

AUSTRALIAN GOVERNMENT
ATTORNEY-GENERAL'S DEPARTMENT
AND
DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING

**SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE**

**Disability Discrimination Amendment (Education
Standards) Bill 2004**

Disability Standards for Education

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1. Introduction

The Disability Discrimination Amendment (Education Standards) Bill 2004 amends the *Disability Discrimination Act 1992* (DDA) in minor ways to ensure that the draft Disability Standards for Education (Standards) are fully supported by the Act. The Standards will provide greater certainty and clarity to education providers as to their obligations under the Act.

2. Consultative processes for development of the Standards

Development of the Disability Standards for Education (Standards) under the *Disability Discrimination Act 1992* (DDA) has involved ongoing and extensive consultation with key education, training and disability stakeholders.

The instigation for work on the development of the Standards was a request in 1995 from the then Attorney-General to the then Minister for Employment, Education and Training, seeking advice on the creation of disability standards which would make rights and responsibilities in the field of education and training easier to understand. In December 1995, the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) agreed to establish a Taskforce to oversee this task. In setting up the Taskforce, the Ministers were keen to ensure that as many stakeholders as possible were represented within a group of manageable overall size.

Accordingly, in 1996, a Taskforce led by the Australian Government and comprising representatives of State and Territory and non-government education and training authorities and providers, the university sector and the DDA Standards Project representing the disability sector, commenced work on the development of a discussion paper that canvassed the feasibility and desirability of disability standards for education. This paper was endorsed by MCEETYA as the basis for consultation in 1997 with education, training, and disability stakeholders. Importantly, the consultations found that 80 per cent of

respondents favoured the production of standards but they wished to be consulted on any standards produced.

Work on drafting the Disability Standards for Education commenced in 1998. Their development involved an iterative process to define essential concepts, operational principles and performance measures. Throughout the developmental period Ministers, senior education and training officials and other stakeholders saw this as important to ensure that:

- the nature and content of the Standards would be informed by ongoing consultation among stakeholders; and
- the Standards produced would give education and training providers a clear understanding of their obligations to make sure that students with disabilities can participate in education and training without experiencing discrimination.

In 2000, MCEETYA agreed that the draft Standards as then developed should be used as the basis for broad consultation with education, training and disability stakeholders. 12,000 copies of the Standards and Guidance Notes, as then drafted, accompanied by a consultation paper were released for comment in August 2000. 102 responses were received, of which 15 provided consolidated comment from consultations undertaken by Taskforce members within their own sectors. Following those consultations the draft Standards were further amended to take account of the feedback received.

In July 2001, MCEETYA referred the Standards to its senior officials' committee, the Australian Education Systems Officials Committee (AESOC) for agreement on amendments and clarifications to the Standards and development of a Regulation Impact Statement (RIS). A Working Group, established to assist AESOC and covering the stakeholder groups, produced further drafts of the Standards.

At this point an initial attempt was made to undertake a cost-benefit analysis of the potential impact of the Standards. However, not all jurisdictions and systems participated in the analysis, there was no overall consistency in the methodologies employed and the costings provided varied markedly. Some providers anticipated large cost increases while others anticipated only slight increases in the cost of providing for students with disabilities and did not expect these to impede implementation of the Standards. However, providers agreed that the Standards generally reflect the existing law and good practice.

At its meeting in July 2002, MCEETYA expressed concern over the delay in finalising the draft Standards and requested resolution of remaining legal and financial issues. Legal issues raised by education providers and other stakeholders were systematically addressed by Australian Government officials, in consultation with the Australian Government Solicitor (AGS). Noting the concerns of some education providers regarding potential cost implications and at the request of AESOC, the Department of Education, Science and Training (DEST) commissioned an independent quantitative cost-benefit analysis of the Standards to inform the Regulation Impact Statement (RIS). The analysis found that the primary impact of the Standards is to provide clarity and that their overall benefits exceed the associated costs. This is further detailed in the following section.

In July 2003, MCEETYA considered the outcomes of this analysis and the final draft of the Standards. While MCEETYA endorsed the form and content of the Standards, the States other than Tasmania and the ACT indicated that their endorsement was subject to Australian Government agreement to provide new, non-recurrent funding for professional development transition costs and to share unforeseen costs arising from the Standards. The Minister for Education, Science and Training offered to make a contribution to the development of professional development materials to support the implementation of the Standards.

As the meeting did not collaboratively endorse the Standards, and consistent with the Australian Government's position, Minister Nelson announced that, having now exhausted all options for collaborative endorsement of the Standards, the Australian Government would move unilaterally to implement the Standards and issued a media release to this effect.

This decision was also consistent with the recommendation of the Senate Employment, Workplace Relations and Education Committee when it released its unanimous report on *Education of students with disabilities* in December 2002. The Committee was strongly critical of the failure of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) to reach agreement on the Standards and urged the Commonwealth to act unilaterally to bring the Standards into force.

3. Costing issues related to the Standards

Standards clarify and make explicit the existing obligations of education and training providers under the Act. On the advice of education and training providers, the Standards codify existing good practice. The Standards seek to balance the needs of students with the interests of all parties affected, including providers. They require only reasonable adjustments as the means of ensuring that students can participate in education and training without experiencing discrimination. In addition, they would extend the unjustifiable hardship provision beyond the point of enrolment, so that education providers would not be required to make adjustments for students with disabilities if those adjustments would cause them unjustifiable hardship.

Thus, if providers are compliant with their existing obligations under the DDA, the cost of providing for students with disabilities should not increase once the Standards are implemented. Notwithstanding this, some providers have persistently raised concerns about the potential for increased costs of providing for students with disabilities once the Standards are implemented. To address these concerns, two separate costing exercises were undertaken, the first led by DEST and the second as an independent commissioned analysis. Both were based on the provision of quantitative and qualitative data by education and training providers and other stakeholders.

The first quantitative costing of the Standards was undertaken in late 2002. However, this process failed to allay concerns about costs, primarily because:

- Those sectors who provided data did not adopt a consistent methodology to estimate potential costs. Importantly, their costings failed to differentiate the costs of implementing the Standards over and above the costs of their existing obligations for compliance with the DDA, which has been in place since 1992.
- Other sectors (non-government schools and training providers and the university sector) did not provide costing estimates. In the case of the university sector this was because they supported and were prepared to implement the Standards as then drafted.

Subsequently, in early 2003 at the request of AESOC, DEST commissioned an independent, robust and transparent quantitative cost-benefit analysis of the potential cost implications of the Standards over and above the costs of compliance with the DDA, to inform the RIS. This was consistent with the recommendation of the Senate Report of the Inquiry into the *Education of Students with Disabilities*, which noted that such a cost assessment was "required to give support to the claims made by state education departments" but that it was "concerned about the basis of the [states'] estimates".

The Allen Consulting Group was selected to undertake the analysis on the basis of the Group’s clear understanding of the project specifications, relevant expertise in undertaking cost-benefit analyses and developing regulatory impact statements, and background in the areas of education and training.

The focus of the independent analysis was to estimate the marginal impacts – the additional financial costs and benefits – arising from compliance with the Standards, over and above the costs and benefits of compliance with the DDA. A huge variation was identified in the maximum marginal costs claimed by the States and Territories, as shown in the table below. Importantly, the analysis found that:

- many of the costs providers attributed to the Standards are actually costs of compliance with the DDA;
- some estimates lack validity because education providers incorrectly assumed that the Standards will increase the number of students with disabilities;
- some providers adopted an overly risk-averse position and assumed that the measures suggested in the Standards as examples of compliant actions are mandatory in practice and emphasised the concept of ‘on the same basis as’ while failing to recognise the effect of moderating concepts, such as ‘reasonable adjustment’.

The following table presents a comparison of the maximum claimed costs with recurrent expenditure (for 2000-01) and the reasonable costs identified by the consultants for government schools estimated by the providers and the consultants.

Government Schools: Maximum Claimed Compliance Costs versus Recurrent Expenditure and Estimated Costs

	Claimed Costs (Maximum)		Estimated Costs	
	\$million	% of Recurrent Expenditure	\$million	% of Claimed Costs
NSW	1828.0 ^(a)	33.4	18.8	1.0
VIC	1424.0 ^(b)	34.7	14.0	1.0
QLD	1.6	<0.1	13.5	843.8
SA	19.4	1.4	4.8	24.7
WA	15.8	1.0	6.4	40.5
TAS	2.2	0.4	1.9	86.4
NT	NA	NA	0.8	NA
ACT	Zero	0.0	1.0	NA

(a) “if, with the Standards, the disability incidence rate grew to 18 per cent”

(b) Victoria initially provided this figure, which needs to be revised according to the revised projections for the incidence of disability to 5% across the school sector, 10% across both TAFE and ACE sectors, provided on 11 June.

On the basis of the quantitative and qualitative information provided by jurisdictions and stakeholders, the cost-benefit analysis concluded that:

- the overall benefits of the Standards would exceed their associated costs;
- the principal impact of the Standards would be to provide increased clarity for education providers, as to their obligations under the DDA, and for students with disabilities, as to their entitlements under the DDA; and
- professional development to support the introduction of the Standards would be the only reasonable cost attributable to the Standards. Based on a unit cost of \$250 for one day per teacher, as one potential method of estimating this cost, it provided an estimate ranging from \$72.7 million to \$89.8 million.

At the July 2003 meeting of MCEETYA, the Minister for Education, Science and Training offered to contribute, from existing programme funds, to the development of professional development materials to support the introduction of the Standards.

4. Funding for students with disabilities

The primary responsibility for the provision of education and training rests with providers. While the Australian Government is not a provider of education and training, the Australian Government provides substantial assistance to State and Territory and non-government education and training authorities in all education sectors, including for students with disabilities.

In the schools sector, Australian Government direct financial assistance to the States and Territories to improve the educational outcomes of students with disabilities is largely provided through three programmes:

- Of these, the *General Recurrent Grants Programme* is the principal source of Australian Government funding, with an estimated \$20.1 billion being provided in the 2001-04 quadrennium;
- The *Strategic Assistance for Improving Student Outcomes (SAISO) Programme* is the Australian Government's major targeted funding programme to improve the learning outcomes of educationally disadvantaged students in government and non-government schools, particularly in literacy and numeracy, and for students with disabilities. In 2001-04, the Australian Government will provide an estimated \$1.6 billion through the SAISO Programme;
- This amount includes an estimated \$112 million for the *Special Education – Non-government Centre Support (SENCS) Programme* for services to children with disabilities.

On 17 November 2004, the Minister for Education, Science and Training introduced legislation to approve a \$33 billion package of funding for Australian schools for the 2005-08 quadrennium. This funding includes an estimated \$2.1 billion for a new overarching targeted programme, *Literacy, Numeracy and Special Learning Needs* programme, targeted at the most educationally disadvantaged students, including students with disabilities.

Funds available under the *Literacy, Numeracy and Special Learning Needs* programme will be shared between the Government, Independent and Catholic schools sectors, with Government schools to receive approximately \$1.3 billion and non-government schools approximately \$800 million. This targeted funding will continue to provide education authorities with significant flexibility to determine which schools have the greatest need for additional assistance for educationally disadvantaged students, including students with disabilities, and to allocate funds accordingly.

In 2004 the Australian Government has provided \$1.13 billion to the States and Territories for vocational education and training (VET).

Under the national VET arrangements, responsibility for both public and private training systems lies with State and Territory Governments. However, the Australian Government has significantly increased VET funding for people with a disability under its *Australians Working Together* welfare reform package, with an additional \$9 million dollars being available in 2004 for more training places and learning supports for people with disability. This will grow to over \$11 million in 2005 and to more than \$22 m in 2006 once the Senate passes legislation associated with the Government's welfare reform package.

The focus of activity in *Bridging Pathways: A Blueprint for improving opportunities for people with a disability*, agreed by Australian and State and Territory Ministers of Training in June 2000, has been to improve the VET system's capacity to respond to the needs of people with a disability, including ensuring that resources and supports are available at the point of delivery. This national initiative and additional funding for training places for people with a disability has contributed to a 50% increase in people with disability participating in VET since 2000.

In the higher education sector, universities are expected to provide the infrastructure and support necessary to ensure optimal participation by all their students, including students with a disability. In 2005 the Australian Government will provide funds under the *Commonwealth Grants Scheme* of almost \$3 billion for the provision of Commonwealth-supported university places.

As part of the *Our Universities: Backing Australia's Future* reforms, from 2005 the new *Higher Education Disability Support Programme* will strengthen the focus of disability support in the Australian higher education sector and increase the funding to \$6.5 million.

The *Higher Education Disability Support Programme* consists of three components:

- *Additional Support for Students with Disabilities*, which provides funding support to higher education providers to assist with the costs incurred in providing educational support and/or equipment to students with disabilities;
- *Regional Disability Liaison Officers*, who help facilitate the transition from school to VET or higher education and then onto employment; and
- Performance-based disability support funding, which encourages higher education providers to implement strategies to attract and support students with disabilities.

There are significant additional financial resources provided to the States and Territories in the form of Goods and Services Tax receipts returned to their Treasuries and which may be applied to assist people with disabilities.

5. Estimated numbers of students with disabilities

Definitions vary across the sectors for reporting numbers of students with disability. In the schools sector, reporting of students with disabilities by State and Territory government and non-government school authorities reflects the number of students who attract funding support. In the higher education and vocational education and training sectors, students self-identify. These sectors report that typically the number of students identifying with a disability is lower than the number of those actually requiring support.

Notwithstanding these definitional issues, as shown in the table below, in 2003, there were more than 210,000 students with disability across all education and training sectors. On the basis of recent trends it is clear this number is increasing.

Estimated numbers of students with disabilities for 2003

Schools	Vocational education and training, including new apprentices	Higher education	Total
116,100	73,200	22,300	211,600

It is important to note that the Disability Standards for Education have the potential to make a significant difference by ensuring that all students with disabilities can participate in education and training on the same basis as students without disabilities. This is the most effective means of ensuring that students with disabilities are equipped with the knowledge, skills and qualifications, as well as the capacity to manage their disabilities, for effective participation in work and society and ongoing self-reliance.

6. Implementation

When will the Education Standards be formulated?

The Government has publicly stated its commitment to formulating and tabling the Education Standards when the Bill has passed both Houses.

Once the amendments contained in the Bill are passed, the Attorney-General will formulate the Standards, which will trigger the statutory process in section 31 of the Act. Subject to a notice of motion to amend the Standards being given in either House of Parliament, the date of commencement of the Education Standards is not less than 15 sitting days after they are tabled by the Attorney-General. Clause 2 of the Bill provides that the amendments to the Act will commence on a day to be fixed by Proclamation. This will allow the commencement of the amendments and the Education Standards to be co-ordinated.

In his Second Reading Speech, the Minister for Justice and Customs said that “the Bill is an important precursor to the formulation of the disability standards for the education of people with disabilities.” In a joint media release dated 17 November 2004 the Attorney-General and Minister Nelson announced that:

Re-introduction of the Disability Discrimination Amendment (Education Standards) Bill is an important part of the Government’s commitment to the implementation of Disability Standards for Education made under the *Disability Discrimination Act 1992*...

The Disability Standards for Education will be formulated and tabled when the Bill passes the Parliament.

How will people know what the Education Standards entail?

As the draft Education Standards particularise positive steps that education providers will have to take, implementation of the Education Standards is also a matter for individual education providers. To assist education providers to understand their obligations under the Standards, plain-English Guidance Notes have also been developed. As noted above, the draft Education Standards were negotiated with education providers and the disability sector in great detail over many years. Their development has been a collaborative work involving representatives of State and Territory Governments and stakeholder groups within the education and training sector, including non-government education and training providers, universities and the disability sector.

In public statements of 12 August 2004 and 18 November 2004 the Acting Disability Discrimination Commissioner, Dr Sev Ozdowski, stated that:

These amendments, and the Standards to follow, are an important part of the movement towards equal opportunity in education for people with disabilities in Australia, from infants to primary and secondary schooling and on to TAFE and university level. As an essential part of the same goal, they provide greater certainty for education providers about what they have to do...

Draft Standards on education under the Disability Discrimination Act have been negotiated over the last eight years, involving state and private education authorities as well as people with disabilities and Commonwealth government departments.”

The Human Rights and Equal Opportunity Commission has a statutory function under section 67 of the Act to promote an understanding and acceptance of compliance with the Disability Discrimination Act, and to undertake research and educational programmes, and other programmes for the purpose of promoting the objects of the Act. This assists both people who have rights under the Act, and people who have obligations.

The Commission uses a range of strategies to communicate its key human rights messages to the community, including:

- the Commissioners and staff holding consultations with a range of peak bodies, community groups, NGOs, parliamentarians, business and industry groups, academics and government offices
- the development of an extensive and accessible website which provides human rights education materials for individuals, students, teachers, employers, government and community groups, and
- curriculum-linked human rights education materials for teachers and students.

The Commission also facilitates investigation of unlawful discrimination through its complaint handling procedures. Under section 32 of the Act, it is unlawful to contravene a disability standard. Once the draft Education Standards are in place, a person may continue to make a complaint to the Commission if they feel that they have been discriminated against on the basis of a disability. However, compliance with the Education Standards will be taken to be compliance with the Act.

Following formulation of the Education Standards, the Minister for Education, Science and Training will write to all schools across the country, informing them of the Education Standards and providing them with copies of the Standards and accompanying Guidance Notes. Letters will also be sent to disability organisations to inform them about the Education Standards. The Education Standards and Guidance Notes will be made electronically available to the public by publishing them on relevant websites (including the Attorney-General’s Department, the Department of Education, Science and Training, and the Human Rights and Equal Opportunity Commission).

In line with his offer at the 2003 MCEETYA meeting, the Minister for Education, Science and Training will contribute to the development of professional development materials to support the implementation of the Standards.

Attorney-General’s Department

Department of Education, Science and
Training

6 December 2004