DISABILITY STANDARDS FOR EDUCATION 2005 (CTH): SWORD OR SHIELD FOR AUSTRALIAN STUDENTS WITH DISABILITY?

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This article explains the scope and effect of the Disability Standards for Education 2005 (Cth) (the 'Standards') and considers whether they operate as a legislative sword or shield in respect of the battle to protect the education rights of people with disabilities in Australia. Evidence suggests that the Standards would be a more effective weapon if there were greater understanding of how they oblige education providers to make reasonable adjustments to their policies and practices to support access for and participation by students with disabilities.

I THE SCOPE OF THE DISABILITY STANDARDS FOR EDUCATION 2005 (CTH)

A *What are the Standards?*

The *Standards* are Commonwealth subordinate legislation passed under the authority of the *Disability Discrimination Act 1992* (Cth) ('*DDA*'). They came into effect in August 2005. As explained by Australia's Acting Disability Discrimination Commissioner at that time, Dr Sev Ozdowski, they were expected to enhance the effectiveness of the *DDA* in preventing disability discrimination in education.

> The purpose of *Standards* is to provide clearer delineation of what actually must be done to ensure access and equity than is provided for in the Act itself, in which the requirements for equal access for people with disabilities are only broadly stated. This type of open-ended legislation has its advantages, but is limited in its capacity effectively and consistently to achieve equality for people with disabilities ...
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> What these *Standards* do try to do is set down principles which assist education providers, as well as adults and children with disabilities seeking education, to be clearer about what does and does not constitute discrimination under the *DDA*; and processes to avoid discrimination occurring.[1]

The overriding objects of the *Standards* are adapted from its parent act, the *DDA*:

> (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the area of education and training; and
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> (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law in the area of education and training as the rest of the community; and

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(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 *Standards* 'ensure, as far as practicable' that education for students with disability 'on the same basis as education for students without disability' They articulate a series of rights for students with disabilities in the areas of enrolment, participation, curriculum design, delivery and assessment, student support services and freedom from harassment and victimisation For each right a correlating obligation is placed on education institutions Measures for compliance are also provided against which schools may benchmark the discharge of their obligations

B *Who is Caught by the Standards?*

The *Standards* regulate both state and independent education authorities and education providers in the compulsory and post compulsory education and training sectors

They cover preschool providers (but not child care centres), schools and TAFES and universities and the authorities which regulate them, but they also cover private training providers such as business colleges commercial training businesses, community-based not-for-profit education providers and industry skills centres [4] Moreover, they apply in respect of a complete range of modes of education delivery, 'including in-class tuition distance education, flexible delivery computer-assisted learning, on-line delivery, part-time study for post-compulsory students and the various combinations of these modes and on-the-job training' [5]

C *What is Disability for the Purpose of the Standards?*

The *Standards* adopt the *DDA* definition of disability [6] Disability is very broadly defined to encompass physical, intellectual, behavioral, psychiatric and sensory impairments It is particularly important for education providers, that the definition specifically includes 'a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction' As such, the *Standards* create rights and impose obligations in respect of a wider range of disabilities than those which typically attract targeted government funding In Queensland, for example the categories which attract such funding in the compulsory education sector are as follows

- Autism Spectrum Disorder (ASD)
- Hearing Impairment (HI)
- Intellectual Impairment (II)
- Physical Impairment (PI)
- Speech-Language Impairment (SLI)
- Vision Impairment (VI)
- Social Emotional Disorder (SED)

It should be noted that from late 2013 to 2015, a new system of reporting disability will implemented by compulsory sector education providers Australia wide The Nationally Consistent Collection of Data on Students with a Disability program (NCCD) contemplates a closer alignment of its specified categories of disability with the *DDA* definition [7]

- Sensory
- Physical
- Social/Emotional
- Cognitive

While funding will not be linked to these categories in the short term, it is anticipated that there will eventually[8] be alignment once the recently elected Federal Government determines its new model for school funding.[9]

D *What do the Standards Set Out to Achieve?*

As noted above, the *Standards* acknowledge that students with disability have a right to an education on the same basis as students without disability. Education 'on the same basis' does not mean that all students are to be treated the same way. Rather, the *Standards* contemplate that students with disabilities may need to be treated differently in order to access education rights 'on the same basis' as students without disability. The overarching obligation under the *Standards* is to make 'reasonable adjustment' to policies and practices and to the school environment and curriculum, to facilitate access and inclusion.

It is a well recognised tenet of anti discrimination law that treating people the same way, regardless of individual circumstances such as disability, may result in inequality. In particular, this is the premise underlying prohibitions against indirect discrimination, which arises when the unreasonable imposition of a term or condition has the effect of disadvantaging a person with a protected attribute.[10] Since relevant amendments came into effect in August 2009,[11] the *DDA* has acknowledged that discrimination may flow from a failure to make reasonable adjustment.[12]

1 *Cases Interpreting the Standards*

To date, there has been limited consideration of the scope and effect of the *Standards* by the Federal Court:[13] *Walker v State of Victoria*,[14] *Sievwright v State of Victoria*,[15] *Abela v State of Victoria*[16] and *Kiefel v State of Victoria*.[17] In each of these four decided Federal Court cases, the plaintiff failed to prove any breach of the *DDA* or of the Standards. What can be inferred from each case about the operation of the *Standards* will be contextualised, where relevant, below.

2 *Reasonable Adjustment*

An adjustment is a 'measure or action' designed to promote inclusion and access to educational opportunity.[18] The *Standards* specify student rights and require adjustments in respect of the following areas:

- Enrolment
- Participation
- Curriculum development, accreditation and delivery
- Student support services
- Harassment and victimisation

The *Standards* also provide generic advice as to the kinds of adjustments that may be required in the form of lists of 'measures for compliance'.[19] Ramifications for education providers in each of the areas are summarised, below.

3 *Participation Curriculum and Student Support Services Standards*

It is appropriate to consider these three areas collectively as they address the intersecting curricular and co-curricular aspects of school life

Plainly grounds and facilities used in the course of schooling must be accessible Obligations here apply not only to class rooms and school playgrounds and facilities but also to venues outside the school where school activities are scheduled excursion destinations, school camps, school celebration venues and work placements It is both equitable and efficient to choose venues which are accessible to all for outside school activities, so as to minimise the need for ad hoc adjustments to facilitate access for students with disabilities [20]

The Standards also address access to the school curriculum Again it makes sense, wherever possible, to choose learning activities and assessment items which are accessible to all To facilitate student engagement with the curriculum, schools may need to provide in class aide or technical support and teachers may need to adjust learning activities and assessment to accommodate disability Adjustment for assessment is particularly controversial in that teaching staff may see such adjustment as providing a 'head start' to a student, or as compromising the integrity of an assessment item [1] Adjustments such as extra time, formatting changes, even the substitution of different test items or instruments are properly designed to remove barriers to student ability to demonstrate the acquisition of knowledge and skills Reasonable adjustment will not require schools to make a test 'easier' or to waive any requirement that a student meet essential learning thresholds to 'pass' The *Standards* s 3 4(3) provide as follows

> In assessing whether an adjustment to the course of the course or program [sic] in which the student is enrolled or proposes to be enrolled is reasonable the provider is entitled to maintain the academic requirements of the course or program and other requirements or components that are inherent in or essential to its nature

In addition to support services which are generally available to students such as counselling and careers advice, reasonable adjustment may also require schools to provide access for students with some disabilities to specialist technologies facilities and support staff To give just a few examples, students with speech language impairment may require speech pathology support, students with hearing impairments may require Auslan interpreter support, students with visual impairment may need taped or Brailed learning materials Controversially where a school or school system does not provide onsite specialist therapy, access to external support may need to be arranged 'including through collaborative arrangements with specialised service providers' [22]

It is clear from cases like *Stewright*, where expensive and extensive one-on-one expert therapy was unsuccessfully sought by a student with speech learning impairment, that reasonable adjustment should not be taken to guarantee the delivery of specialist support services Marshall J also acknowledged that schools have 'finite resources', and that, as such, even where provision of therapy is a reasonable adjustment it may not be unreasonable to require a student to join a waiting list for that therapy, where 'that list is prioritised according to the children's needs and the availability of therapists' [23]

In *Kiefel* a student with Autism Spectrum Disorder had sought, inter alia, the provision of '[s]ignificant, if not full-time one to one assistance from a person trained in [Assisted Behavioural Analysis] ABA' [24] Tracey J in finding against the student, suggested that reasonableness will require the demonstration of a nexus between the support service sought and ability to participate in school life Tracey J said that the *Standards* do not 'impose an obligation [upon schools] to provide services such as speech therapy, specialist trained teachers or teachers' aides',[25] instead

schools must 'take reasonable steps to ensure that the student has access to the service' where it is demonstrated that 'a specialised support service is necessary for a student to participate in the activities in which the student is enrolled'.[26] In *Kiefel*, the student had availed himself of ' a range of services' to support his participation, and was unable to 'identify any specialised support service which was available and relevant to his needs but which he was not able to use'.[27] Moreover, at least one of the schools the subject of the claim, 'simply did not have the human and physical resources which would have been necessary to provide one-to-one instruction for 40 hours per week'.[28]

4 *Enrolment*

The focus of the enrolment *Standards* is upon adjustment to enrolment policies and procedures. They anticipate that information about the academic curriculum and wider life of a school should be accessible to students with disability and their families. So, too, should the enrolment process. At minimum, compliance with the *Standards* will require the availability of staff able to provide information and assist in the enrolment process. However, schools should consider maximising the accessibility of their online profiles by providing information in alternative formats.

It should be noted that the *Standards* do not guarantee enrolment at a school of choice. While there may be rights to adjustment, there are no rights to enrolment. This is explained by Tracey J in *Abela*:

> Section 4.2(1) [of the *Standards*] provides that an education provider must take reasonable steps to ensure that an aspiring student is able to seek admission to, or apply for enrolment in, a school on the same basis as prospective students without a disability and without experiencing discrimination. Section 4.2(2) imposes a similar obligation on the provider when the provider is deciding whether or not to offer a place to the prospective student. The provider is not obliged to enrol the student in a school of the student's choosing. Nor does the Standard confer on a student a right to admission to a particular school.[29]

Refusing enrolment, however, without considering whether reasonable adjustment could be made is a risky strategy. Refusing a place to a student with disability, when a student without disability would not be refused, exposes a school to allegations of a failure to make reasonable adjustment and of consequential direct discrimination – less favourable treatment. Moreover, a note to the *Standards* explains that a school which refuses a place to a student because of a belief that a place is available to that student at another institution, 'does not treat a prospective student on the same basis as a prospective student without a disability' unless it would also refuse a place to student without disability.[30]

There are two potential protections of students with disability which flow from this principle. First, a school should not maintain a separate waiting list for students with disability or place a 'cap' on the number of places available for students with disability. In this respect, treatment on the 'same basis', *does* require that students with disability be treated the same as students without disability. Secondly, a school which receives an application for enrolment from a student with disability must give serious consideration as to how and whether it can support that student before refusing that application.

5 *Harassment and Victimisation*

The unjustifiable hardship exemption is not applicable to a school's obligations under the *Standards* with respect to the harassment and victimisation of students with disability. The

obligations extend, too, to students with 'associates' with disability – for example, siblings or parents [1] Harassment is defined inclusively as 'an action taken in relation to the person's disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person' [2] Schoolyard and schoolroom taunts, teasing and physical bullying are all likely caught by the definition Moreover online, offsite bullying behaviour is also likely within the scope of a school's obligations

The definition of victimisation is adopted from the *DDA* [3] Victimisation occurs if a person with disability, or his or her associate, is subjected to or threatened with a detriment because of a proposed or actual complaint of breach of the *DDA* or *Standards* A bored or tired, or simply unaware or insensitive, school staff member who tells a victim to 'toughen up' or, worse punishes a victim for complaining, risks attracting a complaint of victimisation

Pursuant to the *Standards*, Schools must generate disability specific policies for both staff and students which expressly prohibit harassment and victimisation There must be 'fair, transparent and accountable' procedures for managing complaints [4] which are put into effect 'promptly and with due regard to the severity of the matter' [5] Staff must be 'trained to detect and deal with, harassment in education and training settings' [6] Both staff and students should be 'effectively informed and reminded, at appropriate intervals', [7] through, for example, explicit training and environmental prompts such as posters and pamphlets, that students with disability have a right to a education free from harassment and victimisation

6 *Right to be Consulted*

Education providers must consult with students or their associates, about what adjustments will be made to facilitate participation in school life, engagement with the school curriculum, ability to demonstrate, for assessment, knowledge and skills acquired, and access to support services [38] Consultation must occur at the point of enrolment[39] and regularly throughout the term of enrolment [40] The *Standards*, therefore ensure that a student has some influence upon decisions which are made about how his or her education is delivered In this respect, the *Standards* could be seen as reflecting the sentiments of Article 12 of the Convention on the Rights of the Child

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child the views of the child being given due weight in accordance with the age and maturity of the child

While it may be best practice for schools to schedule regular formal consultations for the purpose of monitoring the continuing effectiveness – and reasonableness – of adjustments in place, it is problematic, perhaps, that the Standards do not prescribe a consultation process [41] The Federal Court, therefore, in *Walker* has read consultation very broadly

> [The *Standards*] do not require that such consultation take any particular form or occur at any particular time Those involved may meet formally or informally Discussions can be instigated by either the school or the parents Consultation may occur in face-to-face meetings in the course of telephone conversations or in exchanges of correspondence [4]

In light of *Walker*, schools should implement a process whereby teachers record and report any 'informal' meetings or correspondence about student progress

While the *Standards* require that the views of the student are to be sought, it is important to note that they are not determinative of the regime of adjustments to be made It is clear from each of the decided *Standards* cases, that schools may seek advice from their own expert staff

and consultants as to the kinds of adjustments that could and should be made. In both *Walker*[43] and *Sievwright* it was accepted that it is the school who is best placed to decide whether a particular adjustment, or group of adjustments, will be implemented. Marshall J in *Sievwright*, for example, said that 'Jade's teachers, being qualified education providers, were in the best position to understand the breadth of her educational needs'.[44] Moreover, it may be inferred from the decision *Sievwright*, where the plaintiff's submissions about adjustments required to support her learning were all rejected, that the fact that a particular adjustment was requested by a student does not automatically render it 'beneficial', let alone reasonable.[45]

7 *Limits on Reasonable Adjustment*

Tracey J in *Walker* makes it plain that '[t]here may...be cases in which an adjustment is necessary but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved'.[46] Whether an adjustment is reasonable will be established by 'balancing the interests of all concerned'.[47] 'All relevant circumstances' should be considered including the following specified matters:

- The relevant disability
- The views of the student about the adjustment
- The effect on the student of the adjustment
- The effect on others of the adjustment
- The costs and benefits of the adjustment[48]

By implication, an adjustment will not be required if it is not reasonable. Even a reasonable adjustment, moreover, will not be required if one of the exceptions provided for in the *Standards* is engaged. The exceptions align with equivalent exceptions in the *DDA*.

- An adjustment will not be required if it is inconsistent with an act authorised by regulation or a court order.[49]
- If it is 'reasonably necessary' to protect the health and welfare of the school community, a school may 'isolate' a student with disability, or 'otherwise discriminate' against him or her, 'if the disability is an infectious disease or other condition'.[50]
- A school may 'provide special measures (including specialised units or institutions) intended specifically for the benefit of students with disabilities'.[51]
- A reasonable adjustment will not be required if it would cause unjustifiable hardship to the school.[52]

As noted above, the unjustifiable hardship exception cannot be relied upon by an education provider to excuse it from its obligations under the harassment and victimisation *Standards*.[53]

(a) Unjustifiable Hardship

Of the exceptions outlined above, unjustifiable hardship is the most problematic and potentially the most powerful. It is unfortunate that there is significant overlap in respect of the circumstances stipulated as relevant to reasonableness and those stipulated as relevant to proof of unjustifiable hardship. The difference between an unreasonable adjustment and an adjustment which causes unjustifiable hardship is not clearly explained in the legislation. Section 10.2(3) of the *Standards* provides that the 'provider must comply with the Standards to the maximum

extent not involving unjustifiable hardship' This approach suggests that unjustifiable hardship is the limit on reasonable adjustment and aligns with the approach taken in the *DDA* where a reasonable adjustment is defined as 'an adjustment to be made by a person unless making the adjustment would impose an unjustifiable hardship on the person'[54] The note to s 10(2) of the *Standards* however says that '[t]he concept of unreasonable adjustment is different to the concept of unjustifiable hardship on the provider in section 10 2 Where the obligation to make a reasonable adjustment none-the-less imposes unjustifiable hardship on the provider section 10 2 will operate' Clearly too there is an overlap in terms of the considerations relevant to reasonableness and hardship Both enquiries will consider the nature of the disability, its effects, and the costs and benefits for all concerned in making an adjustment [55] In respect of hardship, however the financial circumstances of the education provider are also relevant [56]

Discrimination case law including case law which interprets the *Standards* suggests that there are two situations where a school may seek to rely on unjustifiable hardship First a school may raise unjustifiable hardship to excuse a decision to refuse to enrol, or to exclude, a student with disability related problem behaviour if that behaviour poses a safety risk to others in the school community Two cases interpreting the *Standards Walker* and *Abela* concerned students with problem behaviour In both cases a *Purvis v New South Wales*[57] style analysis of proof of less favourable treatment and causation was applied there was no less favourable treatment of the complainant because a student without his disability but with his problem behaviour would also have been excluded there was no causal link between the disability and the treatment because its 'true basis' was concerns about safety concern not the student s disability Further in both cases there was no reasonable adjustment identified which may have mitigated the behaviour and contained its impact on the school community and which had not been made available Since the *Standards* it may be incumbent upon education providers to demonstrate attempts to accommodate problem behaviour via adjustments such as individual aide support and withdrawal from settings which may stimulate or aggravate the problem behaviour But the facts of *Walker* and *Abela* suggest that there may be situations where adjustments cannot remove, or even reduce to an acceptable level the risk of harm posed by the enrolment of the student with the disability related problem behaviour

Secondly a school may raise unjustifiable hardship if the cost of making an adjustment or a series of adjustments is unaffordable While early cases suggested that only under resourced, independent education providers could hope to succeed in proving unjustifiable hardship flowing from financial hardship [58] more recent cases suggest that even the State may now be able to run such an argument with prospects of success The *Stewright* case acknowledges the burden of the State s responsibilities to all students at its schools and any order mandating an increased level of support for one student may in practice oblige a school system to provide that same increased level of support to a much wider group of students with similar levels of disability In that case it was held that the circumstances were such it was 'not unreasonable' not to provide an aide to the complainant Jade There was persuasive evidence about the enormous cost that would be associated with providing a full time aide to all students who had a IQ in the vicinity of Jade's Such an imposition would double the current PSD [disability support] budget requirements and result in a need for the State to engage 20 000 extra staff So even if a school or school system can afford to make adjustments for one student there may be circumstances where it may not be reasonable for it to do so because of the flow on cost of making such adjustments available to a wider group In an earlier full time aide case which like *Stewright* involved a challenge to the actions of the Victorian Education Department but which was brought under state legislation

and thus did not consider the *Standards*,[59] the Victorian Supreme Court found that '[e]vidence relevant to these [cost] considerations must be assessed ... having regard to the practical realities of the situation facing the respondent and not hypothetically as if resources are unlimited'.[60] The Court also warned, however, that if a school's argument about reasonableness hinged on the flow on cost of making adjustments available to a broader class of students 'it should present evidence of these costs and make it clear ... in its submissions how the evidence is said to impact on the issues'.[61]

It may be speculated that there is an intersection between cost hardship and behaviour hardship in that perhaps the most expensive adjustment sought by students with disability is the provision of full time one on one aide support and this is exactly the kind of adjustment that may be required to support the enrolment of students with complex behaviours. The issue of whether a school was obliged by law to provide full time support was relevant in each of the cases interpreting the *Standards*. In each case, no breach of the *DDA* or the *Standards* could be identified in the failure to provide such support.

II Standards: Sword or Shield?

A *Standards as a Shield...*

The relevant wording of the *DDA* suggests that the *Standards* may work to protect education providers from liability under the *DDA*. The *DDA* provides that compliance with the *Standards* amounts to compliance with the *DDA*.[62] The decided cases demonstrate, however, that actions are now being brought against education providers which allege both non-compliance with the *Standards* and direct and indirect discrimination as prohibited by the *DDA*. How these actions intersect will be explained, below.

It appears therefore, that compliance with the *Standards* is a shield for education providers only in the sense that their demonstrated compliance will defeat any claim of non-compliance. It appears that a compliant school will defeat a challenge, but the challenge will still be made. The battle will not be prevented, but the battle will be won. It must be a source of frustration to education providers that, however hard they work on compliance, they cannot be certain that they will not be sued. Gray J, in his decision in the *Walker* appeal, hinted at this frustration in his criticism of the 'diffuse manner in which the appellant's case ...was prepared and presented':

> ... That is something that ought not to occur In the course of the proceeding, the respondent has no doubt incurred considerable expense in preparing for and conducting the trial and the appeal. The money it has expended would have been better spent in the provision of services for disabled students, including the appellant, than in contesting a very wide-ranging and vague series of allegations such as those made in the present case.[63]

B *Standards as a Sword of the State...*

As already noted, the *Standards* acknowledge 'rights to equality' in education. Students with disability are to be afforded such rights 'on the same basis' as students without disability. The intention of the legislature is apparent in the following guidance note to the *Standards*:

> 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 [64]

Before the *Standards*, education providers were not compelled, at least by the law, to deliver different treatment, to accommodate disability until a complaint of discrimination had been brought and adjudicated upon in favour of the complainant It was made clear in the High Court case *Purvis v New South Wales*[65] that the *DDA* did not impose an obligation to make reasonable adjustment on education institutions The *DDA* has since been amended to create such an obligation[66] and, as this article has explained, under the *Standards*, education providers are now obliged by the law to reasonably adjust regular enrolment, participation, curriculum and student services policies and practices to accommodate student disability and to promote inclusion and opportunity Moreover, the *Standards* override inconsistent state law[67] The *Standards* seek to shift the burden of ensuring that education rights are respected from the student to the education provider by obliging the education provider to be proactive in removing barriers to inclusion

In one sense, then, the *Standards* are a sword wielded by the State to mandate action which will improve education opportunities for students While the *Standards* may oblige education providers to respect the education rights of students with disability, however, there is no guarantee that they will respect those rights

It is a weakness of this sword of the State, moreover, that it is still up to individual students to enforce compliance with the *Standards* There is no independent compliance framework for checking that education providers are respecting the rights of students with disabilities If the *Standards* are a sword of the state, the sword is, for now, wielded by the student

C *Standards as a Sword of the Student*

It can be seen from *Walker*, *Stevwright* *Abela* and *Kiefel*, that students are prepared to wield the *Standards* as a sword in a battle to win further and better accommodation of disability A student may allege a breach of the *Standards*[68] and bring a complaint to the Australian Human Rights Commission [69] A breach of the *Standards* is in itself unlawful and creates a cause of action separate from any remedy for direct or indirect discrimination Breach of the *Standards* was argued in conjunction with direct and indirect discrimination claims in all three cases

It is explained by Tracey J, in the *Walker* case, upon appeal, that breach of the *Standards* is a cause of action separate from direct or indirect discrimination It is a breach of s 32 of the *DDA* which provides that it is unlawful to contravene a disability standard

> the purpose of the *Standards* is to prescribe processes, such as consultation, which must be observed when determining how best to assist a disabled student A failure to comply with one of the requirements does not give rise to discrimination within the meaning of the *DDA* It gives rise to a contravention of s 32 [0]

D *Standards an Effective Weapon?*

As noted above, to date, there have been only four cases where the *Standards* have been considered in any detail *Walker*, *Stevwright* *Abela* and *Kiefel* Each of these cases involved complex allegations of failures to provide support and services All of these cases suggest a lack of understanding by students, their families and even their legal representatives, of the detail of the *Standards* and of how they are to be applied in practice The way the *Standards* were pleaded

was criticised in each of the cases. As noted above, in *Walker*, upon appeal, Gray J criticised the 'diffuse manner in which the appellant's case, both at first instance and on appeal, was prepared and presented'.[71] In *Sievwright*, Marshall J said that Sievwright's counsel had 'misunderstood'[72] the effect of some sections of the *Standards* and repeatedly rejected his analysis of the application of other sections.[73] In *Abela*, Tracey J said of some of the complainant's allegations that they 'are confusing and difficult to relate to the language employed by the draftsman of the Disability Standards'.[74] And in *Kiefel*, Tracey J lamented 'the failure of...legal advisers to provide particulars' of ABA (Applied Behavioural Analysis) adjustments sought which meant that the Court was 'left in the position of having to determine whether this constituted a reasonable adjustment without knowing precisely what it is said should have been, but was not, provided and without having any expert evidence before it which would permit a judgment to be formed about whether a more intense ABA program would have been of any benefit'.[75]

There is significant other evidence that the *Standards* are not well understood by education providers either. The *Standards* are subject to regular review as mandated by the *DDA*. A report of the results of the first review was published on 1 August 2012. The reviewing body received 200 submissions and conducted meetings with 150 stakeholders including disability advocacy groups, education providers and anti -discrimination commissions.[76] The review found that there was ignorance about the *Standards* across all education sectors and a need for institutional awareness of the *Standards* to be raised:

> The overwhelming feedback from the roundtable discussions and submissions was that there needs to be much greater awareness about the *Standards*. Users and providers did not have detailed knowledge or understanding of the *Standards* and how they operate.[77]
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> The consultation process highlighted that levels of awareness of the *Standards* amongst education providers was patchy. The review heard that: education providers have little understanding of what the *Standards* mean; principals may be aware of the *Standards* but not teachers; disability support officers in the tertiary sector often have to educate teachers/lecturers on the *Standards*; and there is a lack of recognition of the *Standards* by some Registered Training Organisations.[78]
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> The majority of submissions argued that there needs to be a focus on awareness raising. This includes awareness about the *Standards* as well as measures to improve understanding of disability, discrimination and the impacts of disability on learning.[79]

III Conclusion and Recommendations

The *Standards* are likely be an effective weapon, sword or shield, in improving educational outcomes for students with disabilities only if their scope and import are well understood by educators and their students. Educators will then be equipped to implement reasonable adjustment as required by law and students will be equipped to hold schools to their obligations.

It is suggested that schools should take the following steps to ensure compliance by their staff with the *Standards*:

- Develop protocols for the management of the enrolment and on-going education of students with disabilities which are informed by the *Standards*: for example, protocols for managing the enrolment process, consultation, the reporting of disclosure of disability, recording agreement as to what adjustments shall be made, reporting of problems with the utility of in place adjustment plans, and reporting and resolution of harassment and victimisation.

- Recognise that compliance with the *Standards* is the work not only of specialist disability support staff but of all school staff from enrolment officers, to maintenance staff to teachers to administrators
- Appropriately train all staff in the scope and effect of the Standards
- Workshop with staff what compliance with the Standards would look like in respect of a range of situations where reasonable adjustment may be required for example enrolment procedures school facilities and functions, lesson planning, assessment student support services and protection from harassment and victimisation

The Federal Government has recognised that more needs to be done to raise awareness of the *Standards* if they are to be an effective measure for the delivery of equality of opportunity in education Its More Support for Students with Disabilities (MSSD) program has allocated funding across 2012 – 2014 to the compulsory education sector in Australia to 'help education providers and teachers be more inclusive and improve the learning experiences educational outcomes and participation of students with disability in further education or work' [80]

The Commonwealth Education Department has published a 'stocktake' of resources which have been made available by schools and school systems to promote staff awareness of and compliance with the Standards through the utilisation of MSSD funds [81] They have also developed a series of brief but useful 'factsheets' about aspects of the *Standards* targeted at various stakeholders in the education environment [8] One promising resource is that under development by the University of Canberra (UC) in conjunction with state and territory school systems and the New South Wales Catholic Education Commission [5] When complete it will comprise a series of online learning modules which may be completed by school staff UC claims that around 90% of Australian schools will have access to this resource An evaluation of the tertiary version of the UC package found that e-learning combined with face to face training is more effective than either strategy alone [84] One package which has incorporated face to face training alongside a DVD resource is that developed by Brisbane Catholic Education (BCE) working cooperatively with Independent Schools Queensland (ISQ) The DVD training has been rolled out to all staff in all BCE schools and made available too, to every independent school in Queensland ISQ supported this initiative by facilitating a series of face to face training workshops attended by enrolment disability support and classroom staff and well as school administrators [85] The BCE/ISQ project has been the subject of a case study in the review of the More Support for Students with Disability program [87] Encouragingly the case study reports that

> [t]he availability of the BCE Disability Awareness PD materials provided an impetus for broad based changes to both school practices and communication patterns with potential and existing parents at the school The materials provide much needed support for staff as they work towards inclusive reforms [8]

Anecdotal evidence suggests that training packages will have improved impact where they are actively supported by those with the power to make or change policy – school administrators [88] It is suggested that once only training is also unlikely to have lasting effect School administrators should commit resources to regular staff training so as to ensure currency of awareness and implementation of the *Standards* Ultimately however, the *Standards* are only likely to achieve their object of equality of opportunity in education if there is an ongoing commitment by government to the funding of staff training programs and, indeed to the proper funding of schools to provide for students with disabilities

Keywords: discrimination law; Disability Standards for Education; reasonable adjustment.

ENDNOTES

1 Sev Ozdowski, *Advancing equality in education and beyond* (Paper presented at Eastern Metropolitan Region Student Disability Conference, Melbourne , 1 September 2005.).
2 Ibid s 1.3; *DDA* s 3.
3 *Standards* ss 4.2, 5.2, 6.2, 7.2.
4 *Standards* s 1.5.
5 Ibid s 1.5 Note 3.
6 Ibid s 1.4; *DDA* s 4.
7 Price Waterhouse Coopers, *2012 Trial of the Nationally Consistent Collection of Data on School Students with Disability: Final Report*, 13 March2013, 3.
8 Perhaps from as early as the 2015 school year, after the first data is collected and collated under the scheme. See Justine Ferrari, 'School Disability Model Opens $2bn Hole', *The Australian* (Sydney), 23 January 2014, 1.
9 Ibid.
10 *Griggs v Duke Power Co*, 401 US 424 (1971). *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.
11 Pursuant to the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).
12 *DDA* ss 5(2), 6(2).
13 There have been several cases involving allegations of a breach or breaches of the *Standards* which have been settled, and where the Federal Court has ratified the settlement pursuant to an applicant under the *Federal Court Rules 2011* r 9.71. See, eg, *A on behalf of B v State of NSW (Department of Education and Training) (No 2)* [2013] FCA 551 (30 May 2013).
14 [2011] FCA 258 (Tracey J, Federal Court of Australia, 23 March 2011) ('*Walker*'). The decision was upheld in *Walker v State of Victoria* [2012] FCAFC 38 (Gray, Flick and Reeves JJ, Federal Court of Australia Full Court, 22 March 2012).
15 [2012] FCA 118 (Marshall J, Federal Court of Australia, 21 February 2012) ('*Sievwright*').
16 [2013] FCA 832 (Tracey, J, Federal Court of Australia, 16 August 2013) ('*Abela*').
17 [2013] FCA 1398 (Tracey J, Federal Court of Australia, 20 December 2013) (*Kiefel*).
18 *Standards* s 3.4.
19 *Standards* ss 4.3, 5.3, 6.3, 7.3 and 8.5.
20 See, for example, the Queensland education discrimination case *I v O'Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1 where the school made complicated arrangements for access to otherwise wheelchair inaccessible graduation and formal venues.
21 For more detailed coverage of assessment issues see Elizabeth Dickson, The Assessment of Students with Disabilities: the Australian law as to reasonable adjustment and academic integrity (2012) 17 (2) *IJLE* 49.
22 *Standards* s 7.3(b).
23 *Sievwright* [214].
24 *Kiefel* [149].
25 *Kiefel* [247].
26 *Kiefel* [250].
27 *Kiefel* 252.
28 Kiefel 177.
29 *Abela* [214].
30 See *Standards* 2.2(2).
31 Ibid s 8.3(2)(a).
32 Ibid s 8.2(a).
33 *DDA* s 42.

34 *Standards* s 8 5(c)
35 Ibid s 8 5(f)
36 Ibid s 8 5(e)
37 Ibid s 8 5(d)
38 Ibid s 3 5
39 Ibid s 4 2(3)
40 Ibid ss 5 2(3) 6 2(3) 7 2(7)
41 See Department of Education Employment and Workplace Relations Australian Government *Report on the Report on the Review of Disability Standards for Education 2005* (June 2012) v
42 *Walker* [284]
43 Ibid
44 *Stewright* [162]
45 Ibid [212]
46 *Walker* [284]
47 *Standards* s 3 4(1)
48 Ibid s 3 4(2)
49 Ibid s 10 3 *DDA* s 47
50 Ibid s 10 4 *DDA* s 48
51 Ibid s 10 5 *DDA* s 45
52 Ibid s 10 2 *DDA* s 29A
53 Ibid s 10 2(1)
54 *DDA* s 4
55 Compare *Standards* s 3 4(2) and *DDA* s 11
56 See *DDA* s 11(1)(c) and (d)
57 (2003) 217 CLR 92
58 See for example *P v Director General Department of Education* [1995] 1 QADR 755 and *K v V School (No 3)* [1996] 1 QADR 620
59 Note that the relevant legislation has now been amended to provide for consideration of the *Standards* in determinations of reasonableness See *Equal Opportunity Act 2010* (Vic) s 40(4)
60 State of Victoria v Turner [2009] VSC 66 [102]
61 Ibid [104]
62 *DDA* s 34
63 *Walker v State of Victoria* [2012] FCAFC 38 (Gray Flick and Reeves JJ Federal Court of Australia Full Court 22 March 2012) [114]
64 *Disability Standards for Education 2005 Guidance Notes* 2
65 (2003) 217 CLR 92
66 *DDA* ss 5(2) and 6(2)
67 *DDA* s 13(3) (3A)
68 Under *DDA* s 32 it is unlawful to contravene a disability standard
69 For the process of making a complaint to the Australian Human Rights Commission see *Australian Human Rights Commission Act 1986* (Cth) s 46P
70 *Walker* [273]
71 *Walker v State of Victoria* [2012] FCAFC 38 (Gray Flick and Reeves JJ Federal Court of Australia Full Court 22 March 2012) [114]
72 *Stewright* [243]
73 Ibid [239] [242]
74 *Ibela* [101]
75 *Kiefel* [180]
76 Department of Education Employment and Workplace Relations Australian Government *Report on the Review of the Disability Standards for Education 2005* (June 2012)
77 Ibid 4

78 Ibid 5.
79 Ibid.
80 Department of Education, Employment and Workplace Relations, Australian Government, *More Support for Students with Disabilities* <http://deewr.gov.au/more-support-students-disabilities>.
81 See <https://education.gov.au/disability-standards-education>.
82 Ibid.
83 See Australian Government, Department of Education, *Disability Standards for Education 2005: Stocktake of Jurisdictional Activities and Resources* (June 2014) 4-5.
84 See Christine Kilham, *Higher Educators Advancing the Disability Standards Project: Final Report* (2012) <http://www.voced.edu.au/content/ngv64399>.
85 See Australian Government, Department of Education, *Disability Standards for Education 2005: Stocktake of Jurisdictional Activities and Resources* (June 2014) 67.
86 Phillips KPA, *Evaluation Case Study: A cross-sector partnership to produce professional learning materials for DSE 2005(*2014) <http://docs.education.gov.au/node/35735>.
87 Ibid 4.
88 Above n 62, 24.