

DISABILITY STANDARDS FOR EDUCATION AND REASONABLE ADJUSTMENT IN THE TERTIARY EDUCATION SECTOR

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The Disability Standards for Education 2005 (Cth) were introduced by the Australian Federal Government as a strategy to enhance equality of educational opportunity for people with disabilities. The Education standards operate under the authority of the Disability Discrimination Act 1992 (Cth) and have the primary effect of imposing upon Australian education providers an obligation to make 'reasonable adjustment' to enrolment, participation, curriculum and student support programs in order to accommodate students with disabilities. This paper focuses on the impact of the Standards on tertiary education providers and considers what existing discrimination case law reveals about the margin between 'reasonable' and 'unreasonable' adjustment.

I INTRODUCTION

Recent Australian education policy has emphasised that an 'inclusive' education should be made available to students with disabilities encompassing access to the full range of educational opportunities open to other citizens. This policy is informed by a shift in the understanding of the nature of disability and of the place of people with disabilities in the wider community. Disability, the social restriction experienced by people with impairments, is now widely regarded as, to a large extent, a social construction. Disability flows from the failure of society to accommodate the different needs of people with impairments. To use a simple example, a person with a mobility impairment may be 'disabled' from entering a building not because he or she uses a wheelchair, but because the building has no wheelchair access. Moreover, the accommodation of people with impairment is now asserted as a rights issue rather than a welfare issue. People with impairments claim the same basic rights as people without impairments, including a right to educational opportunities.

All Australian states and territories have enacted anti-discrimination legislation which purports to deliver equality of opportunity to people with disabilities in a range of areas of social engagement, including education.¹ However, owing to perceived problems with the effectuality of anti-discrimination legislation as a measure to promote equality of opportunity in education, however, in 1995, education standards were first mooted as a supplementary strategy. Standards shift the burden of taking action to protect rights, it may be argued, from the individual to society. This difference of approach may be illustrated in the education context. Under anti-discrimination legislation, it is the individual student who complains of unfair treatment who must take steps to fight that treatment by making a claim of unlawful discrimination. Under a standards regime, by contrast, the onus is on the educational institution, proactively, to take steps to accommodate each

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student with disability. The education institution is obliged to make 'reasonable adjustment' to the education environment so that students with disabilities may be included in that environment on the same basis as students without disabilities.

The *Disability Discrimination Act 1992 (Cth) (DDA)* provides that the relevant Minister may formulate standards in relation to a range of service areas including the education of persons with a disability.² The effect of standards is that compliance with them by a service provider will amount to compliance with the *DDA*.³ As noted above, standards for education were first raised as an issue in 1995 with a taskforce of representatives from the Commonwealth and each State and Territory established to formulate draft standards. Two important recent reviews of education services provided to people with disabilities have considered standards an important tool for the delivery of equality in opportunity in education to people with disabilities. The Senate *Inquiry into the Education of Students with Disabilities*⁴ (*Senate Report*) arose from concerns about the effectiveness of Commonwealth programs affecting the teaching of students with disabilities and the effectiveness of the delivery of Commonwealth funds towards supporting such programs.⁵ The *Senate Report* concluded that standards were a 'necessary step'⁶ and likely to be a more successful means than legislation alone of delivering education opportunity to people with disabilities:

The formulation of education standards is an essential part of the overall legislative scheme developed to reduce discrimination in education. While existing law will be able to deal with matters contained in the standards, the committee has learnt that the Act by itself is not necessarily the most effective or efficient means of achieving this aim.⁷

The Productivity Commission *Review of the Disability Discrimination Act 1992*⁸ (*PC Review*), released in April 2004, is a voluminous analysis of the social impact of that legislation in the decade following its implementation. The Commission received 373 submissions and conducted hearings in all capital cities. The hearings were attended by 190 individuals and organisations.⁹ The impact of the *DDA* on education opportunities available to people with disabilities was an important focus of the *PC Review*. After comprehensive consideration of the pros and cons of education standards,¹⁰ the Productivity Commission commented that they were an effective mechanism for bringing about systemic change¹¹ and found that they had 'the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints'.¹² Despite the support evident in both the *Senate Report* and the *PC Review*, prolonged debate between the states and Commonwealth as the expense and efficacy of standards for education, however, delayed their implementation. Ultimately, the Commonwealth acted unilaterally to implement standards in 2005.¹³ As they are enacted under the authority of commonwealth legislation, the *DDA*, the *Disability Standards for Education 2005 (Cth)* (*'Education Standards'*) will be binding upon education providers in all Australian states and territories.

II EDUCATION STANDARDS AND THE TERTIARY EDUCATION SECTOR

An earlier article in this journal has looked generally at the likely impact of the education standards.¹⁴ The particular focus of this article is on the ramifications of the education standards for tertiary education institutions. The *PC Review* is useful not only for its general commentary on the status of education opportunities available to people with disabilities but also as the most comprehensive source of recent Australian data relating to the education of people with disabilities. The data suggest that tertiary enrolments of people with disabilities are increasing. While an increase in enrolments is a positive outcome for people with disabilities, the data also suggest, however, that those students are not achieving the same completion rates as students

without disabilities. As such, there is legitimate concern that some students with disabilities in tertiary institutions may face barriers to participation in their studies which prevent their successful completion. It may be suggested that these are the kind of barriers that are intended to be addressed by the *Education Standards*. Some detail of the *PC Review* data is provided, below, to set the context for an analysis of the scope of the *Education Standards* and of their potential impact on the education services provided to students with disabilities by the Vocational Education and Training (VET) and University Sectors.

A Participation in Tertiary Education by Students with Disabilities

1 Vocational Education and Training (VET)

Since 1994 VET students have been asked to identify their disabilities on enrolment forms. Although such reporting is voluntary and, as such, not ‘completely reliable’¹⁵ data collected suggest that participation rates in the VET sector by students with disabilities have increased substantially over the last decade. The number of students with self-identified disabilities grew at an average rate per annum of 11.2%, while the student population grew at an average rate of 5.2%.¹⁶ Statistics suggest that students with a wide range of disabilities are accessing VET. Enrolment forms provide for students to report a disability which is physical, hearing, visual, intellectual, a chronic illness or ‘other’. The most common disabilities reported in 1996, 1999 and 2000 were physical, visual and intellectual, but more than 30% of VET students who reported having a disability did not specify the nature of the disability.¹⁷ Data suggest, however, that students with a disability were less likely to be enrolled in specific job related courses, such as engineering or business studies, and more likely to be enrolled in generic courses, such as study skills and job-seeking skills. In 1996, 47% of students with disabilities were enrolled in generic courses. By 2000, however, this proportion had lessened to 27%.¹⁸

Notably, students with a disability were less likely to complete their selected subjects than other students. In 1996, for example, 71.2% of students with a disability successfully completed subjects for which they were enrolled, compared with 76.8% of all students. In 2000 the comparable figures were 74.3% and 80.1%.¹⁹

2 University

Nationally consistent information relating to the participation of students with disabilities at the university level has been collected since 1996.²⁰ Like VET students, university students are required only to self-report disability on enrolment forms. Thus, like VET data, there is some question as to the accuracy of information. Between 1996 and 2003 the number of students self-reporting a disability increased from 1.9% of all enrolled students to 3.6% of all enrolled students.²¹ This figure of 3.6% is approaching the participation target of 4% set by the Commonwealth’s Higher Education Equity Program in 1990.²²

University students report disability according to a different set of classifications from VET students — hearing, learning, mobility, visual, medical and other. The largest number of students — 33.3% in 1996 and 33.6% in 2000 — reported a medical disability. It is, perhaps, not unusual, in the context that university is the tertiary study destination of academically ‘elite’ students, that no student specified an intellectual disability.²³ Data analysed by the Productivity Commission suggest that students with disabilities were more likely to study arts, humanities and social sciences than other students and less likely to study business, administration, economics and

engineering. Similar percentages of students, however, enrolled in education, health, law and legal studies and sciences.²⁴

As with the VET sector, students with disabilities were found to be more likely to fail their courses. In 2000, for example, 81% of students with disabilities passed their year's studies while 87% of other students passed.²⁵ Further, students with disabilities are less likely to pursue post-graduate studies than others. In 2000, 15.7% of university students with a disability were enrolled in post-graduate studies compared with 20.5% of others.²⁶

B *Obligations Under the Education Standards*

The *Education Standards* impose a general obligation of reasonable adjustment.²⁷ Guidance about how this is to be achieved is provided in relation to a number of key aspects of the delivery of education services: enrolment;²⁸ participation;²⁹ curriculum development, accreditation and delivery;³⁰ student support services;³¹ and the elimination of harassment and victimisation.³² It is also interesting to note that in relation to each of these aspects, the *Standards* set out not only the legal obligations of education providers but also student rights, 'consistent with the rights of the rest of the community'.³³ The standards also set out 'measures of compliance' in relation to each aspect and these are of particular importance for the education institution as they act as benchmarks against which an education institutions performance may be assessed. The key obligation placed upon Education Providers by the Standards is to make 'reasonable adjustment' to the education environment to support the full inclusion of students with disabilities.³⁴

It is, therefore, implicit that a particular adjustment will not be required if it is not 'reasonable'.³⁵ The standards provide for further limits on compliance, however. An accommodation will not be required if it would cause unjustifiable hardship,³⁶ if it would be inconsistent with an act authorised by statute,³⁷ or if it would jeopardise the health of a student with disabilities or the health of other students.³⁸

While there may be hope that the standards will increase education opportunities for people with disabilities, there is also some fear that compliance with the *Standards* will place onerous resource pressures on education institutions and, particularly, on tertiary institutions. A TAFE or university may have many hundreds of students with disabilities enrolled across a wide variety of courses in a wide variety of learning contexts. Every student with a disability must, potentially, therefore, be monitored and his or her treatment tested for compliance with the *Standards*. The modern Australian tertiary institution will have an equity department charged with this responsibility, but administrators and academics in each faculty may reasonably expect to be kept informed about the 'reasonable adjustments' required to be made to accommodate those students with disabilities within their care. It is only to be anticipated, therefore, that there will be some initial concern about the nature and extent of adjustments required by the *Standards*. While the *Standards* provide some generic guidance as to the type of adjustments which might be made there is inevitably some doubt about the margin between what is reasonable and what is unreasonable. There will inevitably be students who claim that not enough was done to accommodate their particular disability. Some of those claims will inevitably end up in court. Until the courts are called upon to settle the scope of the adjustment required by the standards, there is value for tertiary educators in looking at cases where the courts have decided whether the treatment of tertiary students with disabilities was discriminatory.

Australian anti-discrimination legislation, including the DDA, recognises two classes of discrimination: direct discrimination, where a person is treated 'less favourably' because of their

disability; and indirect discrimination, where an unreasonable requirement is imposed upon a student with disability that he or she cannot meet. An example of direct discrimination would be to refuse enrolment to a student because of his or her disability. An example of indirect discrimination would be to require a student with a hearing impairment to receive his or her instruction only in spoken English. What is 'less favourable' and what is 'unreasonable' are usually in issue in discrimination cases. What courts have already accepted as 'less favourable' and 'unreasonable' in tertiary education cases, and what they have not, may resonate in what courts would be likely to find 'reasonable' and 'unreasonable' in the context of the adjustments required by the *Standards*.

Moreover, while the *Standards*, as noted above, also impose obligations in respect of enrolment, student support services and the elimination of victimisation and harassment it is likely that most confusion will arise in respect of obligations imposed in respect of student participation and curriculum development and delivery. This is because the decided cases involving claims of discrimination brought by tertiary students suggest that, to date, it has been in these two areas that most disputes have arisen. Accordingly, these areas of student participation and curriculum development and delivery will be the particular focus of the following case analysis.

III THE PARTICIPATION STANDARDS

The key obligation of the education provider in respect of student participation is to

take reasonable steps to ensure that the student is able to participate in the courses or programs provided by the educational institution, and use the facilities and services provided by it, on the same basis as a student without a disability, and without experiencing discrimination.³⁹

A checklist of suggested measures which may be implemented to achieve compliance with the participation standards are as follows:

- (a) the course or program activities are sufficiently flexible for the student to be able to participate in them; and
- (b) course or program requirements are reviewed, in the light of information provided by the student, or an associate of the student, to include activities in which the student is able to participate; and
- (c) appropriate programs necessary to enable participation by the student are negotiated, agreed and implemented; and
- (d) additional support is provided to the student where necessary, to assist him or her to achieve intended learning outcomes; and
- (e) where a course or program necessarily includes an activity in which the student cannot participate, the student is offered an activity that constitutes a reasonable substitute within the context of the overall aims of the course or program; and
- (f) any activities that are not conducted in classrooms, and associated extra-curricular activities or activities that are part of the broader educational program, are designed to include the student.⁴⁰

A Participation Cases

The early discrimination case of *Kinsela v Queensland University of Technology*⁴¹ is particularly interesting because it highlights the fact that student participation is an issue outside the primary context of the class room. In *Kinsela*, the complainant, who used a wheelchair, argued that he was the victim of indirect discrimination arising from the structure of his graduation ceremony. The plans for his involvement in the ceremony, at the Concert Hall in the Queensland Performing Arts Complex, were that instead of entering the stage from the auditorium with all other graduands, he would enter from the side of the stage to receive his degree. The requirement imposed upon him in that case was that ‘to take part in the degree ceremony fully with the other students, Mr Kinsela would have to be able to use steps’.⁴²

Kinsela’s complaint of discrimination was upheld by Commissioner Atkinson of the Queensland Anti-Discrimination Tribunal (QADT) who found that it was not a ‘trivial matter’ to be able to sit with fellow graduands and to ‘process’ to the stage with them for the actual degree presentation. Kinsela had completed the degree Bachelor of Science (Human Services) at Queensland University of Technology (QUT). One focus of the degree was disability services and the course materials indicated a strong commitment to ‘civil, political, economic, social and cultural rights’ for all people.⁴³ Commissioner Atkinson noted the policy inconsistency between these course materials issued by QUT and Mr Kinsela’s exclusion by QUT from full participation in the graduation ceremony.⁴⁴ Further, Commissioner Atkinson emphasised ‘the undoubted goals of the Act of inclusiveness, accessibility and availability’⁴⁵ and cautioned that as anti-discrimination legislation has introduced change, so the university must change.⁴⁶

It should be noted that QUT has, indeed, changed its graduation ceremony since the *Kinsela* decision — now all graduands sit on the stage and move to the front of the stage to receive their diploma or degree before returning to their seats. As such there is no longer a requirement imposed on graduands that they ‘be able to use steps’ in order to participate in the ceremony.

The case of *Sluggett v Flinders University of South Australia*,⁴⁷ concerned a student with mobility impairment, and demonstrates that the complainant’s own behaviour, rather than any lack of ‘reasonable adjustment’ may be interpreted by a court or tribunal as contributing to, if not causing, relevant detriment. Sluggett, a social work student at Flinders University, had mobility difficulties due to a childhood infection with polio. Her difficulties increased during the course of her studies because she developed post-polio syndrome. The evidence was that she did not consider herself to be ‘disabled’. Further she did not keep the university administration fully informed of her disability, only complaining after she had been excluded from the degree course as a result of failure to meet course requirements. She made complaints of both discrimination in education and discrimination in access to premises to HREOC. HREOC declined to inquire further into the complaints. Upon review by the President of HREOC this decision was confirmed in relation to the education claims but the access claims, formulated as complaints of indirect discrimination, were referred for hearing.

Sluggett’s complaints of indirect discrimination related to an alleged requirement that she ‘attend classes’ in the hilly Flinders campus and that she attend work placement premises to which she had been allocated and where she needed to negotiate a spiral staircase. The claim in relation to the university campus failed because it was held that she could comply with the requirement as lifts were available as an alternative means of access. That Sluggett did not know of the existence of the lifts could be traced, it was held, to her own lack of enquiry and to her failure to put the university on notice about her access difficulties. The claim in relation to the work placement failed because there was found to be no requirement ‘imposed’ on Sluggett

that she use the stairs at these premises because she had agreed to the work placement. The University argued that Sluggett had not taken up an opportunity, before complaining to HREOC, to object to her placement and that had Sluggett refused the placement on the basis of her mobility problems an alternative accessible placement could have been arranged. Upon review by the Federal Court, Drummond J declined to interfere with the decision of HREOC on the basis that he could find no reviewable error.⁴⁸ Upon appeal to the Full Federal Court, Drummond J's decision was affirmed.⁴⁹

Although the complainant was unsuccessful, the *Sluggett* case illustrates the kind of adjustments to the education environment which may enhance student participation. If a student with mobility impairment is enrolled in a particular subject, classes should be timetabled in venues which are accessible to that student. When off campus placements or excursions are part of required coursework, an education provider's obligation may extend to ensuring that the relevant off campus venues are accessible.

The *Sluggett* case also illustrates, however, that dire consequences may follow for a student who chooses not to reveal an impairment to the administration of the education institution attended. In essence, HREOC found that it was Sluggett's own failure to enquire about alternative access and not the university respondent's failure to make 'reasonable adjustment' which caused her detriment. While many students are understandably reluctant to identify themselves as 'impaired', fearing not only the stigma which, historically, has attached to that status, but also, ironically, a discriminatory response, if they do not reveal the impairment in sufficient detail to allow an education institution to respond to it then it becomes difficult for them to allege discrimination in any failure to accommodate.

It is interesting to note that, perhaps as a result of cases such as *Sluggett*, it is current practice for many education institutions, at least at the tertiary level, to encourage disclosure of impairment upon enrolment and to provide the opportunity to do so on enrolment forms, so that equity officers can be notified of that impairment and plan, with the student, appropriate accommodation strategies.⁵⁰ Such a 'risk management' strategy, discreetly managed, it is to be hoped, may improve levels of inclusion for students with impairment. It is also interesting to note that the UK legislature has protected its tertiary institutions from claims by students who have not disclosed their disability by providing that there can be no discrimination on the basis of disability, in the higher education context, when the higher education institution 'did not know, and could not reasonably have been expected to know, that [a student] was disabled'.⁵¹ While no similar statutory protection is provided to Australian education institutions, the *Sluggett* case suggests that it will be difficult to prove not only discrimination but also a failure to make 'reasonable adjustment' for a student who has chosen not to disclose their disability. In other recent cases, courts and tribunals have made the explicit finding that there cannot be discrimination on the basis of an undisclosed disability. In the *DDA* case *Tate v Rafin*,⁵² for example, a case involving the expulsion of a person with a psychiatric disorder from his cricket club on account of behaviour related to the disorder, Wilcox J determined that, as the club was unaware of Tate's psychiatric condition, it could not have engaged in discriminatory behaviour because of it:

... there is no evidence that any member of the committee realised that Mr Tate had a psychological disability... Mr Tate does not claim to have disclosed to the club that he suffered any psychological disability. That being so, it seems impossible to say the club discriminated against Mr Tate **on the ground** of his psychological disability (emphasis in original).⁵³

IV THE CURRICULUM DEVELOPMENT, ACCREDITATION AND DELIVERY STANDARDS

The key obligation of the education provider in respect of student participation is to

take reasonable steps to ensure that the course or program is designed in such a way that the student is, or any student with a disability is, able to participate in the learning experiences (including the assessment and certification requirements) of the course or program, and any relevant supplementary course or program, on the same basis as a student without a disability, and without experiencing discrimination.⁵⁴

A checklist of suggested measures which may be implemented to achieve compliance with the participation standards are as follows:

- (a) the curriculum, teaching materials, and the assessment and certification requirements for the course or program are appropriate to the needs of the student and accessible to him or her; and
- (b) the course or program delivery modes and learning activities take account of intended educational outcomes and the learning capacities and needs of the student; and
- (c) the course or program study materials are made available in a format that is appropriate for the student and, where conversion of materials into alternative accessible formats is required, the student is not disadvantaged by the time taken for conversion; and
- (d) the teaching and delivery strategies for the course or program are adjusted to meet the learning needs of the student and address any disadvantage in the student's learning resulting from his or her disability, including through the provision of additional support, such as bridging or enabling courses, or the development of disability-specific skills; and
- (e) any activities that are not conducted in a classroom, such as field trips, industry site visits and work placements, or activities that are part of the broader course or educational program of which the course or program is a part, are designed to include the student; and
- (f) the assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed.⁵⁵

A Curriculum Cases

*Bishop v Sports Massage Training School*⁵⁶ provides, perhaps, the most straightforward case example of the kind of curriculum adjustment expected of an education provider. It involved, like most of the decided cases in this area, a dispute about the arrangements made for Bishop to complete assessment. Bishop who had a learning disorder, dyslexia, narrowly failed a written examination causing him 'a delay in his career and a significant loss of self-esteem'.⁵⁷ Bishop alleged indirect discrimination in that he was required to complete the examination 'in the same two-hour period as the other, able-bodied students'.⁵⁸ HREOC found that '[t]here [was] a real chance that had [the complainant] been given an extra half-hour, or had the examination been conducted orally in his case, he would have passed'.⁵⁹ The complainant was awarded \$3,000 damages to compensate him for losses including the cost of relocating to another massage school where his disability was properly accommodated.⁶⁰

Seven years after the Bishop case was decided, it would be difficult, perhaps, to find a tertiary teacher who is unaware of the need to modify examination arrangements to accommodate student disability so as to avoid liability under anti-discrimination laws. ‘Reasonable adjustment’ in this area may require that extra time is allowed for the completion of examinations and assignments, examination papers are provided in different fonts or even different formats or readers and writers are assigned to assist students to complete examinations.

While these kinds of administrative adjustments to facilitate participation in the curriculum are ‘reasonable’ it is clear there is no requirement that a tertiary institution take steps to pass a student who is failing simply because he or she has a disability. This remains the case even when the disability is clearly causally related to the failure. A distinction must be drawn between adjustments to the way a course is structured and delivered and adjustments to the standard of work or knowledge to be achieved in order to complete the course. It may be speculated that the former kind of adjustments will almost always be required, the latter kind almost never. The complainant in *Sluggett*, discussed above, for example, had also sought ‘adjustment’ to her disability in the sense of extensions and remarking of papers because of difficulties in attending university. These adjustments had been afforded her, though ultimately they were not enough to allow her to pass her course. In the words of the Full Federal Court: ‘The appellant complained to her lecturers that she was having difficulties. They made some accommodations for her in terms of receipt of late papers and such like, but these were insufficient to resolve her problems’.⁶¹ Tertiary educators can be reassured on this point by the fact that the *Education Standards* explicitly recognise a limit to the notion of ‘reasonable adjustment’ in respect of students who cannot meet legitimate course requirements:

In assessing whether an adjustment to the course of the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.

Note In providing for students with disabilities, a provider may continue to ensure the integrity of its courses or programs and assessment requirements and processes, so that those on whom it confers an award can present themselves as having the appropriate knowledge, experience and expertise implicit in the holding of that particular award.⁶²

Aside from the express terms of the *Standards*, a long list of decided cases, including *Brackenreg*,⁶³ *W*,⁶⁴ *Chung*⁶⁵ and *Reyes-Gonzalez*⁶⁶ demonstrates that tertiary institutions will not be required to continue to accommodate those students whose impairments mean that they do not have the capacity to ‘pass’ their course.⁶⁷ These cases give some guidance on the threshold point at which ‘reasonable’ adjustment becomes ‘unreasonable’.

The *Anti-Discrimination Act 1991* (Qld) (QADA) case, *Brackenreg v Queensland University of Technology* concerned a student excluded from the Bachelor of Laws degree course at Queensland University of Technology. The complainant enrolled as an external student in 1993 and was excluded in December 1997, as she was ‘in breach of both the double fail rule and the progression rule’.⁶⁸ She reapplied for admission in second semester 1999 but the University declined to readmit her to the course. Brackenreg had syringomyelia and cervical cancer, and, most significantly for her studies, Attention Deficient Hyperactivity Disorder (ADHD). Brackenreg’s case was that her academic difficulties had flowed from her then undiagnosed ADHD, that the ADHD had since been controlled by medication and that, as such, she should be allowed another opportunity to complete her course. She applied to the QADT for an interim order that the University readmit her pending the outcome of her complaint of discrimination.

President Copelin of QADT found that Brackenreg's 'difficulties with her studies' were not due to less favourable treatment and that Brackenreg was treated more favourably than other students: 'the complainant's disability was taken into account and certain adjustments were made'.⁶⁹ President Copelin found that Brackenreg's difficulties 'were attributable ... to her disabilities, to circumstances in her personal life, and studying as an external student'.⁷⁰ There were, perhaps, 'multiple causes' for the complainant's difficulties but none of them was any 'less favourable treatment' of her by QUT:

In this case the evaluation by the respondent of the complainant's academic performance before and at the time of her exclusion from QUT may have reflected a manifestation of the symptoms of the complainant's disabilities. However, even when consideration was given to the complainant by the respondent for her disabilities, such as giving her extra time to complete exams, extensions of times in handing in assignments, and by giving her conceded passes on numerous occasions after considering her circumstances, she still demonstrated an inability to satisfactorily complete a law degree to the standard required by the respondent.⁷¹

President Copelin made the clear finding that '[t]here is no obligation on the respondent to pass a student just because they have a disability'⁷² and held that the respondents had acted appropriately and to the extent required by law to accommodate the disability of the complainant.

In a similar case, *W v Flinders University of South Australia*,⁷³ brought under the *DDA*, the complainant was excluded after failing to meet the course requirements of her teaching degree. W had been diagnosed with a psychiatric disorder, the symptoms of which included 'depression, short term memory loss, poor concentration, withdrawn and racing thoughts, hypermania, confusion, forgetfulness, thought disorder, and anxiety'.⁷⁴ The symptoms were 'erratic and episodic' and affected her ability to study.⁷⁵ Further, she did not disclose her disability to the university before she experienced difficulties with the course. In one subject, for example, she sought an extension after the due date for an assignment had passed and did not provide medical evidence to support her extension application until one month after the due date. Commissioner McEvoy of HREOC held that when staff were alerted to her disability they acted appropriately to accommodate her disability – granting extensions, undoing late penalties and redesigning her assessment schedule.⁷⁶ A particular focus of W's complaint was that she was not permitted to undertake her teaching practicum on the part time basis she requested. The university negotiated for her to attend the practicum from Monday to Thursday for 10 weeks instead of Monday to Friday for 8 weeks. The complainant, however, sought an arrangement whereby she worked Monday, Tuesday, Thursday and Friday. Commissioner McEvoy accepted the respondent's submission that the practicum 'had to be performed on four consecutive days in order to maintain the academic integrity of the subject'.⁷⁷ Like the QADT in *Brackenreg*, Commissioner McEvoy emphasised that a university is 'not obliged to forgo the academic requirements of its course for people with disabilities'⁷⁸ and attributed W's difficulties not to her treatment by the university but to her disability:

... I am satisfied that the complainant's complaints cannot be sustained under the Act. Her circumstances clearly demonstrate many of the difficulties which persons with disabilities may face but I am satisfied that she was not discriminated against either directly or indirectly by the respondent on the basis of her disability ... None of those difficulties resulted from discrimination on the basis of her disability, although they may well have resulted from her disability itself.⁷⁹

The case of *Chung v University of Sydney*⁸⁰ again concerned a student with a disability excluded for failure to meet course requirements. Chung, who had been diagnosed with

depression, enrolled in a physiotherapy degree course and had completed sixty percent of course requirements at the time of his exclusion. Chung made a complaint of disability discrimination and race discrimination to the Human Rights and Equal Opportunities Commission (HREOC). HREOC dismissed his complaint as lacking in substance and Chung appealed the decision to the Federal Magistrates Court. Driver FM found that there was no evidence to support a claim of either disability or race discrimination. Indeed, responding to the demands of his disability, the university had allowed Chung the opportunity to repeat assessment items and whole subjects. Like President Copelin in *Brackenreg* and Commissioner McEvoy in *W*, Driver FM considered that the university took reasonable steps to accommodate Chung:

It is apparent that Mr Chung suffered difficulties in coping with his university studies almost from the outset. It is also apparent that the university made a substantial effort, in fact a very substantial effort, to attempt to assist him with his studies to enable him to complete his course successfully. Ultimately, after seven years the university felt that it was unable to continue with those efforts and took the decision to exclude Mr Chung.⁸¹

Driver FM went so far as to imply, perhaps, that the complainant's illness not only caused his failure at university, but also explained his difficulty in accepting the fact that no discrimination could be proved. He implied, too, that an order for summary dismissal was appropriate in the case as a 'means of protecting' Chung from the distress of further pursuing the claim of discrimination:

Mr Chung clearly suffers from a disability, be it an anxiety disability or a depression disability, that continues to this time. He has been unable to accept the appropriateness of the way that he has been dealt with by the university and that has led him to this point... In addition to the general principles that I have referred to in relation to the exercise of the discretion of summary dismissal it seems to me that there are cases where it is in the interests of justice that litigants be given some protection from themselves.

It seems to me that this is such a case.⁸²

The summary dismissal, however, did not 'protect' Chung from appealing, unsuccessfully, from Driver FM's decision to the Federal Court or, subsequently, from seeking leave to appeal, unsuccessfully, to the High Court. Spender J of the Federal Court also implied a link between Chung's depressive anxiety and his inability to accept that 'justice' had been done⁸³ and cautioned that '[b]road and bald accusations which fly in the face of the material are insufficient to establish discrimination on the ground of disability or on the ground of race'.⁸⁴ After urging an unrepresented Chung to address the issue of whether the lower courts had erred in law in their decisions, Gaudron and McHugh JJ ultimately refused leave to appeal to the High Court of Australia.⁸⁵

The case of *Reyes-Gonzalez v NSW TAFE Commission*⁸⁶ reprises themes evident in the cases discussed above — the complainant's failures are attributed not to any failure to accommodate his disability but to the disability itself. Multiple allegations of discriminatory treatment by the TAFE College attended by the complainant were dismissed by the NSW Administrative Decisions Tribunal on grounds ranging from a deficiency of evidence, to a failure to prove that he had been treated less favourably than others without his impairment would have been treated in the same circumstances, to a failure to prove that his treatment and not his impairment had caused him detriment. Reyes-Gonzalez had been diagnosed with schizophrenia which resulted in problems with meeting schedules and deadlines, problems interacting in groups, and, as a result, problems with completing his courses. The tribunal accepted that Reyes-Gonzalez had been provided an extensive variety of accommodations:

[T]he Respondent made a series of concessions in each semester to assist the Applicant overcome the difficulties he was experiencing in his application to the course. There are numerable instances of this assistance. It included reducing his work load through the number of subjects to be studied in a semester; provision of tutorial services; concession by some teachers to allow him to study alone and not in groups; modification to the exam timetable and examination times; and in 1997 the granting of passes in subjects...when the Applicant's marks in those subjects, technically did not qualify him for a pass.⁸⁷

The clear implication of the decision in this case is that the complainant's disability was fundamental to his failure at TAFE. Medical evidence which detailed the significant impact of his impairment on the complainant's ability to complete tertiary studies was persuasive:

His illness, as noted by me and others, would affect his capacity to study at TAFE, this would include working in groups. He may be sensitive or over sensitive to peer assessment, particularly if others are not aware of his disabilities and do not take those disabilities into account. It is likely he will have difficulties from time to time attending classes at 9am and equally he is likely to have problems remaining at school for a full day. Noises such as voices, televisions and radios may cause him to become anxious or paranoid and there are times when his anxiety symptoms may cause him to become anxious or paranoid and there are times when his anxiety symptoms may cause him distress if he feels trapped or confined in a building. I would equally expect him to have problems writing examinations, presenting in front of a class, doing group projects and being peer assessed.⁸⁸

As in the case of *Chung*, there was also some suggestion that his disability impacted not only the complainant's difficulties with completing course requirements but also on his dealings with TAFE in relation to his discrimination claims. One doctor, while accepting the respondent may have breached its duty to the complainant, implied paranoia in the complainant's dealings with TAFE about the discrimination allegations:

... my overall impression is that Mr Reyes-Gonzalez's history of poor educational attainment and conflict with educational institutions may well be largely as a result of his schizophrenic illness. His capacity to effectively study for and pass courses may well be severely affected by his illness. There is a paranoid tinge to his correspondence and interaction with educational institutions which may also be a reflection of his illness, however such situation does not exclude the scenario that there may have been a lack of appropriate accommodation made for him and his disability.⁸⁹

The influence of this evidence can be detected in the Tribunal's finding in relation to several allegations of discrimination that they illustrate 'the degree of sensitivity of the Applicant in his perception of circumstances which otherwise are neutral but which, as a consequence of his disability, he either misunderstands or unduly gives greater emphasis than would a person who did not have his disability'.⁹⁰

The recent *DDA* case, *Ferguson v Department of Further Education*,⁹¹ is especially interesting, perhaps, in that, unlike *Brackenreg, W, Chung* and *Reyes-Gonzalez*, it concerned a student with a sensory impairment, a variety of impairment which does not directly affect the intellectual or psychological processes involved in learning. Nevertheless, in *Ferguson*, Raphael FM found that '[t]he reason that Mr Ferguson did not complete the course within three and a half years was not because he did not have sufficient [support]...but because the course was simply too demanding for him'.⁹²

Ferguson concerned a TAFE student who was profoundly deaf and relied on the assistance of Auslan⁹³ interpreters to access course materials. The substance of his complaint was that TAFE

had limited his access to educational benefits in that he took seven years to complete a course which most students completed in two and a half years. The evidence was that during his studies the amount of Auslan assistance he received varied from semester to semester. He received a minimum of six hours a week, increasing at times to fifteen hours per week. The complainant alleged indirect discrimination arising from a requirement that he ‘undertake his learning’ with only ‘limited assistance from an Auslan interpreter’.⁹⁴ Raphael FM found, however, that no such condition was imposed in that the complainant had ‘received all the interpreting assistance which he could usefully handle’.⁹⁵ While the relevant disability is different, the decision in *Ferguson* is consistent with the decisions in *Brackenreg*,⁹⁶ *W*⁹⁷ and *Chung*⁹⁸ in that it was held that any detriment to the complainant was caused by the complainant’s disability and not by any failure to make reasonable adjustment.

The case of *Hinchliffe v University of Sydney*⁹⁹ demonstrates in a different context the willingness of courts and tribunals to attribute a failure to achieve to a student’s disability rather than to an education provider’s failure to make ‘reasonable adjustment’. In that case, a student with a visual impairment claimed that she had been the victim of discrimination in that the University of Sydney had failed to provide course materials to her in an accessible form. The case is interesting because, unlike other university cases, the complainant was not failing subjects. On the contrary, she achieved a distinction, two credits and four passes in her first semester of studies in Occupational Therapy at the University of Sydney and a high distinction, three distinctions, a credit and four passes in the second semester.¹⁰⁰ By her own admission her results would ‘probably not be perceived as being poor’.¹⁰¹ Her claim was, nevertheless, that her academic future had been compromised by what she presented as the University’s failure to provide her with course materials in an acceptable format which accommodated her disability. She was not successful, however, in proving her case of indirect discrimination, with Driver FM finding that the actions of University disability support staff were ‘sufficient and adequate’.¹⁰²

Upon enrolment, Hinchliffe had provided the university with very clear details as to the format in which she would require course materials to be made available to her. Specifically, it was her preference that material be provided in an enlarged font on light green paper. It is significant, however, that during the course of her studies Hinchliffe discovered that she preferred materials to be provided, where possible, in an audio format. While the court accepted Hinchliffe’s allegations that there were delays in the provision of materials, it attributed these delays, in large part, to the fact that the university was initially unaware of the changed preference and to the fact that it was more time consuming to produce audio than paper based materials.¹⁰³ The court also emphasised that there were other aspects to the support provided to Hinchliffe which had to be accounted for in any assessment of the reasonableness of the accommodation provided: access to a disability support officer, and to a disability services room containing computers, a photocopier, a scanner, a printer and a stock of green paper.¹⁰⁴

V CONCLUSION

The overarching obligation under the *Education Standards* is to make ‘reasonable adjustment’. While it is too early to make unequivocal pronouncements about the nature and scope of ‘reasonable adjustment’ in the tertiary sector, the decided cases suggest that ‘reasonable’ is the key word in this formula. Moreover, the decided cases give some insight into what will and what won’t be ‘reasonable’ in the contexts of student participation and curriculum development, accreditation and delivery. It is clear that adjustment to timetabling, to the format and delivery of course materials, and to the format and scheduling of assessment items will be necessary to

meet obligations under the standards. It is clear also that courts and tribunals are impressed by the provision of counselling and resource support to individual students, and more likely to find that adjustment made in a supportive setting are 'reasonable'.

Universities will not be required, however, to 'second guess' the adjustments required by individual students. They will be obliged only to respond to disabilities of which they have been made aware. Moreover, a level of pro-activity will be expected from each student in keeping his or her education provider up to date with information about the status of his or her disability, its impact on their work, and the adjustments required to mitigate that impact.

Tertiary education providers can be reassured that they will certainly not be required to guarantee a 'pass' to students. It appears they will not even have to guarantee a positive university experience to students with disabilities. Courts and tribunals hearing discrimination in education claims have been pragmatic in their emphasis on two important points: first, there are limits to what can be done to neutralise the impact of a student disability on the ability to participate in and succeed in education at the tertiary level; secondly, the tertiary institution has an obligation to its student body, to potential employers, and, indeed, to society at large to maintain and protect the academic integrity of all degrees and diplomas awarded.

Keywords: Disability Standards for Education; Tertiary Education Policy; Education Law; Discrimination Law.

ENDNOTES

1. *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1991* (Qld), *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1992* (NT), *Equal Opportunity Act 1995* (Vic), *Anti-Discrimination Act 1998* (Tas).
2. *Disability Discrimination Act 1992* (Cth) ('DDA') s 31(1)(b).
3. *DDA* s 34.
4. Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, *Education of students with disabilities* (2002) ('*Senate Report*').
5. *Ibid* Preface xix.
6. See *Senate Report*, above n 4, 114 [7.18].
7. *Ibid* [7.19].
8. Productivity Commission, Australian Government, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004) ('*PC Review*').
9. *Ibid* G1.
10. *Ibid* Chapter 14, generally.
11. *Ibid* 41,[4.1].
12. *Ibid* Finding 14.2.
13. *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth); *Disability Standards for Education 2005* (Cth).
14. Dickson, Elizabeth, 'Disability Standards for Education and the Obligation of Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 23.
15. *PC Review*, above n 8, B7.
16. *Ibid* Table B7, B13.
17. See *Ibid* Table B2, B8. These are the three years compared in the table.
18. *Ibid* B9.
19. *Ibid* Table B4, B10.
20. *Ibid* p B.11.

21. Ibid Table B5, B11.
22. Ibid B11.
23. Ibid Table B6, B11.
24. See Ibid Table B7, B13 for data from 2000.
25. Ibid B13.
26. Ibid Table B7, B13.
27. *Education Standards* Part 3.
28. *Education Standards* Part 4.
29. *Education Standards* Part 5.
30. *Education Standards* Part 6.
31. *Education Standards* Part 7.
32. *Education Standards* Part 8.
33. *Education Standards* Introduction.
34. *Education Standards* s 3.4 note.
35. *Education Standards* Part 3.
36. *Education Standards* s 10.2.
37. *Education Standards* s 10.3.
38. *Education Standards* s 10.4.
39. *Education Standards* s 5.2(1).
40. *Education Standards* s 5.3.
41. *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997) ('*Kinsela*').
42. Ibid [14].
43. *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997) [5].
44. Ibid [30].
45. Ibid.
46. Ibid [26].
47. *Sluggett v Flinders University of South Australia* [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000) ('*Sluggett*').
48. *Sluggett v Human Rights & Equal Opportunity Commission* [2002] FCA 987 (Unreported, Drummond J, 9 August 2002).
49. *Sluggett v Flinders University of South Australia* [2003] FCAFC 27 (Unreported, Spender, Dowsett, Selway JJ, 5 March 2003).
50. See, for example, the University of Queensland, *Do I have to disclose my disability at enrolment?* <<http://www.sss.uq.edu.au/index.html?page=22729&pid=1208>> at 27 November 2006. Queensland University of Technology encourages '[s]tudents with disabilities who may require support services ... to disclose their needs at the earliest opportunity': Queensland University of Technology, *Guide for students with a disability 2005* <http://www.equity.qut.edu.au/programs/forstudents/disability_services/disabgd_2005/part_1.jsp#applying> at 20 November 2006.
51. *DDA* (UK) s 28(4).
52. *Tate v Rafin* [2000] FCA 1582 (Unreported, Wilcox J, 8 November 2000).
53. Ibid [65]. See also *Lynch v Sacred Heart College and Others* (1995) EOC ¶92-724. It is likely that the view contra expressed by Wilson P of HREOC in *X v McHugh* (1994) 56 IR 248 would no longer be followed by an Australian court since the analysis of causation advanced by a majority of the High Court in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92. In the context of the *Purvis* case, the issue of knowledge of disability was explicitly discussed in the judgment of Emmett J of the Federal Court upon the original review of the decision of HREOC and *Tate v Rafin* was endorsed on the point. See *New South Wales (Department of Education) v Human Rights and Equal Opportunities Commission* (2001) 186 ALR 69, 77 [35].
54. *Education Standards* s 6.2(1).
55. *Education Standards* s 6.2(3).

56. *Bishop v Sports Massage Training School* [2000] HREOC No H99/55.
57. *Ibid* [1].
58. *Ibid*.
59. *Ibid*.
60. *Ibid*.
61. *Sluggett v Flinders University of South Australia* [2003] FCAFC 27 (Unreported, Spender, Dowsett, Selway JJ, 5 March 2003) [5].
62. *Disability Standards for Education 2005* (Cth) s 3.4(3).
63. *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999).
64. *W v Flinders University of South Australia* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998).
65. *Chung v University of Sydney* [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001).
66. *Reyes-Gonzalez v NSW TAFE Commission* [2003] NSWADT 22 (Unreported, Ireland J, Members Silva and Strickland, 3 February 2003).
67. See *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)].
68. *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.1.3(vii)].
69. *Ibid* [4.2.2.4].
70. *Ibid* [4.2.1.3].
71. *Ibid* [2.2.4(iv)].
72. *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4 iv].
73. *W* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998).
74. *Ibid* [4.1].
75. *Ibid*.
76. *Ibid* [6.4.3]. [7].
77. *Ibid* [4.7], [7].
78. *Ibid* [6.4.3].
79. *Ibid* [7].
80. *Chung* [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001).
81. *Ibid* [22].
82. *Ibid* [27].
83. *Chung v University of Sydney* [2002] FCA 186 (Unreported, Spender J, 21 November 2002) [28]-[29].
84. *Ibid* [46].
85. *Chung v University of Sydney* [2002] HCA S87/2002 (Unreported, Gaudron, McHugh JJ, 5 November 2002). It is clear from the text of each of the decisions in this case that Chung was disadvantaged by the fact that he did not have legal representation. See *Chung* [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001) [46]; *Chung v University of Sydney* [2002] FCA 186 (Unreported, Spender J, 21 November 2002) [1]-[5]. Mr Chung had indicated to the Federal Court that he did not want legal representation: *Chung v University of Sydney* [2002] FCA 186 (Unreported, Spender J, 21 November 2002) [4].
86. *Reyes-Gonzalez v NSW TAFE Commission* [2003] NSWADT 22 (Unreported, Ireland J, Members Silva and Strickland, 3 February 2003) (*'Reyes-Gonzalez'*). Reyes-Gonzalez also alleged, but failed to prove, instances of race discrimination.
87. *Ibid* [116].
88. *Ibid* [16].
89. *Ibid*.
90. *Ibid* [46]. See also [43] and [56].
91. *Ferguson v Department of Further Education* [2005] FMCA 954 (Unreported, Raphael FM, 21 July 2005) (*'Ferguson'*).
92. *Ferguson* [2005] FMCA 954 (Unreported, Raphael FM, 21 July 2005) [32].
93. Auslan is a signed language, the indigenous language of Australian's with profound hearing impairments.

94. Ibid [1].
95. Ibid [34].
96. *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999).
97. *W v Flinders University of South Australia* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998).
98. *Chung v University of Sydney* [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001).
99. *Hinchliffe v University of Sydney* [2004] FMCA 85 (Unreported, Driver FM, 17 August 2004).
100. Ibid [66].
101. Ibid [25].
102. Ibid [121].
103. Ibid [118]-[119].
104. Ibid [120]-[121].

