

SUPPORTING UNIVERSITY STUDENTS WITH DISABILITIES: MAKING REASONABLE ADJUSTMENTS WHILE MEETING EDUCATION PROGRAM AND COURSE REQUIREMENTS

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University students with a disability have a right to access education and to participate in education programs and courses on the same basis as students without a disability. In order to be able to participate fully in education, students are entitled to reasonable adjustments in terms of education programs and courses. What constitutes a reasonable adjustment, however, is often contested. Through a comprehensive review of cases and tribunal decisions, this article examines the application of the Disability Standards for Education in relation to making adjustments to programs and courses, the kinds of reasonable adjustments that are typically available to students and factors that are considered when determining if an adjustment will be made.

I INTRODUCTION

Students with a disability who are undertaking university studies have a right to access educational programs ‘on the same basis’ as students without a disability, and not to be discriminated against on the grounds of disability.¹ However, issues concerning access to education and claims of discrimination often arise when making reasonable adjustments or accommodations in relation to educational programs and courses where there are essential course learning outcomes and course requirements to be met.² The meaning of reasonable adjustments or accommodation and the extent to which reasonable adjustments must be made are often contested, thus the focus of the article is on the question of what constitutes reasonable adjustments (accommodation) according to Australian case law.

Discrimination claims based on disability require an assessment of the disability, whether discrimination has occurred, and the nature of

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¹ *Disability Discrimination Act 1992* (Cth) s 22; *Disability Standards for Education 2005* s 2.2.

² In this article ‘program’ refers to set of courses that leads to a qualification and ‘course’ refers to a single unit of study with its own outcomes, content and assessments.

discrimination. This article, therefore, focuses on four key aspects: (a) the legal meaning of the term disability; (b) determining direct and indirect discrimination; (c) what constitutes reasonable adjustment (accommodation); and (d) reasonable adjustment in relation to program and course requirements. In addressing these aspects, the article first provides an overview of the current legal framework and applicable legislation, followed by a discussion on reasonable adjustments in relation to the design and delivery of education programs and courses with examples drawn from case law and tribunal decisions.³ The article concludes with the implications for university policy and practice derived from the case law.

II THE LEGISLATIVE FRAMEWORK

The legal framework that protects and promotes the educational rights of students with disabilities comprises international and national legislation, and educational standards.

A Convention on the Rights of Persons with Disabilities

The United Nations *Convention on the Rights of Persons with Disabilities*⁴ (the Convention) provides the international framework for promoting equal educational opportunities for students with disabilities. The Convention is ‘intended as a human rights instrument with an explicit social development dimension’ and it ‘clarifies and qualifies how all categories of rights apply to persons with disabilities’.⁵ The aim of the Convention is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’, which includes access to education.⁶

³ Although the focus of the article is on universities, the article refers to several key cases relating to schools; however, the definitions and principles examined apply equally to universities and other educational institutions. A comprehensive search of case law was conducted to include all cases and tribunal decisions to the extent possible that deal with higher education institutions and specifically matters concerning program and course requirements.

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 3 May 2008).

⁵ *Ibid.*

⁶ *Ibid* Art 1.

Article 24(5) of the Convention provides that:

States Parties shall ensure that persons with disabilities *are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others*. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities. [Emphasis added]

State signatories are obliged to introduce measures that promote the human rights of persons with disabilities; this includes introducing anti-discrimination legislation, eliminating laws and practices that discriminate against persons with disabilities, taking into account the rights of people with disability in laws and programs, ensuring institutions act in accordance with the Convention and promoting the training of people working with disabilities.⁷ The Convention was ratified by Australia in July, 2008 and entered into force on 16 August, 2008 with the Optional Protocol to the Convention in 2009.⁸ The Convention, however, can only be enforced if it has been incorporated into domestic legislation. This has been achieved *inter alia* through the adoption of the *Disability Discrimination Act 1992* (Cth) and the Disability Standards for Education 2005 (the Standards).

B *Anti-discrimination Legislation*

The *Disability Discrimination Act 1992* (Cth) (the DDA),⁹ gives effect to the Convention and makes it unlawful to discriminate against a person on the basis of their disability.¹⁰ The Objects of the DDA include eliminating ‘as far as possible, discrimination against persons on the ground of disability’ in

⁷ *Ibid* Art 4 (General obligations).

⁸ Australian Human Rights Commission, *United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)* (Web Page) < <https://humanrights.gov.au/our-work/disability-rights/united-nations-convention-rights-persons-disabilities-uncrpd>>. See also, United Nations, *Convention on the Rights of Persons with Disabilities and Optional Protocol* < <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>>.

⁹ The *Disability Discrimination Act 1992* (Cth) (as amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*) is overseen by the Australian Human Rights Commission. An individual may lodge a complaint of discrimination and harassment with the AHRC who then investigate the complaint and resolves the matter through a process of conciliation. The AHRC may refer the matter to the Federal Court or Federal Magistrates Court.

¹⁰ *Disability Discrimination Act 1992* (Cth) s 12.

certain areas such as education and employment, and ‘to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community’.¹¹ Gleeson CJ noted in *Purvis v State of New South Wales* that the ‘Act deals with discrimination in a normative, not a value-free context’ and is ‘concerned with discrimination of a kind that the legislature regards as unjust, and makes unlawful’.¹² Furthermore, Gleeson CJ noted that in its application to educational authorities ‘the Act enters an area of relationships governed by legal obligations designed to protect the young and vulnerable’.¹³

The DDA thus makes it unlawful for an educational authority, both private and public, to discriminate against someone because they have a disability.¹⁴ Part 2 of the DDA sets out the ‘acts, omissions and practices’¹⁵ that are unlawful in the specified areas, including education. This includes universities and other institutions of higher education. A person with a disability has a right to study at any educational institution in the same way as any other student. If a person with a disability meets the essential entry requirements, then educators must make changes or ‘reasonable adjustments’ to ensure students with a disability can access and fully participate in education programs and courses.

Pursuant to s 22 of the DDA it is ‘unlawful for an educational authority to discriminate against a person on the ground of the person’s disability’. Relevantly, s 22(2A) makes it unlawful for an education provider to discriminate against a person with a disability ‘by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment’.¹⁶ The DDA, together with and the Disability Standards for Education, aims to ensure that appropriate education policies, programs and practices are put in place to meet the needs of students with disabilities. However, as will become evident from the discussion on access to educational courses and reasonable adjustments, the practical implementation of such laws and policies remains an ongoing

¹¹ *Ibid* s 3.

¹² *Purvis v New South Wales* (2003) 217 CLR 92, [7].

¹³ *Ibid*.

¹⁴ *Disability Discrimination Act 1992* (Cth) s 22.

¹⁵ *Sklavos v Australasian College of Dermatologists* [2016] FCA 179, [33].

¹⁶ *Disability Discrimination Act 1992* (Cth) s 22 and s 22(2A).

issue as students with disabilities continue to face significant challenges to accessing education.¹⁷

In addition to the DDA, all Australian states and territories have anti-discrimination laws that include disability or impairment as one of the grounds of unlawful discrimination, which apply to the education sector.¹⁸ Federal legislation does not exclude the operation of state or territory legislation. A complainant may elect the jurisdiction in which to bring a complaint; however, federal legislation precludes a person from bringing a complaint under federal legislation if the person has initiated proceedings under state or territory law.¹⁹ The state and territory legislation likewise covers direct discrimination, which concerns a person with a disability being treated less favourably than a person who does not have a disability or impairment, and indirect discrimination that concerns a person with an impairment having to meet a condition or requirement that is unreasonable within the circumstances of the situation.²⁰ However, where the DDA makes

¹⁷ In this regard see Australian Human Rights Commission, *Access to Education for Students with Disability: Barriers and Difficulties* (Web Page) < <https://humanrights.gov.au/our-work/access-education-students-disability-barriers-and-difficulties>> and the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability, *Students with Disability Face Serious Barriers to Accessing Safe, Quality and Inclusive Education* (Web Page) < <https://disability.royalcommission.gov.au/publications/report-public-hearing-7-barriers-experienced-students-disability-accessing-and-obtaining-safe-quality-and-inclusive-school-education-and-consequent-life-course-impacts>>.

¹⁸ *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (QLD); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (TAS) ss 14-15; *Equal Opportunity Act 2010* (VIC); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

¹⁹ See, eg, *Disability Discrimination Act 1992* (Cth) s 13. In terms of the federal anti-discrimination laws, the Australian Human Rights Commission (AHRC) has an ‘exclusive regime’; hence, discrimination claims must be lodged with the AHRC and if the matter is not resolved by means of conciliation the President may a certificate terminating the complaint. Complainants may then apply to the FCA or FCC pursuant to s 46PO of the *Australian Human Rights Commission Act 1986* (Cth). There is no ‘general jurisdiction’ of the FCA or FCC to hear discrimination claims. See, e.g. Chris Ronalds and Elizabeth Roper, *Discrimination Law and Practice* (The Federation Press, 2012) citing *Carreon v Vanstone* [2005] FCA 865. Similarly, state and territory legislation make provision for applicants to bring proceedings in the relevant tribunal if the complaint is not resolved by the equal opportunity/anti-discrimination commissioner.

²⁰ *Anti-Discrimination Act 1977* (NSW) Prt 4A; *Anti-Discrimination Act 1991* (QLD) ss10-11; *Equal Opportunity Act 1984* (SA) s 66; *Anti-Discrimination Act*

specific reference to the provision of ‘reasonable adjustments’, this is not necessarily so in state and territory legislation. For instance the *Tasmanian Anti-Discrimination Act 1998* makes no reference to ‘reasonable adjustments’. Likewise in the *NSW Anti-Discrimination Act 1977* there is no reference to ‘accommodation’ or ‘adjustments’ and there is ‘no positive duty’ to provide adjustments as held in *Court v University of Wollongong*.²¹ The *Equal Opportunity Act 1984* (WA) merely provides that ‘different accommodations or services may be required by the person who has an impairment’.²²

Ronalds and Roper note that there may be some inconsistencies between federal and state laws in which case s 109 of the Constitution on the conflict of laws applies and federal law will prevail ‘to the extent of the inconsistency’.²³ However, they also point out that although each jurisdiction has its own anti-discrimination regime ‘each jurisdiction has been open to adopting precedents from other jurisdictions, giving rise to a reasonable consistency on issues of interpretation and application’.²⁴

C Disability Standards for Education

The Standards were made under the DDA and are ‘subject to the objects of the DDA’.²⁵ The Standards ‘clarify and elaborate the legal obligations in relation to education’.²⁶ The Standards apply to Commonwealth, state and territory institutions as well as private educational institutions. They set out a process to ensure that ‘students with disability are provided with opportunities to realise their potential through participating in education and training on the same basis as other students’.²⁷ The Standards cover matters such as enrolment; participation; curriculum development, accreditation and delivery;

1998 (TAS); *Equal Opportunity Act 2010* (VIC) ss 7-9; *Equal Opportunity Act 1984* (WA) s 66A; *Discrimination Act 1991* (ACT) s 8; *Anti-Discrimination Act 1992* (NT) s 20.

²¹ [2015] NSWCATAD 249, [21].

²² *Equal Opportunity Act 1984* (WA) s 66A(2).

²³ Ronalds and Roper (n 19) 11.

²⁴ *Ibid*.

²⁵ Disability Standards for Education 2007, 4. Part 11 of the Standards provides for a review of the Standards every five years to determine ‘whether they continue to be effective and remain the most efficient mechanism for achieving the objects’ of the DDA.

²⁶ Disability Standards for Education 2005 s 4.

²⁷ *Ibid* 4.

student support services; and the elimination of harassment and victimisation. The Standards are set out in Parts that ‘include[s] a statement of the rights, or entitlements, of students with disabilities in relation to education and training, consistent with the rights of the rest of the community’. Each Part then ‘describe[s] the legal obligations, or responsibilities, of educational authorities, institutions and other education providers’.²⁸ Under s 32 of the DDA, it is unlawful for a person to contravene the Standards; hence a breach of a Standard is a breach of s 32 of the DDA. If an education provider ‘can demonstrate that it has acted in accordance with a disability standard, then Part 2 of the DDA does not apply and the provider’s conduct is deemed to be lawful under the DDA’.²⁹

The Australian disability discrimination and equal opportunity legislation and the Standards provide the framework for universities to ensure that students with a disability are able to access and participate in tertiary education on an equal basis as students without a disability. The legislative framework provides the definition of disability, the statutory scheme for determining discrimination based on disability, and the standards that are to be met in terms of educational provision and reasonable adjustments. A key issue in disability discrimination claims generally concerns reasonable adjustment and what this means, which is often the least understood and the most contested issue.

II DISCRIMINATION BASED ON DISABILITY AND A FAILURE TO PROVIDE REASONABLE ADJUSTMENTS

As noted above, students with a disability have a right to access education on ‘the same basis’ as students without a disability. The DDA further provides that unlawful discrimination includes ‘developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment’.³⁰ To this end, the law imposes a legal obligation on educational providers to provide ‘reasonable adjustment’ to ensure students with a disability are able to participate in and successfully complete their studies. The question is what constitutes ‘reasonable adjustment’? This part discusses the key elements of disability,

²⁸ Ibid 4.

²⁹ *Kiefel v State of Victoria* [2013] FCA 1398, [235]. Disability Standards for Education 2005 s 34.

³⁰ *Disability Discrimination Act 1992* (Cth) s 22(2A).

discrimination, and reasonable adjustment, with reference to meeting course participation standards.

A Defining Disability

Before considering what constitutes reasonable adjustment (or accommodation), it is necessary to clarify the meaning of disability and, therefore, the students who are entitled to educational adjustments for the purpose of their studies. Students with a disability necessarily need to disclose their disability and provide sufficient information, including suitable supporting documents such as medical reports, to the university regarding their disability if they wish to receive reasonable adjustment in relation to their studies, which is subject to privacy law. Some students may choose not to make any disclosures. However, in bringing a discrimination claim on the ground (or attribute) of disability ‘the applicant must adduce evidence to prove they have a disability and the nature and extent of the disability where that is relevant to the claim’.³¹

The Convention does not specifically define the term ‘disability’, but states that ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.³²

The DDA provides a broad definition of disability that covers temporary and permanent disabilities, and a wide range of disabilities whether physical, cognitive, psychiatric, sensory, social or emotional.³³ It also encompasses current disabilities, those that no longer exist and those that may exist in the future.³⁴ In many cases, the disability may be an obvious physical disability or an identifiable disability such as dyslexia, bipolar disorder, Asperger’s syndrome, or attention deficit hyperactivity disorder. However, a student’s disability can often be vague and ill-defined with no obvious sign or diagnostic evidence of a disability. For example in *Chung v University of Sydney & Ors*,³⁵ the appellant described her disability as including a ‘mood

³¹ Ronalds and Roper (n 19) 24.

³² *Kiefel v State of Victoria* [2013] FCA 1398, [235].

³³ *Disability Discrimination Act 1992* (Cth) s 4(1).

³⁴ *Disability Discrimination Act 1992* (Cth) s 4(1)(h) to (j). See also *Disability Standards for Education 2005* s 1.4.

³⁵ [2002] FCA 186, 2 [7].

disorder’ and in *Huang v University of New South Wales*³⁶ the disability identified was one of anxiety and depression, and the fact that the appellant felt ‘her brain was heavy’ which affected her ability to study. Such illnesses or impairments are likely to fall within the category of ‘a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour’.³⁷ In *W v Flinders University of South Australia*, Commissioner McEvoy held that:

I have found that the complainant does have a disability and I am satisfied, despite the lack of precise evidence relating to the nature of her disability, that it is a disability which comes within the definition provided in section 4(1): that is, that the complainant has a disability in the nature of “a disorder, illness or disease that effects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour”...³⁸

The importance of identifying and characterising the nature of the disability and providing the evidence that a person has a disability, is illustrated in *USL ob her Son v Ballarat Christian College (Human Rights)*³⁹. It dealt with the exclusion of a student from a school camp because of poor behaviour. The issue was whether the decision to exclude the student was based on poor behaviour or because of the student’s disability. It was claimed that the student suffered from ADHD and hence he had been discriminated against based on his disability. The nature and symptoms of ADHD had to be characterised and manifested at the relevant time. To succeed with the claim of discrimination it was, therefore, ‘fundamental that the mother [was] able to firstly establish that the boy did have ADHD in 2012, and secondly, that the symptoms and manifestations...were in that year’.⁴⁰ Judge Harbison accepted that the student suffered from ADHD but that there was ‘no evidence to support the proposition’ that the student’s behaviour in 2012 was necessarily a symptom or manifestation of ADHD and hence a disability.⁴¹ Judge

³⁶ [2008] FCA 1930, 27 [92].

³⁷ *Disability Discrimination Act 1992* (Cth) s 4(1)(g).

³⁸ *W v Flinders University of South Australia* No. H 96/57 In the Human Rights and Equal Opportunity Commission (24 June), 6.2 <<https://humanrights.gov.au/our-work/disability-rights/w-v-flinders-university-south-australia>>.

³⁹ [2114] VCAT 623 (2 June 2014). For example, in *Frost v Southern Cross University* [2020] NSWCATAD 105, [19] the Tribunal noted that ‘Ms Frost would need to show at hearing that she either has a disability or was thought by the University to have had a disability’.

⁴⁰ *Ibid* 7, [47].

⁴¹ *Ibid* 11, [77 – 78].

Harbison concluded that the '[a]pplicant has been unable to establish that the symptoms or manifestations of that disability were what she claimed them to be' and that his exclusion was 'because of his bad behaviour, unconnected with his disability'.⁴² Notwithstanding such issues that may arise in identifying and proving the disability, for the most part courts and tribunals are inclined to accept that the relevant individual has a disability.

B Determining Discrimination

Discrimination, in an educational context, may include: refusing or not accepting an application for enrolment;⁴³ suspending or excluding a student because of behaviour associated with their disability; not providing adequate support for a student with disability to access education; allowing the student with disability to be bullied or isolated, and not providing reasonable adjustments.⁴⁴

Discrimination under the DDA may be direct or indirect and is defined in sections 5 and 6 respectively.⁴⁵ In *Waters v Public Transport Corporation* Dawson and Toohey JJ explained that a 'distinction is often drawn between two forms of discrimination, namely "direct" or "disparate treatment" discrimination and "indirect" or "adverse impact" discrimination'.⁴⁶ Further, the courts have held that direct and indirect discrimination are 'mutually exclusive' which means that 'the same conduct cannot amount to both direct and indirect discrimination'.⁴⁷ Thus, in *Sklavos v Australasian College of*

⁴² Ibid 35, [267].

⁴³ *Scott and Bernadette Finney on behalf of Scarlett Finney v The Hills Grammar School* No. H98/6

In the Human Rights and Equal Opportunity Commission (13 June 2000)

<<https://humanrights.gov.au/our-work/disability-rights/scott-and-bernadette-finney-behalf-scarlett-finney-v-hills-grammar>>.

⁴⁴ Ibid

⁴⁵ *Disability Discrimination Act 1992* (Cth) ss 5 and 6. State and territory anti-discrimination laws provide similar definitions and elements of direct and indirect discrimination. See *Anti-Discrimination Act* (n 20).

⁴⁶ (1991) 173 CLR 349, [392].

⁴⁷ *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, [13] [Bromberg J]. See also Tracey J in *Walker v Victoria* [2011] FCA 258, [28] and *Abela v Victoria* [2013] FCA 832, [84] holding that the DDA definitions of direct and indirect discrimination are mutually exclusive. However, in *Andreopoulos v University of Canberra* [202] ACAT 95, [14] it was argued that 'they are not mutually exclusive and may arise out of the same set of circumstances'.

Dermatologists Bromberg J stated that ‘the proper characterisation of the conduct falls to be determined by the court on the basis that the same conduct cannot constitute discrimination as defined under s 5 and discrimination as defined under s 6’.⁴⁸ Bromberg J further noted that each of the subsections in 5 and 6 ‘raise a number of elements which must be satisfied to establish discrimination within the meaning of each of those subsections’ and that the ‘factors specified are varied but, in each case, a causation question is raised by the common phrase “because of the disability”’.⁴⁹

1 *Direct Discrimination*

In brief,⁵⁰ the test for direct discrimination as defined in s 5(1) is whether a person is *treated less favourably*, because of his or her disability, than a person without that disability would be treated in ‘circumstances that are not materially different’; in other words, in the same or similar circumstances. Section 5(1) involves a consideration of two aspects – whether the treatment of the person was less favourable and whether the differential or less favourable treatment was based on the disability. The first aspect involves a ‘comparator test’, whether a real or hypothetical comparator, whereby the comparator does not have a disability.⁵¹ This essentially involves determining whether the person with the disability was treated less favourably than a person without a disability in circumstances that are the same or similar, i.e. not materially different. The second aspect requires that the disability must be the reason for the conduct of the discriminator.⁵² In *Purvis v State of New*

⁴⁸ *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, [14]

⁴⁹ *Ibid* [22].

⁵⁰ For a detailed explanation on direct and indirect discrimination see Chris Ronalds and Elizabeth Roper, *Discrimination Law and Practice* (The Federation Press, 2012).

⁵¹ In *Petrak v Griffith University & Ors* [2020] QCAT 351, 9 [40] Member Gordon noted the line of authority in various jurisdictions that consider that the two-step approach in *Purvis* can be regarded a single question in appropriate cases.

⁵² *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [236]. The ‘court is therefore required to determine, as a question of fact, why (in sense of the “real reason” or “true basis”) the impugned conduct occurred’: *Walker v state of Victoria* [2011] FCA 258, [71] The *Purvis* case drew much debate on the definition of disability and in particular the ‘comparator analysis’ especially in relation to students with challenging behaviours that are a *manifestation* of a disability. See e.g., Colin Campbell, ‘A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the Disability Discrimination Act 1992 (Cth)’ (2007) 35(1) *Federal Law Review* 111; Elizabeth Dickson, ‘Disability

South Wales, Gummow, Hayne and Heydon JJ held that the ‘...central question will always be – *why* was the aggrieved person treated as he or she was?’.⁵³ In *BKY v The University of Newcastle* the question put by the tribunal ‘was the applicant’s disability a real, genuine reason for the treatment?’.⁵⁴ Hence as Bromberg J in *Sklavos* held ‘for direct disability discrimination it is necessary that the disability explains (or partially explains: s 10) the treatment or conduct of the discriminator which resulted in the less favourable treatment’.⁵⁵ If there is more than one reason for the conduct (act), s 10 provides that where one of the reasons is the disability of the person the ‘act is taken to be done for that reason’, irrespective of whether it is the dominant or substantial reasons for doing the act.

Relevantly, s 5(2) provides that direct discrimination arises if the discriminator does not make, or proposes not to make, *reasonable adjustments* and the failure to make reasonable adjustments means that the person with the disability is treated less favourably than a person without a disability in ‘circumstances that are not materially different’.

2 Indirect Discrimination

Indirect discrimination occurs when the same treatment applies to people with and without a disability, but the impact i.e. *the effect* is to disadvantage or exclude people with a disability in a way that is not reasonable. In the case of

discrimination in education: *Purvis v New South Wales* (Department of Education and Training), amendment of the Education Provisions of the Disability Discrimination Act 1992 (Cth) and the Formulation of Disability Standards for Education’ (2005) 24(2) *University of Queensland Law Journal* 213; Karen ‘O’Connell, ‘Should we take the ‘Disability’ Out of Discrimination Laws: Students with Challenging Behaviours and the Definition of Disability’ (2017) 35(2) *Law in Context* 108 and Kate Rattigan, ‘*Purvis v New South Wales* (Department of Education and Training). A Case for Amending the *Disability Discrimination Act 1992* (Cth)’ (2004) 28(2) *Melbourne University Law Review* 532. Varnham and Jackson suggest that with the clarification inserted in s 4(1) of the DDA clarifying the definition of disability ‘renders this decision [Purvis] extinct’ on the issue of the ‘comparator’ analysis: Sally Varnham and Jim Jackson, ‘Australia’ in Charles Russo (ed), *The Legal Rights of Students with Disabilities: International Perspectives* (The Rowman & Littlefield Publishing Group, 2011) Section 4(1) of the DDA includes the following statement: ‘To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability’.

⁵³ *Ibid.*

⁵⁴ [2014] NSWCATAD 39, [94].

⁵⁵ *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, [23].

indirect discrimination, Bromberg J explains that ‘no direct connection between the disability and the conduct itself is required. The disability need not have caused the conduct. The nexus with conduct is merely indirect – hence the designation “indirect disability discrimination”’.⁵⁶ Further, conduct will constitute discrimination if it has “the effect of disadvantaging persons with a disability” but only where “because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition”.⁵⁷

In terms of s 6(1), indirect discrimination arises if a person is required to comply with a requirement or a condition but because of their disability is unable to do so. On the face of it, the requirement or condition may be fair; but the *effect* is such that the person with a disability is disadvantaged. As held by Brennan J in *Waters v Public Transport Corporation* the imposition of a requirement or condition ‘amounted to discrimination unless the requirement or condition was reasonable’.⁵⁸ Indirect discrimination under s 6(2) as amended in 2009 ‘broadened the scope of indirect discrimination by extending the definition to include proposed acts of discrimination and by introducing an explicit duty to make reasonable adjustments for a person with a disability’.⁵⁹ It provides that a person (the discriminator) also discriminates against a person with a disability if they can only meet the imposed requirement or condition *if the discriminator made reasonable adjustments for the person* and such adjustment is not made, or proposed not to be made, the failure of which has the effect of disadvantaging the person with the disability.⁶⁰

⁵⁶ Ibid 25.

⁵⁷ Ibid 24.

⁵⁸ (1991) 173 CLR 349, [392] (*Waters*). It is noted in *Kiefel v State of Victoria* [2013] FCA 1398, [37] that the 2009 amendments to the DDA meant that the ‘burden of proof relating to the “reasonableness” of the requirement or condition ... shifted from the applicant to the respondent’.

⁵⁹ *Kiefel v State of Victoria* [2013] FCA 1398, [38].

⁶⁰ Amendments to the DDA in 2009 in relation to indirect discrimination replaced the test of proportionality with the requirement that the ‘condition or requirement imposed by the discriminator had, or was likely to have’ the effect of disadvantaging people with the disability of the aggrieved person’: *Kiefel v State of Victoria* [2013] FCA 1398, [36].

C Reasonable Adjustments

If a student has a disability, he or she is entitled to ‘reasonable adjustments’ or ‘reasonable accommodation’.⁶¹ The meaning of and extent to which reasonable adjustments are made is often not clear cut.

Article 2 of the United Nations *Convention on the Rights of Persons with Disabilities* defines reasonable accommodation as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.⁶²

Similarly, the DDA provides that an ‘*adjustment* to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person’ (the discriminator).⁶³ The Standards expand on this definition. In the area of education, the Standards state that an ‘adjustment’ is:

a measure or action taken by an education provider to assist a student with a disability to participate in education and training on the same basis as a student without a disability.⁶⁴

The Standards also require that the education provider ‘must take reasonable steps to ensure that any adjustment required to be made is made within a reasonable time’.⁶⁵

An adjustment is *reasonable* if ‘it balances the interests of all parties’.⁶⁶ The balancing factors include:

- a) the nature of the student’s disability;
- b) the effect of the adjustment on the students and others;
- c) the cost and benefits of making the adjustment;

⁶¹ These terms are used interchangeably; however, ‘reasonable accommodation’ is a broader concept, and the adjustments are the actual measures or steps put in place to accommodate a student with a disability.

⁶² *Convention on the Rights of Persons with Disabilities* (n 4).

⁶³ *Disability Discrimination Act 1992* (Cth) s 4(1) [Emphasis added].

⁶⁴ Disability Standards for Education 2005 s 3.3.

⁶⁵ Disability Standards for Education 2005 s 3.7(1).

⁶⁶ Disability Standards for Education 2005 s 3.4.

- d) *the academic requirements and integrity of the course* (emphasis added); and
- e) if it would be less disruptive than intrusive adjustments.

The types of adjustments relevant to an educational institution include aspects such as: modifying educational premises, changing course delivery, modifying or providing equipment, and changing assessment procedures.⁶⁷ The type of adjustments will depend on the nature of the disability and the particular circumstances, and are decided on a case-by-case basis. It is also possible for there to be ‘cases in which an adjustment is necessary, but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved’.⁶⁸

D *Reasonable Adjustments and Meeting Educational Course Requirements*

Reasonable adjustments are often necessary in order for a student with a disability to fully participate and engage in their studies and to take full advantage of the learning opportunities available. This may cover many areas including enrolment, facilities, resources and relevantly the educational program or course itself. In the discussion that follows, cases and tribunal decisions serve as examples of the kinds of adjustments that may be provided.

Standard 2.2(3) aims to ensure that

[a] person with a disability is able to participate in courses or programs provided by an educational institution, and use the facilities and services provided by it, *on the same basis* as a student without a disability if the person has opportunities and choices in the courses or programs and in the use of the facilities and services that are comparable with those offered to other students without disabilities’. [Emphasis added].

Ensuring that students with a disability can participate in educational programs, courses and activities ‘on the same basis’ as other students of necessity may require making reasonable adjustments. The notion of ‘on the same basis’, does not mean treating students ‘in the same way’ as this may in fact lead to unintended discriminatory outcomes. As explained by Commissioner Sir Ronald Wilson in *AJ v A School*:⁶⁹ ‘It will be remembered

⁶⁷ Australian Human Rights Commission, ‘Disability Rights’ (Web Page) <http://www.hreoc.gov.au/disability_rights/index.html>.

⁶⁸ *Walker v Victoria* [2001] FCA 118, [284] (Tracey J).

⁶⁹ [1998] ECO 92-948.

that ... it is not just a question of treating the person with a disability in the same way as other people are treated; it is to be expected that the existence of the disability may require the person to be treated differently from the norm; in other words that some *reasonable adjustment* be made to accommodate the disability'. The question of what constitutes reasonable adjustments specifically in relation to the participation in and delivery of programs/courses is considered next.

1 Program/Course Design and Outcomes

Under the terms of s 22(2A)(a) of the DDA, it is unlawful for an education provider to discriminate against a person on the grounds of the person's disability by developing curricula or training courses with a content that will either exclude the person from participation, or subject the person to any other detriment. Furthermore, the Standards require the curriculum and delivery of courses or programs to be designed so that students with disabilities can actively participate.

Standard 5.1 likewise provides that an education provider must 'take reasonable steps to ensure that the student [with a disability] is able to participate in the courses or programs provided by the educational institution ... on the same basis as a student without a disability, and without experiencing discrimination'.⁷⁰ Measures of complying with this Standard include: ensuring that the course or program activities are 'sufficiently flexible' to enable the student to participate, providing additional support where necessary to enable the student to achieve the intended learning outcomes, offering reasonable substitutes for activities in which the student cannot participate⁷¹ and developing individual learning plans. Pursuant to Standard 6.2 an education provider is also required to ensure that the course or program is designed in such a way that students with a disability can participate in and complete the program. As noted in Part 6, the Standards relating to the design and delivery of courses are 'to give students with disabilities the right to participate in educational courses or programs that are designed to develop their skills, knowledge and understanding, including relevant supplementary programs, on the same basis as students without disabilities'.⁷²

⁷⁰ Disability Standards for Education 2005 s 5.1(a).

⁷¹ Disability Standards for Education 2005 s 5.3.

⁷² Disability Standards for Education 2005 s 6.1.

It is, therefore, essential in the first instance that information about a program or course is explicit and readily accessible to students. This includes information about the essential program and course learning outcomes, duration of the program/course, mode of delivery, curriculum content, required assessments and so forth. Students need to be fully informed of conditions, requirements, and expectations. Moreover, students also need to be appraised of external professional regulatory requirements which, for instance, may require the completion of a program or activity within a fixed period of time. To this end, making reasonable adjustments may be necessary to enable students with a disability to complete a program or course and to fulfil the essential outcomes and requirements. In making reasonable adjustments, various factors are considered including balancing the needs of the student with a disability with the academic integrity and requirements of the program/course. This is aptly demonstrated in *BKY v the University of Newcastle*⁷³ in which the applicant was granted an extension of time to complete a five-year Bachelor of Medicine degree. The tribunal found that the clear connection between the decision not to grant additional time and the applicant's psychiatric condition amounted to a decision based on the applicant's disability and hence was unlawful.⁷⁴ This case highlights the importance of taking care when making decisions relating to termination from programs/courses, specifically that the reasons relate to program/course requirements and the integrity of the course such as currency of knowledge and essential requirements, not the person's disability. The institution also needs to clearly demonstrate what reasonable adjustments have been made to facilitate completion of a program/course.

In contrast, the court held in *Chung v University of Sydney & Ors* that the appellant who was excluded from the Bachelor of Applied Science (Physiotherapy) program seven years after his first enrolment had not been discriminated against based on his disability. Rather his failure to meet fundamental academic requirements despite the provision of reasonable adjustments had resulted in his exclusion.⁷⁵ Similarly in *Cavanagh v School of Nursing and Midwifery, University of Notre Dame*,⁷⁶ the court held that the applicant had not been discriminated against when they were terminated from

⁷³ [2014] NSWCATAD 39.

⁷⁴ *Ibid* [115]. As noted, where there are two or more reasons, and one relates to disability even if not the dominant reason it meets the definition of unlawful discrimination.

⁷⁵ *Chung v University of Sydney & Ors* [2002] FCA 186, [36].

⁷⁶ [2021] FCA 300.

a nursing program as they had been terminated based on performance issues and unprofessional conduct rather than their disability.

2 Study Materials, Learning Tasks and Assessments

Measures of compliance, set out in Standard 6.3 are comprehensive, but not exhaustive, and include: ensuring that the curriculum, teaching materials and assessments are appropriate and accessible, designing learning activities that take into account intended educational outcomes and the learning capacities and needs of the student, making study materials available in a format that is appropriate for the student adapting assessment procedures and methodologies for the course or program to enable the student to demonstrate the knowledge, skills or competencies being assessed, and designing out of class activities⁷⁷ that are part of the broader course or educational program of which the course or program is a part, to include the student.⁷⁸

Study materials need to be accessible, which may require providing them in different formats, in advance, and in a timely manner.⁷⁹ For example, a law student who was vision impaired was provided with material on large buff coloured paper using a minimum 24pt font. The growing availability of eBooks and electronic materials that can be customised have significantly increased accessibility. However, making sure students do have access to suitable texts and formats is often hampered by inadequate resources, support services and administrative support often leading to a delay in students receiving the materials they need in a timely manner. However, as cogently argued by Harpur and Loudoun while there has been a significant increase in the availability of texts in accessible formats the ‘regulatory framework is not ensuring students with print disabilities have timely access to textbooks required for their university studies’ such that students with print disabilities

⁷⁷ For example, a complaint concerning a student with a physical disability who could not participate in an arts project involving all the other members of her class and a presentation of Balinese dancing was resolved when the school arranged tutoring to enable the girl to play Indonesian percussion music and accompany her classmates on stage (AHRC, Conciliation Register July 2004 – 2005).

⁷⁸ Disability Standards for Education 2005 ss 6.2 and 6.3

⁷⁹ For example, a university student studying through distance education who had not received study material in a suitable format and was therefore not able to complete the course received compensation of AUD\$15,000 from the university (AHRC, Conciliation Register July 2004 – 2005).

‘continue to experience barriers which the wider student cohort does not confront’.⁸⁰

The most common adjustments are generally made in relation to learning tasks and assessments. This generally involves granting extensions for work to be submitted, deferring assessments, exempting students from certain activities or providing suitable alternative activities. For examinations, students may be given additional time and permitted to use assistive technologies. It may also be appropriate to allow for a different assessment format such as an oral examination, or a different kind of assessment but which is equivalent in terms of content and learning outcomes. However, giving practical effect to the legal requirements means that lecturers need to be equipped with the necessary skills and resources, including appropriate time allocations, to design appropriate assessments and learning tasks, which also needs to be supported by university assessments, policies, and practices. The development and implementation of inclusive assessment practices and a wider range of assessments and learning tasks would ultimately benefit all students.

In deciding on the type of accommodation to be made and whether it is reasonable in the circumstances, consideration is given to various balancing factors including the ability to achieve learning outcomes, academic requirements, and integrity of the course.⁸¹ In *TGD v Australian National University*⁸² the applicant, who had a diagnosed disability, was enrolled in a Bachelor of Advanced Computing and Bachelor of Economics and had an Education Access Plan (EAP). The EAP makes provision for reasonable accommodations ‘where possible’. The applicant claimed discrimination, inter alia, on the basis that his request for an extension for certain assessments and deferred exams had been denied. The Tribunal found that efforts had been made to accommodate the student’s requests, which included allowing the student to submit assessments remotely and other options being available to the student in relation to a mid-semester exam that was ‘optional and redeemable.’⁸³ The latter applied equally to all students, and students could make up the marks in a final exam. Relevantly the Tribunal noted that, the

⁸⁰ Paul Harpur and Rebecca Loudoun, ‘The Barrier of the Written Word: Analysing Universities’ Policies to Students with Print Disabilities’ (2011) (33(2) *Journal of Higher Education Policy and Management* 153

⁸¹ Disability Standards for Education 2005 s 3.4(2)(b).

⁸² [2019] ACAT 81, in which it was held that the applicant had ‘no arguable case’ and was not ‘sustainable in law or fact’ [137].

⁸³ *Ibid* [86].

lecturer declining the deferred mid-semester exam ‘was entitled to maintain the academic requirements of the course’.⁸⁴

This factor was also considered and applied in *Andreopoulos v University of Canberra*.⁸⁵ In this case the applicant was enrolled in a Bachelor of Physiotherapy, which required the completion of time-critical Clinical exams (also referred to as Viva exams). The student failed the first viva in one course and her request for additional time for the second viva was denied; but the student was offered an ‘additional one-on-one practice session’ to better prepare for the second exam.⁸⁶ Having failed the second viva the student had to withdraw from the program. The student’s claim of discrimination for failing to make reasonable adjustments was dismissed. The Tribunal noted that ‘an overarching consideration is the maintenance of academic requirements of the course and other requirements that are inherent in or essential to its nature’.⁸⁷ Weight was given to the integrity of the course, achieving learning outcomes, course accreditation and importantly patient safety, which was a ‘paramount consideration’.⁸⁸ Students have to be able to demonstrate they can ‘perform safely and competently’ in a clinical environment.⁸⁹ The Tribunal accepted that allowing additional time for practical components of the physiotherapy course ‘would not provide reasonable adjustment’.⁹⁰ The Tribunal also noted that reasonable adjustments to ensure that students can participate in a program on the same basis do not require a university ‘to provide a bespoke learning experience’.⁹¹

Similarly, in *Brackenreg v Queensland University of Technology*,⁹² a student with ADHD and a ‘mild form of dyslexia’⁹³ had been excluded from the Bachelor of Law program and denied readmission based on her academic record. The Tribunal noted that the student had been given ‘extra time to complete exams, extensions of time in handing in assignments and by giving her conceded passes on numerous occasions after considering her

⁸⁴ Ibid.

⁸⁵ [2020] ACAT 95.

⁸⁶ Ibid [4].

⁸⁷ Ibid [253].

⁸⁸ Ibid [239].

⁸⁹ Ibid [227].

⁹⁰ Ibid [257].

⁹¹ Ibid [239].

⁹² *Brackenreg v QUT*, Anti-Discrimination Tribunal Queensland (Brisbane) No. MIS99/80 (20 December 1999).

⁹³ Ibid 15-16.

circumstances'.⁹⁴ The Tribunal noted that even with these adjustments the student had not been able to 'satisfactorily complete a law degree to the standard required by the [university]' and stated 'there is no obligation on the [university] to pass a student just because they have a disability'.⁹⁵ The Tribunal highlighted that the 'obligation is to reasonably make available such special services or facilities which may be necessary to enable a student with disabilities to be able to undertake their studies'.⁹⁶

In the cases cited above, weight was given to maintaining the integrity of a course and meeting required standards. It was accepted that reasonable adjustments had been made that were in keeping with the academic and professional requirements of the relevant courses. This however does raise issues in terms of how the 'integrity' of a course is articulated and assessed, and the extent to which 'inherent standards or requirements' of a course are identifiable, transparent, assessable and justifiable. Determining inherent requirements can be difficult. Not all programs or courses necessarily explicitly state the inherent requirements beyond learning outcomes, which are often stated in very general terms. Moreover, institutions and programs have different approaches to developing and implementing inherent requirements. This is not dealt with in the Standards.⁹⁷

Standard 6.3(g) provides that assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed. Reasonable adjustments, therefore, include making adjustments to teaching methodologies and approaches that enable students to engage in learning more fully and to achieve learning outcomes. However, as some case examples demonstrate, courts recognise the experience and expertise of educators and other professionals in determining appropriate educational methods and teaching strategies. In *Kiefel v State of Victoria* for instance the claim, that the applicant was directly discriminated against because the school did not offer Applied Behavioural Analysis (ABA) Therapy, failed.⁹⁸ ABA Therapy is a program used to help develop and improve communication and for 'treating and

⁹⁴ Ibid 20.

⁹⁵ Ibid 21.

⁹⁶ Ibid.

⁹⁷ See eg KN Johnston et al, 'Reconsidering Inherent Requirements: A Contribution to the Debate from the Clinical Placement Experience of a Physiotherapy Student with Vision Impairment' (2016) *BMC Med Educ* 16.

⁹⁸ *Kiefel v State of Victoria* [2013] FCA 1398, [106].

assisting suffers of ASD [autism spectrum disorder]'.⁹⁹ The Court noted that teachers had used some ABA Therapy materials;¹⁰⁰ however, importantly the Court considered the efficacy of ABA Therapy and the pedagogical rationales for educators choosing whether or not to use ABA therapy. The Court noted that ABA Therapy is but 'one of a range of treatments' and 'is not a mainstream method of treatment'.¹⁰¹ The Court noted based on expert evidence 'there was no material in the literature that assessed the efficacy of such programs' and that there, are many students with autism who 'do not respond positively to the therapy'.¹⁰² No compelling evidence was provided that pointed to the fact that educators should have used this method and that a failure to do so disadvantaged the student. While the Court was prepared to treat the applicant's complaint as 'being one of failure to provide him with ABA Therapy', this was not because of the applicant's disability.¹⁰³ Likewise, *Burns v Director General of the Department of Education*¹⁰⁴ concerned the effective and appropriate use of a Pragmatic Organization Dynamic Display (PODD)¹⁰⁵ for learning. The Court held that there had been no discrimination, as teachers had been trained in the use of the PODD and there was insufficient evidence to argue that further training would have made a difference to the student's ability to communicate.

While these cases dealt with school students and complex issues concerning disability, they serve to highlight the kinds of reasonable adjustments that are often required, and the challenges encountered in fulfilling obligations and meeting the Standards. To ensure students, including university students, can access and participate in educational programs *on the same basis* requires the design and implementation of appropriate teaching and learning strategies and

⁹⁹ Ibid [162].

¹⁰⁰ Ibid [103].

¹⁰¹ Ibid [162].

¹⁰² Ibid [165] and [168].

¹⁰³ Ibid [177].

¹⁰⁴ [2015] FCCA 1769, [77]. In this case a student had a range of significant physical and intellectual disabilities for which accommodations were required and made including the use of a Pragmatic Organisation Dynamic Display (PODD). See however *Beasley v Victoria Department of Education and Training (Anti-Discrimination)* [2006] VCAT 1050 in which a failure to provide Auslan support for a student was indirect discrimination as the student was not able to participate in class.

¹⁰⁵ Pragmatic Organization Dynamic Display is a communication system using symbols.

methods, and may require the use of various assistive technologies,¹⁰⁶ for which educators need to be trained. In terms of curriculum design and teaching approaches, some universities have adopted a framework for the Universal Design for Learning, which largely consists of a set of principles for developing curricula that support equal learning opportunities for all students.¹⁰⁷

3 *Practicums and Placements*

As per Standard 6.3, reasonable adjustments also need to be considered and made for students with disabilities undertaking fieldwork, practicums, clinical programs and work placements in order to support and facilitate their full participation in the academic program or course. As discussed above, reasonable adjustments are made taking into account program or course requirements, and will usually require careful and advanced planning with the relevant workplace or external party. As demonstrated in *Cavanagh* these kinds of activities also include professional behaviour requirements that must be met. In *Cavanagh*, a student with disabilities was terminated from a nursing program because of ‘unprofessional conduct and inappropriate behaviour during the placement’.¹⁰⁸ The behaviour included failing to turn up for a meeting, unprofessional communication and dealings with residents, making residents feel uncomfortable, and entering residents’ rooms without knocking.¹⁰⁹ It was noted that the university’s decision to remove the student from the practicum was reasonable based on ‘reasonable requirements that any person would be expected to meet during a nursing practice’.¹¹⁰

¹⁰⁶ For some useful insights into the use of assistive technologies in higher education see Aoife McNicholl, Hannah Casey, Deirdre Desmond and Pamela Gallagher, ‘The Impact of Assistive Technology Use for Students with Disabilities in Higher Education: A Systematic Review’ (2021) 16(2) *Disability and Rehabilitation: Assistive Technology* 130.

¹⁰⁷ See e.g., UNSAW, *Universal Design for Learning* (Web Page) <<https://www.teaching.unsw.edu.au/universal-design-learning-udl>> and Victoria University, *Universal Design for Learning* (Web Page) <<https://www.vu.edu.au/learning-teaching/teaching-for-learning-at-vu/learning-teaching-approaches/learning-teaching-practices/universal-design-for-learning>>.

¹⁰⁸ *Cavanagh v School of Nursing and Midwifery, University of Notre Dame* [2021] FCA 300, [6].

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* The application for leave to appeal was dismissed as the applicant and no prospects of success [17].

In *Sabbah v Charles Darwin University*¹¹¹ the applicant claimed that the School of Education had failed to accommodate her special needs in relation to meeting the professional placement requirements for a Graduate Diploma in Teaching and Learning. However, the Tribunal held that ‘all the evidence points to a conclusion that the respondent at all times acted extremely reasonably and patiently in its dealings with the applicant and continued its negotiations with her in good faith and with a genuine wish to arrive at a workable solution’.¹¹² In addition to highlighting the importance of holding genuine consultations with the student, the Tribunal also noted the importance of meeting the needs of the students but at the same time ‘ensuring that the academic objectives served by the PEP (Professional Experience Placement) were not compromised’.¹¹³

The *Cavanagh* and *Sabbah* decisions demonstrate the application of balancing factors in assessing whether adjustments are reasonable, and weighing up the needs of students with a disability and essential course requirements, in particular professional requirements for practicums. The decisions also recognise and emphasise the importance of consultation, expert advice, communication, good faith negotiation and flexibility in arriving at reasonable adjustments and appropriate placement plans.

E Exemption to Reasonable Adjustments

Relevant legislation and the Standards require ‘reasonable’ adjustments to be made to programs and courses to support students with disabilities. There is no obligation to make *unreasonable* adjustments. An adjustment is reasonable unless making the adjustment would impose an *unjustifiable hardship* on the provider. In relation to the area of education it is not unlawful for a ‘person (the discriminator) to discriminate against another person on the grounds of disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator’.¹¹⁴ In determining whether an adjustment amounts to an unjustifiable hardship, all relevant circumstances of the case must be taken into account, including the following:

¹¹¹ [2018] NTCAT 992.

¹¹² *Ibid* 7, [28].

¹¹³ *Ibid*. The Tribunal noted that the demands of the student in terms of what she required from the school providing the placement were unreasonable, unworkable or incompatible with the PEP requirements: [41].

¹¹⁴ *Disability Discrimination Act 1992* (Cth) s 29A.

- a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- b) the effect of the disability of any person concerned;
- c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- d) the availability of financial and other assistance to the first person; and
- e) any relevant action plans given to the Commission under section 64.¹¹⁵

Therefore, an adjustment should not create an undue burden on the institution. The Standards provide that ‘the concepts of reasonable adjustment and unjustifiable hardship seek to provide a balance between the interests of providers and others, and the interests of students with disabilities’ (section 10). The burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.¹¹⁶ For instance, in *Sluggert v Flinders University of South Australia*¹¹⁷ altering the university terrain would have imposed a significant financial hardship on the university. However, in *Kinsela v Queensland University of Technology*¹¹⁸ the financial burden and ‘administrative inconvenience’ of finding an alternate venue for a graduation ceremony were not considered to impose an unjustifiable hardship. Tracy J in *Walker* also noted that ‘[t]here may be cases in which an adjustment is necessary, but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved’.¹¹⁹

¹¹⁵ *Disability Discrimination Act 1992* (Cth) s 11(1). Under Part V of the DDA, an education provider may develop and implement an action plan to achieve the objects of the Act. The plan may be given to the Commission and made available to the public.

¹¹⁶ *Disability Discrimination Act 1992* (Cth) s 11(2).

¹¹⁷ *Sluggert v Flinders University of South Australia* No. H96/7 In the Human Rights and Equal opportunity Commission (14 July 2000)

<<https://humanrights.gov.au/our-work/disability-rights/chandrankanthi-sluggert-v-flinders-university-south-australia>>.

¹¹⁸ *Kinsela v Queensland University of Technology* No. H 97/4 In the Human Rights and Equal Opportunity Commission (24 February 1997)

<<https://humanrights.gov.au/our-work/disability-rights/bradley-john-kinsela-v-queensland-university-technology>>.

¹¹⁹ *Walker v Victoria* [2011] FCA 118, [284] (Tracey J).

III POLICY AND PRACTICE

In examining case law and tribunal decisions specifically with regards to participation and curriculum delivery, a number of key themes emerged that provide useful guidance on issues concerning policy and practice. In the majority of cases and decisions reviewed, there was no finding of direct or indirect discrimination. Some of the key reasons for the findings were that appropriate policies and procedures (such as appeal procedures) had been implemented by the institution, support services had been available to students and that there was lack of evidence supporting claims of discrimination based on the failure to provide reasonable adjustments.

A Policy and Procedures

Policies and procedures dealing with equity and access, and for managing students with disabilities form part of a university's broad suite of policies. Such policies and procedures are necessary for implementing legislative obligations, setting out rights and duties, promoting inclusive learning environments, providing necessary resources and services, providing reasonable adjustments and for monitoring purposes. Policies and procedures should be readily accessible to staff and students so that staff are well informed about their legal obligations in terms of supporting students with disabilities. Policies and procedures include providing students with a learning/education access plan that sets out the reasonable adjustments available based on consultation with the student and medical reports. It is, however, submitted that relevant academic staff should be included in the consultation and decision-making process about reasonable adjustments, given they are usually best placed to advise on program/course requirements, accreditation and suitable substitutions for content and tasks.

B Support Services

All students must have access to a range of services to support their learning and well-being.¹²⁰ Standards 7.2 and 7.3 set out the standards and measures for providing support services to students generally. Students with a disability must be able to access support services on the 'same basis as a student without a disability, and without experiencing discrimination'.¹²¹ Specialised support services and specialised equipment may also be required such as scribes,

¹²⁰ See, eg, the Higher Education Standards Framework (Threshold Standards) 2015 [2.3] and [3.3] on support services that apply for all students.

¹²¹ Disability Standards for Education 2005.

interpreters, and assistive technology. The issue of access to support services was raised in *Frost v Southern Cross University*¹²² in which the applicant claimed she had inter alia been ‘denied access to counselling’. The student had been suspended for non-academic misconduct but was later permitted to re-enrol ‘subject to [the] provision of medical evidence of fitness to study’.¹²³ In addition to not having the evidence to support her claims,¹²⁴ it was noted that the student was not eligible for counselling services as she was not enrolled. Notwithstanding the technical issue concerning the student’s enrolment status, support services were available to students.

C Supporting Documentation and Record Keeping

In several of the cases discussed above it was held that the complaint was ‘lacking in substance’ or ‘has no merit’.¹²⁵ As noted above, the first step in establishing discrimination on the grounds of disability is that the complainant must show they have a disability for which reasonable adjustments are required. A recurring theme in decisions is that the complainant had not provided appropriate, adequate or current supporting documentation, mainly in the form of medical reports, to the university (or educational institution) to assist the institution to make decisions about appropriate adjustments. In most cases it is incontrovertible that the person has a disability, but this has not been made known to the institution.

In *Huang v University of New South Wales* for instance while the court recognised that Ms Huang ‘suffered from disabilities’, it was not clear on the evidence ‘when Ms Huang’s mental difficulties started to interfere with her studies, nor the extent to which they did. It [was] not clear whether the University knew or was aware of any such impact’.¹²⁶ In *Court v University of Wollongong* the student submitted that she had a ‘very rare disability’ (which meant she could not use electrical gadgets) and needed a support person to help her access a computer. However, the university argued that it had ‘not received enough information about her medical condition to determine what kind of support’ was needed and the complainant did not

¹²² [2020] NSWCATAD 105, in which an application for leave to proceed with the complaint in the Tribunal was denied.

¹²³ Ibid [5] - [6].

¹²⁴ Ibid [23] - [24].

¹²⁵ See eg, *Huang v University of New South Wales* [2008] FCA 1930; *Frost v Southern Cross University* [2020] NSWCATAD 105; *Sabbah v Charles Darwin University* [2018] NTCAT 992.

¹²⁶ *Huang v University of New South Wales* [2008] FCA 1930, [106].

provide ‘extra documents’ when requested.¹²⁷ Moreover, the student had been diagnosed with an ‘impaired working memory’ for which there was no current medical report¹²⁸ on the nature of her disability, the impact on her studies and hence the support needed. This highlights the challenges students may face having to ‘prove’ they have a disability. This also has implications for managing disclosure, privacy and confidentiality. To this end, it is important for staff and students to be fully informed about the rights of students in terms of disclosing a disability, confidentiality of information and how and when it is appropriate to share relevant information.

Associated with this is the need for diligent and meticulous record keeping. It is essential to keep complete and accurate records that can assist both the student and institution in effectively managing and supporting students with disabilities in the education context. Such records include medical reports, other supporting documentation, correspondence (including emails), notes of meetings and a record of reasonable adjustments that have been provided. In the cases above involving school students with a disability, the decisions in favour of the school were largely decided on the basis that the school maintained comprehensive records detailing all the adjustments made by the school to support the student in compliance with the relevant legislation and standards.¹²⁹ Such records are also essential for holding educational institutions to account for meeting the needs of students with disabilities and their obligations.

IV CONCLUSION

University students with a disability have a right to access education and to fully participate in education programs and courses ‘on the same basis’ as students without a disability. To this end, students with a disability have a right to reasonable adjustments (accommodations). Reasonable adjustments are often necessary to enhance and support students’ learning and progress so that they can fulfil their education goals and aspirations. Whether or not the provision of reasonable adjustments is expressly provided for in legislation at a state level, it is implicit in the law on discrimination that reasonable adjustments may be necessary otherwise students with a disability could not participate in education programs and courses ‘on the same basis’ as other

¹²⁷ *Court v University of Wollongong* [2015] NSWCATAD 149, [2].

¹²⁸ *Ibid* [17].

¹²⁹ See, eg, *Kiefel v State of Victoria* [2013] FCA 1398 and *Burns v Director General of the Department of Education* [2015] FCCA 1769.

students. Reasonable adjustments can take many forms as outlined in the Standards and noted in the cases discussed.

A number of key principles can be gleaned from the cases considered in this article. First, students with a disability need to provide the university (or relevant education institution) with adequate and appropriate information in order to receive reasonable adjustments. There is no obligation on universities to make adjustments if a student does not have a disability and/or does not disclose adequate information to help the university put in place an appropriate learning access plan. Second, while every effort must be made to meet the needs of students and to make reasonable adjustments, a university does not have to make adjustments that are unreasonable and which are incompatible with the academic integrity of the course, inherent course requirements or course accreditation requirements. To this end, program and course requirements need to be clearly identified, communicated, assessable and justified. Third, it is essential for a university to maintain detailed records of all consultations and correspondence with a student, and all adjustments that have been afforded to a student. Fourth, staff need to receive professional development and training in terms of supporting students with disabilities and fulfilling their legislative and policy obligations. Finally, university policies and procedures relating to students with disabilities should be regularly reviewed and monitored to ensure that they are being implemented and supporting students with disabilities to fully engage in their studies and have the best opportunity to complete their program or course.