

Submission to the 2020 Review of the Disability Standards for Education 2005

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I appreciate this opportunity to provide input into the 2020 Review (the Review) of the Disability Standards for Education 2005 (the Standards). This Review is a key opportunity to reframe and strengthen the Standards and the implementation of the Standards to ensure accessible and equitable educational opportunities for all Australian students, from birth onwards.

The recognition of the need to consider amendments to the Standards, and the focus on the question of expanding the scope of the Standards to include all early childhood education and care (ECEC) settings are important strengths of the 2020 Review. This Review is also timely in light of the current review of the National Disability Strategy, and the current Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Together these form an important opportunity to create a comprehensive national approach to equitable education (and beyond) for all students who experience disability.

In the first section of this submission I will speak to the questions contained within the review, before then providing further detail in the form of eight key recommendations for amending the Standards in the second section.

As explored further in the recommendations below, amendments to the Standards are required in order to bring the Standards up to date with the changing education landscape since 2005, particularly in light of the advent of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006¹, and the associated General Comment 4 on Inclusive Education². Additionally, the Review provides a valuable opportunity to provide clarity and to support the goals of the Standards through extending the application of the Standards to all ECEC providers, thus remedying the current situation (and associated confusion in practice) whereby the Standards apply to some ECEC settings (preschools, including kindergartens) but not to child care providers, and yet the Disability Discrimination Act 1992 (DDA) applies to all.

The Standards play an important role in setting out the rights, obligations and measures of compliance that must be adhered to by education providers in order to ensure that students who experience disability can access and participate in education on the same basis as students who do not experience disability. This is essential in working towards the fundamental goal of equitable access to education and training opportunities for students who experience disability. Consistent with the findings of the 2010 and 2015 reviews, considerable efforts have been made to increase awareness and understanding of the Standards. The current landscape indicates that these efforts need to be sustained.

¹ *Convention on the Rights of Persons with a Disability*, 2006, <https://www.un.org/disabilities/default.asp?id=150>

² United Nations Office of the High Commissioner (OHCHR) (2016) General comment No. 4 (2016) on the right to inclusive education. Retrieved from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en

Greater clarity is needed regarding key aspects of the Standards to support education providers in understanding and meeting their obligations under the DDA. Two key areas pertain to the requirements for 'reasonable adjustments' and the notion of 'on the same basis'.

Throughout the Standards, the use of more explicit language would be helpful in increasing clarity regarding the obligations of providers, and in reducing the likelihood of misunderstanding or misuse of the Standards in ways that perpetuate discrimination. The use of more explicit language would also reduce the current excessive burden frequently shouldered by students and their families or allies and advocates in seeking their fundamental human rights. Additionally, enforceable time frames are required so that students and their families are fully informed and are not inadvertently excluded, nor discrimination perpetuated, while decision making processes are occurring.

Currently the implementation of the Standards relies heavily on a complaints-based mechanism driven by students and their families/allies/advocates. This creates an inequitable situation where people with greater resources for identifying and fighting discrimination are more likely to receive access and opportunity in education. Perversely this means that many students who experience disability and who face discrimination will continue to do so. The impact of intersectionality needs to be addressed within the Standards. This is particularly important in addressing the genuine inclusion of Aboriginal and Torres Strait Islander students who experience disability. The onus of responsibility must be reversed and the Standards need to make clear and explicit the requirements of service providers in providing equitable access and participation within education to all students throughout Australia. Mechanisms and requirements for transparent record keeping regarding decision making and steps taken to ensure that the legal rights of students are upheld, are required as a key aspect of progressing this aspect of the Standards.

It is noteworthy that a nationally consistent monitoring and accreditation model was recommended in the 2015 review, with a view to strengthening proactive compliance with the Standards³. This recommendation remains important. Additionally, clear and easily accessible information (for example through a central contact point) needs to be made available to students and families/allies/advocates, including access to legal advice if needed, as well as to education providers, to ensure ongoing clarity regarding the rights and obligations of all. This is consistent with Recommendation 2 of the 2015 review of the Standards regarding the need to ensure that information regarding "accessible summaries of rights, obligations and complaints processes is provided to all prospective students as part of enrolment processes in every education settings; published on every education institution's website; and is prominently displayed in education facilities".⁴

In addition to the essential goal of ensuring that all students and education providers are fully informed regarding their legal rights and obligations, and the procedures to ensure these are met, there is a need and opportunity to create mechanisms to support inclusive practice. Information for education providers should include advice regarding how to implement the Standards, such as, for example, in the design and construction of materials and educational experience to avoid the need for retrofitting exclusionary materials or approaches. Mechanisms to facilitate collaborative practice and sharing could provide valuable support to providers and facilitate increased quality rather than duplication of effort. All relevant accreditation requirements need to be aligned with the Standards.

There are many strengths of the Australian Education system, including within aspects and incidences of the implementation of the Standards. However, it is also the case that there is ongoing

³ <https://docs.education.gov.au/system/files/doc/other/final-report-2015-dse-review.pdf>

⁴ Ibid

evidence of discrimination in a wide range of areas, such as rife gatekeeping practices, discriminatory education practices, and abusive behaviour through practices of restraint and seclusion.⁵ It is clear from these ongoing and serious issues that there is considerable room for improvement in the understanding, application, and compliance of the Standards. The focus on enrolment and participation within the Standards needs to be strengthened to ensure that students are not turned away or forced out of education settings. The introduction of a default presumption of inclusion is essential to upholding the legal rights of every student and a strong mechanism is required through the Standards to eliminate current discrimination.

Genuine equity in education – with the lifelong benefits this entails – requires a culture of inclusion. Without a culture of inclusion, barriers will always exist that prevent students who experience disability from genuine access to and participation in education and training. At the core of the Standards, it is essential to address the need for a culture of inclusion throughout education settings. Education settings need to value and welcome students who experience disability. Incorporating a mechanism for reporting on the ways in which this culture shift is being addressed within education settings would be a valuable amendment to the Standards.

In summary, given the changes in national and international law, as well as more contemporary educational practice, the Standards need to be amended to a) address the obligations of education providers under the CRPD (including being amended in light of the revisions that have been made thus far to the DDA), b) consistent with these legal rights, to ensure a presumption of inclusion and facilitate a culture of inclusion and, c) to minimise ambiguity that can lead to placing onus for preventing discrimination on students and their families, rather than on education providers.

Recommendation 1: Amend the Standards to ensure consistency with the United Nations Convention on the Rights of Persons with Disabilities and the associated revisions to the Disability Discrimination Act 1992

As addressed within the discussion paper, the Standards seek to ensure that students who experience disability can access and participate in education on the same basis as students who do not experience disability. This review tests if the Standards are effective in:

- eliminating discrimination against people who experience disability in the area of education and training;
- ensuring that people who experience disability have the same rights to equality before the law in the area of education and training as the rest of the community;
- and promoting recognition and acceptance within the community of the principle that people who experience disability have the same fundamental rights as the rest of the community.

The discussion paper then goes on to identify that consideration of inclusive education and the existence of special schools or segregated settings is outside the scope of this review. However, inclusive education has been recognised as a fundamental human right for all⁶, and ensuring people

⁵ For example, see: Poed, S., K. Cologon, and R. Jackson. 2020. "Gatekeeping and restrictive practices with students with disability: results of an Australian survey." *International Journal of Inclusive Education*, (iFirst). doi:1080/13603116.2020.1726512

⁶ United Nations Office of the High Commissioner (OHCHR) (2016) General comment No. 4 (2016) on the right to inclusive education. Retrieved from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en

who experience disability have the same rights to education before the law requires upholding the right to inclusive education. Furthermore, given that the segregation of students into education settings (schools, classes, or units) on the basis of disability is frequently reported to be directly or indirectly forced – rather than a genuine ‘choice’ as it is purported (or intended) to be⁷ – this practice constitutes and perpetuates rather than eliminates discrimination. It is therefore clear that the Review cannot be an effective ‘test’ without addressing the matter of inclusive education. By contrast, the Standards, and thus the Review, provide an important opportunity to promote recognition and acceptance within the community of the principle that people who experience disability have the same fundamental rights as the rest of the community *through* support for inclusive education.

Inclusive education is at the heart of the key intention of the Standards – that is, ensuring that students who experience disability can access and participate in education on the same basis as students who do not experience disability. As explored extensively elsewhere⁸, there is a strong evidence base for inclusive education. In order for students to be prepared to participate effectively and collaboratively within diverse societies throughout life, an overarching focus on inclusive education is essential⁹. A genuinely inclusive approach to education can combat prejudice, address discrimination, facilitate lifelong learning for *all*, and pave the way for a socially cohesive and inclusive community within and beyond education settings.¹⁰ Taken together there is a compelling basis for the importance of addressing inclusive education within the Standards. However, in this context the more pressing point is the requirement under international law to ensure the right to an inclusive education for every student.¹¹

As noted in the discussion paper, the Standards are subordinate legislation to the DDA. Australia ratified the CRPD in July of 2008. The Australian Government identifies the DDA as a key vehicle through which Australia obligations under the CRPD.¹² While the 2019 UN Report on Australia’s Review of the CRPD¹³ outlines that further amendments are needed to ensure that the DDA

⁷ For example, see: Lilley, R. 2013. “It’s an absolute nightmare: maternal experiences of enrolling children diagnosed with autism in primary school in Sydney Australia.” *Disability & Society* 28(4): 514-526. doi:10.1080/09687599.2012.717882; Mann, G. 2016. “From here to there and back again: the story of a mother, her son, disability, and school choice.” *International Journal of Inclusive Education* 20(9): 909-920. doi:10.1080/13603116.2015.1122842; Mann, G., M. Cuskelly, and K. Moni. 2018. “An investigation of parents’ decisions to transfer children from regular to special schools.” *Journal of Policy and Practice in Intellectual Disabilities* 15(3): 183-192. doi:10.1111/jppi.12238

⁸ For a comprehensive systematic review see: Cologon, K. 2019. *Towards inclusive education: A necessary process of transformation*. Melbourne: Children and Young People with Disability Australia. <https://www.cyda.org.au/resources/details/62/towards-inclusive-education-a-necessary-process-of-transformation>

⁹ Ibid

¹⁰ Ibid

¹¹ United Nations Office of the High Commissioner (OHCHR) (2016) General comment No. 4 (2016) on the right to inclusive education. Retrieved from

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en

¹² See: <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/rights-people-disability>

¹³ See:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f2-3&Lang=en

adequately meets the requirements of the CRPD, revisions have been made to the DDA in light of the CRPD and the Standards need to be amended to reflect these changes.¹⁴

Additionally, the 2019 UN Report on Australia's Review of the CRPD specifically calls on the Australian Government, in undertaking this Review, to develop new Standards that address the previous recommendations on the Standards, alongside the development of a national Action Plan for Inclusive Education. This includes the requirement to "Address the increasing rate of segregation, seclusion and isolation, lack of age appropriate settings for students with disabilities, in particular Aboriginal and Torres strait Islanders, at all levels and **redirect adequate resources to a nationwide inclusive education system for all students.**"¹⁵

While the right to an inclusive education is not afforded to every student in Australia, barriers will remain that prevent students who experience disability being able to access education and training opportunities on the same basis as students who do not experience disability. 'Reasonable adjustments' made within or for the purposes of segregated education do not enable students who experience disability to access education and training opportunities on the same basis as students who do not experience disability.

It is therefore incumbent upon this Review to address the matter of inclusive education. To achieve this, the Standards would be amended throughout to reflect **a strong and consistent presumption of inclusion for every student**. The starting point would be clear articulation of the right to inclusive education for all students within the Standards.

In addition to addressing inclusive education within the Standards, it is essential that inclusive education is defined in accordance with the CRPD. This includes clarity on what constitutes inclusion and what instead forms exclusion, segregation, and integration.

The remaining recommendations within this submission are subsidiary to recommendation 1 in that fully addressing the requirements of the CRPD in the Standards would incorporate addressing all of the remaining recommendations. However, there are many noteworthy amendments required and these are highlighted in the subsequent recommendations.

Recommendation 2: Address the definition of disability within the Standards

Since the Standards were developed, considerable social change has occurred with the increasing understanding of the ableist processes involved in the lived experience of disability. This growing awareness is having an increasing influence on policy and practice. For example, the National Disability Insurance Scheme was built around a social model understanding of disability in which disability is understood to occur through barriers imposed upon individuals, rather than as a 'deficit' inherent within a person. In amending the Standards, adopting a contemporary definition of 'disability' is important from the outset. This definition also needs to be reflected throughout the amended Standards and Guidance notes.

¹⁴ See: <https://humanrights.gov.au/our-work/disability-rights/changes-dda-disability-discrimination-and-other-human-rights-legislation>

¹⁵ See: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f2-3&Lang=en. page 12, emphasis added.

Recommendation 3: Expand the scope of the Standards to include all ECEC providers

The focus on ECEC in this Review is important and commendable. As noted in the discussion paper, the early childhood years are of critical importance. It has been well established that education from the very beginning of the early childhood years is of critical importance to individual outcomes, social cohesion, and to broader societal outcomes.¹⁶ Additionally, further extending on recommendation 1, the right to inclusive education has been articulated from early childhood onwards. Consequently, the Standards needs to be applied to all ECEC settings. In implementing this recommendation, guidance, training and support is needed to ensure awareness, understanding and resourcing to implement the Standards within all ECEC settings.

Recommendation 4: Strengthen the provisions for student and family consultation

Consultation with students (and their families/allies/advocates as appropriate) is an important cornerstone of the Standards. In amending and updating the Standards, it is important to further strengthen the provisions for student consultation to ensure that students (and where appropriate families and/or other associates) are meaningfully and respectfully consulted and fully informed regarding their rights and the supports that must therefore be provided in order to facilitate equitable access and participation in education.

Recommendation 5: Incorporating a framework of Universal Design for Learning as a foundation for the Standards

As explored elsewhere, achieving equity requires addressing structural *inequities* in education systems. It requires valuing deliberative democratic education; and respect and recognition of knowledges and experiences of minoritized students, families, teachers and communities. It involves applying universal approaches to ensure all students receive the support they need to access, participate fully and meaningfully, and have their contribution recognised and valued. It means moving beyond a deficit focus and removing environmental, pedagogical, systemic and structural barriers to ensure inclusive education for all.¹⁷ Universal Design for Learning (UDL) is not only a cornerstone of upholding the right to inclusive education¹⁸, it is also a useful conceptual framework for shifting thinking from ‘retrofitting’ exclusionary systems and practices towards an approach whereby educational opportunities are designed and planned inclusively from the outset.

¹⁶ For example, see: Heckman, J. (2000). *Invest in the very young*. Chicago, IL: Ounce of Prevention Fund and the University of Chicago. Retrieved from www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED467549&ERICExtSearch_SearchType_0=no&accno=ED467549; Organisation for Economic Co-operation and Development. (2017). *Starting Strong V – Transitions from Early Childhood Education and Care to Primary Education*. Paris: OECD; Shonkoff, J. P. & Phillips, D. A. (Eds). (2000). *From Neurons to Neighbourhoods: The science of early child development*. Washington: National Academy Press

¹⁷ Cologon, K. 2019. *Towards inclusive education: A necessary process of transformation*. Melbourne: Children and Young People with Disability Australia. <https://www.cyda.org.au/resources/details/62/towards-inclusive-education-a-necessary-process-of-transformation>

¹⁸ United Nations Office of the High Commissioner (OHCHR) (2016) General comment No. 4 (2016) on the right to inclusive education. Retrieved from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en

Consequently, UDL needs to be incorporated within the Standards, and as a guiding foundation for implementation. Genuinely achieving the overarching goal of the Standards requires clear articulation of the requirements for UDL in the Standards, as well as provision for associated training and guidance materials for education providers.

Recommendation 6: Align the concept of ‘reasonable adjustments’ with the CRPD and the DDA

In keeping with the shift to a presumption of *inclusion*, the notion of ‘reasonable’ adjustment needs to be pushed beyond the currently inherent association between reasonable and *unreasonable*. Given that the intention of the Standards is to ensure equity and eliminate discrimination, this concept as a whole requires reframing. While the term is embedded within national and international law, the Standards provide an important opportunity for clarity to ensure that the framing of the relevant adjustments is focused on *equity* and on planning for the inclusive education of all students from the outset, rather than from the perspective of ‘additional’ or ‘extra’ work to retrofit educational settings, materials, and opportunities to accommodate for students who are currently excluded.

Achieving this includes making a shift in the conceptualisation of reasonable adjustments from the current definition and use within the Standards to align with the articulation of this concept in the CRPD. Specifically, this would mean ensuring that reasonable adjustments are required to be provided from the outset, without the onus on a student or family to first demonstrate discrimination requiring reasonable adjustments. This includes clearly identifying that the consideration of what is reasonable is underpinned by a recognition of the right to inclusive education, rather than on notions of competing interests from which there is a troubling question regarding fundamental human rights. As articulated in General Comment 6 on the CRPD “the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability”.¹⁹ A key component of addressing this recommendation involves reframing the notions of ‘disability’ and ‘reasonable adjustments’ to recognise barriers within education systems and settings, rather than taking a deficit view of individuals who experience disability.

Recommendation 7: Align curriculum development, accreditation and delivery with the (amended) Standards

The alignment of curriculum development, accreditation, and delivery with the Standards is an important component of making a positive difference towards students who experience disability being able to access education and training opportunities on the same basis as students who do not experience disability. This is also important in supporting effective pre-service and in-service teacher education and increasing awareness and understanding of the Standards.

¹⁹ United Nations Office of the High Commissioner (OHCHR) (2016) General comment No. 6 (2018) on equality and non-discrimination. Retrieved from: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en, paragraph 25(a).

Recommendation 8: Incorporating a mechanism for reporting on the culture of inclusion within education settings

As addressed in the first section of this submission, creating a culture of inclusion is essential to ensuring access and participation within and beyond education settings. Given the ongoing experiences of discrimination reported within the Australian Education system at present, incorporating a mechanism for reporting on the ways in which a culture shift towards inclusion is being addressed within education settings would be a valuable amendment to the Standards. It is also important that facilitating a culture of inclusion is facilitated throughout pre-service and in-service teacher education and curriculum and accreditation approaches.