



NATIONAL CATHOLIC EDUCATION COMMISSION

Submission to the Productivity Commission Review of the *Disability Discrimination Act (Cth) 1992*

(i) Introduction

The National Catholic Education Commission (NCEC) welcomes the opportunity to comment on the impact of the Disability Discrimination Act ("the Act") upon the education sector.

The NCEC is the official body appointed by and responsible to the Australian Catholic Bishops' Conference for developing, enunciating, and acting upon policy at the national level for the Church's work in education. The NCEC is the focal point for ongoing discussions and negotiations with the Commonwealth Government and other national bodies involved in education. The NCEC is also a national forum for discussion and debate on significant matters of interest and concern to Catholic education in Australia. It represents over 1700 schools enrolling more than 650,000 students, or approximately 20% of the school population.

In making this submission, NCEC addresses specific questions set out in Section 3.2 of the Discussion Paper, relating to discrimination in education. The responses should be seen within the context of the Catholic school sector's strong support of the aims of the Act, which is to remove unfair discrimination against people with disabilities and to enhance their participation in the life of the community. There are currently 14,874 students (approximately 2.3%) with disabilities in Catholic schools who meet the Commonwealth's criteria for funding support.

(ii) What are the current educational outcomes for people with disabilities in different types of education and training?

Whilst there would be anecdotal evidence of the gains made by students with a disability (SWDs) in the acquisition of competencies, in the school education sector there is currently no comprehensive or reliable data that allows meaningful public reporting of the aggregate educational outcomes of students with disabilities, though obviously there is accountability back to parents of individual students. The Ministerial Council for Education, Employment, Training and Youth Affairs (MCEETYA) has initiated a process, fully supported by both government and non-government school education authorities, which aims to establish a definition of students with disabilities that is consistent across all states and territories. This is simply one aspect of work on nationally consistent definitions being carried out by the MCEETYA Taskforce on Performance Measurement and Reporting (PMRT). Although this exercise is very difficult, it is hoped that it will be completed early in

2004. This will allow, from 2005, data to be collected on the achievement of students with disabilities in the curriculum areas that have been identified by MCEETYA for the purposes of national reporting against the National Goals for Schooling. These areas are literacy, numeracy, the participation and attainment of young people, VET in schools, science, information and communication technology, civics and citizenship education and enterprise education. It should be noted, however, that some students with disabilities have learning difficulties that are so severe/profound that including them in the assessment regime for national reporting purposes is of very little value both for their own learning and for national reporting, and therefore they are currently exempted from that process. In order to include these students, alternative assessments would need to be developed. This would require specific resourcing.

(iii) How has the term ‘unjustifiable hardship’ been interpreted in education?

‘Unjustifiable hardship’ has often been interpreted in fiscal terms i.e. the cost of the accommodation required which may include provision of staff, services, equipment, access and training and development needs. In part this has resulted from cases before the Human Rights and Equal Opportunity Commission (HREOC) and current defence/ exemptions under the Act.

Less often have factors related to infrastructure, curriculum and student management been defined within the concept of unjustifiable hardship. Few cases before HREOC have clarified where the concept of unjustifiable hardship relates to the impact that a student with significant disabilities may have on the opportunities of other students to learn. The question is to what extent may the rights of one student infringe on the rights of other/all students. This could also relate to the concept of ‘saturation’ and its interpretation within the framework of unjustifiable hardship.

The focus has been on financial factors rather than the purpose of the Act, which is maximising the educational benefits for people with disabilities.

(iv) What are the costs of ‘reasonable adjustments’ in education?

It is impossible to identify the precise costs of reasonable adjustments given the broad nature and definition of disability and the range of adjustments a student may require in order to access any given site and its curriculum. Parents may be likely to argue that unless their requested modifications to curriculum and support are met, then that constitutes discrimination, whereas it may be the case that other adjustments are better for all concerned and are therefore reasonable. There are other less measurable adjustments eg changes in community beliefs and values, that are essential for the active participation of the student in their community. A second issue is the concept of who considers what a ‘reasonable adjustment’ is, since under the current provisions it is via the complaint process. Whilst the proposed Draft Education Standards are an attempt to clarify what is reasonable, there remains a need to rely on the outcome of current HREOC and Federal Court and High Court cases to assist in the definition of what is ‘reasonable’.

(v) Who currently bears these costs? Who should bear them and why?

Each school sector (government, Catholic, and Independent) meets the costs of servicing the needs of students with disabilities enrolled in its schools. In the government sector, a reasonable estimate for the additional costs incurred in meeting the needs of students with disabilities in regular schools and can be derived by subtracting the Average Government School Recurrent Costs (AGSRC) from the average expenditure on students with disabilities that meet funding criteria. The AGSRC is currently \$5657 for primary students and \$7469 for secondary students, which equates to an overall figure of \$6352. Official figures from Queensland, Victoria and the ACT suggest that a reasonable estimate of the average expenditure on students with disabilities is \$20,000 (see Table 1). This means that a reasonable estimate for the average cost of meeting these students' additional disability-related needs in government schools is \$13648.

Table One: Average Cost of Educating Students with a Disability in Regular Government Schools

This table is offered to support the figure of \$20,000 as being a considered estimate for the average expenditure by government school systems on students with disabilities enrolled in regular schools. Information from some states is not available, and the information that is available is not always directly comparable across states/territories.

<u>State</u>	<u>Funding</u>	<u>Information Source</u>
ACT	\$19,225	ACT Budget Estimates 2000-01, for mainstream schools only.
Qld	\$22,649	Qld Budget 2001-2, includes special schools.
Vic	\$17,969	1999 ANR figure for Victorian AGSRC, supplemented by movements in the national AGSRC, plus \$11,500, being the estimate from the Disability and Impairment Section of Victorian DEET for the average additional expenditure on SWDs in mainstream settings in 2001-02.

The Catholic sector receives some support from the Commonwealth and or State government but it is not enough to allow Catholic schools to offer a similar range of services to a similar range of students with disabilities as in the government sector (for illustration of this, a set of sample case studies is attached in Appendix A). In 2002, there were 14,872 students with disabilities who met the criteria for government support. On average, each of those students attracted an additional \$2433 (from the Special Learning Needs portion of the Strategic Assistance for Improving Student Outcomes and the Strategic Assistance Amount) in Commonwealth funding while the level of support from State/Territory governments varies depending on the State in which the student lives, the disability definition and the sector within which the student is being educated. However the combined effect of both Commonwealth and State/Territory funding is still substantially less than the additional resources available to service the needs of students in government schools.

It is the view of the NCEC that as the Act is a Commonwealth Act, the Commonwealth should increase its level of targeted funding to the non-government sector for the support of students with disabilities, particularly in light of the broader definition of disability under the Act. In this context, NCEC anticipates that in the course of this review the Commissioners and some submissions may refer to the report of the Senate on the education of students with disabilities released in December 2002. While this report has much to commend it, NCEC submits that the report has a major flaw in that it seriously misunderstands the nature and level of resources available to non-government schools to assist them to meet their obligations under the Act.

In particular, NCEC draws attention to Appendix 6 of the report, which purports to demonstrate that non-government schools are more than adequately resourced for addressing the needs of students with disabilities. The Appendix concludes that “on current funding trends, the Catholic education system will in 2004 have an estimated total income 11.7% 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% higher.” Anyone familiar with school funding policy in Australia will immediately know that these figures are flawed.

Appendix B to this submission, prepared by DEST, addresses the flaws in the Report’s Appendix 6, and concludes that “it is estimated that in 2004, the non-Catholic sector will receive total recurrent funding on par with the government sector, while the Catholic sector will be funded at a level some 20% below the government sector.” (It should be noted that the term “funding” in this conclusion is inclusive of private income received through fees and donations.)

Also, there are provision of service gaps where health, education and welfare organisations are needed to provide services to the student and where there is a lack of clarity regarding who should/could meet the costs, how costs could be shared and eligibility requirements. For families this presents a significant frustration and cost.

(vi) How do different definitions of disability for different purposes influence the effectiveness of the DDA in relation to education?

The Act creates service provider obligations in respect of a very broad category of students with an educational impairment, whilst State and Commonwealth funding criteria/eligibility have a much narrower application (see *paras.* 34-5). These definitional discrepancies result in a mismatch between the Act’s legal definition of disability and the definitions used for State-based funding eligibility. All schools in Australia need to be better resourced in the first instance in order to identify and address the needs of all students who have a disability.

The Australian Bureau of Statistics (*Australian Social Trends* 2000) estimates that 8% of all children aged 5-17 have a disability involving a specific restriction capable of impacting on their schooling. In addition, there are other students with learning difficulties enrolled in Catholic, and other, schools, who currently fall outside the criteria for SWD funding. This group may represent an additional 12% of enrolments (cf. *Disability Standards for Education 2000, Draft Regulatory Impact Statement*, page 11).

Furthermore, assessment of student needs applies State-based and State required processes and criteria. Currently, funding approval requires access to psychologists for assessment of cognitive disabilities. Similarly, access to a speech pathologist is required for the assessment of a specific language disorder. Other disabilities require assessment by medical rather than educational professionals. These professionals include doctors, psychiatrists, occupational therapists and physiotherapists.

Access to these services depends on local facilities such as State Area Health Boards, State Disability Services Departments, hospitals, or associations such as the Spastic Centre or Autism Association. The definition used for entry criteria into these programs is presently not only different to that of the Act, but in some states, also differentiates between government and non-government school clients. There is also a gap in early intervention services.

A further troublesome definitional issue is that the definition is used by government funded programs to restrict admission by age and this, perhaps unintentionally, causes a gap between services, particularly for students who require transition to work or post school disability support programs before the age of 18. This issue also impinges on those students who choose or require school support after the age of 16.

(vii) What are the advantages and disadvantages of developing disability standards for education?

Both the Act and the draft Standards rely on the concept of Reasonable Adjustment. A key difficulty for all parties seeking to apply the Act to any particular circumstance is the fact that the Act does not define “reasonable adjustment”, indeed the phrase is not even mentioned in the Act.

In the absence of any statutory guidance as to the meaning of “reasonable adjustment” HREOC and the Federal Court have attempted to define it by developing a set of quantitative and qualitative criteria or tests.

The draft Standards devote a lot of space and words to an attempt to build on the work of HREOC and the Federal Court in defining or codifying “Reasonable Adjustment”. If this task of clarification were to be successful it would represent the key advantage of developing Standards for Education. However, the NCEC is concerned that rather than clarifying the meaning of “reasonable adjustment” the draft Standards further confuse and conflate a range of potential quantitative and qualitative criteria for the assessment of reasonable adjustment. All of these criteria will in turn have to be assessed in the context of each particular student and their educational setting.

Given these inherent difficulties, the NCEC is concerned that rather than reducing litigation, the proclamation of the Standards will increase litigation. Increased litigation will lead to increased diversion of scarce resources from disability provision to the subvention of legal costs.

If Standards for Education are to be effective a prior step is required: *the DDA should be amended to insert a section dealing with “Reasonable Adjustment”. Such a section could appropriately be inserted after the existing section (11) “Unjustifiable Hardship” and be modelled upon that section.*

Furthermore it is strongly suggested that the new section should be based on Disability Standards for Education 2003 (Draft) Guideline Note 4.1.

NCEC proposes the following new Section 11A:

In providing reasonable adjustments for a student with a disability, it is intended that an education provider should:

- ensure that the processes for seeking an adjustment are accessible and transparent;
- take into account information provided by, or on behalf of, the student about whether the disability affects the student's ability to participate;
- take into account the views of the student, or an associate of the student, about whether a proposed adjustment is reasonable and will result in the student being treated on the same basis as students without a disability;
- take into account information provided by, or on behalf of, the student about his or her preferred adjustments; and
- act upon information about an adjustment in a timely way that maximises the student's participation in education or training.

In deciding on a reasonable adjustment, the education provider also needs to take into account:

- the effect of the proposed adjustment on the student;
- whether there is a more appropriate location for the student to attend;
- the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students; and
- the cost and benefits of making the adjustment.

With respect to the actual drafting of the Standards they should include a schedule for staged implementation (Target) dates for compliance, as applies to the Transport Standards. In this regard a separate and additional round of consultations should be held to identify a schedule of target implementation dates for specific standards.

(viii) What lessons can be learnt from the process to date of developing the education disability standards?

The Draft Education Standards represent a significant shift in the engagement and enrolment of young people deemed to have a disability into mainstream schooling.

Historically, special education was the creation of government policy authorising compulsory education for all citizens. The policy of compulsory education created a

need to establish “special” settings for “special” students to ensure the objectives of compulsory education were achieved.

With the creation of “special facilities” a body of knowledge was established titled “special education” which developed perspectives from the psycho-medical model to provide the traditional discourse of the special education field. Special education asserted that it provided an education for all within a context that integrates education within the psycho-medical model. An ideology of professionalism and expertism developed within the special education knowledge tradition.

Parallel to the development of special education knowledge tradition was the development of the concept of the best interests of the child which originated in the United Nations Convention of the Rights of Children. The concept of the best interests of the child now pervades legislation to do with children. According to Article 3 (1) of that convention, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration.”

The concept of the best interests of the child has been further framed by the Salamanca statement (UNESCO 1994) which enhanced the principle of inclusion and concepts of schools for all. The Australian special education field has been highly visible in the development and implementation of policy intended to promote inclusive schooling, however there appears little critical commentary or evaluation about the changing context of special education.

Consequently the education standards which seek to further reinforce the placement of students in mainstream education have entered a context where policy and operational practice are experiencing transformational paradigm shifts. For example, inclusive schooling is seen as the outcome of providing for all students yet special education continues to utilise the language of integration which seeks to introduce students with disabilities into regular schools from a setting where attendance may exclude them from the regular school.

The development of the Draft Education Standards has provided a focus for a significant paradigm and attitudinal shift needed to achieve inclusive schooling outcomes. Consequently, difficulties in operationalising the concept of the best interests of the child have been identified through the standards process. The standards process has highlighted the complexity of effort needed to provide definitional and operational concepts into a context where identification, analysis and evidence of common factors still pose a challenge.

In summary the Draft Education Standards represent an operational and skills based paradigm shift for education which has utilised assessment and diagnosis to guide practice in the best interests of the child. The process of developing the standards has also highlighted historical cultural and ideological considerations in regards to the best interests of the child. Such considerations have impacted upon the processes of developing the standards and have parallels in the areas of child protection, family law, treatment of indigenous children and children of refugees.

APPENDIX A

Costs of Inclusion

HIGH LEVEL SUPPORT NEEDS ~ SWD STUDENT

Disability: Multiple (Moderate
Intellectual/Language/Speech/Physical/Behaviour)
Ascertainment: Level 3

COST PER ANNUM

Salary

Classroom Teacher – 32 Students in class	1,407
Education Officer – Special Education 15 hrs per term	2,566
In School Special Needs Co-Ordinator 2 hrs per year	56
Speech Pathologist – Assessment & Report – Community Health	- -
Occupational Therapist – Assessment & Report – Community Health -	- -
Teacher Assistant – 18 hrs per week - SWD & IESEP	13,356
T.A. Relief & Playground Supervision 5 hrs per week	1,855
PD Relief for Teacher Assistant – 2 days per year	222
Relief for Class Teacher – 1hrs per week	1,125

Individual Education Plan Development / Program Review

Co-Ordinator – Special Education 5 hrs per term	855
Education Officer – Special Education 5 hrs per term	855
In School Special Needs Co-Ordinator 6 hrs per term	672
Class Teacher 4 hrs per term	448

Case Management

Co-Ordinator – Special Education 5 hrs per term	855
Education Officer – Special Education 5 hrs per term	855
In School Special Needs Co-Ordinator 2 hrs per term	224
Classroom Teacher 12.5 hrs per term	1,407
Speech Pathologist – 3 hrs per year - Community Health	- -
Occupational Therapist – 3 hrs per year – Community Health	- -
Behavioural Therapist – 15 hrs per year – Community Health	- -
Principal – 1 hr per week	2,000
Funding Review Panel - 2 hrs per year	500
Secretarial Support Diocese Based – 2 hrs per year	50

Non Salary Costs

Staff Development Day – Education Officer – 1 Day	342
Resource Purchases – OT Equipment, Teacher Resources)	500
Travel Expenditure – 12,000 kms x 50.3 cents per km per year (Includes Education Officer, Co-Ordinator of Special Education to attend PD & Meetings)	6,036
Telephone and Postage Costs	100
Learning Support Centre Running Cost – share per SWD Student	500

TOTAL SALARY/NON SALARY EXPENDITURE \$ 36,786.00

A few examples of students presently enrolled in Catholic Schools.

Student 1

Steel rods inserted in spine due to scoliosis which then reduces his flexibility regarding reach. He is permanently in a wheelchair. He is unable to feed himself or drink unaided due to the rigidity of his spine and muscle wasting in his arms. He needs complete toileting assistance using a hoist and bottle. He is unable to access his curriculum areas. Whilst he has a specialised computer system he is only able to independently access this in a very limited fashion. He has a major problem with fatiguing and needs frequent breaks from work. He travels by disabled taxi to and from school. Complete support structures need to be in place for excursions, retreats, camps etc. He has major therapy needs due to cramping and continuing muscle deterioration. However this is rarely available.

Cost for Full-time Aide plus therapy support needs: at least \$28,000

Student 2

This student needs help with toileting and ambulation. She is fed every two hours through a gastroscopy. She is currently in a wheelchair most of the time, however she has AFO's fitted to both legs to allow her to begin to weight bear. She uses basic signs and an augmentative communication board. Occupational therapy & speech therapy support are critical but seldom available.

Cost for Full-time Aide plus therapy support needs: at least \$28,000

Student 3

This student has to be in an air-conditioned class with a constant temperature as his body can't control its temperature. He cannot have any food or drink by mouth so has a constant food supplement with drugs through a button feed. His blood sugar levels are measured several times per day and all urine output must be measured and tested and his drugs altered accordingly. He is in a wheelchair as his legs have wasted due to Mitochondria disease. He fatigues easily and needs 10 minute breaks each hour, out of class. Support is considered too stressful for one Aide so two Aides are employed part-time so he has constant support. Even with this his mother has to assist on occasions. He needs Physiotherapy, Occupational therapy, speech therapy & nursing support to allow him to function in a school setting.

Cost for Full-time Aide plus therapy support needs: at least \$28,000.