

## **Inquiry into the Disability Discrimination Amendment (Education Standards) Bill 2004 Submission by Human Rights and Equal Opportunity Commission**

1. The Human Rights and Equal Opportunity Commission supports passage of the Disability Discrimination Amendment (Education Standards) Bill without delay, and the approval of Disability Standards for Education as soon as practicable thereafter.
2. This support has been publicly expressed in press releases issued by the Acting Disability Discrimination Commissioner, Dr Sev Ozdowski, on 12 August 2004 and (in precisely similar terms) 18 November 2004 (attached).
3. The Selection of Bills Committee, in its report on 1 December, indicated the following reasons for referral of this Bill to the Senate Legal and Constitutional Committee and principal issues for consideration:
  - To investigate the adequacy of Commonwealth support to States/Territories for transitional costs associated with the Standard's implementation particularly relating to professional development;
  - to examine the Standard's implementation strategy, and
  - to facilitate the Standard's expeditious tabling.
4. The Human Rights and Equal Opportunity Commission understands that the Commonwealth Government, through the Attorney-General's Department and the Department of Education, Science and Training, will be providing information on Commonwealth support to education providers, including State and Territory Governments but also including non-government schools, in relation to the education of students with disabilities.
5. The Commission does not therefore propose to discuss directly the first point indicated above by the Selection of Bills Committee. However, the Commission's view on the relationship of the Bill, and of the draft Disability Standards for Education as currently proposed to be introduced, may assist the Inquiry in considering this point.
6. In brief, the Commission's view is that the Bill and the proposed standards will be important in stating the law more clearly, but do not substantially alter rights and responsibilities which exist under the current provisions of the general anti-discrimination provisions of the Disability Discrimination Act (DDA) .
7. The decision of the Full Federal Court in *Catholic Education Office v Clarke* [2004] FCAFC 197 (6 August 2004) ('*Clarke*') confirms that broad obligations to make reasonable adjustments, such as are provided for by the Standards, are already contained in the DDA by reference to the concept of indirect discrimination.
8. It should also be noted that very closely equivalent rights and obligations are provided for under the legislation of each State and Territory, and that in most jurisdictions introduction of this legislation pre-dated or was closely contemporaneous with the DDA.

9. The Commission strongly endorses views that additional support from all governments for equal educational opportunity for students with disabilities is desirable. The Committee may wish to note the following comments made by the Commission in our second submission to the Productivity Commission review of the DDA:

Several submissions (s39,86) raise concerns that the number of students with disabilities requiring specific support far exceeds the number receiving it and that resources provided by government to assist with education of students with disabilities has not kept pace with increased rates of integration. Submissions also raise problems with eligibility for assistance including rigid classifications; failure to include some forms of disability; and time spent in categorising rather than assisting. Several submissions (s46, 86,148) refer in particular to limited public funding assistance available for students with disabilities in non-government schools.

HREOC's initial submission also refers to concerns in this area which have been raised with us. Several other submissions however note the levels of Commonwealth assistance going to some relatively privileged independent schools, albeit not targeted to students with disabilities. It would clearly be a serious concern if priority in allocation of public funds were going to facilities such as additional cricket pitches at elite schools rather than to basic support for students with disabilities whatever school they attend. HREOC is not in a position to assess this or the competing claims of public and independent schools, but is concerned that current arrangements do not appear to be directing sufficient resources to support equal and effective participation by students with disabilities overall.

10. However, we do not consider that arguments for significant additional support can be soundly based on additional costs said to arise from the introduction of Disability Standards in this area.

11.. The Committee may wish to note the following comments made by the Commission in our initial submission to the Productivity Commission review of the DDA:

It does not appear possible to set standards for non-discriminatory education which would specify the required outcomes to the same degree as for access to buildings. However, HREOC sees benefits in standards which set out more fully and clearly the principles to be applied and which give some indications of required performance. There would clearly be some advance in these respects compared to the current position under the DDA if standards were adopted in or close to the form of the draft education standards currently being considered.

This form of standards will not resolve all issues itself but it should provide a clearer basis for formation of policies by education providers and for discussions between providers and students or parents in individual cases, so

as to reduce the need for access and inclusion issues to result in DDA complaints; and if complaints are made standards should assist in resolving them.

Apart from reduction in potential legal costs in arguing about the meaning of discrimination provisions, greater clarity of obligations in this area implies time saved in making decisions and thus a reduction in the time during which a student may be falling behind his or her peers and missing out on educational opportunities, as well as reduction in time and stress spent by teachers.

12. While the Commission considers that the Bill and the proposed Disability Standards for Education do not impose substantial new obligations we also wish to emphasise our view that they do not substantially diminish existing rights and responsibilities.

13. In particular, our view is that the extension of the defence of unjustifiable hardship to apply at all stages of the education process, rather than only prior to enrolment as at present, removes a source of confusion arising from a defect in drafting, rather than substantively altering the existing law.

14. The decisions of the High Court in *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (11 November 2003) and the Full Federal Court in *Clarke* confirm that under the existing provisions of the DDA, a requirement for reasonable adjustments to accommodate students with disabilities may arise from the prohibition on indirect discrimination, rather than direct discrimination. As a result, these obligations are already qualified by the concept of reasonableness.

Attachment 1: Press release 18 November 2004

## **Progress welcomed on education for people with disabilities**

Acting Disability Discrimination Commissioner Dr Sev Ozdowski has today welcomed the re-introduction of amendments to the *Disability Discrimination Act 1992*.

The amendments clarify the operation of the Act in the education area and clear the way for authorisation of more detailed standards which have been drafted on access to education.

"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," Commissioner Ozdowski said.

The amendments address a drafting error in the original legislation, by providing that issues of unjustifiable hardship in providing equal access in particular cases can be considered at all stages rather than only at enrolment and admission. "This amendment will provide more clearly for a balancing process which at present depends on a much more complex set of legal arguments," the Commissioner said.

The amendments also confirm that Standards under the Act can provide for positive measures to provide equal opportunity for students with disabilities and to prevent harassment.

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 amendments are intended to avoid any doubts regarding validity of making of disability standards in the terms of this draft.

Commissioner Ozdowski also welcomed commitments by the government that the amendments would be proclaimed to commence with the tabling of the draft Standards, and that the Standards will be formulated and tabled by the Attorney-General as soon as the amendments are passed.

"Although I do not believe that the amendments substantially affect existing rights and duties for anyone, I appreciate the assurance that has been given to the disability community that these amendments will be approached as a package with the adoption of Standards," the Commissioner said.

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