

Chapter 7

The Disability Discrimination Act and the Role of the Commonwealth

7.1 The Disability Discrimination Act has markedly affected the way our schools operate by providing legislative support for inclusive education. By giving a broad definition to disability, it has raised questions about whether our schools adequately provide for all those who are protected by its provisions. The proposed disability education standards will make the rights of these students more transparent. Inconsistencies between the definition of disability under this Act and those that determine funding eligibility for disability support programs in schools have already been discussed in Chapter 2. This definitional issue and its funding consequences underpins the reluctance of some educational authorities to finalise education standards. This chapter focuses on the broader funding implications of the Disability Discrimination Act and in particular the proposed education standards. It will examine the adequacy of current Commonwealth funding arrangements for students with disabilities in light of the proposed new education standards and consider the level of financial responsibility that the Commonwealth should accept to ensure that all students can fully participate in education.

7.2 The Disability Discrimination Act, along with similar state and territory laws, makes it unlawful to discriminate against a person on the ground of the person's disability. The Act imposes a general obligation not to discriminate in education and provides a corresponding right to complain of unlawful discrimination, either to the Human Rights and Equal Opportunity Commission (HREOC) or the Federal Court. It is unlawful to discriminate in areas relating to admission, access to benefits provided by the educational authority or to student expulsions. The obligation upon an educational authority is to avoid direct and indirect discrimination. In the case of indirect discrimination, an educational authority is only required to make reasonable adjustments to allow the student with disability to participate, but it is not unlawful for an educational authority to refuse an enrolment that would impose an unjustifiable hardship upon the authority.

7.3 The Disability Discrimination Act has been a catalyst in the integration of most students with disabilities, and in response, educational authorities have had to develop new funding mechanisms to support integrated education in government schools. These mechanisms were discussed in Chapter 2. However, the Act applies to a wide range of educational institutions regardless of the sector, and this has resulted in greater demand for enrolment of students with disabilities in non-government schools and systems. For example, in the independent school sector¹ enrolments have

1 Independent schools are a diverse group of non-government schools serving a range of religious or other communities.

increased by 89 per cent since 1995, compared to a 26 per cent increase in total full time enrolments.² The Catholic school sector estimates that, in 1985, students with disabilities made up only 0.2 per cent of the total enrolments, yet by 2000 this figure had increased to 2.2 per cent of enrolments.³ The cost of supporting these students has had financial implications for the non-government school system.

7.4 The National Council of Independent Schools' Association (NCISA) had the following to say about the effect of the Disability Discrimination Act:

NCISA is concerned that while the *Disabilities Discrimination Act 1992* has introduced a rights-based model for students with disabilities, current government funding arrangements for students with disabilities inhibits its implementation. It potentially places an inequitable burden on the families in those independent schools which have students with disabilities enrolled. The problem is particularly acute for independent schools since they are generally not able to draw on the state services to assist in meeting the needs of students with disabilities nor can spread the cost over a student population wider than at their own school.⁴

7.5 Similarly, the Catholic system argued that the cost of meeting the needs of an increasing number of high support students was problematic:

As NSW Catholic schools enrol more students with greater support needs, funding support cannot be expanded rapidly enough to address all identified learning needs. For example, simply arranging for a student to be catheterised or otherwise toileted at school can cost up to \$6,000 per year.

Similarly, as the number of students who enrol in NSW Catholic schools, particularly those with higher support needs, increases so do total support costs. All eleven NSW Dioceses have indicated that the cost of support provision for students with disabilities is far greater than the Commonwealth and state funds attracted by the student's enrolment. The cost of essential support for a student with a disability in a regular school can vary from \$1,600 to \$32,000, depending on the level of need of the particular student. Available Commonwealth funds typically meet no more than 40% of service provision costs for students with mid-range service support needs.⁵

7.6 The recent and well publicised anti-discrimination case involving the Hills Grammar School⁶ will increase the pressure on non-government schools to accept students with significant disabilities. In 1997 the parents of a girl with spina bifida attempted to enrol their daughter in kindergarten for 1998 at the Hills Grammar School. After some discussion about her needs, the school eventually refused the

2 Submission No. 175, National Council of Independent Schools Association, p. 5

3 Submission No. 149, National Catholic Education Commission, p. 1

4 Submission No. 175, op.cit., p. 8

5 Submission No. 183, Catholic Education Commission, NSW, p. 7

6 *Finney v Hills Grammar School* [2000], EOC 93-087

enrolment. This decision was made on the basis that the school was not adequately resourced to look after the girl, given her special needs. The parents took the matter to the Human Rights and Equal Opportunity Commission. The Commissioner found that the school had unlawfully discriminated against the girl on the grounds of disability. An appeal by the school was lost in the Federal Court.

7.7 The *Finney v Hills Grammar School*⁷ case was particularly important as it tested the extent to which the non-government school sector can argue that the enrolment of student with a disability places an unjustifiable hardship on the school, and consequently refuse the enrolment. The unjustifiable hardship exemption provides educational authorities with the ability to argue that the services or facilities required by a student with a disability seeking admission to an institution would result in significant costs, or cause major difficulties, and consequently lead to unjustifiable hardship.

7.8 It was found that it would not have been unjustifiable for a non-government school to have enrolled a child with spina bifida given the specifics of the case. While the Commissioner agreed that the enrolment of the student would place a ‘hardship’ on the school the hardship was not considered to be unjustifiable. The Commissioner took into account the *benefits* and detriments for the student, the school and the community, and balanced these against the hardships which would be encountered:

...the concept of “unjustifiable hardship” connotes much more than just hardship on the respondent. The objects of the Act make it clear that elimination of discrimination as far as possible is the legislation's purpose. Considered in this context, it is reasonable to expect that the School should have to undergo some hardship in accepting Scarlett’s enrolment. It is clear from the evidence that this would have occurred, as Scarlett required services and facilities not required by other students. The nub of the issue is whether such hardship was unjustifiable. In paragraph 6.16 and 6.17 I have set out the benefits and detriments to all concerned, including the effects of Scarlett’s disability and the financial implications for the School. Determination of this question requires me to decide if, in the context of these benefits and detriments, the hardship caused would have been unjustifiable. I find the defence of unjustifiable hardship has not been made out by the School.⁸

7.9 The non-government education sector was not only concerned because the Commissioner found against the school, but because the case did little to clarify the meaning of the term ‘unjustifiable’:

While the requirement to enrol students with disabilities is apparently softened by the “unjustifiable hardship provision” there continues to be uncertainty about the precise legal obligation this entails for schools, with

7 *ibid.*

8 *ibid.*, s.7.6

the assessment of “unjustifiable hardship” depending on the particular facts of each case.⁹

7.10 The committee notes that the unjustifiable hardship exemption is only available to a school when it is considering a student’s application for enrolment. The proposed education standards will extend this exemption to apply post enrolment. Some representatives from the disability sector were concerned about the apparent loss of rights that this extension would cause, while the non-government sector supported the extension of the exemption. Whether this will affect the rights of students with disabilities is debateable. Currently it is open to a school accused of indirect discrimination to argue that its decisions or actions were not unreasonable under the circumstances; alternately, they can argue that the demands of the aggrieved person were unreasonable.

7.11 Universities and Technical and Further Education (TAFE) colleges have been struggling with appropriate strategies to implement the obligations imposed by the Disability Discrimination Act. A number of universities have developed action plans to develop strategies for ensuring equity and access for their students with disabilities. These are considered by HREOC when making determinations in relation to unjustifiable hardship. Banks and Kayes reported that long standing use of disability action plans in the TAFE sector might be responsible for disability discrimination being less of a problem in that sector.¹⁰ The committee notes that, at the time of writing this report, 22 universities and 18 TAFE Colleges or Institutes of Technology had lodged action plans with HREOC.¹¹

7.12 As noted in Chapter 6, the committee has little doubt that funding these strategies has proved difficult for the post-secondary sector. The University of Melbourne wrote in its submission:

There are significant resource implications for the University in providing an educational environment that is free of disability discrimination, as mandated by anti-discrimination legislation. In a climate of reducing reliance on government funding, the University has to allocate its resources responsibly and cannot afford to alter its environment and practices to comply with anti-discrimination legislation in a short time frame. The cohort of students with disabilities in the University environment has increasing numbers of students with high support needs which will result in increasing demand for time and financial resources. There will continue to

9 Submission No. 175, National Council of Independent Schools Association, p. 8

10 Banks, R. and Kayes, R., *The Disability Discrimination Act: Working Towards Compliance in Education*, A discussion paper for Disability Discrimination Act Standards Project, July 1999, p. 9

11 *Register of Disability Action Plans*, Human Rights and Equal Opportunity Commission, http://www.hreoc.gov.au/disability_rights/action_plans/Register/register.html#educ (access. 12 November 2002)

be barriers towards the participation of students with disabilities if the funding made available to Universities is not increased.¹²

The draft disability standards for education

7.13 The Disability Discrimination Act makes provision for the Attorney-General to formulate education standards. Standards made by the Attorney are subject to parliamentary approval and possible amendment.¹³ Once in force, the Act provides that it will be unlawful for a person to contravene a disability standard. Standards will set out how education and training are to be made accessible to students with disabilities and include measures that, if implemented by educational authorities, will be evidence of compliance with legal obligations. However, some state government and many non-government authorities have raised concerns about the cost implications of this approach for the school sector, given the broad and generally untested scope of the Disability Discrimination Act.

7.14 The Victorian Department of Education and Training summarises the position of a number of authorities:

A number of government school and VET [Vocational Education and Training] systems, along with Catholic and independent school systems, have expressed concern at the potential cost of implementing the standards. The Commonwealth has argued that as the standards simply codify the Act, there should be no additional costs generated by the standards. Attempts to undertake a cost benefit analysis of the standards have not been successful.¹⁴

7.15 The committee agreed with those witnesses who argued that education standards would give greater certainty about equity entitlements for students with disabilities. The committee also believes that because the Disability Discrimination Act is drafted in very general terms and applies to a broad range of areas, the standards will be important for providing greater certainty and clarity about the responsibilities of education institutions. Teachers, schools and education authorities have had to rely on interpretations from case law to clarify the expectations of the anti-discrimination provisions.¹⁵ The committee is concerned, however, that after a process of six and a half years, the standards have yet to be finalised.

7.16 The Disability Discrimination Act acknowledges the importance of consultation with relevant parties and, in particular, state and territory governments, because it requires the comments of relevant state and territory ministers to be taken

12 Submission No. 186, University of Melbourne, p. 8

13 See *Disability Discrimination Act 1992*, subsection 31 (3)

14 Submission No. 212, Victorian Department of Education and Training, p. 33

15 Keeffe-Martin, M., 'Legislation Case Law and Current Issues in Inclusion: An Analysis of Trends in the United States and Australia', *Australia and New Zealand Journal of Law and Education*, Vol. 6, 2001, p. 33

into account before making standards that are enforceable at law.¹⁶ As a consequence, the Ministerial Council for Education, Employment, Training and Youth Affairs (MCEETYA) established a taskforce to develop disability standards for education in 1995. The taskforce was chaired by the Commonwealth and comprised representatives from the states and territories, the DDA Standards Project¹⁷ and stakeholder groups within the education and training community.

7.17 The outcome of that process was a set of draft disability standards for education. These were considered by MCEETYA in July 2002. The standards dealt with the areas of: enrolment; participation; curriculum development, accreditation and delivery; student support services; harassment and victimisation, and set out the rights, or entitlements, of students with disabilities, consistent with the rights of the rest of the community. They describe the legal obligations of educational authorities, institutions and other education providers, and include examples of compliant measures that are performance based. The meeting made the following resolution on the standards:

Council expressed concern over the delay in finalising the draft Standards but agreed that outstanding legal and financial issues be further addressed by December 2002 prior to the introduction of legislative amendments to the Disability Discrimination Act if necessary, and to the implementation of the Standards, and urged all jurisdictions to work co-operatively on this matter.¹⁸

7.18 The committee sees the development of disability education standards as one of a number of steps necessary to address the discriminatory practices identified in this report. It agrees that all Australians should be protected by nationally agreed disability standards with respect to education, and consequently shares the concerns of the Physical Disability Council of Australia which had the following to say about the outcome of the July 2002 MCEETYA meeting:

As the convener of that [*DDA standards*] project and as the executive officer of the Physical Disability Council of Australia, we would like to say that we were extremely disappointed to see that the standard was referred to yet another task force for further work, especially since we understand that the advice that was received from the Commonwealth Deputy Chief Counsel should have allayed any fears about the actual draft standard exceeding the legislation. The Physical Disability Council of Australia even questioned whether the standards would ever be finalised.¹⁹

16 See *Disability Discrimination Act 1992*, section 132

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

18 Mr Tony Greer, Group Manager, Schools Group, Department of Education, Science and Training, *Hansard*, Canberra, 11 September 2002, p. 651

19 Ms Sue Egan, Executive Officer, *Hansard*, Brisbane, 6 September 2002, p. 469

7.19 The formulation of education standards is an essential part of the overall legislative scheme developed to reduce discrimination in education. While existing law will be able to deal with matters contained in the standards, the committee has learnt that the Act by itself is not necessarily the most effective or efficient means of achieving this aim.

7.20 Compliance with the current law often depends on a parent lodging a complaint against an educational institution with the ultimate resolution of the problem relying on a court decision. The committee found a level of dissatisfaction with this process, particularly the time taken to deal with complaints, the stress endured during the process and the final outcome of the process. In Brisbane, Queensland Parents for People with a Disability (QPPD) told the committee:

Two years ago QPPD gathered together three families who had been involved in cases in Queensland, and all three stated that they would not ever go through the process again. They felt that the victimisation they had suffered afterwards was worse than the process of going through the court case. In fact there is a culture in Queensland where parents often advise other parents not to complain, because of the risks involved.²⁰

7.21 Although the Disability Discrimination Act has been in force since 1992 it has become evident that, in its application to education, the objectives of the Act are yet to be fully realised. Evidence provided to the committee suggests that there is considerable variation in legislative compliance among the states and territories as well as differences in compliance between the government and non-government school sectors. The Independent Education Union describes the situation in relation to the non-government sector:

...many of the submissions received from members reflect their real concern at not being able to meet these obligations. The consistent and strong feedback from members is that the resources and funding arrangements for students with disabilities in non government schools are not adequate and that schools are therefore vulnerable to being in breach of the Act.²¹

7.22 Further, the committee was told that in 2000, only 1.5 per cent of students enrolled in the independent school sector and 2.2 per cent of students in the Catholic school sector had a disability. This compared to 3.9 per cent of total students in the government school sector.²² While the committee accepts that there has been a trend towards increasing enrolments of students with disabilities in non-government schools, the magnitude of the disparity between the enrolment numbers of the government and non-government school sectors raises questions about equity of

20 Ms Sandra Kalms, Executive Coordinator, Queensland Parents for People with a Disability, *Hansard*, Brisbane, 6 September 2002, p. 415

21 Submission No. 215, Independent Education Union, p. 1

22 Submission No. 14, Australian Parents Council, p. 6

access. Following her study into numeracy and literacy for students with disabilities Dr Christina van Kraaynoord had the following to say:

...I think it is our experience, based on our research, that the state takes the bulk of students with severe disabilities. Although the Catholic education system is increasingly taking children with high support needs, I believe that independent schools, because of their independent nature, are able to select students much more carefully and may, in fact, seek ways of precluding students from attendance or enrolment in their schools, despite the anti-discrimination legislation.²³

7.23 The Queensland Parents for People with a Disability told the committee:

Some of the general feeling from parents who have given us anecdotal feedback about private schools is that generally the Catholic system has been more welcoming of students with disabilities, whereas other non-denominational or independent schools seem to have the notion that they require special facilities in order to take children with disabilities, even though the reason that people approach those schools in the first place is usually to avoid special facilities.²⁴

7.24 In the government sector, students with ‘traditional disabilities’ are reasonably well catered for under funded programs, although some parents would argue that until education is fully inclusive many students with disabilities will continue to be discriminated against; this issue was explored in Chapter 3. Mary Keeffe-Martin reports that Australia has not experienced a ‘flood’ of special education litigation because of complex complaint-based appeal processes, unwanted expense and publicity, the exemption clause of unjustifiable hardship and the stress of lengthy court cases.²⁵ She also reports that there is a growing body of evidence to suggest that this trend is changing. Parents, students, teachers and advocacy groups have raised awareness about discriminatory practices in schools. During 2000–2001, 82 complaints were made to HREOC about discrimination in education.²⁶

7.25 Of particular concern is the extent to which students with ‘less traditional disabilities’ are managed. The legislation relies on the concept of reasonable adjustment being made to provide substantive equality for students with disabilities. For some disabilities such as conductive hearing losses, learning disabilities, and some behavioural disorders this is clearly not happening in all instances. The Australian Association of Teachers of the Deaf had the following to say about the management of conductive hearing losses in Victoria:

23 *Hansard*, Brisbane, 6 September 2002, p. 457

24 Ms Michelle O’Flynn, Queensland Parents for People with a Disability, *Hansard*, Brisbane, 6 September 2002, p. 413

25 Keeffe-Martin, M., *op. cit.*, p. 40

26 *Annual Report for the Human Rights and Equal Opportunity Commission 2000–2001*, Part 2

We believe that the eligibility criterion should be broadened to include these students in recognition that their hearing impairment places them at risk for language, communication and literacy development. These students have complex needs and access to a learning environment with trained Teachers of the Deaf will provide them with an appropriate supported learning environment.²⁷

7.26 The Independent Schools Association of Western Australia described the situation in Western Australia:

Many students in member schools, particularly the Aboriginal schools, suffer from this. It is estimated that 40–80% of Aboriginal students are affected in member schools whether they are in urban, rural or remote setting. Schools cannot access specialist support because the Western Australian Institute for Deaf Education, the visiting teacher service of the State Education Department which also supports independent schools, does not support students with conductive hearing loss.²⁸

7.27 One witness explained that it was not until she began studying at university that appropriate and reasonable accommodations were made to allow for her learning disability, scotopic sensitivity:

This is my first year at University and the first time my disability has ever been validated. I have had substantial support, lighting has been changed, photocopied are my sheets, I am not marked down for only being able to read a certain amount of work, extensions on assignments, the list seems endless.

I did not attend a bad school nor have heartless teachers. My teachers were merely ignorant of my disability and this is a result of poor training in the area of Scotopic Sensitivity. They followed all guidelines set down by the Board of Education, although these guidelines did not meet any of my needs as a student with a disability.²⁹

7.28 Many witnesses told the committee, or wrote in their submissions, about the lack of assistance provided in schools to students with dyslexia. As one dyslexic wrote:

It does not appear that the NSW Education Department has established a clear policy position on dyslexia or a framework for delivering practical and effective assistance to dyslexic children, most of whom will not complete their education, and many of whom will continue to swell our prison and

27 Submission No. 110, Australian Association of Teachers of the Deaf, p. 1

28 Submission No. 118, Association of Independent Schools—WA, p. 5

29 Submission No. 2, Ms Olivia Baczynskyj, p. 2

juvenile justice systems, which are comprised mainly of people with reading and learning difficulties.³⁰

7.29 As discussed in Chapter 5, even where established programs provide funding support for students with ‘traditional disabilities’, equality is not always assured in a mainstream setting if teachers and teacher aides do not possess the necessary skills, or are not available, to give students with disabilities appropriate access to curricula.

7.30 Evidence was given to the committee about the negotiation process which has eluded MCEETYA for more than six years. It was explained that there was a great deal of resistance to the adoption of the standards. The convenor of the Disability Discrimination Act standards project group told the committee that it is unlikely that any agreement would be reached in 2002, and that resistance was coming from states which ‘deemed’ that inclusive education was too expensive.

7.31 The report³¹ prepared by the Standards Working Group for the July 2002 MCEETYA meeting, sets out points of legal contention that were also reported to have delayed the adoption of standards. The report discusses a number of legal issues raised by one state government. In particular, it addresses issues to do with the legal basis for the standards, and whether some provisions seek to extend the application of the Disability Discrimination Act. Evidence provided to the committee indicates that one solution to the uncertainty surrounding the legal basis of the standards, is to amend the Disability Discrimination Act to ensure that the standards will be within power. This will ensure that once adopted, the standards will be beyond legal challenge.

7.32 The committee agrees that the finalisation of the standards is long overdue. It also agrees that Australia’s education system should be underpinned by an agreed set of national standards setting out the equity entitlements of students with disabilities. In the event that MEECTYA cannot reach agreement about the proposed standards, the committee believes that the Commonwealth has no alternative but to take a unilateral step and bring into force the Disability Standards for Education 2002. These have been available in draft form for some months.

Recommendation 17

The committee recommends that the Attorney-General formulate the Disability Standards for Education 2002, under paragraph 31 (1) (b) of the *Disability Discrimination Act 1992*; it also recommends that the Commonwealth take the necessary legislative action to put the education standards beyond legal challenge.

30 Submission No. 190, Mr James Bond, p. 5

31 Department of Education, Science and Training, answer to question on notice taken Canberra, 11 September 2002

Cost implications of the standards

7.33 The committee is concerned about the claims made by a number of witnesses that cost considerations have also hindered progress in finalising the standards. However, it does not believe that these considerations should hinder the finalisation of the standards.

7.34 The Commonwealth argued that the education standards should not impose any significant financial burden on educational authorities because they clarified existing obligations and did not extend the ambit of the Act.³² That is, provided education authorities were meeting their current obligations under the Act, there should be no need to extend or modify current programs and processes. The Commonwealth also advised that state and territory jurisdictions had indicated that they complied with the requirements of the Disability Discrimination Act. In a speech to a disability and research seminar the Deputy Disability Discrimination Commissioner had the following to say on this matter:

The extra costs argument is hard to understand. On the one hand the States assert that they are currently complying with the provisions of the DDA in this area. However they assert that the draft Standards, which with a few minor exceptions do not extend the DDA in my view, will cause them major extra costs. This is hard to understand if one accepts their first assertion, and the fact that all of them have had similar State legislation, in some cases for twice as long as the DDA has been law.³³

7.35 The committee is aware that the New South Wales government did not share this view and was concerned that the standards exceeded the Act in application. As a consequence the New South Wales government predicted that the introduction of the standards would have significant cost implications.

7.36 The Tasmanian Department of Education supported the introduction of the standards. They argued that because their department's policies and practices met current legislative requirements, the standards would not impose any additional costs. They also told the committee that some other states were less than compliant with current requirements, and consequently concerned about possible costs implications:

Other states would agree, I think, that at this point in time they are not necessarily meeting their full requirements under the act and that has been highlighted in relation to the DDA standards. It is the difference between the standards and the act—that is, the gap in funding—that is difficult. If the

32 Department of Education, Science and Training, answer to question on notice taken Canberra 11 September 2002

33 Graeme Innes, Deputy Disability Discrimination Commissioner, *Presentation to Disability Studies and Research Seminar*, 19 July 2002
http://www.hreoc.gov.au/disability_rights/speeches/ris.htm (access. 24 October 2002)

standards are implemented, it is going to raise a profile in relation to the act and recognise that discrepancy.³⁴

7.37 The South Australian government estimated the cost for the state of introducing the standards would be in the order of \$19.3 million.³⁵ It predicted that the state will be required to extend support to the cohort of students that came within the definition of disability under the Disability Discrimination Act, but were not currently provided for under the department's policies and programs. The department also expected additional costs to be incurred from:

- the provision of professional development in relation to the obligation of educators under the Education Standards;
- the adaptation and production of curriculum support materials following the development of individual education plans for all students with a disability;
- the provision of timely support services especially to isolated areas;
- the additional costs for technology-based services and laptop computers with specialised software programs.³⁶

7.38 The Victorian government was also concerned about the largely untested scope of the definition of disability under the Disability Discrimination Act. At issue is the extent to which students that fall within the broad definition disability under the Disability Discrimination Act are covered by existing disability arrangements. As the Victorian Department of Education and Training explained:

The issue confronting providers in an environment where the dedicated program (in Victoria's case the Disability and Impairment Program and Commonwealth Targeted Program funding) does not cover the whole population covered in the statute, is whether the adjustments made as the result of other program initiatives (eg Special Learning Needs, Reading Recovery) or allocation of additional resources by an individual school, will satisfy a tribunal or court that a reasonable adjustment has been made.³⁷

7.39 The Victorian government made the following assessment of the cost of implementing the education standards:

...should it become evident that there is a requirement to provide the same type and level of adjustment to all students who meet the Act's definition, it

34 Ms Kerry McMinn, Department of Education, *Hansard*, Hobart, 3 September 2002, p. 387

35 Ms Stephanie Page, Department of Education and Children's Services, *Hansard*, Adelaide, 9 September 2002, p. 553

36 Submission No. 238, Department of Education, Training and Employment, South Australia, p. 29

37 Submission No. 212, Department of Education and Training, Victoria, p. 32

has been estimated that costs in Victoria will increase by approximately \$100m per annum for government schools alone.³⁸

7.40 Education Queensland wrote:

The Standards however, have a potential impact of increasing costs if the Standards expand the current range of students identified as having a disability. One assumption shared by some service providers is that the combined population of students with high need disabilities and learning difficulties is about 18%. Currently Education Queensland supports about 15% of students across this range.³⁹

7.41 The committee agrees that a full and independent cost assessment of the impact of the draft education standards is required to give support to the claims made by state education departments. The committee obtained a copy of the draft regulation impact statement prepared for the July 2002 MCEEYTA meeting and it is concerned about the basis of the estimates. The regulation impact estimates the cost of introducing the standards to be \$328.3 million to \$334.3 million for schools (\$310.2 million) and the VET sector (\$18.1 to 24.1 million). Of this \$141.3 million to \$147.3 million was identified as recurrent costs, \$5 million as recurrent costs for five years, \$2 million as one of costs with the remaining costs unspecified.⁴⁰

7.42 The committee is sceptical of the estimates for two reasons: not all states contributed to the costing exercise; and some estimates were based on the assumption that 18 per cent of school students would fall within the Disability Discrimination Act definition of disabilities. This figure is inflated by the inclusion of students with learning difficulties, many of whom would not fall within the definition of disability under the Act. While the number of students that fall within the definition of the Disability Discrimination Act is unknown, the committee notes that the Australian Bureau of Statistics (ABS) found that in 1998, 277,400 children aged 5–17 years, or 8 per cent of all children in this age group had a disability.⁴¹ While the definition of disability under the Disability Discrimination Act is much broader than the definitions used for funding eligibility support under state programs, it is unlikely that all students falling within the broader definition would require significant, if any, educational adjustments.

7.43 The Disability Discrimination Act gives a new responsibility to the Commonwealth government. To ensure the objectives of the Act are achieved, the committee agrees that the Commonwealth will have to accept a level of financial responsibility for the implementation of the education standards in government

38 *ibid.*, p. 212

39 Submission No. 213, Education Queensland, p. 258

40 Department of Education, Science and Training, answer to question on notice taken Canberra, 11 September 2002

41 *Australian Social Trends 2000 Education—Participation in Education: Disability and Schooling*, Australian Bureau of Statistics, p. 2

schools. The committee agrees that the cost of implementing the standards should not prevent their finalisation, but rather that these cost considerations should be addressed jointly by the Commonwealth and state and territory governments. The extent to which this responsibility should be shared between the Commonwealth, states and territories is a matter that is most appropriately decided by MCEETYA. Importantly, because the committee agrees that all governments have a responsibility to ensure that the object of the Act is achieved, the provision of additional Commonwealth funds to assist in the implementation of the education standards should be contingent on finalisation of those standards. Such funding would be over and above those funds currently provided to state governments for the education of students with disabilities.

Recommendation 18

The committee recommends that Commonwealth, state and territory governments share the cost of implementing the education standards. MCEETYA is the appropriate forum to determine the extent that these costs should be shared.

Commonwealth funding for the school sector

7.44 The committee examined current Commonwealth funding arrangements in schools to determine whether Commonwealth funding is being effectively targeted to meet the needs of students with disabilities.

7.45 General recurrent grants are the principal Commonwealth funding source available to government and non-government schools. This funding is based on the average recurrent cost of educating students in Australian schools (AGSRC index). The AGSRC index includes the costs associated with educating students with disabilities and in the case of non-government schools grants are also based on the capacity of a school community to support its school. These funds are allocated on a per student basis and it is estimated that the Commonwealth will provide in recurrent funding \$9.2 billion to the Catholic system, \$5 billion to the independent sector and \$5.7 billion to the government schools over the 2000–2004 quadrennium.⁴²

7.46 Traditionally, the Commonwealth has provided funds for specific purposes, such as disability education and attempted to limit their use to that purpose. However with the passage of the *States Grants (Primary and Secondary Education Assistance) Act 2000* this approach was discarded, and a new accountability framework introduced that focussed on improving student outcomes. As a condition of funding, state and territory authorities were required to commit to the National Goals of Schooling and to achieve any performance measures, including targets, incorporated in the Act.

7.47 Under the revised arrangements, funds previously provided under the literacy and numeracy grants program were combined with special education support grants to

42 Department of Education, Science and Training, answer to question on notice taken Canberra, 11 September 2002

fund a new program, known as the *Strategic Assistance for Improving Student Outcomes (SAISO) Program*. This program aims to provide educational authorities with funds to improve educational outcomes for students who are educationally disadvantaged. Funds may be directed at school students from kindergarten to year 12 who are educationally disadvantaged in terms of their educational participation and learning outcomes, particularly in numeracy and literacy. This may be associated with a range of factors such as disability, a language background other than English, Aboriginal or Torres Strait Islander background, low socio-economic background and learning difficulties. As education is primarily a state responsibility, the funds are not intended to meet all of the costs of meeting the needs of educationally disadvantaged students, but are meant to be used strategically, to improve educational outcomes over time.⁴³

7.48 The program is designed to give educational authorities the flexibility to make decisions about which schools have the greatest need for additional assistance to achieve improved outcomes. These authorities have the responsibility to distribute SAISO funds throughout the sector and determine appropriate funding amounts for schools. These are required to provide the Commonwealth with details about how the funds are managed. The committee accepts that the current funding arrangements are administratively simple, and allow authorities to address the needs of students with multiple educational disadvantages without being constrained by artificial divides between programs. However, these new arrangements result in a loss of transparency about the use of Commonwealth funds to support students with disabilities. The problem is that there is no corresponding mechanism to measure improvements in educational outcomes for students with disabilities; that is, until as discussed in Chapter 2, performance measures for this group can be developed.

7.49 Figure 7.1 sets out the total level of funding provided under SAISO to each sector. Included is that part of SAISO funding that is allocated on a per capita basis to students with disabilities. It includes an amount of \$116 for every government student and \$589 for every eligible non-government student. These funds must be directed towards those students that meet the eligibility criteria outlined in paragraph 2.7. For the reasons set out above it must be assumed that only a portion of *total* SAISO funds are directed towards students with disabilities.

7.50 With eligibility to per capita funding being restricted to the traditional categories of sensory, physical and intellectual disabilities, many disabilities that fall within the broad definition of disability under the Disability Discrimination Act do not qualify for per capita support. Some submissions from the non-government sector criticised this lack of Commonwealth funding support for this group of students:

I believe (and I have heard from numerous colleagues at conferences) that it is often the students with disabilities who present the least amount of problems in the classroom. The students with learning disabilities such as

43 *Commonwealth Programs for Schools Quadrennial Administrative Guidelines 2001–2004*, Department of Education, Science and Training, p. 70

students with ADHD, usually present far more of a challenge—displaying feelings of inadequacy (that they are unable to cope with mainstream curriculum) and taking it out in a number of ways: anger, frustration, bullying etc. Yet, there is no funding for these students.⁴⁴

**Figure 7. 1: Total SAISO Funding \$m 2001–2002 – including additional⁴⁵
including additional strategic assistance)
(to nearest \$100,000)**

		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
Government	Per capita	3.9	2.1	2.5	1.5	1.0	0.4	0.2	0.6
	No. of students	31,706	15,183	19,205	11,487	7,566	2,956	1440	4622
	Total	83.9	39.9	53.0	19.7	20.3	7.3	2.3	4.4
Catholic	Per capita	4.3	1.1	2.83	0.8	0.6	0.1	0.08	0.08
	No. of students	6,507	1,661	3,314	1,206	1,008	185	189	87
	Total	30.4	8.2	22.4	4.6	7.2	1.3	1.0	1.1
Independent	Per capita	1.3	0.4	1.0	0.8	0.2	0.06	0.1	0.03
	No. of students	2,013	694	1,464	1,140	328	118	71	91
	Total	13.9	4.1	11.6	3.2	3.0	0.7	0.6	0.3

44 Submission No. 215, Independent Education Union, p. 12

45 Table compiled from data provided by the Department of Education, Science and Training, answer to question on notice taken Canberra 11 September 2002

7.51 The committee is concerned that this criticism arises because funds for educationally disadvantaged students have been broadbanded under the new arrangements. Although per capita support is targeted towards students with higher support needs, education authorities have considerable discretion in the use of the vast majority of SAISO funds. Consequently, they can direct funding towards any disadvantaged student, including students that would fall within the broad definition of disability under the Disability Discrimination Act. The committee shares the concerns expressed by the Australian Association of Christian Schools in relation to broadbanding:

Broadbanding has its up sides. It provides the individual organisation, be it the AIS or the Catholic Education Commission or government education authority, with a range of choices inside a broad band. However, it might mean, for example, in the current broadbanding area that you are referring to, that the bulk of the money could wind up in literacy and numeracy areas and very little of it might find its way into the support of students with disabilities, and that is a major concern.⁴⁶

7.52 The National Council of Independent Schools' Association also criticised the lack of transparency about the current arrangements:

While the broadbanding has had positive benefits in terms of new approaches to meeting the needs of students with disabilities, it has failed to effectively address the problem of inadequate government funding and has acted to reduce the transparency of the total level of government resources provided to meet the specific additional educational support needs of students with disabilities.⁴⁷

7.53 Submissions questioned the rationale behind the new arrangements. As previously explained SAISO funding has two components; that which must be directed toward students with disabilities and that which must be directed towards educationally disadvantaged students. While specific funding for students with disabilities will increase as the number of students with disabilities in a sector increase, the quantum of funds directed towards educationally disadvantage students remains fixed regardless of the number of students with disabilities enrolled in any sector. The Association of Independent Schools of Western Australia wrote in its submission:

The original funding distribution was established during the mid nineteen eighties when independent schools across Australia enrolled few students with disabilities. The same historical formula is being used in 2002 and the Department of Education Science and Training has admitted, when questioned, that the funding has 'no formula but only a history'. The allocation certainly does not take into account the cost of complying with

46 Mr Peter Crimmins, Executive Officer, Australian Associations of Christian Schools, *Hansard*, Sydney, 3 July 2002, p. 164

47 Submission No. 175, National Council of Independent Schools Associations, p. 12

the DDA, the increase in numbers of students with disabilities enrolled in the sector and the costs of providing for these students.⁴⁸

7.54 The committee understands the appeal of broadbanding to schools and to state and territory educational authorities. The difficulty that arises for the committee however, is that under current arrangements it cannot follow the trail of financial assistance from the Commonwealth to the final recipient. Consequently the committee cannot be assured that Commonwealth funds are being used as Parliament intended. Committee members have considerable anecdotal evidence gleaned from visits to schools in their states and of reports to electoral offices that children eligible for funded support are not being supported in a manner that corresponds to the funds provided to the school.

7.55 The committee does not question the rights of schools to determine the use to which funds are put. The choice of employing specialist assistance, purchasing assistive technologies, modifying school environments or implementing a particular strategy designed to assist a student with a disability is most properly decided by those with specific knowledge of a student's circumstance. What the committee does require is evidence that funds are expended in a way that is relevant and appropriate to the educational task that needs to be performed. For this reason, the committee believes that the Commonwealth should require state and territory education departments as well as non-government systems and schools to develop reporting processes that ensure accountability for Commonwealth funds expended at the school level.

7.56 The States Grants (Primary and Secondary Education Assistance) Act 2000 prescribes the general conditions under which financial assistance is to be paid to a state for government or non-government schools. The Act requires that before authorising payments, the Commonwealth must agree with state and territory governments about the conditions on which financial assistance is granted. The committee notes that the current agreement lists financial accountability as a condition for funding. The committee also notes that this condition is met if a qualified accountant provides a certificate stating that the amount received by an education authority has been spent or is committed to be spent for the purposes for which the assistance was granted. The committee is highly sceptical about the adequacy of this measure and agrees that improved accountability mechanisms are necessary to ensure the transparent use of Commonwealth funds for students with special needs.

Recommendation 19

The committee recommends that the conditions on which financial assistance is paid to state and territory education authorities, and the supporting guidelines for quadrennial funding, should be strengthened to include reporting processes that ensure that Commonwealth funds for students with disabilities are spent on students with disabilities.

48 Submission No. 118, Association of Independent Schools, Western Australia, p. 5

Adequacy of funding in the non-government sector

7.57 Many submissions raised concerns about the extent to which current funding arrangements allowed schools to meet the expanding responsibilities brought about by the introduction of Disability Discrimination Act and the increasing number of students being diagnosed with disabilities:

These legislative moves have had wide ranging impact on the capacity of schools to ready themselves for inclusion. The capital component alone, physically restructuring schools to meet all forms of student disability, is well beyond the capacity of school communities to meet. Capital funding has not increased to meet these demands. Classroom curriculum demands, the provision of resource teachers to cater for students with disabilities, are resource intensive. No forward planning to meet this additional resource demand in the form of additional funding has been forthcoming.⁴⁹

7.58 The committee also received evidence from the non-government sector, about the disparity of funding between the government and non-government school sectors. This was a criticism about the level of funding from state education departments as much as it was about Commonwealth funding arrangements. It was argued that the lack of funding restricted the ability of schools to provide adequately for students with disabilities and consequently restricted the educational outcomes of such students enrolled in non-government schools:

I must admit that, when I did move across from the state system to Catholic and independent schools, I was absolutely horrified at the lack of funding that was made available to students in independent and Catholic schools. Our students in independent schools are funded at one-tenth of what they would get in state schools. An example of this would be that a number of our funded students who are accessing only three hours of support time a week would be funded full time in the state school system. This impacts hugely on learning programs for those students.⁵⁰

7.59 Teachers from the sector argued that they were not getting the support they needed to meet the needs of students with disabilities. It was argued that integration places high demands on education staff and there can be a tension in balancing the needs of the whole class if appropriate levels of support are not in place. They were concerned about the lack of adequate resources available to them to prepare separate curriculum content or manage a wider range of learning needs. As one teacher wrote:

As a school we are committed to fostering equal access to the curriculum for all students. This is a labour intensive initiative, not only do we team teach in classes, we modify units of work, set alternative assessment tasks, act as notetakers and conduct intensive reading classes. This all takes an enormous amount of staffing time. Consequently the amount of funding

49 Submission No. 120, Queensland Catholic Education Commission, p. 3

50 Ms Delma Wotherspoon, Victorian Independent Education Union of Australia, *Hansard*, Melbourne, 13 August 2002, p. 231

allocated is never enough and each year one has to be more creative because the demands continue to grow.⁵¹

7.60 It was also argued that the lack of funding for students with disabilities in non-government schools denied parents the right to choose the type of education that suits their child. This was particularly problematic where a parent wanted a child with a disability to attend the same school as a sibling:

Another school that wrote recently sought to enrol the sibling of a currently enrolled student. The sibling had Down syndrome. The child arrived at the school, funding could not be found to provide adequate support, and reluctantly they have had to take that child and the sibling out of the school because they wanted both of their children to go to the same school.⁵²

7.61 This in itself was described as discriminatory:

The discrimination is that those students who seek to choose an independent school setting are not able to do so with the same freedom as other students. A child with a disability is discriminated against by not having the same choice as non-disabled students. That is because of the inequities in the funding. It is a structural issue, if you like, rather than a philosophical issue.⁵³

7.62 Inequities extended beyond funding support. The evidence suggests that students attending non-government schools do not have the same level of access to assessment services, therapy services or even funded school transport services in some states, as students attending government schools.

Revised funding arrangements for the non-government school sector

7.63 Submissions from non-government school authorities argued for revised funding arrangements as a means of addressing the inequities previously discussed. Both the NCISA and the National Catholic Education Commission (NCEC) proposed funding models to support the education of students with disabilities in their sector.

7.64 The NCISA advocated that students with disabilities should receive the same level of government support irrespective of the school sector in which they are educated. They argued that this support should include access to state and territory government provided services, such as transport and therapy services, as well as funding. NCISA maintains that the responsibility of providing for students with disabilities should be shared between Commonwealth and state governments, the extent to which the responsibility is shared being a matter of negotiation between governments.

51 Submission No. 215, Independent Education of Australia, p. 12

52 Mr Stephen O'Doherty, Chairman, Australian Associations of Christian Schools, *Hansard*, Sydney, 3 July 2002, p. 160

53 *ibid.*, p. 163

7.65 In place of the current system of general recurrent grant funding and SAISO funding, the National Catholic Education Commission advocates that government funding for students with disabilities should more closely reflect the cost of educating students with disabilities in the government sector. This model mirrors current arrangements for all students attending non-government schools, but instead of using the AGSRC as the measure for calculating recurrent funding for students with disabilities, a new measure is proposed. As the Catholic Education Commission of NSW explains:

...in place of the current Commonwealth funding arrangements for students with disabilities...the Commonwealth should allocate funds for each SWD [student with disabilities] in Catholic systems equivalent to 56.2% (51.2% in the ACT) of the national average cost of educating a student with disabilities in regular government system schools. It is proposed that \$20,000 be used as a reasonable estimate for this.⁵⁴

7.66 The Catholic Education Commission of New South Wales goes even further to suggest that this mechanism should be applied to all other non-government mainstream schools, so that they receive for each student with a disability an amount equivalent to their SES percentage of the average cost of educating a student with a disability.

7.67 The committee rejects both the models outlined above. Under the NCISA model the independent school sector accepts no financial responsibility for providing for students with disabilities. While the committee notes that the model proposed by the Catholic sector proposes that this responsibility be shared between Commonwealth, state and territory governments and the sector, it questions the appropriateness of using an average cost of supporting students with disabilities given the enormous heterogeneity of the group.

7.68 Most importantly the committee rejects both models on the basis that their implementation would result in significant funding increases to the non-government sector. Given the competing demands for education funding, and the significant resources available to this sector, the committee does not agree that there is justification for increasing the total quantum of Commonwealth funds provided to this sector. The committee does not accept that the non-government sector lacks the financial resources required to address the needs of students with disabilities. On current funding trends, the Catholic education system will in 2004 have an estimated total income 11.7 per cent higher than the estimated total cost of educating primary and secondary students in government schools. For other non-government schools, estimated total income will be 7.8 per cent higher.⁵⁵

54 Submission No. 183, Catholic Education Commission, New South Wales, p. 11

55 Information and Research Services, Department of the Parliamentary Library. For methodology please see Appendix 6.

7.69 The committee also notes that the Commonwealth funding formula for the non-government schools sector reflects actual expenditure by the two levels of government on government schools. This includes the funds allocated for students with disabilities and the support services provided. Therefore the Commonwealth funds provided to non-government schools through general recurrent grants implicitly includes a proportion of funding for the education of students with disabilities. Where non-government schools either do not enrol many students with disabilities or where they do not provide appropriate levels of support for students with disabilities, they benefit disproportionately from Commonwealth financial assistance. The committee agrees that the needs of students with disabilities in this sector would be more appropriately served if the sector made better use of its current resources. It therefore makes no recommendations in relation to further assistance to non-government schools. Matters relating to special education may be an issue for the non-government sector in funding negotiation for the 2004–2007 quadrennium.

Non-government support centres

7.70 The committee heard from a number of non-government centres that provide education, therapeutic or other services to improve the educational opportunities, learning outcomes and personal development of children with disabilities. The committee visited the Cora Barclay Centre in Adelaide and was impressed by the important contribution that this centre made to the lives of many students with hearing impairments. The value of the work by associations such as the Australian Federation of SPELD Associations (AUSPELD), the Autism Association and Royal Blind Society is also well documented in *Hansard*.

The committee regrets that it has not been able to give adequate attention to the funding issues associated with these centres in the time it has had to report. However, the committee is concerned about the extent to which these centres rely on charity to carry out their important work. The committee concludes that appropriate funding arrangements for these centres requires more detailed examination and consideration.