

SUBMISSION BY THE ATTORNEY-GENERAL'S DEPARTMENT TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

INQUIRY INTO THE EDUCATION OF STUDENTS WITH DISABILITIES

This submission provides general information concerning the operation of disability discrimination laws to assist the Senate Employment, Workplace Relations and Education References Committee in its inquiry into the education of students with disabilities.

2. This submission outlines the general operation of *Disability Discrimination Act 1992* (the DDA) and its operation in relation to education.

3. The information contained in this submission may assist the Committee in considering the criteria used to define disability (sub-paragraph (1)(a)(i) of the Terms of Reference) and the legal implications of current Commonwealth, state and territory legislation (sub-paragraph (1)(a)(viii) of the Terms of Reference).

The *Disability Discrimination Act 1992* (the DDA)

4. The DDA is the principal piece of Commonwealth legislation that prohibits discrimination on the ground of disability in a wide range of areas of public life (including education, employment, the provision of goods and services, access to premises used by the public and the administration of Commonwealth laws and programs). Together with similar State and Territory laws¹, the DDA provides a comprehensive prohibition against discrimination on the basis of disability throughout Australia.

Objects of the DDA

5. Section 3 of the DDA sets out its objects. Section 3 states:

The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sport; and
 - (ii) the provision of goods, facilities, services and land; and
 - (iii) existing laws; and
 - (iv) the administration of Commonwealth laws and programs; and
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- (c) to promote recognition and acceptance within the community of the principle that persons

¹ See *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

with disabilities have the same fundamental rights as the rest of the community.

Definition of “disability” under the DDA

6. Section 4 of the DDA defines “disability” to mean:

disability, in relation to a person, means:

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

and includes a disability that:

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

7. The definition of “disability” under the DDA ensures that a wide variety of disabilities are covered. Similar definitions are used in some State and Territory anti-discrimination laws. Some of the types of disabilities covered by the DDA include (but are not limited to):

- paraplegia or quadriplegia
- amputations
- HIV/AIDS
- sensory disabilities such as vision or hearing impediments
- psychiatric conditions
- being a member of a family which has a history of a particular disease (a disability that may exist in the future)

8. In the education context, whether a disorder or malfunction that results in a person learning differently” includes learning difficulties (such as literacy problems or behavioural problems) is an issue that has been considered from time to time.

9. Not every learning difficulty will necessarily be regarded as a “disability” for the purposes of the DDA. Whether a learning difficulty will be considered a “disability” for the purposes of the DDA will depend on the circumstances of the particular case and any medical evidence that is available to demonstrate whether the difficulty is a disorder or malfunction. In a recent case before the Federal Magistrates Service concerning disability discrimination in the employment context,

dyslexia was considered by the Federal Magistrate to be a “disability” for the purposes of the DDA².

10. The DDA also covers people with a disability who may be discriminated against because they are accompanied by an assistant, interpreter or carer; if they are accompanied by a trained animal (such as a guide or hearing dog) or if they use equipment or aids (such as leg or neck braces or wheel chairs)³. The DDA also protects a person who has a personal connection or relationship with a person with a disability (referred to as an “associate” in the DDA) if they are discriminated against because of that connection or relationship. An example of such a relationship is if a person is refused access to a service because they are with a friend who has a disability.

Unlawful discrimination and harassment under the DDA

11. The DDA prohibits two forms of discrimination, direct discrimination and indirect discrimination. Direct discrimination⁴ occurs where a person with a disability is treated less favourably than a person without the disability, in circumstances that are the same or not materially different. For example, if a person were refused enrolment in a university on the basis that they are a paraplegic in a wheelchair, this would constitute direct discrimination (subject to any exceptions – see below). In determining whether the circumstances are materially different, the fact that a person with a disability requires different accommodations or services, which a person without a disability would not require, is irrelevant.

12. Indirect discrimination⁵ occurs where a person with a disability is required to comply with a requirement or condition with which a substantially higher proportion of people without the disability comply or are able to comply. In order for indirect discrimination to arise, the requirement or condition must be one that is not reasonable having regard to the circumstances of the case and the person with the disability must not or not be able to comply with the requirement or condition.

13. Indirect discrimination often arises in a situation which, at first glance, does not appear to discriminate against a person with a disability. For example, requiring passengers on public transport to validate a “scratch” ticket before commencing a journey would indirectly discriminate against a person with motor or sight impairments. In considering whether this would constitute indirect discrimination, whether the requirement to scratch tickets was reasonable would be considered (eg considering whether there would be other ways of validating the ticket that would be as effective and not costly).

14. The effect of indirect discrimination ensures that conditions or requirements which are in themselves not imposed on the basis of a person’s disability but which impact adversely on a person with a disability are reasonable having regard to all relevant circumstances.

15. The DDA⁶ also prohibits the harassment of a person with a disability and their associates in employment, education and the provision of goods and services. Harassment is humiliating or insulting conduct that is directed to a person because of their disability (for example, degrading jokes or comments). In the context of education, harassment on the basis of a student’s disability, the disability of a student seeking admission or an associate with a disability is prohibited.

² See *Randell v Consolidated Bearing Company (SA) Pty Ltd* [2002] FMCA 44, 3 April 2002.

³ See ss. 7, 8, 9 and 10 of the DDA.

⁴ See s.5 of the DDA.

⁵ See s.6 of the DDA.

⁶ See Division 3 of the DDA.

16. The DDA⁷ provides that if an act is done for two or more reasons and one of the reasons is the disability of a person then the act is taken to be done for that reason (regardless of whether or not it is the dominant or substantial reason for doing an act).

Exemptions under the DDA

17. The DDA provides a range of exemptions from the requirement to avoid discrimination on the grounds of a person's disability. Division 5 of the DDA sets out exemptions that apply to all areas of prohibited discrimination. These exemptions cover issues such as acts that are undertaken to ensure that people with disabilities have equal opportunities (special measures); acts done pursuant to a specified or prescribed law or in accordance with an order of a court; and acts that are reasonably necessary to protect public health from an infectious disease.

18. Some areas of prohibited discrimination may also provide specific exemptions that apply in relation to that area. For example, the unjustifiable hardship exemption that allows an educational authority to argue that the provision of a service or facility that a student with a disability who is seeking admission to the educational institution would require would lead to unjustifiable hardship for the authority (further information on this exemption is provided at paragraph 29 below).

19. In addition, the Human Rights and Equal Opportunity Commission (the Commission) may grant an exemption from the operation of the DDA. The effect of an exemption from the Commission is that any act in accordance with the provisions of the exemption will not be taken to be an act of unlawful discrimination. An exemption may be granted subject to such terms and conditions as the Commission specifies. An exemption must not exceed a period of 5 years. Exemptions granted by the Commission can be reviewed by the Administrative Appeals Tribunal and notice of the exemption (setting out the Commission's findings and reasons for the exemption) must be published in the Gazette⁸.

Complaints of unlawful discrimination

20. Since April 2000, significant reforms have been implemented that streamline the resolution of complaints of unlawful discrimination⁹. If a person considers that they have been unlawfully discriminated against on the basis of their disability, they can lodge a complaint to the Human Rights and Equal Opportunity Commission (the Commission) under the *Human Rights and Equal Opportunity Commission Act 1984* (the HREOC Act).

21. Upon receipt of a written complaint, the President of the Commission will undertake an initial assessment of the complaint and attempt to conciliate it. If the President of the Commission is satisfied that there is no reasonable prospect of the complaint being settled by conciliation, he or she may terminate the complaint. A complaint may also be terminated for other reasons (including if the President is satisfied that the complaint is trivial or vexatious or if the complaint was lodged more than 12 months after the alleged unlawful discrimination took place)¹⁰.

22. Where a complaint has been terminated an application alleging unlawful discrimination can be made to the Federal Court or the Federal Magistrates Service¹¹. Such an application must be

⁷ See s.10 of the DDA.

⁸ See ss.55-58 of the DDA.

⁹ The reforms were implemented by the *Human Rights Legislation Amendment Act (No. 1) 1999*.

¹⁰ See s.46PH of the HREOC Act.

¹¹ See s.46PO of the HREOC Act.

made within 28 days after the date on which the notice of termination was issued. The Federal Court or Federal Magistrates Service will hear the matter and if satisfied that there has been unlawful discrimination may make such orders as it sees fit (including an order requiring the performance of a reasonable act or course of conduct or an order requiring the payment of compensation for any loss or damage suffered as a result of the unlawful discrimination). The Federal Court and the Federal Magistrates Service may also grant an interim injunction at any time after a complaint is lodged with the Commission in order to maintain the status quo (as it existed immediately before the complaint was lodged) or to maintain the rights of the complainant, respondent or any other affected person¹².

23. In proceedings before the Federal Court and the Federal Magistrates Service, the Disability Discrimination Commissioner may, with leave of the court concerned, assist the court in proceedings that may affect to a significant extent the human rights of people who are not parties to the proceedings or would have significant implications for the DDA or where it would be in the public interest for the Commissioner to assist the court¹³.

Disability discrimination in education

24. The DDA, as with similar State and Territory laws, provides that it is unlawful to discriminate on the basis of a person's disability in education. Section 22 of the DDA provides:

22 Education

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:
 - (a) by refusing or failing to accept the person's application for admission as a student; or
 - (b) in the terms or conditions on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:
 - (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
 - (b) by expelling the student; or
 - (c) by subjecting the student to any other detriment.
- (3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.
- (4) This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority.

25. The DDA defines "educational authority" to mean a body or person administering an educational institution¹⁴. "Educational institution" is defined to mean a school, college, university

¹² See s.46PP of the HREOC Act.

¹³ See s.46PV of the HREOC Act.

¹⁴ See s.4 of the DDA.

or other institution at which education or training is provided¹⁵. Section 14 of the DDA provides that the DDA binds the Crown in right of the Commonwealth and of each of the States and of Norfolk Island. Consequently, the prohibition against discrimination in section 22 of the DDA applies to a wide range of educational institutions (as defined by the DDA) regardless of whether they are operated by the public sector or are independent or religious schools.

26. Section 22 of the DDA makes it unlawful for an educational authority to discriminate against a student or a prospective student on the ground of the student's disability in certain specified areas. The areas covered are:

- the admission of students (by refusing or failing to accept an application for admission as a student or in the terms or conditions on which a person will be admitted as a student);
- access to any benefits provided by the educational authority (such as access to library or sporting facilities or excursions);
- the expulsion of the student or subjecting the student to any other detriment.

27. As outlined above, the obligation upon an educational authority is to avoid direct and indirect discrimination on the grounds of a person's disability. In the case of indirect discrimination, an educational authority would only be required to make reasonable adjustments in order to allow the student with disability to participate. For example, it may be a requirement of a course that students undertake a field study as part of the assessment for the course. A student with a disability may not be able to undertake a field study. The educational authority would be required to consider whether there are any other options to the field study that the student with a disability could undertake in order to satisfy the assessment requirements. This could include undertaking a written or oral exam in order to assess the student's skills and knowledge as an alternative to a field study. The educational authority would only be required to undertake options that are reasonable.

Exemptions for education institutions under the DDA

28. Section 22 provides two specific exceptions relating to the education sector. The first exception provides that it is not unlawful to discriminate against a person on the ground of their disability in relation to admission to an educational institution that is established wholly or primarily for students who have a particular disability and the person seeking admission does not have that particular disability¹⁶.

29. The second exception provides that it is not unlawful to refuse or fail to accept a person's application for admission as a student where the person, if admitted, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose "unjustifiable hardship" on the educational authority¹⁷. It is important to note that under the DDA, this exception is limited to the consideration of a person's application for admission and not at other stages of the education process.

¹⁵ See s.4 of the DDA.

¹⁶ See s.22(3) of the DDA.

¹⁷ See s.22(4) of the DDA.

30. Section 11 of the DDA provides that in determining what constitutes unjustifiable hardship all the relevant circumstances of the particular case are to be taken into account, including:

- the nature of any benefit or detriment likely to accrue or be suffered by any persons concerned;
- the effect of the person's disability; and
- the financial circumstances and estimated amount of expenditure required to be made by the person or body claiming unjustifiable hardship.

31. The exception of unjustifiable hardship provides educational authorities with the ability to argue that the services or facilities required by a student with disabilities seeking admission to the institution would incur significant costs or would cause major difficulties and consequently lead to unjustifiable hardship.

Disability Standards for the education of persons with a disability

32. Section 31 of the DDA allows the Attorney-General to formulate Disability Standards in relation to a number of issues, including the education of persons with a disability. The DDA is drafted in very general terms. Disability Standards aim to provide greater certainty and clarity about the rights and responsibilities under the DDA.

33. Under section 32 of the DDA, it is unlawful for a person to contravene a Disability Standard. A complaint about an alleged contravention can be made to the Commission which will consider the complaint in the same way as it considers other complaints of unlawful discrimination (see paragraph 20 above). Section 34 of the DDA provides that, if a person acts in accordance with a Disability Standard, Part 2 of the DDA (which sets out the prohibited grounds of discrimination) does not apply to the person's action. In other words, the person's action will be taken to comply with the DDA.

34. At present, action is underway to develop Disability Standards in the areas of public transportation services, access to public premises and education.

35. Access to education and training is a fundamental aspect in ensuring that people with a disability can participate fully and effectively in the community.

36. Disability Standards for Education are being developed under the auspices of the Ministerial Council on Education, Employment, Training and Youth Affairs (the Ministerial Council). In 1995 the Ministerial Council established a Taskforce on Disability Standards in Education (the Taskforce). That Taskforce, which was chaired by the Commonwealth (through the Department of Education, Science and Training), comprised representatives from the States and Territories, the DDA Standards Project¹⁸ and stakeholder groups within the education and training community.

37. Through the Taskforce, national consultation on the development of Disability Standards for Education has been undertaken. In 1997 an extensive consultation process was undertaken to determine whether there was support for the development of Standards.

¹⁸ The DDA Standards Project was established to coordinate disability sector input into the development of disability standards under the DDA. The Attorney-General's Department funds the Standards Project.

38. At its meeting in March 2000, the Ministerial Council agreed that draft Disability Standards for Education and accompanying Guidance Notes, developed by the Taskforce, be used as the basis for consultation. Submissions on the draft Standards were sought during 2000.

39. In July 2001 the Ministerial Council considered revised draft Standards which took into account the outcomes of the Taskforce's consultations and the submissions it received. In July 2001, the Ministerial Council asked the Australian Education Systems Officials Committee (AESOC) to consider the draft Standards, agree on amendments and clarifications and develop a Regulatory Impact Statement to facilitate implementation. An AESOC Working Group has been established, with representation from all the major education stakeholders and disability groups, to undertake this task. AESOC is expected to report back to the Ministerial Council later this year.

40. The current draft Disability Standards for Education specify how education and training can be made accessible to students with disabilities. The draft Standards cover the following areas:

- enrolment
- participation
- curriculum development, accreditation and delivery;
- student support services; and
- harassment and victimisation.

41. The draft Standards are intended to provide greater clarity about the entitlements under the DDA of students with disabilities in relation to education and the obligations under the DDA of education authorities, institutions and other education providers in relation to the areas listed above. The draft Standards also set out measures that are examples of ways in which the obligations in the Standards may be met.

42. An important consideration in the development of the draft Standards has been to provide greater clarity about rights and responsibilities under the DDA while maintaining sufficient flexibility to ensure that the needs of different students and education providers can be taken into account.

43. Work on the draft Standards is continuing and further developments are expected later this year.