

Submission  
No 692

## **INQUIRY INTO THE PROVISION OF EDUCATION TO STUDENTS WITH A DISABILITY OR SPECIAL NEEDS**

**Organisation:** NSW Disability Discrimination Legal Centre Inc

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**Submission: Inquiry into Provision of Education to Students**

**with a Disability or Special needs**

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## **About DDLC**

The NSW DDLC was set up in 1994 to help people with disability to use disability discrimination laws. Our role is to provide accurate and easy to comprehend advice to people with disability in NSW who want to make a complaint of disability discrimination. We give free legal advice, run disability discrimination cases and represent people with cases of disability discrimination.

The NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- ability to exercise rights.

DDLC's objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;
- To ensure the effective participation of people with disabilities in the management and operation of the Centre;
- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.

## **1 Introduction**

The NSW Disability Discrimination Legal Centre (DDLC) welcomes the opportunity to contribute to the Inquiry into the Provision of Education to Students with a Disability or Special Needs.

DDLC provides advice and case work services and makes policy submissions on the education of students with disability, including engaging with the Department of Education for a number of years in relation to amendments to the *Education Act 1990*. Informing our work in these areas is the principle of inclusive education, and to an extent there has been some improvement in this regard. According to the Australian Institute of Health and Welfare, the number of children with disability attending mainstream schools, including students in special classes, has increased by 93% between 1981 and 2003<sup>1</sup>.

However, people with disability still experience barriers to achieving full and equal participation in the education system. These barriers take the form of attitudinal barriers, inadequate funding and inappropriate classroom support and specialised equipment.

Currently, one of the largest areas of complaint to the DDLC is education. The complaints are largely against government 'mainstream' schools and in the past year we provided advice to over 103 clients regarding discrimination in education.

The consequences of a failure to provide equal access to and full participation in education are severe –both for the individual, their families and society as a whole. Indeed, education is one of the most determinative factors in an individual's economic and social future.

### **1A The Legal Framework**

#### **i) Domestic Law**

It is unlawful to discriminate against people with disability in education under s49L of the *Anti-Discrimination Act 1977* (NSW) ("the ADA") and section of 22 of the *Disability Discrimination Act 1992* (Cth) ("the DDA"). It is also unlawful under the DDA to breach the

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<sup>1</sup> Australian Institute of Health and Welfare, 'Disability in Australia: trends in prevalence, education, employment and community living' (June 2008) *Bulletin* 61 at 19.

*Disability Standards for Education 2005* (Cth) (“the Standards”), which set out three main obligations on education providers: to consult with students or their associates; to make reasonable adjustments and to eliminate harassment and victimisation.

The importance of reasonable adjustments in law has been significantly strengthened by the recent introduction of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (“the Amendment”). The effect of the Amendment is that the definitions of indirect and direct discrimination have been expanded. These expansions now include that a failure to make reasonable adjustments, if having the effect that a person is treated less favourably, constitutes unlawful discrimination. This has the potential for huge impact on the education sector, as students with disability often require reasonable adjustments for their education and indeed our assessment is that cases that were previously unsuccessful under the DDA pre-amendment, such as *Hinchliffe v University of Sydney*<sup>2</sup>, would have increased prospects of succeeding under the DDA, post- amendments.

## ii) International Obligations

Australia also holds obligations to the international community under Article 24 of the *Convention on the Rights of Persons with Disabilities* (CRPD), which Australia ratified in July 2008.

The adoption of the CRPD is a significant legal and policy advance, moving from non-binding international standards to formally binding legal obligations for those States that become party to the Convention. It is effectively an international charter of rights for persons with a disability. It provides a framework for policy analysis, design and implementation and is a tool for disabled persons’ organisations in advocating for the rights of people with disability.

It has been noted that CRPD has approached economic, social and cultural rights in a very specific way. Overall the requirement is for ‘States to incorporate a ‘twin-track’ approach to meeting the economic, social and cultural rights of persons with disability, which involves, firstly, incorporating disability sensitive measures into mainstream service delivery; and

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<sup>2</sup> [2004] FMCA 85

secondly, ensuring the provision of necessary specialist services and special measures in a manner that facilitates the inclusion and participation of persons with disability within the general community'.<sup>3</sup> The outcome is that *CRPD* seems to quite specifically move away from segregated specialist service delivery to people with disability.

Recognised as a cornerstone of social inclusion, education was an acutely contentious article during the Convention negotiations. It was extensively debated with over 110 interventions from Member States and NGO delegations. The underlying tension in the education debate was around the principle of inclusive education. Some Member States strongly supported an exemption clause to allow for segregated education at all levels. Despite this, there was significant support for this article to be based on the principle of inclusive education.

The final wording of Article 24 on Education, establishes a principle of inclusive education and promotes reasonable accommodation of an individual's requirements. The article requires State Parties to take effective measures to support people with disability in the general education system and requires that all support measures are provided in environments that maximise academic and social development of people with disability. The emphasis is on establishing an inclusive education system that effectively supports the full participation of students with disability.

The text of the article is as follows:

*1. States Parties recognize the **right of persons with disabilities to education.***

*With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties **shall ensure an inclusive education system at all levels and life long learning directed to:***

*(a) **The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;***

*(b) **The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;***

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<sup>3</sup> Kayess, R and French, P. Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities, *Human Rights Law Review*. Oxford University Press. 2008.

*(c) Enabling persons with disabilities to **participate effectively** in a free society.*

*2. In realizing this right, States Parties shall ensure that:*

*(a) Persons with disabilities are **not excluded from the general education system on the basis of disability**, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*

*(b) Persons with disabilities can **access an inclusive, quality and free primary education and secondary education on an equal basis** with others in the communities in which they live;*

*(c) **Reasonable accommodation of the individual's requirements** is provided;*

*(d) Persons with disabilities **receive the support required**, within the general education system, **to facilitate their effective education**;*

*(e) **Effective individualized support measures are provided** in environments that maximize academic and social development, consistent with the **goal of full inclusion**.*

*3. States Parties shall **enable persons with disabilities to learn life and social development skills** to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:*

*(a) **Facilitating the learning** of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;*

*(b) **Facilitating the learning of sign language and the promotion of the linguistic identity** of the deaf community;*

*(c) Ensuring that the **education of persons**, and in particular children, who are blind, deaf or deafblind, is **delivered in the most appropriate languages and modes and means of communication for the individual**, and in environments which maximize academic and social development.*



*4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.*

*5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.*

Therefore it can be seen that there is a strong and clear legal framework that supports inclusive education for students with disability. Such clear provisions in the law appear to indicate that fulfilment of these rights is in sight. However, our work indicates that there are clear gaps between these rights in law and their practical implementation. One of the reasons for these gaps is that the legal processes for enforcing these rights are not the most appropriate sphere for students to insist on these rights.

## **1B Problems with the Existing Regulatory Model**

### **i) Systemic Issues are not adequately addressed through the DDA or ADA**

The individual complaints system that is the vehicle for asserting rights under the ADA and the DDA, does not address systemic type issues. In general, discrimination law remedies are compensatory in nature only and the amount of compensation awarded tends to be comparatively low to that awarded in other areas of law. In our experience, the relatively small sum of damages does little to prevent further discriminatory practice. It is also rare for policy change to be part of the settlement or court finding. In circumstances where a settlement provides for systemic outcomes, such as training or policy changes, conciliated agreements are often confidential which means the outcome cannot be used by other

people as a precedent to seek improvements more generally. Court decisions are also often applicable to the facts of the case only.

According to Dr Belinda Smith:

*While the stated objective of the Act is normative ... formal regulatory mechanisms seem designed to achieve only the implicit remedial objective of resolving discrimination claims as interpersonal disputes<sup>4</sup>.*

Therefore systemic issues, such as lack of adequate funding or resourcing, or discriminatory policies are not able to be dealt with adequately through using discrimination law.

Complaints through the DDA and ADA are also not the most appropriate mechanism for addressing issues on an individual level

**ii) The Discriminatory Law Regime is also not the best forum for Resolving Complaints on an Individual Level.**

While DDLC does provide advice to a large number of clients on education matters; these are not indicative of the significantly larger number of people in the community that do not seek legal advice or pursue legal remedies in relation to these issues. The complaint process is hampered by a number of barriers for clients.

**a) A desire to preserve the relationship with the school**

These barriers include the fact that education is an area that usually requires an ongoing relationship with the respondent. The nature of the ongoing relationship with a school means that many families choose not to make a formal complaint against the school as they fear a breakdown in communication and in the treatment of their child. As a result, many students simply live with the difference between their legal entitlements and the provision they actually receive. We find that often complaints that are made against schools, are

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<sup>4 4</sup> Belinda Smith, "A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?" in C Arup, et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press: Sydney (2006), 105-124 p.109)

made once the situation has become so desperate that families have chosen for their child to change schools.

**b) Onus on individuals to assert, advocate for and litigate their rights**

Another significant problem with the enforcement of discrimination law is the fact that it is an individual complaint driven process. The process necessitates that individuals bring complaints and back it up with evidence in an area of law that has a high evidentiary burden. This evidentiary burden also requires exact dates and notes of conversations – which many clients simply do not have, as they did not realise until the events had compounded that the provision of education was a legal issue that required meticulous recording.

This individually driven process fails to account for the ordinary individual that generally has little to no education regarding the legal and non legal options available to them. Disability is most prevalent in areas of society that are already disadvantaged. The individual complaints process necessitates that the complainant (usually the parent) has experienced a good education, has a good understanding of English, and has the confidence and time available to advocate for their child. These practical requirements alienate many from the complaint process, especially in geographical areas of disadvantage.

**c) Power imbalances in conciliation**

If the complaint has been accepted by the Anti-Discrimination Board of NSW (“ADB”) or the Australian Human Rights Commission (“AHRC”), the next step is alternative dispute resolution by attending conciliation. At the conciliation level, education respondents are often represented by solicitors and complainants can feel intimidated. If the respondent fails to agree to the complainant’s sought outcomes, the only option available for families to resolve the process is to go to Court. At the conciliation level, compensatory outcomes also fail to adequately address the pain and suffering that students and their families encounter.

**d) Financial, psychological and other costs associated with Court**

Families that do initiate the disability discrimination complaint, are often stopped in their tracks by the fact that the Federal Court and the Federal Magistrates Court is a formal costs

jurisdiction. The vast majority of complainants choose not to pursue the complaint beyond a conciliation level as the costs involved are too great for what is often a non financial outcome. As a result, there is a consistent failure for families to have closure and resolution of discrimination issues. There is also a consistent failure to clarify more specifically how the law is applied in education matters. Indeed, since the introduction of the Disability Standards for Education in 2005, there have been no education cases to test its boundaries – and therefore, given they are descriptive rather than prescriptive there is still ambiguity around their meaning.

#### **Case study**

A student with a visual impairment studying for her HSC encountered great difficulty in gaining access to her texts in an adaptable format. Her marks suffered as a result. She was given the option of taking the matter to court. However, the reality was that if she lost, at least at the Federal level, she would have had to pay the other side's legal costs which we estimated would be anywhere up to approximately \$ 20,000. She also was not prepared to spend her HSC fighting over this issue in a court room nor deal with the stress that would come with this. Therefore, she chose not to pursue it any further. Consequently, her case was not tested and students with vision impairments continue to struggle in obtaining access to texts in an accessible format within a reasonable time period.

### **1C The role for DET**

In light of these issues, litigation through the Federal Court, and alternative dispute resolution through either the ADB or AHRC, are not the ideal ways to resolve these issues on an individual or systemic basis. What is needed is for the Department of Education and Training (DET) to take a more pro- active role and this will be an overarching theme of this submission. This would mean that students with disability would be more strongly guaranteed access to a meaningful inclusive education and fulfilment of their potential. Indeed, by adopting stronger 'risk management' type approaches up front, the DET would in the end save time and money currently spent on dealing with complaints as they arise. We will discuss practical ways this could occur later on in this submission.

## 1D Barriers to access

Students with a disability still face barriers in education in areas ranging from access to premises; access to adaptive technology support; teachers' aide assistance; communication with schools; and support needed for their education and harassment.

In fact, more than 29% of submissions to the National Disability Strategy Consultation complained about access to education for people with disabilities and the consultation report prepared by the National People with Disabilities and Carer Council found:

*'... far from ensuring young people with disabilities have every opportunity to realise their potential, the education system acts as a barrier to greater achievement and independence in their lives.'*<sup>5</sup>

These barriers students face are compounded by a lack of effective training of teachers in disability awareness and by a lack of systems or training in how to effectively consult with students with disabilities, and make reasonable adjustments in their education. Access to effective education is also hindered by the effects of harassment and victimisation on students, and a lack of training of teachers and students in how to deal with these issues. An essential issue for schools is knowledge building as well as practical skills training, so that schools, staff and principals are equipped to know what their obligations under law are to students with disability, and know how to implement these obligations on a practical level. There is therefore huge potential for the DET for providing centralised training, systems and accountability mechanisms to support capacity building and enforce compliance with the legislative framework.

The barriers for students in accessing a meaningful and inclusive education, and many other issues, will be addressed in this report. This submission will focus on the following terms of reference ('TOR'):

- 4. The adequacy of integrated support services for children with a disability in mainstream settings, such as school classrooms;**

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<sup>5</sup> National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and their Families in Australia – National Disability Strategy Consultation Report* (2009) 47.

5. **The provision of a suitable curriculum for intellectually disabled and conduct disordered students;**
6. **Student and family access to professional support and services, such as speech therapy, occupational therapy, physiotherapy and school counsellors;**
7. **The provision of adequate teaching training, both in terms of pre-service and ongoing professional training; and**
8. **Any other related matters, which includes for this report:**
  - The need for training in the obligations under the Standards; and**
  - The need for a Centralised Approach to fulfilling the obligations under the Standards**

## **2 The inadequacy of integrated support services for children with a disability in mainstream setting, such as school classrooms (TOR4)**

### **2A Awareness of staff and provision of specialised services**

Central to the provision of inclusive education is that staff are aware of specialised support services.

Indeed, the Standards mandate that staff at schools are aware of the specialised services available for the student and are provided with information that enables them to assist the student to access the services that the student needs<sup>6</sup>.

However, in our experience, staff are generally unaware of what is available to assist a student unless they have dealt effectively with a student of a similar disability before. Knowledge of specialised services tends to be experiential only.

Ultimately, the best practice model in our experience was the Centralised Equity Services System, employed by TAFE, until 2008 when funding cuts resulted in a loss of specialist services. Applied to schools, such a model would see the use of a centralised secretariat system, where 'disability specialists', experienced in working with students with a particular form of disability, liaise with schools on behalf of students and their parents.

Such a model would ensure that parents (and students) primary contact was a specialist who liaised with school to coordinate all adjustments required by the student. It would mean that the parent's point of contact would be someone who was not defensive about the classroom situation.

***Recommendation 1:***

**The DET should investigate a Centralised Equity Services System, previously employed by TAFE where a centralised secretariat system, where 'disability specialists', experienced in working with students with a particular form of disability, liaise with schools on behalf of students and their parents.**

<sup>6</sup> Part 7.3, Disability Standards for Education 2005

## **2B Equipment and adaptive technology**

The equipment or assistance required for students with a disability or special needs varies widely from student to student, and an individual student may require multiple forms of assistance or adaptation for a number of disabilities. The provision of specialised equipment is also mandated by the Standards.<sup>7</sup> We recognise this also to include adaptive technology and assistive devices.

### **i) Visually impaired students**

One issue that DDLC has encountered often is that of adaptive technology for visually impaired students. For visually impaired students to be able to access technology and some class materials, programs such as ZoomText and/or JAWS Screen Reader may be required.

The cost of adaptive technology for an individual student to bear is quite prohibitive. Although some assistance is available for students through organisations like Vision Australia, access to adaptive technology is required for visually impaired students on computers provided by the school for classwork, and/or on laptops the students own.

Failure to provide such access has the effect that students cannot keep up with classwork as they may not be physically able to read the material on the screen without adaptive technology. This gradually erodes their self-confidence, their marks and their potential. This is of particular importance as many schools transition to technology based learning.

In particular, making school computers accessible for students with a visual impairment through log-in accounts that automatically generate ZoomText and JAWS Screen Reader are options that have not been fully explored. Also, further collaboration between education providers and organisations such as Vision Australia, needs to be increased and encouraged.

#### **Case study**

A visually impaired student studying for the HSC requires ZoomText on the computers in order to be able to participate in IT classes. ZoomText is not working adequately on the class computers. Therefore, the student uses her own

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<sup>7</sup> *Disability Standards for Education 2005 (Cth), Part 7.3 (c)*



laptop with ZoomText on it. This is problematic as all the files required for use are on a drive on the class computers.

The same student also requires JAWS Screen Reader to be provided on computers. The program is eventually installed over six months after she requested it and after her doctor had recommended it for her use. The same student also receives a range of important information only in PDF files, which is incompatible with her adaptive technology programs. There is a time delay in her receiving the information all other students receive at the same time.

### **Case study**

A high school student with vision impairment experienced difficulties in obtaining many of her English texts in an electronic form.

When we examined her grades over the last few years, we could see that the effects of this were quite profound. In semesters when the text has been made available to her in an accessible form at the same time as it was made available to other students, her grades were very high. When there was a delay in receiving the texts her grades were significantly lower.

She filed a disability discrimination complaint, and the complaint went to conciliation. However, it was already too late for the student – the relationship between the student, her family and her school had completely broken down and her parents had been ‘banned’ from school grounds.

In conciliation, we managed to reach an agreement about getting her accessible materials for her final year at school. However, six months later, the school was not abiding by the timeframes and she continued to experience difficulty.

**Recommendation 2:**

***The DET should ensure that all schools, have adaptive technology installed on computers for students' use.***

**Recommendation 3:**

***The DET should ensure that all schools know what program formats are compatible with accessible technology so that students can access the information they need for their education.***

## **2C Funding**

One of the most crucial issues in the provision of education to students with disability is the immense lack of funding:

*'funding for children with special needs/disabilities in regular schools varies greatly. Some may receive as little as \$605 per semester, or 12 minutes aide time each day... Students who may have more than one disability do not receive any additional support for their additional disability'<sup>8</sup>.*

In many mainstream schools, students with disability are placed into separate classes where no extra assistance is given, due to a lack of resources. Increases in funding are urgently needed to ensure that students with disability are able to participate in a meaningful, rather than tokenistic education. It is impossible for students with disability to receive a meaningful education without increases in funding. All of the recommendations within this submission will all necessitate increased funding so that they can be implemented. We strongly submit that the NSW Government substantially increase its funding to the disability sector in education.

### **i) Disadvantaged areas**

Of particular note, schools in poorer areas should be paid special attention in funding increases. Students living in these disadvantaged areas are more challenged by poor resourcing, and generally families are not as affluent or empowered to be able to advocate

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<sup>8</sup> Public Schools Principals Forum, *Provision of Special Needs/Disabled Students in NSW* (March 2009) 3.

for their child's needs. As a result, many students growing up in these backgrounds are disadvantaged and are not aware of the redress available for them.

The Public Schools Principals' Forum report lists areas of disadvantage which include, but are not limited to: Hunter/Central Coast; Queanbeyan; Sapphire Coast/Monaro; Shellharbour; Clarence/Coffs harbour; Richmond Valley, The Wilson; SouthWest Sydney (Campbelltown, Bankstown, Granville, Macarthur, Liverpool); Shoalhaven; Warrambungle; Minchinbury; Penrith; Riverina/SouthWest Central Richmond; Lake Macquarie<sup>9</sup>.

Funding should be increased to target areas of special disadvantage to ensure that students from these areas have greater opportunities to fulfil their potential.

**ii) Lack of Clarity between State and Federal governments for provision of funding equipment and specialised services**

The Federal government's increasing involvement in and funding of primary and secondary public education, has not been adequately thought through in relation to students with disability. In particular, laptops issued to all high school students under the Commonwealth's National Secondary School Computer Fund under the Digital Education Revolution initiative, are not accessible to students with vision impairments and the laptops offered to these students by the State Government are offered on less favourable terms.

**Case study**

A visually impaired student attends a school where students receive provision of a Netbook for personal possession after completion of Year 12 under the Commonwealth Government's *National Secondary School Computer Fund* initiative. The Netbook on offer under the Fund is not suitable for her needs as a visually impaired student. The Commonwealth government has said that any laptops for visually impaired students must be provided by the State. However, State government policy is that the student is unable to keep the laptop beyond Year 12 and must return it to the Department for another student to reuse.

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<sup>9</sup> Ibid 7.

Visually impaired students therefore receive unequal access to laptops in high schools.

There also needs to be increased clarity about who is responsible for funding of equipment and specialised support for students with a disability. In particular, there needs to be clear guidelines regarding the responsibility of the Commonwealth or State regarding funding. This is crucial as the provision of services to students can differ under alternative funding bodies.

Increased clarity regarding funding is now also a legal issue for the NSW Government and the DET. The changes to the DDA under the Amendment have also meant changes to the defence of 'unjustifiable hardship', where it now also includes part (d):

*(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the first person) would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:*

*(d) the availability of financial and other assistance to the first person.*

The effect of this Amendment is that consideration of available/alternative funding sources needs to be weighed in the determination of whether granting an adjustment constitutes unjustifiable hardship. This therefore limits access to the defence of unjustifiable hardship in circumstances where a school is eligible to apply for funding but does not do so. It is therefore important, as a liability issue, that DET ensures schools know the financial assistance available to students with disabilities.

***Recommendation 4:***

***The DET should review its current communication with schools regarding the National Secondary School Computer Fund and all subsequent programs under the Digital Education Revolution, to ensure that schools know the application process for Commonwealth funding for students with disabilities.***

**Recommendation 5:**

***The DET should review its channels of communication to schools regarding funding availability.***

**Recommendation 6:**

***The DET should substantially increase special funding to provide for students with disability in education, particularly to areas of special disadvantage.***

**2D Appropriately trained support staff**

**i) Auslan interpreters**

The requirement for students who communicate in Auslan to be able to access their own language in the school environment has been noted in case law: *Catholic Education Office v Clarke* (2004) 138 FCR 121; *Hurst and Devlin v Education Queensland* [2005] FCA 405. The Standards also outline that education providers are to provide interpreters for students with disabilities<sup>10</sup> and the obligation on education providers to provide reasonable adjustments has been strengthened in law since the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

The importance of provision to students of interpreters is also emphasised in Article 24 of CRPD:

***4) In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education...***

The Deaf Society of NSW has indicated that on a practical level, the current provision of Auslan is inadequate. Current early intervention programs do not all appear to take seriously the risk of delayed language acquisition, or the potential for early Auslan programs to eliminate this risk. The current quality standard of Auslan training certificates is also inadequate, and there needs to be an increase in the quality of training in Auslan. Staff

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<sup>10</sup> Part 7.3(d), *Disability Standards for Education 2005* (Cth)

employed by the DET who teach or support students who use Auslan are currently not required to be fluent in Auslan.

There needs to be an adoption of a benchmark for fluency for staff who are employed to work with children who access the curriculum using Auslan, whether teacher's aides; learning support officers; interpreters or teachers of the deaf. This benchmark should be the NAATI Paraprofessional level accreditation or recognised Deaf Relay Interpreter training or accreditation as a minimum<sup>11</sup>.

#### **Case study**

A profoundly deaf primary school student whose main language was Auslan wished to attend a mainstream school. She left the specialist school she was attending, and was enrolled in a mainstream school on the basis of its hearing support unit and the employment of an Auslan interpreter. Soon after her commencement at the school, the Auslan interpreter went on maternity leave and no replacement was sought. The class teacher and the teachers' aide could not communicate in Auslan. The student became bored and confused because she could not understand her teachers. She began to obtain poorer marks than she had previously been awarded.

#### ***Recommendation 7:***

***The NSW Government and DET should ensure adequate funding for effective Auslan teacher training.***

#### ***Recommendation 8:***

***The DET should promote the importance of the provision of Auslan to teachers.***

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<sup>11</sup> Deaf Society of NSW

**Recommendation 9:**

***The NSW Government should increase the benchmark standard of fluency for all support teachers and interpreters to NAATI Paraprofessional level accreditation or recognised Deaf Relay Interpreter training.***

**2E Access to premises**

School premises are still not meeting physical access standards for people with disability. Physical access is a fundamental pre-requisite to accessing education. This issue has begun to be addressed through the *Draft Disability (Access to Premises- Buildings) Standards* (Cth) and we are hopeful that the passing of these Standards is imminent. Increased mobility access is an essential need for students, and was elaborated upon in the case of *Scott and Bernadette Finney v The Hills Grammar School [1999]* HREOCA 14 where the defence of unjustifiable hardship did not succeed.

**Case study**

A high school student was born with a deformity to his feet (club feet) and required walking sticks to be able to walk. While still at primary school, there were problems with the provision of special transport to assist him to travel to school, and he was therefore unable to attend school for a substantial period of time. As the special transport bus was unsuitable, he had to try and ride his bike to school which caused him great pain.

When he started attending high school, he had to walk up three flights of stairs to his classrooms, where it was extremely painful for him to even walk up one flight of stairs. As a result, he was put into a classroom on the ground floor alone for up to four hours a day if he was scheduled for classes on the higher levels of the school building.

Eventually as a result of the intervention of the NSW Ombudsman, the school was forced to offer classes on the ground floor to the student.

**Recommendation 10:**

*The NSW Government should call upon the Federal Government to pass the Draft Disability (Access to Premises- Buildings) Standards (Cth) so that they are enforceable in law.*

**Recommendation 11:**

*The NSW Government should commence compliance with the Draft Disability (Access to Premises – Buildings) Standards (Cth).*

**3 The provision of a suitable curriculum for intellectually disabled and conduct disordered students (TOR5)**

**3A Segregated Schools**

While the CRPD and domestic law mandate a move towards inclusive education, we acknowledge segregated schools currently exist and stress that while this is the case, these schools must be adequately resource. In our experience, they are not:

**i) Teaching quality**

The teachers are employed on a primary formula basis – i.e. under the secondary formula, a requisite number of teachers for specialist subjects such as geography, history, art, science, and business studies are designated by the DET. However, for special schools, there is no requisite designation. As a result, there are no systems in place to guarantee the employment of specialist teachers for these subjects. Often, teachers in these schools are primary trained and employed on a temporary basis with high turnover.

**ii) Equipment**

The school equipment is also significantly under-resourced, with secondary education requirements – for example, science labs, and music equipment, woodwork and metalwork type facilities, and art rooms are non-existent in the majority of these schools.



### iii) Schools moving towards inclusion

One of the key rationales for the development of special schools initially was to assist in the inclusion of students into society. According to the Schools Principal's Association, facilities for therapy and intervention to assist in this process are severely lacking within these schools<sup>12</sup>. In the majority of schools, access to a counsellor is limited to one day per week and no additional psychological or other types of therapy are available. While we recognise that ultimately the provision of therapy is not the direct responsibility of the DET, such support measures, leading to the development of life and social skills are fundamental to ensuring the provision of inclusive education, as mandated by Article 24(2) (e) of CRPD. As an education provider, DET must play a greater role in facilitating and leading the provision of therapy to these students.

Ultimately the goal should be inclusion in mainstream schools, yet it appears to us that the relationships between mainstream and special schools are minimal.

Further, there are no interlinking relationships between special schools and vocational training such as with NSW TAFE. Most comprehensive high schools have joint TAFE programs. Opportunities for training in vocational education is an essential part of long-term plans for inclusion in society and providing options for a student's future. However, students at special schools miss out on these kinds of opportunities.

***Recommendation 12:***

***With the goal of inclusion in mind, we recommend that the DET evaluate the effectiveness of the provision of education to students in special schools, including funding, resource provision, facilities and therapy programs.***

***Recommendation 13:***

***We also recommend that the DET explore options for partnership between TAFE and special schools and between mainstream schools and special schools, and to create plans for inclusive education.***

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<sup>12</sup> Schools Principal's Association, Submission to Inquiry into Provision of Education to Students with Disability or Special Needs, February 2010.

### **3B Suspension policies in mainstream schools**

DDLC frequently encounters complaints regarding the application of the standard DET suspension policies to students with behavioural disabilities. The result is that often students are suspended for weeks on end, which force them to miss out on educational opportunities. Often the behaviour that led to the suspension is a result of adjustments not being made for the student's disability in the first place. For example, children with autism spectrum can 'act up' when their environment is disrupted or they are not able to communicate their needs. We recognise the duty of the DET to balance OHS obligations to teachers and other students, but we submit that often the balance reached severely disadvantages the student with a disability.

#### **Case study**

An eight year old primary school student with a mild intellectual disability and suffering from post-traumatic stress disorder was attending a mainstream school. He was suspended a number of times for violent behaviour throughout year 1, with an accrued amount of 80 days in one year. This amount was in breach of the standard policy that recommended 20 days as the maximum accrued amount. The school refused to accept his enrolment for year 2, and he was placed in a class for emotionally disturbed students at an alternative school. He was refused enrolment in a mainstream school.

#### **Case study**

An eight year old primary school student with Asperger's, a type of Autism Spectrum disorder, was suspended for a period of twenty days for trying to escape from physical restraint imposed by a staff member. The parents of the child subsequently felt intimidated by the school and considered the option of moving him to another school as they feared he would be exposed to similar treatment again. The school was the only one in his (rural) area that catered for students with autism. Accordingly his mother withdrew him from school completely.

**Recommendation 14:**

***The DET review its standard suspension policies.***

**Recommendation 15:**

***The DET institute training in alternative behavioural management policies for schools.***

**3C Education Amendment Act – transferring students with behavioural disabilities**

In particular, the release of the *Guidelines Issued Under Part 5A of the Education Act 1990 for the Management of Health and Safety Risks Posed to Schools by a Student's Violent Behaviour* ("the Guidelines") is an issue of concern for DDLC.

**i) Pose a risk**

The Guidelines are cited to:

*'...only apply to students who pose a current risk to schools because of their violent behaviour.'*

This definition of application is wide – and there is no certainty as to what 'pose a current risk' constitutes. Certainly, 'extremely severe risk' may have been a better test. However, the use of the words 'pose a risk' could mean that any student that may manifest in violent behaviour as a result of their disability, which is 'occurring' could suddenly fall under these Guidelines. This test is too wide and too vague. The low threshold means that students can easily fall under these Guidelines, which have the potential to be applied incorrectly and on too wide a discretionary basis.

**ii) Safety and reasonable adjustments**

While the Guidelines assert that the requirements of the Standards should be met at all times, as the Standards are descriptive only, and have not been tested in a Court, it may be easy for the Standards to be watered down on this particular issue. In particular, the Guidelines cite that an adjustment is reasonable if it:

*'achieves this purpose while taking into account the student's learning needs and balancing the interests (including safety) of all parties affected including those of the student with the disability, the school, staff and other students.'*

There is no formula available to determine what weight is given to the safety of other students, or perceived prospective safety of other students, and how this is balanced with the student's right to an inclusive education. There is also no indication of how these Guidelines intersect with the provisions against indirect and direct discrimination in the DDA, which now include the 'failure to make reasonable adjustments' as unlawful discrimination<sup>13</sup> where the student incurs less favourable treatment. DET needs to consider this issue to ensure that the implementation of the Guidelines is not in breach of the DDA.

### **iii) Violent behaviour**

There is also no formula in the Guidelines regarding an assessment of violent behaviour. The Guidelines cite that:

*'only a small number of students with a disability will have a **history of violent behaviour...**'<sup>14</sup>*

It is also not stipulated what constitutes a 'history', or what constitutes 'violent behaviour'. Certainly, there will be opportunity for these vague definitions to be abused. Within the Guidelines, no allowance is made for violent behaviour that occurs as a result of antagonism, and the omitting of such incidences from a student's 'history'.

At DDLC, we see that students with behavioural disabilities are often bullied. In some cases, students with disabilities may not understand rules of social interaction and play, and may not comprehend how to react to bullying, especially in the absence of anti-bullying programs. Violent behaviour may occur as a result of fear, anxiety or antagonism- or more often because adequate support mechanisms are not in place to assist some students express their needs through other means. The Guidelines do not allow for discretion in assessing the reasons behind violent behaviour. In the absence of alternative guidance,

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<sup>13</sup> See s 5 and 6, *Disability Discrimination Act 1992* (Cth)

<sup>14</sup> page 84, Guidelines

these incidences may be added to a student's record to potentially prejudice them at a future point in time.

The fact that education providers already have an insufficient understanding of their legal obligations under the Standards, means that this check upon the application of the Guidelines could go sorely unused. The Guidelines could therefore be applied more widely than originally intended by the NSW Government. Again, this could be a cause for legal challenge of the Guidelines as in breach of the DDA.

**Case study**

A kindergarten boy with autism spectrum disorder is bullied at the school that he attends. In one instance, a child sprays him with chemical spray in his groin area, to which he has a bad allergic reaction. Hours later, he threatens to kill another child with scissors in the classroom. He also does not have the fine motor skills necessary to operate a pair of scissors. The school suspends him indefinitely on the basis of his violent behaviour.

**iv) Effect on child**

The transfer of students can also be extremely disruptive to the student as behavioural disabilities often include an inherent struggle with changed circumstances. The transfer of students with behavioural disabilities can mean that students are shunted from school to school, with parents having to bear the brunt of the effect that this has on their child. This can also lead to a rapid disintegration in the student's condition.

**Case study**

A student in primary school with a behavioural disability is not allowed to attend the local primary school as the school is unable to cope with his disability. He is provided with entry to a special school, where the staff are inadequately trained in how to deal with students with special needs. His attendance at the special school is detrimental to his emotional health and he is withdrawn from the school. He attempts suicide twice. His parents struggle to find a school that he

can be enrolled in. Finally, there is a staff change over at the special school and he is re-enrolled there. Both he and his parents suffer immensely emotionally.

***Recommendation 16:***

***The DET should inform schools of their overriding obligations under the Standards, and the potential for breach of the Standards through mis-application of the Guidelines.***

**v) Conforming with the DDA and the Standards**

It is highly questionable as to whether the Guidelines are in conflict with the DDA and the Standards. In the case that they do conflict, such conflict would be in breach of the DDA and may be overturned by a Court in the future. Essentially, these Guidelines are vague, and it is the implementation of the Guidelines that will guide as to whether they conflict with Commonwealth law. The NSW Government and the DET should therefore review implementation of the Guidelines so that their application is not in conflict with the DDA, the Standards and CRPD.

***Recommendation 17:***

***The NSW Government and the DET should review the implementation of the Guidelines to ensure compliance with the DDA, the Standards and CRPD.***

**4 Student and family access to professional support and services, such as speech therapy, occupational therapy, physiotherapy and school counsellors (TOR6).**

**4A Prohibitive costs**

The majority of families that approach DDLC are in the low income range.

The cost of treatment for a child with a disability is an extremely large strain on a family. These costs are also a consideration in enforcing the child's entitlements under disability discrimination law.

For many families, the cost of going to Court is prohibitive due to the costs jurisdiction of the Federal Court. However, this cost is also prohibitive as families of a student with disability already bear the burden of high costs of intervention treatment for their student.

## **5 The provision of adequate teaching training, both in terms of pre-service and ongoing professional training (TOR7).**

It is essential that education providers and staff be effectively trained in understanding disability.

### **5A Disability awareness training**

Disability awareness training is essential as it assists staff in their interaction with students with a disability.

In assisting complainants in both the ADB and AHRC processes, an outcome that is often sought by complainants is disability awareness training. Discrimination often sources from a lack of understanding of how the disability affects an individual. Disability awareness training is therefore an integral part in reversing trends towards discrimination in education. Disability awareness training is also important as it facilitates greater communication between staff, students and parents. As staff develop a greater understanding of disability, they are more informed and therefore greater placed to assist the student in the ways they require. The student is also less likely to be alienated or insulted, and feel implicitly that they are misunderstood and a burden.

The importance of disability awareness training is also emphasised in Article 24 of CRPD:

*4. In order to help ensure the realization of this right [to education], States Parties shall take appropriate measures to employ teachers, including teachers*

*with disabilities... and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.*

**Case study**

DDLC represented the father of a high school student with muscular dystrophy who had been harassed at school by a teacher. The student had been fearful of returning to school after a relief teacher had mimicked the way he walked in front of the class. The matter settled when the education provider agreed to implement a new education plan that would encourage the boy's participation in class, provide him with access to the school computer, a new adjustable desk and compensation. The relief teacher agreed to attend a training day on disability and discrimination awareness.

**Case study**

A student at a primary school has a visual impairment. Her teacher does not understand that she cannot see the board. The student continues to sit in a row in the class where she cannot physically see the board. She slips further and further behind. The teachers at the school also do not understand her visual impairment. A male student who is a friend of hers publicly receives a special citizenship award at an annual school assembly for actually 'being her friend'. Her parents choose not to submit a complaint, but hope it doesn't happen again. Noting this issue, DDLC has offered to train DET in disability awareness, as well as obligations under the Standards, but has received no response.



## **6 Any other related matters, which includes for this report:**

### **6A The need for training in the obligations under the Standards (TOR8).**

The Standards outline three main obligations on education providers:

- the obligation to consult;
- the obligation to make reasonable adjustments; and
- the obligation to eliminate harassment and victimisation.

There is a clear and definite need for effective training in informing teachers, staff and education providers of their obligations under the Standards. Staff also should be informed of the effect that failure to meet these obligations may have on a child's education and general health, as well as potential legal outcomes.

The measures for compliance within the Standards provide a rough guide as to what fulfilment of the Standards looks like. These measures need to be clearly communicated to teachers, so that they can work towards and reach effective outcomes that genuinely assist the student.

***Recommendation 18:***

***The DET review and replan teacher training regarding the obligations under the Standards, including training on the measures for compliance.***

In the following sections we outline the obligations under the standards and provide case studies as to where these obligations are not being met:

#### **i) The obligation to consult**

The *Disability Standards for Education 2005* outline the need for consultation with students and parents in Parts 3.5; 4.2; 5.2; 6.2; and 7.2. There is therefore a great focus placed on the obligation of education providers to consult. Specific teacher training is required, in the legal obligation to consult, and how to practically consult with students with disabilities and their parents.

We have found in a number of complaints, that while schools often make some effort to engage with families of children with disabilities, this level of consultation is inadequate to address the child's needs. Part of this problem is ignorance in education providers about their obligation to consult; and knowledge of how that obligation can be fulfilled.

The level of consultation can also erode over time. This is in breach of the Standards, which cites:

*(3) The provider must repeat the process set out in subsection (2) [regarding consultation about whether the disability affects the student's ability to participate in the program and the making of reasonable adjustments] ...as necessary to allow for the changing needs of the student over time.*

This is particularly a problem as both assistive technology, support structures and the nature of the disability can change over time.

#### **Case study**

A primary school is generally not open to communication between staff and parents and has stopped offering parent teacher interviews. The family of a student with a disability are offered only two meetings in one year to discuss their daughter's welfare. These are for half-hour periods each. The Individual Education Plan (IEP) of the child is never provided to the family. Meetings required for adjustments to the IEP are infrequent and inadequate. The family are made to feel like a nuisance personally by the Principal. Complaints to the school are not acted upon.

#### **ii) Obligation to make reasonable adjustments**

The obligation of schools to make reasonable adjustments is now also part of the *Disability Discrimination Act 1992* (Cth), and failure to make reasonable adjustments can constitute direct or indirect discrimination.

We have found in a number of complaints that the failure to make reasonable adjustments rests greatly on the failure to consult.

### iii) **Obligation regarding harassment and victimisation**

Part 8.3 of the Standards outlines that education providers:

*(2) ... must take reasonable steps to ensure that **its staff and students are informed about:***

*(a) the **obligation not to harass or victimise students with disabilities, or students who have associates with disabilities; and***

*(b) the **appropriate action to be taken if harassment or victimisation occurs; and***

*(c) **complaint mechanisms available to a student who is harassed or victimised in relation to a disability of the student or of an associate of the student.***

Part 8.5 – Measures for compliance with Standards -. These are measures that education providers may implement to enable the student to participate in education and training in an environment free from harassment and victimisation including ensuring that:

*(a) the provider's **policies, procedures and codes of conduct for its staff and students explicitly prohibit harassment and victimisation of students with disabilities, on the basis of disability, including:***

*(i) the need for individual strategies and adjustments for a student; and*

*(ii) the need to use such supports as a wheelchair, hearing aid, breathing support, an interpreter, a reader, an assistant or carer or a guide or hearing dog, or other appropriately trained animal; and*

*(b) the **policies, procedures and codes of conduct for staff and students explicitly prohibit harassment and victimisation of the associates of students with disabilities, on the basis of disability; and***

*(c) the **procedures for handling any cases or complaints of harassment and victimisation relating to disability are fair, transparent and accountable; and***

*(d) the provider's **students and staff are effectively informed and reminded, at appropriate intervals, of their rights and responsibilities in maintaining an environment free from harassment and victimisation on the basis of disability; and***

- (e) the professional development programs offered to the provider's staff ensure that policies, procedures and codes of conduct, including matters of harassment and victimisation, are known and understood by staff, and that staff are trained to detect, and deal with, harassment in education and training settings; and*
- (f) any cases or complaints of harassment or victimisation on the basis of disability are handled promptly and with due regard to the severity of the matter.*

Within the Measures for Compliance, there is a large focus on the 'policies, procedures and codes of conduct' for education providers. However, our casework indicates that harassment policies, if in existence at all are not adequately communicated to staff. Nor are complaints of harassment handled promptly.

**Case study**

A girl studying at a high school in a rural area with a visual impairment is harassed by other children and bullied on the basis of her disability. When she tells a DET representative about her experience, she is told to 'get over it, that's life sweetie'.

**Case study**

A girl studying at a primary school, with a behavioural disability, is bullied for a period exceeding one year. This has an extremely detrimental effect on her, exacerbates her disability, and impacts on her general health and her family. Her parents report the bullying incidences constantly to the school. They are told, 'the child who bullies has issues'. And 'I'll look into it'. This was never done. The bullying escalates to such an extent, and the child's psychological injuries escalate to such an extent, that her parents are forced to withdraw her from the school.

**Case study**

A kindergarten boy diagnosed with high-functioning autism is hit with sticks by another child and sustains bad bruising. When the parents report it to the class teacher, she reports the mother to DOCS. The principal promotes the view that the boy was involved in self-harm.

**6B Any other related matters, which includes for this report:****The need for a Centralised Approach to fulfilling the obligations under the Standards****i) The interface required between the DET and the Standards**

The Standards are by their nature descriptive, rather than prescriptive. This means the functionality of the Standards is dependent on how they are interpreted and applied to each particular student's situation.

As noted earlier in this submission, there is a need for a more proactive role for the DET in the form of setting up a Centralised Equity Services System with specialist staff equipped at interpreting the Standards and applying them to a specific situation.

Staff in this unit would then work with each student and school to develop individual support plans, that were reviewed regularly. This ISP would enumerate more specific targets as applied to each student, than those provided in the Standards. By way of example, in relation to the obligation to consult the ISP could include:

- a minimum number of meetings per year required between schools and a student with disability;
- a minimum number of meetings per year following change in circumstance;
- a standard timetable suggesting how far in advance meetings should be made;
- a suggested flexible but minimum timetable for reassessment of a child's changing needs;
- specific information to be highlighted/addressed in the individual education plan;
- parents to be provided in writing with their child's individual education plan.

In the absence of such a plan, families can be made to feel like a nuisance if they request the number of meetings required for their child's needs. The development of this plan would assist parents to specifically know what consultation processes they are entitled to.

## **7 Conclusion**

In order to comply with domestic and international legal obligations, the needs of students with disabilities requires examination as well as effective action. The DET needs to take a more proactive role to ensure that the legal entitlements of students with disabilities are being met, and in our opinion one of the major ways this can be done is through the use of adequately equipped centralised support units.

All of our recommendations require that there be a substantial increase in funding to the provision of education to students with disabilities in order to move towards inclusive education as mandated by CRPD. Funding should also be increasing in quality and encouraging greater effectiveness in service delivery. This increase in funding should occur in 2010, with a long term plan for continued funding, so that schools and the DET can implement programs and strategies that will be long lasting and sustainable.

We laud the initiation of this Inquiry and look forward to seeing results in funding allocations, implementation of systems as well as other creative measures to guarantee inclusive education for students with disabilities and special needs in NSW. Ultimately, a decrease in education complaints to our centre would be ideal if it indicated that students with disabilities were gaining equal access to a fulfilling education.

## 8 Summary of Recommendations

***Recommendation 1:***

The DET should investigate a Centralised Equity Services System, previously employed by TAFE where a centralised secretariat system, where 'disability specialists', experienced in working with students with a particular form of disability, liaise with schools on behalf of students and their parents.

***Recommendation 2:***

*The DET should ensure that all schools, have adaptive technology installed on computers for students' use.*

***Recommendation 3:***

*The DET should ensure that all schools know what program formats are compatible with accessible technology so that students can access the information they need for their education.*

***Recommendation 4:***

*The DET should review its current communication with schools regarding the National Secondary School Computer Fund and all subsequent programs under the Digital Education Revolution, to ensure that schools know the application process for Commonwealth funding for students with disabilities.*

***Recommendation 5:***

*The DET should review its channels of communication to schools regarding funding availability.*

***Recommendation 6:***

*The DET should substantially increase special funding to provide for students with disability in education, particularly to areas of special disadvantage.*

**Recommendation 7:**

*The NSW Government and DET should ensure adequate funding for effective Auslan teacher training.*

**Recommendation 8:**

*The DET should promote the importance of the provision of Auslan to teachers.*

**Recommendation 9:**

*The NSW Government should increase the benchmark standard of fluency for all support teachers and interpreters to NAATI Paraprofessional level accreditation or recognised Deaf Relay Interpreter training.*

**Recommendation 10:**

*The NSW Government should call upon the Federal Government to pass the Draft Disability (Access to Premises- Buildings) Standards (Cth) so that they are enforceable in law.*

**Recommendation 11:**

*The NSW Government should commence compliance with the Draft Disability (Access to Premises – Buildings) Standards (Cth).*

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