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NGO in Special Consultative Status with the
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Senator Judith Troeth
Chair
Employment, Workplace Relations and Education Committee
The Senate
Parliament of Australia
CANBERRA ACT 2600

Dear Senator Troeth

Inquiry into the *Workplace Relations Amendment (Work Choices) Bill, 2005*

We write to provide a brief submission to the Inquiry into the *Workplace Relations Amendment (Work Choices) Bill, 2005*.

1.0 About PWDA

People with Disability Australia Incorporated (PWDA) is a national disability rights and advocacy organisation. Our primary membership is made up of people with disability and organisations mainly constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement. We have a cross-disability focus - we represent the interests of people with all kinds of disability. PWDA is a non-profit, non-government organisation.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are respected and celebrated.

PWDA has a number of policy concerns regarding the Bill. We take the view in this submission, however, that it would be most constructive for us to direct the Committee's attention to particular textual matters that are capable of being remedied through relatively simple amendments that we outline below.

We would have welcomed the opportunity to be provided with more time in which to comment on the Bill.

Our principle concerns about the Bill, in this submission, relate to the inadequacy of the Bill's handling of the concepts 'disability' and 'discrimination'.

2.0 Conceptualisation of disability

At various points throughout the Bill references are made to two different conceptualisations of disability. The first conceptualisation refers to 'physical or mental disability'. This phrase is not defined in the Bill but is used whenever the Bill refers to discrimination on certain grounds. See for example ss 3(m), 44B, 83 BB (3)(b), amongst others.

This undefined phrase is clearly at odds with Australian Government legislation prohibiting discrimination in the area of employment on the ground of disability, the *Disability Discrimination Act, 1992* (DDA). The DDA contains a definition of disability that is more inclusive. As a result, the DDA definition has eliminated the possibility of legal 'skirmishing' around the issue of who has and who doesn't have a disability. This very type of 'skirmishing' exists in the United States, which in the *Americans with Disabilities Act* adopted a less inclusive definition of disability that looks more like the Bill's definition than that of the DDA.

The DDA definition of disability was recently examined by the High Court in the case of *Purvis v State of New South Wales* and was found therein to reflect contemporary domestic and international policy practice in defining disability.

Recommendation 1: Wherever the phrase 'physical or mental disability' appears in the Bill it should be replaced with the phrase 'disability'. 'Disability' should be defined in identical terms to the definition of disability in the DDA.

Recommendation 2: Given the historic disadvantage faced by people with disability in obtaining and retaining employment, we also recommend that the list of 'workers in disadvantaged bargaining positions' (s 83BB (2)) should be expanded to include people with disability.

The second reference is to 'employee with a disability'. 'Employee with a disability' is defined in the Bill as an employee who is eligible for the Disability Support Pension (DSP) (s90B). S90C defines a 'pro rata disability pay method' that determines a rate of pay for employees with a disability. S110 details the wage-setting parameters of the Australian Fair Pay Commission and lists the factors to which the Commission is to have regard when setting wages, including:

'providing minimum wages for employees with disabilities that ensure those employees are competitive in the labour market'.

The intent behind these provisions is to provide the means for a productivity-based wages system for employees with disability. We foresee, however, great difficulties in the implementation of this system flowing from the limited definition of 'employee with a disability'. From July 2006 there will essentially be two categories of people in receipt of the DSP. These are those people who were already in receipt of the DSP prior to the 2005/2006 Federal Budget and those people who will be deemed as being unable to work more than 15 hours per week. Those in the former category may not all be people who would require the supported wages system. Rather, many of this group require increased investment in infrastructure and support in order to gain and maintain a job.

Recommendation 3: That the definition of ‘employee with a disability’ contained in the Bill be amended to adequately reflect only that group of employees that require the supported wages system to participate and be competitive in the labour market.

3.0 Conceptualisation of discrimination

There are numerous references to discrimination throughout the Bill. For the most part the references refer to preventing and eliminating discrimination ‘on the basis’ of or ‘because of’ certain grounds. See for example ss 3 (m), 83 BB (3)(b) amongst others. The use of these phrases indicate a direct and sole causative link between the discrimination and the characteristic protected by the anti-discrimination legislation.

State, Territory and Federal discrimination laws do not require that the discriminatory basis or ground be the sole basis or ground in order for a complaint of discrimination to succeed. There is, therefore, a clear inconsistency between the Bill provisions pertaining to discrimination and those of anti-discrimination laws themselves.

To remedy this inconsistency and potential constitutional problem, such sections of the Bill should be amended to include the words ‘or for reasons including’ so that they might read as follows, ‘discrimination because of or for reasons including race...’, or again ‘discrimination on the basis of or for reasons including race...’. In one provision the Bill does so provide and we recommend that this approach be adopted throughout. See. s44B.

Recommendation 4: Those provisions of the Bill referring to discrimination, similar to ss 3 (m), 83 BB (3)(b) for example, should be reworded to include the words ‘or for reasons including’ to better reflect existing anti-discrimination laws and to avoid inconsistency.

PWDA welcomes any opportunity to make further submissions to the Committee. Should you have any questions or would like further information, please do not hesitate to contact Matthew Keeley, Senior Legal Officer on any of the contact numbers above.

Yours sincerely

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