

The Impact of the Disability Discrimination Act on School Students with a Disability in Australia

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Abstract

This paper examines the relationship between the Commonwealth Disability Discrimination Act and recent educational policy, enrolment and educational outcomes for students with a disability in Australia. Particular attention is paid to recent trends and initiatives in NSW. The conclusion reached is that while educational policy for students with a disability is similar across the states and territories, and that these policies are broadly consistent with the principles espoused in the DDA, there is little evidence that the DDA has had a significant impact on enrolment patterns for students with a disability. Further, students with a disability continue to be excluded from significant aspects of education reform in Australia. Parent choice, the lack of education standards to supplement the DDA, professional development for teachers, and political expediency are discussed as potential reasons for the on-going exclusion of students with a disability from the education reform agenda and from more inclusive settings.

Introduction

The treatment of students with disabilities provides an important test of the levels of egalitarianism and social justice in our public education system, as well as in society more broadly (NSW Public Education Inquiry, 2002, p.1).

In the ten years since the promulgation/enactment of the Commonwealth Disability Discrimination Act (DDA), there has been a degree of clarification about the prospects for the inclusion of students with a disability in Australian mainstream education. A decade ago, inclusion was still a relatively new and radical ideology and its prospects for achieving reform were largely untested. Now we have a much clearer understanding of the extent to which inclusion has and will impact on regular and special education (at least in the short to medium term).

At the same time, we have a much clearer understanding of the strengths and limitations of the DDA in relation to school students with a disability. The DDA has certainly had an impact on debate about the enrolment of students with a disability in regular schools and classes. Because its current provisions do not extend beyond access to schools, it is less clear as to the impact the DDA may have had on other aspects of education for students with a disability. However, the education of these students continues to attract considerable attention across the community (Employment, Workplace Relations and Education References Committee, 2002; NSW Public Education Inquiry, 2002).

The extent to which students from cultural minorities are identified with disabilities, whether students with disabilities are or are not identified as such, the educational settings that students with a disability access, and the support services available for and educational outcomes of students with a disability are all relevant indicators by which to examine the degree of educational

discrimination that students with disabilities may continue to experience. Each of these issues is now examined and the contribution that the DDA may have made to reducing discrimination in these areas is discussed.

Educational Definitions of Disability

One aspect of the DDA that has been widely praised in the decade since its introduction, is the broad manner in which it defines disability. Specifically, the DDA defines disability as including a range of more traditional impairments (e.g. physical, intellectual, psychiatric and sensory), as well as some impairments that are typically not recognised as disabilities in educational settings in Australia (e.g. learning disabilities and physical disfigurement). In addition, the DDA recognises disabilities that individuals may presently experience, may have had in the past, or may have in the future.

At the moment, international, national and jurisdictional definitions of disability are in a state of flux. Conceptions of disability based on the medical model have and, some would argue, continue to dominate many official definitions of disability. However, in recent decades the manner in which ‘disability’ is socially constructed has been widely accepted. This has led to a large literature base which argues, among other things, that the notion of disability varies across cultures and subsequently across educational jurisdictions, that disability may be transient, and that a more fruitful way to define disability may be in terms of relevant individual support needs rather than an individual’s perceived deficiencies (Kalyanpur, & Harry, 1999; Lupart, 2000). In many ways, these ideas that are associated with social models of disability are also consistent with the DDA definition of disability.

The Commonwealth Department of Education, Science and Training (DEST) definition of disability is restricted to intellectual, physical, social and emotional impairments, and to students who are eligible to receive special educational services in their jurisdiction. In 2001, DEST (2002a), estimated that 3.4% of school age students may be identified with a disability, and the Department provided over \$22 million in that year to schools for students with a disability. Although it is used only for funding purposes, this definition has had a major influence over the definitions of disability used in the states and territories. Indeed, given that educational definitions of disability are so closely associated with eligibility for funding in Australia, it is not unreasonable to argue that the existing DEST definition continues to distort both our educational understanding of disability and the manner in which students with a disability should be supported. The undesirability of such distortion is recognised in other countries (President’s Commission on Excellence in Special Education, 2002).

None of the Australian educational jurisdictions use a definition of disability for reporting or for the purposes of describing support needs that is different from the definition used to determine eligibility for funding (see submissions to the Senate inquiry on the education of students with disabilities, Employment, Workplace Relations and Education References Committee, 2002). The definitions currently used include generic and/or specific definitions of disability. The generic definitions usually include specific disability categories such as intellectual, physical and sensory and further descriptors to determine severity of disability, which may determine whether the student is seen as having a disability. The wording of specific definitions of disability differ, however the purpose is usually identification for funding or service provision. This results in diversity across the states and territories as to what may constitute disability. For example, learning disability is not recognised by any jurisdiction, autism is not recognised as a specific

disability by all jurisdictions, and in some locations mild disabilities are not recognised at all.

In NSW, 4.7% of all students were identified with a disability in 2002 (NSW Public Education Inquiry, 2002), 0.79% of the Tasmanian school population were identified as 'Category A' students, or students with high support needs, with other students with a disability not formally identified by schools (Tasmanian Department of Education, 2003), and in the Northern Territory, close to 20% of the 32,000 students in the Territory's government schools access special education programs (Northern Territory Department of Employment, Education and Training, 2002). Some jurisdictions (e.g. Western Australia and Queensland), are examining ways in which definitions of disability may be more closely allied to educational needs rather than perceived deficiencies, which may change the proportion of students with a disability identified in those states.

Discomfort over inconsistencies between the DDA's definition of disability and the definitions used by the educational jurisdictions is widespread (NSW Public Education Inquiry, 2002). The principal concern relates to students who may have multiple mild disabilities, students with ADHD, behaviour problems, and students with learning difficulties/disabilities. While these students are generally seen as deserving of additional funding, they are not eligible to receive targeted disability funding because the jurisdictions generally don't classify them as having a disability. Although it must be said that all the jurisdictions provide support services to this broader group of students, there is much less assurance in suggesting that these students are funded in as equitable a manner as those students identified with a disability.

At this time, the discrepancy between the DDA definition and jurisdictional definitions of disability remains untested. That there is a discrepancy should be and is likely of concern to education authorities in the states and territories. Indeed, the inability of the jurisdictions to address the differences in definition largely explains the inability of the Ministerial Council of Employment, Training and Youth Affairs (MCEETYA) to achieve ratification of the education standards associated with the DDA. Education standards will be discussed in more detail later in this paper.

The other issue that is relevant in discussions about the identification of disability is the extent to which there may be disproportionate representation across a range of demographic variables among students identified with a disability in schools. The US experience suggests that this is an area of concern. For example, in that country black students are 2.24 times more likely to be identified with intellectual disability than white students (National Research Council, 2002).

The haphazard and piecemeal approach that Australia takes to the collection and reporting of educational data for students with a disability means that we do not have a clear idea of the extent of the problem here. Some of this information has to be 'prised' from the educational jurisdictions through Freedom Of Information legislation because it is deemed to be too politically sensitive. One such disclosure occurred in the lead up to the recent NSW State election. Doherty (2003) reported that the State Government had scrapped an independent review of Aboriginal education in NSW because the results were damning. While Indigenous students comprise 4% of the government school population in NSW, in 2001 40% of school suspensions of girls in infants grades were Aborigines, and nearly one quarter of suspensions in the same age group for males were Aboriginal students. Despite the poor access to data in this area, there is concerning evidence of both gender and ethnic over-representation in special education services in Australia (Dempsey, in press).

Enrolment of Students with a Disability

Since 1997, NSW DET has had a common enrolment policy for all students, including students with a disability (NSW Department of School Education, 1997). Notably, this document replaced a separate and discriminatory enrolment policy for students with a disability that had been in place for over a decade. While the current policy recognises that it is possible to enrol students with special needs at their local school, it also states that there are a variety of considerations associated with such an enrolment. These considerations include the characteristics and capacity of the school involved, the student's educational needs and their support requirements, the choice of parents and caregivers, and the availability of support services at alternative locations. While there was an increase in the extent of enrolment choice for parents in the current enrolment policy over that last, there clearly remain many limitations in the extent to which this choice may be exercised. On the one hand parents may be encouraged to seek enrolment in inclusive settings by advocacy groups and by some health professionals, and on the other hand they may be discouraged from such aspirations by some educational professionals, particularly if their son or daughter has high support needs or displays challenging behaviour (NSW Public Education Inquiry, 2002).

Education authorities have a legitimate basis for refusing enrolment of students with a disability in regular schools within the DDA legislation. The unjustifiable hardship argument has been used both successfully and unsuccessfully in cases of complaint that have come to the Human Rights and Equal Opportunity Commission and to the Federal Court (Human Rights and Equal Opportunity Commission, 2003).

Figure 1 shows the number of enrolments of students with a disability across all educational settings in NSW. It demonstrates a significant increase in the number of students with a disability enrolled in regular classes, such that these students now challenge the number of students in special schools and support classes. Arguments that this increase is due to a movement of students with a disability from segregated settings to inclusive settings is not convincing, because the proportion of students in segregated settings, in comparison to the total school population, has remained fairly stable in the past decade (Dempsey, Foreman, & Jenkinson, 2002). A far more convincing conclusion is that the increase in the number of students with a disability in regular classes has resulted from increased community awareness of disability and the availability of Commonwealth disability funding, and that the students being identified with a disability in regular classes were likely always there.

What the data displayed in Figure 1 do not show are differences in placement for different groups of students with a disability. Inclusive placements appear to be increasing for many students with special needs. However, in recent years the number of specialist schools for students with serious behaviour problems has increased to 11 in NSW and the suspension from school of students with behaviour problems has also significantly increased (NSW Public Education Inquiry, 2002).

It would be pointless debating the relative merits of inclusive over segregated placements in this context. What must be said is that at this time parents, educators and the wider community continue to value having choice in enrolment over a range of educational settings. In terms of the movement of significant numbers of students with a disability into less restrictive environments, the DDA appears to have had little impact. However, it is likely to have had some impact in the increased identification of students with a disability in regular classes. While the extent of this influence is difficult to determine, some high profile court cases associated with the DDA, such as *Hills Grammar School v HREOC* (Federal Court of Australia, 2000), have no doubt increased

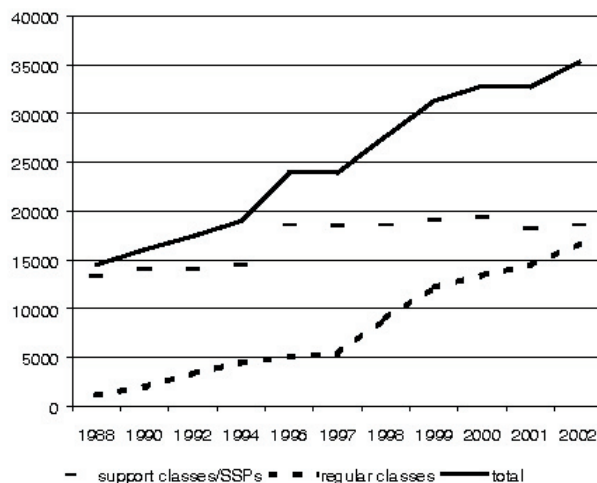


Figure 1: Enrolment of students with disabilities in NSW support classes, SSPs and in integrated settings, total primary and secondary, 1988 – 2002 (sourced from NSW Public Education Inquiry, 2002).

community awareness about disability rights and alerted the educational jurisdictions to their responsibilities.

Before leaving the issue of enrolment of students with a disability, it should be noted that the NSW experience does not necessarily reflect the experience of other educational jurisdictions in Australia. For example, in both Tasmania and Victoria support classes have been virtually abolished as an enrolment option. Having just two enrolment options creates its own challenges in terms of transitioning to a less restrictive environment. However, the decision to move away from support classes in these states predates the gazetting of the DDA.

Educational Policy in the Jurisdictions

Social justice demands that students with disabilities should have equal access to education. Commonwealth, state and territory anti-discrimination legislation supports this fundamental principle, yet there still appear to be marked disparities in the quality of educational opportunities offered to students with disabilities (Employment, Workplace Relations and Education References Committee, 2002, p. xix).

Funding for students with a disability in regular classes has increased significantly in the past decade. For example, NSW Department of Education and Training (DET) funding for such students increased from \$9 million to \$53 million in the five year period to 2002. Overall, NSW DET spent \$500 million on special education services for students with special needs (including students with a disability and learning difficulties) (NSW Public Education Inquiry, 2002). This trend is apparent in other states (Dempsey, Foreman, & Jenkinson, 2002), and in the non-government school sector (Dempsey, 2001).

This expenditure has led to a wide range of useful NSW initiatives for students with disabilities. Examples of these initiatives include the development of a needs-based ascertainment

instrument to more equitably distribute funding to students with a disability in regular classes, the establishment of Learning Support Teams in schools to coordinate support for individual students, the development of individual education plans or modifications to mainstream programs for students with special needs, and the provision of alternative curricula (Bell & Dempsey, 2001). All these measures have the potential to facilitate the inclusion of students with a disability in mainstream settings. However, there have been some significant roadblocks in the successful and widespread implementation of these measures in schools.

One significant impediment to reform has been the industrial policy pursued by the NSW Teachers Federation. Following the introduction of the common enrolment policy in 1997, the Federation described the policy as ‘inclusion by stealth’, and stated that it removed ‘... significant professional rights and responsibilities to make professional decisions concerning programme provision in favour of a market driven ideology of individual parent choice’ (NSW Teacher’s Federation, 1997). In addition, during the protracted dispute between the Federation and NSW DET in 1999 over salary negotiations, the Federation banned the introduction of the DET’s ‘Learning Together’ professional development package (NSW DET, 1999), designed to assist regular classroom teachers to support students with a disability. Another significant impediment to reform has been the effective evaporation of meaningful professional development funding for teachers in NSW government schools. These roadblocks have contributed to the widespread concern that general education teachers may be poorly equipped to effectively support students with a disability in regular classes given the average age of these teachers, their professional background and skills, and the class sizes they operate under (NSW Public Education Inquiry, 2002).

What has not helped teachers and schools in this climate is uncertainty over exactly what they should be expected to do for students with a disability once they are enrolled. For example, it is not clear what might be reasonably be expected in terms of curriculum modification or in the nature and extent of internal support services to be offered these students. Since 1996, when a discussion document on the desirability of the introduction of Education Standards to supplement the DDA was released, the process of developing such standards has had a checkered history.

Members from each of the states’ education systems, with little representation from people with a disability or their advocates, were responsible for the development of the draft education standards. The standards were released for public consultation in 2000. The report from this consultation process concluded that the standard is ‘... too low, “mean spirited” or misinterprets the DDA. They (disability sector), believe it will fail to eliminate disability discrimination in education for students with disability. It is viewed by people with disability as a draft to put parameters around legal disability discrimination’ (Human Rights and Equal Opportunity Commission, 2001). In 2002 a revised set of education standards was released to the states and territories for further consultation. Agreement on these standards is urgently needed. However, the delay is due to concern at the jurisdictional level that once agreement is reached it will require the states and territories to broaden their definition of disability, as discussed in an earlier section of this paper.

The jurisdiction’s concerns about the adoption of Education Standards is no doubt reinforced by the Australian Senate Inquiry into the education of students with a disability which concluded that there is unambiguous evidence of under-resourcing of support programs for students with a disability that relate to including students with disabilities in regular school settings. Moreover, the inquiry found significant funding inconsistencies across the states and territories for students with disabilities (Employment, Workplace Relations and Education References Committee, 2002).

Educational Outcomes for Students with a Disability

In 1999, the Australian Education Ministers endorsed a set of nationally agreed, common goals for schooling to ‘establish a foundation for action among State and Territory governments’ (DEST, 2002b, p1). These goals were to improve educational partnerships, increase the quality of teaching and the curriculum, and increase public confidence in school education through explicit and defensible standards that guide improvement in students’ ‘levels of educational achievement’ (DEST, 2002b, p2). These were endorsed as the Adelaide Declaration on National Goals for Schooling in the Twenty-first Century. The Declaration was inclusive of all school students.

An early outcome from these goals was the development of a National Literacy and Numeracy Plan, which established minimum acceptable standards for literacy and numeracy at different year levels (DEST, 2002c). These benchmarks were considered relevant to all students ‘while recognising that a very small percentage of students suffer from severe disabilities and so may be unable to achieve the minimum standards’ (DEST, 2002c, p2). An additional outcome of the Plan is the development of an assessment and reporting process by which the degree of success in achieving these benchmarks may be determined (DEST, 2002b).

If one takes it as a given that all students have a right to participate in educational testing, unless there is a very good reason not to do so, then the extent to which students with a disability currently participate in national testing is problematic. The 2000 National Report on Schooling in Australia reported disaggregated data according to student gender, status as an indigenous student or student with a language background other than English (MCEETYA, 2002). However, there was no disaggregated reporting of data for students with disabilities apart from noting the percentage of students exempted from the assessments. Further, the report notes that ‘students who are exempt are reported as having not achieved the benchmark’ (MCEETYA, 2002, p.7). At this time, it is impossible reliably to determine the characteristics of students excluded from Australian national testing because the jurisdictions do not have consistent policies on the reporting of this data. However, the most commonly excluded students appear to be students with intellectual disability and students with limited proficiency in English.

The proportion of students exempted from 2000 national testing ranged from 0.6% in Tasmania to 3.7% in the Northern Territory, and the proportion of students either absent or withdrawn by parents/caregivers varied from 1.9% in South Australia to 19.1% in the Northern Territory (MCEETYA, 2002). Some of these variations may be related to the characteristics of the students (e.g. the higher proportion of indigenous students in Western Australia and the Northern Territory, and the level of school attendance on any given day). The exemption policies are also likely to have influenced the variability of the data. These policies ranged from the use of teacher discretion as to whether the student will be able to complete basic aspects of the test, to the specification of a number of disability categories that are exempted (MCEETYA, 2002). The extent to which some students with a disability may be encouraged to be absent from school on the day(s) of testing because the school and/or caregivers may believe that the testing process is irrelevant to the student, or because of a desire by the school to enhance their results, is unclear. However, the adoption of a common definition of disability across the jurisdictions may assist in reducing the variability of participation in testing.

The most recent reauthorisation of the U.S. *Individuals with Disabilities Education Act* (Office of Special Education Programs, 2003), requires the states to include students with a disability in US national reporting of educational outcomes. The states are continuing to grapple with a range of issues associated with this reporting and so no reliable national data is available at this time. However, it is clear from the debate that has developed over these participation issues,

that both accommodations and alternative testing are important considerations in enhancing participation in national testing by students with a disability (Johnson et al, 2001; Thurlow & Bolt, 2001).

Agreement needs to be obtained on the accommodation that may be provided to students with disabilities during Australian national testing. While accommodation for students with sensory disabilities and learning difficulties have been commonly utilised (e.g. scribes, additional time), the use of accommodations with the full range of students with a disability needs to be addressed to increase these students' access to national testing. This discussion may extend to the provision of alternative testing formats and possibly alternative assessment tasks for students with severe disabilities. Without such modifications, most students with disabilities may never be meaningfully involved in the national assessment program because their performance will continue to be reported at an aggregated level below the national benchmarks.

Conclusions

It would be naive to think that the DDA has eliminated much of the discrimination that school students with a disability experienced a decade ago. Like all pieces of legislation, the DDA is relatively open in texture and is subsequently open to interpretation. And like all pieces of legislation, the spirit of the DDA continues to be resisted at a variety of levels.

Although there was criticism about a perceived inadequate education campaign for the DDA in the early years of its implementation, the legislation has had a significant impact in the level of awareness about disability in all of the educational jurisdictions. The evidence for this lies in major increases in the identification of disability in schools, some high profile court cases involving the DDA, the widespread use of Action Plans, and the development of some excellent professional development resources (NSW Department of Education and Training, 1999; South Australian Department of Education, Training and Employment, 2000).

While there may be increased awareness of disability in schools, this awareness has not necessarily resulted in an increase in inclusive practices in schools. There is no reliable evidence of a significant movement of students with disabilities from segregated to inclusive settings, and in at least one state there has been industrial action by teachers to resist the inclusion of students with a disability. On the other hand, some jurisdictions are beginning to move away from deficit-based notions of disability to a conception of disability based on necessary supports which may assist in achieving more genuine inclusion of many students with a disability.

The DDA continues to provide much promise about what may be achieved for school students with a disability. In particular, the realisation of Education Standards appear to be tantalisingly close (at the time of writing), and their ratification should do much to clarify the level of responsibility schools have in the provision of support to these students. One can only hope that the inordinate amount of time taken to reach agreement here is not a ploy being used by the jurisdictions to browbeat other stakeholders into approving a 'watered down' version of the standards.

Perhaps the greatest promise from the DDA is the potential for the adoption of a more general educational definition of disability than is presently used by the jurisdictions. Ratification of the Education Standards would seem to effectively guarantee this outcome. The advantages of the adoption of the DDA definition of disability by schools are considerable and they include the opportunity to identify disability separate to identification that may occur during the funding process, to include a range of legitimate mild disabilities that are not formally recognised by most

states and territories, and to allow some context related decisions about the presence or absence of disability. Counter arguments that the broad DDA definition will lead to unreliable diagnosis founder on the understanding that disability is indeed context driven and that the present specific definitions of disability provide no guarantee of reliability of diagnosis.

While the DDA must be regarded as a most useful piece of legislation for school students with a disability, it must also be considered as a piece of unfinished business. Its full potential continues to be hampered by the intransigence and ‘mean spirit’ of some constituents from the educational bureaucracy, the teaching profession, and from politics. However, the encompassing manner in which the DDA defines disability must be regarded as an aspect of the legislation for which those responsible for its writing and successful passage through Parliament should be roundly praised.

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