



## Disability Discrimination Amendment (Education Standards) Bill 2004

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

**Date Introduced:** 17 November 2004

**House:** Senate

**Portfolio:** Attorney-General

**Commencement:** The formal provisions commence on Royal Assent. The substantive provisions commence on Proclamation or, if this does not occur within six months of Royal Assent, the first day after that period.

### **Purpose**

To amend the *Disability Discrimination Act 1992* (DDA) to enable the introduction of Disability 'Standards' for Education.

### **Background**

#### **Basis of policy commitment**

The DDA provides for the formulation of standards in section 31. This section covers a range of areas for which standards can be formulated:

- Transport
- Education
- Employment
- Accommodation
- Administration of Commonwealth Government Laws & Programs, and
- Access to Public Buildings (added following an amendment to the DDA on September 23, 1999).

There are already standards governing Public Transport and the draft standards for Access to Premises were released earlier this year.

Standards made under section 31 are essentially delegated or subordinate legislation, made on the basis that Parliament cannot be expected to legislate for the minutiae of government and there will be many aspects of the standards which must be changed regularly or which need detailed consideration not amenable to parliamentary enactment.

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Standards are designed to deal with systemic discrimination without the need to resort to proving discrimination through a complaints based process under the Human Rights and Equal Opportunity Commission ('HREOC'). Given that section 32 makes it unlawful not to comply with standards in force, the need for a victim to take a case to HREOC regarding discrimination they have experienced may be short-circuited. The use of standards in the DDA represents an innovative approach to anti-discrimination measures in Australia.

The current Bill is designed to clear the way for the introduction of standards in the area of education. It makes some modifications to the DDA which the Government feels are necessary before the Disability Standards for Education can be introduced. According to the Joint Media Release from the Attorney-General and the Minister for Education, Science and Training '[t]he Disability Standards for Education will be formulated and tabled when the Bill passes the Parliament.'<sup>1</sup>

The Disability Standards for Education (the Standards) have been developed after a fairly lengthy process, starting in 1995 with the formulation of the DDA Standards Project (an advisory body composed of disability interest groups) which, through the relevant Ministers, prompted the involvement of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), which established a Taskforce to oversee the developments of appropriate standards. Various processes continued until more recently there was a paper commissioned by the Department of Education, Science and Training (DEST). The paper was developed at the behest of the Australian Education Systems Officials Committee (AESOC), which used an independent consultant to examine the issue of the costs of implementing the Standards. This paper, *The Net Impact of the Introduction of the Disability Standards for Education*, was published by the Allen Consulting Group in June 2003 (who also noted the 'report was prepared in a very short time-frame and is heavily reliant on written and verbal information provided by key stakeholders').<sup>2</sup> The Productivity Commission has also recently produced a Report on the costs and benefits of the DDA (the *Review of the Disability Discrimination Act 1992*) which the Government believes supports the need for standards.<sup>3</sup>

In July 2003 the Minister for Education, Science and Training, Dr Brendan Nelson MP, issued a Media Release announcing the Government's intention to move unilaterally to implement the Disability Standards for Education. The Disability Discrimination Amendment (Education Standards) Bill was introduced into Parliament on 12 August 2004, but lapsed when the election was called. This Bill is in identical form.

The DDA gives legislative authority to issue standards to the Commonwealth Attorney-General. The involvement of the various State and Territory educational authorities through MCEETYA involved additional consultation beyond that required by the DDA's legislative framework, but seems to have struck problems. Some of the States and Territories had expressed concerns at the financial implications of the Standards (only Tasmania and the ACT were supportive of the Commonwealth's proposals). Dr Nelson

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commented that the States and Territories had ‘wildly different assessments of the impact on their budgets of implementing the standards’.<sup>4</sup>

The independent report by the Allen Consulting Group assembled the various costings and commented on the various differences. It noted that only *reasonable* adjustments are needed to comply with both the DDA and the proposed Standards. An educational provider can be exempt from making an adjustment where it is proven that such an adjustment would cause *unjustifiable hardship*. Nevertheless the quantum and scope of cost estimates provided differed significantly and ‘were influenced by providers’ interpretation of their obligations under the measures outlined in the *Standards*.’<sup>5</sup>

The Report also noted that the costs provided by educational providers appeared to have blurred costs which are one-off and those which may be ongoing. Furthermore the estimates were often prepared with different timing bases and used different assumptions as to the estimated number of students with disabilities. This all meant that any effort to achieve a comprehensive overview of costs was fraught, and that a focus on the requirements of the DDA itself needs to be taken into account. The notable feature of the Standards is that, legally speaking, they do not expand requirements already in place under the legislation, they simply systematise and clarify them. Nevertheless the Report was clear that their introduction would involve some additional costs to education providers.

### **Position of significant interest groups/press commentary**

After Dr Nelson’s declaration that he would act unilaterally regarding the Standards, Members of the Disability Discrimination Act Standards Project applauded Dr Nelson’s leadership, saying

We are disappointed that some of the States and Territories attempted to once again delay the introduction of the Education Standards.

To our delight, the Commonwealth Minister, Dr Brendan Nelson, has exercised his leadership. Dr Nelson recognises that after seven and half years of development, the Education Standards are now in agreement, and that legal and financial concerns have been resolved through independent inquiry.<sup>6</sup>

The Allen Consulting Group identified education providers’ concerns that there will be increased associated costs with the Standards. They believe that while the Standards may not legally expand the requirements of the DDA they change the nature of the enforcement from having been ‘passive’ to requiring active compliance. The Standards may also increase the number of students (and their guardians) expecting to receive services. It follows that increasing the awareness of the DDA’s provisions and highlighting how they apply to education will probably mean that more people with a disability are made aware of their rights and seek to utilise them. The Allen Group Report also identified the fact that the definition of ‘disability’ used in the DDA is broader than many definitions used

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elsewhere by the Commonwealth, including the criteria for funding grants being made to cater for the needs of those with ‘disabilities’.

Wendy Currie, a Research Officer with the NSW Teachers Federation, has commented that while the Standards set out definitions and requirements they don’t ‘make it clear whose responsibility it is to ensure compliance: the school, the system or the state government.’ She also expressed a concern that 80 per cent of the money set aside in the Federal Budget for implementation of the Standards went to private schools.<sup>7</sup>

### **Pros and cons**

As stated above, it is legally clear that the Standards do not change the Act. The Standards subsist within the framework of the legislation and can neither expand nor contract the coverage of the Act. However the concerns raised by ‘education providers’ as identified in the Allen Consulting Group’s study do identify concerns with how the funding of the impact of the Standards will occur. The concern with the different definitions of disability in use raises questions of who is responsible for funding any necessary changes (and under which definition of disability they are operating).

In contradistinction to the proposed Standards the current Bill does in fact modify the Act itself. These changes are mostly clarificatory and indeed can actually serve to exempt education providers from the possible effects of the Standards. The spokesperson for the DDA Standards Project argues that by extending the current ‘unjustifiable hardship’ provisions (at the moment the unjustifiable hardship provisions in the area of education only apply to enrolment), this Bill will, if anything, financially benefit education providers by widening the potential ‘defence’. The Allen Consulting Group expressed hesitation with respect to this logic, but do confirm that some smaller schools might find a benefit. They also assert that there are costs associated with the Standards but that the costs will be outweighed by the benefits.

## **Main Provisions**

Item 1 of Schedule 1 introduces a new definition of ‘education provider’ which is broader than the pre-existing definitions which cover educational authorities and educational institutions. Under the Bill an ‘education provider’ will encompass both the first two definitions and also bodies which develop or accredit curricula or training courses.

Item 2 extends the existing definition of discrimination in education to encompass the creation or accrediting of curricula or training courses which exclude those with a disability (or those associating with someone with a disability). This extension is in a sense offset by the introduction of a new ‘unjustifiable hardship’ provision in Item 3. The new subsection introduced in Item 3 confirms the Act’s pre-existing approach and ensures

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that educational providers do not have to avoid discrimination in education when it would impose an unjustifiable hardship to do so.

Finally Item 4 introduces some clarificatory provisions into section 31. These amendments clarify that 'reasonable adjustments' must be made in order to comply with standards and avoid disability discrimination. It also introduces provisions which allow the Standards to require that education providers develop strategies and programs to stop harassment or victimisation of the disabled, along with provisions which clarify that such requirements for training are not subject to the 'unjustifiable hardship' provisions.

## Concluding Comments

Since the announcement by Dr Nelson that the Commonwealth would proceed with the Disability Standards for Education there does not seem to have been a great deal of public comment by interested bodies. It seems that the major concerns with the Standards and this associated Bill are more to do with questions of funding than they are to do with the principles of the issues. The Allen Consulting Group was clear in their Report that a staged introduction process would go some way towards alleviating such funding problems, and also highlighted the economic and other benefits associated with increasing education levels amongst the disabled population.<sup>8</sup>

## Endnotes

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- 1 The Hon Dr Brendan Nelson MP, Minister For Education, Science And Training and the Hon Philip Ruddock MP, Attorney-General, 'Government Acts on Discrimination Against Students With Disabilities', News Release, 17 November 2004.
- 2 The Report is available from the DEST website at [http://www.dest.gov.au/Research/docs/july\\_03/DDA\\_Standards.pdf](http://www.dest.gov.au/Research/docs/july_03/DDA_Standards.pdf)  
This account of the historical developments is taken from a number of sources, but draws heavily from the Regulation Impact Statement prepared jointly by the Department of Education, Science and Training and the Attorney-General's Department.
- 3 *Review of the Disability Discrimination Act 1992*, Report No.30, Productivity Commission Inquiry Report, July 2004.  
<http://www.pc.gov.au/inquiry/dda/finalreport/index.html>
- 4 Dr Brendan Nelson MP, Minister for Education, Science and Training, 'Most State And Territory Education Ministers Vote Against Disability Standards', Media Release, 11 July, 2003 MINCO 7/03, [http://www.dest.gov.au/ministers/nelson/jul\\_03/minco703.htm](http://www.dest.gov.au/ministers/nelson/jul_03/minco703.htm)

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- 5 *The Net Impact of the Introduction of the Disability Standards for Education*, The Allen Consulting Group, June 2003, pp. 5 & 7.  
[http://www.dest.gov.au/Research/docs/july\\_03/DDA\\_Standards.pdf](http://www.dest.gov.au/Research/docs/july_03/DDA_Standards.pdf)
- 6 Disability Discrimination Act Standards Project, 'DDA Standards will be law', Media Release, 11 July 2003,  
<http://members.ozemail.com.au/~ddasp/Media%20Releasesdda703.htm>
- 7 Wendy Currie, 'Impact of disability standards is unknown', *Education*, vol 85, No 7, 9 August 2004, p. 10.
- 8 The Allen Consulting Group, *The Net Impact of the Introduction of the Disability Standards for Education*, June 2003. See chapter 5 on the benefits of the changes generally and chapter 6 and its conclusions on the wisdom of approaching the matter slowly, NB p. 58.  
[http://www.dest.gov.au/Research/docs/july\\_03/DDA\\_Standards.pdf](http://www.dest.gov.au/Research/docs/july_03/DDA_Standards.pdf)

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