Article

From *Wardley* to *Purvis* — How far has Australian anti-discrimination law come in 30 years?

Dr Belinda Smith[*]

In this article the first Australian anti-discrimination law case is contrasted with the most recent direct discrimination case of the High Court of Australia in order to demonstrate that the progressive potential of Australian anti-discrimination laws has diminished rather than grown over the past 30 years. When anti-discrimination laws were enacted in Australia, they were considered radical and cases such as ***Ansett Transport Industries (Operations) Pty Ltd v Wardley*** *demonstrated the laws' capacity to challenge exclusionary policies and practices. However, the most recent direct discrimination case in the High Court,* ***Purvis v New South Wales (Dept of Education and Training)****, reflects and cements a significant kerbing of the power of these laws to effect equality. In* ***Purvis****, the High Court narrowed the approach for direct discrimination generally, by ruling that in determining treatment education providers only needed to consider a student's behaviour, not whether his disability caused the behaviour. So long as a school, and by extension employer, treats a person with disability the same as anyone else* ***who behaves that way****, there will be no different treatment, a prerequisite for a finding of direct discrimination. The* ***Purvis*** *approach confirms that our direct discrimination laws are underpinned by a formal rather than substantive model of equality, and are thus limited in their capacity to eliminate all but a small subset of discrimination and able to do little more than promote procedural fairness. All citizens are ostensibly* ***permitted*** *to participate in education and work and other public realms of life, but our anti-discrimination laws do little to* ***enable*** *the participation of those who do not fit the norm of benchmark man. In this way, the* ***Purvis*** *case demonstrates the limited capacity of our equality laws to achieve substantive equality and lends weight to calls for regulatory reform.*

Introduction

In 1976, Deborah Lawrie applied to become a trainee pilot with Ansett, then one of Australia's major airlines. She was well qualified, being a flight instructor with extensive flight experience, and certainly more qualified than some of her students who already had been accepted as trainee pilots. Her application was rejected, and the General Manager explained:

* Faculty of Law, University of Sydney, belinda.smith@usyd.edu.au. I would like to thank Kate McCrossin for her excellent research assistance and two anonymous referees for their insightful comments.

> We have a good record of employing females in a wide range of positions within our organisation but have adopted a policy of only employing men as pilots.[1]

Now, 30 years later, we can marvel at this comment, knowing that no major public company would hold such a blatantly discriminatory policy or at least that no general manager would publicly own up to one if they did. Lawrie (who changed her name to Wardley upon marriage) challenged the rejection, lodging a sex discrimination claim with the Victorian Equal Opportunity Board, and she won.[2] This was the first sex discrimination claim determined in an Australian tribunal.[3] The most recent High Court case on direct discrimination, *Purvis v New South Wales (Dept of Education and Training)*,[4] provides us with an opportunity to reflect on how far we have come in addressing discrimination since the early days of *Wardley v Ansett*.

These two seemingly unrelated cases of *Wardley* and *Purvis* provide a good opportunity to explore what a prohibition on direct discrimination means in Australia today. They provide an opportunity to consider the progressive potential of our anti-discrimination rules and our courts' understanding of 'equality'. The first case, *Wardley v Ansett*, documents an employer caught by surprise at having a job applicant challenge its managerial prerogative to hire whomsoever it wanted for the job of being a pilot. The second case, *Purvis*, in contrast documents a school going to great lengths, first to address the special needs of a disabled student and then, when it ultimately expelled him due to his anti-social behaviour (caused by his disability), fighting hard against a finding that it had discriminated against the student.

In this article these two cases are used to explore the current scope of direct discrimination protection, and to consider the litigation and policy implications of the *Purvis* case. For some, the position the High Court took in *Purvis* was a perfectly understandable one, given the difficult facts of the case (set out below). However, by not limiting its reasoning to those facts, the case stands as general precedent for anti-discrimination legislation across Australia and its implications are potentially very far-reaching. It is timely to tease out some of those implications to appreciate the limitations of our legislation to achieve equality.

The potential of anti-discrimination laws to change behaviour and transform norms certainly does not depend solely upon the content or judicial interpretation of the particular rule that prohibits discrimination. Also relevant are the other regulatory elements — who gets to enforce the rules, by what process, and with what ultimate sanction for transgressors?[5] However, it is worth exploring the jurisprudence for a number of reasons. Firstly, litigation

---

1 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-003 at 75,260 (*Wardley*).

2 Ibid, at 75,264. The decision was handed down on 29 June 1979.

3 F Smith, 'Bridging the Gap Between Expectation and Reality', speech delivered at the Women and Work 2025, Premier's Women's Summit, Victoria, September 2004, at <http://www.equalopportunitycommission.vic.gov.au/pdf/expectationandreality.pdf> (accessed 31 July 2007).

4 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92; 202 ALR 133.

5 For a regulatory analysis of Australian anti-discrimination law, see B Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it Effect Equality or Only Redress Harm?' in C Arup et al (Eds), *Labour Law and Labour Market Regulation — Essays on the*

of discrimination claims is one of the most important mechanisms for defining the parameters or giving content to a norm of non-discrimination. The judiciary is not the only site of norm elaboration,[6] but it is the most public and important one, and of particular interest to lawyers. And, with direct discrimination claims being the most common form of discrimination claims made under anti-discrimination legislation, it is important to explore what impact the High Court may have had on their scope in the *Purvis* case. Examination of this case also reveals the particular concept of equality that underpins our direct discrimination laws.

Another reason to take a look at the scope of protection afforded by anti-discrimination laws is the substantial changes made to employee protections under the WorkChoices legislation.[7] With award protections and the rights to unfair dismissal severely curtailed, many employee advocates in particular may be casting a new eye over previously disregarded sources of protection, such as anti-discrimination legislation.

After briefly outlining the elements of direct discrimination (part II) and the liberal approach taken to this action in the 1979 *Wardley* decision (part III), the *Purvis* judgment is contrasted to appreciate how the nature and scope of the action has narrowed in 30 years (part IV). A survey of the federal discrimination cases decided since *Purvis* then demonstrates how the approach adopted by the High Court to resolve the particular problem in that case has been applied beyond the ground of disability and beyond the educational sphere (part V). Using the facts in *Wardley*, the law is then applied to various kinds of employment decisions that are biased in either their treatment or effect (part VI). It becomes clear that in narrowing the scope of direct discrimination law the High Court has further limited a regulatory system that was already struggling to achieve substantive equality. This backward step in the development of Australian equality laws contrasts with international developments and lends weight to calls for legal reform.

II Direct Discrimination and the Comparator

While it is well understood that our anti-discrimination laws are directed at promoting equality, the particular notion or notions of equality they are designed to promote is often not questioned or explored. The most well-recognised notions of equality are formal and substantive. The notion of equality that has popular appeal and appears conceptually straightforward is that of 'formal equality'. This Aristotelian notion of equality (merely) requires

---

Construction, Constitution and Regulation of Labour Markets and Work Relationships, Federation Press, Annandale, NSW, 2006, p 105.

6 By developing and distributing information about rights and responsibilities, and educational materials, anti-discrimination agencies such as HREOC also give content to the norm of non-discrimination: E Hastings, *FounDDAtions: Reflections on the First Five Years of the Disability Discrimination Act in Australia*, 1997, Human Rights and Equal Opportunity Commission, at <http://www.hreoc.gov.au/disability_rights/hr_disab/found.html> (accessed 23 October 2007). See also S Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101(3) *Columbia L Rev* 458.

7 The Workplace Relations (Work Choices) Act 2005 (Cth), amended the Workplace Relations Act 1996 (Cth) (WRA), came into effect in March 2006.

likes to be treated alike and says that justice inheres in consistency.[8] It means ignoring differences, judging 'blindly' and focusing instead on the relevant criteria for the job, position, etc.[9] This is powerful for opening doors that have been closed to whole groups, such as women, and compelling individuals to be treated according to their merits rather than their group status or stereotyping. However, it suffers many limitations.[10] The mandate to treat likes alike immediately prompts the difficult question of 'who is like whom?' (and the related question of who gets to decide this). Thornton provides the powerful example of how treating women less favourably than men in ancient Athens was not considered by Aristotle to be a breach of the tenet to treat likes alike because women (and slaves) were characterised as different to men.[11] A second problem is that this notion is only relative, only an entitlement to be treated the same as someone else whether that treatment is good or bad. Finally, while it requires that individuals be treated according to their merits, it does not enable any challenge to the criteria that are used, only the consistency of their application.

On the other hand, substantive equality requires differences to be acknowledged and accommodated rather than ignored.[12] Substantive equality is about equality of outcome or equality of opportunity, not merely same treatment. When there are relevant differences, simply ignoring them will not promote equality of opportunity or outcome and can, in fact, exacerbate inequality. As Graycar and Morgan, among others, have argued forcefully in respect of gender inequality: 'Historically men and women have not been treated identically. Treating them exactly the same now may only reinforce the already existing disadvantage of women.'[13] In practice, substantive equality means doing more than simply allowing all to apply; it requires a review of the criteria to see if their *effect* is exclusionary. Both notions of equality feature in our anti-discrimination laws.

Across Australian jurisidictions, anti-discrimination laws reflect a relatively uniform regulatory model. These laws prohibit both direct and indirect discrimination (ie, disparate treatment and disparate impact) on various grounds in respect of specific (public) arenas, such as work, and particular decisions or conduct in those arenas, such as hiring and firing employees, engaging contractors, and offering contractual terms and conditions.[14] To date, most claims have been framed as direct discrimination, with indirect discrimination often being characterised as conceptually difficult to understand and extremely difficult to prove.[15] Although it is extremely difficult

8 S Fredman, *Discrimination Law*, Oxford, Clarendon, 2002, p 2.

9 R Graycar and J Morgan, *The Hidden Gender of Law*, 2nd ed, Federation Press, Leichhardt, NSW, 2002, pp 28–9.

10 Fredman, above n 8, pp 7–11.

11 M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, pp 9–10.

12 Fredman, above n 8, pp 11–14.

13 R Graycar and J Morgan, 'Thinking About Equality' (2004) 27 *UNSWLJ* 833 at 834.

14 See, eg, Anti-Discrimination Act 1977 (NSW) s 25 or Sex Discrimination Act (1984) Cth s 14 prohibiting sex discrimination in respect of employment decisions.

15 Hastings, above n 6. 'Disability Standards under the Disability Discrimination Act'; cf R Hunter, *Indirect Discrimination in the Workplace*, Federation Press, Annandale, NSW, 1992.

to assess, it is arguable that these provisions have had an impact in reducing at least the most blatant kinds of discrimination.[16]

Direct discrimination prohibits disparate treatment of persons in like circumstances based on a protected trait (such as sex or race). The focus is on treatment and, more importantly, the reason for that treatment. At its most simple, direct discrimination is about rejecting someone for a job or promotion *because of* their race, sex, religion etc. Indirect discrimination prohibits the requirements or conditions that disparately impact on protected groups, unless the requirement or condition is reasonable in all the circumstances.[17]

It is generally understood that both direct and indirect discrimination are proscribed by our legislation in order to promote both formal and substantive equality. At a glance, the direct discrimination prohibition reflects a 'same treatment' notion of equality and thus would appear to serve only to promote formal equality. However, as will be explored below, such a narrow interpretation was originally rejected in Australia, as seen in *Wardley*. The primary significance of the High Court's judgment in *Purvis* is that it has made clear that the action of direct discrimination *is* confined to the promotion of formal equality, leaving only indirect discrimination to promote substantive equality.

It is important to note that in the definition of direct discrimination in Australian legislation there is no justification or reasonableness element.[18] For the most part, the legislation simply says that the particular grounds or traits must not be used to distinguish between candidates in the provision of jobs, services, etc. In order to prevent absurdities arising from this general prohibition, exceptions have been set out rather than a general 'justification' defence. Some exceptions allow employers to choose by trait for particular positions. So, for example, sex discrimination legislation enables theatre groups to choose women for female roles and lingerie sellers to employ women to fit bras using a 'genuine occupational qualification' exception.[19] Some exceptions allow for the trait to be used to identify disadvantaged groups and offer 'special measures'[20] in order to promote substantive equality.[21]

Conversely, an exception may permit employers to exclude protected groups when their traits prevent them from performing the job. So, for example, disability discrimination legislation allows bus companies to exclude blind people from bus-driving jobs by identifying sight as an 'inherent requirement' of the job.[22] However, the scope of this statutory exception is

16 See comments on the effectiveness of the Sex Discrimination Act 1984 (Cth) in 'Forum: The Sex Discrimination Act: A Twenty Year Review' (2004) 10(2) *University of New South Wales Law Jnl Forum*.

17 See, eg, Disability Discrimination Act 1992 (Cth) s 6.

18 In the United Kingdom this is also the case for sex discrimination and race discrimination, *but not* disability discrimination: Fredman, above n 8, pp 102–4.

19 SDA s 30.

20 See, eg, SDA s 7D.

21 Other exceptions suggest political compromises, such as exempting small businesses and private educational authorities from such discrimination prohibitions in New South Wales. See, eg, Anti-discrimination Act 1977 (NSW) s 49D(3).

22 See, eg, Disability Discrimination Act s 15(4); Anti-discrimination Act s 49D(4).

quite narrow. Under federal law, it is limited to the Disability Discrimination Act 1992 (Cth) (DDA) and the Age Discrimination Act 2004 (Cth), being notably absent from the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth) (SDA), and further limited to hiring and dismissal from employment, and applies not to all employer requirements but only 'inherent' requirements or essential aspects of the job.[23]

Importantly, the 'inherent requirements' exception in the DDA that applies to disability discrimination in employment has attached to it an implied reasonable accommodation element. This provides that if an applicant could perform the requirements of the job with some 'services or facilities', the employer is required to provide these up to the point of 'unjustifiable hardship'.[24] So, that it is not enough simply to ask whether the applicant can perform the inherent requirements as identified by the employer. The first question that needs to be asked is whether the applicant could perform the inherent requirements if provided with 'services or facilities'. If so, the second element is, whether providing this accommodation would impose an 'unjustifiable hardship' on the employer. Thus the statutory exception of inherent requirements, whereby an employer has freedom to determine the job and what is required, is (a) limited to disability discrimination in employment and (b) modified by a reasonable accommodation obligation. In this way, in respect of these grounds the legislation requires a balancing of the costs and benefits and, in a very limited way, is redistributive because it does require employers to bear some costs of accommodation at least up to the point of them being 'unjustifiable'.

Anti-discrimination laws have a patchwork of such exceptions designed to make workable the general prohibition on direct discrimination. If different treatment (direct discrimination) is found, each exception, in effect, allows for a consideration of whether the use of the ground or trait is 'justified' or permitted for some policy reason. In this way, the legislation and specifically the exceptions provide some concession to a strict formal equality approach which says that such grounds or traits may *never* be used as a basis for decision-making.

To prove direct discrimination, a claimant needs to establish two related elements in respect of a prohibition:

- that they have been treated less favourably in comparison to someone who is not of the same trait (gender, race, disability, etc) but is otherwise in the same material circumstances (the '*comparator*' element); and
- that the different treatment was because of the trait of gender, race, disability, etc (the 'causation' element).[25]

---

23 In New South Wales, the exception of inherent requirements is also used for carer's responsibility discrimination. Anti-Discrimination Act s 49V(4).

24 See Disability Discrimination Act s 15(4).

25 See, eg, Disability Discrimination Act s 5(1):

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

The respondent may then try to prove that the case falls into one of the exceptions and thus is 'justified'.

On one view, the comparator element can be seen as a mechanism to suggest causation, by operating to isolate the motivating factor in a decision. So, for instance, if the *only* difference between the successful applicant and the unsuccessful one is sex, then an inference might be drawn that the reason for the different (less favourable) treatment is sex. Such an inference could then be strengthened by other evidence, such as comments of bias made by the decision-maker, or rebutted by other evidence of causation. In this way, the comparator element is used as a way to demonstrate or infer causation and does not operate as a truly distinct requirement. If there is no actual comparator to whom the claimant can be compared, it has been said that a hypothetical comparator can be used. At least in New South Wales this has been described as serving to conflate the comparator and causation elements into a single question of causation[26] — what was the true or real basis for the conduct? This is not, however, the position the majority of the High Court has taken.

The role and purpose of the comparator element has been criticised at the highest level. In their *Purvis* minority judgment Justices McHugh and Kirby noted with approval scholarly attempts to 'reformulate the notion [of direct discrimination] so as to free it of the shackles of the comparator'.[27] The Australian Capital Territory has adopted this position in its formulation of direct discrimination,[28] but there is little evidence to indicate whether this has made any difference in that jurisdiction to an understanding of discrimination or the success of applicants.

To prove the second element, causation, the claimant must provide evidence of the reasons for the decision or conduct, such as statements disclosing the reason or conduct or statements disclosing a prejudice or animus from which it can be inferred that the trait was at least one of the reasons for the decision or conduct.[29] It is often said that intention or motive need not be proven, simply that the ground was the 'true basis' for the decision.[30]

It is common for direct discrimination definitions to include two 'characteristic extensions'. So, for instance, s 5 of the SDA defines sex discrimination to be less favourable treatment by reason of the sex of the aggrieved person or 'a characteristic that appertains generally to persons of the sex of the aggrieved person' or 'a characteristic that is generally imputed to

---

26 *Dutt v Central Coast Area Health Service* [2002] NSWADT 133 at [63].

27 *Purvis* (2003) 217 CLR 92; 202 ALR 133 at [114] per McHugh and Kirby JJ, citing to Fredman, above n 8, p 96 and to *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 (which indicates that the comparator issue falls away once the causation issue is decided).

28 Discrimination Act 1991 (ACT) s 8.

29 Note that in all Australian anti-discrimination laws, apart from the Age Discrimination Act 2004 (Cth), the discriminatory reason need only be one of the reasons, not the sole or even dominant reason, for a decision to be unlawful. See, eg, SDA s 8; Anti-Discrimination Act s 4A.

30 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176–7 per Deane and Gaudron JJ, 184 per Dawson J, 208 per McHugh J; 189 ALR 1; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J, 400 per McHugh J; 103 ALR 513.

persons of the sex of the aggrieved person'.[31] It has been explained as a means of capturing 'stereotyping' within the direct discrimination prohibition, but there is some confusion about the purpose and effect of these provisions, as will be explored below in part VI.

The difficulty of applying these legal definitions of discrimination to real life situations became apparent very quickly to the courts and tribunals charged with interpreting anti-discrimination legislation, as demonstrated by *Wardley v Ansett*.

III The *Wardley* Decision

It was 1976 when Deborah Lawrie (soon to be Wardley)[32] applied for a pilot's job with Ansett Airlines, the company of the 'infamously unprogressive' Sir Reg Ansett.[33] She was rejected by Ansett despite being, in the words of Mr Pascoe, the General Manager, 'a very nice person, highly intelligent and undoubtedly a good pilot'.[34] She met the prerequisites for employment with Ansett as a pilot — a commercial pilot's licence with sufficient hours clocked up, morse code rating and completion of certain theory units and the leaving certificate.[35] She also fared well on the employment tests, receiving a higher score than the average of the successful applicants on most of the criteria and tests.[36] Importantly, Wardley outperformed one of the successful applicants on every criteria except age (which was the same as hers).[37]

What concerned some members of the selection panel was that Wardley was a young woman about to be married and thus likely to become pregnant anytime soon.[38] This would require her at least to take leave. In the final interview 'various matters were discussed which related to her as a woman', including pregnancy.[39] Wardley told the panel that she was engaged to be married and hoped to have children at some stage, but assured the interviewing panel that she was committed to the job and would not let this interfere with her long-term career.[40]

Although it entertained her job application, Ansett had a policy of not hiring women and it subsequently gave this as a reason for refusing to hire Wardley. Probably to the airline's great surprise, Wardley challenged its power to use

31 Note that the Anti-Discrimination Act similarly extends the definition of discrimination in respect of each of the grounds covered under that Act. See, eg, s 24(1A) defining sex discrimination.

32 To avoid confusion, I will use the complainant's married name throughout the article because this was her name by the time she commenced proceedings and the name in the litigation.

33 Sir Reginald Ansett was said to have 'called over-28-year-old air hostesses "old boilers" and believed that women were unsuitable to be pilots because of their menstrual cycles': '25 years on, pilot fighter lands softly', *The Age*, Melbourne, 27 June 2004, at <http://www.theage.com.au/articles/2004/06/26/1088145020233.html> (accessed 23 October 2007).

34 Above n 1, at 75,260.

35 Ibid, at 75,261.

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid, at 75,260.

40 Ibid, at 75,261.

sex as a criterion for excluding her from the position by taking a discrimination claim under the newly enacted Equal Opportunity Act 1977 (Vic). Ansett lost, Wardley won and the case was considered a victory by equality advocates,[41] even though subsequent litigation meant Wardley had to keep fighting through the courts until the matter was finally resolved by the High Court a number of years later.[42]

During the course of the litigation before the Equal Opportunity Board, Ansett expressly or impliedly relied on various reasons for not hiring Wardley. These included:

- *policy*: we simply don't hire women and neither does any other airline. The General Manager specifically said: '[We] have adopted a policy of only employing men as pilots . . . in the running of our business we have, along with every other major airline operator in Australia, adopted a similar policy in the past';[43]
- *safety*. '[W]e are concerned with the provision of the safest and most efficient air service possible. In this regard we feel that an all male pilot crew is safer than one in which the sexes are mixed.'[44] Ultimately, the issue of safety was not relied upon in argument and thus this point was disregarded by the board;[45] and
- *profitability*, or a business case rationale — The board concluded that some members of the panel 'were influenced to reject [Wardley] by the prospect of absences in the early years of her flying career and the cost involved for the company'.[46]

The policy or tradition of not hiring women was in no way denied or hidden. It was a blatant and blanket use of 'sex' as a basis for determining employment. All members of the class of 'women' were excluded. The fact that other airlines did the same thing, while possibly providing moral comfort to the managers, had no relevance to the legal question at hand. Having stated that this was the company's policy, it was then difficult for the company to rebut the presumption that the reason Wardley was not chosen was because she was a woman.

However, Ansett in effect tried to 'justify' this policy of excluding applicants on the basis of sex by arguing that it had an economic rationale, the third reason outlined above. The company argued that it had rejected Wardley because she was likely to take leave (for pregnancy and birth). In this way, it argued, it had not treated her any differently than it would treat any applicant, male or female, *who was likely to take extended leave*.[47] The (potential) taking of leave thereby rendered different the circumstances between her and the other equally qualified male candidates.

---

41 See '25 years on', above n 33; ABC Radio National, 'Equal Opportunity in the Workplace', *The Law Report*, 6 July 2004, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1147044.htm> (accessed 23 October 2007).

42 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; 28 ALR 449.

43 Above n 1, at 75,260.

44 Ibid.

45 Ibid.

46 Ibid, at 75,261.

47 Ibid.

The legislation clearly said that an organisation could not base its recruitment decision on sex. But the question that arose in this case was whether an organisation was still permitted to take into account characteristics or circumstances that were closely related to sex such as the taking of maternity leave, being a characteristic that appertains peculiarly to women because of pregnancy and birth. Put more generally: When is a decision because of 'sex' and when is it because of something else? And if the 'something else' is closely linked or appertains generally to a particular sex, does that infect the decision and mean that a decision on that basis is, in effect, on the basis of sex?

The legislation required the comparator to be of the opposite sex but also required the comparator to be in circumstances that were the 'same or are not materially different'.[48] So, Wardley was to be compared with a male applicant, but what would make their circumstances alike? As the applicant, Wardley argued that she should be compared to men who were similarly qualified, had similar experience and test scores as these were the formal criteria for the job.[49] By controlling for all of these criteria — on which Wardley scored as well or better — Wardley sought to rule out other motivating factors and show that her sex must have been a factor in the decision not to hire her. The board concluded: 'From the evidence it is clear that had the claimant been male she would have been selected by the panel.'[50]

In contrast, Ansett argued that Wardley was likely to take (maternity) leave some time soon and that the taking of leave was a circumstance that should also be attributed to the comparator.[51] In this way, Ansett argued that it rejected Wardley not because she was a woman but because she was likely to take leave. The argument was that it was economically rational for the airline to choose the applicants who were not likely to take leave because absences diminished the airline's return on its training investment. The board had to decide whether a decision based on the likely taking of maternity leave by Wardley was a decision based on sex and thus unlawfully discriminatory.

The board rejected Ansett's argument that the decision was based on potential taking of leave, rather than sex, because it saw these things as being too integrally connected to be distinguished. It noted 'the only ground advanced for the complainant's failure to be selected was the probability of absences of a kind which could *only* arise *because* of her sex'.[52] The board, in contrast to earlier American and Canadian decisions,[53] adopted Wardley's interpretation, reasoning:

> It seems to us unlikely that the legislature having proscribed discrimination in employment on the ground of sex would then open the way to that discrimination against members of the female sex because of their child-bearing potential which is the very essence of the distinction between the sexes . . . child bearing potential of women should not be used as an excuse to limit women's role in society.[54]

48 Equal Opportunity Act 1977 (Vic) s 16(2)(b) Similar wording is found in SDA s 5(1)(c).
49 Above n 1, at 75,261.
50 Ibid, at 75,262.
51 Ibid.
52 Ibid.
53 Graycar and Morgan, above n 9, p 35.
54 Above n 1, at 75,263.

The board went on to clarify:

> [W]e reject [Ansett's] ingenious and very well presented argument that it is for each employer to judge the relevance of circumstances in the light of the requirements of the particular employment including the costs involved. These would seem to be matters more relevant to exemption applications than to the complaint before us.[55]

In essence, the board drew a distinction between whether direct discrimination had taken place and whether it was 'justified'. In respect of the first question it concluded that to make a decision based on a characteristic that was so closely associated with (the female) sex was in effect to make a decision on sex. Thus, excluding the applicant because of potential pregnancy amounted to direct discrimination on the basis of sex. Taking this approach, once this finding of discrimination is made, the only way in which a ruling of unlawfulness could be avoided is if the respondent was able to prove that an exemption existed which permitted the discrimination. And, as the board made clear, there was no exemption of business need which would allow the employer to use sex (or pregnancy, or potential pregnancy) to exclude an employee because it was justified on the basis of business efficiency. Indirect discrimination allows for an examination of 'reasonableness' or justification for the imposition of the rule or criteria, but for direct discrimination the question of justification could only arise if an exception existed.

One important implication of this distinction between different treatment (as discrimination) and justification is that the prohibition on using sex as a decision-making criteria was to apply *even if* this imposed a cost upon the business. The mandate applied, even if it required businesses to incur some costs, such as accommodating the leave-taking of female pilots. Any question of whether the costs were too great could only be assessed by the court at the justification stage and only if an exception existed to allow for this consideration. Exceptions such as 'unjustifiable hardship' or, in the case of indirect discrimination, 'reasonableness', provide for this balancing of the individual and social costs and benefits.

Generalising back to the framework of direct discrimination actions, the board's decision meant that the employer was prohibited from using as a selection criterion the probability of (maternity) leave *because* this criterion was a characteristic that appertained generally to women. By analogy, the following scenarios could amount to unlawful direct discrimination unless an exemption permitted them because the decision-making is based on a characteristic that is so closely connected to the protected trait:

- excluding an applicant with carer's responsibilities because she was unable to work overtime without notice;
- rejecting an orthodox Jewish applicant because he could not work on Saturday;
- refusing to renew the contract of an employee with carer's responsibilities because he had used his entitlement to carer's leave and was thus more absent than his colleagues; and
- demoting or making redundant an employee because she had taken maternity leave.

55 Ibid.

This approach challenges the view that there is a bright line between direct and indirect discrimination, between treatment and impact. If a characteristic appertains generally to a class, as pregnancy and even family responsibilities appertain generally to women, this would also be *the reason for the disparate impact* on women of family-unfriendly requirements or conditions. A decision to hire only those employees who could be deployed or were able to travel to any region in the state would be a decision based on a characteristic (of restricted deployability) that appertains generally to women. Framed as indirect discrimination, a requirement that an employee be deployable or readily able to travel to any region in the state would disparately impact upon female teachers because they disproportionately bear family caring responsibilities.[56] This is not to say that all indirect discrimination claims could necessarily have been framed as direct discrimination simply by relying upon this 'characteristic appertaining to' extension; simply that *Wardley* made clear that it was permissible for many claims to be framed alternatively as direct or indirect discrimination. Under the *Wardley* approach, it is not permissible to ignore the *reason* why some employees are unable to travel. It is not enough to treat those workers who cannot travel because of family responsibilities the same as those who cannot travel because of 'sporting commitments or second jobs or responsibility for pets'.[57] Substantive equality in respect of family responsibilities, for instance, requires those with family responsibilities to be treated differently to those who have such other commitments.

Returning to the different notions of equality, we recall that formal equality requires that likes be treated alike and this prompts the question: Alike in what way? Human beings are similar and different is so many ways, but only some characteristics are given significance or 'matter' in the comparison.[58] The related question that arises in this case is: Who gets to determine who is alike? Under the *Wardley* approach the court decided that the *purpose* of the legislation is relevant in deciding who is comparable to the applicant, and it is not up to the respondent alone to determine which 'circumstances' are to be attributed to the comparator. Characteristics that appertain generally or are closely associated with the trait cannot be attributed to the comparator thereby erasing the claim that there has been different treatment. This meant that prima facie, the use of such traits and characteristics was discriminatory and, if a respondent wanted to justify their use it had to identify and argue for an exception. It was then up to the court to assess whether this particular different treatment was justified under an exception or not.

In *Purvis* the High Court has rejected this approach.

---

56 As was the case in *New South Wales v Amery* (2006) 226 ALR 196; [2006] HCA 14; BC200603095, although the claimants lost in the case because the High Court, taking an extraordinarily narrow and technical approach, held that no such requirement was imposed upon them as casual teachers.

57 B Smith and J Riley, 'Family-Friendly Work Practices and The Law' (2004) 26(3) *SydLR* 395 at 416.

58 M Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca, 1990, pp 3–4, 50–3.

IV The *Purvis* Decision

A quarter of a century after *Wardley*, in November 2003 the High Court issued its decision in *Purvis*. The claimant, Daniel Hoggan, had multiple disabilities stemming entirely from an accident when he was a baby.[59] He had been admitted to a New South Wales public school and the principal had invested considerable 'time, resources, energy, expertise, money and compassion' to accommodate his special needs,[60] although whether these were invested effectively was disputed.[61] The student repeatedly exhibited anti-social and violent behaviour resulting in his suspension on five occasions and, finally, the principal decided to expel him.[62]

The claim before the High Court was that the school had directly discriminated[63] against Daniel on the basis of his disability in expelling him.[64] To decide this, the court had to determine whether there had been different treatment, and this in turn required the court to consider which aspects of the student's behaviour could be attributed to the comparator as 'circumstances'.[65] In the DDA it is clear that a claimant must be compared with someone who does not have the protected trait — in this case, disability. But, is he to be compared with someone who has acted in the same way? Is the violent behaviour a manifestation or characteristic of the disability that should *not* be attributed to the comparator, or a circumstance which *should* be attributed to the comparator? The court held it was the latter:

> The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the 'discriminator'. It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability . . . In the present case, the circumstances in which Daniel was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils.[66]

This meant the factual question for the court was: Did the school treat Daniel the same as it would treat a non-disabled student *who behaved as Daniel had behaved* (ie, violently and disruptively)? The court found that the answer was yes — Daniel was treated as he was treated because of the circumstances (ie, his behaviour) not his disability (which was separated). Thus he was found to have been treated the same as a non-disabled comparator *in these circumstances*. This meant that the school had not discriminated against Daniel because of his disability.

---

59 Above n 4, at [182].
60 Ibid, at [239].
61 Ibid, at [16], [23], [49]–[55] per McHugh and Kirby JJ.
62 Ibid, at [239], [33]–[42].
63 Indirect discrimination was not argued.
64 *Purvis* (2003) 217 CLR 92; 202 ALR 133 at [180].
65 Ibid, at [8]–[9] and [11]–[12] per Gleeson CJ; [219]–[232] per Gummow, Hayne and Heydon JJ; [27], [113]–[138] per McHugh and Kirby JJ.
66 Ibid, at [224]–[225] per Gummow, Hayne and Heydon JJ; Gleeson CJ concurred at [11], and Callinan J at [273].

It is not difficult to see why the *outcome* in this case would have appealed to the High Court. Firstly, the school had gone to some effort to help the student and accommodate his special needs. To find that it had discriminated despite all of this effort seemed wrong or unfair. Further, in addition to non-discrimination obligations the school had competing duties, such as duties of protection (including criminal duties under occupational health and safety (OHS) legislation) toward its staff, students and visitors. The court would naturally be eager to choose an interpretation that eliminated the conflict. It would not have wanted to find that the school had a civil duty under the DDA to retain the student when this would likely cause it to breach criminal OHS duties.

Both the federal and NSW legislation provide an exception in respect of disability discrimination that permits an educational authority to decide against a student *enrolling* because of his or her disability if accommodation would impose an 'unjustifiable hardship' on the school. However, at the time only the state legislation had an equivalent exception in respect of *expulsion* that says a school which has tried to accommodate can ultimately expel a disabled student if accommodating their disability imposes an unjustifiable hardship.[67]

The existence of an unjustifiable hardship exception enables or permits a court to take a wide interpretation of the definition of different treatment (discrimination) because the exception then serves to protect against employers or schools or other respondents unfairly having to bear inordinate costs of accommodation that are more appropriately borne by society as a whole for the social and economic benefits of enabling the full participation and development of capacity of all citizens.

Such an exception would have allowed the court to find that discrimination had occurred, in the sense that Daniel's disability was a factor in the school's decision to expel him, and *then* go on to examine whether it was nonetheless justified. It would have allowed the school to say: Yes, we did decide to expel this student because of his disability but this is not unlawful because accommodation was posing an unjustifiable hardship. Such an exception enables the discrimination itself to be distinguished from the lawfulness or justification, a question that has traditionally arisen as an exception.

Without an available exception that enabled the court to weigh up the question of how the costs and benefits of integration are shared between disabled citizens and in this case a school, the department was left only with the options of arguing that the decision-making was not discriminatory at all or conceding that it had discriminated unlawfully (and risk an order to re-enrol Daniel and continue the struggle to integrate him). The court too faced difficult alternatives because of the absence of the exception. To find that the school had discriminated seemed harsh, given all the effort it had made to accommodate Daniel and the competing demands it had to meet. But, without the exception, the court had no scope for weighing up and acknowledging these efforts. Instead, the court took the crucial step of bringing the question

67 This anomaly has since been remedied: Disability Discrimination Amendment (Education Standards) Act 2005; amending subs 22(4) of the Disability Discrimination Act which came into effect on 10 August 2005.

of justification forward into the question of whether there was different treatment. In doing so, it set down a new and narrow approach for direct discrimination generally.

The original HREOC decision[68] and the dissent of Justices McHugh and Kirby in the High Court provide an alternative approach. In the first instance, Commissioner Innes adopted an approach akin to that used in *Wardley*. Under this approach the behaviour that was caused by the disability could not be separated from the disability itself and attributed to the comparator:

> The Commissioner held that Mr Hoggan's behaviour was so closely connected to his disability that less favourable treatment on the ground of his behaviour was discrimination on the ground of his disability. The Commissioner also held that, to determine the discrimination issue, Mr Hoggan's treatment by the state had to be compared to that of a student without his disability and therefore without his disturbed behaviour.[69]

Under the *Wardley* approach, the *reason* for Daniel's behaviour would have been relevant to the question of who is comparable. To compare Daniel to someone who was voluntarily misbehaving is to deny the significance of his disability to Daniel's experience. It reflects a respondent or perpetrator view, saying it is enough for employers and service providers to look only at the behaviour and not further, and requires only that they treat the same behaviour the same way and do no more. The picture looks very different from the disabled person's point of view.

The Commissioner said that:

> to allow the disability itself to become the basis for determining that there are no same or similar circumstances would circumvent the clear legislative intent to make unlawful discrimination against a person because of a disorder, illness or disease that results in disturbed behaviour.[70]

Justices McHugh and Kirby argue strongly that the majority approach ignores established jurisprudence on this question. They state plainly that this question of the comparator has already been resolved (along the lines of *Wardley*):

> Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment and which are related to the prohibited ground are to be excluded from the circumstances of the comparator. In *Sullivan v Department of Defence* [(1992) EOC 92-421 at 79,005], Sir Ronald Wilson said:
>
> 'It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment . . . could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.'[71]

Their Honours are critical of the majority approach which allows the question of justification to be brought forward into the definition of direct

---

68 *Purvis obo Hoggan v New South Wales (Department of Education)* (2001) EOC 93-117.
69 Above n 4, at [48] per McHugh and Kirby JJ.
70 Ibid, at [115] per McHugh and Kirby JJ.
71 Ibid, at [119] per McHugh and Kirby JJ.

discrimination. They note with approval Sir Ronald Wilson's views on this question in *Proudfoot v Australian Capital Territory Board of Health*:[72]

> the equivalent exemption provisions of the Sex Discrimination Act:
>
> 'would be rendered superfluous by such a construction, as presumably all of the circumstances contemplated by those sections would constitute material differences, with the consequence that the actions identified did not even pass through the threshold requirement of constituting discrimination. In my opinion, this construction could not have been intended. I therefore conclude that a difference to be material cannot be referable to the prohibited basis for less favourable treatment, namely sex. The purpose of s 5(1) is to identify less favourable treatment of one sex than the other in essentially the same circumstances, which circumstances are external to the question of sex.'[73]

The majority's approach in *Purvis* arguably does render many of the express exceptions superfluous by opening up more scope for respondents to defend their decision-making at the threshold question of whether discrimination has occurred. This judicial defence is akin to the statutory defence of 'inherent requirements', but is significantly wider than it in a number of ways. Firstly, unlike the statutory defence of 'inherent requirements' in the DDA, the *Purvis* defence is not limited to decisions of hiring and firing in employment. Secondly, it is not limited to requirements that are 'inherent' or essential to that employment, permitting a respondent to argue that they excluded a candidate or expelled a student, for instance, because they failed to comply with even a minor or arbitrary requirement. Further, unlike the inherent requirements defence, this defence is not coupled with any reasonable accommodation obligation. Finally, in their reasoning the majority judges did not expressly or impliedly limit this approach to the DDA or disability. The *Purvis* 'defence' can apply generally, to all grounds, all areas, and without any obligation to bear costs of accommodation up to a limit of 'unjustifiable hardship'.

The dissenters acknowledged that the absence of an exception in the *Purvis* case is unfortunate, but urge against a judicial attempt to correct it:

> the unjustifiable hardship provisions in relation to education operate only in relation to a refusal or failure to accept a student's enrolment and not the way in which that person, once admitted, must be treated. The appropriate course, however, is to accept that the limited operation of s 22(4) is anomalous and requires correction by Parliament, rather than to impose on the definitional provisions an artificial construction in an attempt to resolve the anomaly.[74]

They clearly saw the lower court's (and, by implication, the majority's) approach as being driven by the noble but misguided desire to avoid a harsh outcome in these particular circumstances, but caution against this:

> The correct path of judicial interpretation — as always — requires that the Act be applied according to its terms and purposes. If its application in a particular case operates or may seem to operate harshly, it is a matter for the Parliament to correct. And it should not be forgotten that construing the Act narrowly because of the consequences in a particular case may lead to injustices in other cases perceived by

72 (1992) EOC 92-417 at 78,980.
73 Above n 4, at [120] per McHugh and Kirby JJ.
74 Ibid, at [96] per McHugh and Kirby JJ (footnotes omitted).

> the judicial mind as more deserving. In matters of anti-discrimination law generally, and disability law in particular, judicial intuition as to what is 'draconian' must be kept in firm check, for sometimes it will be based unconsciously on the very attitudes that the law is designed to correct and redress.[75]

In summary, there are traditionally two steps in determining whether unlawful direct discrimination has occurred. The first is to determine whether a person was treated less favourably than someone without their trait because of that trait (the 'discrimination' question). The second question is, whether the use of the trait in the particular case was permitted under an exception (the justification question). In *Purvis*, the High Court had no scope for considering justification because of the absence of a relevant exception. Instead, it adopted an approach for direct discrimination that found there had been no different treatment in the first place, thereby avoiding any finding of discrimination at all.

This approach allows employers, education providers and other duty holders to decide who is like whom, which, in effect, brings forward and obscures the justification question. It removes from the court's examination the question of whether the decision-making criteria used by the organisation are legitimate within the purposes of the legislation, leaving the court only to decide whether the criteria have been applied consistently. This opens up a new range of obstacles for claimants and a new range of arguments for respondents.

V The *Purvis* Approach Applied?

The lack of reference in the majority's decision in *Purvis* to the peculiarity of the facts and the legislative anomaly means that the decision potentially has general application as precedent for all anti-discrimination legislation in Australia. Its precedential weight is further enhanced by the rarity of decisions in the field (because most claims do not proceed beyond conciliation)[76] and the relative uniformity of Australian anti-discrimination legislation. The case's implications for the interpretation and application of anti-discrimination legislation are far reaching. To date there has been little academic exploration of these implications,[77] and mixed application of the decision by lower courts (and tribunals).

Purvis was not the first case in which the courts took this approach. Only a year earlier, Justice Allsop in the Federal Court did likewise in *Thomson v*

---

75 Ibid, at [19] per McHugh and Kirby JJ (footnotes omitted).

76 A Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22 *SydLR* 321 at 321–2.

77 A number of good case notes have been written analysing the judgments, but few have been able to draw out the implications. See S Roberts, 'The Inequality of Treating Unequals Equally: the future of direct discrimination under the Disability Discrimination Act 1992 (Cth)?' (2005) 45 *AIAL Forum* 20, and case notes: K Rattigan, '*Purvis v New South Wales (Department of Education and Training)*: A case for amending the Disability Discrimination Act 1992 (Cth)' (2004) 28 *MULR* 532; S Edwards, '*Purvis* in the High Court: Behaviour, Disability and the Meaning of Direct Discrimination' (2004) 26(4) *SydLR* 639; and C D 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 *Fed L Rev* 111.

Orica Australia Pty Ltd.[78] The claim was one of pregnancy discrimination, with the applicant arguing that the employer, Orica, had used Thomson's pregnancy and, more specifically, her taking of maternity leave to inflict a detriment of demotion in returning her to a lesser position rather than the same or comparable position. Thomson argued that the taking of maternity leave was a characteristic that appertained generally to pregnancy and the court accepted this.[79] However, the court then went on to determine that Thomson should be compared with a hypothetical comparator who had also taken 12 months leave.[80] In doing so, the court was allowing the employer to use the taking of leave as a basis for decision-making and to ignore the reasons for taking leave. No distinction was made between maternity leave and any other sort of leave, despite the acknowledged connection between maternity and pregnancy (a protected trait and traditional source of disadvantage).

It is important to note that Orica was still required by this test to treat Thomson the same as such a comparator and, in breaching its own policy, the court found sufficient evidence that Orica had not done this.[81] While this formal equality approach does little to challenge the employer's freedom to choose the criteria used in its policies, what it does require is strict consistency in the application of those criteria.

There are many examples already of courts adopting a *Purvis* approach to direct disability and sex discrimination claims, at least within the Federal jurisdiction (briefly explored below). It would be fair to say now that the predominant method of constructing the comparator is that advocated in *Purvis*. In adopting this approach, the courts and tribunals have either relied directly upon *Purvis* as precedent, relied upon the similar approach in *Thomson v Orica*,[82] or have adopted the approach without any reference to authority.[83] The approach does not appear to have had such a ready adoption in race discrimination claims, but this might be partly because of the peculiar statutory language in the RDA, and possibly because they are less amenable to the separation of a protected trait and a manifestation of the trait. Conversely, there are few cases that have not adopted the *Purvis* approach and none have formally distinguished the judgment of the High Court.

In the education field in a case that posed similar facts to those in *Purvis*, FM Driver in *Tyler v Kesser Torah College*,[84] had to decide whether a school, in temporarily excluding a student with Down's syndrome, had directly discriminated against him on the basis of his disability. The student had a history of poor behaviour. Applying *Purvis*, Driver FM attributed the student's behaviour to the hypothetical comparator,[85] finding that the school

78 (2002) EOC 93-227; 116 IR 186; [2002] FCA 939; BC200204194. For analysis see B Smith, 'Maternity Leave: Still Unpaid and Still Uncertain' (2002) 15 *AJLL* 291; Smith and Riley, above n 57, at 405–8.

79 (2002) EOC 93-227; 116 IR 186; [2002] FCA 939; BC200204194 at [165].

80 Ibid, at [121].

81 Ibid, at [138].

82 See, eg, *Sheaves v AAPT Ltd* [2006] FMCA 1380; BC200609725.

83 See, eg, *Hollingdale v North Coast Area Health Service* [2006] FMCA 5; BC200600171; *Trindall v NSW Commissioner of Police* [2005] FMCA 2; BC200500200; *Howe v Qantas Airways* (2004) 188 FLR 1; EOC 93-359; [2004] FMCA 242.

84 (2006) EOC 93-425; [2006] FMCA 1; BC200600169 (*Kesser Torah*).

85 Ibid, at [106].

would have treated the comparator in exactly the same way. The amendments allowing unjustifiable hardship to be pleaded as an exception were not yet in force[86] and thus the case was left to be argued along the same lines as *Purvis*, on the basis that there had been no discrimination because the student had been treated the same as any other student in his circumstances would have been.

The *Purvis* approach regarding the construction of the comparator has also been applied to direct discrimination claims in the employment field. In the case of *Y v Human Rights & Equal Opportunity Commission*[87] an aspiring postal worker who suffered from various psychiatric disorders which manifested in antisocial conduct had claimed direct disability discrimination in employment by Australia Post. In the original hearing conducted by HREOC, while discrimination was found, the discrimination was found not to be unlawful because Australia Post had successfully argued in defence that the applicant had been unable to fulfil the inherent requirements of the job. In a judicial review of this decision the Federal Court held that there was no reason to consider the inherent requirements exception in this case as, applying *Purvis*, there was no discrimination in the first place.[88] With Y's behaviour attributed to the hypothetical comparator, the employer was found not to have treated Y any differently than the comparator.

In another employment case under the DDA, *Ware v Oamps Insurance Brokers Ltd*,[89] Ware, a depressed office worker with Attention Deficit Disorder who exhibited poor interpersonal relationships and declining work performance among other things, claimed direct discrimination by his employer. The Federal Magistrates Court stated:

> Critical to the resolution of this dispute is the identification of an appropriate comparator. . . . On the authority of the decision of the High Court in *Purvis* it is necessary to identify a hypothetical comparator who did not suffer from Mr Ware's disabilities but who exhibited the same behaviours.[90]

However, in relation to the applicant's demotion and dismissal, less favourable treatment was found because his performance was not evaluated in accordance with stipulated criteria.[91] It was found that the company would have generally assessed an employee according to criteria that it stipulated in a work agreement and, in this case, had not. In this way, as in the case of *Thomson v Orica*, the employer had been allowed to set the criteria but had still fallen foul of the formal equality requirement by not being consistent in its application of the policy.

Purvis has similarly been applied in cases where the applicant has required leave from work as a result of their disabilities, and this leave taking has been

86 The scope of this defence was not extended until 10 August 2005. See above n 65.
87 (2004) EOC 93-325; [2004] FCA 184; BC200400708.
88 Ibid, at [24]–[31].
89 (2005) EOC 93-402; [2005] FMCA 664.
90 Ibid, at [100].
91 Ibid, at [111].

attributed to the comparator.[92] For example, in *Forbes v Australian Federal Police (Commonwealth of Australia)*,[93] Selway J constructed the comparator as 'a non-disabled employee who had been absent from work for a long period and whose relationship with the AFP had irretrievably broken down',[94] despite the fact that the applicant's absence from work was a manifestation of her depressive illness.

Purvis has also been applied in direct pregnancy discrimination cases. In *Dare v Hurley*,[95] Driver FM followed *Purvis* in ascertaining whether Kisha Dare had been directly discriminated against by Patrick Hurley in her employment when she was dismissed soon after indicating that she would like to take maternity leave. The reach of *Purvis* was thus revealed to extend to direct discrimination claims under the SDA, although since *Thomson* this approach had been quite commonly applied in relation to sex discrimination. Despite acknowledging that requiring maternity leave was a characteristic that appertains to women who are pregnant,[96] Driver FM defined the comparator as an employee who has expressed a wish to take a period of unpaid maternity leave. However, as in *Ware*, Dare was ultimately successful in proving less favourable treatment because Driver FM did not believe that Hurley would have incorrectly applied the disciplinary policy contained in the employee manual to the comparator, as occurred in relation to Dare.[97]

One notable example of the Purvis case being cited but not correctly applied is the judgment of McInnis FM in *Wiggins v Department of Defence — Navy*.[98] In *Wiggins*, McInnis FM had to resolve whether the transfer of the applicant (who had suffered from depression and consequently taken leave) from the Command Centre to another position (effectively a demotion) could constitute unlawful discrimination for the purposes of the DDA.[99] The respondent alleged that the transfer had occurred because of the absences of the applicant, as distinct from her depression, and that this treatment would have also been dealt out to another officer who was similarly absent for an unspecified period of time.[100] However, McInnis FM rejected this argument, stating that the leave was 'inextricably related to her disability', and thus it was because of her disability that she was transferred.[101] Although McInnis FM does not reject *Purvis*, his refusal to separate the depression from the leave reflects the dissenters' views, not the majority judgment in that case.

In all but the last of these cases, we see that the *Purvis* approach leads the courts merely to ask whether the employer's or education provider's policy has been applied consistently. If the employer or school has identified an organisational need that underpins their decision and applied it consistently,

92 See, eg, *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254; 132 IR 102; [2003] FCA 1475; BC200307661 at [8]; *Power Junior v Aboriginal Hostels Ltd* (2004) EOC 93-342; [2004] FMCA 452; BC200404941 at [16].
93 [2004] FCAFC 95; BC200402343.
94 Ibid, at [81].
95 (2005) EOC 93-405; [2005] FMCA 844; BC200505928.
96 Ibid, at [116].
97 Ibid, at [113]–[114].
98 (2006) 200 FLR 438; EOC 93-441; [2006] FMCA 800; BC200604493.
99 Ibid, at [164].
100 Ibid, at [161].
101 Ibid, at [170].

without assumption or prejudice, then they have been able to argue that they have treated all likes alike.

What are the implications of this for equality?

VI Implications For Equality

In order to identify implications of this case for equality, it is first useful to tease out what direct discrimination laws now cover. This is done by returning to the scenario of the young Mrs Wardley applying for a job as an Ansett trainee pilot and considering alternative ways in which the Ansett board might have reasoned to a rejection of Wardley's application. Four alternatives are identified, representing general bases of decision-making rather than alternatives peculiar to these parties, and these are each subjected to an analysis of whether they would breach direct discrimination under our laws as they now stand.

Before considering these alternatives it is worth remembering that our anti-discrimination laws rely upon the victims of discrimination to enforce transgressions, rather than a public agency with investigative powers. It is up to the individual victim to identify discrimination, to lodge a complaint and, ultimately, to gather and present sufficient evidence to prove unlawful discrimination in a court or tribunal on the balance of probabilities. In considering the following alternatives, let us assume just for the sake of the argument, that Wardley would actually be told the true basis for the decision by the Ansett board (as she was in the original case 30 years ago) and thus would not face the evidentiary hurdles that are imaginable.

The board could have rejected Wardley, giving any of these alternatives reasons:

1. We don't hire women; we only hire men. That is our policy. (Reasons unstated.)
2. We won't hire you because we don't think women are suited to this job.
3. We won't hire you because you are young and just married and, based on averages for this group, you are likely to get pregnant sometime soon and thus require leave of which we don't want to bear the cost.
4. We won't hire you because when we asked if you intended to take any leave in the next three years (the intensive training period for pilots), you said that you did intend to take at least six months leave (to have a baby) and we don't want to bear the cost.

Applying direct sex discrimination laws, how would Ansett fare under each of these four alternative explanations? There can be little doubt that the blanket exclusion of women under scenarios one and two would offend any prohibition against direct sex discrimination. It seems fair to say too that while there might be exceptions that allow respondents to argue in some cases that the use of a trait is justified in decision-making, it is likely that the notion of such blatant discrimination simply being wrong and unacceptable would prevent an organisation from stating a policy in such a way, even if it legally could. This blanket exclusion clearly ignores the specific skills and attributes of the applicant and treats her merely as a member of a class in a way that

offends notions of human dignity, reflects economic inefficiency for the organisation, and wastes human resources for society. *Purvis* does not alter the law in respect of this scenario.

Similarly, in the third scenario, the company has again treated the applicant merely as a member of a class, rather than as an individual, attributing to her a statistical average that might pertain to the class but does not necessarily apply to her as an individual. In this way, the offence is in the imputation, *assumption* or stereotyping. So long as it could be proven that the company did simply jump to this conclusion based on Wardley's group membership, or *assume* that she would take leave, then it could be shown that it has treated her differently to male applicants in the same circumstances of being young, recently married, similarly qualified, etc. On the other hand, is it possible to argue that the likelihood of taking leave, based on her group membership, is also merely a circumstance that should be attributed to the comparator? The employer would then be arguing that Wardley was treated the same as others whose group, on average, was likely to require leave in the medium term, such as semi-professional athletes, or possibly someone with a chronic disability. So long as a court recognised that category based anti-discrimination laws are designed to reduce or eliminate acting upon stereotypes and assumptions, and specifically, assumptions about particular categories or classes of people, this defence would not be acceptable. A finding of unlawful direct discrimination would thus still be possible post-*Purvis*, although not entirely certain.

However, what *Purvis* has done is make clear that the final scenario does *not* fall within the scope of direct discrimination. It is not permissible to base a decision on characteristics that are imputed (as in scenario two or three), but it is now permissible to use characteristics that appertain generally, so long as they actually appertain to the applicant. If the company asked the applicants explicitly *and consistently* about the possible taking of leave, and made a decision without assumption or prejudice, the company is permitted to exclude all applicants who said that they intended to take leave. In this way, it would be treating like applicants alike, treating all leave-takers like other leave-takers. *Purvis* makes clear that the reason for the leave or its association with a protected trait is no longer relevant to the legal question of direct discrimination.

What about the 'characteristic extension' found in most Australian anti-discrimination legislation, such as s 5(1) of the SDA, that suggests it is not permissible to treat someone less favourably because of their trait, a characteristic imputed to that group or a characteristic that appertains generally?[102] It is clear now that the extension does not apply to the comparator limb of the test. The comparison is with someone who does not have the trait, but is not extended to someone who does not have the characteristics. The extension is only relevant to the question of causation and, if there is no less favourable treatment, then there is no need even to consider causation.

So *Purvis* has the effect of limiting the progressive potential of direct discrimination laws. The blatant use of categories of sex, race or disability is not permitted, and assumptions or stereotypes about such groups are also still

102 See above n 31.

offensive. But, if the stereotype or statistical average of the group does actually apply to the claimant, so that the employer is basing their decision upon knowledge rather than assumption, direct discrimination offers little assistance to challenge the decision. The prohibition on direct discrimination in respect of a ground does not prohibit treatment that is based on a characteristic or manifestation of a ground so long as that characteristic or manifestation is actually borne by the person and not simply assumed or imputed. Direct discrimination arguably now only covers blanket exclusion, prejudice and assumption, not a small field but not as large as the alternative suggested by the earlier cases, such as *Wardley*.

As noted above, *Purvis* also makes clear that the notion of equality underpinning direct discrimination is that of 'formal equality'. This concept of equality challenges prejudice and assumption, where irrational bias has manifested or untrue characteristics have been attributed. It allows, even requires, rules to be applied consistently. However, to prove different treatment there must be a comparator and, with employers now clearly free to choose the applicable comparator, there is no restriction on the comparator being any other person *who also deviates* from the norms of 'benchmark' man[103] — 'white, male, Christian, able-bodied and heterosexual'.[104] The norm is left intact and the requirement is simply to treat all deviants consistently.

This creates a strong conformist pressure[105] whereby individuals are encouraged and permitted to apply and participate, but only to the extent that they can conform to the pre-existing rules and requirements. Those with differences to the norm are not afforded or owed special treatment in order to bring about actual or substantive equality. Fredman articulates the problem:

> in rejecting the negative effects of taking group-based characteristics into account, [this] principle of equality has assumed that all aspects of group membership should be disregarded. Yet, . . . cultural, religious, and ethnic group membership is an important aspect of an individual's identity. Indeed, to attempt to abstract the individual from that context is not to create a universal individual, but simply to clothe her with the attributes of the dominant culture, religion, or ethnicity.[106]

In *Purvis* Justices McHugh and Kirby draw upon Canadian jurisprudence to articulate the limitations of such a strict formal equality model:

> The Supreme Court of Canada has explained why a requirement of accommodation is necessary to achieve true equality for the disabled. In *Eaton v Brant County Board of Education* [[1997] 1 SCR 241 at 272–3 [67]], Sopinka J said:
>
> 'Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual . . . Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case

103 N Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen & Unwin, Sydney, 1990; Thornton, above n 11, p 1.
104 Fredman, above n 8, p 9.
105 Ibid.
106 Ibid, p 10.

> of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment.'[107]

A substantive equality theory says that same treatment is not enough because the goal is equal outcome or equal opportunity, not merely equal treatment. Under a substantive equality theory, discrimination is not merely the attribution of stereotypical characteristics that are untrue, but also the failure to accommodate those characteristics that do appertain generally (even if not peculiarly) to the class. Differences need to be acknowledged and, if necessary, accommodated to bring about equality of results, not merely procedural fairness.[108]

What scope is there for achieving substantive equality under our anti-discrimination laws? While earlier cases had identified a line between direct and indirect discrimination,[109] *Purvis* draws it starkly and cements the distinction. A claimant such as Wardley who wants to challenge the use of leave-taking as a criterion for selection must now either try to argue that the criterion was not applied consistently, hence breaching the limited direct discrimination rule, or turn to indirect discrimination, an action that is generally accepted as being significantly more difficult to identify and prove.

Under indirect discrimination, the claimant would need to prove that the requirement disparately impacted upon their class (in *Wardley*'s case, women). Crucially, in most cases, the claimant also bears the burden of having to prove that the requirement is not reasonable in all the circumstances.[110] This action does allow the court to consider how the costs of accommodation might reasonably be shared between the claimant and the respondent, but only if the individual claimant gets as far as court and has been able to prove disparate impact. Few cases are even run.

The *Purvis* case has further undermined the effectiveness of our anti-discrimination laws in addressing inequality. The regulatory framework has significant limitations.[111] It is not difficult to see the weaknesses of a regulatory system that aims to ameliorate the burden of disadvantage experienced by identified groups by granting only individual compensatory remedies and only when individual members of the disadvantaged groups are able alone to identify and prosecute breaches of the laws. Victims of discrimination are generally not well equipped to run court cases. In significantly limiting the scope of direct discrimination actions the High Court has made the burden of trying to change structural and systemic bias against marginalised groups that much heavier for such victims.

---

107 Above n 4, at [97], per Kirby and McHugh JJ (footnotes omitted).

108 Fredman, above n 8, p 11.

109 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; 89 ALR 1; *Waters v Public Transport Corporation* (1991) 173 CLR 349; 103 ALR 513.

110 This is the case in respect of federal race and disability discrimination and all grounds under the NSW Act. The federal sex (and age) discrimination legislation is unusual in that under s 7C of the SDA the respondent bears the onus of proof in respect of reasonableness.

111 Smith, above n 5; B Smith, 'Not The Baby And The Bathwater — Regulatory Reform for Equality Laws To Address Work-Family Conflict' (2006) 28 *SydLR* 689.

VII Conclusion

This article has elucidated the scope of Australia's direct discrimination laws after the High Court's decision in *Purvis* by exploring alternative bases for decision-making within organisations and how they would fare under these laws. The *Purvis* case serves to limit the scope of direct discrimination, by allowing employers greater scope in identifying the relevant comparator and thereby avoid a finding of any different treatment, a prerequisite for a finding of direct discrimination. This approach makes clear that our direct discrimination laws are underpinned by a formal rather than substantive model of equality, and are thus limited in their capacity to eliminate all but a small subset of discrimination and able to do little more than promote procedural fairness. All citizens are ostensibly *permitted* to participate in education and work and other public realms of life, but our laws do little to *enable* the participation of those who don't fit the norm of benchmark man.

That said, the *Purvis* case does not leave direct discrimination laws with nothing to do. Formal equality does still require decision-making to be free of prejudice and assumption, and requires criteria to be applied consistently. This is easier said than done. There is a growing body of research on implicit bias and stereotyping and how it infects both formal and informal decision-making in workplaces and other public realms.[112] With a greater acknowledgment of this bias in everday decision-making, we may grow more sensitised to recognise evidence of it occuring.

A comparison of the *Wardley* and *Purvis* cases makes clear that the jurisprudence of direct discrimination has developed over the past 30 years in a way that does little to promote substantive equality. It has again reinforced in our legal system, and any public consciousness that flows from this, an understanding of equality that is limited to formal equality rather than substantive equality.

While equality advocates continue to point out the limitations of a formal equality approach,[113] the willingness and capacity of courts to adopt a fuller conception of equality is in doubt. The High Court of Australia has clearly eschewed a commitment to substantive equality, in *Purvis* and the later case of *New South Wales v Amery*[114] in which it took an extraordinarily narrow reading of indirect discrimination provisions in respect of gender equality. However, even in jurisdictions with an apparently strong judicial commitment, such as Canada, the courts struggle to give effect to the concept, possibly because of its redistributive aspect and the challenge this poses for courts in a constitutional democracy.[115] Judy Fudge notes that substantive equality:

---

112 See, eg, how it is used to prove family responsibilities discrimination in employment: WorkLife Law, 'Issue Brief: Current Law Prohibits Discrimination Based on Family Responsibilities & Gender Stereotyping' Summer 2006, at <http://www.worklife law.org/pubs/IssueBriefFRD.pdf> (accessed 23 October 2007).

113 See Graycar and Morgan, above n 9. See also Fredman, above n 8.

114 (2006) 226 ALR 196; [2006] HCA 14; BC200603095.

115 J Fudge 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 2*3(2) South African Jnl on Human Rights* forthcoming.

> pushes beyond the conventional understandings of civil and political rights and troubles the boundaries of the traditional relationship between the courts and other institutions of the state. Substantive equality has the potential to impose positive obligations on the state and it can require direct redistribution of resources and benefits.[116]

To the extent that equality does require redistribution of resources and benefits perhaps it is more appropriate for our legislature to make the call rather than expecting the courts to do so. Can we expect our courts, in interpreting legislation, to adopt an approach that could substantially shift, for instance, the costs of participation and integration in society from persons with disability to others, such as educators and employers. The answer possibly lies in one's view of the role of courts and judges in a democracy. I would argue that the courts are routinely involved in the role of interpreting open-textured legislation and ambiguous precedent, with redistributive effects, and that only a strict legal formalist would deny this. In any event, in the case of equality legislation which clearly sets out its purpose of eliminating discrimination and promoting equality, the court is given by parliament not only a mandate but a responsibility to adopt an approach which promotes a full rather than limited conception of equality.

Ultimately what the case of *Purvis* possibly demonstrates is that even with equality objectives stated in legislation and the courts directed to take a purposive approach, there is still scope for our courts to limit rather than promote the achievement of equality. This is partly due to the central role the courts have been given in Australian equality legislation. By establishing only a negative duty on educators and employers and an individual rights based mechanism for achieving equality, our courts are given the central role of deciding what equality means. We need to consider whether alternative regulatory models of equality laws might provide better means of achieving true equality. In this way, *Purvis* lends weight to calls for regulatory reform.[117]

Almost a decade ago, the UK government appears to have commenced an exploration of this question. Following a number of public inquiries,[118] it has enacted significant regulatory reforms. These include the introduction of positive duties on public authorities to promote equality in respect of gender, race and disability, and they apply in addition to the traditional negative duty not to discriminate.[119] Many critics argue that these duties do not go far enough,[120] particularly because they are limited to public authorities, but they

---

116 Ibid.

117 See eg, Smith, above n 111.

118 Sir W Macpherson, *The Stephen Lawrence Inquiry — Report*, 1999; B Hepple, M Coussey and T Choudhury, *Equality: A New Framework — Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart Publishing, Oxford, 2000.

119 For further discussion of this approach and these duties, see B Smith, 'It's About Time — For a New Approach to Equality', SSRN Working Paper, University of Sydney — Faculty of Law, 2008, at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101187>.

120 Eg, S Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 4 *Maastricht Jnl of European and Comparative Law* 369; S Fredman and S Spencer, *Delivering Equality: Towards an Outcome-Focused Positive Duty — Submission to the Cabinet Office Equality Review and to the Discrimination Law Review*, 2006, Equality and Diversity Forum, at <http://www.edf.org.uk/news/Delivering%20equality%20submission%20030606-final.pdf> (accessed 10 December 2007);

do at least reflect a move by the United Kingdom away from merely a complaints-based model of anti-discrimination law toward a proactive model of equality regulation. They reflect some acknowledgement that equality will not be achieved by a rights based mechanism that relies upon individual victims to prosecute and our courts to interpret. Given the persistence of discrimination and inequality in Australia despite more than 30 years of anti-discrimination laws, it is time we considered taking a similar look at our own discrimination laws to identify ways in which they could be made more (rather than less) effective.

C McCrudden, 'Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's Consultative Paper' (2007) 36(3) *Industrial L Jnl* 255.