

Disability Standards for Education 2005

Guidance Notes

1. Purpose of Guidance Notes

The *Disability Standards for Education (2005)* (the Standards) are formulated under the *Disability Discrimination Act 1992* (DDA). The primary purpose of the Standards is to clarify, and make more explicit, the obligations of education and training service providers under the DDA and the rights of people with disabilities in relation to education and training.

The Standards include introductory information to assist the reader in interpreting the Standards. Notes are also included in each part of the Standards with a view to assisting the reader in the same way.

The Guidance Notes, set out below, seek to provide additional explanatory material, including background information and comment, to assist the reader in interpreting and complying with the Standards. The Notes are intended to enhance understanding of the scope and practical application of the Standards, in much the same way that an Explanatory Memorandum can assist in the interpretation of an Act of Parliament.

2. Application of the Standards

(Standards, section 1.4)

Section 1.4 of the Standards provides a list of education providers bound by the Standards. The effect of section 1.4 of the Standards is that, subject to Section 12 of the DDA (which deals with the application of the Act and applies to the Standards), the Standards apply in relation to the provision of education and training to persons with disabilities by:

- (a) the Commonwealth; or
- (b) a State; or
- (c) a Territory; or
- (d) a public authority of the Commonwealth; or
- (e) a public authority of a State or Territory; or
- (f) organisations in the private sector.

3. Rights of students with disabilities

(Standards, Parts 4 to 8)

Parts 4 to 8 of the Standards set out the standards that education providers must comply with to achieve the objects of the DDA in relation to the provision of education and training. Each of these parts deals with different aspects of education and training.

Part 4 deals with enrolment, Part 5 with participation, Part 6 with curriculum development, accreditation and delivery and Part 7 student support services. Part 8 requires providers to develop and implement strategies and programs to prevent harassment and victimisation.

The note at the foot of the Application provision for each of the Parts sets out the effect of the Part in terms of the rights of students with disabilities.

The Standards are intended to give students with disabilities the same rights as other students. The Standards are based on the position that all students, including students with disabilities, should be treated with dignity and enjoy the benefits of education and training in an educationally supportive environment that values and encourages participation by all students, including students with disabilities. To achieve this, the effect of the Standards is to give students and prospective students with disabilities the right to education and training opportunities on the same basis as students without disabilities. This includes the right to comparable access, services and facilities, and the right to participate in education and training unimpeded by discrimination, including on the basis of stereotyped beliefs about the abilities and choices of students with disabilities.

4. Standards for enrolment, participation, curriculum and support services

(Standards, sections 4.2, 5.2, 6.2, and 7.2)

The Standards apply to education providers in relation to the provision of their education and training services. Sections 4.2(1),(2), 5.2(1), 6.2(1), and 7.2(1),(2) require education providers to take reasonable steps to ensure that students with disabilities are provided with opportunities to realise their individual potential through their participation in education and training on the same

basis as students without disabilities, and that they are not subject to discrimination (the concept of ‘on the same basis’ is discussed below in part 4.1).

The Standards set out a process whereby education providers can meet this obligation (sections 4.2(3), 5.2(2), 6.2(2), and 7.2(5), (6); there is no process for section 4.2(2), which relates simply to decisions to offer enrolment). This includes an obligation to make reasonable adjustments where necessary to ensure that students with disabilities are able to participate in education and training on the same basis as students without disabilities (the concept of reasonable adjustment is discussed below in part 4.2).

The process includes:

- consultation with the student;
- consideration of whether an adjustment is necessary;
- if an adjustment is necessary, identification of a reasonable adjustment;
- making the reasonable adjustment.

If the provider complies with this process, then they have complied with the Standards, and they cannot be said to have discriminated (sections 4.2(4), 5.2(4), 6.2(4), and 7.2(8)).

However, education providers are required only to make reasonable adjustments. They are also exempted from making adjustments that would impose unjustifiable hardship on them. Exceptions from the legal obligations in the Standards are set out in Part 10.

In cases where a provider decides that an exception applies, it is the responsibility of the provider to demonstrate how the exception operates.

4.1 Meaning of ‘on the same basis’

(Standards, section 2.2)

The concept of on the same basis is used in relation to the basic requirement of the Standards in sections 4.2(1),(2), 5.2(1), 6.2(1), and 7.2(1),(2). This concept is fundamental to the operation of the requirement of a provider not to discriminate against students with disabilities. An education provider treats a student with a disability on the same basis as a student without the disability if the student

has opportunities and choices, which are comparable with those offered to students without disabilities, in relation to:

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

A provider is required to make any decisions about admission and enrolment on the basis that reasonable adjustments will be made where necessary so that the student with a disability is provided with opportunities and choices that are comparable with those available to students without disabilities (section 2.2(2)).

4.2 Making reasonable adjustments

(Standards, Part 3)

Education providers are required to provide reasonable adjustments (sections 4.2(3), 5.2(2), 6.2(2), and 7.2(5), (6)), and can meet their general obligations under the Standards by doing so (sections 4.2(4), 5.2(4), 6.2(4), and 7.2(8)).

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 achieves this purpose while taking into account the student's learning needs and balancing the interests of all parties affected, including those of the student with the disability, the education provider, staff and other students.

The need for an adjustment and the nature of an adjustment should be determined in consultation with the student or their associate (sections 4.2(3)(a), 5.2(2)(a), 6.2(2)(a), and 7.2(5)(a), (6)(a), and 3.5). This might include consultation on whether there is any other adjustment that would be no less beneficial for the student but less disruptive and intrusive for others.

In providing reasonable adjustments for a student with a disability, it is good practice for an education provider to ensure that the processes for seeking an adjustment are accessible and transparent. In deciding on a reasonable adjustment, it may be necessary to seek professional expertise. This might include a detailed assessment by an independent expert of the nature of the student's disability and the adjustment(s) that is (are) appropriate

for the student. It is good practice for an education provider to ensure that there are review mechanisms in place to deal with any grievances arising from differences in the student's preferred reasonable adjustment and the adjustment recommended by professional experts.

In assessing whether a particular adjustment is reasonable for the student with a disability, the education provider should take into account:

- the nature of the student's disability;
- the information provided by, or on behalf of, the student about how the disability affects the student's ability to participate;
- views of the student, or an associate of the student, about whether a proposed adjustment is reasonable and will enable the student with a disability to access and participate in education and training opportunities on the same basis as students without disabilities;
- information provided by, or on behalf of, the student about his or her preferred adjustments;
- the effect of the proposed adjustment on the student, including the student's ability to participate in courses or programmes and achieve learning outcomes;
- the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students; and
- the costs and benefits of making the adjustment (sections 3.4(2), 4.2(3)(a), 5.2(2)(a), 6.2(2)(a), 7.2(5)(a), and 7.2(6)(a)).

In making a reasonable adjustment, the provider should ensure that the integrity of the course or program and assessment requirements and processes are maintained (section 3.4(3)).

The education provider should act upon information about an adjustment in a timely way that optimises the student's participation in education or training (section 3.7).

Clause 3.4.2 of the Standards makes it clear that the interests of the student are a very significant consideration in identifying an appropriate and reasonable adjustment. This is made explicit by the requirement to have regard to the student's disability and the

effect of the adjustment on the student, and the costs and benefits including those accruing to the student. If in a particular situation the school could show that a student would be better off in another available school which had the adjustments required by the student, then this would clearly be a factor in determining whether any significant adjustment at the school would be reasonable.

In meeting its obligations to provide reasonable adjustments, an education provider may provide an alternative adjustment to the student's preferred form of adjustment, if the alternative is effective in achieving the desired purpose.

As noted, there is no requirement to make unreasonable adjustments. Once an adjustment is considered reasonable in the circumstances, balancing the interests of all parties affected, the next step is to consider whether it would nonetheless impose unjustifiable hardship on the education provider (see section 4.4 below).

4.3 Obtaining disability information (Standards, section 3.7)

When considering an adjustment for a student with a disability, a provider is entitled to information about the student's disability and individual requirements if that information is directed towards:

- providing the adjustment, including assessing the nature and extent of the adjustment needed and assessing the provider's capacity to provide the adjustment; and
- an assessment that is intended to clarify the student's ability to comply with any non-discriminatory requirements of a course or training program.

Any confidential information provided to education providers for the purposes of making adjustments should not be disclosed except for the purposes of the adjustment or in accordance with a lawful requirement.

4.4 Unjustifiable hardship

(Standards, Part 10)

Under section 10.2 of the Standards, it is not unlawful for an education provider to fail to comply with a requirement of the Standards if, and to the extent that, compliance would impose unjustifiable hardship on the provider. Unjustifiable hardship has a meaning in accordance with Section 11 of the DDA. However, the exception of unjustifiable hardship does not apply to Part 8, the Standards for harassment and victimisation.

In determining whether unjustifiable hardship applies, within the meaning of Section 11, in relation to an adjustment for a student with a disability, it is good practice for an education provider to:

- take into account information about the nature of the student's disability, his or her preferred adjustment, any adjustments that have been provided previously and any recommended or alternative adjustments. This information may be provided by the student, an associate of the student or independent experts (or a combination of those persons);
- ensure that timely information is available to the student, or an associate of the student about the processes for determining whether the proposed adjustment would cause unjustifiable hardship to the provider; and
- ensure that these processes maintain the dignity, respect, privacy and confidentiality of the student and the associates of the student, consistent with the rights of the rest of the community.

Where a claim of unjustifiable hardship is made, an education provider should take into account all the financial and other resources that are reasonably available for the purpose of making any necessary adjustments for the student, and the impact of those adjustments on the provider's capacity to provide education of high quality to all students while remaining financially viable. The provider should consider all costs and benefits both direct and indirect that are likely to result for the provider, the student and any associates of the student, and any other persons in the learning or wider community, including:

- costs associated with additional staffing, the provision of special resources or modification of the curriculum;
- costs resulting from the student's participation in the learning environment, including any adverse impact on learning and social outcomes for the student, other students and teachers; and
- benefits deriving from the student's participation in the learning environment, including positive learning and social outcomes for the student, other students and teachers, and any financial incentives, such as subsidies or grants, available to the provider as a result of the student's participation.

If the provider decides to rely on unjustifiable hardship, it is good practice for the provider to ensure that a notice stating the decision and the reasons for the decision is given to the student, or an associate of the student, as soon as practicable after the decision is made.

4.5 Treatment of a person who has an associate with a disability

(Standards, Part 9)

Under section 22 of the DDA, an educational institution or an authority must not discriminate against a person on the basis of a disability of any of the person's associates. The Standards generally do not deal with this type of discrimination. Part 9 of the Standards provides that the provisions of the Act continue to apply to this type of discrimination.

5. Legal implications of the Standards

The Standards are enacted under Section 31 of the DDA and form subordinate legislation of the DDA. If a person acts in accordance with the Standards, they comply with the DDA. An education provider must comply with the Standards or it will be acting unlawfully. A breach of the Standards will generate a right of complaint to the Human Rights and Equal Opportunity Commission (HREOC) under the relevant provisions of the DDA and the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act).

The *obligations*, set out in Parts 4 to 8 of the *standards*, are the legal standards with which education and training providers must comply. The *measures* accompanying each statement of obligation provide examples of actions that providers may take to ensure compliance with their legal obligations. Providers are not obliged to comply with the measures. In general, compliance with some or all of the measures may be relevant to a defence against a complaint.

There are some areas in which discrimination may arise in the education context that are not covered by the Standards. However, this does not mean that education providers are not obliged to attempt to eliminate discrimination in such areas, if those areas or issues are covered by the DDA. For example, employment of people with disabilities by education providers is not covered by these Standards, but it is covered by the employment provisions of the DDA.

Section 3.8 of the Standards deals with the alignment of the Disability Standards for Education with any standards made in relation to access to or the use of any premises that may be formulated by the Attorney-General under Section 31 of the DDA. If no Access to Premises Standards are in place, then Disability Standards for Education will apply to any adjustments that education providers are required to make in relation to access to premises.

Nothing in the Standards should prevent or limit education providers from developing measures that extend beyond the requirements of the Standards. Education providers are encouraged to provide, or organise for the provision of, support services or other measures designed to provide students with disabilities with education on the same basis as students without disability.

The Standards operate within the context of other relevant Federal and State or Territory legislation, which includes anti-discrimination, education, building, planning and occupational health and safety laws.

6. Ensuring Compliance

Compliance with the Standards is the responsibility of providers. Enforcement is achieved through HREOC, the Federal Court or the Federal Magistrates Court.

A new procedure for handling complaints of unlawful discrimination under the DDA and the HREOC Act was implemented in April 2000. It aims to resolve complaints quickly and inexpensively by way of conciliation in the first instance. If a student with a disability or a student's associate (the complainant) believes that a provider is failing to comply with the Standards, a complaint about unlawful discrimination can be made to HREOC. Complaints may also be made to HREOC on a representative basis. The President of HREOC 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 the President's delegate must decide whether to attempt conciliation or to terminate the complaint. A complaint that is settled by way of conciliation is implemented by both parties agreeing to abide by the terms of the agreement.

Where the parties are not willing to conciliate or conciliation is unsuccessful, HREOC can no longer deal with the complaint and the parties will be issued with a termination notice. The President may terminate a complaint for a number of reasons, which are set out in Part IIB of the HREOC Act (including that unlawful discrimination has not occurred, the complaint was lodged more than 12 months after the unlawful discrimination took place, the complaint is trivial or vexatious, or that there is no reasonable prospect of the matter being settled by conciliation).

On receiving a termination notice, the complainant can 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.

Any discrimination issues not covered by the Standards remain subject to the provisions of the DDA. For a fuller understanding of the obligations and processes involved, interested parties should consult the DDA and the HREOC Act.

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).

7. Professional development and awareness raising

Good practice requires education providers to ensure that their staff are proficient in interacting with students in ways which do not discriminate against people with disabilities.

Attitude is one of the main barriers to non-discriminatory access to education and training for people with disabilities. To counter any inherent discrimination in the provision of education and training, it is recommended that staff induction and professional development programmes include components on disability awareness and rights and on the obligations of education and training providers under the Standards. Such programmes should enable staff to provide assistance that is helpful, for example during enrolment, without being patronising in language, attitude or actions.

It is further recommended that timely, relevant and ongoing professional development is provided to staff, to ensure they are equipped with the knowledge, skills and understanding to

enable students with disabilities to participate in the full range of educational programmes or services, on the same basis and to the same extent as students without disabilities.

8. Due Diligence and Reasonable Precautions

8.1 Liability for acts by employees or agents

Under Section 123 of the DDA, an education provider is liable for unlawful conduct by the provider's employees or agents unless the provider can establish that it took reasonable precautions and exercised due diligence to avoid the unlawful conduct. This includes instances where employees or agents of a provider fail to comply with the Standards. In such cases, the education provider bears the onus of demonstrating that reasonable precautions had been taken and due diligence has been exercised.

The DDA does not define **due diligence** or **reasonable precautions**. The meaning of these terms will be determined by the courts in relation to individual complaints. In one case involving a similar defence under the *Sex Discrimination Act 1984*, the Federal Court implied that it would be necessary for an employer to show that effective policies with respect to non-discrimination against people with disabilities are in place and that the employer was active in trying to avoid discriminatory behaviour.

8.2 Discrimination by agents

Education providers sometimes arrange for delivery of educational services by contract with other individuals or organisations, rather than providing services directly. In these cases the service provider may be considered to be an agent of the education provider, in which case the education provider may be liable under Section 123 for discrimination in the course of service provision by the agent unless reasonable precautions have been taken and due diligence exercised by the education provider. Part 7 of the Standards sets out standards for support services.

Reasonable precautions and due diligence in this context may include prompt and effective action being taken by the education provider in response to any indications that the service provider is not complying with the DDA or the Standards.

Where reasonably available, auditing or reporting mechanisms and the establishment or promotion of consumer grievance procedures may also be required and should be considered to ensure that the Standards and the DDA are being complied with.

8.3 Discrimination by staff

A single model of reasonable precautions and due diligence to prevent discrimination by employees or agents cannot be prescribed for all education providers. However, the following elements of an effective strategy should be considered by providers:

- making all relevant staff aware of the need to avoid discrimination. This might include issuing a formal policy statement on compliance with the DDA and the Standards and more direct advice to staff;
- taking reasonable measures to ensure that staff have sufficient information and expertise concerning non-discriminatory methods of service delivery. This may include the provision of formal training;
- establishing or using and promoting existing complaint procedures in relation to discrimination;
- ensuring that complaints are properly and effectively dealt with; and
- implementing other reasonably available monitoring strategies, additional to complaint mechanisms, including internal monitoring through supervisory and management responsibilities and external monitoring through customer reference groups.

9. Harassment and victimisation (Part 8)

The Standards require education providers to have strategies and programs to prevent harassment and victimisation of persons with a disability (section 8.3). Harassment means an action taken in relation to a persons disability that is reasonably likely to humiliate, offend, intimidate or distress the person (section 8.1). The strategies and program must extend to students with an associate who has

a disability (such as a relative or carer). An education provider is required to ensure that staff and students are aware of the obligation not to harass or victimise students with disabilities or students who have associates with disabilities. The Standards require the education provider to take reasonable steps to ensure that staff and students are aware of appropriate actions to be taken if harassment or victimisation occurs.

An education provider that has no strategy or program to prevent or remove harassment and victimisation, simply because it was not aware that these were occurring, is not likely to be able to establish a defence under the Standards or the DDA. Similarly, the exception of unjustifiable hardship is not available as a defence where a provider fails to comply with the Standards for Harassment and Victimisation.

10. Review of the Standards

Part 11 of the Standards provides for a review of the Standards every five years to determine whether the Standards continue to be effective and remain the most efficient mechanism for achieving the objects of the DDA.

The review will determine:

- whether discrimination has been removed, as far as possible, according to the requirements for compliance with the DDA;
- whether the Standards continue to be compatible with contemporary practices in education and training; and
- if any amendments are required to ensure the effectiveness of the Standards including those to ensure the Standards are compatible with contemporary practices in education and training.