



**public interest**  
ADVOCACY CENTRE

## **Submission to 2020 Review of Disability Standards for Education 2005**

**September 2020**

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## 1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make submissions to the 2020 Review of the *Disability Standards for Education 2005*.

PIAC has lengthy experience in tackling barriers to justice and fairness experienced by people with disability, including cases involving access to education for children with disability. This submission draws on our experience with the Standards, focusing on the lack of clarity around concepts referred to in the Standards, and the poor enforcement and compliance mechanisms available to students with disability and their associates.

## 2. Ambiguity and discretion in key concepts

As stated in the Explanatory Statement to the Standards, the *primary* purpose of the Standards is to 'clarify, and make more explicit, the obligations of education and training service providers under the [*Disability Discrimination Act 1992* (Cth) (**DDA**)] and the rights of people with disabilities in relation to education and training.' Despite this, key concepts under the Standards remain ill-defined and ambiguous, or inconsistent with definitions under the DDA, rendering it difficult for schools, students and their families to effectively use the Standards.

This ambiguity also leads to unnecessary conflict between students and families on the one hand, and education providers on the other, due to differing expectations of their respective rights and obligations.

Given the existing discretion provided to educators under the Standards in decision-making, this ambiguity affords educators even greater discretion, often to the detriment of students and their families.

There are two fundamental concepts under the Standards which PIAC considers requires amendment and clarification: reasonable adjustments and consultation.

### 2.1 Reasonable adjustments

The provision of reasonable adjustments is a core part of the Standards, and is reflected in the obligations under paras 4.2(3)(c), 5.2(2)(c), 6.2(2)(c), 7.2(5)(c), 7.2(6)(c). Part 3 of the Standards then set out how such reasonable adjustments are to be identified, including when an adjustment is said to be *reasonable* (para 3.4).

There are a number of issues with the term 'reasonable adjustments' which substantially limit the ability of the Standards to effectively clarify the obligations of educators and the rights of students with disability.

#### Definition of reasonable adjustments under the Standards

First, the definition of 'reasonable adjustment' differs from both the definition in the DDA and the Convention on the Rights of Persons with Disabilities (**CRPD**)<sup>1</sup>. This difference makes it both

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<sup>1</sup> Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTR 3 (entered into force 3 May 2008) ('CRPD').

inconsistent with the intention behind the concept of 'reasonable adjustment' under the DDA, and weakens the protections afforded under the DDA.

Under s 4 of the DDA, 'reasonable adjustment' is defined as an adjustment that does not impose an unjustifiable hardship on the person required to make the adjustment. It is not defined by reference to what adjustments are 'reasonable': all adjustments that do not impose an unjustifiable hardship are 'reasonable'. This is well-established by case law. In *Watts v Australia Postal Corporation*, Mortimer J held:

Thus, s 4 has effect as a deeming provision. The word "adjustment" is left undefined by the statute and is to be given its ordinary meaning as "an alteration or modification": Oxford English Dictionary (online edition). However, unlike other aspects of the DDA (see, for example, s 6) the statute does not leave it to the discriminator in the first instance and the Court in the second instance to determine whether an adjustment is "reasonable". Although the word "reasonable" is used, it has no qualitative character in its context.<sup>2</sup>

The explanatory material introducing the 'reasonable adjustment' provisions into the DDA also show that this interpretation was intended by Parliament. The Explanatory Memorandum to the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* provides that:

This item inserts a definition of 'reasonable adjustment' into the interpretation provision. A 'reasonable adjustment' is an adjustment that does not impose unjustifiable hardship on the person.<sup>3</sup>

The Explanatory Memorandum also states, in its outline, that the amendments in the Bill were intended to implement 'recommendations made by the Australian Government Productivity Commission in its 2004 report entitled *Review of the Disability Discrimination Act 1992*.' The recommendation made in the Productivity Commission report stated:

The Disability Discrimination Act 1992 should be amended to include a general duty to make reasonable adjustments.

- Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.<sup>4</sup>

In contrast, the Standards, which pre-date the introduction of a general 'reasonable adjustments' provision in the DDA, provide a separate definition of 'reasonable' under s 3.4. An adjustment is 'reasonable', according to s 3.4(1), 'if it balances the interests of all parties affected'. Section 3.4(2) then sets out a non-exhaustive list of relevant circumstances and interests which should be considered in balancing the interests of all parties affected.

In a note to s 3.4(2), the Standards then introduce a concept of 'unreasonable adjustment', which is not found in any substantive provision of the DDA or the Standards, and exists only as a 'note' (including as a note to s 10.2(3)).

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<sup>2</sup> (2014) 222 FCR 220, [22] ('Watts').

<sup>3</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* [28] ('Disability Discrimination Bill')

<sup>4</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report, No 30, 30 April 2004), p XLIX).

In effect, the Standards introduce a 'qualitative character' (to borrow Mortimer J's term in *Watts*) to the word 'reasonable', in direct contrast to the DDA. An adjustment must first be determined to be *reasonable*, before any considerations of unjustifiable hardship are even relevant. This means that the education provider has discretion to determine first, whether the proposed adjustments are 'reasonable' and then second, if they are, whether they nonetheless impose unjustifiable hardship on the educator. In this way, the education provider gets two bites of the cherry.

Where a provider does not agree with a proposed adjustment, and considers it would cause unjustifiable hardship, the discrepancy between the DDA and Standards will not matter. However, where it would not cause unjustifiable hardship, but where the provider considers it may be 'unreasonable' on any ground, the Standards allow the provider discretion to refuse the adjustment on an additional basis.

This is both confusing and unfair for providers and consumers.

It is confusing because the definition of 'reasonable adjustment' will differ depending on whether the Standards apply. A university student for example, would need to navigate different thresholds for requesting a 'reasonable adjustment' depending on whether she was requesting an adjustment in relation to her education at the university (where the Standards apply), or an adjustment in relation to her part-time employment by the university (where the Standards do not).

It is also confusing because the factors for determining what is 'reasonable' under s 3.4(1) and (2) are unnecessarily complicated and vague. These are matters which should be the subject of consultation between the student and their associates, and the education provider. Any adjustment resulting from the consultation should be made by the education provider, so long as it does not constitute 'unjustifiable hardship'. This is already the case for adjustments under the DDA.

The Productivity Commission's Report, prepared at a time when the Standards were in draft form, makes a similar point. It says:

The introduction of the concepts of reasonable and unreasonable adjustment in the standards raises other issues. The Commission supports the standards' use of the term 'reasonable adjustment'. It is for the most part consistent with the approach outlined earlier in this chapter, though it is unhelpful in creating a divergence between unreasonable adjustment and unjustifiable hardship. Defining reasonable adjustment as all adjustments that do not cause unjustifiable hardship would resolve this issue.<sup>5</sup>

The effect of the difference is that a student requiring reasonable adjustments to access education is subject to different, more onerous, considerations, than any other person with disability who requires reasonable adjustments for accessing any other service.

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<sup>5</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report, No 30, 30 April 2004), 209.

The fact that it will be the education provider determining whether a proposed adjustment is 'reasonable' creates a risk of conflict. Adjustments which are considered 'reasonable' by the student and their parents may not be so considered by their school.

This unfairness is entrenched in s 34 of the DDA: provided that an education provider acts in accordance with the Standards, the provider will be exempt from the unlawful discrimination provisions of the DDA.

This discrepancy is a relic leftover from the fact that the Standards pre-date the introduction of the 'reasonable adjustment' obligations in the DDA more generally. It does not serve any useful purpose, and ought to be removed.

### **Clarifying the meaning of 'reasonable adjustments'**

In addition to ensuring consistency between the DDA and the Standards in respect of 'reasonable adjustments', the Standards should also be amended to provide more clarity to the term 'reasonable adjustments'.

First, it is important the Standards do not alter the definition of 'reasonable adjustments' as contained in the DDA, but rather provide guidance and clarity as to what the term means in an education context.

The DDA requires that 'adjustments' be determined by reference to the individual student only. As stated by Mortimer J in *Watts*, adjustments are made 'for' the person with disability.<sup>6</sup> However s 3.4(1) of the Standards requires the consideration of 'all parties affected', which, through s 3.4(2)(d), includes consideration of the interests of 'anyone else affected, including the education provider, staff and other students'. This is not consistent with how reasonable adjustments are determined under the DDA.

Matters regarding the interests of other affected persons are properly dealt with when considering unjustifiable hardship. By ensuring that considerations for 'reasonable adjustment' are focused on the individual student, and leaving all other considerations to be dealt with in the form of 'unjustifiable hardship', the objects of the Standards (as stated under s 1.3) – each of which are focused on persons with disabilities – are better realised. At the same time, education providers will not be required to make adjustments which would demonstrably cause unjustifiable hardship to them or to those they have obligations towards.

Second, 'reasonable adjustments' should be better aligned with international human rights law, specifically the CRPD.

The term 'reasonable adjustment', when introduced into the DDA, was intended to be consistent with international human rights law. The Explanatory Memorandum to the *Disability Discrimination Bill* provides that the definition of 'reasonable adjustment' is 'consistent with the definition of 'reasonable accommodation' in Article 2 of the [CRPD].'<sup>7</sup>

'Reasonable accommodation' is there defined as follows:

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<sup>6</sup> *Watts*, [23]-[24].

<sup>7</sup> Explanatory Memorandum, [29]

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms<sup>8</sup>

General Comment No. 6 on Article 5 provides useful guidance on what ‘reasonable accommodation’ means.<sup>9</sup> We recommend the Department consider the guidance provided in this General Comment. Elements that guide the implementation of this duty include:

- Identifying and removing barriers that have an impact on the enjoyment of human rights for persons with disabilities, in dialogue with the person with a disability concerned
- Assessing whether an accommodation is feasible (legally or in practice)
- Assessing whether the accommodation is relevant (i.e., necessary and appropriate) or effective in ensuring the realisation of the right in question
- Ensuring that the reasonable accommodation is suitable to achieve the essential objective of the promotion of equality and the elimination of discrimination against persons with disabilities
- Ensuring that the persons with a disability more broadly do not bear the costs

In the context of inclusive education specifically, General Comment No. 4 provides extensive examples of how reasonable accommodations should be recognised and implemented, and the types of accommodations which might be sought. For brevity, the details in General Comment No. 4 are not extracted here, however we recommend the Department give consideration to the principles there outlined.<sup>10</sup>

### ***Recommendation 1: Amend the Standards in respect of ‘reasonable adjustment’***

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*The Standards should be amended to ensure that the definition of ‘reasonable adjustment’ is consistent with the definition used in the Disability Discrimination Act 1992, and for consistency with the concept of ‘reasonable accommodation’ under the UN Convention on the Rights of Persons with Disabilities. The Standards should provide greater clarity in respect of what ‘reasonable adjustment’ requires.*

## **2.2 Consultation**

The consultation provisions of the Standards also require amendment for clarity and guidance. Consultations form a core part of the reasonable adjustments (if any) to be provided to a student. Students and/or their associates (including their parents or other relatives or carers) must be consulted before an adjustment is made (s 3.5).

The Standards do not, however, specify what consultation means, or how the requirements might be satisfied. This point was noted in the report of the 2015 Review.

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<sup>8</sup> CRPD, Art 2.

<sup>9</sup> Committee on the Rights of Persons with Disabilities, General Comment No 6 (2018): On equality and non-discrimination UN Doc CRPD/G/GC/6 19th sess, (26 April 2018).

<sup>10</sup> Committee on the Rights of Persons with Disabilities, General Comment No 4 (2016): On the right to inclusive education UN Doc CRPD/G/GC/4 (25 November 2016).

While tools are available to assist educators and students in engaging in consultation<sup>11</sup>, from a legal and compliance standpoint, the Standards do not provide a sufficient baseline for consultation. This renders the Standards ineffective in ensuring that educators are aware of their obligations, and in providing remedies for students and their associates where educators do not engage sufficiently in consultations.

The Government's response to the 2015 Review was that 'the Australian Government cannot enforce specific requirements around consultation'.<sup>12</sup> While it may not be desirable to create specific requirements around consultation, it is necessary for there to be minimum baselines for several reasons.

First, the Standards are not simply a guidance or policy tool to assist students in accessing education without discrimination. They are subordinate legislation, breach of which contravenes the DDA and which may entitle the student to a remedy.<sup>13</sup> Conversely, compliance with the Standards also renders the unlawful discrimination provisions in the DDA inapplicable.<sup>14</sup> The Standards are a powerful instrument for both education providers to defend against claims of discrimination, and students to ensure their rights are respected.

Given that consultation underpins a significant portion of the Standards, it is important that consultation be given effective meaning within the Standards.

Second, the Standards so far have proven ineffective in providing a minimum baseline for consultations. In several decisions, the courts have declined to provide any clarity around the obligation of consultation.

In *Walker v State of Victoria*, Tracey J held that:

[The Standards] do not, however, 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.<sup>15</sup>

In *Burns v Director General of the Department of Education*, Judge Lucev held:

To the extent that the *DD Act*, read with the *Disability Standards*, provides a right to be consulted it is not a right which requires the consultation to take a rigid form, or any particular form at all...

...

The requirement to consult, which is a mandatory requirement under the *Disability Standards*, ought not be performed in a perfunctory way, and requires a proper process, including the

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<sup>11</sup> For example, the Department's Fact Sheet on Effective Consultation and the 'Planning for Personalised Learning and Support: A National Resource'.

<sup>12</sup> Initial Response, p 10.

<sup>13</sup> DDA, s 32.

<sup>14</sup> DDA, s 34.

<sup>15</sup> [2011] FCA 258, [284]. Tracey J's remarks in this paragraph were upheld on appeal: *Walker v State of Victoria* [2012] FCAFC 38.

exchange of appropriate information. ...there is to be consultation in a comprehensive manner with an exchange of information.<sup>16</sup>

In both of these cases, the courts held that there was 'extensive' consultation, and so allegations concerning a breach of the requirement to consult were not upheld. However, PIAC is aware of cases where consultation has not been 'extensive', and arguably, not sufficient under the Standards.

We consider that the consultation provisions in the Standards should be clarified, and that Judge Lucev's comments in *Burns* provides a useful starting point. The Standards should provide that:

- Consultation requires a proper process and must be comprehensive. It is not necessary for the Standards to specify a particular process, but it should require the education provider to provide for a process that is clear, transparent and comprehensive. It should not be 'perfunctory'.
- The student's advocates or medical professionals must be permitted to attend consultations if requested by the student or their parent.
- Consultation must be conducted in good faith by all parties, including the exchange of relevant information.
- Where a formal process for consultation is adopted, written records of consultation must be prepared by the education provider.
- Consultation must be ongoing in relation to any ongoing enrolment of a student with disability.
- Consultations may include independent persons where agreed to by the parties involved, but only with the consent of the student and their associate.

Each of these points are consistent with the Department's Fact Sheet on Effective Consultation and with Judge Lucev's comments in *Burns*, and are able to form the basis for a minimum baseline for consultations. Having a set of baseline provisions for consultation ensures that there is substance to ss 32 and 34 of the DDA in respect of consultation.

### ***Recommendation 2: Amend the Standards in respect of 'consultation'***

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*The Standards should be amended to provide a minimum baseline for 'consultation'. The minimum baseline should reflect that consultation requires:*

- (a) a proper process to be instituted;*
- (b) good faith participation by all parties;*
- (c) written records of consultation for all formal consultation processes;*
- (d) where requested by the student or their associate, participation by the student's advocate or medical professional; and*
- (e) where requested and agreed to between the parties, the involvement of independent persons.*

## **3. Compliance and enforcement**

Related to the issues around the lack of clarity in key concepts is the difficulties in enforcing compliance with the Standards. This is an issue that was identified in the 2015 Review, and

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<sup>16</sup> [2015] FCCA 1769, [177] and [179].

reflected in two recommendations: first, that the Australian Government ‘develop nationally consistent tools to enable education institutions to conduct “self-audits”<sup>17</sup>, and second that the Government ‘explore the feasibility of a nationally consistent monitoring and accreditation model to strengthen proactive compliance’.<sup>18</sup>

The Government’s response noted its preference to develop ‘self-audit’ tools over establishing a nationally consistent monitoring and accreditation model due to the ‘deregulation agenda of the Australian Government’.<sup>19</sup>

There are two interrelated issues when it comes to the compliance and enforcement mechanism within the Standards. The first is the limited complaints-based compliance model, which requires complaints against the Standards to be made to the Australian Human Rights Commission (**Commission**). Should that process fail, complainants are only able to pursue the matter through the courts process. The Department is well aware of the limitations of this model, and the burden placed on students and their associates, given its previous 2015 Review.

The second issue is the ambiguity of key concepts within the Standards, especially in relation to reasonable adjustments and consultation, as discussed in this submission.

The combination of these issues gives rise to unnecessary disputes about what a student is entitled to and what the education provider is obliged to provide. There is no independent authority (short of the Federal Court) to assist parties to understand what may be required by the Standards. Those disagreements can only be dealt with through the complaints process to the Commission, by which point relationships have often deteriorated. While the Commission process is intended to be informal, this is nevertheless a serious step to be taken by students, given the formal allegations of discrimination or breaches of the Standards that are being made.

Once a complaint reaches the Commission, the Commission has no power to make findings in respect of compliance with the Standards, or to enforce compliance. Any resolution of complaints at the Commission does not necessarily provide parties with clearer guidance on the interpretation of the Standards. It also does not set any precedent for the provider involved, or for any other provider, in the interpretation of their obligations.

It is only when a complaint reaches the Court that the education provider’s compliance with the Standards can be examined and enforced if necessary.

This lengthy complaints-driven mechanism is inappropriate for an instrument whose primary purpose is to ‘clarify, and make more explicit, the obligations of education and training service providers’. It is especially inappropriate in cases where the student and their parents seek to have an ongoing relationship with the education provider.

PIAC submits that consideration should be given to establishing an independent agency to monitor compliance with the Standards, or to establish such a function within the Commonwealth Ombudsman, which would also provide tools to assist students and their associates, and

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<sup>17</sup> 2015 Review of the Standards IX, Recommendation 6.

<sup>18</sup> Ibid, Recommendation 10.

<sup>19</sup> Australian Government, Department of Education and Training, *Initial Response to the 2015 Review of the Disability Standards for Education*, 8.

education providers, in understanding the rights and obligations provided by the Standards. It may be that this model fits in with the recommendation made in the 2015 Review concerning a nationally consistent monitoring and accreditation model<sup>20</sup> (which was accepted in principle, but not implemented).

An independent agency or additional function to the Ombudsman is required to ensure the Standards work as intended. Otherwise, the wide discretion given to education providers combined with a lengthy complaints process which does not allow an independent third party to assess compliance until it reaches a court allows education providers to assess their own compliance against human rights obligations. This puts the burden on students and their associates to pursue their rights – the opposite of the objects of the DDA and Standards.

***Recommendation 3: Establish an independent agency or expand the Commonwealth Ombudsman’s functions to monitor compliance with the Standards***

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*An independent agency be established, or the Commonwealth Ombudsman’s functions expanded, to proactively monitor education providers’ compliance with the Standards. The agency should also provide tools to assist students and their associates, and education providers, in understanding the rights and obligations under the Standards.*

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<sup>20</sup> 2015 Review of the Standards IX, Recommendation 10.