

# Equality & Justice

for people with disabilities



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## THE ADVOCATE



**Villamanta Disability Rights Legal Service Inc.**

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### Editorial

The anniversary of 25 years of the Disability Discrimination Act (“DDA”) was, in some quarters, celebrated, last month.

For the disability community, there was not so much a celebration, but a serious reflection on how the DDA’s limitations and restrictions, both in law and in process, had contributed to the unrealised goals for that community’s equal inclusion in Australian society.

People with disabilities continue to bear the onus of bringing organisations to account for their discriminatory conduct. The Federal Court continues to remain inaccessible to those who have any assets due to the risk of losing those assets to obtain rights already enshrined.

The bringing of claims continues to be onerous for those they are meant to protect, and easy for those with endless money to spend.

Equal access to education remains a dream for those who must use flawed Disability Standards and attempt to explain why their views should hold any weight, in comparison with teachers. The revision of the DDA and the Disability Standards for Education is urgently needed.

Julie Phillips  
Manager  
Disability Discrimination  
Legal Service

Deidre Griffiths  
Principal Solicitor and  
Executive Officer  
Villamanta Disability Rights  
Legal Service

## Inclusive Education Not so Inclusive

The Victorian Department of Education recently announced an inclusive education policy for students with disabilities and additional needs. The policy articulates its own definition of inclusive education for all Victorian government schools.

*The Department is committed to embedding inclusive education in all school environments for students with disabilities and additional needs. All Victorians, irrespective of the school they attend, where they live or their social or economic status, should have access to high quality education.*

This definition lacks elements of compliance with Article 24 of the Convention on the Rights of Persons with Disabilities ('CRPD') due to its failure to mention the importance of educating children with disabilities alongside their peers. The use of the term "all school environments" ignores the fact that Australia is required to report to the United Nations this year on how it is allocating money to move students from segregated settings into inclusive settings. "Inclusive settings" do not include special/segregated schools.

The broad definition provided by the Department appears to be designed to keep the segregation of children with disabilities in Victoria by continuing to maintain specialist schools, which continue to receive millions of dollars in new funding. It is widely known through the research that the best form of education for children with disabilities is through inclusion in mainstream schools.

Part of the definition includes the statement that inclusive education "*ensures that students with disabilities are not discriminated against and are accommodated to participate in education on the same basis as their peers*". The clear avoidance of using the words 'amongst their peers', highlights the fact that the Department is not willing to take the step to abolish specialist schools and fully integrate children with disabilities into the mainstream school system. It is essential that the Department focuses on eliminating specialist schools and using all its resources to fully equip mainstream schools to allow for the full inclusion of children with disabilities into these schools. Research on inclusion can be found at <http://allmeansall.org.au/research/>.

## **The Expansion of the Victorian Disability Worker Exclusion Scheme (DWES)**

The DWES is a scheme that excludes persons from work as a 'disability worker' in a disability service if they pose a threat to the health, safety and welfare of people with disabilities.

Exclusion occurs as a result of being put on the DWES List. For example, a person will be placed on the DWES List if they have been found guilty of an offence involving violence, or of a sexual nature. If an employee's name is on the DWES List, the employer must immediately remove them from any direct care/contact role.

Prior to this expansion, the DWES only applied to workers in direct support roles at registered disability residential services. In light of the release of the Inquiry into Abuse in Disability Services Final Report in May 2016, the DWES has been expanded to cover all disability services providers. This is reflective of one of the Report's recommendations, in order to introduce a prevention and risk management workforce strategy that addresses screening and recruitment.

This expansion occurred on 1 November 2017. A 'disability worker' under the DWES is now defined as any person engaged by a disability service provider who:

- provides direct support to a person with a disability or
- supervises or manages a person who provides direct support to a person with a disability; and
- has direct contact or access to a person with a disability

This includes NDIS providers that are registered with the Department of Health and Human Services, as well as casual employers, volunteers and contractors. In other words, this expansion increases the categories of people that will be captured by the DWES and is a further protective mechanism to eliminate abuse and misconduct in the disability services sector.

All disability service providers must conduct an annual compliance check to ensure that all disability workers currently engaged by the provider have been checked against the DWES List. All workers must provide consent for the checks. These checks are also required for prospective disability workers.

As a result of this expansion, all checks on existing disability workers who have provided consent must be completed by 1 February 2018. Providers must select an Authorised Person to submit all checks and notifications advise all workers and obtain their consent. Please note that whilst the NDS supports this expansion, it has expressed concerns regarding the strict timeframes that the Department has prescribed.

Link to judgement: [https://jade.io/article/544319/section/140832?asv=gloss\\_widgets](https://jade.io/article/544319/section/140832?asv=gloss_widgets)

**Facts:** The Appellant had a specific phobia relating to the Australasian College of Dermatologists' (respondent's) written entrance examinations. He is a medical practitioner who sought accreditation to practice as a dermatologist without having to take the examinations. Sklavos provided the College with a report from his psychiatrist stating his disability and its ability to "have a disabling effect on his capacity and performance" in exams (at [4]). Accordingly, Sklavos requested that the College admit him without completion of the examination condition.

The appellant received a letter denying his request and informing him the College would take his disability into consideration and "consider any reasonable request made by him for special conditions in the 2012 examinations under the College's special consideration policy" (at [5]).

Ultimately, the appellant decided to lodge a complaint with the AHRC.

**History:** The case went through the conciliation process at the AHRC, and was heard by a primary judge of the Federal Court. The judge found in favour of the respondent.

### **Appeal**

Sklavos' phobia was not contested in the primary case, and was classified as a disability as defined by s 4 of the *Disability Discrimination Act 1992* (Cth) ("DDA").

Sklavos appealed the primary judge's decisions in *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 on the following grounds:

- 1) Sklavos contended that he suffered direct disability discrimination under s 5(2) of the DDA following the College's failure to make reasonable adjustments to their examination condition that addressed his disability.
- 2) Sklavos contended that the College's use of the examination condition as a compulsory admission requirement consequently subjected him to indirect disability discrimination under s 6(1) and/or s 6(2) of the DDA.
- 3) Sklavos contended that the College failed to comply with its obligations under clauses 5.2 and 6.2 of the *Disability Standards for Education 2005* (Cth) ('Disability Standards') and therefore contravened s 32 of the DDA. Further, Sklavos claimed that the primary judge failed to provide sufficient reasoning to support her rejection of such arguments.

### **Judgement: Bromberg J Re Difference between Direct and Indirect Discrimination**

Bromberg J acknowledged that the definitions of both direct discrimination (s 5 DDA) and indirect discrimination (s 6 DDA) are mutually exclusive. Hence, he emphasised that the same conduct cannot constitute both direct discrimination under s 5 – by which there is a causal link between a person's disability and the conduct of the discriminator – and indirect discrimination under s 6 – whereby the disability "need only be a reason or basis for the disadvantage" (at [23]).

## **Re Direct Disability Discrimination: Section 5 DDA**

Bromberg J identified the primary challenge raised within the appeal relating to direct discrimination as under ss 5(1) and 5(2) of the DDA, namely Sklavos' argument that the College failed to make reasonable adjustments to their admissions process due to his disability. His judgement emphasised that causation must be established for a claim of discrimination under s 5(2) to be successful, and hence Sklavos' disability must have been a reason for the respondent's conduct.

Within *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 the primary judge concluded that "nothing that the College did or did not do was caused by Dr Sklavos' disability in the sense required by s 5(2)" (at [49]). Bromberg J supported this previous judgement, emphasising that the wording of s 5 – specifically the word "effect" – created the requirement of causation (at [43]). Hence, Bromberg J rejected Sklavos' argument of discrimination under s 5 as it failed to establish a causal link between the organisation's actions and the appellant's disability.

## **Re Indirect Disability Discrimination: Section 6 DDA**

There was no contest that s 6(1)(a) of the DDA was satisfied, as the College imposed the examination condition upon Sklavos. Further, there was no contest regarding the primary judge's holding that s 6(1)(b) and (c) were satisfied, as Sklavos could not comply with the examination condition as a result of his disability and it thus had the effect of disadvantaging him (at [57]).

However, Bromberg J emphasised that though discrimination under s 6(1) does not have the same causation requirement as s 5, conduct will only be considered discriminatory under s 6 where, because of the disability, the affected person will or cannot comply with the requirement or condition (s 6(1)(b)).

Bromberg J upheld the primary judge's ruling that the College effectively established that their examination condition was "reasonable" as required under s 6(3). Further, Bromberg J ruled that the College provided sufficient evidence to suggest that a reasonable alternative capable of achieving both the objectives of the College and accommodating Sklavos' situation was considered in their decision to deny his request. Bromberg J acknowledged Sklavos' argument that the primary judge's decision was contrary to evidence contending that he could undertake an alternative assessment program, however, shared the primary judge's concern as to the strength of such evidence and the likelihood of Sklavos' completion of such assessments.

Thus, the primary judge's holding was upheld and s 6(3) was satisfied. Further, Bromberg J contended that Sklavos did not sufficiently establish an error in the primary judge's ruling that the examination condition was reasonable given the College's policies and Sklavos' likelihood of the completion of alternative assessments. Accordingly, as the condition was held to be reasonable under s 6(3), both s 6(1) and 6(2) were inapplicable and Sklavos' appeal on these grounds was dismissed.

## **Re Disability Standards: Clauses 5.2 and 6.2**

With reference to Clauses 5.2 and 6.2 of the Disability Standards, Bromberg J held that the primary judge was not required to rule on any actions made by the College except for the obligation to make reasonable adjustments (at [40]), nor was she required to determine whether any additional obligations imposed on the College by clauses 5.2 and 6.2 relating to such reasonable adjustments had been met (at [141]).

Bromberg J emphasised that a reasonable adjustment in the case of the Disability Standards is one in which “balances the interests of all parties affected” (at [144]), and acknowledged that it is not unlawful for an education provider to fail to comply with such standards if compliance would “impose unjustifiable hardship on the provider” (clause 10.2(2)).

Ultimately, Bromberg J agreed with the primary judge’s determination that the Disability Standards were not contravened by the College, and that the alternative adjustments argued by Sklavos were not reasonable as they would impose unjustifiable hardship on the College (at [145]). However, Bromberg J acknowledged that the primary judge did not explain her reasoning sufficiently. Hence, the appeal ground 4(a) challenging the primary judge’s reasoning regarding her Disability Standards decision was established, however, the appeal ground 4(b) challenging her findings was denied.

#### **Judgement: Griffiths J**

Contrastingly, Griffiths J denied the appeal ground 4(a), contending that the primary judge’s brief reasoning was sufficient given the irrelevance of many clauses in the Disability Standards relied upon by Sklavos (at [209]). Further, Griffiths J agreed with the reasoning of Bromberg J and dismissed the remainder of the appeal.

#### **Judgement: Bromwich J**

Similarly, Bromwich J agreed with Griffiths J in denying the appeal ground 4(a), and contended the remainder of the appeal should be dismissed.

## **Marketing and Fundraising Committee Member Being Sought**

The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability.

DDLS relies on government funding to assist people with disabilities who need assistance regarding discrimination, throughout the state of Victoria. Our funding permits us 2.7 EFT staff.

We are looking for a volunteer to join our Management Committee who has experience in marketing/fundraising in order to assist us solidify our position and continue to provide the service we do, regardless of variations in government funding.

If this would interest you, please contact Julie Phillips, Manager 9654-8644 or email [manager@ddls.org.au](mailto:manager@ddls.org.au).



## Give Now

Despite living in a wealthy developed country, Australians with disabilities experience extremely high rates of discrimination, abuse and neglect. That's why the Disability Discrimination Legal Service provides free legal services to those experiencing harm. We also work to improve conditions for all people with disabilities through community legal education and law and policy reform.

In the face of limited government funding, we need your support to expand our work, especially in the key areas of education and employment. Despite numerous parliamentary inquiries and government bodies uncovering widespread abuse and neglect, not enough has been done to improve matters. But we know that continual advocacy and litigation creates pressure for better protections. Every dollar you donate helps us to achieve this goal.

DDLS is an independent, non-profit community organisation. Many people with disabilities, volunteers and students contribute their efforts to our work

<https://www.givenow.com.au/DDLS>

### **Donations may also be made to Villamanta Disability Rights Legal Service Inc.**

Villamanta does excellent work for people who have a disability and a disability-related legal issue. These people are often our most vulnerable citizens.

Any amount, no matter how small, will help us to make a difference for those who most need it!

You can help Villamanta to help Victorians who have a disability by donating using either PayPal or Credit Card via our website at [www.villamanta.org.au](http://www.villamanta.org.au)

All donations greater than \$2 are tax deductible and a receipt will be sent to all donors.

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### Staff

#### **Manager**

Julie Phillips

#### **Principal Solicitor**

Placido Belardo

#### **Solicitor**

Deborah Randa

#### **Administrative Officer**

Anna Leyden

#### **Bookkeeper**

Darrell Harding

Ross House, 2<sup>nd</sup> Floor  
 247-251 Flinders Street  
 MELBOURNE VIC 3000  
 Tel: 03 9654 8644  
 Fax: 03 9639 7422  
 Country: 1300 882 872  
<https://twitter.com/ddls2014>  
<https://www.facebook.com/ddls1>  
[www.ddls.org.au](http://www.ddls.org.au)

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### Staff

#### **Principal Solicitor and Executive Officer**

Deidre Griffiths

#### **Lawyers**

Steve Grainger  
 Naomi Anderson  
 Viv Avery  
 Kate McGrath  
 Mae Mactier

#### **Paralegal Worker**

Sue Wolter

#### **Administration Worker**

Viv Nicol

#### **Accounts Administrator/ Personnel/Special Projects Worker**

Darrell Harding

C/- Deakin University  
 Geelong Waurm Ponds Campus  
 Building ib  
 Level 3  
 75 Pigdons Road  
 Waurm Ponds Vic 3216  
 Tel: 03 5227-3338  
 Free Call 1 800 014 111  
[www.villamanta.org.au](http://www.villamanta.org.au)