



**A SUBMISSION BY THE  
AUSTRALIAN EDUCATION UNION  
TO THE PRODUCTIVITY COMMISSION  
INQUIRY INTO THE DISABILITY  
DISCRIMINATION ACT 1992**

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## **1 Introduction**

- 1.1 The Australian Education Union (AEU) is the union representing over 155 000 education workers in public education. As such, its membership includes teachers and teacher assistants in pre-schools, schools and TAFE.
- 1.2 This submission attempts to cover the areas of education covered by the AEU membership. However, except where specifically stated, it refers primarily to schools and school systems. Because schooling is compulsory, arrangements must be made for those students with disabilities. In most states and territories the situation in pre-schools is generally analogous to that of schools, especially where they are covered by education departments, although there are some issues of access. In TAFE, however, there are different issues associated with a system which is non-compulsory, where the issues both of access and then of process are important.
- 1.3 Matters related to the education of students with disabilities are regularly raised within the union's forums by members as matters which are causing dissatisfaction and creating considerable stress and angst. It is clear from the frequency with which such matters are raised that there are widespread problems associated with the way in which the education of students with disabilities is currently managed.
- 1.4 Education workers are supportive and sympathetic to the aspirations of all children and students. They express considerable concern for the welfare and best interests of all students, including those with disabilities. The extent to which they feel that current processes for those with disabilities impose unreasonable burdens on their workload and capacity to make adequate provision for all students creates a sense of frustration, but a frustration which emanates from wanting the best for all students.
- 1.5 As no doubt the Inquiry is aware, the Senate Employment, Workplace Relations and Education References Committee last year conducted an inquiry into the Education of Students with Disabilities. The AEU believes that the findings of this Inquiry were generally excellent and that the directions it pointed give a reasonable course for this area.

This submission draws heavily on the one which the AEU made to that Inquiry, which is available at: [www.aeufederal.org.au/Publications/DisabilitySubmission2002.pdf](http://www.aeufederal.org.au/Publications/DisabilitySubmission2002.pdf).

- 1.6 This submission accepts the invitation in the Issues paper to pick and choose (p.10) from the questions. Each of the sections below deals with a topic arising from those questions relevant to the AEU, and has been given an appropriate heading. The actual relevant questions and the page on which they appear in the Issues paper are included in brackets after each heading. The questions selected are those in Section 2 which are general but have applicability to education, and those in the education sub-section at 3.2.

## 2 Definition of disability

- *(Are any elements of the DDA's definition of disability too narrow, or conversely too broad? (p.11)*
- *How do different definitions of disability for different purposes influence the effectiveness of the DDA in relation to education? (p.32))*

- 2.1 The definition of disability in the Act and that applied by various jurisdictions in regard to identifying and funding students with disability appear to lack any congruence.
- 2.2 In terms of the systems within which members work, each state or territory has developed its own mechanism for identifying and defining disability. This also appears to lead to a wide disparity in the number of students categorised, and the nature of the disabilities so categorised (See Table 1).

<b>Table 1</b>		<b>Students with Disabilities (per cent) in Government Schools 1996 - 2000</b>					
		<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>Change %</b>
NSW		2.7	2.7	2.7	4.0	4.2	1.5
Vic		2.6	2.5	2.4	3.0	3.4	0.8
Qld		2.1	2.2	2.3	2.8	3.0	0.9
WA		2.5	2.9	2.9	3.0	4.0	1.5
SA		5.4	5.6	5.6	5.8	4.5	-0.9
Tas		5.0	4.8	4.8	4.8	4.7	-0.3
ACT		3.9	4.2	4.1	3.8	3.7	-0.2
NT		6.8	11.8	11.7	13.2	14.9	8.1

Note: The proportion of students with disabilities is assessed according to a Commonwealth definition of students with disabilities. To be an eligible student with disabilities, the student must (among other things) satisfy the criteria for enrolment in special education services, or special education program, provided by the Government of the State or Territory in which the student resides.

- 2.3 Table 1 would also seem to indicate that the numbers of students with disabilities (or recognised as having disabilities) is growing. (Unfortunately, data for the whole of Australia is not given for this time period, but there have been increases in the most populous states). This seems to be consistent with data from elsewhere which suggests that the incidence of disability in the general population and schooling populations have both risen significantly in recent years. ABS data (ABS 4430.0) gives an incidence of 15% in 1981 and 19% in 1998 in the general population. (ABS 4430.0 has not been updated since 1998). Of course, not all disabilities identified in the ABS data are relevant to schooling (e.g. some are conditions associated with ageing). The ABS data indicate that for the age group 5-14, the disability rate in 1998 was 9.5% and the incidence of disabilities which restrict schooling/employment was 8.4%. The data from Victorian schools ([Appendix 1](#)) also indicate large increases in the numbers of students identified.
- 2.4 The OECD Report "Inclusive Education at Work" (1999) states that 12 to 20 % of students in Australian schools are recognised as having "special educational needs" but only 2% receive an Individualised Education Program (IEP) and only 0.5% are in special schools.

- 2.5 It therefore seems reasonable to suggest that the incidence of students identified with a disability (using whatever definition) has increased significantly in the last decade and that the number of students in schools who have disabilities significantly exceeds the number of students identified with disabilities for the purposes of receiving additional support. Probably the incidence of disabilities in the general population now exceeds 20%; and depending on how disability is defined, the incidence in schools is somewhere between 12 to 20%.
- 2.6 As shown in Table 1 the current categorisations in some states or territories include as few as 3% of students, and, with the exception of the Northern Territory, are all below 5%. This gives some measure of the proportion of students not included who should be.
- 2.7 The Meyer Report in Victoria (Review of the Program for Students with Disabilities and Impairments, Luanna H Meyer for the Victorian Department of Education, Employment and Training, February 2001) substantiates this in regard to Victoria. It indicates that there is a quite rigid definitional approach which precludes targeted support through disabilities programs for many students who may have learning difficulties, learning disabilities, mild impairments or challenging behaviour. This indicates the need to broaden the population of students with special educational needs.
- 2.8 In general, the processes require the categorising of a student into one of a number of categories. Typically, the categories are based on the type of disability (such as physical, sensory, intellectual, etc). There is then a process of determining a level or degree of disability within that category, and the level of resourcing that is provided.
- 2.9 There are generally four problems that arise within this process:
- As noted above, the categories exclude certain types of disability by defining them too narrowly, and by not keeping up to date with current knowledge and understanding. Disabilities such as learning difficulties (which itself includes a wide range such as mild intellectual disabilities and dyslexia); acquired brain injury; ADD/ADHD; behavioural disorders; foetal alcohol syndrome; and significant medical conditions are generally not included.
  - The levels also tend to become inflexible and are particularly inadequate around the cut off points. They do not sufficiently allow the identification of individual needs and the best way to meet them. They also exclude from any support students with low level disabilities.
- The AEU supports a more flexible and individualised approach based on the identified needs of students in an educational setting.
- The level of resourcing is generally totally inadequate. As a result, the needs of the student with a disability are not adequately met, and other students in the class or school also often suffer diminished resources. (This is further dealt with below.)
  - The workload and time associated with the actual categorisation is considerable. Special education teachers, in particular, spend a considerable proportion of their time in this activity rather than dealing with the students themselves.

- 2.10 The AEU advocates that decisions concerning students with disabilities should be made on a case by case basis. The parents and, where appropriate, the students, should be fully involved in such deliberations. Teachers in the potential educational settings should also be involved. The assessment should be reviewed on an ongoing basis.

### **3 Unjustifiable hardship and reasonable adjustments**

- *(How has the concept of “unjustifiable hardship” enhanced or reduced the effectiveness of the DDA? (p. 14)*
  - *How has the term “unjustifiable hardship” been interpreted in education? (p. 32)*
  - *What are the costs of “reasonable adjustments” in education? (p.32))*
- 3.1 Within education, there is considerable debate, legal challenge and confusion around the interpretation of subsections 22(1-3), and of how subsection 22(4) relates to this, particularly with regard to the definition of “unjustifiable hardship”.
- 3.2 A key issue of contention is frequently the extent to which individual institutions can argue “unjustifiable hardship”, or conversely the extent to which systems can meet the requirements of the Act by planned system provision, such as the provision of schools designated as appropriate for students with specified disabilities. There is a considerable degree of confusion on this matter.
- 3.3 Within the public education systems run by state or territory governments, it is not appropriate to place the issue of reasonable adjustments at an institution level, and place the onus for reasonable adjustments within that institution, when the discretionary funding may not be within the autonomy of the institution, and the system may make alternative arrangements.
- 3.4 Students with disabilities must receive the range of resources, including such things as therapy, in a way that does not impinge on the general running of the schools and other students, or on the ability of the authority to provide a high level of education services generally in the area. At the same time, many disabilities, can and should be accommodated within any school.
- 3.5 The AEU is conscious of the moves by both parents and educators towards an increase in the integration of students with disabilities into mainstream or regular classrooms and early childhood settings, and that they have become an established and common way of educating students with disabilities. The AEU understands the philosophical and educational reasons for increased integration and is broadly supportive of such moves.
- 3.6 However, the AEU also believes there are considerations that go beyond the wishes of the individual parent and student, and these must be recognised.
- 3.7 This issue of enrolment is not best dealt with solely at the individual institution level. It is important that there be a process that considers enrolment and reasonable adjustment on a broader basis.
- 3.8 Such moves must take place within processes which:
- ensure the most appropriate placement of the student;
  - take note of the professional judgement of teachers and other professionals;

- involve the parents and take note of their wishes;
  - take note of the needs of all students in any educational setting.
- 3.9 The right to enrol also needs to make clear that prospective students have a choice between mainstream schools and those with specialist resources, ie. education support schools, centres or units. The making of choices should be informed so a well resourced consultation process should be articulated allowing all stakeholders and service providers to resolve the issues.
- 3.10 It must be acknowledged that the rate of introduction of integration puts considerable stress on systems and schools. For example, in NSW there has been a 50% increase in the number of students with disabilities integrated in regular classes in the last three years. This has not been matched with a corresponding increase in funding. The data for Victoria (Appendix 1) chart their pattern over the last two decades. In Tasmania the number of students in special schools declined from 690 in 1991 to 233 in 2001. Without a considered program of introduction and training, and the development of adequately trained people, such rapid change verges on the traumatic.
- 3.11 The AEU calls on the Federal and state/territory governments to ensure that current and future legislation and policy includes standards for the integration and inclusion of students with disabilities in regular educational settings. These standards should outline:
- adequate levels of resources;
  - a range of services to be made available;
  - a process for enrolment and integration;
  - a placement review process;
  - inter agency support networks and case management;
  - dispute resolution procedures;
  - protection for education workers' working conditions and OH&S;
  - training and professional development of teachers and other education workers.
- 3.12 In addition, all legislation and government policies should guarantee:
- the maintenance of a full range of educational placement settings for students with disabilities, including special schools and pre-schools, special classes and integrated settings;
  - the provision of appropriate special education programs and resources for all students who require them. These programs to include curricula specifically designed to maximise the potential of each individual to have a productive and independent post school life;
  - the professional integrity of the teaching profession, as the major provider of education programmes to all students in consultation with their parents/carers and the students where appropriate;
  - the educational and general welfare of all students. Appropriate processes of consultation with parents, students and education workers should be guaranteed and the rights of all parties within reasonable parameters observed;
  - that public education authorities must be the final arbiters in these processes;
  - the industrial rights of education workers, particularly in relation to their workload and working conditions. This includes the right to pursue issues related to this matter in the various industrial tribunals and through the available industrial instruments, e.g. Awards, Enterprise Agreements.



- 3.13 It is regrettable that a minor proportion of those who advocate for those with disabilities believe that they will best achieve their objectives by confrontation and litigious test cases, rather than working with teachers and the education community to improve understanding and confidence, and secure adequate resourcing.

## 4 Funding

- *(Who currently bears these costs? Who should bear them, and why? (p.32))*

- 4.1 There is a clear and direct relationship between the capacity of an educational setting to include particular students and the level of resources provided. It is regrettable that the moves to greater inclusion have been accompanied by cost cutting and inadequate resource provision.
- 4.2 The priority is the provision of greater staff support as an automatic part of the process of including students with disabilities. It may allow reduced class sizes, additional support staff (integration aides or inclusion support assistants or similar), or be used in other ways, as appropriate in the particular circumstances.
- 4.3 The states and territories and the Commonwealth should work together to achieve the best for all Australian students. The National Goals of Schooling express the objectives in regard to schools, and are inclusive of all students. Funding should be coordinated to ensure that these goals can be achieved.
- 4.4 MCEETYA should develop a cooperative funding arrangement between the Commonwealth and states and territories to ensure that the needs of all students in meeting the National Goals of Schooling are met.
- 4.5 The Commonwealth has a particular obligation to both equity and national priorities. It must therefore accept it has a specific responsibility towards students with disabilities and a clear obligation to support the role of states or territories as the primary providers in this area.
- 4.6 The bias of the current government to private schools has seen a massive increase in the funding of, in particular, privileged independent schools operating well above the resource levels of government schools. The proportion of Commonwealth schools expenditure going to targeted programs, including that for students with disabilities, has declined dramatically as a result.
- 4.7 At the same time, the Commonwealth has broad banded targeted programs so that specific expenditure on special education is becoming more and more difficult to trace. It is now contained within the “Strategic Assistance for Improving Student Outcomes” program. The reporting mechanisms required under this program do not specifically require reference to expenditure on students with disabilities (although provision for students with disabilities is foreshadowed as a possible area in which reporting may be required in some future year).
- 4.8 State or territory expenditure is often equally difficult to track.

- 4.9 The Commonwealth funding under the “Strategic Assistance for Improving Student Outcomes” program is also biased towards private schools. Public schools receive \$122 (plus supplementation adjustment) per student, whilst private schools receive \$620 (plus supplementation adjustment). This is supposed to compensate private schools for the greater cost of students with disabilities, a cost that is said to be largely met by state or territory governments in the case of public schools. However, the AGSRC, on which general recurrent funding for private schools is based, also includes state or territory expenditure on students with disabilities, so there is an extent to which private schools “double dip.”
- 4.10 Many private schools have infrastructure facilities that are superior to public schools, and it seems grossly unfair that they should also receive greater subsidy from the Commonwealth. There is a need to consider whether students with disabilities receive equitable treatment and access to equivalent resources regardless of which sector they attend school in. Parents should not be pressured to send their children with disabilities to private schools in order that their needs can be more fully met.
- 4.11 The result of the bias in both general recurrent funding and the strategic assistance funding means that the Commonwealth contribution to students with disabilities in public schools is less than 2% of its total expenditure on schools, despite the fact that the vast majority of students with disabilities attend public schools (see Table 2).

**Table 2**                      **Students with disabilities (per cent of students) 2000**  
Government and Non Government Schools

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT (a)	AUST
Government Schools	4.2	3.4	3.0	4.0	4.5	4.7	3.7	14.9	3.9
Non-government Schools	2.6	1.6	1.4	1.3	2.9	1.3	1.2	2.8	2.0
All Schools	3.7	2.8	2.5	3.0	4.1	3.8	2.8	12.4	3.3

(a) The NT advises caution regarding these figures. Source data is being examined for accuracy.

Source: DETYA (unpublished).

Taken from Report on Government Services website on 8 May 2002.

## 5 Outcomes for students with disabilities

- *(What are the current educational outcomes for people with disabilities in different types of education and training? (p.31))*

- 5.1 There is little data that reports the outcomes for students with disabilities. Whilst it is common in much educational research to disaggregate data on the basis of Indigeneity, socioeconomic status and language other than English spoken, it is not current practice to report on students with disabilities.
- 5.2 There are difficulties of categorisation and assessment of the “degree of disability” in some areas, such as intellectual disability, which make comparison difficult.
- 5.3 Indeed, many standardised tests permit the exclusion of certain students because of their disability in order that results can be made more comparable.

- 5.4 Equally, however, there are certain categories of disability which should not lead to an expectation of different outcomes, but we are unable to provide data on whether this happens.
- 5.5 The AEU is particularly concerned about the outcomes where there is a compounding of the effect of disability with other factors known to be indicative of poorer outcomes. In this regard, there is particular concern about the outcomes for Aboriginal and Torres Strait Islander and remote areas students with disabilities.
- 5.6 Problems encountered by those in rural and remote areas are considered in Chapter 3 of the HEREOC Report, "Education Access: National Inquiry into Rural and Remote Access", (Human Rights and Equal Opportunities Commission, 2000). The AEU commends this section of the Report to the Inquiry.
- 5.7 There is a particular problem for educational settings in remote areas accessing appropriate staff with specialised skills and experience with students with disabilities.
- 5.8 Access to transport to the most appropriate setting is also a problem in some cases. In the Northern Territory, in particular, remoteness from appropriate facilities combines with a lack of transport to make access for a number of students, the majority of whom are Indigenous, extremely problematic.
- 5.9 The issue of transport is not limited to remote areas, but seems to be a problem in other areas as well. Ensuring that transport is available to travel to the facility decided as the most appropriate setting is sometimes hindered by bureaucratic decision making processes.

## **6 Harassment**

- *(How effective has the DDA been in reducing harassment in education? (p. 32))*
- 6.1 The current process is not harassment free. Episodes of harassment towards students with disabilities (and many others) do occur and teachers seek to deal with these within a context of raising awareness of the rights and feelings of others.
  - 6.2 In general, schools and other educational settings are safer and there is less likelihood of harassment because of this preparedness to deal with it as it arises. One hopes that harassment is diminishing both as students progress through school and in terms of the overall levels.
  - 6.3 The concern about harassment should not be limited to the students themselves. It should be extended to ensure that none of the parties in the process, including teachers and parents, are harassed, and that the processes themselves are harassment free.
  - 6.4 The right of all students with disabilities to quality advocacy is supported, but regrettably much advocacy at present tends to be confrontational and results in the harassment of teachers and other education workers. Establishing clear and transparent processes within which standards of advocacy are set would alleviate some of the problems in this area.

## 7 Disability standards for education

- *(What are the advantages and disadvantages of developing disability standards for education? (p.32)*
- *What lessons can be learned from the process to date of developing the education disability standards? (p.32))*

- 7.1 The AEU strongly supports the development and application of Standards.
- 7.2 The current process consists of resolution through complaint arrangements, some of which are resolved before formal DDA complaints are made and some of which go through to high courts and serve to set case law. In all circumstances, this requires that there be victims. In most cases those victims are the students themselves and the education workers that teach them. For these people, there is considerable and often excessive stress and trauma involved in the process. For those teachers involved, there may well be long term personal and career consequences due to purely random and uncontrollable chance.
- 7.3 The educational institutions involved are also put under considerable pressure, both within themselves and in their relationship with the community, which has consequences that go way beyond the issue itself.
- 7.4 The AEU is concerned that employing authorities are too willing to take the line of least resistance, do not themselves accept full responsibility for the situation, and will only become involved when forced to by someone, usually a teacher or an educational institution, taking a stand against an unacceptable situation.
- 7.5 This is a totally unacceptable means of resolving the issues around students with special needs. It is destructive for the individuals concerned, for the educational institution, and ultimately for the effective implementation of the Act. It serves nobody's interests. It is therefore imperative that some level of certainty be given to the situation through the introduction of Standards which are known and applicable, and which remove victims from the process.
- 7.6 The AEU expresses its dissatisfaction with the lack of progress towards agreed and regulated education standards under the Disability Discrimination Act. The development of such standards was begun in 1996 under the auspices of MCEETYA, and the failure to reach agreed resolution of this process to date must be a matter of considerable concern which is worthy of further investigation.
- 7.7 In particular the situation of teachers and other education workers is not clear. Most parents do not approach the authority (e.g. education department) but the individual institution.
- 7.8 The failure of the Act to outline the respective but differing obligations of authorities and institutions leaves institutions and education workers as "the meat in the sandwich" between the specified rights of the student and their parents and the unspecified obligations of authorities to ensure that resourcing is adequate to meet those rights, as well as the specific obligations as an employer under Occupational Health and Safety legislation.

- 7.9 The resources which authorities should supply to their institutions in order that they can meet their obligations under the Act is not adequately specified, nor is it specified that these must be additional to standard resourcing. The potential for systems to cost shift responsibility to the individual institution remains. The capital costs for adjusting physical structures must be additional to institutional budgets and there must also be additional support for the educational program of the institution. The costs of adaptation can often be considerable.
- 7.10 The AEU believes that these issues should be addressed through a set of Regulatory Standards.
- 7.11 The intersection of legislation relating to anti-discrimination and occupational health and safety is an area that requires investigation. In some states this intersection has led to lengthy and costly court cases, which are not in the best interests of students, teachers, care-givers or education authorities.

## **8 Conclusion**

The AEU concludes that the above difficulties and issues leave serious doubts about the implementation of the Act in regard to schools.

## Victoria -Number of Students with Disabilities and Impairments from 1984 to 2001

Year	Regular Schools	Special Schools	Total Students with Disabilities	DEET School Population	Percentage of DEET Population
1984	0	5,314	5,314	572,613	0.93
1985	500	5,421	5,814	557,838	1.04
1986	2,140	5,243	7,561	546,137	1.38
1987	2,893	5,123	8,136	537,895	1.51
1988	2,744	4,916	7,867	532,217	1.48
1989	4,335	4,911	9,251	527,700	1.75
1990	4,918	4,849	9,829	526,576	1.87
1991	4,987	4,912	9,899	536,754	1.84
1992	5,619	4,738	10,357	539,231	1.92
1993	5,668	4,539	10,207	535,925	1.90
1994	5,705	4,604	10,309	528,152	1.95
1995	5,910	4,913	10,823	519,804	2.08
1996	5,950	5,336	11,286	522,524	2.16
1997	6,338	4,962	11,300	523,943	2.16
1998	7,039	5,231	12,270	525,998	2.33
1999	8,262	5,506	13,768	529,072	2.60
2000	10,142	5,396	15,538	531,535	2.92
2001*	10,650	5,716	16,367	536,687	3.05

\*Incomplete data. Final figures will be known only at the end of the year.

**Source:** "Better Services, Better Outcomes in Victorian Government Schools", Office of School Education, Department of Education, Employment and Training, State of Victoria, October 2001.