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Our Ref:

6 December 2004

Committee Secretary
Senate Legal and Constitutional References and Legislation Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

By e-mail: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into *Disability Discrimination Amendment (Education Standards) Bill 2004*

I write to provide our comments on the *Disability Discrimination Amendment (Education Standards) Bill 2004* (the Bill), and on related matters.

The Public Interest Advocacy Centre (“PIAC”) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision making.

PIAC welcomes the opportunity to make a submission—albeit brief—to this Inquiry

PIAC is particularly concerned to ensure that any amendments made to the *Disability Discrimination Act 1992* (Cth) (“**the DDA**”), whether for the purposes of ensuring the power to make Disability Standards or otherwise, are consistent with the recommendations of the Productivity Commission and promote the objects of the DDA.

PIAC’s brief submission is attached.

Yours Sincerely

A handwritten signature in blue ink, appearing to read 'Robin Banks', with a long horizontal flourish extending to the right.

Robin Banks
Director

Encl:

Submission to the
Senate Legal and Constitutional
References and Legislation Committee

Inquiry into the

***Disability Discrimination Amendment
(Education Standards) Bill 2004***

6 December 2004

Robin Banks
Director

Summary of recommendations

Recommendation 1:

That the Senate Legal and Constitutional Legislation Committee seek an extension of time to report to the Senate to provide people with disabilities and other interested parties with sufficient time to consider the scope and effect of the Bill and to make submissions.

Recommendation 2:

That clause 1 of Schedule 1 of the Bill be amended as follows:

education provider means any person who, or body that, whether for payment or not provides education or training, or related services, and includes, but is not limited to:

- (a) an educational authority ... [proposed additional text]

Recommendation 3:

That clause 3 of Schedule 1 of the Bill be amended as follows:

This section does not make it unlawful for an education provider to discriminate against a person or student as described in subsection (1), (2) or (2A) on the ground of the disability of the person or student or a disability of any associate of the person or student if avoidance of that discrimination would necessarily impose an unjustifiable hardship on the education provider concerned. [proposed additional text]

Recommendation 4 :

That clause 1 of Schedule 1 of the Bill be amended as follows:

Insert:

adjustment means:

- (a) a measure or action (or group of measures or actions) taken or proposed to be taken in order to provide substantive equality for a person with a disability, including an aid, a facility, or a service that the person requires; or
- (b) a change made or proposed to be made to a measure or action (or group of measures or actions) taken for the purpose of providing substantive equality for the person with a disability.

reasonable adjustment means an adjustment that:

- (a) promotes or achieves substantive equality for the person with a disability; and
- (b) does not cause unjustifiable hardship.

substantive equality means equality of opportunity and treatment for the person or persons with disabilities compared to persons without disabilities where:

- (a) in identifying adjustments that need to be made to achieve substantive equality, the individual requirements of the person or persons with disabilities and other relevant considerations must be taken into account; and
- (b) the extent to which the implementation of an adjustment achieves substantive equality for a person or persons with disabilities can be assessed, after the adjustment has been made, by comparing the opportunities provided for and the treatment of the person or

persons with disabilities with the opportunities provided for and the treatment of a person or persons without disabilities.

Recommendation 5:

That clause 2 in Schedule 1 of the Bill be amended to add after the existing text:

- (2B) If there is an adjustment or adjustments that would prevent or limit discrimination under subsections 22(1), (2) and (2A), an education provider is required to make reasonable adjustments.

Recommendation 6:

That the Senate Legal and Constitutional Legislation Committee seek from the Senate an expanded reference of the current Inquiry to include a review of the draft Disability Standards for Education and call for submissions to be made on or before 31 March 2005.

Introduction

About PIAC

The Public Interest Advocacy Centre (“**PIAC**”) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision making.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, community legal centres, private law firms, professional associations, academics, experts, industry and unions to achieve our goals. PIAC works on public interest issues at both a NSW and National level.

PIAC was established in 1982 as an initiative of the (then) Law Foundation of New South Wales, with the support of the NSW Legal Aid Commission. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty percent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The current Inquiry

On Thursday 2 December 2004, PIAC became aware that the Senate Legal and Constitutional References and Legislation Committee (“**the Committee**”) had, on 1 December 2004, announced its Inquiry into the *Disability Discrimination Amendment (Education Standards) Bill 2004* (“**the Bill**”). The Committee is to report to the Senate on 7 December 2004. This allows only three working days in total between the reference to the Committee and its report to the Senate.

PIAC has prepared these submissions in light of the extremely limited time available and is concerned that many with a direct interest in this Bill will have no opportunity to inform the Committee of their views. Of particular concern is the fact that, given the proposed extension of the defence of unjustifiable hardship, people with disabilities will have reduced rights in education as a result of the proposed amendments. Reductions in rights under human rights legislation such as the *Disability Discrimination Act 1992* (Cth) (“**the DDA**”) should never be made lightly and certainly should not be made with such haste.

Recommendation 1:

That the Senate Legal and Constitutional Legislation Committee seek an extension of time to report to the Senate to provide people with disabilities and other interested parties with sufficient time to consider the scope and effect of the Bill and to make submissions.

PIAC’s experience with the *Disability Discrimination Act 1992* (Cth)

Through its litigation practice, PIAC has been involved in several test cases under the DDA.

In 1998, PIAC represented Scarlett Finney in her case alleging unlawful disability discrimination in education by the Hills Grammar School. Scarlett, a child with spina bifida had been refused enrolment at the school because she had a disability and the school perceived that it could not—because of unjustifiable hardship—make the necessary adjustments for Scarlett. The decision of

the Hearing Commissioner at first instance was that the school had unlawfully discriminated against Scarlett. This finding was upheld by the Federal Court.¹

In 2000, PIAC represented Bruce Maguire in his case alleging unlawful disability discrimination in service provision by the Sydney Organising Committee for the Olympic Games (“SOCOG”). Bruce, a blind man had been unable to access ticketing information about the Olympic Games, either through the ticket information posted to all households by SOCOG, or through the SOCOG website. SOCOG argued that it would impose an unjustifiable hardship and take up to a year to make the necessary adjustments. The Inquiry Commissioner upheld Mr Maguire’s complaint.²

PIAC has also advised and represented a number of complainants with other complaints under the DDA involving alleged unlawful discrimination in education and other areas. In addition, PIAC has made submissions to the Productivity Commission’s public inquiry into the DDA in 2003, and in 2004, PIAC made a submission to the Committee’s Inquiry into the *Disability Discrimination Amendment Bill 2003*.

As a result of this experience, PIAC is concerned to ensure that any amendments to the DDA reflect the purpose and objects of the DDA and are consistent with efforts to achieve substantive equality in key aspects of Australian society for people with disabilities.

The Disability Discrimination Amendment (Education Standards) Bill 2004

The Explanatory Memorandum to the Bill states that the Bill seeks to amend the DDA in order to ensure that the provisions of the draft Disability Standards for Education (“**the draft Education Standard**”) are fully supported by the Act.

PIAC is concerned that the Bill does not achieve this aim and urges the Committee to consider several further amendments to ensure the DDA fully supports the draft Education Standard

Clause 1 of Schedule 1 of the Bill

Clause 1 provides an additional definition to be included in section 4 of the DDA. This is a definition of “education provider”, being a term that is not currently used or defined in the DDA.

The Explanatory Memorandum states:

The draft Education Standards employ the general term ‘education provider’ to describe educational authorities, educational institutions and organisations whose purpose is to develop or accredit curricula or training courses. However this term is not currently used nor defined in the Act.

When proclaimed, this item will introduce a definition of ‘education provider’ to subsection 4(1) of the Disability Discrimination Act 1992 (‘Interpretation’). The term ‘education provider’ **will be defined to include an** ‘educational authority’ and an ‘educational institution’, both of which are already defined, as well as an ‘organisation whose purpose is to develop or accredit curricula or training courses used by other education providers’. [**Emphasis added.**]

¹ At first instance: *Scott and Bernadette Finney on behalf of Scarlett Finney v The Hills Grammar School* [1999] HREOC No. H98/60 (Unreported, G Innes AM, 20 July 1999). On appeal: *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658.

² *Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games* [2000] HREOC No. 99/115 (Unreported, the Hon W Carter QC, 18 November 2000).

This suggests an inclusive definition of education provider.

The relevant part of clause 1 reads:

education provider means:

- (a) an educational authority ...

The use of the word “means” limits the scope of the definition to the actual entities listed rather than providing for a definition that goes beyond the listed entities. This is of particular concern given the likely changes to education service delivery with, for example, changes in technology and expansion in the delivery of training by individual providers.

Recommendation 2:

That clause 1 of Schedule 1 of the Bill be amended as follows:

education provider means any person who, or body that, whether for payment or not provides education or training, or related services, and includes, but is not limited to:

- (b) an educational authority ... [proposed additional text]
-

Clause 3 of Schedule 1 of the Bill

Clause 3 provides for the extension of the existing defence of unjustifiable hardship from enrolment to all aspects of the provision of education services covered by the DDA. This is done through an amendment to section 22 of the DDA to provide a new subsection 22(4).

PIAC is concerned about and opposes any extension of the defence of unjustifiable hardship. However, PIAC recognises that this is consistent with the recommendations of the Productivity Commission, which are discussed in detail below. In that light, PIAC is concerned to ensure that it is clear to education providers that they cannot avoid obligations to provide non-discriminatory access to education because one possible mechanism for avoiding discrimination would impose unjustifiable hardship, despite there being other mechanisms that would not create such hardship. It is also important to ensure that education providers and courts understand that the intention of the DDA is for the obligation to provide non-discriminatory treatment to continue up to the point of unjustifiable hardship. That is, if there are measures that will provide for less discriminatory access short of those that impose unjustifiable hardship, such measures must be implemented.

Because of these concerns, PIAC proposes the insertion of the word “necessarily” as a qualifier for the imposition of unjustifiable hardship.

Recommendation 3:

That clause 3 of Schedule 1 of the Bill be amended as follows:

This section does not make it unlawful for an education provider to discriminate against a person or student as described in subsection (1), (2) or (2A) on the ground of the disability of the person or student or a disability of any associate of the person or student if avoidance of that discrimination would necessarily impose an unjustifiable hardship on the education provider concerned. [proposed additional text]

Clause 4 of Schedule 1 of the Bill

Clause 4 provides for amendments to section 31 of the DDA, which is the section that empowers the Minister to make disability standards. There are three parts to this amendment. New subsection 31(1A) provides that the disability standards may require reasonable adjustments to be made.

This proposed subsection imports into the DDA a new term: “reasonable adjustment”, but only for the purposes of disability standards.

PIAC strongly supports the clear statement of an obligation to make reasonable adjustments in order to prevent discrimination and commends to the Committee the report of the Productivity Commission Public Inquiry into the DDA, *Review of the Disability Discrimination Act 1992*.³ PIAC notes that the Productivity Commission stated:

The Commission has made a number of recommendations for improving the operation of the DDA, including the introduction of an explicit duty to make reasonable adjustments. This goes to the heart of the DDA, and would complement other features such as the prohibitions on direct and indirect discrimination. Such a duty would be consistent with the Australian Government’s original intentions for the Act, and would promote awareness among organisations and people with disabilities. Balanced by a clearer and broader unjustifiable hardship defence, the duty would reassert the role of the DDA as a vehicle for achieving real change for people with disabilities.⁴

To this end, the Productivity Commission made the following relevant recommendations:

RECOMMENDATION 8.1

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

- Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.
- The person or persons on whom the duty would fall should be identified.
- Examples of how the duty might apply should be included in each area of the Act.

RECOMMENDATION 8.2

The *Disability Discrimination Act 1992* should be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.

RECOMMENDATION 8.3

The criteria for determining unjustifiable hardship in the *Disability Discrimination Act 1992* (s.11) should be expanded to:

- require consideration of the costs and benefits to all persons and an assessment of the net benefit to the community
- include as a relevant circumstance, the availability of financial and other assistance
- clarify that any respondent to a complaint (not just ‘service providers’) can expect to have their action plan considered.⁵

PIAC strongly supports the proposal in recommendation 8.1 and accepts that, if this occurs, there is a stronger argument for extending the defence of unjustifiable hardship. PIAC submits that, in order to ensure that the inclusion of a power to provide for an obligation to make reasonable adjustments in the draft Education Standard is “fully supported” by the DDA, it is appropriate (if

³ Productivity Commission (2004) *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report, Volumes 1 and 2, Report No. 30, 30 April 2004.

⁴ *Ibid*, page XLVII.

⁵ *Ibid*, page XLIX.

not necessary) for the DDA to be amended to include that express obligation in its substantive provisions.

PIAC also notes that, while the term “reasonable adjustments” is used in the proposed subsection 31(1A), it is not a term defined in the DDA.

In consultation with a small group of lawyers and disability advocates—given the extremely limited time available to provide this submission—we have formulated suggested amendments to the Bill that would provide for an appropriate definition to be inserted into the DDA.

Recommendation 4 :

That clause 1 of Schedule 1 of the Bill be amended as follows:

Insert:

adjustment means:

- (a) a measure or action (or group of measures or actions) taken or proposed to be taken in order to provide substantive equality for a person with a disability, including an aid, a facility, or a service that the person requires; or
- (b) a change made or proposed to be made to a measure or action (or group of measures or actions) taken for the purpose of providing substantive equality for the person with a disability.

reasonable adjustment means an adjustment that:

- (a) promotes or achieves substantive equality for the person with a disability; and
- (b) does not cause unjustifiable hardship.

substantive equality means equality of opportunity and treatment for the person or persons with disabilities compared to persons without disabilities where:

- (a) in identifying adjustments that need to be made to achieve substantive equality, the individual requirements of the person or persons with disabilities and other relevant considerations must be taken into account; and
- (b) the extent to which the implementation of an adjustment achieves substantive equality for a person or persons with disabilities can be assessed, after the adjustment has been made, by comparing the opportunities provided for and the treatment of the person or persons with disabilities with the opportunities provided for and the treatment of a person or persons without disabilities.⁶

Recommendation 5:

That clause 2 in Schedule 1 of the Bill be amended to add after the existing text:

- (2B) If there is an adjustment or adjustments that would prevent or limit discrimination under subsections 22(1), (2) and (2A), an education provider is required to make reasonable adjustments.
-

⁶ These definitions are drawn from the previous draft of the Disability Standards for Education promulgated in 2002, the current draft Education Standards and Recommendation 8.1 of the Productivity Commission’s report referred to above.

Disability Standards

Disability Standards as a mechanism for systemic change

In developing the DDA, the Parliament was concerned to provide mechanisms that enabled systemic change in recognition of the systemic nature of much of the discrimination experienced by people with disabilities. A key mechanism included in the DDA to achieve systemic change was the power to make Disability Standards under section 31 in Part II.

The Disability Standard for Public Transport (“**the Transport Standard**”) is a good example of how the standard-making power has been used to develop a mechanism for systemic change. Rather than setting out what a public transport provider is to do in response to individual needs as they arise, the Transport Standard requires the implementation of specified access improvements over a twenty-year period. The implementation of the Transport Standard will result, over the implementation period, in increasing access to the range of public transports services available.

The draft Disability Standard for Access to Premises (“**the draft Premises Standard**”) similarly sets out the required access improvements to be implemented in new building and new work on existing buildings. This will, over time, inevitably result in more and more buildings that provide access for people with disabilities.

The draft Disability Standard for Education

Unlike the Transport Standard and the draft Premises Standard, the draft Disability Standard for Education (“**the draft Education Standard**”) does not require implementation of specified access improvements over a defined time frame. Rather, it requires education providers to respond in a particular way to individual need as it arises. This means that, unlike the Transport Standard and the draft Premises Standard, there is no mechanism for access improvements to become part of the core service over time. As a result, the draft Education Standard is highly unlikely to result in any significant systemic change, and is also likely to be a less cost-effective mechanism for improving access to education for people with disabilities.

In their current form, the draft Education Standard does no more than provide some clarification to the existing prohibition against discrimination in education on the basis of disability found in section 22 of the DDA. As such, it is PIAC’s view that the draft Education Standard ought not proceed as a Disability Standard under section 31 of the DDA. Rather it should be either published as a guideline for the assistance of education providers, or amended to provide for systemic mechanisms for change to achieve substantive equality for people with disabilities.

As well as this over-riding concern, PIAC has a number of concerns about specific aspects of the draft Education Standard.

For example, PIAC is concerned that the draft Education Standard:

- Provides that an education provider can determine what is a reasonable adjustment by consulting either with the person with a disability or an “associate”. The term “associate” is defined in the DDA in section 4(1). The purpose of that definition is to provide limits to the scope for the protection against discrimination of associates. It is not included in the DDA as a term to define those who can appropriately be consulted about the particular adjustments that may be necessary to enable non-discriminatory access to education. It is not appropriate and is highly patronising of people with disabilities to provide a blanket option of referring any questions about the needs of a person with a disability to an “associate”. Rather the draft Education Standard ought properly permit reference to a

third party where the person with the disability is a minor or is unable, because of their disability, to provide information about their needs or consent to the education provider seeking information from a third party.

- Fails to deal with the examination and/or assessment aspects of education. Significant improvements have been achieved in this area through the provision of adjustments to examination or assessment methodology and allotted time.
- The current draft Education Standard does not fully reflect the draft that was made available for public consultation in 2002.

PIAC urges the Committee to expand its terms of reference and time for submissions to enable consideration of the purpose and content of the draft Education Standard.

Recommendation 6:

That the Senate Legal and Constitutional Legislation Committee seek from the Senate an expanded reference of the current Inquiry to include a review of the draft Disability Standards for Education and call for submissions to be made on or before 31 March 2005.
