DISABILITY DISCRIMINATION IN EDUCATION
DISCUSSION PAPER

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February 1999

This paper is a small version of a longer paper prepared under contract to the DDA Taskforce. In the preparation of the papers the authors have received enormous assistance from members of the DDA Taskforce, in particular from Rose Ross, the National Convenor. Members of the taskforce have contributed reference material or leads on where to get it, legal and professional advice in areas requiring particular expertise and vast amounts of invaluable editorial comment. We are extremely grateful for this support, which was often given at some cost to individuals due to the pressures of deadlines.

The DDA Standards Project would like to thank the Attorney General's Department and the Department of Education Training and Youth Affairs for funding the research for this paper.

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ABSTRACT

The Disability Discrimination Act (DDA) 1992 was designed to protect people with disabilities against discrimination, including discrimination in education. Despite this intent, surveys and anecdotal evidence indicate that discrimination remains a significant problem at all levels of education, and in particular for children with disabilities wishing to be included in mainstream education. In response to this continuing problem the Commonwealth MCEETYA Task Force has been investigating the implementation of Education Standards as a means of strengthening the implementation of the DDA.

In this paper a range of strategies used around the world to ensure compliance with legislation are discussed in relation to their applicability to ensuring compliance with the DDA. It is argued that a successful strategy will have four key components, all of which are considered to be essential:

(a) specific substantive principles;
(b) a cohesive set of procedures for implementation of the substantive principles;
(c) review by an independent agent when a dispute arises about adherence to the substantive principles for a specific person's program and/or placement; and
(d) a monitoring and compliance system for enforcing the actual program and placement.

Educational Standards could be the procedure to stipulate the substantive principles. Implementation guidelines attached to the principles would then be used as the method to provide legal compulsion for the implementation of the Standards. Experience around the world has demonstrated that essential principles are 'stay put' provisions where the person remains in their current placement while a dispute is resolved; onus of proof needs to be on education authorities to justify discriminatory actions; and very short time-lines are necessary for the resolution of disputes as justice delayed can have major impacts on the individual concerned.

Even with Standards and implementation guidelines, compliance with the DDA is still unlikely to occur unless there is detailed monitoring of the extent and quality of compliance, and positive and negative contingencies on performance. Part of the monitoring and compliance mechanism would have to be independent and tenured bodies to resolve disputes so that individuals could raise discrimination issues without the current need for long drawn out processes that have no legal enforcability even if the findings are in favour of the person with a disability. A range of additional strategies is suggested to provide both the necessary support for implementation of the Standards together with monitoring and enforcement to ensure that the law is adhered to.

It is concluded that the history of discrimination in education points clearly to the need for multiple strategies to address discrimination. No process such as Education Standards will be effective unless supported by enforced implementation; independent monitoring; contingencies on compliance, and an independent, timely appeal process.

1. INTRODUCTION

(i) Requirements of the DDA

In 1992 Australia passed what we had hoped would be landmark legislation making it an offence to discriminate against people with disabilities. Under the Disability Discrimination Act (DDA) 1992, it is an offence to discriminate against a person due to their disability (direct discrimination) or to require a person with a disability to meet conditions which while appropriate for people without a disability, are not reasonable for a person due to their disability (indirect discrimination). It is also illegal to discriminate against the family or associates of a person with a disability on the grounds of the person's disability. This means that education bodies have a legal obligation to allow access to the normal education system by people with a disability. They are also required to provide the necessary supports and environmental adaptations necessary for the person to be able to access the education in the same way that people without a disability are accommodated (ie. overseas students; fee-paying students etc). The limitations to these broad requirements are covered under 'unjustifiable hardship' provisions of the DDA. These limitations take into account the reasonableness of any needed adaptations to the environment required to include a person with a disability and allows organisations to claim unjustifiable hardship as a defence under the DDA.

In short, discrimination in education is **unlawful**. For education systems or institutions with budgets of hundreds of millions of dollars and access to all required expertise, common sense indicates that 'unjustifiable hardship' is unlikely to be morally sustainable as a defence.

(ii) The extent of the problem

Two recent surveys indicate that discrimination in education is perceived to be a major problem by people with disabilities and their families. The results of these surveys are set out below and indicate that discrimination occurs right through the education system at all levels and in all States of the Federation. The problem is particularly pronounced in school education where compliance with the DDA varies greatly both between and within States and Territories, and the public and private sectors. It is also apparent that awareness of the DDA is generally poor right through the education sector.

(iii) Procedures to ensure compliance with the DDA

The country with the greatest experience with ensuring compliance with anti-discriminatory legislation is the USA. Two pieces of legislation, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA), set out the requirements for private and public institutions. The ADA sets out requirements broadly for people with a disability in all areas of society, detailing access and support requirements for access and support with procedures for monitoring compliance and attached penalties for non-compliance. IDEA is a development of PL94-142, which was the law setting out education for all children with disabilities originally passed in 1974. Under IDEA there are four key aspects that they have found to be essential if discrimination in education is to be eliminated:

(a) specific substantive principles;
(b) a cohesive set of procedures for implementation of the substantive principles;
(c) review by an independent agent when a dispute arises about adherence to the substantive principles for a specific child's program and/or placement; and
(d) a monitoring and compliance system for enforcing the actual program and placement.

In this discussion paper we are adapting this framework to recommend an appropriate formula for Australia to ensure compliance with the DDA.

(iv) Setting Educational Standards

The DDA allows for the setting of Standards and currently the MCEETYA Task Force is looking at the development of Standards. Standards are in operation under other legislation such as the Disability Services Act 1986, where accommodation and work services for people with a disability are required to conform to standards set under that Act. Standards may well provide one of a number of strategies to reduce educational discrimination, but the improvements in other areas due to the application of standards are less than might have been expected for several reasons:

- The minimum Standards have tended to become the ideal so that as long as the standard is met no further action is seen to be necessary.
- Standards do not guarantee compliance. Compliance to an objectified measure does not guarantee that the situation actually changes. For example, the fact that a nursing home has a grievance committee to air complaints may have no impact on abuse if the residents of the service are too scared to complain because of potential repercussions.
- There is an increasing trend towards voluntary compliance approaches rather than mandatory. If this trend is continued with Educational Standards, the track record of discrimination in education would indicate that the effectiveness of any Standards would be severely compromised.
- It is normally difficult to apply such Standards to government facilities such as education systems. For example, applying the standards to government controlled sheltered workshops seems to be much less enthusiastically followed up than applying the standards to non-government or private services.
- Standards tend to be set around issues that can be measured. Issues such as subjectively perceived service quality, openness to outside comment or critique and similar central issues are very difficult to monitor through standards.
- Standards may reduce all States to a "lowest common denominator". At the moment there is some difference between individual States. While Standards may pressure the worst performing States to improve, they could reduce the pressure on others.

Despite these reservations, in combination with a range of compliance and monitoring processes Standards are likely to be helpful in reducing educational discrimination. This paper details the necessary content and processes for the application of Educational Standards.

(v) Purpose of the Discussion Paper

The purpose of this discussion paper is to:

- raise awareness of the field to the nature and extent of discrimination that occurs in education;
- propose a set of substantive principles which must underpin procedures to reduce discrimination in education. These principles would become the basis for Standards in education with enforceable implementation guidelines similar in intent to the Transport Standards and guidelines;
- propose a process for independent review and resolution of disputes which is seen to be fair, effective and efficient; and
- propose systems for monitoring and enforcing compliance with the DDA and Standards.

2. CURRENT DISCRIMINATION IN EDUCATION

The hopes of people with disabilities and their families for the legislation in reversing discrimination based on disability have proven less than was envisaged. At the five year mark (after enactment) there was little doubt that discrimination in education was still a real problem. In Australia, the National Children's and Youth Law Centre published a report on disability discrimination in schools in 1997[i]. The research involved focus groups, telephone interviews and survey techniques with a total of 784 people including parents, carers, students and former students. A range of disability discrimination issues were uncovered in the areas of enrolment, post enrolment, meeting personal support needs, participation and belonging, discriminatory attitudes by staff, bullying, other parent attitudes, and insensitivity to disability specific issues. Of particular concern was the experience of making formal complaints under the DDA. Complaints were found to be costly and time consuming with long delays involved. For example one case involved 13 months of protracted negotiations with the education system only coming up with a workable proposal days before the scheduled hearing. Complaining direct to the school was negative for a large majority, with students discriminated against or forced to leave school as a result. Three parents were threatened with defamation action by schools.

In November 1997 the Disability Discrimination Act Standards project reported to the MCEETYA Task force of the results of a survey they had carried out with individuals and organisations involved in education for people with disabilities. Their survey received a total of 1689 responses of which 1307 were from a parent of a child with a disability of compulsory school age. Since the initial report, a similar number of additional responses have been received and while they have not been analysed in detail, the responses are consistent with the original sample.

Over 1220 of the initial 1307 reported experiencing some form of discrimination based on disability, and most of these believed that discrimination based on disability is endemic and systemic to education systems in Australia. The overwhelming number of responses expressed frustration and alienation from the mainstream education system, with many reporting a deliberate campaign by education systems and administrators to exclude them from participating in mainstream education. Even where children with disabilities were permitted to attend mainstream schools, many parents believe that their child was being 'baby sat' rather than educated. 1257 of the respondents indicated a belief that that at the very least their child should be able to access the public school system but could not do this satisfactorily at the moment.

Of the 1307 individual respondents, 301 have lodged a complaint about discrimination in education under either the DDA or their State/Territory anti discrimination legislation. Only 2 of these were satisfied with the outcome. The remainder, 299 respondents, indicated they were unhappy with the outcome because they:

- only settled because they couldn't afford to continue either financially or emotionally;
- were concerned about the lengthy hiatus in their child's education;
- felt they were getting nowhere with the process;
- original outcome was okay but it broke down at a transition point or education provider reneged on agreement.

All 301 respondents indicated that they would never lodge a complaint again, no matter how bad things got.

A further 1300 individuals reported experiencing discrimination in education based on their child's disability but indicated that they had not lodged a complaint about discrimination in education because they:

- knew someone who had;
- had heard it was a lengthy and costly exercise;
- had tried to lodge but the disability legal service were unable take their case;
- only had access to a community legal service and somebody in that service was related to someone at the local school;
- had tried to lodge but the Human Rights and Equal Opportunity Commission (HREOC) had advised that the case was unlikely to be successful;
- relied on the goodwill of the local community and did not want to jeopardise that relationship;
- were not sure what their rights were.

Only 76 individuals reported no experience of discrimination in education based on their child's disability.

In general it seems clear that this group feel alienated from the mainstream education sector. Even when individuals manage to get their children enrolled in local public schools the educational outcomes are poor. One parent withdrew her daughter from school and taught her to read at home before the State primary school in question recognised the child's potential. The child is successfully completing primary school and will enter high school next year - but in the Catholic system not the State system due to the reluctance of any State high school to enrol her without 'conditions' or a trial period. Several other examples are detailed in the report on the DDA Standards Project survey of 1997 and in the major document prepared for this discussion paper. Both can be accessed by contacting the DDA Standards Project.

In higher education, anecdotal accounts indicate that discrimination continues but few of these cases have reached the point of being determined by the Human Rights and Equal Opportunity Commission (HREOC) Hearing Process. Discrimination issues in higher education have covered physical access; inadequate support such as interpreters for deaf people or provision of course notes; inadequate allowance for inability to complete tasks within the requisite time or in the prescribed manner; and setting up “special” graduation ceremonies for people with a disability.

From the DDA Standards Project Survey, 92 responses related to people with a disability wanting to participate in adult and community education. The major issues for this group were:

- physical access;
- access to course materials in alternate formats; and
- access to appropriate support services.

187 responses related to students with a disability attending TAFE or university. Of these 97 responses came from TAFE students, 64 responses came from tertiary students and 26 responses came from the parents of students with disabilities attending either TAFE or university.

The major issues for these students are:

- gaining enrolment;
- access to appropriate support services;
- physical access; and
- assessment.

It appears that as higher education systems have to compete for students, they are relatively willing to come to conciliated agreements when challenged on discrimination issues. The potential public stigma of being found to have discriminated against students seems to be a powerful incentive to come to a conciliated agreement. However it is also possible that some people with a disability, particularly people with a psychiatric disability, may just drop out because of the potential stigma associated with the disclosure of disability if they complain. In contrast, compulsory education in the school years means that there is not the same danger of losing students so school education systems remain the major area of resistance to compliance with the DDA.

The current DDA, while helpful, has not ensured that discrimination in education does not occur with large or small systems particularly in the area of inclusion of students with an intellectual disability, learning disability, attention deficit hyperactivity disorder, other behavioural disorders and psychiatric disabilities. Indeed it seems that it is considered to be a failure by families trying to gain inclusive education for their son or daughter. Additional measures will be required and this discussion paper lists alternatives that are used around the world and comments on their likely effectiveness.

Compliance with the DDA in the tertiary sector is patchy at best. There are some outstanding examples of tertiary institutions who accommodate students with disabilities in an exceptional manner. However, these institutions are in the minority and are having to stretch their resources as more and more students with disabilities gravitate to them. This gravitation takes place because other tertiary institutions discourage enrolment or continued participation by students with disabilities. In school systems, there seems to be a strong reluctance by departments and schools to address the issues 'at the grass roots level'. Most school systems appear to have a high level policy commitment to equity but this commitment breaks down the closer it gets to the individual. Most seem unable to cope with the thought of large numbers of people with disabilities entering the system.

3. DDA EDUCATION STANDARD - SUBSTANTIVE PRINCIPLES

From a review of the experiences in Australia and overseas, it is our belief that the following principles are fundamental to overcoming the problems of discrimination in education. These principles need to be incorporated in to any DDA Education standards with attached guidelines to give legal backing to ensure that they are not avoided as has been the case under the DDA (ie a similar profile to the Draft DDA Transport Standard.)

1. *People with disabilities must be included in the general education classes, programs and facilities to the maximum extent possible.* That is, presence in the classroom is insufficient - the person must be involved in the curriculum and social aspects of the educational experience.

2. *Educational institutions must provide supplementary aids and services* (e.g., teaching assistants, sign language interpreters, special transportation, therapy, revised curricula, positive behaviour management plans, etc.) to support people in general education settings and to ensure that educational benefit accrues to the person.

3. *People with disabilities or their family members where appropriate must be permitted to provide input into program and placement decisions.*

4. *Resources (supplementary aids and services) go with the person not the program.*

5. *Placement decisions are made on the basis of the individual person's needs and the existence of supplementary aids and services and not the person's category or level of disability and require four elements.*[1]

   5.1 The choice of schooling type and location is normatively determined by the student and in the case of a child, the parents; and must therefore be the principle rule for students with disabilities.
   5.2 . Decisions to deny enrolment & participation in local, home schools is unlawful.
   5.3 . (Any) decision to deny participation in local, home school must be temporary; with an overt plan and timetable for return.
   5.4. (Any) decision to temporarily deny participation in local, home school must not be based on the person's label, category or level of disability.

6. *The questions that must be considered for the temporary denial of participation are*:
   (a) can the person benefit academically from the local, home school setting with appropriate supplemental aids and services,
   (b) can the person benefit socially from the local home school setting with supplemental aids and services,

[1] Existence in this sentence means within the realm of possibility (i.e. does an appropriate supplementary aid or service exist) not does the institution currently have such an aid or service.

(c) will the person's presence be disruptive even with supplemental aids and services (including positive behaviour management plans),
(d) is the cost for inclusion excessive?

If the answer to either of the first two questions is affirmative, the person must be included in the general education setting. Obviously, most people with disabilities can derive social benefit (e.g. appropriate modeling) from people in the general education setting. Thus, it would be rare that these elements could be used to justify exclusion or segregation. The third element (disruptiveness) involves a more complex debate. Disruptiveness is not mere inconvenience (such as a student slowed by a wheelchair), nor is it mere misbehaviour, especially when the misbehaviour has been untreated. The disruptiveness must be chronic and unresponsive to an array of interventions. Institutions must demonstrate that they have implemented and evaluated interventions for the disruptions. Furthermore, if exclusion is permissible for disruption, it is only permissible from the specific environment in which the disruption occurs not from the entire general education program.

For costs, institutions with a budget of hundreds of millions of dollars could not reasonably argue that they could not afford to take a non-discriminatory approach. For adult education, these costs would in most cases be additional as people with disabilities have often been excluded for education environments in the past, but the institutions have a responsibility to comply with the law. For school systems however, there are now extensive data to demonstrate that while there may be some initial costs associated with broadening access, in the long run broadening access to the local, home school is cost neutral.

7. *Where it is found appropriate to exclude or segregate an individual, there must be a plan for the person's re-integration into full time normal education with a time line for accomplishment. (see 5.2 above).*

8. *Stay put provisions. If a decision of the education authority was disputed, the person would stay where s/he was until the dispute was resolved.* This would force the education authorities to act with some urgency whereas without this provision they can delay proceedings at considerable emotional and financial cost to individuals and families and detriment to the person's education.

9. *The onus of proof in justifying a decision to temporarily deny participation rests with the education authorities, regardless of whether the person or education authorities challenge the placement decision .* This reverses the current onus where the person or family has to prove that segregation or exclusion was discriminatory.

10. *Educational authorities must be able to demonstrate educational benefit to the person through the education provided.* This would be to counter the possibility of leaving the person in the back of the classroom and ignoring him/her.

3A. PROCEDURES FOR IMPLEMENTATION OF THE DDA EDUCATION STANDARDS

(i) Policy

While not sufficient in itself, policy is almost certainly a necessary condition to counteract discrimination. Policy is required in the following areas for example:

- Enrolment procedures.
- Acceptance of the normal classroom/lecture theatre being the expected full time placement for the person.
- Support for the person in the regular classroom/lecture theatre.
- Involvement of the person (or parents in the case of children) in decision programs or placement.
- For the person (or parents) to have a friend or advocate present at meetings.
- Policies on the design of educational programs to ensure educational benefit.
- Processes for the monitoring of progress.
- Support for the teaching staff.
- Dispute resolution procedures.
- Confidentiality of assessment reports.
- Independent, external review of disputed decisions.

The implementation guide would have to directly relate to the Standards which would incorporate the substantive principles. They would specify, in detail:

- processes to be implemented to meet the Standards,
- the time limit for achievement,
- the method by which success or failure could be objectively measured and the persons responsible for implementation.

Guildelines would be required for:

- the system level,
- at the level of the educational institution or school, and
- at the level of individual people with disabilities. This latter point would subsume the 'IEP' (individual education plan) which while having advantages in ensuring a person is not overlooked, often produces undue focus on the disability rather than education and can isolate an individual as 'special'.

4 MANDATORY ACTION PLANS (MAPs)

Part 3 of the DDA sets out provisions enabling service providers to develop Action Plans as a means to identify and eliminate discrimination in service provision. These action plans are not mandatory and there is very limited oversight of their quality or implementation. However, in this model we are proposing that separate legislation be introduced to specifically mandate education action plans or that the DDA be amended to allow for this to occur.

However, a mandatory action plan *must not be incorporated* into a DDA Standard. It must be a separate measure. This is critical because if a DDA Standard mandated the development of action plans, all that a provider would have to do to gain the benefit of the section 34 defence would be to develop an action plan within the specified timeframe. The quality of the action plan would be an irrelevant consideration as

long as the process complied with the lodgement requirements set out in the Act"(Submission NSW DDLC 27/10/97).

Mandatory Action Plans (MAPS) have had an impact under some legislation such as the WA Disability Services Act. This process has advantages in allowing individual bodies the opportunity to develop their own strategies to meet requirements and so allows some flexibility; allows time to comply and so takes in the realities of systems having to adjust to changing demands -- while still having a mandatory component. However action plans are only as good as the monitoring and compliance enforcement processes.

Another model for MAPS is the Affirmative Action Act and Agency. This model, described as an 'enforcement hierarchy' has been used in other areas of government regulation in Australia and overseas, such as nursing homes and occupational health and safety. The model progresses through a range of steps intended to increase pressure to bring non-compliant parties into line, culminating in effective 'sticks' to bring about compliance, which would only be expected to be used in very rare circumstances.[3]

The key findings of the recent review of the Affirmative Action Agency recommended modification of the model to ensure that 'more cooperative relations between regulators and Australian Business, as well as other reporting organisations' is ensured'. The key here is that the committee believed that business needs more 'delivery flexibility' to encourage it to comply with the legislation. They proposed keeping the model that has the following hierarchy:

i. Capacitation - foster cooperative relations with business to encourage compliance;
ii. Dialogue - a series of six or seven letters reminding businesses of their obligations under the law (high compliance rates - over 90%);
iii. Deterrence - try to persuade business using a number of methods; and,
iv. Incapacitation - naming of business in parliament and preclusion from tendering for Commonwealth contracts ('only had deterrence value for some of the non-compliers some of the time') (pgs 95-97).

However, they focussed far more attention on the (i) and (ii) to encourage "'greater business ownership' so businesses themselves have more incentive to participate and comply with reporting requirements." (pg 97). "The Committee reached these conclusions by looking at some of the overseas evidence on compliance and regulatory models. "Contemporary regulatory thinking is that exceptions to commitment-based regulation should occur only when one cannot afford to risk anything short of strict command and control, and these cases are becoming more infrequent. (Braithwaite, John and Drahos, Peter (in preparation) Global Business Regulation 1998 ch.8).

"Moreover, the empirical evidence is now overwhelming that the best way to get people to obey the law is to persuade them the law is a good law and that those

[3] ." Unfinished Business: Equity for Women in Australian Workplaces. Final Report of the Regulatory Review of the Affirmative Action Agency (Equal Employment Opportunity for Women) Act 1986, June 1998, pg 89.

responsible for enforcing the law use fair procedures [4]. If normative commitment to the law is built in this way, most businesses will comply with the law simply because it is the law."

A similar approach could be used in this case although we should be wary of accepting the arguments for voluntary compliance at face value. As with the nuclear industry in the USA, there has to be a very effective monitoring process to ensure that compliance is working, and there also needs to be an implied 'big stick' to ensure institutions don't comply in theory but not in practice.

A range of sanctions could be implemented similar to those outlined above. For example:

- *Capacitation* –
  - provide training opportunities for staff and expert resources to assist educational facilities conform to the Act and Standards.
  - Establish joint working parties to develop MAPs and other procedures and share information from other institutions.
  - Fund demonstration projects.

- *Dialogue* - a series of six or seven letters reminding educational facilities and institutions of their obligations under the law.

- *Deterrence* - try to persuade using a number of methods; and,

- *Incapacitation* -Special conditions are imposed on the school or institution which have to be followed if funding is to be continued (in this case it would be federal education funding).
  - Public reporting of breaches.
  - Delays in funding.
  - Reduced funding.
  - Total withholding of funding.
  - Fines.
  - Legal sanctions against individuals
  - The running of the school temporarily taken over by appointees of the panel.

Compliance problems which could lead to such action could be:

- Failure to submit an acceptable action plan.
- Failure to comply with an order by a hearing officer or court.
- Failure to implement corrective action required.
- Failure to submit required reports.

In particular, it is absolutely essential that there is an external and independent body overseeing the process of MAP development and implementation, with the ability to apply meaningful sanctions for noncompliance. In short, if the current procedure is applied and MAPs are lodged with the Human Rights and Equal Opportunity

[4] Tyler, Tom R. 1990. Why People Obey the Law, Yale University Press, New Haven.; Lind, E Allen & Tyler, Tom R. 1998. The Social Psychology of Procedural Justice, Plenum Press, New York.; Makkai, T & Braithwaite, J 1996. Procedural justice and regulatory compliance, Law and Human Behaviour, vol.20 no.1, pp.83-98

Commission (HREOC) without comment, oversight or sanction, then the system will just be adding a layer of paper over the problem in an attempt to cover the issue of discrimination. Other ways of achieving compliance with MAPs include Internal performance audits, Training and support, and Centres of excellence

(i) Internal performance audits

In most government instrumentalities there is some process of performance review of individual staff members. It would be possible to build in a process where effectiveness in the area of discrimination was added as an area to be assessed. For example, teaching staff could be assessed on their effectiveness at assisting in the participation of a person with a disability in their class. Principals or Vice Chancellors could be assessed on the number of people with disabilities who are participating; the number of discrimination complaints; procedures to support teaching staff and adjustments made to the organisation of the system to facilitate the participation of people with disabilities. Educational administrative staff could be held accountable for the levels of participation the supports provided to teaching staff and institutions, the willingness to negotiate solutions to problems, and support to the teaching establishments for additional services such as therapy, translation, access or transport. These performance audits would need to be built in at the level of human resource policy.

(ii) Training and support

If discrimination is to be effectively countered over the longer term, it is essential that both current and future teachers and administrators are fully conversant with the issues involved, current research and relevant strategies at the system, institution, schools and classroom levels. It is unlikely that this is going to occur unless it is mandated. For example, teacher accreditation could depend on undergraduate or in-service training on the issue, principals and administrators could be required to attend training on ways to organise schools to maximise successful participation of students with disabilities Teacher aides could be required to undergo training in support of participation and on the requirements of the DDA. Higher education institutions could encourage a similar range of training in the same way that they make training available to staff on occupational health and safety. It is this level of commitment that is necessary. Most government departments including education have installed a wide network of training and procedures around occupational health and safety and there is no reason why a similar focus would not have major benefit in reducing discrimination.

It would seem essential that moves are made in this area. In higher education and schools it is apparent that many individuals and facilities have little or no awareness of the DDA and concern with discrimination issues is peripheral in almost all. Participation by students with disabilities in our schools depends on the goodwill of individual principals and staff; training is minimal; and visiting support staff are normally experienced in teaching students with disabilities in separate facilities but have little or no experience or knowledge in how to assist students with & without disabilities to participate developmentally with one another or participate and learn in the regular classroom. Strategies to work with families are not normally covered in any training. Similarly, university teacher programs still have a strong separate versus participatoryeducation split as that has been their tradition. Training of teachers by universities to assist students with and without disabilities to participate

developmentally with one another may not be systemically addressed unless it is forced onto them by demand from the system for appropriately trained staff.

(iii) Centres of excellence

For a teacher learning that a child with a disability is coming, the common reaction is to find out from someone what is likely to be involved. At the moment the most likely sources of information are staff in the special education area, who normally have little experience with assisting students with and without disabilities to participate developmentally with one another but considerable experience with specialised and separate education. It is likely that the information gained may be biased against an approach that assists students with and without disabilities to participate developmentally with one another and not strongly based on experience. Similarly, staff in tertiary institutions may be quite insensitive to the needs of students with a disability and carry on discriminatory practices without thought or be incorrectly advised on what is appropriate.

In such an environment, it is likely that individual schools and institutions will be overwhelmed if compliance is enforced but insufficient support is available to staff. A positive solution would be to provide funds for individual tertiary institutions or schools to implement demonstration projects on how to assist students with and without disabilities to participate developmentally with one another to demonstrate how it can be done as a resource for other facilities. This could be supported by universities and community groups.

Funding of a similar nature is currently being made available for literacy development. There is no reason why a similar program could not be implemented in this area. In higher education there is enormous potential for demonstration projects -- in fact this could be considered one of their key roles in society. If universities or other higher education institutions had access to funds to set up model programs to fully comply with the DDA and provide research information on the impact, costs and other parameters, then it would have the effect of providing a positive incentive for other institutions; demonstrate that it could be done to undermine the 'unjustifiable hardship' let-out clause; and provide new and creative ways of overcoming problems that occur.

5. ENSURING COMPLIANCE

(i) Mediation

From the surveys carried out on discrimination in education, it is apparent that at the school level at least, mediation has failed as a process. In higher education some discrimination complaints do appear to be settled by mediation, but in these cases there is greater incentive for the institutions to come to a negotiated solution due to the damage to their image and potential student market from poor publicity over discrimination. A similar outcome has been found in the USA where the outcome of mediation has been mixed at best. One exception is Colorado which uses a unique mediation/advocacy system where the school district selects an individual from among a pre-approved group of advocates. The individual, after fact finding, produces a cost-benefit analysis including the cost of services for the child and the projected

costs of a continuing dispute (including time away from primary responsibilities for the school personnel who must attend due process hearings). The advocate makes a recommendation to school personnel who may adopt the recommendations or proceed to due process. The largest district in Colorado (Denver City Schools) reports that all of their disputes for the past 20 years have been settled through this unique mediation system without invoking due process procedures. It is likely that part of the success of this approach is likely to be that decisions to move to due process would be pushed to more senior people who would be accountable for the level of funds expended. Cooler judgments are more likely if such accountability is in operation.

If mediation is to work, it must be backed by a mandatory system of contingencies for failure to come to a solution. Some characteristics of an effective mediation system would be:

- Independent arbitrators. The Colorado example above where the education system can choose from a range of arbitrators might be viewed more favourably than other alternatives, but the accountability aspects would need to be preserved.
- Strict time limits for a resolution so that mediation could not be used as a stalling tactic as appears to be happening currently. A time limit of 14 days would be appropriate as any greater period would impact on the individual's education significantly.
- Failure by the education system to come to a mediated compromise could be used as evidence in any subsequent due process, with penalties increased accordingly if findings were ultimately made against the education system.

(ii) Independent appeal processes

At the moment there is nothing in between sorting out a discrimination problem with the education system or institution and taking the issue up with the HREOC. In the case of a dispute, families or people themselves can only appeal to someone in the system -- appeal to Caesar against Caesar. If this does not work then they have to either accept a decision which they believe to be contrary to their or their child's best interests or take on a mediation/litigation process through the HREOC that can be drawn out for years, quite literally. Then, even if they gain a judgement in their favour, they may have to take the same case to the Federal Court to ensure that it will be enforced. Another method of dealing the enforcement issue would be for each system to develop, in consultation with people with disabilities, an independent appeals process. The NSW School Education system is currently doing this.

The independent panels in the US are a means to bridge the gap. In many States there are two levels of review: by a local hearing officer and subsequent appeal to an appellate panel. The local hearing officer is an individual who does not have a relationship (professional or financial) to the school. In Australia, this would mean that the person would need to be independent of the education departments and individual tertiary institutions involved in any challenge. The hearing officer schedules a hearing with the two parties with each provided an opportunity to present evidence and testimony, and the hearing officer may request additional evidence. The decision is binding on all parties. The appellate panel comprises a member of the community, a lawyer and someone with expertise in inclusive (rather than just special) education. The process is critically assisted by:

- The "stay put" provisions of the law.
- The onus of proof being on the education system.
- The centrality of inclusion as a focus of the legislation.
- Most important, the panels are independent and TENURED. That is, members are appointed for a five year term by the government and cannot be removed during that period. This means that they are able to give unbiased decisions without the fear of being removed from the tribunal for making the 'wrong' decision.
- All documents and transcripts are available to the person or their family free of charge so that they would not be disadvantaged if they wished to appeal the decision.
- There is be a strict time limit for the hearing to be completed and a decision handed down. A limit of 14 days would ensure that minimal disadvantage would accrue to the person's education through the process.

Data from an evaluation of the independent appeal systems in various States indicated that a two tier independent appeal process was cheaper than a single tier approach. Another element of the approach that seemed to be very important was the independent review office making available educational consultants to try to assist the school to resolve the discrimination issue before it proceeded further. This combination of expert help by an independent group with the knowledge that failure to work cooperatively would be used against them in the appeal process was a very powerful combination. Carrot and stick.

These tribunals are also open to having their decisions challenged in the court system. That is, they are open to appeal in the same way as any other court which means that they have to ensure that they follow the letter and spirit of the law to avoid being overturned.

There would be some costs in setting up such a system of independent review panels although it should not be excessive as the panels would only need to sit when a case was brought before them. In comparison to the financial costs of the current system as well as the costs to goodwill and family harmony, the cost may be small indeed and strongly outweighed by the benefits.

(iii) Legal action

It is a recognised right of our society that decisions of any tribunal or mediation body must be open to legal appeal, through to the High Court. This would be essential to maintain, but the intention is to minimise the need for such processes by implementing a system that works effectively.

The role of the HREOC has been questioned by the great majority of those who have come into contact with it in relation to education issues. It is instructive that of the 300 families reported in the DDA Taskforce survey who had contact with the HREOC or similar State bodies, not one of the families would use the system again. In defence of the HREOC it is severely hampered by lack of personnel and other resources as well as being required to go through a conciliation process even when it is apparent that the situation is beyond conciliation. Then, even if the issue proceeds to a hearing and a judgement is handed down in favour of the person with a disability, the case has to be re-tried in the Federal Court to ensure that compliance with the

decision is guaranteed. It may be that due to the limitations of the HREOC, an alternative body or bodies are necessary to counter educational discrimination.

Some suggestions for major reform of the HREOC processes are:

- If mediation is to be used, the guidelines above be implemented in relation to time limits and contingencies where conciliated agreements are breached.
- The tribunal be restructured to a sitting tribunal of three persons for education cases - a lawyer, an expert in education with experience with assisting students with & without disabilities to participate developmentally with one another, and a knowledgeable member of the community. All members of the panel(s) to be **independent and tenured.**
- Tribunals would sit in appellant judgement on a lower level of independent review as outlined above (the hearing officer). As such they would not necessarily need to directly hear testimony but would have access to all transcripts and relevant records.
- There would be a statutory time limit for the hearing of the case and subsequent judgement. A total of 30 days is allowed in the USA which is a recognition that judgement delayed is particularly unfair on the individual involved.
- Transcripts and other court documents would be provided to the person with a disability free of charge.

5A. MONITORING SYSTEMS

The first question to address is whether compliance should be voluntary or enforced. It is clear from a review of the Australian and overseas systems that the lack of an effective compliance system is a key reason for inadequate compliance with anti-discrimination legislation. In effect the current system is quasi voluntary as there is little compulsion on institutions to comply with the Act. A decision of the HREOC hearing process may have moral power, but in fact the case has to be reheard in the Federal court if one of the parties refuses to comply with the HREOC decision. Where effective systems are in operation, as in the USA, they are compulsory and closely monitored. When this is the case discrimination significantly reduces whereas other countries such as Australia with ineffectual monitoring and compliance system are much less effective at combating discrimination in education. It may be that flexibility can be allowed in the means of implementing the DDA and Standards, but ultimately performance needs to be closely measured and there has to be ultimately a threat of significant consequences for failing to comply with the law.

(i) External reporting of performance

In the US an external group publishes a report of the comparative rate of inclusion across the States of the US and several years ago the Australian Council of Educational Research published a similar report, although much reduced in scope. While there are likely to be problems with the quality of the data when collected over such a large area, it nevertheless gives a direct comparison of the success with inclusion across the States. In the Australian context, if such a process was implemented (similar to the 'Good Universities Guide') then there would be a process for individual State departments --and individual institutions in the case of tertiary institutions -- to be held publicly accountable. It would also have the advantage of

giving individual State Departments and institutions a positive incentive to improve their rate of inclusion rather than the negatively biased character of many of the alternative safeguards. The survey would have to be done independently of the State Departments or institutions. It could be done through funding of the HREOC to carry out the task or through a tender made available to universities, or vested with a current body of some high standing ... Australian Council of Education Research (ACER), National Council on Intellectual Disability (NCID) or by some joint project.

(ii) Review and audit of Mandatory Action Plans and Standards compliance

Currently action plans are lodged with the HREOC but it appears that there is little if any review of the plans, action to improve their quality or monitoring of their implementation against reasonable criteria. If there is inadequate quality monitoring and no consequence for failure to produce real outcomes on discrimination issues, then MAPs are little more than a bureaucratic exercise to give the impression of something happening. For example, the action plan of the Western Australian Department of Education recognises the lack of inclusion as a discrimination issue but the actions proposed are about review of policy and placement procedures. There is nothing about targets for inclusion, methods of assessing outcomes, training of staff in inclusion, providing resources for implementation, parental involvement, independent appeal processes or other critical issues outlined above. The requirement to produce a MAP has been met but it is difficult to foresee anything worthwhile coming out of this action plan. No doubt many of the action plans submitted to the HREOC are of high quality and prepared by institutions earnestly endeavouring to comply with the law but these do not seem to be evaluated or recognised for their quality. If there is a requirement for action plans to be lodged with the HREOC, it is incumbent on that body to evaluate the plans, require improvements where necessary and publicly report on their findings in relation to individual plans. Most important, they must monitor the impact on actual discrimination. MAPs are a process to reduce discrimination -- they are not an end in themselves. Similarly, if Education Standards are introduced in line with the substantive principles outlined above, they will only be effective if compliance is monitored and there are consequences for compliance and non-compliance.

Overall, if the HREOC is to fulfil this task, it will be essential that there are increases in its budget to allow the work to be competently completed, as well as powerful policies and procedures developed focused on minimising discrimination in education in an efficient and effective manner.

(iii) Mandatory audits by the Auditor General.

The process used by the Auditor General in relation to financial matters has a long history in society and is widely respected by the public and taken seriously by government departments. Over time the Auditor General has been reporting on departments' setting and meeting goals in areas beyond the purely financial, particularly in Western Australia. It would seem that there is a possibility of this procedure being applied to force compliance with the DDA. That is, if departments and institutions were required to set goals in relation to a clearly defined set of Standards and then were required to have their performance audited by the Auditor General's department and reported to parliament, it is highly likely that the performance in this area would be likely to improve. Obviously the Auditor General

could monitor and oversee the implementation of Mandatory Action Plans, with the advantages outlined above likely to accrue.

(iv) Ombudsman

Currently it is possible to use the ombudsman to review the actions of any department of the Commonwealth. As most of the problems in discrimination are occurring with State education departments and private schools, the potential for the use of this office is probably limited although it could have its purview redefined to cover this area. However, as the role of the Auditor General appears closer to the issue at hand, it is recommended that this option be looked at before the office of the Ombudsman.

(v) People with Disabilities

At the moment there is always the option of people with disabilities - and especially organisations of people with disabilities - enforcing the DDA by publicising breaches. This would require some effort on the part of the disability sector as a whole, but a number of umbrella organisations exist in the USA who fulfil this function. They have taken on this role apparently as a result of differences in interpretation of what constitutes compliance between the monitoring and/or compliance bodies set up by the US Government and organisations working for people with disabilities. This isn't as evident in the area of education, as in some other areas like transport or premises. In the final analysis it is people with disabilities and their allies who will have to remain vigilant.

5B. PENALTIES FOR FAILURE TO CONFORM.

At the moment there is little cost to an educational system that refuses to conform to the DDA. They may receive adverse publicity and incur some costs in defending cases, but the costs in comparison to the financial and emotional costs on people with disabilities and families are minimal. In other areas of law such as competition policy, firms can incur very substantial fines for ignoring the law or being in breach of it. If similar penalties were in the Act for departments or institutions who treated the DDA with disregard, it is likely that there would be a much greater interest in complying.

6. CONCLUSION

The DDA is only necessary because we have to make something right for a group of people for whom the right thing is not being done voluntarily. Despite these noble intentions it is apparent that there is limited awareness of the DDA in education systems at all levels. In school systems in particular the right thing is still not being done even though there is awareness of the law at senior levels.

It is our conclusion that very large institutions with very large budgets and a history of getting their own way have shown that they will not do the right thing, despite the law. Moreover, they will not do the right thing in future unless principles are clearly defined, their performance is independently monitored and very powerful contingencies are placed on compliance with the law. Their enormous power needs to

be countered by procedures that ensure real compliance and put the balance in favour of people with disabilities and their families.

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[i] Flynn, Christine. April 1977. Disability discrimination in schools. National Children's and Youth Law Centre. Sydney