

REASONABLE ACCOMMODATION OF UNIVERSITY STUDENTS WITH DISABILITIES

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ABSTRACT

University students with a disability have a right to education, including equal access to facilities, services and programs, and not to be discriminated against on the grounds of disability. An educational institution, therefore, has a duty to provide a student with a disability with reasonable accommodation or reasonable adjustment to ensure they are able to fully participate in tertiary education. However, in order to provide reasonable accommodation students and staff need to be aware of their legal rights and responsibilities in this regard. This article examines the scope and meaning of the concept of reasonable accommodation with reference to case law. The article focuses on three key aspects: (a) the legal meaning of the terms disability and reasonable accommodation; (b) the types of accommodation; and (c) the key issues of undue hardship, academic integrity and disclosure.

I INTRODUCTION

University lecturers will often receive requests from their students for an extension of time for assessments, deferred examinations, alternative assessments and even different study material. Requests by students appear to be more prevalent at examination time and when submission deadlines for assessments are due. Such requests are often based on medical grounds or a disability and are often made without supporting medical documentation or prior notice of the student's disability. It is, therefore, not surprising that many such requests are refused, resulting in potential complaints, appeals and grievances.¹ However, students with a disability have a right to education, including equal access to facilities, services and programs, and not to be discriminated against on the grounds of disability. An educational institution, therefore, has a duty to provide a student with a disability with reasonable accommodation to ensure they are able to participate in education. The question addressed in this article is what constitutes reasonable accommodation of university students with a disability. The article focuses on three key aspects: (a) the legal meaning of the terms disability and reasonable accommodation; (b) the types of accommodation; and (c) the key issues of undue hardship, academic integrity and disclosure. In so doing, the article reviews applicable legislation and case law.

II THE LEGISLATIVE FRAMEWORK

There are many students with a range of disabilities attending universities across Australia. Although there is little statistical data available, it is reported that students with disabilities in university study doubled over a ten year period: from 11 656 students in 1995 to 27 661 students in 2005.² Students with a disability have a right to education and to be protected against unlawful discrimination. The legal framework that seeks to protect and promote the educational rights of students with disabilities comprises international and national legislation, educational standards and institutional policies.

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1 As a lecturer and previous Head of School the author has dealt with numerous student complaints and appeals in this area.

2 Australian Disability Clearinghouse on Education and Training, *Statistics related to students with disability in university and VET* <<http://www.adcet.edu.au/View.aspx?id=3931>> 20 October 2009.

The starting point is the *United Nation Convention on the Rights of Persons with Disabilities* (2008)³ (the Convention) that seeks to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’⁴ The Convention does not specifically define the meaning of disability, but states that ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’⁵ The Convention is ‘intended as a human rights instrument with an explicit social development dimension’ and therefore it ‘clarifies and qualifies how all categories of rights apply to persons with disabilities’⁶ including the right to education. Pursuant to Article 24:

States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning...

Article 24(5) further provides that

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

States signatories are obliged to introduce measures that promote the human rights of persons with disabilities; this includes introducing anti-discrimination legislation and eliminating laws and practices that discriminate against persons with disabilities. The Convention was ratified by Australia in July 2008.⁷ In a press release, the Commissioner for Human Rights, Graeme Innes, stated that the ‘ratification of the Convention on the Rights of Persons with Disabilities is a symbolic commitment to equal enjoyment of human rights for Australians with disability’ and that

[w]e must strive to remove barriers to physical and information access, ensure equal opportunity—not just in theory, but in practice—in employment and education, as well as address the severe inadequacies in supports and services for many people with disability and their families.⁸

The *Disability Discrimination Act 1992* (Cth) (the DDA),⁹ which gives effect to the Convention,¹⁰ makes it unlawful for an educational authority to discriminate against someone because that person has a disability.¹¹ A person with a disability has a right to study at any educational institution in the same way as any other student. If a person with a disability meets the essential entry requirements, then educators must make changes or ‘reasonable adjustments’ (discussed below) if that person needs them to perform essential

3 Opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).

4 *United Nation Convention on the Rights of Persons with Disabilities* (2008) art 1.

5 *Ibid.*

6 United Nations Enable, *Convention on the Rights of Persons with Disabilities* <<http://www.un.org/disabilities/default.asp?navid=12&pid=150>> at 7 October 2010.

7 Robert McClelland, Stephen Smith, Bill Shorten, ‘Australia ratifies UN Disability Convention’ (Joint Media Release, 18 July 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_18July2008-AustraliaRatifiesUNDisabilitiesConvention> at 7 October 2010.

8 Australian Human Rights Commission, ‘A great day for Australians with disability, but there is still much to achieve’ (Media Release, 18 July 2008) <http://www.hreoc.gov.au/about/media/media_releases/2008/74_08.html> at 6 October 2009.

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

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

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

coursework. Reasonable adjustments may be required to avoid direct and indirect discrimination.

Under the DDA, direct discrimination means to treat a person less favourably, because of his or her disability, than a person without that disability would be treated in the same or similar circumstances.¹² Indirect discrimination occurs when the same treatment applies to people with and without a disability, but the impact is to disadvantage or exclude people with a disability in a way that is not reasonable.¹³ Section 6(2) of the DDA, relating to indirect discrimination, provides that a person (the discriminator) also discriminates against another person (the aggrieved person) on the grounds of a disability of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

In the case of *Hinchliffe v University of Sydney* (discussed below), the difference between direct and indirect discrimination was explained as follows, citing Dawson and Toohey JJ in *Waters v Public Transport Corporation* (1991) 173 CLR 349 (at 392):

Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such 'equal' treatment is that the former is in fact treated less favourably than the latter. The concept of indirect discrimination was first developed in the United States in relation to practices which had a disproportionate impact upon black workers as opposed to white workers: *Griggs v. Duke Power Co.* (1971) 401 US 424. Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.¹⁴

The Australian Disability Standards for Education (2005) (the Standards) are subject to the objects of the DDA. The Standards clarify and elaborate the legal obligations in relation to education. Under s 32 of the DDA, it is unlawful for a person to contravene the Standards. They apply to Commonwealth, State and Territory institutions as well as private educational institutions. The Standards cover matters such as enrolment; participation; curriculum development, accreditation and delivery; student support services; and the elimination of harassment and victimisation. The Standards set out a process to ensure that 'students with disability are provided with opportunities to realise their potential through participating in education and training on the same basis as other students.'¹⁵

12 *Disability Discrimination Act 1992* (Cth) ss 5, 6.

13 *Ibid.*

14 *Hinchliffe v University of Sydney* [2004] FMCA 85 (17 August 2004) [50].

15 Australian Disability Standards (2005) iii.

In addition to the DDA and the Standards, all Australian States and Territories have anti-discrimination laws that include disability or impairment as one of the grounds of unlawful discrimination and which apply to the education sector.¹⁶

The disability and equal opportunity legislation and the Standards provide the framework for universities to develop appropriate policies and procedures to ensure that the required legal obligations and standards are implemented in practice and to ensure that students with a disability are able to access and participate in university education.

III DEFINING DISABILITY

Before considering what constitutes reasonable accommodation, it is necessary to clarify the meaning of disability and, therefore, the body of students who are entitled to educational adjustments for the purpose of their studies.

The DDA defines 'disability' as:

- a total or partial loss of the person's bodily or mental functions;
- a total or partial loss of a part of the body;
- the presence in the body of organisms causing disease or illness;¹⁷
- the presence in the body of organisms capable of causing disease or illness;
- the malfunction, malformation or disfigurement of a part of the person's body;
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.¹⁸

The definition is broad and covers a wide range of disabilities whether physical, psychiatric, sensory or intellectual. Moreover, a disability does not have to be permanent. For example, a student with a broken arm has a temporary disability and falls within the definition. In many cases, a student's disability is unambiguous because there is clear medical evidence. The disability may be an obvious physical disability or an identifiable disability such as Meniere's disease, dyslexia, Asperger's syndrome or attention deficit disorder. However, a student's disability can often be vague and ill-defined with no obvious sign or diagnostic evidence of a disability, but the student nonetheless seeks accommodation based on that disability. These students will usually fall within the category of 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.'¹⁹ For example, a student who has lost a loved one and is unable to concentrate on their work may fall within this category. The fact that the disability is not obvious, or subject to precise definition or evidence, does not preclude the student from reasonable accommodation. In *W v Flinders University of South Australia*, which is discussed in more detail below, Commissioner McEvoy held that

I have found that the complainant does have a disability and I am satisfied, despite the lack of precise evidence relating to the nature of her disability, that it is a disability which comes within the definition provided in section 4(1): that is, that the complainant has a disability in the nature of 'a disorder, illness or disease that effects a person's thought

16 *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1996* (NT).

17 This definition covers diseases and illnesses such as HIV/AIDS and other communicable diseases. Swine flu would also fall within this definition. It is not, however, discriminatory to isolate a person with a disease or illness that threatens the health and safety of others, such as in the case of swine flu.

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

19 *Ibid.*

processes, perception of reality, emotions or judgment or that results in disturbed behaviour’...²⁰

IV WHAT IS MEANT BY REASONABLE ACCOMMODATION?

If a student has a disability, he or she is entitled to ‘reasonable accommodation’ or ‘reasonable adjustment.’²¹ A university’s duty to provide reasonable accommodation to students with a disability is pivotal to students being able to access and participate in education and not be discriminated against. The question is: what constitutes ‘reasonable accommodation’ or ‘reasonable adjustment’? Article 2 of the *United Nations Convention on the Rights of Persons with Disabilities* states that reasonable accommodation means

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The DDA as amended provides that an ‘adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person’ (the discriminator).²² The exception of hardship is discussed further on. The Standards expand on this definition. In the area of education, the Standards state that an adjustment is:

a measure or action taken by an education provider to assist a student with a disability to participate in education and training on the same basis as a student without a disability.²³

An adjustment is *reasonable* if ‘it balances the interests of all parties.’²⁴ The balancing factors include:

- the nature of the student’s disability;
- the effect of the adjustment on the students and others;
- the cost and benefits of making the adjustment;
- the academic requirements and integrity of the course; and
- if it would be less disruptive than intrusive adjustments.²⁵

These factors are highlighted in the following discussion on types of accommodation and within the context of the case examples provided.

V TYPES OF ACCOMMODATION OR ADJUSTMENTS

The types of accommodation or adjustments relevant to an educational institution include modifying educational premises; changing or modifying course participation, delivery and assessment; and providing certain equipment and teaching aids. The type of adjustments will depend on the nature of the disability and the circumstances, and are decided on a case-by-case basis. These types of adjustments are considered in more detail below with reference to case law. The material facts of the cases are provided in some detail as this goes to the personal circumstances and experiences of the students concerned, and the basis of reasonable accommodation and of claims of discrimination.

20 *W v Flinders University of South Australia* [1998] HREOCA 19 (24 June 1998) [6.2].

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

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

23 Disability Standards for Education (2005) s 3.3.

24 Disability Standards for Education (2005) s 3.4.

25 *Ibid.*

A Modifying Educational Premises

Students with a disability have a right to access educational services, which includes physical access to premises. Students with a disability, in particular students with physical disabilities, may require the premises to be modified to gain access to facilities. A common example is the construction of ramps for wheelchair access or installing automatic sliding doors. Access to premises is covered by s 23 of the DDA, which makes it unlawful for a person to discriminate against another person on the grounds of the other person's disability in relation to a number of issues concerning access to premises. The term 'premises' is defined in s 4 and includes educational institutions. However, discrimination is not unlawful under s 23 where it can be shown that removing a barrier to access would impose unjustifiable hardship. Access to²⁶ and the modification of educational premises is illustrated in the following cases.

The Human Rights and Equal Opportunity Commission (HREOC) case of *Kinsela v Queensland University of Technology*²⁷ dealt with the issue of physical access to a graduation venue. The student claimed discrimination on the basis that he was not able to participate in the graduation ceremony. The student, who was a quadriplegic and used a wheelchair, claimed that 'he would be unable to graduate alongside his fellow students due to difficulties with accessibility at the venue chosen for the ceremony.'²⁸ In order for the student to take full part in the degree ceremony with the other students, he would have to use steps. Although the university had taken measures to make the venue more accessible, the venue had 'a number of inherent limitations and [the university was] unable to make the venue completely accessible to the complainant.'²⁹ The Commissioner noted that

in weighing up then what is reasonable under sub-section 6(b) of the Act [indirect discrimination], I have had to have regard to the factors on both sides, and in the end, as I have said, the weight of the evidence suggests that it is not reasonable to require the use of steps to fully participate in a graduation ceremony.³⁰

The Commissioner considered the cost and administration involved in organising a graduation ceremony and the inconvenience of finding an alternative venue. However, these factors did not outweigh the importance of Mr Kinsela being able to participate in the processional and recessionary marches, to sit with his fellow graduands during the graduation ceremony and to progress with his fellow graduands from the body of the hall to the stage for the actual presentation of the degree.³¹ In finding for the complainant, the Commissioner made a declaration that 'the respondent provide or arrange for the provision of facilities for the complainant's graduation ceremony that will enable the complainant to participate in that graduation ceremony in the same way that able-bodied persons will participate.'³² To this end, the respondent could choose another venue for the all the graduation ceremonies or it could choose to hold some of the ceremonies at another venue that would accommodate the complainant.

In contrast, in *Sluggett v Flinders University of South Australia*,³³ another case heard before HREOCA, the Commissioner applied the unjustifiable hardship exemption. The

26 The Australian Human Rights Commission declined a complaint on behalf of a woman with a mobility disability requiring her to use a wheelchair. She alleged that she had been discriminated against by a proposed move of her tertiary education campus to a location further from her home and more difficult to travel to. The delegate of the Commissioner declined the complaint. There had been no less favourable treatment on the basis of disability (since the campus would be moved for everyone) and hence no direct discrimination; at http://www.hreoc.gov.au/disability_rights/decisions/decline/decline_education.html.

27 *Kinsela v Queensland University of Technology* [1997] HREOCA 5 (24 February 1997) [2].

28 *Ibid.*

29 *Ibid* [3].

30 *Ibid* [20].

31 *Ibid* [30].

32 *Ibid* [34].

33 *Sluggett v Flinders University of South Australia* [2000] HREOCA (14 July 2000). The decision was upheld on appeal in *Sluggett v Flinders University of South Australia* [2003] FCAFC 27 (5 March 2003).

facts of the case are as follows. The student was a postgraduate student at the university. As a child she suffered from polio and subsequently she walked with a limp. While studying she experienced health problems, which included shortness of breath, chest pain and muscular weakness, particularly in the legs, and was diagnosed with post polio syndrome. She informed her lecturers who accommodated her by permitting her to submit work late. However, in 1993 the student failed three of the four subjects she was required to pass. She applied for her papers to be remarked, which was granted, but she still failed. She then appealed to the Students Appeal Committee who dismissed the appeal. The Committee considered that the School of Social Administration had made special allowances for Ms Sluggett, but the School had not been advised of the true nature of her condition, namely post polio syndrome, until after the due date for the work to be submitted. Thereafter, the student lodged a complaint with HREOC claiming that the university had discriminated against her contrary to the *Disability Discrimination Act 1992* (Cth). Her complaint was that she received less favourable treatment in access to services; harassment by university staff on the grounds of disability; difficulties in accessing the university campus; and had difficulties in accessing her office in a university supervised work placement (the Health Service in the City of Adelaide). The key issue was whether the university had provided adequate accommodation, taking into consideration the physical location and nature of the premises.

The respondent university has a large campus situated on a steep site with premises constructed on several levels with considerable distances between locations. It was acknowledged that Ms Sluggett had to walk relatively long distances and use stairs to get to her classes and work placement. However, it was accepted that the facilities and premises were adequate given the extent of disabilities as disclosed by the appellant. Moreover, it was possible to access the lecture theatres and other classrooms without needing to climb any stairs. The university provided lift access, but Ms Sluggett did not avail herself of the alternative routes at the university or in the Health Service. The Commissioner noted that

there is no doubt Ms Sluggett had difficulty in getting around the university premises because of her disability, and faced difficulties at the Health Service with the stairs because of her disability. However, that she faced difficulties and had to negotiate stairs, doors and distances in walking, does not necessarily lead to the conclusion the respondent has discriminated against her in relation to the provision of means of access to the premises.³⁴

While the available access routes were not necessarily ideal or the most convenient, the Commissioner held that the respondent could not alter the nature of the site of its premises or make modifications to improve access. It was held that

... many of the aspects of the premises which were difficult for Ms Sluggett are unable to be addressed by the respondent because of their physical nature. The respondent cannot alter the nature of the site of its premises, and modification to address the access issues referred to by Ms Sluggett at the hearing is, if not impossible, impractical and unreasonable (even were they properly to be regarded as presenting an inappropriate barrier to a person with disabilities). Addressing these aspects by the respondent would require very significant outlays of money. In particular, the provision of additional lift access, in addition to lifts already existing throughout the University, would be very expensive. There was no evidence before me as to cost, but I accept it would be very significant indeed. The installation of automatic doors would be disruptive and costly. Ms Sluggett identified 16 doorways through which she had to go, and I am satisfied it would be difficult to replace all or perhaps even the majority of these (for financial and other reasons) with automatic doors.³⁵

34 *Sluggett v Flinders University of South Australia* [2000] HREOCA (14 July 2000) [5.2.2].

35 *Ibid.*

In addition to the issue of physical access, the Commissioner also took into account the fact that Ms Sluggett was well aware of the physical location of the campus and the nature of the facilities when she first enrolled at the university as an undergraduate student. Ms Sluggett had also not adequately informed the university or the School of the full extent of her disability and her academic needs so that they could provide her with more support:

Ms Sluggett did not at any stage provide the respondent with adequate or appropriate information which would have enabled the respondent to make alternative accommodations: in particular, alternative arrangements for the placement in the Health Service. Ms Sluggett was aware that, if she had significant difficulties such that the placement was not able to be successfully pursued, a different placement could have been arranged.³⁶

It was noted that Ms Sluggett had been provided with accommodations and that despite extensions and other accommodations, Ms Sluggett's work did not meet the required academic standards. It was thus held that the student's poor academic record was not a consequence of any difficulty of access to the premises, which the respondent could reasonably have addressed. On appeal, the Federal Court dismissed the application and upheld the decision of the Commissioner.³⁷

B Changing or Modifying Course Participation, Delivery and Assessment

Under the terms of s 22(2A)(a) of the DDA it is unlawful for an education provider to discriminate against a person on the grounds of the person's disability by developing curricula or training courses with a content that will either exclude the person from participation, or subject the person to any other detriment. Furthermore, the Standards provide that an education provider must 'take reasonable steps to ensure that the student [with a disability] is able to participate in the courses or programs provided by the educational institution ... on the same basis as a student without a disability, and without experiencing discrimination.'³⁸ Measures of complying with this Standard include ensuring that the course or program activities are 'sufficiently flexible' to enable the student to participate; providing additional support where necessary to enable the student to achieve the intended learning outcomes; and offering reasonable substitutes³⁹ for activities in which the student cannot participate.⁴⁰ For example, in one case a parent of a TAFE student with a learning disability lodged a complaint with the Human Rights Commission claiming that the student had been refused enrolment in a program and that the adjustments to accommodate his disability were not provided. The complaint was, however, resolved when the educational institution agreed to accept the student and develop a reasonable adjustment plan.⁴¹ An education provider is also required to ensure that the course or program is designed in such a way that students with a disability are able to participate and complete the program. Measures of compliance include ensuring that the curriculum, teaching materials and assessments are appropriate and accessible; making study materials available in a format that is appropriate for the student; and ensuring that assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed.⁴²

36 Ibid.

37 *Sluggett v Flinders University of South Australia* [2003] FCAFC 27 (5 March 2003).

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

39 See, eg, the US case *Guckenberger v Boston University*, 974 F Supp 106 (D Mass, 1997) involving a class action by students having attention-deficit/hyperactivity disorder and/or learning disabilities against Boston University claiming inter alia discrimination based on the university's failure to allow course substitutions for foreign languages.

40 Disability Standards for Education (2005) s 5.3.

41 Australian Human Rights Commission, *Conciliated outcomes: education 2007* <http://www.hreoc.gov.au/disability_rights/decisions/conciliation/education_conciliation.html> at 10 October 2009.

42 Disability Standards for Education (2005) ss 6.2, 6.3

Therefore, making reasonable adjustments to a course, and to the delivery of a course, is one of the more common types of accommodation made for students with physical and psychological disabilities. This may include providing study materials in advance and in different formats or providing alternative assessments; for example, allowing for different examination methods such as oral examinations, giving extra time for examinations and granting extensions for work to be submitted. However, a main consideration when making adjustments to a course is the impact the adjustments might have on the academic requirements and integrity of the course. This is an issue of particular concern for academic staff when called upon to make course adjustments. This involves balancing the needs of the student with a disability with the educational requirements and integrity of the course, as demonstrated in the following cases.

The decision in the case of *Bishop v Sports Massage Training School*⁴³ is equally applicable to university students and illustrates the circumstances where it might be reasonable to provide an alternative assessment or, at the least, an extension of time. In this case the complainant suffered from dyslexia, which falls within the definition of a disability. Mr Bishop claimed that the respondent made no allowances for his disability. In particular, Mr Bishop was required to complete the examination in the same two-hour period as the other students, who did not suffer from any disability. He was not given the option of an alternative oral examination. Mr Bishop had on several occasions informed staff of his disability and prior to the examination had attempted to submit a medical report. Mr Bishop failed the examination and subsequently lodged a complaint of discrimination under the DDA. The Commissioner held that the conduct amounted to indirect discrimination in the field of education and the complainant was awarded A\$3000. The Commissioner held that

the evidence in this case satisfies me that the respondent could easily have allowed the complainant a further half-hour to complete the examination and should have done so. On balance, I am also satisfied that the respondent could properly have offered the complainant an oral examination and, in all the circumstances, should have done so...⁴⁴

In *W v Flinders University of South Australia*,⁴⁵ the student, who was studying for a Bachelor of Education, complained that the respondent had discriminated against her on the basis of a psychiatric disability that affected her ability to study in not providing the reasonable adjustments needed to accommodate the disability and that the consequence of this discrimination was adversely affecting her academic record. In particular, the student complained that she was not given reasonable accommodation in respect of one of her subjects (Language/Arts II) and the required teaching practicum. The student had, for instance, failed a number of assessments and was unable to complete parts of the work that required oral presentations. She claimed that she was not permitted to resubmit work and that an extension of time was not granted for certain work. For the teaching practicum, the student claimed that no accommodation was provided to allow her to complete the teaching practicum over a different period of time. On evidence the Commissioner noted that quite considerable accommodation had been made by the university, which included allowing the student to write supplementary examinations, remarking work and allowing the student to resubmit work: 'These were quite significant accommodations both in terms of extensions for submissions of assignments and the reweighing and reorganisation of assessment.'⁴⁶ The student was also accommodated in respect of the teaching practicum:

All accommodations sought by the complainant in respect of the Teaching Practicum were acceptable to the University, other than the sequence in which she sought to undertake the Teaching Practicum: the University agreed that the complainant could undertake the Teaching Practicum on a part time basis extending over four days instead of five days per

43 *Bishop v Sports Massage Training School* [2000] HREOCA (20 December 2000).

44 *Ibid* [1].

45 *W v Flinders University of South Australia* [1998] HREOCA 19 (24 June 1998).

46 *Ibid* [5].

week, and the period of the Practicum to be extended by two weeks, but advised that she would be required to undertake the Practicum on four consecutive days per week, not on the fractured basis which she had sought.⁴⁷

The Commissioner accepted that the assessment and course requirements were reasonable in the circumstances of the case.

The issue of disclosure was also addressed. It was noted that the student had not identified her disability at any earlier stage to the respondent and nor did she do so at the inquiry. This made it difficult for the university to provide adequate and timely accommodation to the student:

Her circumstances clearly demonstrate many of the difficulties which persons with disabilities may face but I am satisfied that she was not discriminated against directly or indirectly by the respondent on the basis of her disability. I am satisfied that the complainant's difficulties in Language/Arts II in 1994 occurred because she submitted an assignment of inadequate academic quality and therefore failed the assignment, and then because of her disability, as yet undisclosed to her lecturer, was unable to perform part of her class work. However, the complainant chose to withdraw from that subject because she had failed a compulsory piece of the assessment. She did not seek an extension or to re-submit that assignment. None of these difficulties resulted from discrimination on the basis of her disability, although they may well have resulted from the disability itself.⁴⁸

The case of *Beanland v State of Queensland & Another*⁴⁹ that was heard in the Queensland Anti-Discriminatory Tribunal provides an example of academic adjustments that were sought in relation to changing the syllabus and assessment criteria, which is relevant to the university context. This case is also of interest because the secondary student concerned was planning to study law at university. A prospective student may not be discriminated against by 'refusing or failing to accept the person's application for admission as a student.'⁵⁰ However, a student is still required to meet the minimum course requirements, notwithstanding any reasonable adjustments made. In some cases, even if an adjustment is made it might still not necessarily address the disability. In *Beanland*, the parent wanted the assessment changed so that her son would not need to write: 'The syllabus would have to change for William. The requirement for William to read and write should not be in the syllabus. He should do his work just by listening and speaking.'⁵¹ The secondary school student suffered from cerebral palsy and cortical visual impairment. He attended Corinda State High School, where he successfully completed grades 8, 9 and 10. In 2005, the complainant and his parents held discussions with the school about the subjects he could take in grades 11 and 12. In particular, he wished to study Senior German and Senior English. Through prolonged discussions between the parents and the school, it was conveyed to the parents that the complainant would have difficulty meeting the reading and writing assessment requirements for Senior German and Senior English, as the complainant's impairment prevented him from being able to read and write. The complainant would be required to apply for special consideration for each and every item of assessment. The parent wanted to have the syllabus changed by the Queensland Studies Authority to remove the mandatory reading and writing requirements. The parent argued that 'you want William to read and write but he can't read and write. His ambition is to be a lawyer.'⁵² The parent was clearly anxious that her son should not be prevented from completing the necessary subjects and obtaining the required grades to enter university to study law. However, the school could not remove the mandatory requirements noting that '[i]n most subjects we can accommodate people with disabilities as there are a number of

47 Ibid.

48 Ibid [7].

49 *Beanland v State of Queensland* [2008] QADT 5 (9 April 2008).

50 *Disability Discrimination Act 1992* (Cth) s 22(1)(a).

51 *Beanland v State of Queensland* [2008] QADT 5 (9 April 2008) [30].

52 Ibid [48].

ways to assess knowledge and thought processes. However, in subjects such as English and German the essential parts are reading, writing, listening and speaking.⁵³ The school did, however, make some proposals for special considerations to be put in place, for example, by making use of a special computer set-up and software to aid reading and writing. The school had also recommended that the complainant take other subjects. Before the matter was resolved, the complainant left the school and enrolled at another school.

The student claimed discrimination based on impairment under the *Queensland Anti-Discrimination Act 1991* (Qld), which prohibits direct and indirect discrimination on the basis of an attribute, including impairment.⁵⁴ The Queensland Anti-Discrimination Tribunal dismissed the complaint. The Tribunal recognised that the complainant had an impairment but determined that the complainant had not been discriminated against, either directly or indirectly. The education authorities had not treated him less favourably than any other student. The Tribunal acknowledged the parent as a caring person who wanted the best for her son, but that her evidence did not accurately reflect what was claimed to have been said by the respondents at the various meetings. The documentary evidence also indicated that the parent had agreed that the complainant would take other subjects. It was further noted that the school had not denied special considerations; the complainant left the school before the special considerations had been finalised. The Tribunal dismissed the complaint.⁵⁵

C Providing Suitable Equipment and Teaching Aids

Providing equipment and aids, such as modifying equipment, lowering laboratory benches, enlarging computer screens and providing specific computer software,⁵⁶ is another means of ensuring students with a disability have access to education and are not prevented from meeting the course requirements.⁵⁷ Students may also be assisted by a reader or a scribe (an amanuensis) to help them with their reading and writing.⁵⁸ A number of cases have dealt with these issues.

*Hinchliffe v University of Sydney*⁵⁹ is a case dealing with the provision of equipment, teaching aids and study material in a suitable format. In this case Ms Hinchliffe, who was studying for a Bachelor of Applied Science (Occupational Therapy), was visually impaired and required the course material to be in a special format. The student claimed that the university indirectly discriminated against her on the basis that the university imposed on her a requirement or condition that impacted on her ability to do the work. It was claimed that the university had failed to provide her, in a timely manner, course material in the form of natural voice audio tapes or, alternatively, printed material on A4 paper in 22 or 24 point Arial font on light green paper with enlarged diagrams. The student was required to spend considerable time reformatting material. Initially the student indicated a preference

53 Ibid.

54 *Queensland Anti-Discrimination Act* (1991) (Qld) s 7.

55 *Beanland v State of Queensland* [2008] QADT 5 (9 April 2008) [74].

56 Australian Human Rights Commission, *D.D.A. guide: Getting an education* <http://www.hreoc.gov.au/disability_rights/dda_guide/getting/_getting_.html> at 6 October 2009.

57 In one instance a university student studying through distance education had notified the university disability officer that he had a disability and needed to have material provided in a format that was compatible with the JAWs screen reader program. However, the material he received was not compatible and he was not able to complete the course. He claimed that the university had discriminated against him by not providing course material in a format he could access. The university acknowledged that they had difficulties in providing the material and the matter was settled with the university paying the complainant compensation of A\$15 000; see Australian Human Rights Commission, *Conciliated outcomes: education* (updated October 2009) <http://www.hreoc.gov.au/disability_rights/decisions/conciliation/education_conciliation.html> at 27 October 2009.

58 For example, a deaf student being provided with an Auslan (Australian sign language) interpreter for lectures. See also *Clarke v Catholic Education Office* [2003] FCA 1085 (8 October 2003).

59 *Hinchliffe v University of Sydney* [2004] FMCA 85 (17 August 2004) .

for printed material, but in her second year she requested audio material when it became apparent that it was not practical or easy to enlarge volumes of course materials.

The key issues considered were the university's knowledge of the student's disability and requirements; the facilities actually provided by the university; and the detriment suffered by the student. There was no dispute that the student suffered from a disability. Moreover, it was clearly evident that the university was fully aware and informed of the student's disability and needs. However, it was noted that the student did not always make her needs known and did not complain about the lack of services or request additional assistance in collecting, copying or converting texts, especially in the first year of university. The university did not know of the applicant's preference for audio format until it was pointed out to the university.

In terms of the services provided it was noted that the university had provided Ms Hinchliffe with enlarged prints of the course material and audio material. She also had access to a disability services room containing computers, photocopier, scanner, printer and a stock of green paper. Ms Hinchliffe also at times had the services of a scribe and a reader. Although not all the material was provided in the preferred format and in a timely manner, it was acknowledged that most of the material was provided in good time and that it was unavoidable for some material to be provided in a piecemeal fashion because of the time it took to have it reformatted.

On the issue of whether the student suffered a 'detriment', the court acknowledged the difficulty the student had in reading printed material, the inconvenience for the student of having to reformat the material and the stress this caused. Nonetheless, it was held that the student was still generally able to comply with the course requirements and, in fact, had passed all her subjects with very good grades. The court concluded that the student had not been indirectly discriminated against. The university had done all that it reasonably could to accommodate the student and the student was able to meet the course requirements, notwithstanding the challenges the student faced because of her disability.

The case of *H v S*⁶⁰ deals with a somewhat different issue regarding access to facilities, but is instructive in illustrating issues relating to a student's disability and conduct. In this case the student claimed that access to computer facilities was denied on the basis of his disability. It was accepted that H suffered a personality disorder that was a 'disability' as defined by section 4 of the DDA in that H suffered total or partial loss of his mental functions; disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; and a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour. However, the respondent submitted that access had been restricted because of H's threatening and harassing behaviour, not because of his disability. In this case the 'comparator test' applied was 'whether H was treated less favourably than a hypothetical student who did what H did but lacked impairment.'⁶¹ To this end the Commissioner held that

I am satisfied that a person, who was not suffering a disability, who had approached staff in the same manner as H would have had the same restrictions placed upon that person as were imposed upon H. The fact that S imposed the restrictions of May 1994 upon H before either H or S knew that H suffered a personality disorder is strong evidence to support the proposition that H was treated no differently than would have been a person without the question of a disability.⁶²

The Commissioner was also satisfied that the respondent's actions did not constitute indirect discrimination as the 'actions taken to exclude H from certain areas of the

60 *H v S* [1997] HREOCA (23 July 1997).

61 *Ibid* [4].

62 *Ibid* [4].

premises of S and to prevent him from approaching members of staff after the complaints by staff members was reasonable having regard to the circumstances of the case.’⁶³

VI DISCUSSION ON KEY ISSUES

The preceding discussion on the types of accommodation and case examples highlights the key issues—unjustifiable hardship, academic standards and integrity, and disclosure—that are considered in determining whether or not a student has been discriminated against on the basis of a disability by failing to provide reasonable educational adjustments.

A Unjustifiable Hardship

Students with a disability may not be discriminated against in the area of education. Moreover, educational institutions are required to make reasonable academic adjustments as discussed above. However, there is no obligation to make *unreasonable* adjustments. As noted above, an adjustment is reasonable unless making the adjustment would impose an *unjustifiable hardship* on the provider. In relation to the area of education it is not unlawful for a ‘person (the discriminator) to discriminate against another person on the grounds of disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.’⁶⁴ If an adjustment is determined to be reasonable it may be necessary to enquire whether the adjustment is nonetheless likely to impose an unjustifiable hardship on the provider. In determining whether the adjustment amounts to an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial and other assistance to the first person; and
- (e) any relevant action plans given to the Commission under section 64.⁶⁵

Therefore, the academic adjustment should not create an undue burden on the institution. The Standards provide that ‘the concepts of reasonable adjustment and unjustifiable hardship seek to provide a balance between the interests of providers and others, and the interests of students with disabilities.’⁶⁶ The burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.⁶⁷ For instance, in the *Sluggert* case, the university terrain and the financial circumstances would have imposed a significant hardship on the university. However, in *Kinsela*, the financial burden and administrative inconvenience of finding an alternate venue for a graduation ceremony were not considered to impose an unjustifiable hardship.

B Academic Standards and Integrity

Students with disabilities are required to meet the same academic requirements that all students are required to meet. As noted in the cases above, a key issue in determining whether or not the failure to make an educational adjustment amounts to direct or indirect discrimination, is whether the adjustment impacts on the academic standards and integrity

63 Ibid.

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

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

66 Australian Disability Standards (2005) s 10.

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

of the course. In *W v Flinders*, discussed above, the Commissioner stated the following in relation to the preservation of academic integrity:

The University, in requiring compliance with a requirement or condition related to the subjects presented for a degree in Bachelor of Teaching, must structure the curriculum of those courses and assess them with integrity so that those on whom the degree is conferred can hold themselves out as having the appropriate knowledge, experience and expertise implicit in the holding of the particular degree. It is (in part) in this respect that the University must maintain the academic integrity of all its courses and although it must provide appropriate accommodations to persons with disabilities so that they are not thereby precluded from undertaking such studies as they choose at University, this does not of course mean that the university is obliged to forgo the academic requirements of its courses for people with disabilities. It is these considerations which must be taken into account in considering what is “reasonable having regard to circumstances of the case”. The circumstances of this case include the consideration that the requirement or condition relates to assessment leading to the conferral of a degree. Among the circumstances to be taken into account therefore are those which relate to the issue of academic integrity.⁶⁸

Generally courses have specific course requirements and learning outcomes that are essential to the course and which students must meet in order to be accredited with a pass. If educational adjustments are sought that result in one or more of the requirements or learning outcomes not being met or being fundamentally changed, this may compromise the integrity of the course. In many cases reasonable adjustments can be made that do not negate academic standards and integrity, especially where there is more than one way in which to meet the requirements and achieve the learning outcomes. However, in some cases the adjustment required is such that it would not be possible to achieve the learning outcomes of the course, as illustrated in the *Beanland* case.⁶⁹ In considering the integrity of a course or subject, due consideration would need to be given to the nature and purpose of the course, the curriculum and, importantly, key learning outcomes. The types of assessment and assessment criteria also need to be considered. A key question is whether a student with a disability can meet the learning outcomes by learning in a different format and undertaking different assessments. In the *Beanland* case, written assessments were a *sine qua non* for meeting the learning outcomes and requirements for a language subject. Moreover, the fact that the student intended studying law would necessarily require the student to be able to write. In some cases even if an adjustment is made it would not necessarily overcome the disability.

C Disclosure of a Disability

All universities in Australia are likely to have a disability office to oversee the university’s policy and procedures on disability and offer a range of services to students with a disability. Students are expected to be informed about the services provided by the university and should be encouraged to provide the university with information about their disability so that students may be accommodated. However, there is generally no obligation on students to disclose a disability and they cannot be compelled to do so. The DDA and the Standards do not contain any provisions directly on disclosure of disability.

In many cases the situation is straightforward as the student clearly has a disability and has even informed the university on enrolment. Other students have no overt or obvious disability and, therefore, unless the student discloses that information it is not possible to provide assistance. A problem arises when students request special accommodation after

68 *W v Flinders University of South Australia* [1998] HREOCA 19 (24 June 1998) [6.4.3].

69 This is illustrated in the US case of *Southeastern Community College v Davis*, 442 US 397, 413 (1979). The respondent was hearing impaired and could only follow speech by lip-reading. She was denied admission to the nursing program on the basis of her disability. The College found that it would be unsafe for her to practice nursing. The student requested that she be allowed to take the academic courses but be exempted from participating in the clinical training program. The Court held that such an adjustment (accommodation) constituted a fundamental modification to the course and was not reasonable.

the fact, for example, after an assessment has been submitted or an examination has been completed. If no accommodation or adjustment is made to accommodate their needs, only then do they claim disability. Where a student has not disclosed a disability, teaching and other staff are not responsible for providing educational related adjustments. Although students cannot be compelled to disclose a disability, they do have a responsibility to provide the university with sufficient information if they expect the university and academic staff to make adjustments in order to accommodate their disability. Students cannot reasonably expect universities to provide reasonable and appropriate accommodation if they are not properly informed. Therefore, students need to provide sufficient documentation, including medical reports, for the university to assess the needs of the student.

There is also the issue of whether the university ought to have known about a student's disability and, therefore, is reasonably expected to make further enquiries in order to assist the student. It is unlikely that a duty will be imposed on a university to make enquiries where there is no reason to believe the student has a disability. However, if a student has an obvious disability or if the university has some knowledge of the student's disability, the university may be expected to make further enquiries and to provide accommodation.

A further difficulty may also arise when the student with a disability discloses information to a university counsellor or disability officer but not to the academic staff member who may be called upon to make educational adjustments. In such cases the academic staff member might refuse to accommodate the student if they do not have adequate information to make an informed decision about the nature of the adjustment. The question then is: who should decide on whether or not an adjustment must be made and what that adjustment should be? An example of this is illustrated in the following situation.⁷⁰ A student had requested significant adjustments to be made to the assessment of a course based on a disability. However, the student did not disclose the disability and provided no evidence of the disability to the lecturer concerned. The request was declined. The student then obtained a letter from a university counsellor requesting accommodation; however, there was still no explanation or evidence provided to the lecturer. Therefore, it was not possible for the lecturer to determine whether or not the adjustments that were sought were reasonable or appropriate, and since the adjustments impacted on the integrity of the course the request was again declined. On further investigation and consultation it was established that the student did have a disability that fell within the definition of a 'disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.'⁷¹ However, the educational adjustments that the student was seeking were not appropriate given the nature and scope of the disability. Through a process of consultation with all the parties concerned a suitable adjustment was made to accommodate the student's disability and at the same time maintain the integrity of the course. Although it may be the responsibility of a university's disability services to decide on whether or not a student is entitled to reasonable accommodation, it should ultimately be the academic staff, in consultation with the student, who decides whether or not the educational adjustment in relation to the course and assessments is reasonable.

A real concern for some students with a disability is the issue of maintaining confidentiality and privacy. If a student does choose to disclose a disability they have a right to confidentiality and their personal information is protected under the *Privacy Act 1988* (Cth) or relevant State freedom of information legislation.⁷² Students nonetheless need to feel confident and secure in the knowledge that confidentiality will be maintained.

70 Personal and confidential communication with a student.

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

72 See, eg, *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (Vic); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1991* (SA); *Personal Information Protection Act 2004* (Tas); *Information Act 2002* (NT); *Privacy Act 1988* (ACT).

Students may also be concerned about being stigmatised or discriminated against if they disclose their disability, or that it will not necessarily be to their advantage. This was certainly the case of one student who was diagnosed with a learning disability. The student had not disclosed his disability as he did not 'want to be treated differently' and he was concerned that information would not be confidential.⁷³ The student came to the attention of the academic department when the student had failed the semester and was facing termination from his studies. When the student's academic record and the possibility of termination were discussed with the student, it was only then that he disclosed his disability and provided the medical reports. As a result of this, certain strategies were put in place and adjustments were made to accommodate the student's disability that in no way impacted on the integrity of the course. Through this intervention the student passed the following semester and has made steady progress towards the completion of his course. Similarly, a university student who was colour-blind lodged a complaint with the Human Rights Commission submitting that the lecture notes provided by the lecturer in one of his technical courses were on red paper in 10 point font and he was not able to read them because of his disability. However, the complainant conceded that he could have 'obtained the assistance made available to all students with downloading the computer notes, and that he could have visited the lecturer's office to collect the more accessible notes'. However, he stated that he did not do so because he was 'embarrassed about his disability being made more conspicuous and that it was the responsibility of the university to provide reasonable adjustment for vision-impaired students like himself without them having to draw attention to their differences because of their disability.'⁷⁴ The matter was resolved by the university agreeing to a pass in the subject. When dealing with students with disabilities, it is important to be aware of and sensitive to their concerns about privacy and how they may be perceived or treated by others if information about their disability is disclosed. In this regard, the Standards support the right of students not to be harassed and victimised. Actions may not be taken that are likely to 'humiliate, offend, intimidate or distress the person' and an education provider must 'develop and implement strategies to prevent harassment or victimisation.'⁷⁵

VII CONCLUSION

Students with disabilities have a right to education and a right not to be discriminated against in terms of access to education, the services provided and the courses offered. A person with a disability may seek admission to a university on the same basis as a prospective student without a disability. Universities are required to comply with the relevant federal and State legislation and disability standards for education. To this end, universities have their own policies and procedures for ensuring compliance, and it is important for universities to ensure that these are readily available and accessible to students with disabilities. Students with disabilities need to be encouraged to disclose their disability and in so doing be secure in the fact that confidentiality and privacy will be maintained.

Students, however, do need to be aware that the university may not be able to meet their educational needs and make 'reasonable adjustments' if they do not provide the university with sufficient information. It is therefore important for all parties concerned—the student, university disability officer and academic staff—to be involved in the consultations and discussions about the adjustments that need to be made in order to accommodate the needs of students with disabilities. In deciding on the adjustments, consideration must be given to

73 Personal and confidential communication with a student with a learning disability.

74 Australian Human Rights Commission, *Conciliated outcomes: education, Access to lecture notes* (2003) (updated October 2009) <
http://www.hreoc.gov.au/disability_rights/decisions/conciliation/education_conciliation.html> at 9
October 2010.

75 Disability Standards for Education (2005) ss 8.1, 8.3.

the nature of the student's disability, the type of adjustment required, the potential costs involved in making the adjustment, and the inherent requirements of the course. Universities are not compelled to provide educational adjustments if it will impose too great a hardship on the university. Therefore, the needs of the students are balanced against the capacity of the university to make the adjustment. This is particularly relevant with respect to adjustments requiring significant modifications to facilities and infrastructure. Generally, the most common adjustments sought by students with disabilities are changes to course materials and course assessments. Typically students will ask for alternative assessments, more time to submit work and additional examination time. Whether or not the adjustment is reasonable will depend on the nature of the disability, the course requirements and learning outcomes. Therefore, it is important for courses and assessments to be designed with clearly articulated requirements, learning outcomes and assessment criteria that do not discriminate against students and upon which informed decisions can be made. Ultimately it is the teaching staff who are responsible for a student's academic performance, progress and inclusion in a course. It is the teaching staff who must make decisions about learning outcomes and assessments, and whether a student has met the outcomes. They must also make informed decisions about educational adjustments that meet the needs of students with a disability and at the same time maintain the integrity of the course. Therefore, it is essential for teaching staff to be fully informed about the rights and responsibilities of the university and students with regards to disability legislation and what constitutes reasonable accommodation and educational adjustments.

