

CHAPTER 2

ISSUES

2.1 This chapter briefly outlines the broader context relating to the Bill, followed by a discussion of key issues and concerns raised in submissions.

Context of the Bill

2.2 The stated objects of the DDA are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in a range of areas, including education;
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.¹

2.3 Section 31 of the DDA gives the Attorney-General the power to formulate disability standards in certain areas, including education of persons with a disability. Under subsection 31(2), standards made by the Attorney-General must be tabled in parliament. Standards can be amended by parliament under subsection 31(3). The Explanatory Memorandum explains that the purpose of standards is 'to clarify and elaborate the obligations in the Act'.² Under section 32 of the Act, it is unlawful to contravene a disability standard made under the Act. At the same time, under section 34, compliance with a disability standard is a defence to a complaint made under the Act's general provisions.³

2.4 In his second reading speech introducing the Bill, the Attorney-General stated that the Bill is 'an important precursor to the formulation of disability standards for the education of people with disabilities'.⁴ The Attorney General explained that the government released a final draft of proposed Education Standards in June 2004.⁵

2.5 These draft Education Standards have been developed over a long timeframe. The starting point was in 1995, with an agreement of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) to establish a

1 DDA, section 3.

2 p. 2.

3 *Explanatory Memorandum*, p. 2.

4 The Hon. Mr Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 12 August 2004, p. 32510.

5 *Ibid.*

taskforce to oversee the development of disability standards for education under the DDA.⁶ According to the joint submission from the Attorney-General's Department and the Department of Education, Science and Training (DEST), the draft Education Standards have been the subject of extensive consultation.⁷

2.6 The draft Education Standards and proposed amendments have also been the subject of a number of previous inquiries and reports. In December 2002, the Senate Employment, Workplace Relations and Education References Committee report into *Education of Students with Disabilities* recommended that Disability Standards for Education should be formulated, and that the Commonwealth 'take the necessary legislative action to put the education standards beyond legal challenge'.⁸

2.7 The Productivity Commission also conducted a recent review of the DDA, which reported earlier this year. This review was wide-ranging, and included consideration of disability discrimination in the education sector.⁹

2.8 Aspects of these reports will be considered as relevant below.

Key issues raised in submissions

2.9 Some submissions were supportive of the proposed amendments contained in the Bill,¹⁰ and indeed some were keen to see the Bill passed as soon as possible.¹¹ Other submissions felt that the Bill had significant problems and would fail to achieve the stated aim of fully supporting the draft Education Standards.¹² Many submissions raised broader issues relating to the draft Education Standards and their implementation.

2.10 The following key issues were raised in submissions and will be considered in turn below:

- the extension of the defence of 'unjustifiable hardship';
- funding and costs relating to implementation of the Education Standards;

6 Attorney-General's Department and Department of Education, Science and Training, *Submission 9*, p. 2.

7 *Ibid*, pp. 2-3.

8 Senate Employment, Workplace Relations and Education References Committee, *Education of Students with Disabilities*, December 2002, p. 118.

9 Productivity Commission Inquiry Report No. 30, *Review of the Disability Discrimination Act 1992*, 30 April 2004 (PC report), Volume 1, p. 377.

10 See, for example, Royal Blind Society, *Submission 1*, p. 1; Human Rights and Equal Opportunity Commission, *Submission 10*; Australian Federation of Disability Organisations, *Submission 6*.

11 Australian Federation of Disability Organisations, *Submission 6*, p. 2.

12 See, for example, Family Advocacy, *Submission 12*, p. 2; Public Interest Advocacy Centre, *Submission 8*, p. 3; People with Disability Australia, *Submission 13*, p. 3.

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- the process for finalising the draft Education Standards;
 - the content of the draft Education Standards; and
 - other issues.

'Unjustifiable Hardship'

2.11 Some submissions raised concerns with the proposed subsection 22(4), which would extend the defence of 'unjustifiable hardship' in education to post-enrolment situations.¹³ Currently, the defence of 'unjustifiable hardship' can be claimed in relation to refusing or failing to accept a person's application for enrolment, but not in relation to post-enrolment aspects of education to which the DDA applies.¹⁴

2.12 The Australian Learning Disability Association (ALDA) was particularly concerned about this amendment and its possible impact on students with learning disabilities not apparent at enrolment:

Learning disability is identified only within a learning environment and frequently well after enrolment. Currently learning disability does not come within the State schools sector's definition of disability eligible for funding. Therefore students who are assessed as having a learning disability whilst in an education setting could become even more vulnerable ... ALDA is concerned about what will happen to these students if unjustifiable hardship provisions are extended beyond the post enrolment period.¹⁵

2.13 On the other hand, the Australian Federation of Disability Organisations (AFDO) felt that, while the extension of the unjustifiable hardship defence would lead to a reduction in the rights currently enjoyed by people with disabilities, the change would also:

... facilitate the introduction of the Education Standards which will result in greater protection of people with disabilities by setting out the obligations of education providers in complying with the Act at enrolment and throughout participation in education.¹⁶

2.14 In support of the amendment, the Human Rights and Equal Opportunity Commission (HREOC) argued that the Bill and proposed Standards do not substantially alter existing rights and obligations under the DDA.¹⁷ HREOC also submitted that the extension of the defence of unjustifiable hardship simply 'removes a

13 See, for example, Royal Blind Society, *Submission 1*, pp. 1-2; Family Advocacy, *Submission 12*, p. 2; Public Interest Advocacy Centre, *Submission 8*, p. 3; People with Disability Australia, *Submission 13*, p. 3.

14 Subsection 22(4); *Explanatory Memorandum*, p. 5.

15 *Submission 5*, pp. 1-2.

16 *Submission 6*, p. 1.

17 *Submission 10*, p. 1.

source of confusion arising from a defect in drafting, rather than substantively altering the existing law'.¹⁸

2.15 During his second reading speech, the Attorney-General pointed to the Productivity Commission's recommendations in its review of the DDA.¹⁹ The Productivity Commission found that the current limited scope of the unjustifiable hardship defence might actually:

... create incentives for educators to avoid or discourage the enrolment of students with disabilities, in case those students might need adjustments that would impose an unjustifiable hardship later in their education.²⁰

2.16 The Productivity Commission concluded by recommending that the DDA 'be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination unlawful', including in education.²¹

2.17 The Public Interest Advocacy Centre (PIAC), Family Advocacy and People with Disability Australia (PWD) opposed the extension of the defence of unjustifiable hardship. The first concern of these organisations was that the provisions need to make it clear to education providers that they:

... must provide non-discriminatory treatment up to the point of unjustifiable hardship and if there are measures that will provide for less discriminatory access short of those that impose unjustifiable hardship, such measures must be implemented.²²

2.18 To address this concern, these organisations suggested the insertion of the word 'necessarily' between the words 'would' and 'impose' in proposed subsection 22(4).²³

A duty to make reasonable adjustments?

2.19 Further, PWD pointed out that the Productivity Commission's recommendation to extend the defence of unjustifiable hardship was made in conjunction with a recommendation to amend the DDA to expressly provide for a general duty to make reasonable adjustments.²⁴ PWD argued that:

18 *Submission 10*, p. 3.

19 The Hon. Mr Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 12 August 2004, p. 32510.

20 PC report, Volume 1, p. 206.

21 *Ibid.*, p. 211.

22 Family Advocacy, *Submission 12*, p. 2; see also Public Interest Advocacy Centre, *Submission 8*, p. 3; People with Disability Australia, *Submission 13*, p. 3.

23 *Ibid.*

24 *Submission 13*, p. 3; see also PIAC, *Submission 8*, p. 4; PC report, Volume 1, p. 196.

The Productivity Commission saw the two issues as linked, referring to the extension of the unjustifiable hardship defence as a 'check and balance' to the proposed and even more fundamental general duty to provide reasonable adjustments.²⁵

2.20 PIAC, Family Advocacy and PWD also pointed out that the Bill would introduce the term 'reasonable adjustment' into the DDA,²⁶ but this term would not be defined in the Act. They therefore suggested that a number of definitions be included in the Bill, including 'adjustment', 'reasonable adjustment' and 'substantive equality'. They noted that these definitions were drawn from the draft Education Standards (both the current draft and the draft dated July 2002), and, again, that the Productivity Commission had recommended that the concept of 'reasonable adjustments' be defined in the DDA.²⁷ These organisations argued that without such definitions in the Act itself, the Bill would not achieve its primary goal of ensuring that the draft Education Standards were fully supported by the DDA.²⁸

2.21 There was also debate in some submissions as to whether or not there is an implied duty to make reasonable adjustments in the DDA. In its submission, PWD claimed that the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*²⁹ (*Purvis*) had resulted in 'substantial doubt as to whether there is any duty to provide reasonable adjustments'.³⁰ The PWD argued that the concept was of 'such fundamental importance' that it should be defined within the Act itself 'to ensure the duty is clear and to avoid later legal arguments...'.³¹

2.22 However, HREOC pointed to the decision in *Purvis*, and a more recent decision of the Full Federal Court in *Catholic Education Office v Clarke*,³² which it suggested:

... 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.³³

25 *Submission 13*, p. 3.

26 See subsection 31(1A).

27 PC report, Volume 1, p. 196.

28 People with Disability Australia, *Submission 13*, p. 4; Family Advocacy, *Submission 12*, p. 2; Public Interest Advocacy Centre, *Submission 8*, p. 4.

29 [2003] HCA 62 (11 November 2003).

30 *Submission 13*, p. 3; see also PC report, Volume 1, pp. 186-187.

31 *Submission 13*, p. 3.

32 [2004] FCAFC 197 (6 August 2004).

33 *Submission 10*, p. 1.

Funding and costs

2.23 The Explanatory Memorandum states that 'it is not anticipated that the passage of this Bill will have any financial impact'.³⁴ However, an area of considerable dispute in most submissions related to the costs associated with implementation of the draft Education Standards supported by the Bill.

2.24 The joint submission from the Attorney-General's Department and DEST maintained that:

... 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.³⁵

2.25 However, the submission also noted that:

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.³⁶

2.26 The submission pointed out that, to address these concerns, DEST commissioned a cost-benefit analysis of the implementation of the draft Education Standards, as part of the preparation of the Regulation Impact Statement for the Standards.³⁷ The analysis identified a 'huge variation' in the maximum marginal costs claimed by the States and Territories, but concluded that the 'overall benefits of the Standards would exceed their associated costs'.³⁸ This analysis also concluded that:

- 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.³⁹

2.27 Consistent with this last conclusion, the Attorney-General's Department and DEST stated that:

In line with his offer at the 2003 MCEETYA meeting, the Minister for Education, Science and Training will contribute to the development of

34 *Explanatory Memorandum*, p. 3.

35 *Submission 9*, p. 4.

36 *Ibid.*

37 *Ibid.*, pp. 4-5.

38 *Ibid.*, p. 5.

39 *Ibid.*

professional development materials to support the implementation of the Standards.⁴⁰

2.28 The submissions from the ACT Department of Education and Training and the Tasmanian Department of Education agreed with the cost-benefit analysis prepared for DEST.⁴¹ In the view of the Tasmanian Department of Education:

... the Standards serve to clarify requirements under the Act and do not impose any additional responsibilities on education providers. In fact, the Standards have advantaged education providers by extending the application of 'unjustifiable hardship' beyond enrolment.⁴²

2.29 The Tasmanian Department of Education agreed that 'the main costs associated with the implementation of the Standards relate to professional learning to increase awareness among education and training providers of the requirements detailed in the Standards'.⁴³ The Department noted that the Tasmanian Government had provided:

... additional funding over the next triennium to support professional development for all school staff relating to compliance with the Act through the Education Standards.⁴⁴

2.30 Other state governments disputed the analysis prepared for DEST. For example, the Western Australian Department of Education and Training (WA DET) argued that the projected cost for the implementation of the Standards estimated by the Commonwealth was 'manifestly inadequate'.⁴⁵ According to the WA DET, the implementation costs would go well beyond professional development.⁴⁶ The WA DET also said that:

The Standards will increase the expectations for provision of support and services by people with disabilities and their guardians. The implementation of the Standards is likely to have the effect of increasing self-identification of parties as being disabled.⁴⁷

2.31 Similarly, the Northern Territory Department of Employment, Education and Training felt that there would be a number of transitional costs associated with the implementation of the Bill and associated Education Standards. The Department cited, for example, costs associated with infrastructure enhancement, professional

40 Ibid, p. 9.

41 *Submission 11*, p. 1; and *Submission 7*, p. 1.

42 *Submission 7*, p. 1.

43 Ibid.

44 Ibid.

45 *Submission 4*, p. 3.

46 Ibid, p. 1.

47 Ibid.

development, provision of special equipment, information provision and monitoring of implementation.⁴⁸

2.32 Other submissions expressed the view that the Bill and associated Standards would not result in significant additional costs.⁴⁹ As outlined earlier, HREOC argued that the Bill and proposed Standards do not substantially alter existing rights and obligations under the DDA. It also noted that 'very closely equivalent rights and obligations' are provided for in legislation in each State and Territory.⁵⁰ HREOC recognised that 'additional support from all governments for equal educational opportunity for students with disabilities is desirable'. However, HREOC submitted that:

... 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.⁵¹

2.33 The Centre for Special Education and Disability Studies noted that most major education providers 'are likely already meeting most or all of the proposed standards' and that, in its opinion, 'the implementation of the standards will not result in the need for significant changes in school-based or system-wide practice.'⁵²

2.34 The AFDO disagreed that there would be costs associated with professional development requirements.⁵³ In contrast, ALDA agreed that adequate funding should be made available for professional development 'to ensure that the Education Standards are well understood by all education sectors'. The ALDA believed that this was needed particularly because of low awareness of the DDA, and of the fact that learning disability is regarded as a disability under the DDA.⁵⁴

2.35 More general funding issues were also raised relating to the education of students with disabilities. For example, the Australian Associations of Christian Schools (AACS) was concerned about the funding differential between government and non government schools.⁵⁵ The AACS argued that:

These cost differentials will be exacerbated with the introduction of the Disability Standards for Education into the DDA 1992. While non government schools may be able to sustain cases of 'unjustifiable hardship'

48 *Submission 14*, p. 1.

49 See, for example, Royal Blind Society, *Submission 1*, p. 2; People with Disabilities Australia, *Submission 13*, p. 5.

50 *Submission 10*, p. 1.

51 *Ibid*, p. 2.

52 *Submission 15*, p. 2.

53 *Submission 6*, p. 1.

54 *Submission 5*, p. 1.

55 *Submission 2*, pp. 1-2.

it is inconsistent with both the purpose and intention of Christian schooling as well as the Act that students with disabilities should be treated differently to other students.⁵⁶

2.36 The AACCS concluded that 'funding for students with disabilities should follow an individual student with a disability if he or she changed to, or enrolled in, a government or non government school'.⁵⁷

Process for finalising the education standards

2.37 Another concern raised in submissions related to the process and timing for finalising and tabling the Education Standards in parliament.

2.38 As noted earlier, the Commonwealth government has released a final draft of the Education Standards. However, some submissions were concerned that there was no specific timeframe for introducing the Standards into parliament, and no guarantee that the Standards would remain intact and unamended in that time. For example, the ALDA submitted that:

Within the disability community there is a cynical belief that the Education Standards will never happen. There is a further belief that those with a vested interest will keep trying to delay the promulgation of the Standards, thereby giving time to 'water them down'. ALDA is concerned about the ongoing delays and the fact that there is no timeframe for when the Standards will be introduced.⁵⁸

2.39 Similarly, the Royal Blind Society supported the content of the final draft of the Education Standards and noted that it 'would be concerned however if the draft standard was to be weakened in order for it to be adopted by Parliament'.⁵⁹

2.40 On the other hand, the AFDO submitted that, while they would have preferred the Standards to be introduced into parliament at the same time as the Bill:

... the Commonwealth Government has assured our members that the Standards will be introduced as drafted at the earliest opportunity and a delay in the passage of the Bill would be unnecessary and a disadvantage to the benefits the Standards provide people with disabilities and their families.⁶⁰

56 *Submission 2*, p. 2.

57 *Submission 2*, p. 2; see also PC report, Volume 1, p. 444.

58 *Submission 5*, p. 1.

59 *Submission 1*, p. 2.

60 *Submission 6*, p. 1.

2.41 The AFDO concluded by urging the Senate to 'ensure the tabling of the Standards as quickly as possible to allow their passage as delegated legislation through Parliament.'⁶¹

2.42 The Committee notes that the Explanatory Memorandum states that 'the Government intends that the Attorney-General will formulate and table the draft Education Standards in Parliament immediately following the passage of this Bill.'⁶² This commitment was reiterated in the joint submission from the Attorney-General's Department and DEST.⁶³

Content of the standards

2.43 Many submissions also commented on the content of the final draft of the Education Standards. As outlined above, some strongly supported the final draft of the Education Standards.⁶⁴ For example, the AFDO submitted that the proposed Standards are:

... historic and once accepted by Parliament will clarify for students with a disability and their families their rights under the Act to participate and learn in any Australian education institutions without discrimination. After eight years of development and consultation, people with disabilities are excited and relieved that the Standards are ready to be introduced.⁶⁵

2.44 On the other hand, People with Disability Australia (PWD) noted that, while they supported the draft Standards in the form they took in July 2002, they felt that the Bill and current draft Education Standards 'are seriously flawed'.⁶⁶ PWD believed that the balance had 'tipped too far towards the interests of education service providers'.⁶⁷

2.45 Similarly, PIAC and Family Advocacy outlined a number of concerns with the current draft Education Standards, and in fact suggested that the Committee should expand its terms of reference and time for submissions to enable consideration of the purpose and content of the draft Education Standards.⁶⁸ Family Advocacy even concluded that:

61 *Submission 6*, p. 2.

62 *Explanatory Memorandum*, p. 2.

63 *Submission 9*, p. 8.

64 See, for example, Royal Blind Society, *Submission 1*, p. 2; ACT Department of Education and Training, *Submission 11*, p. 1; Department of Education, Tasmania, *Submission 7*, p. 1; Centre for Special Education and Disability Studies, University of Newcastle, *Submission 15*, p. 2.

65 *Submission 6*, p. 1.

66 *Submission 13*, p. 1.

67 *Ibid.*

68 *Submission 8*, pp. 6-7; *Submission 12*, p. 3; see also Australian Lawyers for Human Rights, *Submission 16*; PWD, *Submission 13*, p. 2.

... the draft Standards, as currently worded, reduce the rights of students with disability. We have carefully balanced the onerous nature of the current complaints system against the draft Standards and believe that the absence of a DDA Standard for Education would be vastly more beneficial for students with disability than the promulgation of the current draft Standards.⁶⁹

2.46 Similarly, the Australian Education Union (AEU), while stating that it was a strong supporter of the need for Disability Standards in Education, was 'disappointed' with the Standards in their current form. For example, the AEU was concerned that the Standards would not clarify:

- where any responsibility lies between schools and Departments for meeting the needs of students; nor
- whether a student/parent has the right to insist on a particular school or setting as opposed to the Department nominating the suitable facility.⁷⁰

2.47 In contrast, HREOC supported the draft Education Standards, believing that there would be:

... 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.⁷¹

2.48 HREOC continued:

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.⁷²

2.49 HREOC concluded that:

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.⁷³

69 *Submission 12*, p. 3.

70 *Submission 3*, p. 1.

71 *Submission 10*, p. 2.

72 *Ibid.*

73 *Ibid.*, p. 3.

Other issues

Definition of 'education provider'

2.50 A number of submissions raised concerns that the proposed new definition of 'education provider' in section 4 of the DDA used the word 'means' rather than 'includes' and would therefore be an exhaustive definition rather than an inclusive definition.⁷⁴ PWD believed this could cause 'unnecessary problems for complainants'.⁷⁵ These submissions also noted that this provision was inconsistent with the Explanatory Memorandum, which used the word 'include'.⁷⁶

The Committee's views

2.51 The Committee acknowledges the submissions that were strongly supportive of the Bill and wanted to see it passed as soon as possible. The Committee notes the concerns raised in other submissions, particularly in relation to the extension of the defence of 'unjustifiable hardship'. However, the Committee considers that the concerns raised are not sufficient to prevent the passage of the Bill.

2.52 In relation to funding and costs associated with the implementation of the Bill and the draft Education Standards, the Committee supports the view that the Bill and associated Standards are merely clarifying the existing law. In addition, the Committee recognises the government's commitment to contribute to the development of professional development materials to support the implementation of the Education Standards.

2.53 Finally, the Committee encourages the government to introduce the final Education Standards into parliament as soon as practicable after the passage of the Bill.

Recommendation 1

2.54 That the Bill be passed without amendment.

Senator Marise Payne

Chair

74 See, for example, PIAC, *Submission 8*, pp. 2-3; Family Advocacy, *Submission 12*, p. 2.

75 *Submission 13*, p. 2.

76 *Ibid.*