

Disability Standards for Education 2005 (Cth)

Ramifications for the tertiary education
sector

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Pathways 2012



This presentation

- Disability Standards for Education: brief overview
- Consultation and decision making
- Unreported disability
- Management of students with disability related problem behaviour
- Inherent requirements, academic integrity and legal remedies for students 'misled' about their ability to complete a course
- Illustrative cases
- Apologies for the number of slides! Many FYI only

Standards authorised by *DDA*

- Enacted under the authority of *Disability Discrimination Act 1992 (Cth) (DDA) s 31.*
- Binding upon education providers in all Australian states and territories: *DDA s 14; s 32.*
- Education providers include educational authorities and educational institutions: pre-school to post-compulsory, public, private and not-for-profit. Standards 1.5, 2.1
- Compliance with the Standards amounts to compliance with the *DDA: s 34*
- Apply as a defence to a claim brought under State Legislation (*DDA s 13(3A)*)
- Theoretical protection against being sued

Rationale behind the Standards

The objects of these Standards are:

(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the area of education and training; and

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law in the area of education and training as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

Note These are also generally the objects of the Act in relation to education (see section 3 of the Act).

Standards 1.3

Rationale

- Shift the burden of ensuring that ‘equality of opportunity’ is delivered to people with disabilities from individual complainants (students) to social institutions (schools)
 - *DDA* remedy – student must prove direct or indirect discrimination in the way education services are provided
 - Standards – obligation on education providers to make reasonable adjustment
- This shift is consistent with the ‘social model’ of disability
 - disability is, in large part, caused by the failure of society to accommodate impairment.

What is Disability? *DDA s 4; Standards 1.4*

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

Disability

- Disability is very broadly defined:
 - Physical
 - Intellectual
 - Behavioural
 - Psychiatric
 - Sensory
- Definition of disability explicitly includes learning disorders:
 - ‘a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction’

Disability

- Disability may be
 - Permanent
 - No longer apparent
 - Fluctuating in effect
 - Temporary
 - Future

Case law guidelines

- Only two cases so far which consider in any detail the effect of the Standards
 - *Walker* [2011]; affirmed *Walker* [2012]
 - *Sievwright*
- Can also look at past discrimination cases for guidance
 - If a court considering a discrimination claim found an adjustment was unreasonable or would have caused unjustifiable hardship then it is likely it would be treated the same way in the context of the Standards.
- Legislation prohibits two varieties of discrimination:
 - DIRECT; and
 - INDIRECT

Direct Discrimination

- *Direct discrimination* arises when there is 'less favourable treatment' of the complainant.
- Whether treatment is 'less favourable' is determined by comparing the treatment of the complainant with the treatment of another without the complainant's disability in 'circumstances which are not materially different'. See *DDA s 5*
- **Limit: proof of *unjustifiable hardship* on the education provider will defeat a claim of direct discrimination**
- Classic example of 'less favourable treatment':
 - student with disability not enrolled/excluded, student without disability enrolled/not excluded.
- See, for example, *Hills Grammar School v Human Rights and Equal Opportunity Commission* [2000] EOC ¶93-081

Indirect discrimination

Indirect discrimination is also called ‘facially neutral’ or ‘hidden’ or ‘institutional’ discrimination. It occurs when treating people in the same way has a discriminatory effect on those with a protected attribute.

1. Condition placed upon the inclusion of the person with disability [usually inferred from the facts]; and
2. The person with disability cannot comply with the condition; and

Either (most State acts)

3. persons without the disability can comply with the condition; and
4. The condition is ‘not reasonable’

Or (DDA, s 6)

3. The requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability; and
4. The condition is ‘not reasonable’

Indirect discrimination

- Classic example
 - Condition: you must be able to use steps to attend this institution
 - A student with a mobility impairment cannot use steps
 - Students without a mobility impairment can use steps/condition will disadvantage the student with the disability impairment
 - The term may or may not be reasonable depending on the circumstances
- **See** *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4]

Kinsela v QUT

(mobility impairment – use of wheelchair)

- Kinsela had completed the degree Bachelor of Science (Human Services) at QUT.
- One focus of the degree was disability services: course materials indicated a commitment to ‘civil, political, economic, social and cultural rights’ for all people.
- Tribunal 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.
- Emphasised ‘the undoubted goals of the Act of inclusiveness, accessibility and availability’ and cautioned that as anti-discrimination legislation has introduced change, so the university must change.

Disability discrimination

- Complainant argues:
 - Education Institution failed to make reasonable adjustment
 - Failure amounts to direct or indirect discrimination
- Court will consider:
 - Whether reasonable adjustment has been made
 - Whether elements of direct or indirect discrimination proven
- Decided cases:
 - May set a 'precedent' re what the law (eg DDA) means
 - But most outcomes are examples only of how law has been applied – each case 'turns on its facts'

Effect of the Standards

- Cover a number of key aspects of the delivery of education services:
 - enrolment (Part 4)
 - participation (Part 5)
 - curriculum development, accreditation and delivery (Part 6)
 - student support services (Part 7)
 - elimination of harassment and victimization (Part 8)

Effect of the Standards

- For each aspect, the Standards set out
 - student rights, ‘consistent with the rights of the rest of the community’
 - the legal obligation of education providers – to take ‘reasonable steps’ to ensure students with disabilities enjoy those rights ‘on the same basis’ as other students
 - ‘measures of compliance’
- The overarching obligation is to make ‘reasonable adjustment’

Walker v State of Victoria [2011] FCA 258 (23 March 2011)

- Case alleging discrimination and breach of the Disability Standards
- *‘The Disability Standards require no more of a government agency such as the Department than that, where necessary, it be alert to the need to adjust its normal practices when dealing with a disabled student; to consider, in consultation with the student or his or her parents, what reasonable adjustments to normal practices should be made to assist the student, and then to decide whether a particular adjustment is necessary and, if so, to implement it.’ [274]*

Adjustments? Not just the job of disability support team

- Enrolment:
 - accessibility of enrolment information and forms
- Participation:
 - accessibility of grounds, facilities, activities (on and off campus); specialist support
- Curriculum:
 - adjustment to teaching methods, learning resources, assessment
- Support:
 - access to general and specialist support staff, academic staff
- Harassment and victimisation:
 - staff and student policies which explicitly prohibit behaviour; efficient complaints processes; no exemptions

What is a reasonable adjustment?

(1) For these Standards, an adjustment is ***reasonable*** in relation to a student with a disability if it balances the interests of all parties affected.

Note Judgements about what is reasonable for a particular student, or a group of students, with a particular disability may change over time...

Standards 3.4

Limits on reasonable adjustment

An adjustment will not be required

- if it is not ‘reasonable’
- if it would cause unjustifiable hardship [Standards 10.2]
- if it would be inconsistent with an act authorized by law [Standards 10.3]
- if it would jeopardize the health of a student with disabilities or the health of other students [Standards 10.4]
- **Special measures** [Standards 10.5]

Limit: authorised by law

- (1) This Part does not render unlawful anything done by a person in direct compliance with:
 - (b) an order of a court...
- (2) This Part does not render unlawful anything done by a person in direct compliance with a prescribed law.

Standards 10.3/DDA s 47

Limit: authorised by law

- See *Firestone v ANU*
- Not a Standards case but illustrates the point
- University not obliged to allow physical access to a student with a disability when there is a court order in place prohibiting him/her from accessing the campus

Limit: protection of public health

These Standards do not render it unlawful for an education provider to isolate, or discriminate against, a student with a disability if the disability is an infectious disease or other condition and it is reasonably necessary to so isolate or discriminate to protect the health and welfare of the student with a disability or the health and welfare of others.

Standards 10.4



Limit: Protection of public health

- No tertiary case on point but see *Beattie v Maroochy Shire Council* [1996] HREOCA 40
- Harm to *self* or *others*
- Student with a blood borne disease (HIV; Hep B) seeking access to a health related degree??
- Student with TB?

Limit: special measures

(1) These Standards do not render it unlawful for an education provider to provide special measures (including specialised units or institutions) intended specifically for the benefit of students with disabilities...

Note Special measures are intended specifically for the benefit of students with disabilities, and can take the form of programs or initiatives that afford students with disabilities, or with a particular disability, benefits, grants, programs, goods, or access to facilities, services or opportunities to meet their special needs in relation to education and training. However, providing specialised support services will not necessarily be sufficient to eliminate discrimination.

Standards 10.5

Reasonableness

(1)...

(2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:

(a) the student's disability;

(b) the views of the student or the student's associate, given under section 3.5;

(c) the effect of the adjustment on the student, including the effect on the student's:

(i) ability to achieve learning outcomes; and

(ii) ability to participate in courses or programs; and

(iii) independence;

(d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;

(e) the costs and benefits of making the adjustment.

Standards 3.4



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Unjustifiable Hardship

The provider must comply with the Standards to the maximum extent not involving unjustifiable hardship.

Note Section 11 of the Act provides that, for the purposes of the Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities — an action plan given to the Commission under section 64 of the Act.

In summary, adjustment required if...

- It is reasonable taking into account
 - Disability
 - views of student
 - Effect on student
 - Effect on others
 - Cost and benefits
- And, it does not impose unjustifiable hardship
 - Benefit/detriment to anyone concerned
 - Effect of disability
 - Financial circumstances of provider of service

Limit: Unreasonable? Hardship?

- Case law suggests two circumstances where may be proved
 - Impact of disability on others
 - more later
 - Cost of adjustment
 - Compare *P v Queensland*: difficult for State to prove financial hardship
 - *Turner, Sievwright*: consider flow on effects; budgetary constraints

Cost

State of Victoria v Turner [2009] VSC 66

- Victorian Supreme Court – a more realistic attitude?
- 102 Relevant considerations ... include the cost of alternative conditions and the financial circumstances of the respondent. Evidence relevant to these considerations must be assessed by the Tribunal having regard to the practical realities of the situation facing the respondent and not hypothetically as if resources are unlimited...
103 Where the State is the respondent to a claim alleging indirect discrimination in relation to education, the circumstances the Tribunal must consider include the fact that the State does not provide benefits to a single student (the complainant) in a single school but operates many schools with many students and that the education budget each year is not unlimited.
104 Where the evidence before the Tribunal establishes that a decision by the Tribunal in favour of the complainant will have flow-on effects for the respondent in relation to other persons in a similar position to the complainant (for example, where the proceeding is a test case), the flow-on effects are a relevant consideration for the Tribunal. However... If the respondent wishes the Tribunal to take into account not only the direct but also the flow-on costs to it of a finding in favour of the complainant, it should present evidence of these costs...'

Cost

Siewwright v State of Victoria [2012] FCA 118

- 207. The obligations of the State in respect of individual children must be considered alongside the wider legal responsibilities which teachers and administrators owe to all students... The PSD is designed to achieve that purpose by implementing objective eligibility criteria for students to access additional funding.
- 208. As discussed... above, Jade was not eligible for funding under the PSD until late in 2008, when her IQ was reported to be 68. Before that time, provision of a full time aide for Jade was beyond the financial capability of her school.
- 209. Mr Tainsh gave evidence about the enormous cost that would be associated with providing a full time aide to all students who had a IQ in the vicinity of Jade's before she qualified for the PSD... Such an imposition would double the current PSD budget requirements and result in a need for the State to engage 20,000 extra staff.
- 210. Jade's teachers made significant efforts to implement the recommendations made by experts in relation to Jade, to the extent that was practical and within budget constraints. Given that no expert recommended Jade be provided with an aide in the terms pleaded by Mr Hancock, in all the circumstances, is not unreasonable that such an aide was not provided.

Consultation

Before the education provider makes an adjustment for the student, the education provider must consult the student, or an associate of the student, about:

- (a) whether the adjustment is reasonable; and
- (b) the extent to which the adjustment would achieve ...[inclusion] in relation to the student; and
- (c) whether there is any other reasonable adjustment that would be less disruptive and intrusive and no less beneficial for the student.

Standards 3.5

***Walker v State of Victoria* [2011] FCA 258**

(23 March 2011)

- ‘[The Standards] require a school to consult a student or his or her parents about prescribed matters.
- They do not, however, require that such consultation take any particular form or occur at any particular time.
- Those involved may meet formally or informally.
- Discussions can be instigated by either the school or the parents.
- Consultation may occur in face-to-face meetings, in the course of telephone conversations or in exchanges of correspondence.’ [284]

Who decides what's reasonable?

- *Walker v State of Victoria* [2011] FCA 258 (23 March 2011)
- 'Once consultation has occurred it is for the school to determine whether any adjustment is necessary in order to ensure that the student is able, in a meaningful way, to participate in the programmes offered by the school.
- The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents.
- The school is also required to determine whether any reasonable adjustment is possible in order to further the prescribed aims.
- There may, therefore, be cases in which an adjustment is necessary but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved.' [284]

Who decides what's reasonable?

- *Siewwright v State of Victoria* [2012] FCA 118 (21 February 2012)
- Jade's teachers, being qualified education providers, were in the best position to understand the breadth of her educational needs...Reasonable minds may differ as to the precise scope of intervention required for any particular child [164]

Adjustments must be made in a reasonable time

- See Standards 3.7
- ‘The education provider must take reasonable steps to ensure that any adjustment required to be made is made within a reasonable time’.
- ‘Whether the time is reasonable depends, in particular, on whether and when the student, or his or her associate, has provided...in a timely way, any relevant information in the possession of the student or associate about how the disability affects the student in relation to education or training...’

Reasonable time...

- *Hinchliffe:*
 - Claimed University of Sydney had failed to provide course materials to her in an accessible form in a timely fashion.
 - Distinction, two credits and four passes in her first semester of OT and a high distinction, three distinctions, a credit and four passes in the second semester
 - 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 a format which accommodated her disability.
 - Driver FM found that the actions of University disability support staff were 'sufficient and adequate'.
 - Evidence that after initially requesting materials in an enlarged font on green paper she came to prefer taped materials. At first, did not communicate this change in preference to administration. Slower process to tape materials.

Reasonable time...

- *Sluggett v Flinders University* (mobility impairment)
 - Access to classrooms and facilities – a hilly campus difficult to navigate
 - Access to work placements – needed to climb stairs
- Sluggett failed but on the basis that she had not alerted administration to her problems

Ongoing consultation mandated by Standards

- Standards acknowledge that what is reasonable may change over time: ss 3.4, 3.6
- Standards mandate ongoing consultation: ss 4.2 (3)(a), 5.2 (3), 6.2 (3), 7.2 (7)
- Schedule regular meetings to avoid the *Hinchliffe* issue...

Unknown disability?

- Hinchliffe illustrates unlikely that education providers will be required to 'second guess' the adjustments required by students
- Onus is on the student to keep the provider up to date.
- What about students who do not disclose their disability at all and then seek to rely on it to defeat exclusion or some other detrimental outcome?
- Enrolment forms provide the opportunity for students to disclose a relevant disability - and, as such, alert the education provider to the need to make reasonable adjustment - but there is no compulsion to do so.
 - See eg *McAdam v Victoria University*

Unknown disability

- Case law suggests will be difficult to prove a failure to make reasonable adjustment to an unknown disability.
- *Sluggett* and *W* – students disclosed the disability and claimed failure of reasonable adjustment only after a detrimental event:
 - *Sluggett* - after she had experienced accessing facilities and after she visited and accepted the work placement.
 - *W* - after she had missed assessment deadlines and failed to achieve on assessment items unsuited to her particular disability.
- See also *Tate v Rafin* (post traumatic stress disorder and club membership)

Unknown disability

- If someone responsible for the student's education (eg a lecturer?) knows, may be enough to activate duty
 - See *Bishop v Sports Massage Training School*.
 - See *McAdam v Victoria University*
- May be difficult for tertiary institution to argue that didn't know about a disability if it's obvious from its characteristics.
 - See *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180
- Disability standards require institutions to be proactive about eliminating discriminatory policies and practices
- But...Privacy issues? Remote students? Age of student?

Academic integrity and inherent requirements

- Discrimination challenges typically made by students who are excluded for failing to meet course requirements
- *W v Flinders University of South Australia*
 - psychiatric disorder
 - teaching degree
 - Could not complete some assessment including oral assessment
 - Could not complete practicum
- *Brackenreg v Queensland University of Technology*
 - ADHD (and other physical disabilities)
 - law degree
 - breached ‘double fail rule’

Obligation to pass students with disabilities who cannot meet legitimate course requirements?

- *Brackenreg*:
 - ‘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’ [2.2.4(iv)].
- ‘There is no obligation on the respondent to pass a student just because they have a disability’ [4.2.2.4 iv].
- Similar conclusion in *W*

Integrity of the program and the Standards

Standards 3.4(3):

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.

Disability not failure to adjust the cause of detriment?

- Controversial proposition in terms of disability theory but a view pragmatically adopted by the courts.
- In *Brackenreg*, eg, found that the complainant's difficulties 'were attributable ... to her disabilities, to circumstances in her personal life, and studying as an external student'.
- Some courts have even implied paranoia on the part of complainants who refuse to accept that it is because of their 'illness' and not because of an unaccommodating environment that they are not succeeding:
 - *Reyes-Gonzalez v NSW TAFE Commission* (schizophrenia);
 - *Chung v University of Sydney* (depression)

Why state inherent requirements?

- Unlike compulsory education sector there are no ‘binding’ curriculums or syllabuses which determine core course content
 - But may be relevant professional requirements eg Priestly 11
 - But inherent requirements of degree are not same as inherent requirements of job following degree
- Guidance for students as to what they will need to do to complete the course or program
- Avoid potential for claims by student ‘consumers’ under the Australian Consumer Law:
 - Misleading or deceptive conduct
 - Education services not delivered with due care and skill
 - See Stephen Corones, ‘Consumer Guarantees and the Supply of Educational Services by Higher Education Providers’ (2012) 35(1) *University of New South Wales Law Journal* 1.

Reasonable adjustment and problem behaviour

- Several cases where students with behavioural or psychiatric disability claim discrimination when they are excluded
 - *Reyes-Gonzalez v NSW TAFE Commission* (schizophrenia);
 - *Chung v University of Sydney* (depression)
- What about if the student becomes aggressive? threatening? violent?

Reasonable adjustment and problem behaviour

- Lawful to impose a reasonably adjusted code of behaviour:
 - *Minns v NSW*
- Little doubt that excluding a student because of violence, even if the violence is caused by the disability will not be discrimination
 - Not ‘on the ground’ of disability (*Purvis v NSW*)
 - Unjustifiable hardship arising out of effect on staff and students (*P* and *L*)

Reasonable adjustment and problem behaviour

- Before excluding consider what adjustments may be made to mitigate the effect of the behaviour
- Make sure same disciplinary processes are made available as for students without disabilities

Zhang v University of Tasmania

- Aggressive student referred for counselling: imputed ‘serious psychological’ disability
- University gave student two options:
 - Accept conditions limiting access to staff and research facilities
 - Attend a different university
- Constructive exclusion
- Found student had not been afforded disciplinary action review processes as mandated by policy
- Potentially ‘less favourable treatment’ – remitted for rehearing

Firestone v ANU

- Master of Philosophy student harassing and threatening staff with emails and phone calls; depression
- University granted a court order restricting student's access to campus and staff
- Tribunal could not interfere with the court order
- No causal relationship between treatment of student and disability (c/f *Purvis*)
- No discrimination in handling of disciplinary processes (c/f direct discrimination)
- Conditions imposed on continued (off campus) enrolment designed to assist student to complete degree (c/f indirect discrimination)

Review of the Standards

<http://www.deewr.gov.au/Schooling/Programs/Pages/disabilitystandardsforeducation.aspx>

- Any amendment deferred until new Commonwealth anti-discrimination legislation in place
 - Released for consultation 20 November 2012
 - Will Consolidate existing acts into the ‘Human Rights and Anti-Discrimination Act’
- Issues
 - Meaning of ‘on the same basis’
 - Scope of consultation
 - Scope of reasonable adjustment
 - Call for more support materials

Cases

- *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999)
- *Bishop v Sports Massage Training School* [2000] HREOC No H99/55
- *Chung v University of Sydney* [2001] FMCA 94; *Chung v University of Sydney & Ors S87/2002* [2002] HCA Trans 550 (5 November 2002)
- *Firestone v ANU* [2009] ACTDT 1
- *Hinchliffe v University of Sydney* [2004] FMCA 85 (Unreported, Driver FM, 17 August 2004)
- *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4
- *McAdam v Victoria University & Ors* [2010] VCAT 1429
- *Reyes-Gonzalez v NSW TAFE Commission* [2003] NSWADT 22
- *Siewwright v State of Victoria* [2012] FCA 118
- *Sluggett v Flinders University of South Australia* [2000] HREOC No H96/2
- *State of Victoria v Turner* [2009] VSC 66
- *Tate v Rafin* [2000] FCA 1582 (Unreported, Wilcox J, 8 November 2000)
- *Walker v State of Victoria* [2011] FCA 258
- *Walker v State of Victoria* [2012] FCAFC 38
- *W v Flinders University of South Australia* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998)
- *Zhang v University of Tasmania* [2009] FCAFC 35;