

DISABILITY STANDARDS FOR EDUCATION 2004

REGULATION IMPACT STATEMENT

This Regulation Impact Statement (RIS) has been prepared by the Commonwealth Department of Education, Science and Training, in association with the Commonwealth Attorney-General's Department. Its purpose is to assist the Australian Government to make decisions regarding the provision of education and training that does not discriminate against people with disabilities on the ground of their disability. To achieve this, the RIS assesses the impact of legislating Disability Standards for Education (Standards) under the *Disability Discrimination Act 1992* (DDA).

The RIS identifies community concerns in relation to the participation of students with disabilities in education and training and the need for the elimination of discrimination on the ground of disability. Eliminating discrimination on the ground of disability, as far as possible, and ensuring, as far as practicable, that people with disabilities have the same rights to equality before the law in the area of education and training as the rest of the community are generally the objects of the DDA. The RIS considers a range of possible options for addressing these concerns. Primary among these are Disability Standards for Education.

The RIS concludes that Disability Standards for Education are the most appropriate option to support more effective achievement of the objects of the DDA. This strategy is consistent with the policy direction set by the then Attorney-General who, in 1995, requested the then Minister for Education, Employment and Training to assist with the production of disability standards in relation to the education of people with disabilities.

Furthermore, in December 2002 the unanimous report of the Senate Employment, Workplace Relations and Education References Committee Inquiry into Education of Students with Disabilities recognised that the Standards are necessary to address the discriminatory practices it had identified.

The draft report on the Productivity Commission Review of the DDA (2003) also strongly supports the development of disability standards, and recommends that the DDA be amended to allow for standards development in "any area in which it is unlawful to discriminate on the ground of disability". The review report supports the DDA as the appropriate approach to providing enforceable rights to people with disabilities, and finds that the DDA has been more effective in the area of education than in any other area covered by the DDA. It also finds that disability standards tend to promote a uniform playing field and the Disability Standards for Education seek to address gaps in the DDA's provisions, in particular, through the extension of the unjustifiable hardship provision.

The RIS discusses the implications for various stakeholders of implementing the Standards, including potential costs and benefits arising from the Standards. The primary impact the RIS identifies is the greater clarity and certainty that the Standards would give providers in meeting their obligations under the DDA.

This RIS has been prepared in accordance with *A Guide to Regulation: Second Edition: December 1998* issued by the Office of Regulation Review.

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1 Background

Section 31 of the *Disability Discrimination Act 1992* (DDA) provides for the Attorney-General to formulate standards, to be known as disability standards, in a range of areas, including the education of people with disabilities. Standards are subordinate legislation and are subject to the objects of the DDA. It is unlawful for a person to contravene standards under the DDA (section 32 of the DDA). If a person or organisation acts in accordance with a disability standard, then the requirements of the DDA in relation to matters covered by the standard have been met and they will not be in breach of the DDA (see section 34 of the DDA). As with the DDA, breaches of standards will be redressed through a complaints process.

In 1995 the then Attorney-General identified access to premises, accessible public transport, communications, employment and education as priority areas for the production of standards. A DDA Standards Project, a group representing disability organisations, was established to advise on the creation and implementation of standards in these five areas. With regard to disability standards for education, the Attorney-General wrote to the then Minister for Employment, Education and Training seeking advice on the creation of disability standards which would make rights and responsibilities in the field of education and training easier to understand, and simplify the processes for enforcement and compliance. In December 1995 the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) established a Taskforce to oversee this task. In setting up the Taskforce, the Ministers were keen to ensure that as many stakeholders as possible were represented within a group of manageable overall size.

In 1996 MCEETYA endorsed the development of a discussion paper that canvassed the feasibility and desirability of disability standards for education. This paper was the basis for consultation in 1997 with education, training, and disability stakeholders. The consultations found that 80 per cent of respondents favoured the production of standards and that respondents wished to be further consulted on any standards produced. Work on drafting the Disability Standards for Education commenced in 1998.

Development of the draft Standards involved an iterative process to define essential concepts, operational principles and performance measures so that education and training providers have a clearer understanding of their obligations to ensure that students with disabilities do not experience discrimination in education and training. In March 2000 MCEETYA agreed that the draft Standards as then developed should be used as the basis for further consultation with education, training and disability stakeholders. Following those consultations the draft Standards were further amended to take account of the feedback received.

In July 2001 MCEETYA referred the Standards to the Australian Education Systems Officials Committee (AESOC) with a remit to consider the Standards, agree on amendments and clarifications, develop a RIS to facilitate implementation, and to report back to Ministers by the end of 2001. Accordingly, an AESOC Working Group, established to assist AESOC, produced further drafts of the Standards in consultation with education and training jurisdictions and other stakeholders.

In late 2001 to early 2002 the Working Group also attempted to undertake a cost-benefit analysis of the potential impact of the Standards. However, not all jurisdictions and systems participated in the analysis, there was no overall consistency in the methodologies employed and the costings provided varied markedly. Some providers anticipated large cost increases while others anticipated only slight increases in the cost of providing for students with disabilities and did not

expect these to impede implementation of the Standards. These providers agreed with the Commonwealth that the Standards reflect the existing law and good practice.

At its meeting in July 2002, MCEETYA expressed concern over the delay in finalising the draft Standards, but agreed that outstanding legal and financial issues would be addressed by December 2002 prior to the introduction of legislative amendments to the DDA, if necessary, and to the implementation of the Standards. With advice from the Australian Government Solicitor (AGS) and the Commonwealth Attorney General's Department (AGD), the Department of Education, Science and Training (DEST) produced further drafts of the Standards, taking into account the legal issues raised by education providers and other stakeholders.

Early in 2003, the MCEETYA Taskforce on Targeted Initiatives of National Significance (TINS) agreed on the form and content of the Standards and referred the Standards to AESOC for consideration. Noting the concerns of some education providers regarding potential cost implications, AESOC requested the Australian Government to undertake an independent quantitative cost-benefit analysis of the Standards to inform the RIS.

DEST agreed to commission an independent, transparent and robust analysis of the potential impact of the draft Standards based on methodology agreed by principal stakeholders. Subsequently, DEST employed an independent consultant to estimate the marginal costs and benefits arising from the Standards over and above the costs and benefits involved in complying with the DDA.

Drawing on the quantitative and qualitative information provided by jurisdictions and stakeholders, the independent cost-benefit analysis concluded that "the overall benefits of the Standards exceed their associated costs". It identified increased clarity for education providers as to their obligations under the DDA and for students with disabilities as to their entitlements under the Act as the principal impact of the Standards. It also found professional development to support the introduction of the Standards to be a reasonable cost attributable to the Standards. The cost-benefit analysis identified a huge variation in the maximum marginal costs claimed by the States and Territories. However, the analysis found these to be the costs of compliance with the DDA rather than costs attributable to the Standards. Chapter 7 discusses the cost benefit analysis and the earlier attempt at costing the Standards.

At its meeting in July 2003, MCEETYA endorsed the final draft of the Standards and the outcomes of the cost-benefit analysis. However, some States and Territories indicated that their endorsement of the Standards was conditional, primarily on the agreement of the Australian Government to provide new, non-recurrent funding for professional development transition and other unforeseen costs of implementing the Standards.

The Minister for Education, Science and Training announced, on this basis, that the Australian Government, having now exhausted all options for collaborative endorsement of the DDA Disability Standards for Education, would move unilaterally, as soon as practicable, to implement the Standards.

2 The problem or issue that first gives rise to the need for action

2.1 Objects of the DDA

The Australian Government, State and Territory Parliaments have recognised that people with disabilities should, as far as possible, have access to the same services, facilities and opportunities as their fellow citizens. While this principle underpins State and Territory anti-discrimination legislation, its particular relevance here is reflected in section 3 of the DDA, which states that “the objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sport; and
 - (ii) the provision of goods, facilities, services and land; and
 - (iii) existing laws; and
 - (iv) the administration of Commonwealth laws and programs; and
- (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.”

The DDA recognises that providing access for people with disabilities does not mean access at any cost. The use of terms such as “as far as possible” and “as far as practicable” makes it clear that there must be a balance between the benefit and the cost of providing access. Similarly, the provision of exceptions and the concept of “unjustifiable hardship” in both the DDA and the Standards, whereby action is not required where it would create unjustifiable hardship for a provider, also recognise the need to balance benefits and costs.

2.2 Need to clarify provisions of the DDA

Section 22 of the DDA makes discrimination against a person on the ground of the person’s disability unlawful in the area of education. In summary, it is unlawful for an educational authority to discriminate against a person on the ground of their disability:

- by refusing or failing to accept the person’s application for admission as a student, or in the terms and conditions on which the authority is prepared to admit the person as a student; or
- by denying or limiting the student’s access to any benefit provided by the authority, or expelling the student, or subjecting the student to any other detriment.

It is not unlawful for an educational authority to refuse an application for admission from a person who would require services or facilities that are not required by students who do not have a disability, where the provision of such services would impose an unjustifiable hardship upon the authority.

The DDA seeks to ensure that people with disabilities are not subject to unlawful discrimination in very broad areas of public life. It is therefore drafted at the level of broad obligations. However, this high level of generality, together with the need to balance competing interests, can lead to significant uncertainty for people with disabilities and for those who work with them, such as education and training providers. This lack of certainty gives rise to the need for action – the need to provide greater clarity for providers in terms of their obligations and for students with disabilities in terms of their entitlements. To address this need for action the DDA offers a number of mechanisms including, under section 31, the development of disability standards.

3 The desired objectives

The need for greater certainty about the provisions of the DDA underpins the current pursuit of regulatory reform. To achieve the objects of the DDA, it is necessary for providers, people with disabilities and their associates to have a better understanding of its requirements. Accordingly, the proposed Disability Standards for Education seek to:

- (1) clarify and make more explicit the provisions of the DDA regarding the obligations of providers and the rights of people with disabilities in the area of education and training and provide guidance on how these obligations can be complied with; and
- (2) affirm and strengthen the public's commitment to people with disabilities in education and training, by affording them opportunities to realise their potential on the same basis as people without disabilities.

3.1 Clarification of rights and obligations

It is necessary to clarify the obligations of education providers and the rights of people with disabilities in order to:

- give greater certainty and clarity to providers of education and training regarding their obligations not to discriminate against students with disabilities;
- provide for better understanding among students with disabilities, or their associates, about their expectations and entitlements in accessing and engaging in education and training;
- ensure that students with disabilities are able to participate in education and training without discrimination; and
- reduce costly and painful disputes.

3.2 Enhancing the implementation of the objects of the DDA

The second objective of the regulatory reform is more general, that is to confirm, enhance and give greater consistency to the commitment of the Australian, State and Territory Governments to the objects of the DDA and of similar State and Territory laws, by:

- eliminating discrimination against people with disabilities in the area of education, as far as possible, and hence enhancing their educational outcomes over the longer term;
- ensuring, as far as practicable, that people with disabilities have the same rights to equality before the law as others in the community; and

- promoting recognition and acceptance within the community generally that people with disabilities have the same fundamental rights as others in the community.

The area of education and training is important for the implementation of the DDA objectives. Education and training enhance the ability of people with disabilities to participate more effectively in other areas of public life on the same basis as others in the community. In addition the education system itself can promote public acceptance that people with disabilities have the same fundamental rights as others.

4 The options that may constitute viable means for achieving the desired objective

As indicated in Part 1 above, in 1995, at the specific request of the then Commonwealth Attorney-General, MCEETYA Ministers decided to develop Disability Standards for Education to address the issues raised in Part 2 of this RIS. However, the preparation of a RIS requires consideration of the different options for achieving the desired objectives. Accordingly the following paragraphs set out and provide some comment on the options available under the DDA for clarifying the rights of people with disabilities in the area of education and training and the obligations of education and training providers in relation to those rights. These include to:

- take no action;
- produce educational material;
- produce guidelines;
- develop action plans;
- amend the DDA; and
- produce disability standards.

These options are not mutually exclusive, nor do they all aim to achieve the same results with the same degree of efficacy.

4.1 Consideration of the Options

4.1.1 Take no action

Under this option, there would be no new guidance on rights and obligations under the DDA. As at present, the gradual and complaints-driven development of case law would guide interpretation of the obligations of the DDA over time. The clarification of the Act would therefore rely primarily upon the extent of usage of the complaints mechanism and court processes and upon individual providers themselves undertaking action to increase the levels of their compliance with the DDA. (A description of the complaints mechanism as it now operates under the DDA is included at [Attachment A](#).¹)

In favour of this option, it is true that access to, and the provision of, education and training for students with disabilities have improved since the introduction of the DDA. However, it is not

¹ The disability community and education and training sectors have expressed concerns about their need to use a costly and time-consuming grievance process to redress instances of discrimination. [Attachment A](#) provides a note on improvements to the complaints handling process implemented in April 2000.

clear whether these improvements have arisen from the introduction of the DDA or from the policies implemented by State and Territory governments for integration of students with disabilities into mainstream school education.² In addition, education and training sectors and State and Territory educational authorities have in place their own processes and policies for receiving and hearing complaints from students with disabilities and their associates.

Students with disabilities, and their associates, are increasingly well informed about what they consider to be their entitlements under the DDA. They are therefore likely to expect providers to understand their obligations under the DDA with greater clarity and would continue to test the scope of the DDA.

If no action were taken, providers would continue to have little information and guidance on the adequacy of the services they provide to meet the DDA's requirements. They may encounter difficulty in applying the findings of a particular case to other cases where there may be no ready comparisons between different types of disabilities and different educational contexts and needs.

Consultations with students with disabilities and their advocates have reported continuing discrimination in access to education and training. The option of doing nothing is not likely to be effective in removing such discrimination. If selected, it would not reduce the number of complaints. Neither providers nor people with disabilities support this option.

4.1.2 Produce educational material

Educational material assists providers, students with disabilities and their associates to understand the DDA. It is a statutory function of the Human Rights and Equal Opportunities Commission (HREOC) to promote an understanding and acceptance of the DDA, and compliance with it. In performing this statutory function, HREOC produces explanatory material in relation to the complaints process and the practical operation of the DDA. This material, widely available via the Internet, assists with the implementation of legislation.

The Australian Government also funds the DDA Legal Services program as part of its Community Legal Services Programme to provide advocacy support and community education to address the needs of people with disabilities experiencing discrimination. Disability organisations also provide advice to students with disabilities, their associates and the community more broadly.

All school systems have developed policies and procedures to support appropriate provision for students with disabilities. Both the vocational education and training and higher education sectors have in place voluntary codes of practice and policy documents to guide institutions towards meeting the needs of students with disabilities.

There is already considerable material available to facilitate the objects of the DDA. Additional materials should enable students and providers to be better informed about the DDA, but educational materials in themselves are not a source of legally enforceable norms, nor does acting on them provide a defence against complaints. Hence, both the disability sector and the providers see educational material as critical for explaining the law but not as a substitute for the role Standards could play in clarifying the law.

² This is supported by finding 5.2 of the Productivity Commission's draft report (October 2003) of its Review of the *Disability Discrimination Act 1992*.

4.1.3 Produce Guidelines

The DDA (paragraph.67(1)(k)) gives HREOC power to make and issue guidelines to:

- enhance understanding of rights and obligations under the DDA;
- guide the operation of providers in meeting their obligations under the DDA; and
- assist persons and organisations with responsibilities under the legislation to avoid discrimination on the ground of disability.

Guidelines are not legally binding. Further, while compliance with guidelines may help an education provider in answering a complaint lodged under the DDA, it will not constitute a defence against discrimination. Guidelines may be detailed and persuasive, yet a court would make its own assessment of the requirements of the DDA and would not be required to take compliance with guidelines into account. In the event that a complaint of discrimination is made, reliance upon guidelines may therefore be ineffective as a defence.

When consulted on the issue of producing guidelines, HREOC indicated a clear preference for standards. Consistent with its view that guidelines are not legally enforceable and that education materials offer a more cost-effective way to providing information, HREOC has produced “Frequently Asked Questions” rather than guidelines in the field of employment.

The MCEETYA Taskforce discussed the feasibility of Guidelines at some length. Reflecting in part the difficulties encountered in developing standards, this option temporarily enjoyed a degree of support among some States/Territories. It was also the preferred option of the independent school sector. However, ultimately MCEETYA decided to continue with Standards because of the greater clarity and certainty they offer and their capacity to provide a defence against a complaint.

4.1.4 Action plans

Section 60 of the DDA provides for education providers and institutions to prepare action plans. An action plan can cover such aspects as the policies and programs a provider will develop to achieve the objects of the DDA, how these policies will be communicated, implemented and reviewed, and set goals and targets against which the success of the plan in achieving the objects of the DDA may be assessed. An action plan can operate in relation to an exemption, which can be sought from the HREOC under section 55 of the DDA.

Although the option of preparing an action plan has been available to education providers since the DDA was enacted, to date few of them have taken it up. In total one school, eighteen colleges of technical and further education (TAFEs) and twenty three universities have registered Action Plans with HREOC. This information is current as in October 2003. Action Plans are useful to detail specific policy in cases where an issue is already identified, but are not legally enforceable and work to persuade rather than require parties to resolve differences. They would generally apply to individual institutions rather than to a range of education systems or institutions.

The initial consultation process, referred to in Sections 1 and 6 of this document, indicated little support from the stakeholders for the use of Action Plans. This conclusion was borne out in the second round of consultations in concerns expressed by the disability sector that further legally enforceable means were required to increase compliance with the objects of the DDA.

The draft report of the Productivity Commission's Review of the DDA expresses a similar view. It notes that "voluntary action plans have raised awareness but their overall impact has been limited by the relatively small number that have been lodged".

4.1.5 Amend the DDA

The DDA could be amended to provide greater specificity as to the obligations that educational institutions would need to meet in order to avoid discriminating against students with disabilities. This would provide more certainty for education providers and people with disabilities. The resulting amendments would be legally binding upon institutions, and complaints would be handled under the existing complaints process.

For the most part this option does not differ in its legal effect from enacting Standards. However, amending primary legislation:

- is more cumbersome than preparing subordinate legislation for a comparable level of detail, and may result in more complexity surrounding the operation of the DDA in the area of education;
- would import into the DDA a degree of detail and prescription which would be inconsistent with the current approach taken in the Act, which is framed in terms of broad and general principles and obligations; and
- may act against the preferred outcome of giving providers the clarity and flexibility required to cater for the diversity of disabilities and needs that students may have.

For all these reasons amendment to the Act has not been advocated as a general substitute for Standards.

4.1.6 Produce Disability Standards

As set out above, under section 31 of the DDA the Attorney-General is empowered to formulate disability standards. The Disability Standards for Accessible Public Transport, 2002 were the first of these Standards to be implemented when they came into effect on 23 October 2002. The Disability Standard for Access to Premises is currently being developed.

The primary purpose of the Disability Standards for Education is to clarify and make more explicit the rights of people with disabilities, and the obligations of education and training service providers, to avoid unlawful discrimination in the provision of education and training.

4.2 Preliminary Conclusion

Consideration of the options described above indicates that Standards remain the option with the least disadvantages and the potential for the most advantages. Parties to the consultations clearly preferred this option. Standards provide legislative force to clarify the Act and enhance the achievement of its objectives in education.

In recognition of this, in July 2001, MCEETYA asked that the draft be cast in legal form and that a Regulation Impact Statement be prepared. In July 2002, MCEETYA directed that the jurisdictions and stakeholders work together to finalise the Standards by the end of 2002. In July 2003 MCEETYA endorsed the Standards, although, as discussed below, did not agree to do so unconditionally.

4.3 Development of the Disability Standards for Education

A number of key concepts such as “education provider”, “on the same basis as”, “reasonable adjustment”, and an extension of “unjustifiable hardship” were developed as principles underpinning the operation of the Standards. Some comment on these concepts is included below.

4.3.1 Education providers

The term “education provider” is not contained in the DDA but appears in the Standards in order to make clear that the Standards apply not only to individual institutions and authorities, but also to those organisations which develop or accredit curricula or training courses used by other education providers. The purpose of this change is to make it clear that those formulating and accrediting curricula need to consider the impacts on students with disabilities of the decisions they take.

4.3.2 On the same basis

A student with a disability is treated by the education provider “on the same basis” as a student without the disability if the student has opportunities and choices, which are comparable with those offered to other students without disabilities, to enable:

- admission or enrolment in an institution; and
- participation in courses or programs and use of facilities and services.

This concept is fundamental to the operation of the requirement of a provider not to discriminate against students with disabilities. It interacts with the concept of a “reasonable adjustment”. A provider is required to make any decisions about admission, enrolment or participation on the basis that reasonable adjustments will be made where necessary so that the student with a disability is treated on the same basis as a student without the disability.

4.3.3 Reasonable Adjustment

An adjustment is a measure or action taken to assist a student with a disability to participate in education and training on the same basis as other students. An adjustment is reasonable if it takes into account the student’s learning needs and balances the interests of all parties affected, including the student with the disability, the education provider, staff and other students. Factors to take into account in assessing whether a particular adjustment for a student is reasonable include:

- the nature of the student’s disability;
- the effect of adjustment on the student, including the student’s ability to participate in courses or programs, achieve learning outcomes and operate independently; and
- the costs and benefits of making the adjustment.

A key aspect of the process for making an adjustment is that the education provider is required to consult the student or their associate on the appropriateness of the adjustment. The decision must include consideration of whether there is any other adjustment that would be no less beneficial for the student but less disruptive and intrusive for the student and for others. It may be necessary to seek professional expertise in deciding on an adjustment.

The provider must take reasonable steps to ensure that any required adjustment is made within a reasonable time. In making a reasonable adjustment, the provider is entitled to ensure that the integrity of the course or program and assessment requirements and processes are maintained.

4.3.4 Unjustifiable hardship

Probably the most significant change that the proposed Standards introduce is to expand the scope of the defence of unjustifiable hardship from the point of enrolment in an institution, as is current under the DDA, to apply to the other areas of the Standards – participation; curriculum development, accreditation and delivery; student support services; and elimination of harassment and victimisation – over the total period of a student’s enrolment in an institution.

The Standards require providers only to “take reasonable steps” to “make reasonable adjustments” to enable students with disabilities to participate on the same basis as students without disabilities. The concepts of reasonable adjustment and unjustifiable hardship seek to provide a balance between the interests of providers and the interests of students with disabilities. The expansion of the unjustifiable hardship exception and the clear delineation of the obligation to make “reasonable adjustments” are changes effected by the Standards that are advantageous for providers.

4.3.5 Harassment

Sections 37 and 38 of the DDA make it clear that harassment of a student with a disability, (or his or her associate), on the ground of the disability, by an institution or staff of an institution is unlawful. To provide greater clarity Part 8 of the Standards provides a definition of harassment not included in the DDA. It goes on to describe how an education provider must develop and implement strategies and programs to prevent discrimination arising from the harassment or victimisation of a student with a disability, or the associate of the student, in relation to those disabilities, by other students enrolled in the institution. This change was sought by stakeholders. During the development of the Standards and in the consultation processes, no particular concern has been expressed about this change.

5 Impact Analysis of the Implementation of Education Standards

5.1 Implications for students

For students with disabilities, the Disability Standards for Education work to make more explicit their rights of access to and participation in educational opportunities under the DDA. The objective of both the DDA and the Standards is to ensure that, as far as possible and practicable, students with disabilities have the same access to education as students without disabilities. The Standards will provide students with disabilities with improved information about their rights and what they can reasonably expect as to their entitlements. In this way the Standards will provide a focus for discussions between students with disabilities and providers. Students with disabilities will be better supported in accessing and participating in education and training and better able to achieve the milestones other students achieve.

Through broader and more appropriate opportunities for education and training, people with disabilities are therefore able to achieve better educational outcomes, including in tertiary education. In the longer term the Standards will support students with disabilities in social and economic participation to the fullest extent possible.

For other students, the increased participation of students with disabilities may enhance social interaction between these two groups, with the consequent improvement in social skills and

awareness of disability issues. This supports the achievement of an important objective of the DDA – to promote the concept of recognition and acceptance within the community of the principle that people with disabilities have the same fundamental rights as the rest of the community. This concept is also the objective of State and Territory laws on disability discrimination.

5.2 Implications for providers

The main advantages of the proposed Standards for education and training providers are:

- the clarification of their obligations under the DDA (including exceptions to those obligations) to ensure that students with disabilities are not discriminated against in accessing education and training;
- the clarification of the rights of students with disabilities to be treated on the same basis as students without disabilities; and
- a defence against litigation, where a provider can demonstrate compliance with the Standards.

The enhanced clarity the Standards would introduce may reduce costly litigation in the longer term, if more cases can be resolved before they reach the level of a complaint or a hearing.

While the cost of litigation is an issue of concern to providers, its implications are difficult to assess.

In 2002, DEST attempted to collect statistics on the numbers of complaints pursued in relation to education and training across Federal, State and Territory anti-discrimination bodies. The data need to be interpreted with caution as these bodies do not follow a common approach to recording statistics on complaints received and managed. This said, available data for the three years from 1998-99 to 2000-01 indicate an average total of 133 complaints lodged across the Federal, State and Territory anti-discrimination bodies in relation to discrimination in the area of education and training. Of these only 23% were referred for conciliation or to a tribunal, court or other hearing.

The DEST Annual Report for 2002-03 reports that there were 201,453 students with disabilities across all sectors in 2002. When considered in the context of the total number of students with disabilities, the incidence of complaints is very low. On the basis of the indicative average of 133 complaints per year, the risk of complaints (ie percentage of average complaints per year per student with disability) is about 0.66%. The risk of complaints proceeding to a hearing, conciliation or tribunal is about 0.02%.

There are no available data on the costs of litigation. The independent cost-benefit analysis, discussed in section 7 below, attempted to identify such costs, but without success.

For providers, concern has focused, in particular, on whether the Disability Standards for Education may give rise to additional costs – either because more students would be identified as having disabilities, or because of the obligation to provide enhanced support for students who have them. To analyse this concern it is necessary to review the different ways of defining the concept “student with a disability”. It is important to note at the outset that the Disability Standards for Education use the same definition of “disability” as the DDA and therefore do not seek to redefine the concept of “student with a disability”. However, there are several definitions

in use; for example, as well as the DDA definition, the Commonwealth, State and Territory governments use one definition for funding purposes while the Australian Bureau of Statistics uses a different definition for its surveys.

5.2.1 Definitions of disability

Under the DDA, and the proposed Disability Standards for Education:

disability, in relation to a person, means:

- (a) *total or partial loss of the person's bodily or mental functions; or*
- (b) *total or partial loss of a part of the body; or*
- (c) *the presence in the body of organisms causing disease or illness; or*
- (d) *the presence in the body of organisms capable of causing disease or illness; or*
- (e) *the malfunction, malformation or disfigurement of a part of the person's body; or*
- (f) *a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) *a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*

and includes a disability that:

- (h) *presently exists; or*
- (i) *previously existed but no longer exists; or*
- (j) *may exist in the future; or*
- (k) *is imputed to a person.*

To date no survey has been conducted of the number of students who fall within this definition. Some jurisdictions have argued that some of those who might claim a disability under elements (f) and (g) are not covered under existing disability arrangements. Of particular concern are students with learning disabilities or difficulties and those with behavioural disorders. As mentioned above, these groups of students are covered by the existing DDA.

Some providers have referred to research, providing estimates of the prevalence of learning difficulties within the school age cohort, reported in a 1990 study on learning difficulties by the National Health and Medical Research Council (NHMRC)³, and in a 1999 OECD report on special needs. The NHMRC study draws on United States studies to estimate that 10 to 16 per cent of students may be able to claim specialised support on account of their learning difficulties and 2 to 4 per cent on account of learning disabilities. However, care is needed in using this study because its concept of learning difficulties is very broad and includes some factors such as inadequate environmental experiences and lack of appropriate educational opportunities, which are outside the DDA definition. Moreover, the NHMRC advises that this report was intended to stimulate discussion, rather than provide robust estimates of the number of children with learning disabilities and difficulties. In any case, the NHMRC has recently rescinded the report as it no longer reflects the views of the NHMRC.

The OECD notes wide acceptance in many countries that between 15 and 20 per cent of students will have special needs at some stage in their school careers. Point-in-time and constant

³ NHMRC (1990), *Learning Difficulties in Children and Adolescents* (Commonwealth) – now rescinded

estimates cannot be equated. The findings are not necessarily inconsistent with more recent ABS figures (quoted below) which are based on a point in time.

For Australian Government targeted funding, a student with a disability is defined as:

...a student who is attending a government or non-government school and who has been assessed by a person with relevant qualifications as having intellectual, sensory, physical, social/emotional or multiple impairments to a degree that satisfies the criteria for enrolment in special education services or programmes provided by the government of the State or Territory in which the school or centre is located. (A student whose only impairment is a specific learning difficulty or for whom remedial education or remedial support is appropriate is not an eligible enrolment for the purposes of calculating per capita funding).

Under this definition, the proportion of students with disabilities identified for Australian Government targeted funding purposes varies across the States and Territories, but in 2002, amounted nationally to 3.6 per cent of all school students. Both Australian Government and State/Territory programs provide funding support for this cohort of students.

Australian Bureau of Statistics (ABS) surveys are based on self-identification, or identification by a carer or associate, of a disability according to the following definition:

A person has a disability if he/she has one of the following, that has lasted or is likely to last for 6 months or more:

*Loss of sight (not corrected by glasses);
Loss of hearing (with difficulty communicating or use of aids);
Loss of speech;
Chronic or recurring pain that restricts everyday activities;
Blackouts, fits or loss of consciousness;
Difficulty learning or understanding;
Incomplete use of arms or fingers;
Difficulty gripping;
Incomplete use of feet or legs;
A nervous or emotional condition that restricts everyday activities;
Restriction in physical activities or physical work;
Disfigurement or deformity;
Needing help or supervision because of a mental illness or condition;
Head injury, stroke or other brain damage, with long-term effects that restrict everyday activities;
Treatment for any other long-term condition, and still restricted in everyday activities; or
Any other long-term condition that restricts everyday activities.*

Unlike the Australian Government targeted funding definition quoted above, the ABS definition is intended to cover all ages, and is not specifically oriented towards a need for specialised educational services. Systems note that it is not directly relevant to the way they operate and that a focus on a definition is not necessarily helpful to discussion about the adequacy of provision for students with disabilities. Nonetheless, the ABS survey remains the only recent and comprehensive survey of disability.

Using the above definition, the 1998 ABS survey of disability reported an incidence of 9.7 per cent in the 5-14 age group, 8.2 per cent for 15-24 years and 9.8 per cent for those aged 25-34 years. It is worth noting that the survey found an incidence of 18.8 per cent for the total population noting that the incidence of disability rises steeply with age, particularly beyond the age of 45.

In the Australian Government's view and that of some jurisdictions, it is unlikely that the numbers of people with disabilities seeking additional assistance, ie. adjustments, in education and training at any one time and to assert their rights under the DDA, would be significantly greater than identified by the ABS survey. This view is based on the survey's reliance on self-identification, guided by the broad range of categories of disability indicated above. Indeed the number would be smaller to the extent that some students with disabilities within the ABS definition may not need any adjustment for education purposes. Some students may need assistance on a very occasional, rather than a continual, basis. Point in time estimates are better for costing purposes than whole school career figures since students do not necessarily experience, or need support for, a disability throughout their schooling.

It is important to recognise that within all education sectors there is already a strong system of provision for students with disabilities. Education systems and institutions draw on a wide array of special education and learning needs programs funded by the States, Territories, the Australian Government, systems and institutions themselves to ensure that students with disabilities receive the learning support they need. Practitioners draw on whatever funding source applies in a particular instance. It is likely that some students with disabilities within the DDA definition have their needs met, appropriately, from funding provided to address specific learning needs, including targeted literacy, numeracy and Indigenous education programs. Moreover, some students with disabilities need no, or very few, adjustments.

There are on-going pressures to differentiate educational provision more closely to differences in ability and aptitude, and to adapt specialised services to advances in educational and medical research and practice. These pressures do tend to an increase in costs. However, they exist independently of Standards, and it is unlikely that the impact of Standards could be distinguished from that of the on-going pressures. The Standards do not alter the law on the definition of disability, nor the complaints mechanism under which case law develops.

It should also be noted that while the obligations of providers in the non-government sectors would be identical with those of providers in the government sector, the circumstances of non-government providers may vary. Accordingly, non-government providers, including both those whose operations are systemic and those that are free-standing, have expressed concerns that the level of resources available to them to respond to the needs of students with disabilities may not compare with the resources available to the government sectors. However, integral to the Standards are the concept of "reasonable adjustment" and the defence of "unjustifiable hardship". Non-government providers therefore recognise that in any assessment of their efforts and abilities to meet their obligations, their circumstances, financial and other, would be taken into account in the practical application of these principles.

While there remains some uncertainty among providers about the implications of the draft Standards, this largely stems from the fact that they have not yet been tested in practice. Under the DDA the number of complaints that are not resolved through conciliation is relatively small, but the development of case law is complaints-driven and unpredictable and therefore not conducive to generating certainty. Providers believe their operations are consistent with their obligations under the DDA and the small numbers of complaints indicate this is a reasonable assumption. Unless the clarification provided by the Standards proves this assumption to be unfounded, there need not be an increase in costs. However, there cannot be complete certainty on this point until the Standards have been tested.

Finally, consideration of the different definitions does not directly answer the question of whether the introduction of Standards is likely to increase the number of students assessed as having disabilities and hence the cost of providing for them. There can be no simple, direct

effect since the Standards do not alter the DDA definition, which has been the law of the Australian Government since 1992. Some States and Territories however have argued for a more subtle effect, ie that the Standards would raise awareness and expectations, leading to increased demands for expensive services; and that complaints brought under the Standards would widen the definition further. Students with disabilities and their advocates have become increasingly well informed about their rights under the DDA since its enactment, and this trend is likely to continue. It is possible that the introduction of the Standards will also be accompanied by a ‘demonstration’ effect but this is likely to abate following an initial period of testing.

6 Consultation

Development of the Disability Standards for Education has involved ongoing national collaboration, led initially by the MCEETYA Taskforce established in 1995 and later by its successors, an AESOC Working Group and the TINS Taskforce. The Taskforces and Working Group were all representative of the same stakeholder groups, engaged in careful and deliberative development of the draft Standards, and extensively consulted their constituent organisations throughout the process.

The task of developing the Standards has been both difficult and time-consuming. The key challenge was to reach the degree of certainty and specificity necessary for the Disability Standards for Education to guide providers in terms of their obligations to students with disabilities, while at the same time achieving sufficient flexibility to cater for the diversity of individual learners, education providers and educational settings, sectors and levels. Because of the need for flexibility an early draft of the Standards was developed at the level of principle. However, given that the Australian Government Solicitor considered this early draft too general in nature and insufficiently specific to meet the requirement of DDA standards, measures were added in each of the areas of the Standards, as examples of compliant actions. In consequence, an outcome of the deliberative processes was the mix of principles and performance-based measures that characterise the Standards.

The Taskforces and the Working Group also considered the broad framework for the Standards and individual concepts, such as ‘on the same basis’, ‘reasonable adjustments’ and ‘unjustifiable hardship’. Key objectives of these deliberations were to:

- develop a legal framework that would advance the objectives of the DDA, in terms of assuring the entitlements of students with disabilities to access education and training on the same basis and to the same extent as other students; and
- clarify and keep manageable the obligations of providers.

A constant thread in this deliberative process was whether standards were feasible, given the range of education and training institutions across the sectors and the diversity of needs of students with disabilities, as outlined earlier. Two extensive consultations were undertaken as part of this process.

6.1 The 1997 Consultation Process

In July 1997 MCEETYA carried out extensive consultations to determine whether there was support from the various disability and education sectors for the production of disability

standards⁴. The discussion paper which formed the basis of this process noted the arguments for and against the development of standards. The paper expected the Standards to:

- clarify the obligations of education providers under the DDA, and the rights of people with disabilities in relation to education and training;
- support an environment where providers could plan, fund and offer services knowing that they are conforming with the DDA, and where people with disabilities could plan with more certainty their educational pathways; and
- reduce diversion of resources from the provision of services to the costly complaints handling process.

Over 5,000 printed copies of the discussion paper and survey documents were distributed, and they were also available on the Internet. MCEETYA Taskforce members conducted consultations with their constituents and provided consolidated responses. In addition, over 100 written submissions were received directly by the Taskforce, and nine meetings with national peak bodies were held. The DDA Standards Project undertook community consultations and prepared a questionnaire for the disability sector. Nearly 2000 questionnaires were completed by individuals and disability groups.

Most responses were highly qualified in the absence of a set of draft standards to guide discussion of the issues. While submissions generally took the form of “yes but” or “no because”, overall 80 per cent of respondents supported the introduction of standards.⁵ All those consulted agreed that the current arrangement whereby the DDA and corresponding State/Territory legislation provide the main mechanism for dealing with complaints of disability discrimination in education was less than ideal.

The majority thought that DDA education standards should be developed, although many who endorsed their development also noted significant reservations. In general, the preference for the development of standards was across all types of respondents. The concerns of those whose support was qualified fell roughly into five categories, with their support being conditional upon:

- no reduction in rights for people with a disability;
- a focus on best practice rather than minimum levels of service;
- an improved understanding of the concepts in the DDA;
- appropriate and adequate accountability and monitoring mechanisms; and
- sufficient flexibility to cope with all individual learners and education sectors and settings.

⁴ From Discussion Paper Disability Discrimination Act Disability Standards in Education. July 1997.

⁵ Report of Consultations on Discussion Paper on DDA Education Standards prepared for MCEETYA Taskforce on DDA Education Standards

6.2 The 2000 Consultation Process

On 31 March 2000 MCEETYA noted the progress towards developing draft standards since their previous meeting in April 1999 and agreed to the use of the draft Standards, and accompanying Guidance Notes, as the basis for further consultation with key stakeholder groups.

Twelve thousand copies of a draft set of Standards and consultation paper were released for comment in August 2000. Responses were received until March 2001. One hundred and ten national organisations representing disability, education and training, and legal sectors were consulted. In total, 102 responses were received by the Department, of which 15 were consolidated responses from Taskforce members that provided summary and comment arising from consultations that member organisations had undertaken within their own sectors.

6.2.1 Outcomes

A majority of the respondents gave clear in-principle support for standards. There was general acceptance of the structure and most of the content of the proposed standards. Respondents mainly sought amendments to the draft. Where concerns were expressed about concepts in or aspects of the Standards, these became the focus for further development of the Standards. While many submissions included calls for the clarification of rights of people with disabilities and obligations of providers, there were few suggestions for alternatives to standards.

The submissions also revealed high levels of misunderstanding over the function, purpose, or legal force of standards. In a number of cases it was apparent that the misunderstanding related to the existing procedures and provisions under the DDA, rather than the proposed draft standards. This suggested a case for some form of education campaign or explanatory note to accompany the standards. The disability community also made a submission seeking the establishment of localised, informal and speedy complaint resolution processes. Some providers already have such mechanisms. However, complaints resolution is a separate issue from standards development and beyond its scope.

The consultation process has continued through the representation of key education, training and disability sector representatives on the AESOC Working Group and subsequently the TINS Taskforce, which had the remit to finalise the Standards and prepare a RIS.

6.2.2 Revisions to the draft Disability Standards for Education

As discussed above, the current Standards are the result of a comprehensive and collaborative effort involving representatives of national, State and Territory players in the education, training and disability sectors. They also incorporate the results of the two substantial consultation processes. Development of the Standards has been an ongoing iterative process with drafting focusing on three main aspects:

- specificity balanced by sufficient flexibility to cater for the diversity of education and training providers, educational levels and student needs. By including performance measures draft Standards are both principle-based and performance-based;
- clarification of key concepts, such as “reasonable adjustment”, “on the same basis” and “unjustifiable hardship”; and

- preparation of a set of explanatory or Guidance Notes to accompany the Standards. These notes carry no legal weight but provide further clarification of the operation of the Standards.

6.2.3 Comment on the option to produce Disability Standards

Consultation with stakeholders in 1997 established that standards were their preferred option. In the second round of consultations in 2000, the majority of stakeholders continued to support the concept of standards. Considerable work has been undertaken to ensure that concerns arising from each round of consultation about standards, have been addressed through the drafting process. The collaborative process of developing standards by taskforces and working groups, representative of national stakeholders, including government, education and training, disability and legal peak organisations, continued to the point at which MCEETYA considered a final draft of the Standards at its meeting on 10-11 July 2003. While endorsing the Standards, the States and Territories, other than Tasmania and the Australian Capital Territory, indicated that their endorsement was conditional on the Australian Government's agreement to share professional development and other unforeseen costs of implementing the Standards.

6.2.4 Amendments to the DDA

During consultations on the draft Standards, a number of jurisdictions and stakeholders raised the issue of the need to make amendments to the DDA to secure the areas where the Standards seek to extend the Act. There are four areas where the Standards vary the operation of the DDA. These are:

- extension of the defence of unjustifiable hardship beyond the point of enrolment to also apply to the areas of participation; curriculum development, accreditation and delivery; student support services; and elimination of harassment and victimisation;
- use of the concept of 'reasonable adjustment';
- inclusion in the definition of "education provider" at paragraph 2.1(c) of the Standards 'organisations whose purpose is to develop or accredit curricula or training courses by other education providers'; and
- inclusion of provisions relating to the prevention of harassment and victimisation that require providers to develop and implement strategies and programs to prevent harassment or victimisation of a student with a disability, or of a student who has an associate with a disability.

These extensions are the outcome of policy decisions made through the MCEETYA processes. The Australian Government Solicitor (AGS) has advised that the Standards are able to operate differently from the DDA and to deal with these areas. However, to enhance jurisdictions' confidence in the Standards, the Minister for Education, Science and Training indicated to MCEETYA that he would seek the agreement of the Attorney-General to make amendments to the DDA.

The draft report on the Productivity Commission Review of the DDA also recommends that "the scope of the *Disability Discrimination Act 1992* should only be altered via amendment of the Act, not via disability standards".

7 Potential costs and benefits

Given that the consultations identified standards as the preferred option, the next step was to estimate potential costs and benefits that would arise from the implementation of the Standards.

To this end, an initial effort to achieve a quantitative costing of the Standards was led by the Department of Education, Science and Training early in 2002. However, this process was unsatisfactory for a number of reasons:

- Some sectors (non-government school sector, private vocational education and training sector and the university sector) did not provide estimates of costing, either because they supported and were prepared to implement the Standards as then drafted, as in the case of the university sector, or because they were otherwise unable to provide costing estimates.
- The other sectors provided data but failed to adopt a consistent methodology to estimate potential costs, which led to difficulties in establishing a base-line and robust costing assumptions. Importantly, their costings failed to differentiate between the costs of implementing the Standards and the costs of meeting their existing obligations for compliance with the DDA, which has been in place since 1992.
- The disability sector, while estimating huge benefits resulting from the Standards, was not in a position to provide data to strongly substantiate this claim.

Following the MCEETYA remit of July 2002 for the TINS Taskforce to address outstanding financial and legal issues by the end of that year, revisions were made to the draft Standards to take account of the legal issues raised by stakeholders. Although, the legal issues were for the most part resolved by the end of 2002 culminating in the Taskforce finalising the format and content of the Standards, financial concerns persisted.

Early in 2003 AESOC considered the draft Standards which had been finalised by the TINS Taskforce and the positions of various jurisdictions on the Standards. It noted that full State and Territory support for the final draft was on the proviso that the cost implications as determined by a RIS, which would include both qualitative and quantitative analysis, could be met. It also noted that a qualitative RIS alone would not be sufficient to enable Ministers to determine their ability to meet their obligations should the standards be enacted.

In response to AESOC's request, the Australian Government commissioned an independent and transparent cost-benefit analysis of the impact of the Standards with a view to informing the RIS.

These two attempts at estimating the impact of the Standards are discussed below.

7.1 2002 Costing Exercise

This exercise sought both qualitative and quantitative data on costs and benefits arising from the Standards from State, Territory and non-government education and training providers and the disability sector. The representatives of the universities and the private vocational training providers did not take part in the Survey nor did they raise cost issues.

There were nine responses to the survey. Many of the issues raised are similar to those raised in the independent cost-benefit analysis reported below in section 7.2. The responses can be summarised as follows:

- (1) Four responses indicated significant additional costs, primarily on the basis of an assumption that up to 18 per cent of school students would fall within the DDA definition of disabilities, including students with learning difficulties. These responses also failed to distinguish between the costs of compliance with the Standards and the costs of existing obligations under the DDA;

- (2) One response indicated significant additional costs for reasons distinctive to its area;
- (3) One response indicated no significant additional costs on the grounds that legal obligations to students with disabilities were already being met, and that these would not substantially alter under the Standards. Two jurisdictions which did not respond to the Survey said that they had a similar view. These jurisdictions expected some additional costs arising from increased awareness generated by the Standards, but did not consider these costs would impede implementation of the Standards.
- (4) The two associations representing non-government schools said that they had insufficient data to estimate costs. They argued that there was a differential in the funding of students with disabilities between government and non-government schools, in favour of the former.
- (5) Most respondents covered benefits as well as costs. The DDA Standards project put in a response about benefits only.

Estimation of costs

The cost estimates provided by the five responses (groups 1 and 2 above) varied significantly. For the government school sector, cost estimates ranged from \$125m to \$11m. Estimates from the vocational education and training (VET) sector ranged from \$21m to \$0.6m. These estimates included one-off as well as annual costs. Some responses indicated that costs in VET would increase over time as participation.

Four responses from State school systems estimated their costs on the assumption that they would need to cater for 18 per cent of school students as students with disabilities and would need to negotiate curriculum plans for the entire 18 per cent

- Negotiation of curriculum plans is not an obligation or measure under the Standards.
- For reasons set out in Section 5 of the RIS, the argument that 18 per cent of the school population will need to be provided for under the Standards is not substantiated.

Some education providers also raised concerns that measures included in the Standards would enforce the introduction of particular new provisions by education providers. However, the Standards are quite clear that the measures are simply examples of compliant actions. Compliance with the measures is not required if the legal obligation can be met in other ways.

Some respondents noted that an increased awareness among students with disabilities of their entitlements may encourage more students to claim these entitlements and cause education providers to incur some additional costs. This was seen to be a particular issue in post-compulsory education where participation by people with disabilities is currently quite low. However, any attempt to measure this effect and to distinguish it from the long-run trend towards greater assertion of rights by people with disabilities would be speculative.

As with other legislation, there would be a modest introductory cost for the Standards in terms of awareness raising and professional development for staff.

It should be noted, that, if there were any such increase in participation, that would not only represent more effective fulfilment of the objectives of the DDA, but also increased benefits for the community. An underlying assumption of the argument for standards is that an investment in

education for people with disabilities is sound, in that it returns to the community at a substantially increased rate, and that investment in the short term reaps greater benefits in the long term as the independence and self-reliance of people with disabilities in social and economic life is enhanced by their greater participation in education and training. These implications of the Standards are in the long-term interest of the Australian social and economic community.

The independent cost-benefit analysis conducted in 2003 identified concerns similar to those arising from the 2002 costing exercise.

7.2 Independent cost-benefit analysis of the Standards (2003)

In response to the financial concerns persisting from jurisdictions and other education providers, and to the request from AESOC mentioned above, in early 2003 the Australian Government agreed to commission an independent, robust and transparent cost-benefit analysis of the Standards. It was intended that the outcomes of this study would be used to complete the RIS.

The focus of the cost-benefit analysis of the Standards was to estimate the marginal impacts – the additional financial costs and benefits – arising from compliance with the Standards, over and above the costs and benefits of compliance with the DDA.

To ensure that there was agreement on methodology, a request for tender was developed by the Department of Education, Science and Training (DEST), with input from jurisdictions and stakeholders. Tenders were invited from consultancy firms with demonstrated capacity, expertise and experience in undertaking cost-benefit analyses and a track record in the areas of education and training.

A Steering Committee, comprising nominees of DEST, the States (Victoria and South Australia), National Catholic Education Commission, National Council of Independent Schools Associations and the disability sector, was established to provide support and guidance to the successful tenderer. The Committee selected the Allen Consulting Group to undertake the cost-benefit analysis.

The cost-benefit analysis was commenced in mid-April 2003. A consultation paper was developed to provide a basis for consultation with government and non-government providers and other stakeholders. The Steering Committee directed the consultants to collect data from school, VET, higher education and all other sectors listed in Section 1.4 of the draft Standards. The Committee also noted that data would need to be well-substantiated and disaggregated at the State and Territory level.

The Consultants undertook targeted and focused consultations with education and training providers, including with State and Territory education and training departments, non-government school education authorities, the higher education sector, private training providers and the disability sector. They also organised face-to-face interviews in all capital cities over a two week period.

The consultants submitted their final report, *The Net Impact of the Introduction of the Disability Standards for Education*, on 12 June 2003. In producing the report, the consultants took into account quantitative and qualitative information provided to them by jurisdictions and stakeholders as well as relevant supporting information available through previous research and published reports. A copy of the report is at [Attachment B](#).

7.2.1 Outcomes of the cost-benefit analysis

The cost-benefit analysis identified a variation in the maximum claimed marginal costs of the Standards, ranging from \$1.8b in NSW and \$1.4b in Victoria, to \$19m in SA and \$2m or less in Queensland, Tasmania and the ACT. The following table presents the maximum costs for government schools estimated by the providers and the consultants.

Government Schools: Maximum Claimed Compliance Costs versus Recurrent Expenditure and Estimated Costs

	Maximum Costs Claimed by Jurisdictions		Costs Estimated by Consultants	
	\$million	% of Recurrent Expenditure	\$million	% of Claimed Costs
NSW	1827.0 ^(a)	33.4	18.8	1.0
VIC	1424.0 ^(b)	34.7	14.0	1.0
QLD	1.6	<0.1	13.5	843.8
SA	19.4	1.4	4.8	24.7
WA	15.8	1.0	6.4	40.5
TAS	2.2	0.4	1.9	86.4
NT	NA	NA	0.8	NA
ACT	Zero	0.0	1.0	NA

(a) "if, with the Standards, the disability incidence rate grew to 18 per cent"

(b) Victoria initially provided this figure, which needs to be revised according to the revised projections for the incidence of disability to 5% across the school sector, 10% across both TAFE and ACE sectors, provided on 11 June.

The cost-benefit analysis found that:

- the principal impact of the Standards would be increased clarity for education providers as to their obligations under the DDA and for students with disabilities as to their rights under the DDA. As a result of increased clarity for providers of their obligations:
 - benefits accruing from the Standards will arise from improvements in education and training for students with disabilities, including better access to services that are more appropriate leading to increased participation and retention;
- the principal benefit of the Standards would be greater awareness as to what students with disabilities and their parents or associates should expect. (The analysis noted that the rights of students with disabilities are established under the DDA, which involves both costs and benefits.) This greater awareness will lead to:
 - increased access to educational services that are more appropriate (this benefit was not able to be quantified); and
 - increased participation and retention. Previous research shows that significant benefits are associated with increased participation in vocational education and training; similar benefits are anticipated in the school sector.
- professional development to support the introduction of the Standards as a reasonable, and the only legitimate, cost attributable to the Standards. Based on a unit cost of \$250 for one day per teacher, the analysis estimates these costs to be in the order of \$72.7m to \$89.8m; and

Importantly, the cost-benefit analysis concludes that the net impact of the Standards would be positive with the overall benefits of the Standards exceeding the costs. It also found that while students with disabilities have the most to gain from the Standards, the long-term socio-economic benefits will flow through to the whole community.

7.2.2 Respective positions of education providers

Education providers' positions on the Standards and the cost-benefit analysis varied significantly across jurisdictions:

- New South Wales forecast the school sector to have the greatest costs, “determined on the basis that the Standards would generate a need for 20,000 extra teachers and an extra 23,000 ‘teacher aids special’. Assuming a disability incidence of 18 per cent, this equated to” a total cost of \$1.828 billion – equal to a third of its annual recurrent expenditure.
- Victoria initially claimed that the costs of the Standards would amount to over a third of its annual budget. Victoria initially claimed that the incidence of students with disabilities would increase from currently funded 3% to 18%, and later revised its projections for the incidence of disability downwards to 5% in school sector and 10% in vocational education and training sector.
- The Northern Territory did not provide its estimates to the cost-benefit analysis. The Consultants considered the specific needs of the NT, including its geographic remoteness and the significantly different incidence and pattern of disability, made cross-jurisdictional comparisons problematic.
- Tasmania and the Australian Capital Territory supported the Standards and the outcomes of the cost-benefit analysis, and noted that the Standards reflect existing law and good practice and should not give rise to significant additional cost.
- Queensland identified costs which are in the order of one per cent of their recurrent annual budgets.
- Western Australia also identified costs of similar magnitude to those of Queensland.
- South Australia continued to project a disability incidence of 18% based on a research report by the National Health and Medical Research Council (NHMRC) now rescinded, as noted above; the cost-benefit analysis, which explored the primary sources of this report, notes that these assumptions are intellectually unsound.
- Neither the National Catholic Education Commission (NCEC) nor the National Council of Independent Schools Associations (NCISA) provided quantitative data to the cost-benefit analysis. NCEC and the NCISA have continued to air their concerns about the potential cost implications of the Standards.
- The disability sector is keen to see the Standards legislated. They consider that students with disabilities are persistently discriminated against. The Standards will provide clarity about what they can realistically expect for access to education and training.

- The higher education sector identified no additional costs to the sector arising from the Standards beyond compliance costs associated with the DDA. Consultations with representatives of this sector indicated that the sector has processes in place that comply with the Standards, and identify these as being existing obligations under the DDA. The higher education sector has indicated support for the Standards on several occasions.
- The private vocational education and training sector noted its support for the Standards early in the year, however expressed concerns based around the issue of practicalities of taking ‘reasonable steps’ to comply with the Standards without being subject to ‘unjustifiable hardship’. The Standards make it clear that providers are not required to make reasonable adjustments where to do so would cause ‘unjustifiable hardship’.

7.2.3 Reasons for the variations in estimated costs

The consultants found that many of the costs providers attributed to the Standards are actually costs of compliance with the DDA. Their report notes that some of the estimates “lack validity” because education providers have:

- incorrectly assumed that the Standards will increase the number of students with disabilities;
- because of the common definition of disability in the DDA and the Standards, the report found that the introduction of the Standards will not affect the size of the cohort. Over time the VET and ACE sectors, where students self identify, may see an increase, resulting from increased awareness of rights that the Standards may bring, or a ‘demonstration effect’. However, the report notes this increase is attributable to existing rights under the DDA;
- adopted an overly risk-averse position and assumed that the measures suggested in the Standards as examples of compliant actions are mandatory in practice; and
- given unbalanced weighting to stronger elements such as ‘on the same basis as’ but less weighting to other moderating concepts such as ‘reasonable adjustment’.

7.3 Findings of the 2003 Productivity Commission Review of the DDA

The draft report of the Productivity Commission Review of the DDA notes that disability standards set out the requirements implicit in the DDA in a more accessible format and provide information on the steps necessary to comply with the DDA. It also notes that “the standards’ greatest benefit is that they create certainty where there was none”.

The review finds disability standards to be more competition neutral than the complaints based implementation of the DDA. “Standards largely ensure organisations operating in the same market compete on a level playing field. In the absence of standards, some organisations might choose to discriminate to gain a competitive edge over risk-averse organisations, relying on the fact that compliance with the DDA is a random process. The competitive advantage enjoyed by these organisations would derive from them not meeting what society considers to be minimum acceptable requirements. Thus, while implementing the DDA through complaints rather than standards may be regarded as less costly overall for the society, the benefits are likely to be correspondingly lower.”

8 Conclusion

On the basis of an extended process of investigation, conceptual development, drafting and revisions to the Standards, and consultation with stakeholders conducted through the MCEETYA forums, it is evident that the proposed Standards present the best option for clarifying the rights of students with disabilities and the obligations of education and training providers. This conclusion is supported by the findings of the inquiry of the Senate Employment, Workplace Relations and Education References Committee into the *Education of Students with Disabilities*.

On 10 December 2002, the Committee tabled the unanimous report of its inquiry and highlighted an urgent need to achieve nationally consistent disability standards for education. It noted that the inquiry arose from concerns about the marked disparities in the quality of educational opportunities offered to students with disabilities and that the proposed Disability Standards for Education would make the rights of students with disabilities more transparent.

The report was strongly critical of the failure of the Commonwealth, State and Territory governments to reach agreement through MCEETYA on the draft Standards, and noted that this was “a failure at the national level to recognise the paramount issue of equity in the provision of services to those with disabilities”. “It urged the Commonwealth to act unilaterally to bring into force the standards provided for in the Disability Discrimination Act 1992 (DDA).” The Committee noted that the continuing “wrangle over the education standards”, and “concerns about the untested scope of the DDA’s definition” for funding purposes showed that “commitment to fiscal rectitude is taken more seriously than commitment to principle”.

The inquiry report recognises that the proportion of students with disabilities compared to the total number of students has increased over the last decade, from 1.9% in 1996 to 3.0% in 2000 in the university sector, and from 2.9% to 3.6% in the period 1995 to 2000 in the vocational education and training sector. In both sectors students are required to self-identify at the time of enrolment, with an associated likelihood of underestimation of the numbers of students with disabilities in these sectors. The school sector also shows similar increases in enrolments by students with disabilities.

The increasing number of students with disabilities in these sectors and the increased awareness within the disability sector of their entitlements in relation to education both support the need for nationally consistent standards to be implemented. The Senate Committee report clearly recognises this need for national disability standards for education. In its response to the report in July 2003, the Australian Government noted that it was working closely with education providers and stakeholders to address outstanding legal and financial issues, with a view to achieving agreement to implement the Standards.

As outlined in Section 7.2, the independent cost-benefit analysis found that the benefits resulting from the Standards would far outweigh their costs, clearly indicating that the Standards would be a cost-effective initiative. Taking into account these considerations, at the July 2003 MCEETYA meeting, the Minister for Education, Science and Training proposed that the Council:

- endorse the Standards;
- agree that the Commonwealth would complete the Regulation Impact Statement (RIS) for Ministers’ endorsement out-of-session; and
- refer the Standards to the Commonwealth for formulation after amendments to the DDA to secure the Standards in those areas where they extend the DDA.

While the Council endorsed the Standards, the Ministers for the States other than the Australian Capital Territory and Tasmania indicated their full support for the Standards was conditional on the agreement of the Australian Government, in particular, to:

- provide new, non-recurrent funding for all professional development transition costs; and
- share unforeseen costs that arise from the Standards.

Following seven and a half years of development of the Standards and failure by MCEETYA to endorse the Standards unanimously, the Minister for Education, Science and Training announced that the Australian Government, having now exhausted all options for collaborative endorsement of the DDA Disability Standards for Education:

- would move unilaterally, as soon as practicable, to implement the Standards.

9 Strategy for implementation

It is anticipated that following the formulation of the Disability Standards for Education by the Attorney-General and their formulation following tabling in the Parliament, government and non-government education and training providers will produce their own policies, processes and strategies to promote, support, and inform providers, their staff and consumers about the Standards. Ongoing implementation will also be assisted by the Human Rights and Equal Opportunity Commission, which has a particular statutory function under section 67 of the DDA “to promote an understanding and acceptance of, and compliance with this Act; and to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting the objects of this Act”. HREOC will also facilitate investigation of cases of perceived discrimination through its complaints handling procedures.

The Minister agreed to take up with the Attorney-General the issue of amendments to the DDA to secure the areas where the Standards vary the operation of the DDA, as discussed in Section 6.2.4.

9.1 Review of the Standards

A further implementation issue would be to review the Standards within five years of their implementation to assess their effectiveness in meeting their objectives and related issues.

Consistent with the Standards for Accessible Public Transport, a review clause has been added to the draft Standards to provide that the Minister for Education, Science and Training, in consultation with the Attorney-General, will review the efficiency and effectiveness of the Disability Standards for Education five years after they take effect and every five years after the initial review.

The review will determine:

- (a) whether discrimination has been removed, as far as possible, according to the requirements for compliance set out in the Standards; and
- (b) any necessary amendments to these Standards.

Complaints to HREOC

A new procedure for handling complaints of unlawful discrimination under the *Disability Discrimination Act 1992* and the *Human Rights and Equal Opportunity Act 1986* was implemented in April 2000. Under the new process a complaint about unlawful discrimination is lodged with the Commission; it is then referred to the President of HREOC who is responsible for inquiring into the complaint. A complainant can apply to the Federal Court or the Federal Magistrates Court seeking an interim injunction to maintain the status quo that existed immediately before a complaint was lodged or to maintain the rights of any affected person. Such an application can be made at anytime after a complaint is lodged with the Commission and allows for fast access to a binding process in order to maintain the status quo or the rights of the complainant or respondent while conciliation is attempted. After an initial inquiry, the President or her delegate must decide whether to terminate the complaint or to attempt to settle the complaint through conciliation.

A complaint that is settled by way of conciliation is implemented by both parties to the conciliation agreeing to abide by the terms of the agreement. The President may terminate a complaint for a number of reasons, which are set out in Part IIB of the HREOC Act (including that the President is satisfied that there has not been any unlawful discrimination, the complaint was lodged more than 12 months after the unlawful discrimination took place, the complaint is trivial or vexatious or that the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation).

A complainant whose complaint has been terminated by the President may apply to the Federal Court or the Federal Magistrates Court to have the complaint heard and determined. Both courts encourage parties to resolve their disputes in appropriate cases through counselling, mediation or other alternative dispute resolution methods. Both courts are able to make a wide range of orders if they are satisfied that there has been unlawful discrimination (including an order requiring the payment of damages or an order requiring the performance of a reasonable act). A respondent to a complaint is required to comply with any order of the court.

The new complaints process aims to resolve complaints quickly and cheaply by way of conciliation in the first instance. If conciliation is not successful, access is available to a court process that will determine if unlawful discrimination has occurred and provide appropriate binding remedies. The ability to apply to the Federal Magistrates Court also ensures that less complex disputes can be dealt with in a court that is cheaper, simpler and faster.

Education providers can also establish their own alternative grievance or complaint resolution procedures. Such alternative procedures may assist in resolving disputes at an early stage without the need for recourse to legislative dispute resolution procedures. However, such procedures would rely on the cooperation of all parties involved to resolve and abide by the terms of any settlement. An agreed settlement would not be legally binding upon the parties and the alternative mechanism would not prevent a party from seeking to lodge a complaint under the HREOC Act (as this right is preserved by legislation).