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A non-discriminatory response to disability related problem behaviour at Australian universities

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ABSTRACT

When students with a psychological disorder study at university, there are competing goals and challenges faced by administrators, teaching staff and students. Positive goals such as inclusion, self-determination and respect for diversity are sometimes counterbalanced by problem behaviour associated with mental illness. The challenge for tertiary institutions is to accommodate the educational needs of students with a psychological disorder, without undermining the inherent requirements of a course of academic study, or the duties that a university owes to staff and students with respect to safe and healthy learning environments. This article considers how the Australian legal system has attempted to find balance between these competing needs and duties, in a way that is respectful to those who study with a psychological disorder.

1.1. Introduction

The last decade has seen an abundance of literature focussing on the mental health of university students. Empirical and anecdotal evidence indicates that many university students suffer elevated levels of psychological distress, when compared to similarly aged adults in the general population (Larcombe, Finch, & Sore, 2015; Stallman, 2010; Stallman & Duffy, 2016). For some of these students, this distress will be associated with a diagnosed mental illness (Kelk, Medlow, & Hickie, 2010). Some students will attract disciplinary proceedings if behaviour associated with their mental illness affects others in the university community.

In August 2017 a student of the Australian National University assaulted his tutor and other students in his tutorial with a baseball bat. It was reported in the media that the student was subsequently referred by the Australian Capital Territory Magistrates Court for a mental health assessment (Connery, 2017). The implication was that the student's violence was a manifestation of mental illness. While this incident attracted wide media coverage, it would be dangerous to assume that disability related violence is a novelty on Australian university campuses. In order to protect both student and staff privacy and to prevent reputational damage, universities are reluctant to release details of on-campus incidents involving violent student behaviour (Ward, 2008).

Australian anti-discrimination case law suggests that physical violence is not the only problematic manifestation of mental illness affecting staff or other students. In the Human Rights and Equal Opportunity Commission of Australia decision of *H v S*,[1] the complainant was excluded from university facilities and restrained from approaching staff after his (then undiagnosed) personality disorder manifested as behaviour 'perceived as threatening' by university staff. Commissioner Webster determined (based on expert evidence) that H's behaviour objectively posed no threat to staff at the university, however, '[n]otwithstanding my views I regard the concerns of staff members at S at that time as reasonable, and the actions by S as a reasonable precaution to ensure the safety of its staff'.

In *Zhang v University of Tasmania*,[2] the student complainant brought a discrimination claim in the Federal Court after she was disciplined by the university for 'disruptive' behaviour. This behaviour involved 'slamming papers, crying, shouting, and arguing' and the unchallenged evidence on appeal was that the complainant was 'antagonising everyone she came into contact with [at UTAS], not just University academic or administrative staff but student association people as well'.[3] On one occasion, whilst upset and distressed, she threw a plate of food at a staff member.[4] The University was so concerned about Zhang's behaviour that she was referred to counselling.

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[1] [1997] HREOCA 41 (23 July 1997).
[2] *Zhang v University of Tasmania* [2008] FCA 516 (Heery J, 24 April 2008).
[3] *Zhang v University of Tasmania* [2009] FCAFC 35 (Jessup and Gordon JJ) [66] ('*Zhang*').
[4] Ibid.

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In *Firestone v ANU*,[5] the complainant brought a series of complaints of discrimination under the *Discrimination Act 1991* (ACT) after he had been restrained from entering university premises and grounds and from contacting some staff members at work, due to repeated harassing and offensive emails and phone calls. The ACT Supreme Court found that Firestone's behaviour amounted to 'personal violence' for the purpose of making a restraining order under the *Protection Orders Act 2001* (ACT) s 41. Unlike the more recent ANU case, the Supreme Court found that Firestone's behaviour, 'though harassing and offensive, ha [d] not involved physical violence nor, despite some bizarre references in some emails, threats of physical violence'.[6] Evidence that Firestone had engaged in a similar campaign of harassment, lasting five years, against staff at Monash University (where he had previously studied) was relevant to the decision to grant the order, as it indicated that the harassment was likely to continue unless restrained.[7]

The ACT Supreme Court acknowledged a link between Firestone's disability and his behaviour[8]:

> It was apparent that…the appellant was labouring under the influence of various grievances, mostly imaginary, which were exacerbated by his own disproportionate responses to those supposed grievances. No doubt his clinically diagnosed depressive condition was a contributing factor to his disturbed and concerning behaviour.

In *Kancheff v Charles Darwin University,*[9] a student with depression and anxiety, as well as a range of physical disabilities resulting from a stroke, alleged disability discrimination in that he had been 'forced to apologise' after employing 'abusive language and general belligerence' towards a staff member who had refused to provide him with samples of 'previous student work' to assist him with completing his own assessment.

In each of the above cases, an actual or impugned psychological disorder was the genesis for a discrimination claim against a university. The challenge for tertiary institutions is to accommodate the educational needs of students with a psychological disorder, without undermining the inherent requirements of a course of academic study, or the duties that a university owes to staff and students with respect to safe and healthy learning environments. In none of the above cases was the student complainant successful in their discrimination claim against the university. That said, universities in Australia (and world-wide) will continually need to make subtle and informed judgments about how best to deal with disability related problem behaviours exhibited by students. Psychological disorders, just like physical disabilities, differ in their type and severity. As a corollary, the accommodations that a university can make to help a student succeed with their study will depend upon the type and severity of a student's psychological disorder, and any behavioural manifestations that accompany it.

Australia has a two-tiered system of anti-discrimination legislation with both Commonwealth and state and territory legislation prohibiting discrimination against students on the ground of 'disability' or 'impairment'. While a student complainant may choose to bring his or her action under state or territory discrimination legislation,[10] the particular focus in this article will be upon the relevant Commonwealth act, the *Disability Discrimination Act 1992* (Cth) ('DDA'), and associated *Disability Standards for Education 2005* (Cth) ('DSE'). Both of these instruments apply throughout Australia and oblige education providers, including universities, to make 'reasonable adjustment' for students with disability.[11] In respect of that obligation, the Commonwealth legislation is arguably superior to state or territory legislation. Indeed, the DDA privileges the DSE, and its reasonable adjustment provisions, by ousting any contradictory operation of state and territory legislation.[12] The purpose of reasonable adjustment in an education context, is to facilitate access to education for students with disability 'on the same basis' as students without disability.[13] In practice, reasonable adjustment should be designed to remove barriers which limit or prevent the inclusion of students with disability at university, and which limit or prevent those students from demonstrating knowledge and skills acquired at university.

Failure to make reasonable adjustments may expose a university to litigation via potential claims of breach of the DSE, and direct and indirect discrimination under the DDA or state and territory anti-discrimination legislation. However, both anecdotal evidence and case law suggest that for students with mental illness, a regime of reasonable adjustment may not be available (or in some instances desirable). One group of students in particular may test the limits of reasonable adjustment; students like H, Zhang, Firestone and Kancheff who manifest disability related violent, harassing or disruptive behaviour.

Before addressing the scope of the protection that the DDA and DSE deliver to this group of students, this article will explain the scheme of the legislation. Relevant cases decided under the DDA and DSE regime will be considered (as well as state and territory cases, interpreting similarly drafted legislation) where they illuminate lawful and appropriate responses to the accommodation of students with mental illness by education providers.

1.2. The legislative scheme

The DDA applies the following scheme to proof of unlawful discrimination. The impugned conduct the subject of a claim must happen within a *protected area* of public life. The conduct must be causally related to a *protected attribute*. The conduct must meet the relevant legislative definition of *unlawful discrimination*. Finally, even if a prima facie case of unlawful discrimination is proved, the discriminator may escape liability if an exemption is available to render the impugned conduct lawful. In respect of students with disability, this scheme is explained, below.

1.2.1. Protected area – education

The DDA prohibits discrimination in the protected area of education. It regulates the treatment of students by an 'educational authority'[14] during the enrolment process[15] and after enrolment.[16] 'Educational authority' is defined to mean a person or body administering an 'educational institution'[17] which, relevant to this article, is further defined to cover a university.[18] As the cases referred to above illustrate, many Australian universities have been the subject of complaints under the DDA.

[5] *Firestone v Australian National University* [2009] ACTDT 1 (9 June 2009, Cahill P). Note that an appeal against this decision was dismissed. The ACT Civil and Administrative Tribunal found that it did not have jurisdiction to hear the appeal*: Michael Firestone v Australian National University* [2009] ACAT 27 (28 August 2009, Chenoweth P) [14].

[6] Ibid [29].

[7] Ibid [40].

[8] *Firestone v Australian National University* [2004] ACTSC 76 (1 September 2004) [29].

[9] [2013] FCCA 1564 (10 October 2013).

[10] There may be a costs incentive to commence action under state or territory legislation in some cases in that 'super tribunals' such as the Victorian Civil and Administrative Tribunal or the Queensland Civil and Administrative Tribunal (which hear anti-discrimination claims) are usually costs neutral.

[11] DDA s 4 defines 'educational authority', 'educational institution' and 'education provider'.

[12] DDA s 13(3A).

[13] DSE s 3.3.

[14] DDA s 4.

[15] DDA s 22(1).

[16] DDA s 22(2), (2A).

[17] DDA s 4.

[18] Ibid.

1.2.2. Protected attribute – disability

The DDA defines disability broadly to cover physical, sensory, intellectual and psychiatric disabilities,[19] including, 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.[20] Moreover, amendments to the DDA in 2009, made it clear that the definition of 'disability' will include behaviours that are a symptom or manifestation of that disability. This definition extension is significant for students whose underlying disability, such as depression, or autism or schizophrenia, manifests as disruptive or dangerous behaviour. In each of the *H*, *Firestone* and *Kancheff* cases, it was uncontroversial that the complainants had disabilities within the scope of the legislation. The *Zhang* case was unusual, in that Zhang did not have a psychological disorder or condition; she was 'upset' or 'angry'.[21] The reasoning of the Justices of the Full Federal Court in that case suggests that when the university referred her to counselling, it may have 'imputed' that Zhang had a psychological disability and 'imputed' as well as actual disabilities are protected under the DDA.[22] *Zhang* illustrates the fact that if a university treats a student as if he or she has a psychological impairment, it may attract the application of the DDA to its treatment of the student.

1.2.3. Discriminatory conduct

The DDA and DSE co-operatively prohibit a range of discriminatory conduct. Direct discrimination[23] in education may occur when a student with disability is treated differently ('less favourably') than a comparator student without disability, in circumstances that are not materially different. Where the less favourable treatment is 'because of' the disability, it will be unlawful. A refusal to enrol a student with a disability because of that disability, is prima facie direct discrimination.[24]

Indirect discrimination[25] in education contemplates the situation where treating all students in the same way, has a discriminatory impact on a student with disability. It arises when an unreasonable condition is imposed on all students, a student with disability cannot comply with the condition because of his or her disability, and the condition has the effect of disadvantaging the student with disability. The condition imposed may be expressed or implied from the circumstances. Relevant to students with disability related challenging behaviour, imposition of a student 'behaviour code' has the potential to indirectly discriminate against students whose disabilities prevent them from complying with the code.[26]

Since the 2009 amendments to the DDA, a failure to make reasonable adjustment that results in less favourable treatment, or the inability to comply with an unreasonable condition, has also been capable of amounting to discrimination under the DDA.[27] The 2009 amendments addressed concerns[28] that the DSE, articulated under the authority of the DDA,[29] were beyond power in that they had imposed, since 2005 and in the absence of any supporting provision in the DDA, an obligation upon 'education providers'[30] to make reasonable adjustment across four aspects of the education area: enrolment,[31] participation,[32] curriculum development, delivery and assessment,[33] and student support services.[34] Until the High Court found to the contrary in *Purvis v New South Wales* (2003) 217 CLR 92 ('*Purvis*'), it had been assumed that, in the absence of any express provision for reasonable adjustment, an obligation to make reasonable adjustment was implicit in the terms of the DDA (Dickson, 2006).[35]

An educational authority which 'acts in accordance' with the DSE will be deemed compliant with its obligations under the DDA.[36] However, any breach of the DSE is in itself actionable,[37] and exposes an institution to related claims of direct and indirect discrimination. The DSE were implemented to provide 'clarity and specificity'[38] to education institutions as to the content of their particular obligations to students with disability (Dickson, 2014). The Standards define reasonable adjustment,[39] set out 'standards' for each aspect of education,[40] and set out associated 'measures for compliance'.[41] As noted in the introduction, the fundamental aim of reasonable adjustment is to ensure that a student with disability is treated 'on the same basis' as a student without disability.[42] The reasonable adjustment regime contemplates that a student with disability may need to be treated differently, in order to deliver him or her education 'on the same basis' as others.

The DSE make it plain that an education institution cannot reject an application for enrolment from a student with disability without first considering whether reasonable adjustment is possible to support the enrolment. To do so would breach its obligation to treat the student with disability 'on the same basis' as a student without disability. In this context, an important feature of the DSE is that they impose an obligation of consultation between education institution and student[43] commencing upon application for enrolment[44] and continuing throughout enrolment.[45] The purpose of the consultation is to work out the nature of any reasonable adjustment to be made and to monitor its ongoing efficacy.

1.2.4. Exemptions

The DDA and DSE exempt prima facie unlawful discrimination in some circumstances. The unjustifiable hardship exemption[46] is particularly relevant to students with disability related problem behaviour. If an education provider proves that a student's disability imposes

[19] DDA s 4 definition of 'disability'.
[20] DDA s 4 definition of 'disability' para (g).
[21] Zhang [45].
[22] Ibid [15], [63].
[23] DDA s 5.
[24] See, eg, *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306.
[25] DDA s 6.
[26] *S on behalf of M & C v Director General, Department of Education & Training* [2001] NSWADT 43 (21 March 2001); *Minns v State of New South Wales* [2002] FMCA 60 (28 June 2002).
[27] DDA s 5(2). See *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) Sch 2, cl 17.
[28] Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 39.
[29] DDA s 31.
[30] For the DSE, an 'educational authority' and an 'educational institution' are both 'education providers': DSE s 2.1. An 'educational authority' and 'educational institution' are defined in the same terms as the DDA s 4: DSE s 1.4. As such, a university will be an 'education provider' for the purpose of the DSE. See above n 5.
[31] DSE Part 4.
[32] DSE Part 5.
[33] DSE Part 6.
[34] DSE Part 7.
[35] Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 38. *Garity v Commonwealth Bank of Australia* (1999) EOC ¶92–966 (HREOC); *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999).
[36] DDA s 34.
[37] DDA s 32.
[38] DSE Minister's Forward
[39] DSE s 3.4.
[40] DSE Parts 4, 5, 6, 7 and 8.
[41] DSE ss 4.3, 5.3, 6.3, 7.3, 8.5.
[42] DSE s 3.3.
[43] DSE s 3.5.
[44] DSE s 4.2(3).
[45] DSE ss 5.2(2), 6.2(2), 7.2(5).
[46] DDA ss 11, 29A; DSE s 10.2.

'unjustifiable hardship' on it, then discrimination to avoid that hardship may be lawful. Determination of unjustifiable hardship requires an inquiry into 'all relevant circumstances' and a balancing of competing considerations such as the benefit to the student with disability of enrolment, detriment to others flowing from the enrolment, and cost to and financial circumstances of the education provider.[47] As well as operating to exempt direct or indirect discrimination, unjustifiable hardship intersects with reasonable adjustment in that an adjustment will not be reasonable if it would impose unjustifiable hardship (DDA s 4).

The DDA and DSE create two further exemptions which have attracted little litigation to date, but may be relevant to the treatment of a student with a psychological disorder in the future. First, they exempt discrimination for 'acts done under statutory authority'.[48] Relevantly, this exemption protects the discriminator if action taken to avoid the discrimination would put the discriminator in conflict with a court order.[49] Secondly, the DSE allows an education provider, when considering appropriate reasonable adjustments for a student, to maintain the 'inherent requirements'[50] of a course of study even if to do so would result in discrimination (Johnston, Mackintosh, Alcock, Conlon-Leard, & Manson, 2016). The inherent requirements of a course may be 'academic', or 'other requirements or components that are inherent in or essential to its nature'.[51] In other words, an adjustment which attacks the inherent requirements is not a 'reasonable adjustment'.

1.3. Strategies for exclusion

The cases referred to in the Introduction, indicate that a university student who is excluded or treated unfavourably in some other way because of his or her disability related problem behaviour may bring an action alleging discrimination by the university. However, the DDA (and similar state and territory acts) has been consistently interpreted in a manner which supports the lawfulness of a university's disciplinary response. There are three prime legal reasons why universities are in a powerful position vis-a-vis students who display problematic disability related behaviour.

- The concept of direct discrimination has been construed narrowly by the Australian High Court, to allow less favourable treatment on the basis of behavioural manifestations of disability (Dickson, 2005; Edwards, 2004; Rattigan, 2004).
- Courts have found it 'reasonable' to impose behaviour codes on students with problem behaviour, defeating claims of indirect discrimination
- Challenging behaviour which threatens the safety of staff or students, or disrupts the learning environment, has been found to impose 'unjustifiable hardship' on education providers.

These interpretations of the law will be explained below, reinforcing the view that a university is in a powerful position compared to a 'troublesome' student when it comes to a claim for discrimination on the basis of a disability. The legislative scheme set out above (DDA and DSE) also suggests further lawful strategies for exclusion that may be available.

1.3.1. Direct discrimination

The most significant Australian case in respect of the construction of the direct discrimination provision in the DDA (s. 5) is the High Court decision of *Purvis v New South Wales* ('*Purvis*'),[52] which concerned a violent high school student who was excluded after repeated instances of kicking and shoving other students and staff at his school. The plaintiff had sustained brain damage as a result of an infection with encephalitis in infancy, and this manifested as disinhibited behaviour.

The facts of the *Purvis* case illustrate the poignancy of the situation when a school has competing obligations to both a student with disability and other members of the school community. The majority of the Court accepted that the behaviour of the child at the centre of the case (Daniel) put the safety of staff and other students at risk. To keep Daniel at the school put the school in the invidious position of potentially being unable to discharge its duty of care to staff and other students. Under Australian law, such a duty arises through the common law of negligence, through contract, and via workplace health and safety legislation. Because of safety concerns, the majority of the High Court was motivated to allow the exclusion of Daniel even though previous cases, and the tribunal which decided the case at first instance, had found that exclusion on the basis of the *behavioural manifestations* of disability was prima facie a case of direct discrimination.

Proof of direct discrimination requires proof of less favourable treatment, which in turn requires a comparison of the treatment of the complainant and the treatment of a comparator student without the disability in 'circumstances which are not materially different'. Despite the fact that the High Court accepted Daniel's disability included its behavioural manifestations, the majority judges allowed those manifestations to be taken into account for the purpose of making the comparison. The treatment of Daniel – exclusion – was to be compared with how a hypothetical comparator without his 'disability' but with his challenging behaviour would be treated. Such a hypothetical comparator would also be excluded and therefore there was no less favourable treatment of Daniel. Chief Justice Gleeson explains this approach:

> 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.[53]

The Chief Justice expounded another reason for refusing to find direct discrimination. Any less favourable treatment must be causally related to the disability – 'because of' the disability.[54] The Chief Justice found that Daniel's treatment was due to the school principal's concerns about staff and student safety, and not because of Daniel's disability:

> In the light of the school 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.[55]

Where adult students, rather than 12-year-old boys like Daniel are concerned, the potential for harm to other students and staff is arguably exacerbated. Justice Callinan in *Purvis* suggested that to tolerate disability related problem behaviour was akin to tolerating the criminal behaviour of assault:

> The definition of disability is not to be read as covering criminal or quasi-criminal behaviour. And by criminal behaviour I do not mean

[47] DDA s 11(1).
[48] DDA s47; DSE s 10.3.
[49] DDA s 47(a).
[50] DSE s 3.4(3).
[51] Ibid.
[52] (2003) 217 CLR 92.
[53] (2003) 217 CLR 92, [111].
[54] DDA s 5.
[55] (2003) 217 CLR 92, [13].

> 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…[56]

Unlike school students, all university students have reached the age of criminal liability and are potentially a bigger, stronger and, therefore, more 'threatening' presence than school children. Adult students negotiate the terms of their education on their own behalf and their behaviour is not mediated or moderated by the involvement of a third-party representative such as a parent or guardian. It is not surprising, therefore, that university cases decided since *Purvis* including *Zhang* and *Kancheff* have been decided against complainants with challenging behaviour on the basis that direct discrimination consistent with its construction in *Purvis* could not be proved. In each of these cases, it was held that a comparator student without the psychological disorder, but displaying the same problematic behaviour, would have been treated the same way by the university.

1.3.2. Indirect discrimination

Australian universities routinely impose codes of conducts on their students as a corollary of enrolment. Such codes are likely to prescribe respectful conduct towards other students and staff. Compliance with a code of conduct is likely a 'condition' imposed on students for the purpose of proof of indirect discrimination.[57] While there is no decided university case, in the school case *Minns v State of New South Wales*[58] (*Minns*) it was found that it was reasonable to impose such a condition on a student with disability, provided 'modification' to the code was made to account for the disability. Such modification might allow, for example, a higher number of breaches by a student with disability before penalty provisions are activated. This was the case in *Minns*.

In *Minns*, the rationale for finding the imposition of the code reasonable, as in *Purvis*, was concerns about safety. Federal Magistrate Raphael explicitly drew attention to the similarities with the *Purvis* case commenting that the consequence of Daniel's disability was 'violent and anti-social behaviour very similar to that exhibited by Ryan Minns'.[59] The Magistrate determined that such codes were necessary to enable 'all students to benefit from the educational opportunities offered and the requirement to allow this to happen in a safe environment'.[60] The DDA states that a requirement or condition imposed upon students (such as a student behaviour code) will not amount to indirect discrimination if it is reasonable in the circumstances of the case.[61] In determining the reasonableness issue against Ryan Minns, Raphael FM balanced the benefit to Ryan in allowing him 'free rein'[62] against the potential detriment to others in the school community. Ryan's interests yielded to the interests of the majority. The Magistrate's language was clearly reminiscent of the language of Gleeson CJ[63] and Callinan J[64] in the High Court in *Purvis,* who were concerned about the detriment to others in the South Grafton State High School community should Daniel's enrolment be maintained:

> The classes in which Ryan was placed would be unable to function if he could not be removed for disruptive behaviour. The students could not achieve their potential if most of the teachers' time was taken up with handling Ryan. The playgrounds would not be safe if Ryan was allowed free rein for his aggressive actions. Therefore the claim for indirect discrimination must fail in the manner in which it is put'.[65]

Indeed Chief Justice Gleeson in his decision in *Purvis*, speculated that had the *Purvis* claim been framed as one of indirect discrimination, alleging that Daniel could not comply with a condition that he comply with the school's discipline code, proof that the condition was not reasonable 'would have created a difficulty'.[66]

1.3.3. Reasonable adjustment

In light of the case law with respect to indirect discrimination and how courts have construed the requirement of 'reasonableness', there seems little doubt that the positive obligation to make reasonable adjustment inserted into the DDA after the *Purvis* and *Minns* cases would be unlikely to afford protection against exclusion to a student with disability related violent or disruptive behaviour. It would not be a 'reasonable' adjustment to tolerate such behaviour.

1.3.4. Exemptions

A discriminator may raise any or all of the following exemptions to resist the enrolment of a student with disability related problem behaviour. It is clear that the safety of others is a factor relevant to proof for many of the exemptions. That such a range of exemptions is available indicates a thick protection of the universities duty to protect all its staff and students.

1.3.4.1. Unjustifiable hardship

Some commentators have speculated that the *Purvis* interpretation of direct discrimination is due for review, particularly in light of the amendments to the DDA in 2009 which affirmed that a disability included its manifestations and which expanded the scope of the unjustifiable hardship exemption to the post enrolment period (Rees, Rice, & Allen, 2018). Should the High Court retreat from its narrow reading of direct discrimination, then both pre-*Purvis* and post-*Purvis* case law suggests that the unjustifiable hardship exemption would exempt prima facie discriminatory exclusion of a student with disability related problem behaviour. In *Purvis*, the narrow construction approach taken to direct discrimination meant that there was no prima facie finding of direct discrimination. A broader approach to defining direct discrimination in cases like *Purvis*, might acknowledge that direct discrimination on the basis of a manifestation of a disability did occur, but that discrimination would not be actionable, because an exemption/defence (such as unjustifiable hardship) applies to the discrimination (Campbell, 2007).

Unjustifiable hardship was proved in the 1990s Queensland cases *L v Minister for Education for the State of Queensland (No. 2)* [1995] 1 QADR 207 and *P v Director-General, Department of Education* [1995] 1 QADR 755. There had always been an unjustifiable hardship exemption available post-enrolment in Queensland, so the Queensland Anti-Discrimination Tribunal had no trouble, pre-*Purvis*, accepting that discrimination on the basis of manifestations of disability was prima facie unlawful. Cases decided after 2009 and following *Purvis*, have also suggested that the unjustifiable hardship exemption would have been asserted by defendant education institutions, had a prima facie case of

[56] (2003) 217 CLR 92, [271].
[57] DDA s 6.
[58] [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002).
[59] *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [191].
[60] Ibid [247].
[61] DDA s 6(3).
[62] Ibid.
[63] *Purvis* (2003) 217 CLR 92, 101–3 [11]–[14].
[64] Ibid [266].
[65] Ibid [263].
[66] Ibid [3].

discrimination been found.[67]

Exposure to the risk of breach of its duty of care to staff and students by a university which continues to tolerate violent behaviour likely amounts to 'unjustifiable hardship' in view of the clear language used by the High Court in the *Purvis* case. Case law also suggests that financial cost may be accepted as relevant to unjustifiable hardship. It could be argued for example that a one-on-one university education for a student whose behaviour disrupted the learning environment of others might be a 'reasonable' adjustment. Schools case law suggests however, that even for well-resourced institutions with big budgets, the cost of one on one support may be unjustifiable when that cost is considered in the context of the institution's obligations to all its students.[68] Fairness would demand that the same one-on-one education should be delivered to all students in a similar situation, potentially multiplying the cost to the school or university.[69]

1.3.4.2. Acts done under statutory authority

Adult students who harass or are violent towards other students or staff may find themselves subject to court applications for restraining orders. In the *Firestone* case for example, a court order had been made restraining Firestone from entering university premises. Firestone was decided under the *Discrimination Act 1991* (ACT), not under the DDA, but if similar circumstances were to arise in a DDA case, then the exemption in DDA section 47 would likely be available and the university would not have to put itself in the position of facilitating a breach of the restraining order by tolerating the student's access to the campus, the staff and students protected by the order.

1.3.4.3. Inherent requirements

The term 'inherent requirement' is copied over to the education context from the work context where employers are permitted by the DDA to discriminate against a person with disability if he or she cannot perform the inherent requirements of a particular job. Many Australian universities have published statements of the inherent requirements of their courses. Such statements are potentially beneficial to students with disability in that they allow an informed decision, before enrolment, about whether such requirements can be met. They are also beneficial to staff who are called on to make adjustments to their courses, and particularly to the assessment of their courses, for students with disability.

While it may be anticipated that the inherent requirements of studying law, for example, may differ from those of studying medicine, or education, or science, some universities have claimed an overarching requirement of 'behavioural stability' to all courses of university study (see for example Western Sydney University (n.d.); Newcastle University (n.d.)). This is arguably an attempt to deflect enrolments from students whose problem behaviour might impact not only upon their ability to study, but also upon their ability to interact with staff and other students.

If a university sought to rely on this 'behavioural stability' requirement at trial, it would need to show that it truly was 'inherent' – that it could not be adjusted away in any circumstances without eroding the integrity of a course of study. If a student complainant could show that other students with behavioural instability were accommodated by the university, then the university's inherent requirement case may fail. In the case of *BKY v The University of Newcastle* ('*BKY*')[70] the university sought to exclude a student with a psychiatric impairment which manifested as exam phobia because she failed to complete her Bachelor of Medicine within a mandated 8-year period. In support of the decision to refuse an extension of time, the Dean of the Faculty of Medicine noted that BKY's 'progress…[had] trended downwards over the last three years' and that consideration must be given 'not only to…prospects for completion, but also the interests of academic integrity and professional Standards'.[71] The university argued that the 8 year limit amounted to 'a significant milestone in balancing these interests'.[72] When the student complainant could demonstrate, however, that other students had been allowed more time than the mandated time to complete their degrees, she could prove that the time requirement was not essential to the integrity of the course. As a result, the student was successful in her claim for direct discrimination against the university.

1.4. Strategies to support inclusion

Although Australian law as applied to date suggests that universities may lawfully exclude students with disability related problem behaviour, it should not be assumed that they are eager to do so. Many academics will attest to rigorous attempts to support the enrolment of 'difficult' students.

University is a recognised pathway to employment. To exclude a university student from university excludes him or her also from employment opportunities. For this reason alone, a decision to exclude must be a seriously considered decision. Because students pay substantial fees to study there is an expectation perhaps of a client/service provider relationship and of a willingness to accommodate a paying client. Universities could do more to maximise the potential for those students to complete their courses of study.

1.4.1. Disclosure

There is an argument that universities could do more to encourage disclosure of disability and information sharing. While university enrolment forms may routinely allow an opportunity for students to disclose disability, there is no legal requirement for students to do so. Neither the DDA nor any other Australian law compels a student with disability to disclose it upon enrolment or subsequently. Under the DDA, however, it would not be unlawful to ask a student to disclose disability. The DDA allows requests for information about disability unless the information is required for a discriminatory purpose, for example to found a decision to refuse to enrol or to exclude a student.[73]

The 2012 Report of the review of the DSE noted a continued reluctance for students with disability and mental illness to self-identify when commencing university (Department of Education, Employment and Workplace Relations, 2012). Students may choose not to disclose for many reasons (Getzel & Thoma, 2008). In *Sluggett* v *Flinders University of South Australia*[74] the student did not disclose upon enrolment because she did not consider herself 'disabled'.[75] In *W v Flinders University of South Australia*[76] the complainant considered her disability to be so stigmatised that she revealed only her symptoms, and not her diagnosis, to the hearing tribunal (HREOC) and the matter proceeded on the basis that the respondent university admitted that the complainant had a relevant disability. In *Macadam v Victoria University*[77] the student suggested that she did not disclose her learning disability on one enrolment form because she believed the narrow wording of the invitation to disclose precluded her learning disability ('do you have a significant disability or long term medical condition which may affect your studies?')[78]

Karpin and O'Connell (2015) note the use by discrimination law of

[67] See for example *Abela v Victoria* [2013] FCA 832, [20].
[68] *Sievwright v Victoria* [2012] FCA 118, [207] ('*Sievwright*').
[69] Ibid [209]–[210].
[70] [2014] NSWCATAD 39.
[71] *BKY* [28].
[72] Ibid.
[73] DDA s 30.
[74] [2003] FCAFC 27.
[75] Ibid [4].
[76] [1998] HREOCA 19 (24 June 1998).
[77] [2010] VCAT 1429 (3 September 2010).
[78] Ibid [31].

'categories of stigma' and lament the fact that 'in describing and demarcating such categories, it participates in their creation and brings into being the very thing it sets out to protect against'. They also note the irony that 'in order to access legal protection, discrimination law requires people to assert an identity as 'disabled' even though they may not identify with that status or want to take it on' (Karpin & O'Connell, 2015, p. 1479). A student who does not disclose should be aware that since *Purvis* confirmed a 'true basis' rather than a 'but for' test for causation relating to discrimination,[79] it is unlikely that a university will be held liable for direct discrimination in respect of action taken – or not taken – in respect of an unknown disability. If there has been no disclosure of disability, it will be difficult to prove that any less favourable treatment flowing from a failure to make reasonable adjustment was 'because of'[80] the disability of the student concerned.

Additionally, if students do not disclose a disability, an opportunity is lost for the university to plan and to implement reasonable adjustments which may mitigate the effect of a student's disability and support continued enrolment. Challenging behaviour related to disability may be misinterpreted and even aggravated by uninformed and inappropriate responses to the behaviour. In *H v S*, for example, staff ignorant of the complainant's disability interpreted his behaviour as 'threatening' and the university acted to his detriment in order to ensure staff safety. Expert evidence at trial suggested that the complainant posed no objective threat to staff or students. Shared knowledge of H's disability and its behavioural manifestations may have avoided detriment to H, the fear of the staff and expensive litigation.

Even when disability is disclosed, that information may be tightly held by disability advice staff. Frontline tutors and academics are deprived of knowledge which may allow them to interact with the student in a non-confrontational and more empathic manner. As the *W* case suggests, where a mental illness is involved, reticence about information sharing may be informed by a well-intentioned but misguided desire to 'protect' an affected student from judgment according to stereotype, or in order to give the student a 'fair go' free of prejudgment. This reticence is arguably based on another stereotype – an assumption that people will shun rather than support a person with mental illness. Some disability support staff may misunderstand Australian privacy laws too, believing that a student who discloses to them is entitled to have that information kept secure from other university staff. The case of *Bishop v Sports Massage Training School*[81] shows that disclosure to a staff member amounts to disclosure to the university – the staff member is an 'agent' of the university. In that case there was a discriminatory failure to make adjustment to an assessment item for the student to accommodate his disability because information about the disability was not communicated to appropriate staff. A university clearly has an obligation to share information so as to facilitate appropriate student support.

If a culture of disclosure of disability ahead of respectful treatment and reasonable adjustment can be cultivated at universities, then there is the possibility of supporting a challenging student to graduation, rather than an occurrence of behavioural difficulty potentially leading to exclusion. The achievement of such a culture may admittedly take some time in light of the stigma, stereotype and misinformation which attach to mental illness.

1.4.2. Consultation

One way of creating a culture of disclosure and support may be to broaden the university consultation process to include academic and professional staff who regularly interact with a student with disability. Although the Federal Court decision of *Walker v State of Victoria*[82] confirmed that there is no specific consultation process mandated by the DSE, at present, the process appears to be tightly managed by disability support staff to the exclusion of other relevant university staff. Adjustments brokered as a result of consultation typically concern assessment and physical access to learning environments and learning materials. It would be unusual for academic staff to be involved in consultations about how adjustments might be made in a class room context to support a student with challenging behaviour. Consultation with academics about class room 'management', may deliver positive outcomes for both students with challenging behaviour and other students in the same class.

1.4.3. Staff training

Similarly, it would be unusual for academic staff to receive training in the management of disability related challenging behaviour (Becker, Martin, Wajeeh, Ward, & Shern, 2002). At present staff 'equity training' is typically generic, focussed on general compliance with the law, and not focussed on specific varieties of disability (e.g., EO Online, the online training platform developed for Australian universities). Targeted training in management of interpersonal relationships with people with mental illness, however, may mitigate student behaviour problems and thereby protect against any harm that may flow to a teacher or other students from unmitigated challenging behaviour (Gordon, Feldman, Tantillo, & Perrone, 2004; Kolodziej & Johnson, 1996).

1.4.4. Online learning support

In some cases, it may be possible to mitigate any risk to others posed by a student with mental illness by exploiting the online learning environment. 'Blended learning' is standard at many Australian universities with on-campus and off-campus modes of study available to all students, with and without disability (Morgan, 2018). Students with work or family responsibilities, as well as students with disability may prefer online study. If it is considered necessary for a student to be 'banned' from campus, then off campus learning and support may be an appropriate alternative. The success of such a strategy, however, is necessarily dependant on the cooperation of the student with disability, which may not always be easy to achieve (Roberts, Crittenden, & Crittenden, 2011). In *Firestone*, for example, the complainant unsuccessfully alleged discrimination due to the university's requirement that he study online and off campus. Any adjustment that requires a student to study externally must also be cognisant of any inherent requirements of a course of study, as well as the interruption to social opportunities, friendship formation and networking events that may flow. The success of such a strategy is also dependant on the quality of the online alternative to on campus study. External study should be objectively equivalent to internal study, to avoid allegations of 'less favourable treatment'. Much has been achieved in building effective and engaging online learning environments since the *Firestone* case.

1.5. Conclusion

Although the DDA and DSE appear to offer protection to students with disability, discrimination claims are seldom successful. In only two of the higher education cases referred to in this article (*Bishop* and *BKY*)

[79] *Purvis v New South Wales* (2003) 217 CLR 92. Disability must be the 'true basis' of the discriminatory treatment (Gleeson CJ) 102; the 'real reason' (McHugh and Kirby JJ); 'the central question will always be - *why* was the aggrieved person treated as he or she was' (Gummow, Hayne and Hayden JJ) 163.

[80] *DDA* ss 5.

[81] [2000] HREOC No H99/55.

[82] [2011] FCA 258.

were student claims successful and those cases concerned failures to make adjustments to assessment regimes. The great weight of relevant case law suggests that universities are unlikely to be held to have breached anti-discrimination laws in respect of the much more complicated issue of disciplinary action taken against students because of violent or disruptive behaviour, even when that behaviour is a manifestation of an underlying disability.

The thickness of protection afforded to education institutions through judicial interpretation of the DDA, suggests that students may entrench rather than alleviate any disadvantage by ill advisedly (or in the absence of legal advice) pursuing litigation and subjecting themselves to the physical and financial stress of repeatedly unsuccessful hearings (Kamvounias & Varnham, 2010). Courts and tribunals have also suggested that some disabilities predispose some students to seeing discrimination where none objectively exists. In *Reyes-Gonzalez v NSW TAFE Commission,*[83] the complainant had been diagnosed with schizophrenia and the hearing tribunal found that several allegations of discrimination illustrated 'the degree of sensitivity of the Applicant in his perception of circumstances which otherwise are neutral but which, as a consequence of his disability, he either misunderstands or unduly gives greater emphasis than would a person who did not have his disability'.[84]

The best hope for the delivery of equality of opportunity in university education to students with disability related challenging behaviour, is not the law, but reform of the way universities manage enrolment. Behavioural manifestations of psychological disorders represent a particularly challenging task for universities. Subtle understanding about the aetiology, prevalence, clinical description, course and prognosis of different psychological disorders, all impact upon the accommodations that can be made for university students with disability. Encouragement of a culture of disclosure, meaningful consultation with relevant staff, and staff training all have potential to save students from exclusion.

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