In her Honour's judgment, she emphasised the differences between s 5(1) which is commonly understood as the prohibition on direct discrimination and the reasonable adjustment provision at s 5(2).[76] While her Honour accepted that in *Purvis*, the High Court concluded that s 5(1) required a formal approach to equality — that similarly situated persons be treated the same — her Honour concluded that s 5(2) was directed to a different aim.[77] Unlike the direct discrimination provision at s 5(1), the reasonable adjustment provision at s 5(2) *was* aimed to facilitating substantive equality, although her Honour was not specific about what substantive equality would entail.[78] From her Honour's judgment, it appears that what her Honour considered 'substantive equality' was merely a focus on the effect of the measure, but gives no greater elaboration as to the overarching purpose of the duty. It, however, did also entail a degree of a positive obligation which required a duty-bearer to make adjustments where a failure to do so would cause a complainant to suffer from less favourable treatment.[79] Mortimer J adopts an approach which clearly distinguishes the reasoning process that s 5(2) requires as compared to s 5(1). Section 5(1) is focused on the reason for the treatment and s 5(2) is focused on the effect of the treatment on the complainant.

73 Ibid 229.

74 *DDA* (n 36) s 11.

75 *Watts* (n 7) 225.

76 Ibid 277–8.

77 Ibid 278.

78 Ibid.

79 Ibid 275 (Mortimer J).

Mortimer J's approach in *Watts* recognises and accepts the substantive basis of a duty to make reasonable adjustments. But, while it recognises that substantive equality is the basis of the duty to make reasonable adjustments, Mortimer J fails to articulate or identify what substantive equality entails in the context of the duty. In addition, her consideration focuses primarily on whether the complainant in the case can be individually accommodated rather than challenging and transforming the existing standards. This could be due to her understanding of disability legislation as a 'compromise of the Parliament' rather than a legislative attempt to pursue more far-reaching social change.[80] This understanding of the *compromised* basis for the rights contained in the *DDA* is indicative of the approach adopted to the duty to make adjustments contained in *Sklavos*.[81]

C Sklavos

The Full Federal Court decision in *Sklavos* limits the extent of the positive obligation placed on duty-holders.[82] In *Sklavos*, the appellant was training to become a dermatologist through the respondent college. The appellant suffered from a specific phobia of the college's assessment. To become a dermatologist, he was required to pass the college's examinations. Because of this phobia, he requested that his competency be assessed on an alternative basis. The respondent refused his request. In response, the appellant brought an action for discrimination arguing that the respondent's decision constituted disability discrimination. He argued that the respondent's decision constituted a failure to make reasonable adjustments as required by s 5(2) of the *DDA*. In the alternative, he argued that the respondent's conduct was indirect discrimination and contravened s 6 of the *DDA* and in the second alternative, was a failure to comply with the *Disability Standards for Education 2005* (Cth) and in breach of s 32 of the *DDA*.[83] The appellant was unsuccessful in each of these claims but this article will focus on the Full Court's analysis of ss 5(2) and 6(2) of the *DDA*.[84]

In determining whether the appellant had been discriminated against through the failure to provide reasonable adjustments, Bromberg J (with Griffiths and Bromwich JJ agreeing) considered the causative test required to prove that the complainant was treated the way he was 'because of' his disability.[85] Following *Watts,* the appellant argued that s 5(2) required a different approach to causation to that required by s 5(1), which contained the general definition of direct

80 Ibid 225.

81 *Sklavos* (n 2).

82 Ibid.

83 Ibid 247.

84 Ibid 251 (Bromberg J).

85 Ibid 254–5.

discrimination.[86] Consistently with the decision in *Watts*, the appellant argued that while s 5(1) of the *DDA* is concerned with the duty-bearer's reason for treating the complainant in the way in which they did, s 5(2) is focused on the effect of the treatment, or the failure to make reasonable adjustments on the person with a disability.[87] Given this difference, the appellant argued that the correct approach to s 5(2) was to consider the effect rather than reason for the treatment.[88]

Bromberg J rejected this construction of the causative test. He considered that as the phrase, 'because of the disability' appeared in s 5, a court was required to conduct a causative inquiry.[89] Bromberg J found that the central question for both subsections of s 5 was: why was the complainant treated the way they were?[90] The onus was on the complainant to prove with respect to both ss 5(1) and 5(2) that the substantial reason why they were treated the way they were was their disability.[91]

Bromberg J concluded that this approach to s 5(2) was the only way to achieve harmony between direct and indirect discrimination. Without this interpretation, Bromberg J concluded that ss 5(2) and 6 of *DDA* would be addressing the same subject matter, and this would serve to

> significantly deny what seems to be the obvious intent of the *DDA* as demonstrated by s 6(3), that conduct which is not driven (in part or in whole) by the disability (indirect discrimination) is more amenable to being justified and excused if it is reasonable than conduct that is based (in part or in whole) upon the disability (direct discrimination).[92]

In this case, it meant that the appellant's treatment by the college was to be compared to another person, without a disability, who also wanted to become a fellow of the college without passing the examinations.[93] Utilising that comparison, the Court concluded that the comparator would have been treated in the same way as the appellant.[94] Consequently, there was no direct discrimination against the appellant.

This approach turns what was described in the extrinsic materials as a positive obligation — to make changes to existing structures and practices to accommodate difference — into a negative obligation. It becomes a negative obligation because a duty-bearer is *only* required by the *DDA* to make a reasonable adjustment where a reason for the refusal is the disability itself.

86 Ibid 256 (Bromberg J).
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid.
91 Ibid 258 (Bromberg J).
92 Ibid 259.
93 Ibid 261 (Bromberg J).
94 Ibid.

If a duty-bearer's refusal is based on the cost of the adjustment or the inconvenience of the adjustment but not on the complainant's disability, there is no obligation on the duty-bearer to make an adjustment to existing practice. This approach to s 5(2) of the *DDA* is one which adopts an understanding of discrimination law's purpose as one of formal equality only; that people are only entitled to like treatment, even where they require different treatment to have equal outcomes. Bromberg J's approach to the duty to make reasonable adjustments appears to give such a duty limited applicability because there are few cases where a failure to make adjustments will be substantially because of a person's disability. Rather, it is possible that for many duty-bearers it is concerns of costs and convenience which prevents adjustments being made.

In respect of the indirect discrimination claim, the Court concluded that there was no need to make adjustments where the condition or policy complained of was reasonable.[95] The condition imposed on the complainant was that to be elected as a Fellow of the college, the complainant had to pass the college's final examinations.[96] The Full Court accepted that the complainant could not comply with this condition and that such a condition would have the effect of disadvantaging persons with the complainant's disability generally.[97] But the Full Court concluded that the examination policy was reasonable. It was reasonable because it had a logical, underlying basis,[98] and though alternative assessments could have occurred, the primary judge and the Full Court concluded that alternative assessment would not have been practical. This determination was not made on the case of the respondent but instead on the primary judge and Full Court's acceptance '[t]hat developing and implementing an alternative assessment program would be difficult and involve substantial effort is almost a self-evident proposition'.[99] As the policy was reasonable, there was no need to make an adjustment to the policy for persons with disabilities.

Particularly when considering the duty to make adjustments, this approach is both counter-intuitive and ineffective. As Gwen Brodsky has highlighted in the Canadian context:

> The complaint in most disability accommodation cases is not that the complainant was treated differently from members of another group, but rather that there has been a failure to take disability into account *and* effectively remove a barrier to inclusion. The fact that there may have been the same treatment is irrelevant. It is illogical and counter-productive to require a person seeking accommodation because of disability to demonstrate that they have been treated differently

95 Ibid 269 (Bromberg J).

96 Ibid 262.

97 Ibid.

98 Ibid.

99 Ibid 269 (Bromberg J).

> from anyone else. The goal of accommodating persons with disabilities is not to address different treatment.[100]

The approach adopted by the Full Court in *Sklavos* did not appreciate this difference between accommodation or adjustment claims and other kinds of discrimination claims.[101] It does not appreciate that in order to make appropriate adjustments, organisations may need to undertake considerable work up until the point of unjustifiable hardship to ensure that persons with disabilities have appropriate access to services and opportunities. Particularly in its assessment of the indirect discrimination claim, the Court fails to appreciate that the *DDA* can be utilised to challenge accepted practices or place an onus on respondents to justify the standards and practices that they have put in place in any real way. Like the cases before it, it assumes a compromised balance in favour of respondents not readily identifiable in the legislative text or the associated debates and materials.

It remains to be seen what effect the *Sklavos* decision will have on the development of disability discrimination law. The High Court refused a special leave application on the basis that it was 'not a suitable vehicle for the consideration of the meaning of ss 5 and 6 of the *Disability Discrimination Act 1992* (Cth)'.[102]

V ALTERNATIVE APPROACHES

This relatively strict formal equality approach, focused on the perceived 'compromises' to the duty to make reasonable adjustments in the Australian jurisprudence, has not been seen to the same extent in comparable jurisdictions. This Part will consider the different approaches adopted reasonable adjustments in Canada and the United Kingdom and consider the reasons for the Australian higher courts' distinctiveness.

A *United Kingdom*

A duty to make adjustments has been incorporated into British disability discrimination law since the passage of the *Disability Discrimination Act 1995* (UK) ('*DDA* (UK)').[103] This same duty was also incorporated into the *Equality Act 2010* (UK) ('*Equality Act*').[104] There are important differences between the provisions incorporating the duty in the British Acts as compared to the

100 Gwen Brodsky, '*Moore v British Columbia*: Supreme Court of Canada Keeps the Duty to Accommodate Strong' (2013) 10 *Journal of Law & Equality* 86, 89.

101 Rees, Rice and Allen (n 11) 364, quoting the suggested interpretation of *DDA* (n 44) s 5(2) in Gaze and Smith (n 54) 126.

102 *Sklavos v Australasian College of Dermatologists* [2018] HCASL 7, [1].

103 See, eg, *Disability Discrimination Act 1995* (UK), s 6 ('*DDA* (UK)').

104 *Equality Act 2010* (UK), ss 20–21 ('*Equality Act*'). Note that the *DDA* (UK) (n 103) still applies in Northern Ireland.

Australian approach. First, the duty to make adjustments is not a subsection of the provisions prohibiting direct and indirect discrimination. Instead, it is treated as a separate and distinct obligation. Second, the *Equality Act* is very detailed in its elaboration of what the duty requires with examples and explanations of the kinds of actions which the duty requires.[105] For example, s 20 (which contains the duty to make adjustments) has 13 subsections which identify the kinds of actions, aids and changes that need to be made as a part of a duty to make adjustments. It is possible that this different drafting approach has influenced the way in which the courts have understood and applied the duty.

Unlike the approach of the Australian higher courts, the courts of the United Kingdom have generally understood the duty to make adjustments as a requirement to treat disabled persons differently and potentially more favourably to ensure that similar outcomes are achieved. The requirement for different and possibly more favourable treatment was emphasised in the first disability discrimination case heard by the House of Lords, *Archibald v Fife Council* ('*Archibald*').[106] In *Archibald*, the complainant had been a road sweeper for the Fife Council. After a medical procedure, she was unable to walk and therefore unable to do her job. She requested a redeployment to an office role. The redeployment policy allowed redeployment without a competitive interview for posts of the same or a lower pay grade. However, all office roles were at a higher pay grade than the complainant's current manual position and consequently, the redeployment policy was not used.[107] She argued that the redeployment policy breached the *DDA* (UK) for failure to make reasonable adjustments.[108]

In the House of Lords, the complainant was successful in her claim. In determining the claim, the House of Lords elaborated on the meaning and requirements of the duty to make adjustments.[109] In their consideration of the duty and its potential for justification, they concluded that the duty to make adjustments can involve more favourable treatment for a disabled complainant than another person, and a failure to implement reasonable adjustments had a high threshold for justification.[110]

In doing so, the House of Lords emphasised the differences between the prohibitions on disability discrimination and discrimination on other grounds. As Baroness Hale emphasised:

> [T]his legislation is different from the *Sex Discrimination Act 1975* and the *Race Relations Act 1976*. In the latter two, men and women or black and white, as

105 *Equality Act* (n 104) ss 20(2)–(13).

106 *Archibald* (n 4).

107 Ibid 318 (Baroness Hale).

108 Ibid 306 (Lord Hope).

109 Ibid 319–20 (Baroness Hale).

110 Ibid 322 (Baroness Hale).

> the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.[111]

In her judgment, it is clear that Baroness Hale understood that to achieve equality for persons with disability, there may need to be more favourable treatment. While the legislative regime has undergone a number of significant changes since the decision in *Archibald*, the Supreme Court of the United Kingdom has maintained that the correct approach to the duty to make adjustments requires asymmetry and potentially more favourable treatment of persons with disabilities.[112] This is despite some clear discomfort in the more recent case law about the broader implications of this approach.

This discomfort can be seen in the 2017 decision of *Paulley v FirstGroup plc* ('*Paulley*').[113] In *Paulley*, the complainant was a wheelchair user and wished to catch a bus. While all buses were equipped with a space for wheelchair users, on the bus that he attempted to catch, this space was filled with another passenger with a pram. The complainant was refused entry onto the bus because the bus driver felt unable to engage in any further actions to move the passenger with the pram to another space when the passenger had refused an initial request.[114] The complainant argued that this failure to have a policy in place to deal with unaccommodating passengers constituted a failure to make reasonable adjustments in the provision of services, as prohibited by s 29 of the *Equality Act*.[115] The Supreme Court of the United Kingdom agreed that the bus company was required to do more to attempt to move other passengers from the wheelchair seating area but there was a lack of clarity as to what *more* would involve and the amount of pressure that a bus driver could place another passenger under to get them to vacate the space.[116] In part, some of the judgments, particularly that of Lord Neuberger and Lord Sumption show a clear discomfort with the idea of discrimination law sanctioning merely inconsiderate behaviour, with Lord Neuberger considering:

111 Ibid 316.

112 See, eg, *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220; *O'Hanlon v Revenue and Customs Commissioner* [2007] EWCA Civ 283.

113 [2017] 2 All ER 1.

114 Ibid 426 (Lord Neuberger PSC).

115 Ibid.

116 Ibid 442 (Lord Neuberger PSC).

> As to Lord Sumption JSC's judgment, I agree with him that, at least as a general rule, the law should not normally seek to sanction or otherwise deal with lawful but inconsiderate behaviour, and, similarly, it should not normally enforce basic standards of decency and courtesy. However, we are here concerned with a statute whose purpose is to ensure, within limits, that behaviour is curbed when it results in discrimination under section 29 of the *Equality Act 2010*. Accordingly, while it is essential that any judicial decision in this area seeks to take into account the realities of life and the interests of others, judges have to do their best to give effect to that purpose, even if it may involve a degree of departure from the general rule.[117]

Again, similarly to the decision in *Archibald*, discussed above, the Supreme Court accepts that persons with disabilities may need to be treated differently to others in order to achieve the purposes of the *Equality Act*. What is distinctive about the approach in the United Kingdom case law as compared to the Australian approach is that although the case law still exhibits some of the discomfort with the idea of reasonable adjustments, in the United Kingdom there is an acceptance that the purpose of the legislation is to provide asymmetric and potentially more favourable treatment of persons with disabilities to attempt to achieve a more equal outcome. If this approach was applied to the duty to make adjustments in the Australian legislation, at the very least, individual claimants would need to be accommodated and treated differently and more favourably. This may require creativity on the part of judges and duty-bearers to ensure compliance with the duty to make reasonable adjustments but, nevertheless, recognises that reasonable adjustments are required to be made.

B *Canada*

In Canada, the duty to make adjustments is commonly understood as the duty to accommodate. Like in the United States, it initially emerged in the context of discrimination on the basis of religion.[118] It is not explicitly required by anti-discrimination legislation but the prohibition on discrimination generally has been interpreted to include an accommodation obligation.[119] It was originally conceived as the adjustment of a rule, practice, or condition, to take into account the specific needs of an individual or group, and as acknowledged in the introduction is understood as a fundamental aspect of discrimination law.[120] However, its operation has, at times, been doctrinally confused.

117 Ibid 443–4.

118 *Simpsons-Sears* (n 32).

119 Ibid; Day and Brodsky (n 26) 435.

120 *Simpsons-Sears* (n 32) 554–5 (McIntyre J); Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queens University Press, 2010) 24.

A trilogy of cases in the Supreme Court of Canada first embedded the duty to accommodate into Canadian human rights law,[121] but the manner in which it was embedded was confusing and contradictory. It was unclear whether the duty to accommodate was a concept *only* related to indirect discrimination or whether it applied to both direct and indirect discrimination.[122] The implications for the appropriate remedies was also confused with inconsistent doctrine on whether the duty to accommodate required a singular accommodation to the impugned practice or procedure, or whether remedies could require changes to the practices or policies more broadly.[123]

This doctrinal confusion was removed in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* ('*Meiorin*') in which a unanimous Supreme Court unified the test for prima facie discrimination and the defence of justification and embedded the understanding of the duty to accommodate within the overarching tests for discrimination.[124] In *Meiorin*, the complainant was a woman employed as a forest firefighter in British Columbia. She was let go when the province adopted a new fitness standard which required forest firefighters to be able to run 2.5 kilometres in 11 minutes.[125] It was accepted at the outset that fewer women were passing the new aerobic tests because of natural differences in the aerobic capacity of men and women.[126] There was no suggestion that the complainant had not performed the work of a forest firefighter effectively, only that she could not pass the requisite fitness test.[127] The broader question for the Supreme Court was 'whether the aerobic standard … unfairly exclude[d] women from forest firefighting jobs'.[128]

In answering this question, the Supreme Court revised its approach to discrimination generally and in doing so, also revised the approach to the duty to accommodate.[129] This revised approach to the duty to accommodate was heavily based upon the approach advocated for by Day and Brodsky in their 1994 article discussed above in Part II.[130] The Supreme Court accepted that the standard was discriminatory and that there was no evidence as to any correlation between being able to pass the aerobic fitness test and ensuring high levels of safe work practices for forest firefighters.[131] In her judgment, McLachlin J (as her Honour then was),

121 *Simpsons-Sears* (n 32) 554–5 (McIntyre J); *Bhinder v Canadian National Railway Co* [1985] 2 SCR 561; *Alberta Human Rights Commission v Central Alberta Dairy Pool* [1990] 2 SCR 489.

122 Day and Brodsky (n 26) 437.

123 Ibid.

124 *Meiorin* (n 4).

125 Ibid 9 (McLachlin J).

126 Ibid 12.

127 Ibid 13.

128 Ibid 9.

129 Ibid 19.

130 Ibid 25–6.

131 Ibid 40.

accepted that interpreting human rights legislation with a goal of achieving formal equality undermines human rights legislations' promise of substantive equality.[132] She considered that this lens of formal equality undermines and prevents appropriate judicial scrutiny of standards and practices which perpetuate systemic discrimination.[133] In doing so, McLachlin J emphasised that

> although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the 'mainstream' can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.[134]

This approach to accommodation is also apparent in the Canadian Supreme Court's jurisprudence on disability discrimination. One case which is particularly relevant to the comparison to the Australian circumstance is *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* ('*Grismer*').[135] In *Grismer*, the Canadian Supreme Court emphasised that the approach adopted in *Meiorin* was to be adopted generally in cases of discrimination regardless of the ground or attribute in question.[136] The complainant in *Grismer* had homonymous hemianopia, a condition 'which eliminated [most] … of his left-side peripheral vision in both eyes'.[137] As a result of this condition, his drivers' license was cancelled as his vision no longer met the minimum standard.[138] The complainant argued with some modifications to the vehicle and a certain kind of eyewear, persons with his condition could drive safely.[139] A failure to individually assess his capacity to drive with these modifications, he argued, constituted discrimination on the ground of disability.[140] The Supreme Court accepted this argument. It found that the discrimination that existed in the case was not in the refusal to issue a license, but in the failure to give the claimant the opportunity to prove, through individual assessment, that he could drive without jeopardising the goal of reasonable road safety.[141] It concluded that this failure of

132 Ibid 27–8.
133 See ibid 28.
134 Ibid 26–7.
135 [1999] 3 SCR 868.
136 Ibid 869.
137 Ibid 873 (McLachlin J).
138 Ibid.
139 Ibid 889–90 (McLachlin J).
140 Ibid 892.
141 Ibid 894.

opportunity could not be justified on cost or public safety grounds.[142]

The approach adopted in *Grismer* can be neatly contrasted with the approach taken by the Full Federal Court in *Sklavos*. In *Grismer*, the Canadian Supreme Court is centrally focused on whether standards and tests can be administered flexibly to ensure accommodation whilst simultaneously maintaining high safety standards. In contrast, in *Sklavos,* there is little challenge to the College's assertion that changing the method of assessment would be 'difficult and time consuming' with the respondent seemingly not required to provide evidence of what those costs might be as it was 'self-evident'.[143] If the Full Court had adopted a Canadian approach in *Sklavos*, the very existence of the examination requirements would have needed to be justified and interrogated more extensively. The importance of this difference is that in Canada, the onus to justify a barrier to access is more clearly and strictly placed on a respondent to show that there is no capacity for the inclusion of a complainant without jeopardising broader societal aims, such as public safety.

C *Explaining the Difference*

While it can never be definitively known why the interpretation of adjustment duties in Australian courts has been distinctive, a few theories can be considered. In part, the difference could be explained through the different legislative structures and texts. As explained above, in Britain, the duty is clearly a separate and distinct obligation from the concepts of direct and indirect discrimination. This allows for the duty to make adjustments to be clearly distinguished from direct and indirect discrimination which is more difficult to do in Australia given the construction of the legislation. On the other hand, the more open structure of the Canadian human rights codes[144] could allow for more judicial creativity and ownership in the construction of non-discrimination norms.[145] Further, it could be that the Australian cases have generally involved claimants who have been viewed less sympathetically given the nature of their disabilities have been psycho-social and consequently are cases which can be classed as hard cases making bad law.[146]

In part, this approach to the duty to make adjustments is consistent with the approach of the Australian courts to discrimination more generally as one which

142 Ibid 891, 894.

143 *Sklavos* (n 2) 269 (Bromberg J).

144 For an example of Canadian anti-discrimination law, see, eg, *Canadian Human Rights Act*, RSC 1985, c H-6.

145 Belinda Smith, 'Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest We Should Give Our Judges a Greater Role?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 235.

146 Other decisions that illustrate these difficulties, particularly with psycho-social disabilities, include *Zhang v University of Tasmania* (2009) 174 FCR 366; *Reurich v Club Jervis Bay Ltd* (2018) 360 ALR 296; *Flanagan v Humana Pty Ltd* [2017] TASSC 50.

is 'technical',[147] 'formal',[148] 'narrow',[149] or 'restrictive'.[150] Of particular interest for the purpose of this article, Thornton attributes the restrictive interpretation of discrimination law by the High Court, including the decision in *Purvis*, to the interrelated factors of the inherent tensions of the inclusion of principles of non-discrimination within the neo-liberal state and a conservative judicial culture, which utilises traditional concepts of the appropriate role of the judge to hinder the clear legislative intention of Parliament.[151] This theory is instinctively attractive but it does not entirely explain the distinctiveness of the Australian approach to duties to adjust. These same factors regarding the inherent tensions in the non-discrimination and equality project, and the market economy are present and have been identified in these comparable jurisdictions.[152] Yet, these same difficulties with the duty to make adjustments are not apparent to the same extent. Nor does it explain why judges who have otherwise approached discrimination rights in a more substantive fashion have struggled with the application and approach to the duty to make adjustments.[153]

It could be that it is the positive and possibly transformative nature of the duty which is the difficulty for the Australian courts. The positive nature of the duty to make adjustments makes it a distinctive obligation in both discrimination law in particular and in the legal context more broadly. Other discrimination law obligations require a duty-bearer to refrain from acting in a certain way and the court to sanction that behavior when it is found. In contrast, the duty to make adjustments, particularly when considered in its most substantive light and in the Canadian jurisprudence, requires courts to challenge the existing standards and practices of duty-bearers, and to consider whether the standard as a whole is necessary. This approach requires the court to ask how those standards can be redefined to create a more inclusive community. In its most transformational light, the duty to make adjustments can challenge the traditional understanding of the institutional role of the court.[154]

147 Dominique Allen, 'Barking *and* Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 317, citing Beth Gaze, 'Anti-Discrimination Laws in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 155, 168–70.

148 Linda J Kirk, 'Discrimination and Difference: Race and Inequality in Australian Law' (2000) 4(4) *International Journal of Discrimination and the Law* 323, 326.

149 Smith, '*Wardley* to *Purvis*' (n 57) 3.

150 Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31, 47.

151 Thornton, 'Disabling Discrimination Legislation' (n 57) 2–3.

152 Madam Chief Justice Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* 17, 20.

153 On what this author considers to be a more substantive approach to the various issues in discrimination legislation see, eg, Bromberg J's decision in *Eatock v Bolt* (2011) 197 FCR 261; Mortimer J's decision in *Wotton v Queensland [No 5]* (2016) 352 ALR 146.

154 Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2006) 13(3) *Columbia Journal of European Law* 565, 570–1.

VI CONCLUSION

The Australian judicial approach to reasonable adjustments is distinctive in its commitment to formal equality when compared to the approaches adopted in comparable jurisdictions. In both the UK and Canada, it has been generally accepted for almost 20 years that reasonable adjustment or accommodation is designed to achieve an equality of outcome for persons with disabilities. It requires the challenging of exclusionary standards and practices, so as to remove barriers of access and allow people to live the life they wish to lead, up until the point of an unjustifiable or substantial hardship on a duty-bearer. It is accepted that this is what Parliament intended when they included reasonable accommodation and adjustment requirements in discrimination laws. If there is a compromise in the legislation, that compromise is in favour of a complainant.

There are potential reform opportunities in the Australian context. At the very least, and not a novel suggestion, is that the requirement to make reasonable adjustments should be re-drafted to become a separate and distinct section of the legislation, rather than a sub-section of direct and indirect discrimination. This would clearly identify reasonable adjustments as a separate and distinct obligation which requires different analysis from that related to direct and indirect discrimination. However, unless and until the courts interpret and understand the duty as a positive obligation with an underpinning right to substantive equality, the Australian duty to make adjustments will fail to be an effective mechanism to achieve any kind of equality for persons with disabilities.