

REASONABLE ADJUSTMENT TO ASSESSMENT: WHAT DO AUSTRALIAN TEACHERS NEED TO KNOW AND CONSIDER?*

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ABSTRACT

The Disability Discrimination Act 1992 (Cth) and the associated Disability Standards for Education 2005 (Cth) ('DSE') impose upon Australian education institutions the obligation to make 'reasonable adjustment' to education policies, practices and environments for students with disability. While the DSE are intended to clarify the scope and effect of this obligation, reviews of the DSE, and other government sponsored reports, suggest that education institutions, and their staff, do not understand what is entailed by reasonable adjustment sufficient to ensure its appropriate implementation. An Australian Research Council sponsored study of middle school teachers' knowledge of the DSE suggests that a lack of understanding of what the law requires in respect of reasonable adjustment to assessment is a particularly acute problem. As teachers are tasked with the responsibility of administering assessment to their students, the purpose of this article is to disseminate, for teachers' benefit, an analysis of what is known from the legislation itself, and from the cases which have interpreted it, about the scope and application of the DSE in respect of assessment. Improved teacher understanding of legal obligations may inform improved implementation of adjustment to assessment, promote the equitable education of students with disability, and avoid the financial and human cost of litigation.

I INTRODUCTION

The *Disability Standards for Education 2005* ('DSE') were designed to 'clarify and elaborate' for education institutions, and their employee teachers, their obligations as to the making of reasonable adjustments for their students.¹ They acknowledge a right to education 'on the same basis'² for students with disability in the contexts of enrolment,³

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¹ *Disability Standards for Education 2005* (Cth), 'Introduction' ('DSE').

² *Ibid* cl 2.2.

³ *Ibid* pt 4.

participation,⁴ curriculum development and delivery and assessment⁵ and oblige the making of ‘reasonable adjustment’ for students with disability in those contexts.⁶ Reasonable adjustment is premised on the understanding that, in order for the same quality of education to be delivered to students with disability, it may be necessary to treat them differently.⁷ Properly managed reasonable adjustment supports inclusion and educational equality for students with disability, consistent with Australian educational policy.⁸ Conversely, failure to make reasonable adjustment, may amount to an act of ‘micro-exclusion’ antithetical to educational equality.⁹

Because it is teachers who are tasked with the delivery of reasonable adjustment in the classroom, it is clearly important that they understand the scope of their obligation. Implementing their obligation not only advances the interests of students with disability, it also protects teachers and schools from allegations of disability discrimination and the consequential risk of protracted and expensive litigation.¹⁰ There is evidence, however, that reasonable adjustment is not always managed appropriately, not least in the cases alleging discrimination which have made their way through the Australian courts, some of which are referred to below. There is evidence, too, in a variety of government-sponsored reports and the ongoing (at the time of writing) *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*,¹¹ that a lack of teacher understanding of the *DSE* is causally related to the failure to put the *DSE* into effect as intended. This is despite the ‘More Support for Students with Disabilities’ program, a \$300 million dollar Commonwealth Government initiative, which aimed to ‘to build the capacity of schools and teachers to improve the learning experiences and educational outcomes of students with disability in partnership with parents, carers and students’.¹²

Most recently, the 2021 Final Report of the *Disability Standards for Education 2005, 2020 Review* noted that:

The Review heard that **many educators are unaware of their obligations** under the Standards or lack the resources to implement them, and **those who are aware struggle to find guidance and clarification on how to implement them**. Teaching and learning

⁴ Ibid pt 5.

⁵ Ibid pt 6.

⁶ Ibid pts 4–6.

⁷ Elizabeth Dickson, ‘Disability Standards for Education 2005 (Cth): Sword or Shield for Australian Students with Disability?’ (2014) 19(1) *International Journal of Law and Education* 5.

⁸ Joy Cumming, Elizabeth Dickson and Amanda Webster, ‘Reasonable Adjustments in Assessment: Putting Law and Policy into Practice in Australia’ (2013) 60(4) *International Journal of Disability, Development and Education* 295.

⁹ Teresa Iacono et al, ‘A Document Review of Exclusionary Practices in the Context of Australian School Education Policy’ (2019) 16(4) *Journal of Policy and Practice in Intellectual Disabilities* 264.

¹⁰ Dickson (n 7).

¹¹ Urbis, *2015 Review of the Disability Standards for Education* (Final Report, 17 July 2015) <<https://www.dese.gov.au/swd/resources/final-report-2015-review-disability-standards-education-2005>>; Deloitte Access Economics, *Review of Education for Students with Disability in Queensland State Schools* (February 2017) <<https://education.qld.gov.au/student/Documents/disability-review-report.pdf>>; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, 30 October 2020) <<https://disability.royalcommission.gov.au/publications/interim-report>>.

¹² Urbis (n 11) 4.

are enhanced when educators are trained in the Standards, know how to implement them, and are supported by employers, systems and communities.¹³ [emphasis added]

We have researched and written about reasonable adjustment for a decade.¹⁴ As part of a recent ARC Discovery project examining the provision of classroom assessment adjustments for students with disabilities in Australian secondary schools,¹⁵ we surveyed teachers about their knowledge of the *DSE*. More information about the survey is provided below.¹⁶ We sought to establish, from direct teacher feedback, how well the obligation to make reasonable adjustment is understood in the context of differentiating assessment. In particular, and relevant to this article, we were interested in gauging how well teachers understood the relevant circumstances which should be taken into account when determining the reasonableness of an adjustment to assessment. Consistent with the findings in the reports referred to, above, the responses to our survey indicated incomplete understanding of the scope and effect of the *DSE*.

The purpose of this article is to disseminate, for teachers' benefit, an analysis of what is known from the legislation itself, and from the cases which have interpreted it, about the scope and application of the *DSE*. The article updates our earlier publications on reasonable adjustment to assessment to take into account recent case law development. The decision of the Full Federal Court of Australia in *Sklavos v The Australasian College of Dermatologists* ('*Sklavos*')¹⁷ will be a particular focus in that it authoritatively sets out the process for making reasonable adjustment. Improved teacher understanding of legal obligations may inform improved implementation of adjustment to assessment, promote the equitable education of students with disability, and avoid the financial and human cost of litigation.

II RESEARCH STUDY

The purpose of this article is not to provide detailed analysis of the survey itself or the ARC project, which will form the basis of further publications. However, relevant results from the survey are included here in order to contextualise our aim of promoting teacher understanding of the *DSE*.

¹³ Australian Government, Department of Education, Skills and Employment, *Disability Standards for Education 2005, 2020 Review* (Final Report, 12 March 2021) v <<https://www.dese.gov.au/disability-standards-education-2005/2020-review-disability-standards-education-2005/final-report>> ('*2020 Review of the DSE*').

¹⁴ See Cumming, Dickson and Webster (n 8); Elizabeth Dickson, 'The Assessment of Students with Disabilities: the Australian Law as to Reasonable Adjustment and Academic Integrity' (2012) 17(2) *International Journal of Law and Education* 49; Joy Cumming and Elizabeth Dickson, 'Educational Accountability Tests, Social and Legal Inclusion Approaches to Discrimination for Students with Disability: a National Case Study from Australia' (2013) 20(2) *Assessment in Education: Principles, Policy and Practice* 221; Elizabeth Dickson and Joy Cumming, 'Reasonable Adjustment in Assessment: The Australian Experience', in Karen Trimmer, Roselyn Dixon, and Yvonne S. Findlay (eds), *The Palgrave Handbook of Education Law for Schools* (Palgrave Macmillan, 2018) 315.

¹⁵ Australian Research Council, *Discovery Scheme (2015–2018)*: Joy Cumming, Claire Wyatt-Smith, Elizabeth Dickson and Amanda Webster, *Raising the Bar not the Barrier: Effective, Enriching and Enabling School-Based Assessments and Optimal Adjustments for Secondary School Students with Disabilities*.

¹⁶ See II RESEARCH STUDY.

¹⁷ *Sklavos v Australasian College of Dermatologists* [2017] 256 FCR 247 ('*Sklavos*').

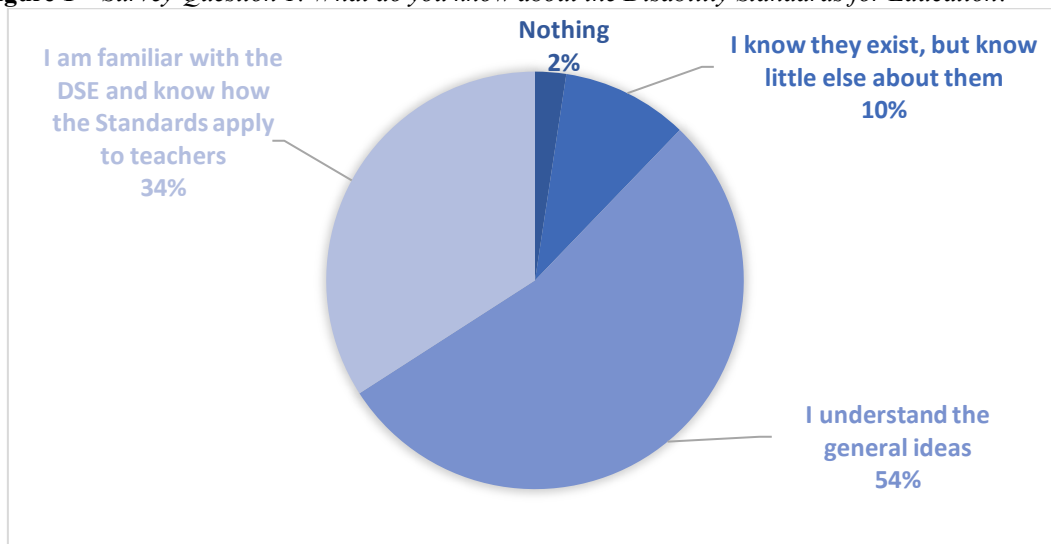
A The Survey

Forty-two teachers of students in Years 7–10 responded to a survey which was administered as part of an ARC-funded research project looking at reasonable adjustment to assessment in Australian middle schools. Teachers were from a range of schools and school systems and reported different levels of teaching experience (Appendix A). They were surveyed about their professional development with respect to the *DSE*, their understanding of their obligations, and factors that informed their current practice. The survey (Appendix B) consisted of ten questions. Each item had a Likert response choice available and was followed by space for teachers to make open-ended qualitative comments related to their response choice. The survey was developed by the study research team and trialled for clarity with a small number of experienced teachers. Ethical approval was gained through the Australian Catholic University, and relevant education jurisdictions. All participants, including principals, teachers, students and their parents or carers, were informed and gave consent to participation

B Survey Results

Responses to Questions 1 and 9 are particularly significant to knowledge of the *DSE*.¹⁸ Figure 1 below shows that a majority of teachers reported, for Question 1, ‘What do you know about the Disability Standards for Education?’, that they had at least some knowledge of the *DSE*. Only 34% indicated, however, ‘familiarity’ with the *DSE* and their application to teachers. Figure 1 also indicates, however, that a disappointing 12% of the respondents reported that they knew little or nothing about the *DSE*.

Figure 1 – Survey Question 1: What do you know about the Disability Standards for Education?



What is of more concern is that none of the surveyed teachers displayed comprehensive knowledge and understanding of the *DSE* when asked to comment on circumstances relevant to reasonable adjustment for Question 9, ‘What factors have you

¹⁸ Survey results for the remaining questions are explored in detail in a forthcoming publication.

considered/would you consider relevant in deciding whether an assessment adjustment was reasonable?'. In Table 1 (below), teacher comments are tracked against the circumstances identified in the *DSE* as specifically relevant to reasonable adjustment. These circumstances will be elaborated upon, below.¹⁹ Table 1 shows response numbers for each circumstance. While some respondents commented on multiple circumstances, not one identified all. A majority of respondents understood that they should consider the nature of the relevant student disability (n=23) and/or the effect on the student of making the adjustment (n=22) but fewer respondents identified the relevance of the other factors. None identified the relevance of a cost-benefit analysis to reasonableness. The teachers' comments suggest an admirable focus on adjusting to accommodate student need but at the expense, perhaps, of the relevance of other factors such as impact on themselves, impact on the system and its resources, and academic integrity. A comparison of responses to Questions 1 and 9, therefore, indicates that even when teachers think they know about the *DSE*, their knowledge is, at best, incomplete.

Table 1 – Survey Question 9: What factors have you considered/would you consider relevant in deciding whether an assessment adjustment was reasonable?

DSE Clause	Relevant consideration	Relevant Responses
3.4(2)(a)	the student's disability	23
3.4(2)(b)	the views of the student or the student's associate	3
3.4(2)(c)	the effect of the adjustment on the student's: (i) ability to achieve learning outcomes (ii) ability to participate in courses (iii) independence	22
3.4(2)(d)	the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students	10
3.4(2)(e)	the costs and benefits of making adjustment	0
3.4(3)	academic integrity	7

¹⁹ See below, Part III D 3 (a) *Reasonableness*.

III THE SCOPE OF A SCHOOL'S OBLIGATION TO MAKE REASONABLE ADJUSTMENT TO ASSESSMENT

Australia is a federation with both federal ('Commonwealth') and state or territory levels of government. At the Commonwealth level, discrimination in education on the basis of disability is prohibited by the *Disability Discrimination Act 1992* (Cth) ('*DDA*').²⁰ The *DSE* are authorised by and subordinate to the *DDA*.²¹ As noted above, the *DSE*, were intended to clarify the obligations of education institutions as to the making of reasonable adjustments for their students.²² While the focus in this article will be on Commonwealth legislation, for reasons explained below, it should also be acknowledged that each Australian state and territory also has generic anti-discrimination legislation which similarly prohibits discrimination in education on the basis of a range of protected attributes, including disability or, for some Acts, 'impairment'.²³ Because of the high level of similarity between the state and territory Acts and the *DDA*, decisions of courts and tribunals interpreting and applying those Acts (case law), can often be relied on to assist our understanding of the *DDA*.

In respect of disability discrimination in education, the *DDA* may be regarded as setting the benchmark for what is required by schools if they are to maximise inclusion and minimise the potential for litigation. Unlike most state and territory Acts, the *DDA* explicitly requires reasonable adjustment for people with disability so as to support their social inclusion.²⁴ As such, the *DDA* requires positive action by institutions, like schools, to take steps to avoid discrimination. Moreover, an educational institution which complies with this higher standard of behaviour prescribed by the *DDA* is likely also to be compliant with state and territory legislation.²⁵

The *DSE* specify that reasonable adjustment is required across core areas of the education experience. Relevant to the assessment of students with disability, the *DSE* impose an obligation to make reasonable adjustment to 'curriculum development, accreditation and delivery'²⁶ so as 'to give students with disabilities the right to participate in educational courses or programs that are designed to develop their skills, knowledge and understanding, including relevant supplementary programs, on the same basis as students without disabilities'.²⁷ 'Assessment and certification requirements' should be appropriate to 'the needs of the student and accessible to him or her'.²⁸

²⁰ *Disability Discrimination Act 1992* (Cth) s 22 ('*DDA*').

²¹ *Ibid* s 31.

²² *DSE* (n 1), 'Introduction'.

²³ See, eg, *Discrimination Act 1991* (ACT) ss 7(j), 18; *Anti-Discrimination Act 1977* (NSW) s 49L; *Anti-Discrimination Act* (NT) ss 19(j), 29; *Anti-Discrimination Act 1991* (Qld) ss 7(h), 38–9; *Equal Opportunity Act 1984* (SA) s 74; *Anti-Discrimination Act 1988* (Tas) ss 16(k), 22(1)(b); *Equal Opportunity Act 2010* (Vic) ss 6E, 38, 40; *Equal Opportunity Act 1984* (WA) ss 66A, 66I.

²⁴ *DDA* (n 20) ss 5–6.

²⁵ Elizabeth Dickson and Joy Cumming, 'Reasonable Adjustment in Assessment: the Australian Experience' in Karen Trimmer, Roselyn Dixon, and Yvonne S. Findlay (eds), *The Palgrave Handbook of Education Law for Schools* (Palgrave Macmillan, 2018) 315.

²⁶ *DSE* (n 1) pt 6.

²⁷ *Ibid* cl 6.1.

²⁸ *Ibid* cl 6.3(f).

Further, ‘assessment procedures and methodologies’ should be ‘adapted to enable the student to demonstrate the knowledge, skills of competencies being assessed’.²⁹

Compliance with the *DSE* protects schools, and their employee teachers, against any liability for breach of the *DDA*.³⁰ Conversely, failure to comply with the *DSE* may amount to discrimination in breach of the *DDA*, and consequential liability in damages. Students who experience a failure to make reasonable adjustment may, therefore, seek a remedy under the *DDA* by complaining to the Australian Human Rights Commission³¹ who will attempt to conciliate a resolution.³² If conciliation fails, action may be taken in the federal courts alleging a failure to make reasonable adjustment and consequential direct or indirect discrimination.³³

A *Direct and Indirect Discrimination*

Consistent with a breach of the *DSE* activating the opportunity to take action under the *DDA*, the *DDA* was amended in 2009 to recognise that a failure to make reasonable adjustment may manifest as discrimination.³⁴

The *DDA* protects ‘formal equality’, equality of treatment, by prohibiting direct discrimination (‘less favourable treatment’) on the ground of disability.³⁵ Direct discrimination might occur if a student with disability is treated less favourably by being denied the opportunity to complete a test or assignment. In the case *TT v Lutheran Education Queensland*,³⁶ for example, a student alleged direct discrimination in that he was not enabled to complete assessment which had occurred while he was absent from school.

The *DDA* also protects against ‘systemic discrimination’, by prohibiting indirect discrimination, the imposition of an unreasonable condition, with which the person with disability cannot comply and which disadvantages them.³⁷ The administration of tests and assignments typically involves the imposition of conditions upon students, both implicit and explicit. In *Bishop v Sports Massage Training School*,³⁸ for example, a student with dyslexia proved indirect discrimination after narrowly failing a written examination he was ‘required to complete...in the same two-hour period as the other, able-bodied students’.³⁹

²⁹ *Ibid.*

³⁰ *DDA* (n 20) s 34.

³¹ *Australian Human Rights Commission Act 1986* (Cth) s 46P.

³² *Ibid* s 46PF.

³³ *Ibid* s 46PO.

³⁴ *DDA* (n 20) ss 5(2), 6(2).

³⁵ *Ibid* s 5.

³⁶ *TT v Lutheran Church of Australia* [2013] QCAT 48.

³⁷ *DDA* (n 20) s 6.

³⁸ *Bishop v Sports Massage Training School* [2000] HREOC No H99/55 (Commissioner Cavanough, 15 December 2000).

³⁹ *Ibid* [1].

B ‘Disability’ and ‘Education’

Relevant *DDA* definitions are adopted by the *DSE*.⁴⁰ The *DDA* defines ‘disability’ to cover physical, psychiatric, behavioural and sensory disabilities.⁴¹ The *DDA* definition of disability aligns with categories for adjustment reporting obligations under the Nationally Consistent Collection of Data on School Students with Disability (NCCD), but is broader in scope than the categories of disability which attract funding to education providers for the support of students with disability.⁴² It is particularly relevant for the assessment context that the definition explicitly includes ‘a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction’.⁴³ It is also relevant that the *DDA* protects students with temporary disabilities caused by injury or infectious disease.⁴⁴

The legislation applies to any educational authority, ‘a body or person administering an educational institution’.⁴⁵ ‘Educational institution’ is further defined to mean ‘a school, college, university or other institution at which education or training is provided’.⁴⁶ For completeness, ‘education provider’ is also defined to mean ‘an organisation whose purpose is to develop or accredit curricula or training courses’ used by educational authorities or institutions.⁴⁷ The broad scope of these definitions indicates that those education bodies which accredit curriculum, implement it, and assess it are all caught by the legislation. The *DDA* makes employers vicariously liable for the discriminatory actions of their staff.⁴⁸ Because employers are more likely to have deeper pockets than an individual staff member, complainants will typically take legal action against the State, or for independent schools, the operator of the school. In some Australian school discrimination cases, however, individual staff members, typically the school principal, have also been sued.⁴⁹ Moreover, it is to be anticipated that classroom teachers may be called upon to give evidence as to their actions in respect of a complainant student.

C What is Reasonable Adjustment?

The key obligation under the *DSE*, is the obligation to ‘make reasonable adjustment’. The term, ‘reasonable adjustment’ is not defined in either the *DSE*, or, indeed, in its parent Act, the *DDA*, with any precision. The scope of the term must be inferred from what the legislation does say, and from related case law.

⁴⁰ *DSE* (n 1) cl 1.4.

⁴¹ *DDA* (n 20) s 4.

⁴² ‘What is the NCCD Model’, *Nationally Consistent Collection of Data on School Students with Disability* (Web Page) <<https://www.nccd.edu.au/wider-support-materials/what-nccd-model-1?parent=/understanding-nccd&activity=/wider-support-materials/what-nccd-model-1&step=-1>>.

⁴³ *DDA* (n 20) s 4 definition ‘disability’ para (f).

⁴⁴ *Ibid* paras (b), (c), (i).

⁴⁵ *DDA* (n 20) s 4; *DSE* (n 1) cls 1.2, 2.1.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*.

⁴⁸ *DDA* (n 20) s 123.

⁴⁹ See, eg, *I v O'Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 2; *Edwards v Hillier and Educang* [2006] QADT 34.

The *DDA* simply, and perhaps unhelpfully, says that ‘an adjustment to be made by a person is a **reasonable adjustment** unless making the adjustment would impose an unjustifiable hardship on the person.’⁵⁰ Unjustifiable hardship as a limit on reasonable adjustment will be considered, below.

In that the *DSE* are intended to ‘clarify and elaborate the legal obligations in relation to education’,⁵¹ they give a little more detail of ‘adjustment’ by explaining that it is a

measure or action taken by an education provider that has the effect of assisting a student with a disability to [experience education] on the same basis as a student without a disability and includes an aid, a facility, or a service that the student requires because of his or her disability.⁵²

The *DSE* further ‘elaborates’ that ‘[i]n some cases, students with disabilities will not be able to participate on the same basis as other students if all students are treated in the same way, or if all students with disabilities are treated in the same way’.⁵³ ‘Adjustment’, then, may be interpreted as the mechanism for treating students with disabilities ‘differently’, not ‘in the same way’, so that they experience their education ‘on the same basis’ as other students.

Many of the cases concerning disability discrimination in education allege a failure to make adjustment to assessment. It may be speculated that this is because assessment is a high stakes issue both at the certification level of the compulsory phase of education and at the tertiary education level: students are motivated to sue if they are denied equitable opportunities to display their knowledge and skills through reasonably adjusted assessment, because, as a corollary, they may be excluded from opportunities for further study and for work.

We can extrapolate, from this case law, examples of adjustments which may be sought by students, or suggested by teaching staff. These adjustments may be to the nature of an assessment item, or to the conditions under which it is administered. Adjustments may involve:

- alternative formatting,⁵⁴ assistive technology,⁵⁵ a scribe,⁵⁶ or translators.⁵⁷
- administration of an alternative assessment item,⁵⁸ such as a spoken instead of a written task, or vice versa.⁵⁹
- rescheduling of an assessment item.⁶⁰

⁵⁰ *DDA* (n 20) s 4.

⁵¹ *DSE* (n 1) ‘Introduction’.

⁵² *Ibid* cl 3.3.

⁵³ *Ibid* cl 2.2 note 2.

⁵⁴ See, eg, *Hinchliffe v University of Sydney* [2004] FMCA 85.

⁵⁵ See, eg, *Beanland v State of Queensland and Queensland Studies Authority* [2008] QADT 5.

⁵⁶ *Ibid*.

⁵⁷ See, eg, *Hurst v State of Queensland* [2006] FCAFC 100.

⁵⁸ See, eg, *Sklavos* (n 17).

⁵⁹ See, eg, *Beanland v State of Queensland and Queensland Studies Authority* [2008] QADT 5.

⁶⁰ See, eg, *TT v Lutheran Church of Australia* [2013] QCAT 48.

- extra time to complete a task,⁶¹ or excusal from an assessment task, or part of a task, altogether.⁶²
- extra time to complete a course of study.⁶³
- food and medication breaks, or spaced exams.⁶⁴
- adjusted achievement level thresholds,⁶⁵ or adjusted weighting of assessment items⁶⁶ (particularly where disability has affected attendance and engagement).

Although it may seem obvious, it should be said that careful consideration of whether a potential adjustment is actually ‘reasonable’ is part of the process of determining reasonable adjustment. This process is addressed in detail, below.

D *The Process of Determining Reasonable Adjustment*

The important decision of the Full Court of the Federal Court of Australia in *Sklavos v The Australasian College of Dermatologists*⁶⁷ concerned tertiary education but is nevertheless relevant to other education sectors for its detailed explanation of the process of determining reasonable adjustment under the *DSE*. It is the most recent, and, as a decision of the Full Court of the Federal Court of Australia, the most authoritative, case to consider disability discrimination in the assessment process. In that case, a doctor seeking admission to the College of Dermatologists asked to be excused from final written and clinical examinations because of a psychiatric condition which manifested as a fear of examinations. This condition was accepted as a ‘disability’ for the purpose of attracting the protection of the *DDA* and *DSE*. Dr Sklavos had requested a different method of assessment, involving observation of his skills in the workplace. The Full Court affirmed the original decision of the Federal Court⁶⁸ that, on the particular facts of the case, including, in particular, the cost and effort imposed on the College and its staff, the alternative form of assessment was not a reasonable adjustment.

What is particularly important for schools to take away from the decision in *Sklavos*, is its breaking down, step by step, of the process of making reasonable adjustment. The Report of the *2020 Review of the DSE* identified a serious concern that the making of reasonable adjustment was too often regarded as an exercise in ‘box ticking’ with

⁶¹ See, eg, *Ibid*; *W v Flinders University of South Australia* [1998] HREOCA 19; *Brackenreg v Queensland University of Technology* [1999] QADT 11; *Bishop v Sports Massage Training School* [2000] HREOC No H99/55 (Commissioner Cavanough, 15 December 2000).

⁶² See, eg, *TT v Lutheran Church of Australia* [2013] QCAT 48.

⁶³ See, eg,

⁶⁴ See, eg, *BI v Board of Studies* [2000] NSWSC 921. Note, however, that this is a judicial review case, not a discrimination case.

⁶⁵ See, eg, *W v Flinders University of South Australia* [1998] HREOCA 19; *Brackenreg v Queensland University of Technology* [1999] QADT 11.

⁶⁶ See, eg, *TT v Lutheran Church of Australia* [2013] QCAT 48.

⁶⁷ *Sklavos* (n 17) 280 (Bromberg J), 293 (Griffiths J), 303 (Bromwich J). This case is controversial in respect of the way the Full Federal Court interpreted the causal link required between disability and the failure to make reasonable adjustment. Analysis of this causation issue is beyond the scope of this article and subject to calls for amendment to the *DDA*. See, for example, People with Disability Australia, ‘Reforming the Disability Discrimination Act Following the Sklavos Decision’ (Media Release, 10 May 2021).

⁶⁸ *Sklavos v Australasian College of Dermatologists* [2016] FCA 179.

‘tokenistic’ modifications made which ‘did not enhance student learning or engagement’.⁶⁹ *Sklavos* indicates that the implementation of any reasonable adjustment should not be haphazard or hasty, intuited or guesstimated; it should involve a considered series of ‘reasonable steps’.⁷⁰

- Step 1: Consultation with the student with disability, or an associate of the student (for example, a parent or guardian), about ‘whether the disability affects the student’s ability to participate in learning experiences of the course or program’;⁷¹
- Step 2: Consideration of whether an adjustment is ‘necessary’ to ensure that the student is able to participate in those learning experiences on the same basis as a student without a disability;⁷²
- Step 3: Adjustment, if ‘a reasonable adjustment can be identified’.⁷³

The Court in *Sklavos* found, consistent with the express terms of the DSE,⁷⁴ that those steps must be repeated ‘as necessary’ throughout the student’s enrolment.⁷⁵ Consultation and consideration must be repeated throughout a student’s enrolment in order to ensure that any reasonable adjustment which is implemented remains apt to the student and that no further or different adjustments are ‘necessary’. Further, the *DSE* acknowledge that ‘multiple adjustments’ may be needed for a student⁷⁶ and that ‘[j]udgements about what is reasonable for a particular student, or a group of students, with a particular disability may change over time’.⁷⁷

While the *Sklavos* case explains the reasonable adjustment process, its facts also serve to demonstrate how that process plays out in a real-life context. It will be referred to, below, to illustrate each of the three steps: consultation, consideration and reasonable adjustment.

1 *Step One: Consultation*

Although the Court in *Sklavos* set out three separate steps in the reasonable adjustment process, it is likely that there will be some time and convenience overlaps between those steps. This is clear, for example, at the consultation stage where information gathered will be important not only on the issue of ‘whether the disability affects the student’s ability to participate in learning experiences of the course or program’,⁷⁸ but will also inform consideration of the necessity of an adjustment and the decision as to its reasonableness.

⁶⁹ 2020 Review of the DSE (n 13) 28 [2.2.2.2].

⁷⁰ *Sklavos* (n 17) 280 (Bromberg J), 293 (Griffiths J), 303 (Bromwich J).

⁷¹ See *DSE* (n 1) cl 6.2(2)(a).

⁷² See *ibid* cl 6.2(2)(b).

⁷³ See *ibid* cl 6.2(2)(c).

⁷⁴ *Ibid* cl 6.2(3).

⁷⁵ *Sklavos* (n 17) 280 (Bromberg J), 293 (Griffiths J), 303 (Bromwich J).

⁷⁶ *DSE* (n 1) cl 3.5

⁷⁷ *Ibid* cl 3.4.

⁷⁸ *Ibid* cl 6.2(2)(a).

Consultation between school and student, or student associate, is mandated by the *DSE*.⁷⁹ While it is an opportunity for a school to find out more about a student and the impact of their disability, as stipulated for Step 1, the *DSE* contemplate that consultation is also an opportunity for a student to advocate for the necessity and reasonableness of a particular adjustment or adjustments. They expressly provide that consultation should address whether a proposed adjustment is reasonable,⁸⁰ as well as the extent to which it would deliver education ‘on the same basis’ for the student.⁸¹ They also anticipate that there may be competing views as to appropriate adjustment, in that consultation must also address whether there is ‘any other reasonable adjustment that would be less disruptive or intrusive and no less beneficial to the student’.⁸²

Consultation was factually important in the *Sklavos* case as it was alleged that the College had not met its consultation obligations under the *DSE*. The Court rejected this allegation,⁸³ and did not disturb the finding in an earlier Federal Court case, *Walker v State of Victoria* (‘Walker’),⁸⁴ that the *DSE*

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.⁸⁵

Absent any prescribed consultation format, and in anticipation of the fact that there may be disagreement between school and student about reasonable adjustment, it would be wise for schools to develop their own systems to support the intent of the *DSE* that regular consultation occurs. Schools should also ensure that records are kept of consultation and how it has influenced subsequent adjustment decisions. Consultation systems should provide for school-initiated consultation but, consistent with the *Walker* case, should also accommodate student-initiated consultation.

2 Step Two: Consideration

It was held in the *Walker* case that the ultimate decision about whether an adjustment is both necessary and reasonable falls to the ‘education provider’.⁸⁶ A school is not obliged to implement an adjustment suggested or requested by a student during consultation and, upon consideration of the matters raised during consultation, may determine that no adjustment is necessary.⁸⁷ The provider may also seek independent advice about adjustment as part of the consideration step:

⁷⁹ *Ibid* cl 3.5.

⁸⁰ *Ibid* cl 3.5(a).

⁸¹ *Ibid* cl 3.5(b).

⁸² *Ibid* 3.5(c).

⁸³ *Sklavos* (n 17) 302 (Griffiths J).

⁸⁴ *Walker v State of Victoria* [2011] FCA 258. This case did not allege discrimination in assessment but in the exclusion of a student with disability which manifested as problem behaviour.

⁸⁵ *Ibid* [284].

⁸⁶ *Ibid*.

⁸⁷ *DSE* (n 1) cl 3.4 note.

A detailed assessment, which might include an independent expert assessment, may be required in order to determine what adjustments are necessary for a student. The type and extent of the adjustments may vary depending on the individual requirements of the student and other relevant circumstances.⁸⁸

In relation to the *Sklavos* case, for example, the College had consulted a variety of experts about how and whether Dr Sklavos's anxiety could be accommodated. While the school might be the decision-maker about adjustment, however, it should be remembered, as *Sklavos* also demonstrates, that it will also be accountable for its decision and may face claims of breach of the *DSE* and consequential discrimination where a student is dissatisfied with the decision.

3 *Step Three: Adjustment*

The final step comprehends an assessment of the reasonableness of a necessary adjustment as a precondition to implementation. Even if an adjustment is necessary, if it is not reasonable, it will not be required to be made. It is possible, therefore, that a reasonable adjustment is not able to be identified. By contrast, the terms of the *DSE* suggest that more than one reasonable adjustment may be available.⁸⁹ In that case, the adjustment which is 'less disruptive and intrusive but no less beneficial for the student' should be preferred.⁹⁰ The implication here is that all potentially reasonable adjustments should be assessed and considered for implementation. It is also important to note, however, that even if an adjustment is reasonable, if its implementation would impose 'unjustifiable hardship' on the school, it will not be required to be made.⁹¹ Careful consideration of circumstances relevant to reasonableness and hardship must be made.

(a) *Reasonableness*

The *DSE* explain that a reasonable adjustment will 'balance the interests of all parties affected'⁹² and that in deciding whether an adjustment is reasonable, 'regard should be had to all the relevant circumstances and interests'.⁹³ The following relevant circumstances and interests are specifically listed:⁹⁴

- (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;

⁸⁸ Ibid.

⁸⁹ Ibid cl 3.6(a).

⁹⁰ Ibid.

⁹¹ Ibid cl 10.2.

⁹² Ibid cl 3.4(1).

⁹³ Ibid cl 3.4(2).

⁹⁴ Ibid.

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

The survey results summarised in Table 1, above, showed that about half the respondent teachers are alert to the relevance to reasonableness of the impact of a student's disability (n=23) and the impact of an adjustment on outcomes for a student with disability (n=22). Less than 25% of teachers, however (n=10) recognised the relevance of the impact on others. None of the respondents appreciated the relevance of the cost of an adjustment as weighed against its benefits. The non-exhaustive list of relevant circumstances in the DSE indicates that the interests of the student must be weighed against the interests of 'anyone else affected'.

Clearly school staff, other students, and even the broader community are potentially affected. In *Sklavos*, for example, the impact on Dr Sklavos of not providing an alternative assessment was considered – not least of which was his inability to practice as a specialist dermatologist⁹⁵ – but so too was the potential impact on Dr Sklavos's future patients if he were allowed to practice as a dermatologist without having completed written examinations.⁹⁶ The effect of an adjustment on the education provider, who will bear the burden of the cost of that adjustment, is also relevant. The 'cost' of an adjustment should account for the staff time applied to its development and implementation. Again, the facts of *Sklavos* provide an example of a situation where the cost of making an adjustment to assessment was found to have outweighed its benefits. The College of Dermatologists had expended significant resources in developing an appropriately rigorous assessment regime for aspiring dermatologists and the Full Federal Court ultimately agreed with the College that insistence on that regime was 'reasonable' and development of an alternative regime for Dr Sklavos, a 'difficult and time-consuming task',⁹⁷ was not reasonable.

Another very important circumstance relevant to reasonableness is the effect of a proposed adjustment on the integrity of the assessment task. The *DSE* stipulate that, in assessing reasonableness, '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'.⁹⁸ A reasonable adjustment, therefore, would not allow a diminution of the difficulty of an assessment item. Such an adjustment would raise the issue of unfairness to other students required to complete a more-difficult task.⁹⁹ Consistent with case law decided before the *DSE* came into force,¹⁰⁰ the *DSE* suggest that maintenance of academic integrity is particularly important when an education provider is certifying to the world at large that a student has acquired particular knowledge or skills to a stated level of achievement:

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

⁹⁵ *Sklavos* (n 17) 271 (Bromberg J).

⁹⁶ *Ibid* 296 (Griffiths J).

⁹⁷ *Ibid* 265 (Bromberg J).

⁹⁸ *DSE* (n 1) cl 3.4(4).

⁹⁹ See *ibid* cl 3.2(4)(d).

¹⁰⁰ *W v Flinders University of South Australia* [1998] HREOCA 19; *Brackenreg v Queensland University of Technology* [1999] QADT 11.

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.¹⁰¹

Although the issue of academic integrity is not directly addressed in the *Sklavos* case, it is implicit in the reluctance of the College to depart from rigorously-developed assessment protocols that there was concern that Dr Sklavos should not be admitted to the College without demonstration of requisite competencies. As noted above, the potential impact on patients of allowing Dr Sklavos to treat patients without his competency as a dermatologist being appropriately assessed was a consideration for the Court.¹⁰²

(b) *Unjustifiable Hardship*

Even an adjustment which is assessed as ‘reasonable’ may not be required if it will impose unjustifiable hardship. The *DSE* position proof of unjustifiable hardship as an exemption from a requirement to make a reasonable adjustment: ‘the provider must comply with the Standards to the maximum extent not involving unjustifiable hardship’.¹⁰³ It is undeniably confusing for those tasked with implementing reasonable adjustment, however, that unjustifiable hardship operates differently in the *DDA*. There it is both an exemption from discrimination¹⁰⁴ and the limit on ‘reasonableness’ for reasonable adjustment. It is also confusing that the relevant circumstances for proof of unjustifiable hardship overlap with the relevant circumstances for determination of reasonableness. The *DSE* adopts the definition of unjustifiable hardship in the *DDA*.¹⁰⁵ That definition again specifies that ‘all relevant circumstances’ must be considered, 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.¹⁰⁶

The legislation indicates, then, that determining both reasonable adjustment and unjustifiable hardship will require an education provider to look specifically at the nature of the student’s disability, the effect of the adjustment on the student with disability and on others in the student’s education community, and the cost of delivery of the adjustment relative to the resources of the education provider.

In practice, it is reasonable to infer that the determinations as to reasonableness and hardship will be made contemporaneously despite the exhortation of the *DSE* that ‘[i]t is only when it has been determined that the adjustment is reasonable that it is necessary to go on and consider, if relevant, whether this would none-the-less impose the specific concept of unjustifiable hardship on the provider’.¹⁰⁷ Indeed, in the *Sklavos* case, the

¹⁰¹ *DSE* (n 1) cl 3.4 note.

¹⁰² See n 96.

¹⁰³ *DSE* (n 1) cl 10.2(3).

¹⁰⁴ *DDA* (n 20) ss 11, 29A.

¹⁰⁵ *Ibid.*

¹⁰⁶ *DDA* (n 20) s 11.

¹⁰⁷ *DSE* (n 1) cl 3.4 note.

Full Federal Court found that a determination of unjustifiable hardship ‘trumped any consideration’ of the matters relevant to reasonable adjustment in *DSE* s 3.4.¹⁰⁸

IV CONCLUSION

The Interim Report of the Disability Royal Commission noted, grimly, that a ‘lack of adjustments, supports and individualised planning, or poor implementation of the same, will often mean that the student with disability is not receiving a safe, inclusive and quality education and is therefore experiencing educational neglect’.¹⁰⁹ Both pre-service and regular in-service training should ensure that teachers have a good understanding of their obligations under the *DSE*. The complexity of the drafting of the *DDA* and *DSE* relevant to reasonable adjustment and unjustifiable hardship is likely a reason that reasonable adjustment is not always understood or implemented appropriately. This article has demonstrated, however, that the terms of the *DSE*, and relevant case law, do provide guidance for school staff to understand legal obligations to the extent necessary to implement a system of managing reasonable adjustment to assessment which maximises student inclusion and minimises the potential for ‘educational neglect’, discrimination and litigation.

There is clarity as to the types of adjustments to assessment that might be required by the law. There is clarity also as to the process involved in determining and implementing reasonable adjustment. It is fair, cautious, and appropriate for that process to be standard for all students with disability, structured consistently with the 3-step process outlined in the *DSE* and explained in *Sklavos*. There is also some case law guidance as to the parameters of ‘reasonableness’ and ‘hardship’. It should not be forgotten, however, that in respect of reasonableness and hardship, treatment should not be ‘standard’. Every case will turn on its facts, and on the relevant circumstances raised by those facts. Each student with disability is different, and the circumstances relevant to the education of each student will be different. As such, it is impossible, and improper to try, to standardise the ‘reasonable adjustments’ that will be made for particular categories of impairments. Differentiation of assessment must be individualised for each individual student, placing a time-consuming and demanding burden on school staff, but delivering undeniable benefits to school students. The law is alert to those competing impacts and the process of managing the determination and implementation of reasonable adjustment allows both the burdens and benefits to be balanced for ‘anyone...affected’,¹¹⁰ ‘all concerned’.¹¹¹

¹⁰⁸ *Sklavos* (n 17) 297 (Griffiths J).

¹⁰⁹ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (n 11) 202.

¹¹⁰ *DSE* (n 1) cl 3.4.

¹¹¹ *Ibid* cl 10.2.

APPENDIX A

Survey Questions: Teacher Knowledge of the Disability Standards for Education

<i>Question 1</i>	<i>What do you know about the Disability Standards for Education? (4 options)</i>
Question 2	Have you had opportunities to participate in professional learning about the DSE? What types of professional learning about the DSE have you had?
Question 3	Do you understand the definition of disability that applies to DSE (taken from the Commonwealth <i>Disability Discrimination Act 1992</i>)?
Question 4	Are you confident about your knowledge of your legal obligations under the DSE?
Question 5	How well prepared do you feel to develop adjustments for classroom assessments for students with disability?
Question 6	What is your overall comfort level with your ability as a teacher to implement adjustments in classroom assessments for students with disability?
Question 7	To what extent is your comfort level affected by the nature of the student's disability?
Question 8	To what extent is your comfort level affected by the subject in which the assessment adjustment is occurring?
<i>Question 9</i>	<i>What factors have you considered/would you consider relevant in deciding whether an assessment adjustment was reasonable? (Open response)</i>
Question 10	Please comment on any or all of the above questions about your practices in differentiating classroom assessments for students with disability through adjustments. What do you see as the main issues for teachers?

APPENDIX B

Background and Teaching Contexts of participant ACAP teachers (n=42)

TEACHER BACKGROUND			SCHOOL CONTEXT		
	n	%		n	%
Age			Year level taught		
Under 25	4	9.5	Year 3-6	1	2.4
25-34	13	31.0	Year 7-10	38	90.5
35-44	6	14.3	Year 11-12	25	59.5
45-54	15	35.7	Other	1	2.4
>54	4	9.5	Curriculum area*		
Gender			English	22	52.4
Male	9	21.4	Humanities and social science	16	38.1
Female	32	76.2	Mathematics	10	23.8
Other	1	2.4	Sciences	10	23.8
Years of experience			HPE	1	2.4
< 5 years	13	31.0	Arts (performing, creative, visual)	1	2.4
6-10 years	10	23.8	Religion	4	9.5
11-15 years	7	16.7	Home economics	1	2.4
16-20 years	7	16.7	Manual arts	1	2.4
> 21 years	5	11.9	Other	3	7.1
Highest level teaching qualification			* Teachers could nominate more than one curriculum area.		
Diploma	4	9.5	Sector		
Bachelor's degree	24	57.1	Government	14	33.3
Post-grad. cert/dip	8	19.0	Independent	11	26.2
Master's degree	6	14.3	Catholic	16	38.1
Employment status			Missing	1	2.4
Continuing	33	78.6			
Fixed term for 1 year or less	9	21.4			