DARLENE MCLENNAN: Well, welcome, everybody. Thank you for joining us today. For those who don't know me, I'm Darlene McLennan, the Manager of the Australian Disability Clearing House on Education and Training, ADCET for short.

This webinar is being live captioned today by the wonderful Bradley Reporting. To activate the captions you can click on the CC button in the tool bar that is located either at the top or bottom of your screen. We also have captions available via a browser and we'll put that into the chat box now. We will keep putting that in for the next five minutes for people who turn up late.

I want to start by acknowledging that ADCET is hosted on Lutruwita, Tasmania Aboriginal land. And in the spirit of reconciliation, ADCET respectfully acknowledges the Lutruwita nation and also recognises the Aboriginal history and culture of the land and we pay our respects to Elders past, and present and to the many Aboriginal people that did not make Elder status.

I also want to acknowledge all countries participating in the meeting and acknowledge the elders and ancestors and their legacies to us, and any Aboriginal and Torres Strait Islander people participating in the webinar. Just as a way of connecting and being part of the webinar, we invite you now in the chat to acknowledge what lands you are on today. And thank you for doing that.

Today's webinar, Disability Discrimination in the Tertiary Sector, the DDA, DSE. This is being presented by the wonderful Dr Elizabeth Dickson, who is a senior lecturer in the Queensland University of Technology. It's fabulous to have Elizabeth with us. We've been working with her for a number of months to get her on board for this webinar. It's one of the things we get asked the most and it's been something we have been working to have happen for a number of years. It's fabulous Elizabeth has committed the time and dedication to putting together this presentation.

A number of people asked questions prior to the webinar, and Elizabeth will try to wrap that into her presentation. And at the end of the session we'll also enable people to ask questions. If you have any burning questions, let us know.

Before I hand over to Elizabeth, we just have a couple of housekeeping details. For those who haven't joined us before, just to let you know the webinar is being recorded and will be on ADCET in the coming days. And also, as I said at the beginning, we are live captioning this event and the wonderful Jason from Bradley Reporting is doing that for us.

If you are experiencing any technical difficulties throughout the presentation, you can email us at admin@adcet.edu.au. We will also be Tweeting. If you want to share your experiences on Twitter, the # will probably be -- it will include the ADCET #. You can join us there on that. Elizabeth will talk for 45-50 minutes and then we will have 10 minutes to ask questions.

If you would like to ask a question, please put that into the Q&A box. Not the chat box. The chat box we leave for you to have conversations with each other and with us. Feel free to make any comments or have a general chitchat in the chat box. If you have any questions, put that in the Q&A box. We have enabled upvoting. You can vote for your favourite question, which will put that to the top of the stream for me to find easily. That's it for housekeeping. That's it for the intro. Now I will hand over to you Elizabeth. Thank you again for joining us. It's fabulous to have you on board. Looking forward to the presentation.

ELIZABETH DICKSON: Thank you, Darlene. I will be covering quite a bit of territory today. Forgive me if I go very quickly. I'm trying to get through as much as I can in the time available. The slides I have put together are mostly for my benefit so that I have prompts to speak to. Feel free to ignore the slides and just to listen to what I'm saying if that works for you.

The first thing I will be doing is giving a brief refresher on the DDA. I will be looking to a couple of limitations on the protection under the DDA that have become apparent in a recent case. I will also give a brief refresher on the DSE. I expect most of you listening will have a very good understanding of the legislative framework already so I will go quite quickly when I look at that stuff.

Then I want to focus on four issues that are apparent in the tertiary sector particularly. I don't purport to have all of the answers in respect of these issues. But I'd like to have a go at explaining how the law might work in the context of these issues.

The first one is disclosure, then I want to look at inherent requirements, then at interrupted course progression, then at disability related challenging behaviour. I'm very happy to answer your questions at the end or afterwards. My email address was on the very first slide. But your questions are appreciated if they are something to do with the law. I need to say at the outset that I am not an expert in the range of adjustments that are available for people with disabilities. That's beyond my expertise. But I do know a bit about the law. So happy to answer those kinds of questions.

So, disability discrimination then. We know that there's not just federal legislation in this area; there's state legislation as well. There are two tiers of legislation. Both of those tiers of legislation, at federal and state level, prohibit discrimination by educational authorities, educational institutes against students with disability. So from my point of view here in Queensland, we're regulated by both the DDA and the Anti-Discrimination Act which is a generic discrimination Act and it prohibits discrimination on a range of protected attributes, including disability or, as the legislation here says, impairment. So students may choose, if they are aggrieved, to bring an action against a tertiary institution under either federal or state legislation. And the education institution that's being sued doesn't really have any say in the venue of that claim.

If a complaint is accepted, though, it will be handled much the same at the state level and at the federal level. There will be a conciliation at first instance to try to settle the issues as between the parties. If the conciliation fails, then there may be an opportunity for a hearing, for a trial, in inverted commas, in respect of the issues. At the federal level, that trial will be before a court, either the Federal Circuit and Family Court of Australia or the Federal Court of Australia. If it's brought under state legislation it will likely be before a Tribunal, one of the super-Tribunals like VCAT or QCAT in Queensland.

But my focus today is on the DDA. And you can pretty much take confidence from this. If you are compliant with the DDA, it's highly likely that you would also be compliant with the state legislation, such is the degree of consistency between the two levels of legislation.

Righto. Discrimination now. There are two varieties of discrimination, direct and indirect. Legislation, Anti-Discrimination legislation, will also prohibit other kinds of behaviours, such as harassment and victimisation, but I won't be looking at them specifically today.

Direct discrimination is quite easy to understand. It sort of appeals to that inherent notion of fairness that we all have within us. We don't like seeing people treated differently and unfairly.

Direct discrimination is different treatment, less favourable different treatment. Now, whether treatment is less favourable is determined by comparing the treatment of the person with the disability with the treatment of a person without the disability in circumstances which are not materially different.

Now, those of you familiar with the famous Purvis case will know the High Court has sort of mashed this up a bit and I will be making a few references to Purvis later in the presentation.

There is an express limit on direct discrimination as well and that is unjustifiable hardship. If an educational institution can show that to avoid the discrimination would subject them to unjustifiable hardship, then that exemption will render the discrimination lawful. Unjustifiable hardship has been very controversial over the years but its present significance has probably been superseded by a focus now on reasonableness, as we will see, on the reasonableness of the treatment. The classic example of less favourable treatment is excluding someone because they have a disability or refusing to enrol someone because they have a disability. One of the early cases in this area was the Scarlett Finney case. Some of you might remember that, where a child was refused enrolment at an independent school in NSW because she used a wheelchair. The school said that to enrol her would have imposed unjustifiable hardship because they would have had to modify their campus, which was a hilly campus. The Court found that Scarlett had been directly discriminated against and the school had catastrophised the impact upon them of enrolling her. The court didn’t accept the arguments that they made about the extent of the adjustments that they’d have to make to their campus. So unjustifiable hardship wasn't proved.

Now, indirect discrimination, the other variety of discrimination, is a little bit more difficult to understand because it arises, potentially, when everyone is treated in the same manner. Everyone is treated the same, whether they have a disability or they don't have a disability. From that treatment, it's possible to extrapolate a condition. So a condition is placed upon the inclusion of the person with a disability. This condition is usually inferred from the facts. The DDA then asks us to look at whether the person with a disability can comply with that condition. And then the issue is whether the condition is likely to have the effect of disadvantaging persons with disability. And, finally, the condition must be not reasonable.

So, reasonableness is an express limit on indirect discrimination. If treating everyone in the same way is reasonable, then there will not be an unlawful discrimination.

So, the classic examples of indirect discrimination often arise in the context of steps where a building or a venue is accessible only by steps. My own university was involved in such a case. That arose out of the protocols for graduations at QUT. So at QUT, back in the time of Mr Kinsella, who brought this claim, everyone had to climb a set of steps to go on to the stage to receive their degree, their certificate, and then they would climb back down the steps to sit back in the body of the hall with the rest of their graduating class. Mr Kinsella couldn't do that because he used a wheelchair. The university said, “that's okay, you can wait out in the wings and you can just roll across on to the stage and then just roll back into the wings when you’ve got your certificate”. He wasn't happy with that solution. He brought a claim and the Tribunal agreed with Mr Kinsella that graduation was about much more than just receiving a bit of paper, it was about participating with your graduating class in the ceremony itself, and the solution that QUT postulated would have excluded Mr Kinsella from that participation.

Now, QUT then came up with a universal design solution where everybody sat on the stage and -- good. Cost neutral solution. Everyone sits on the stage, including the students, and there is no need for the climbing of steps.

Now, since 2009, it's also been possible to prove discrimination in the DDA if there has been a failure to make reasonable adjustment which has manifested then as less favourable treatment or as the imposition of an unreasonable condition.

So I've got the relevant sections of legislation extracted there for you to look at later. But even before these amendments, in a practical sense it was often necessary to make reasonable adjustment in order to avoid discrimination. Before the DSA came into effect, before these amendments to the DDA, ramp access was provided for people with mobility impairment, we were providing assistive technology, we were giving extensions on assignments, and so on, because the reality was that even before this imposition of the obligation to make reasonable adjustments, a failure to do so might have actually resulted in discriminatory treatment.

There was a decision a bit over five years ago called Sklavos that involved a doctor seeking admission to the College of Dermatologists. Dr Sklavos had an exam phobia and he was unable to sit the written exams that had been set by the college for those seeking admission to the college. He wanted the college to make what he advanced as the reasonable adjustment of developing an assessment regime particular to him and to his disability which would have involved more a ... style assessment, on the job assessment as well. The Court found -- and this case was appealed and the Appeal Court agreed that there had been no direct or indirect discrimination and there hadn't been a failure to make reasonable adjustments either. But in reaching their decision they managed to say a couple of things which actually messed up the utility of the obligation to make reasonable adjustments in the DDA itself because they looked at the way it was inserted into the Act. They focused on particular words and they said in respect of direct discrimination, this phrase that I have highlighted on the screen, because of the disability, the effect that the aggrieved person is, because of the person's disability, treated less favourably means that the failure to make reasonable adjustment has to be because of the disability.

So in this case they would have had to prove that the college's failure to make reasonable adjustment for Sklavos was because he had a disability. Now, of course, that isn't the reason. It was almost never, I would suggest, be the reason that an institution failed to make reasonable adjustment. The reason they failed to do it was because it was going to be expensive, it was going to be time consuming, onerous for the people involved, and there was no guarantee that even had they developed this personalised assessment regime that Dr Sklavos wouldn't have been able to complete it.

Now, there was a similar messing around with indirect discrimination because in respect of indirect discrimination they found that if a condition was found to be reasonable for the purpose of the original version of indirect discrimination, then there would be no need to look at whether a reasonable adjustment should be made, which essentially then cut out consideration of reasonable adjustment for the purpose of indirect discrimination. But as I've noted above, we already had situations before the obligation to make reasonable adjustment where cases had found that a failure to do certain things to accommodate disability did, in fact, result in indirect discrimination. And so this ramification of the decision in Sklavos is probably less catastrophic for indirect discrimination because there is still the opportunity to look at reasonableness in the context of indirect discrimination itself.

I hope that makes sense to you. It's very complicated to explain the reasoning of the Court here. But think about it this way: you have to be able to climb steps to access the building. That’s a condition that’s imposed. If the institution installs a ramp, the condition is removed and there is no discrimination that can be alleged. If, however, the institution doesn't install a ramp, the condition remains and there's the potential to bring a case of indirect discrimination and then the Court will look at whether it's reasonable that the ramp hasn't been installed. If it's not reasonable, then there will be a finding of discrimination.

Let's move on to the standards now because, of course, the standards can make up, to some extent, for some of the shortcomings of the DDA because they impose proactive obligations on institutions to do things. They don't have to wait to be sued to respond. They have these obligations to be proactive under the standards. The standards are passed under the authority of the DDA. Theoretically, compliance with the standards results in compliance with the DDA, which suggests theoretical possibility or protection against getting sued. But the reality is that breach of the standards can also be pleaded by students bringing actions against education institutions. And there was some suggestion in Sklavos, even though the DSE do not create specific remedies, that a court may be able to order remedies under the DSE themselves. So watch this space.

So they cover these key aspects of the delivery of education services. I'm sure you're familiar with that. For each aspect of the standards they set out student rights. We're not big on articulating express rights in Australian law. This is quite significant that rights are spelt out in the DSE. And education providers are obliged then to take reasonable steps to ensure those rights are enjoyed on the same basis as other students. They also include the standards measures of compliance. But the overarching obligation under the standards is to make reasonable adjustments. And I've got an extract from the standards here which makes it plain that sometimes treating all students the same way will not mean that they are treated on the same basis as other students. They're not enjoying their rights on the same basis as other students. So reasonable adjustment may be necessary for students with disability.

Now, one of the early cases on the DSA was a school case called Walker. It set out the process that needs to be followed. This process is essentially set out too in the DSE, but Walker brings it together in a snapshot sense. The first obligation is to consult. You need to talk to the student with disability. At the university level it will usually be the student with the disability that you're talking to because they will usually be aged 18 or over and will, therefore, have legal capacity.

Secondly, the university, the tertiary institution, the TAFE, must consider what reasonable adjustments to normal practices – sorry, forgive the language that the courts use -- what should be made to assist the student. Then they have to decide whether that adjustment is necessary, and if it is necessary, then they must implement it.

So consultation, what adjustments are available, is the particular adjustment necessary, then implement it.

Now, consultation isn't defined. So this has been a sore point ever since the standards came into effect. The government has been alerted to the fact that that's problematic several times but no real action has been taken to address the fact that there's no definition. Walker has a crack at it. It says that no particular form or timing for consultation is mandated. Consultation may be formal or informal. It can be instigated either by the institution or by the student. It may occur face to face or via phone conversations or even in exchanges of correspondence.

But we can take away from that at the tertiary level that most of the consultation, the formal consultation anyway, will be conducted on behalf of the institution by Disability Services staff. Usually in the context of the development of an access plan. And I know these plans have different names at different universities.

Now, the expectation of the standards is that consultation will occur upon enrolment. And I know that at the tertiary level, it can be actually very helpful if consultation begins before the formal enrolment begins because there can be a lot of work required to implement adjustments for some students. So, there needs to be consultation upon enrolment. The earlier the better, to allow for planning.

Now, consultation must also continue for the duration of the enrolment to consider any new information that might arise about the disability or about new adjustments that are out there.

Assess whether adjustments are working, to consider whether different adjustments might be tried or might be needed. So it's important to schedule then regular consultation, but also to be available should the student initiate a consultation as well. It's important too to keep cool, to keep good notes, and to keep those notes on file. And I think all tertiary education institutions now have systems in place to affect something like I've described.

Where perhaps there is still some deficiency at the tertiary level is in respect of consultation with academic staff. Now, stuff that is disclosed to academic staff may well be treated by a court as having been disclosed to the tertiary institution itself. But in my experience, there isn't a great deal of opportunity for discussion between academic staff and disability advisers. Now, that's obviously a time constraint but it's perhaps a system constraint as well. And I wonder if that is an area, looking to the future, where we need to do better as tertiary institutions, keeping academic staff in the loop, to provide feedback to disability advisers, and for the disability advisers to be assisting academic staff as well. A lot of our focus is on assessment in access plans, when increasingly and particularly with the impact of the NDIS, facilitating higher levels of enrolment for students with more complex disabilities now, there is increased need for assistance in the classroom, I think, for academic staff. I don't know that that assistance is always forthcoming and that may be problematic.

Okay, who decides what is reasonable? The education institution does. But if you decide something that the student doesn't like, then you need to be prepared for the consequences, I guess, which may involve litigation. Hopefully not. But it's up to the institution to decide. There are limits on when an adjustment will be required. By implication, it's not required if it's not reasonable, it's not required if it would cause unjustifiable hardship, it would be inconsistent with an act authorised by law -- more about that later -- if it would jeopardise the health of a student with disabilities or the health of other students -- more are about that later as well.

Now, reasonableness is fairly broad inquiry, a discretionary inquiry which will require a balancing of often competing considerations. What is the nature of the disability? What are the views of the student with disability? What is the effect on the student with the disability? The effect on the student of the adjustments being sought. What is the effect on others in the educational environment, teaching staff, other students, for example, and what are the costs and benefits? Those costs and benefits aren't limited to costs and benefits for the student with a disability themselves. There may be costs and benefits for other people in the school community as well.

And then there is a second layer, that even if you decide after that balancing act that an adjustment is reasonable, there's a second crack at it if you can prove it would impose unjustifiable hardship. A second crack at avoiding the obligation to make it. But similar things -- I have got them listed there – are addressed as part of the balancing act for unjustifiable hardship. In reality, it will turn on reasonableness. I haven't come across a case in recent times where unjustifiable hardship has been in issue. It’s all been dealt with at the level of reasonableness because the same matters are taken into account.

On to now the four issues that I'd like to talk about in a little more detail. The first one is disclosure. Some students are, for pretty clear reasons, reluctant to disclose disability to an institution. I know my institution, QUT, has done a lot to broaden the language being used to invite people to disclose disability. So, “illness”, “injury” are words that might be used as well. But the reality is that there is still a perception, for some people with disability, and perhaps they're legitimate, with some legitimacy, that stigma may attach to a disability, particularly to psychiatric disability, and there may as such be a reluctance to disclose.

That's going to be problematic if the university hasn't been alerted, there has been no enrolment consultation, no access plan developed and the disability then does interfere with the student's learning. And at that point, a delayed disclosure is made. So everything we could do to encourage disclosure should be done because it's problematic if it's not disclosed down the track, potentially.

Early case law, in the early years of the DDA, suggested that an institution be held liable for discrimination against a person with a disability on the ground of that disability even if the disability hadn't been disclosed. And X and McHugh is a case in point. In that case, a graduate accountant was employed by the government, and that graduate accountant had not disclosed that he had been diagnosed with schizophrenia. The schizophrenia manifested for him as difficulty communicating effectively with co-workers and with clients of the government department.

And when his probation period expired, the government department decided to terminate his employment.

Now, it was held in that case because they had terminated his employment on the basis of a manifestation of his disabilities, communication issues, that that was disability discrimination and the department was held liable. That was an amazingly controversial case at the time for reasons you can realise.

Now, it's not likely that there would ever be a decision like that again. And if a student were going to allege discrimination on the basis of an undisclosed disability, there would be some immediate hurdles to their proving their case. And the first one is that in the Purvis case it was found that the true basis of the discriminatory treatment must be the disability. There needed to be a causal link between the disability and the behaviour. But Purvis also found that the behaviour could be treated separately from the disability that caused it for that purpose, that causation purpose.

So in the Purvis case, for example, it was found that the boy who had exhibited low levels of disability-related violence, could be excluded because the true basis of his treatment wasn't his disability, it was the safety concerns that the principal held for the rest of the school community that motivated the principal's treatment of the boy in the case.

If disability is disclosed to any staff member -- I said this earlier -- of the education institution, rather than through a formal disclosure process, that might amount to constructive knowledge by the institution, and if appropriate adjustment isn't made by the institution, then the institution is vulnerable to a complaint of discrimination. I'm thinking of one case, it involved a sports massage school which shows you how broadly based the coverage of the legislation is. In that case, the complainant had told his lecturer that he had a disability but the lecturer hadn't passed that information up the chain. And because of that failure, there was no adjustment made to his assessment regime. If the university had known, it would have given him longer time to do the assessment. He would have passed the assessment and he would not have been excluded.

Now, I wonder whether big education institutions like universities, like TAFEs are set up to account for this aspect of disclosure, to collect this kind of information to ensure that appropriate action is taken by the institution. Part of the problem here is that I don't think there is sufficient training for academics in respect of how to respond to disability. There have been many attempts made to improve that training but I know at my open institution the pushback has been, “well, there is already so much mandatory training, how much more can we expect our staff to do?” And I think that, to answer my own question, there is a legislative expectation of adjustment by institutions that may need to occur outside the disability adviser, disability access plan framework. So I think that's work that needs to be done in the future on improving that process.

Adjustments must be made in a reasonable time. That's another problem that can flow from delayed disclosure, failure to disclose, because the DSE makes it plain that the reasonableness of the time taken to respond will be influenced by whether the institution has been provided in a timely way relevant information about the disability.

And there are a couple of cases out there -- they are old cases, they predate the DSE -- but essentially in both of these cases, it was found that the reasonableness of the university's response was affected by failures on behalf of the students to make timely disclosure to the institution.

So Sluggett didn't regard herself as having a disability at all. Didn't disclose her mobility problems, and then there were problems in accessing the campus and she brought a claim which was unsuccessful. In Hinchliffe, her preferences for adjustments changed over time but she didn't inform the university in a timely fashion, and so the university's response was held to be reasonable in those circumstances.

Let's move on now quickly -- I'm hooning through this, I know -- to inherent requirements statements. I won't read through the slide. I will summarise it briefly. The legislation, the DSE, allows education institutions to preserve the academic integrity of their courses.

Now, it was acknowledged even before the DSE that universities did not need to adjust the level of difficulty of their courses for students with disability who were having difficulty passing those courses. There is one here that’s from my own law school, Brackenreg. It was held that we didn't have to reduce the level of difficulty of assessment items just so Ms Brackenreg could pass the law units.

A more recent example is Andreopoulos, a 2020 case. You can read the extract from that decision on the slide at your leisure. But it says similar things, that you don't have to erode the integrity of the course to appoint a lower point so that the person with the disability can pass.

Now, some universities have gone down the path of developing inherent requirements statements to work in conjunction with this idea of academic integrity. My university hasn't done it, except for a couple of instances of courses involving practicums. It could be said that it's useful to articulate inherent requirements if only to compel academics to unpack what is actually inherent to the course they are delivering. But inherent requirements statements can be a double-edged sword. You might think it might assist enrolment because you can look at what the inherent requirements are, you can then consider whether adjustments can be made to meet those requirements as part of the consultation process, but there is also some anecdotal evidence that they might be used as shields to stop enrolments, to say, “Look, these are the inherent requirements, we're looking at you. We're making a global assessment of your disability and we don't think you can do it.”

Now, you can't use inherent requirements statements in that way legitimately. You can't use them to refuse all adjustments, just those that would compromise the inherent requirements of the course. You don't have to make the assessment easier to pass but you may still have to provide extra time, a separate venue, access to assistive technology and so on. So you still need to go through the process of considering reasonable adjustment. Just because an adjustment is unreasonable in a legal sense doesn't mean you can still choose to make it. I'm aware anecdotally too of some institutions that have gone above and beyond and have made what may have objectively been unreasonable adjustments for some students, the provision of full-time one-on-one support staff, for example. I don't want to get into that debate now. I'm happy to down the track. But you should take care that if you're providing that kind of adjustment for one student, that there may be an expectation that you would be providing that level of adjustment for other students with a similar level of disability as well, and that may then take you down a path of -- it becomes a financial impost to do so.

Identifying the inherent requirements is not a simple process and you should be prepared to be challenged if you do articulate them. I remember we were looking at course learning outcomes in the law school about 10 years ago. There was some discussion about whether we could talk about effective oral communication as a course outcome for a law degree. We decided, no, we would stick with effective communication, because we weren't convinced that we would never enrol a student who could not speak.

We have enrolled plenty of students who can't hear, plenty of students who can't see. We may well enrol a student who can't speak and be able to adjust our processes to allow that student to meet the inherent requirements of the degree. It's also tempting, but problematic, to conflate the inherent requirements of a job that a particular course is related to, to the university or TAFE course itself. This point was addressed in a case called BKY v The University of Newcastle where a student was studying medicine. Part of the pushback against allowing her extra time to complete the degree because of her disability was that, well, you know, this is going to affect her capacity to practise; her degree will be out of date, and so on. We have to remember that we are education institutions. There are different conversations to be had by employers but employers have to make reasonable adjustment too. I'm wagging my finger now, sorry.

One problematic thing about inherent requirements is that some universities talk about resilience or behavioural stability as an inherent requirement. Now, that raises alarm bells a bit for me because I think that's been used as a proxy for mental health, in inverted commas. I would suggest that we routinely, as education institutions, do make accommodations -- adjustments to accommodate a lack of resilience. We make adjustments for students with mental health to allow them to continue their enrolment and to finish their degrees. So is it then legitimate to say that that is an inherent requirement, if we can adjust to mitigate that effect?

Another issue -- probably don't have time to talk about it today -- is are we actually entrenching a lack of resilience by adjusting for it? Would we be better institutions if we were assisting students to work on improving their resilience?

Interrupted course progression. I know I'm running close to time now so I will speed it up. This is a big problem and it’s a big problem in the degree that I teach in too. Students may withdraw, reenrol, withdraw, fail, have that failure undone, reenrol, and it gets to a point where you have to wonder whether those adjustments of allowing continued withdrawal and reenrolment are actually reasonable adjustments, in that there is, potentially, a negative impact on the student with the disability.

I know I have had it said to me, in respect of a student with chronic severe mental health problems who I was teaching, "Look, we just have to do everything that we can to support the student's enrolment, because it's the only kind of routine or opportunity for success that he currently feels he has in his life".

Now, that is an important consideration. But equally, there are negative considerations, perhaps, around creating a sense of excitement of enrolling and then disappointment of withdrawal. Not to mention the financial ramifications that attach to withdrawing and reenrolling as well. You can see that resilience is particularly -- this is maybe where this resilience language is coming from, this behavioural stability language is coming from in inherent requirements statements.

Can university courses enforce completion time limits?

That's tricky. The BKY case suggested perhaps not if students without disability have been given extra time. So if you have been prepared to waive completion timeframes for students without disability, be prepared to have to extend them for students with disability as well. In BKY arguments were raised around currency, about poor performance during the degree, about safety. But the bottom line was the court was prepared to find in that case that disability was the reason that she was refused the extra time and she won her case.

Challenging behaviour -- now, this is certainly an issue. It's been an issue, an early issue for the DDA, a longstanding issue. Most of the cases that end up in court these days under the DDA are cases that involve challenging behaviour. Purvis is the seminal case in this area. The complainant lost his action in the Purvis case because of the way the court, the High Court of Australia, highest court in the land, construed direct discrimination, and at the same time as the Purvis case was run, there was a similar case being run as an indirect discrimination case. It was held in that case that it was reasonable, for the purposes of indirect discrimination, to impose a reasonably adjusted behaviour code on a student with disability-related challenging behaviour. And so a student who couldn't comply with that adjusted behaviour code could be lawfully excluded.

Now, the DSE means that we have to consider -- means we have to consider whether adjustments can be made to support the enrolment of students with challenging behaviour. It may, in some circumstances -- and this is made easier in these post-COVID days of our superior online learning offerings -- it may be appropriate in some circumstances to require a student, a student whose behaviour poses a threat, for example, to students or staff, it may be reasonable to require them not to enter the campus.

Now, we can facilitate this with online learning. There will be students -- students with disability that restraining orders have been taken out against by staff members at universities. I'm thinking of one case, called the Firestone case. In that case, it was held that it was reasonable that the student's access to the physical campus be blocked because of his threatening and abusive behaviour. Some quotes on that slide as well you might like to look at later.

The Zhang case, which was a case brought against UTAS, and some of you listening might be familiar with this case, it was an interesting case for a number of reasons but the takeaway message I want you to have today about this case is when you are managing the enrolment of a student with a disability, you have extra obligations under the DSE, but you must not forget that they are still students of the university. So the protocols that are in place for managing breaches of behaviour codes that apply to students without disability must also be applied to students with disability. And one of the judges when this case went on appeal to the Full Federal Court, would have found in favour of Zhang in that she had demonstrated to his satisfaction that the university had breached its own protocols in respect of managing the breaches alleged against her of its behaviour codes. That judge was in the minority, two other judges found that there had been no discrimination, but it's nevertheless an interesting case.

So I think that's it now. Sorry for that. It's a whirlwind tour of the issues. I have got a couple of articles, a book chapter here and an article that you might find useful follow-up reading where I talk about some of these issues in a lot more detail. Both of them you should be able to access through my e-prints page at QUT. If you go to e-prints@qut.edu.au, search for me, you should bring up versions of these two things you can read.

Thank you very much. A lot of cans of worms, I know. I hope I haven't stood on too many toes.

DARLENE: That’s been absolutely fabulous. And the amount of questions that we have, we’ve never actually generated this many questions. With the time we have, we will probably only get to one. We do apologise to people. We will work with Elizabeth on answering them in some away. When you receive the link, we might have that there or we will send out another link when we get the questions answered because there are some really insightful questions.

People have upvoted. And, yeah, the one that has the 8 votes so far is could you define what tests of reasonableness the Court will use to determine what is and is not reasonable adjustments? So this was kind of about a request that we get quite often for universities and TAFEs to have recordings, lectures recorded, and some academics refuse to have that happen. And if somebody who has ADHD or other specific learning disabilities require to be able to hear something over and over again to take in, is that a reasonable request? And how would a court -- or is it hard to provide that answer?

ELIZABETH: Look, I'm going to give you the lawyer-type answer to start with, which is that every case turns on its facts. And the way the balancing of these competing relevant circumstances is handled will determine on the facts of the particular case. But I can say that at some universities, like my university, every lecture is recorded. Now, if University A can provide recordings of every lecture, why can't University B? And if I were trying to bring that case to court, that would be an argument that I would be running. If it's reasonable that University A, a big CBD-based, you know, 35,000 student university -- would it be reasonable for another university as well?

I know that there are some academics that will push back against that. But I guess it's about creating a culture at the university that this is just what happens. This is just what we do.

DARLENE: Brilliant answer. That's why you're a good lawyer. You are not a lawyer.

ELIZABETH: Well, I'm not a lawyer. I'm an academic. But, yeah, the other thing is that there are adjustments that may be able to be made to mitigate against the impact of the absence of a recording. I know that they are usually -- I would think much more expensive. For example, I had a student once who was hearing impaired. Even though the lecture was recorded and a transcript was then ultimately generated using speech to text software, the university also provided signing for the student. I have only had that happen once. She got the trifecta of a recording, a transcript and signing. That was a smaller more interactive class. And even though she didn't take advantage of the availability of the person signing to do this, I inferred that the reason for the signing was in case she wanted to ask questions. So if she had someone there available to translate, essentially, for me. But, yeah.

DARLENE: All right. Thank you. I think you have answered that well. It's great. I wanted to grab one more question. As I said, there are so many. This one talks about the need for more knowledge and understanding of the standards and also education across the whole sector, I think, disability practitioners as well as academics. One of the questions I wanted your last thought, what are your thoughts on the current utility of the standards? Do you believe they are still fit for purpose and, if so, how do you believe that the standards could better serve students with disability?

ELIZABETH: Look, I think those of us who have been working in universities for a long time, I think we can still point to situations where universities could do better. There are still some failings. Universities, if you look behind the institution, there are people, people are human, there may be the odd failing. But I think objectively it's undeniable that the service delivery that people with disabilities now is better than it has ever been before. And that is largely on account of the excellent disability adviser staff that the universities have. I was privileged to work for many years as Chair of our Disability Services working party with the DAs at QUT. Hello to any of you who might be listening. I learnt so much from them. I know they liked being able to talk to me about legal issues but I learnt so much from them. So, there are good people being hired to do good things but there may still be some failings.

How could the DSE be improved? I would like to see, but I don't think it will ever happen, some kind of external monitoring of compliance, which would take away a lot of the pressure on students, who in reality are still the ones that have to go to court to force noncompliant institutions kicking and screaming to change. If there were some external monitoring body, that would help that, but that would be expensive and I don't think there is any government will to deliver something like that at present.

DARLENE: That's brilliant. We are out of time. Thank you so much, Elizabeth. This has been one of the most engaging webinars we have had, the questions from everybody and the chat has blown my mind. It's been absolutely fabulous. Thank you to everybody who has participated.

ELIZABETH: I'm happy to do it again if you want to, you know, have a more elaborate interactive look at particular issues. I’m very happy. All you people listening make my job easier.

DARLENE: That’s great. We do send out a survey to people, which has just gone into the chat, or will go out into the email. If people have suggestions on what they would like Elizabeth to cover in the future, that would be great. We would love to keep this relationship going. Your wisdom and experience has been absolutely wonderful. We have also put into the chat a link to our next one, which will be with Headspace and the program they're offering to universities at the moment around mental health conditions. So please join us for that one. I will close now. But as I said, we could keep this being forever. I really appreciate it, Elizabeth. It's been great to hear your knowledge and expertise. Thank you, everybody, for joining us. Have a great day.

ELIZABETH: Thanks for inviting me.

DARLENE: Take care, everybody, bye.