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Committee Secretary
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House,
Canberra ACT 2600

By email: 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.

In summary, it is our firm view that the Bill and Draft Education Standards (as now formulated) are seriously flawed, and that the Bill should not be allowed to pass through the Senate in its current form.

PWD has a long history of interest in the processes surrounding the development of the draft Disability Standards for Education (the Draft Standards), having contributed substantial resources to the public consultation phase of their development. This interest culminated in our full support for the Draft Standards in the form that they took immediately prior to the Ministerial Council of Education, Employment, Training and Youth Affairs' (MCEETYA) meeting in Auckland on 19 and 20 of July, 2002. We are therefore not antagonists to the Draft Standards. Our objection is based on the fact that the Draft Standards now incorporate a number of amendments, which we have not previously sighted, that in our considered view will have a seriously detrimental effect on the operation of disability discrimination law in this area. As currently formulated the Draft Standards will derogate from the protection against discrimination on the ground of disability in the area of education granted under the Act. The balance has now tipped too far towards the interests of education service providers.

Additionally, since the Draft Standards were originally formulated there have been a number of very important developments with a direct bearing on the operation of the *Disability Discrimination Act* 1992 (the Act) and the Draft Standards which, in our considered view, have not been appropriately taken into account in the current Bill or

current formulation of the Draft Standards. Most significant of these have been the High Court of Australia's decision in *Purvis v State of New South Wales* and the outcome of the Productivity Commission's review of the *Disability Discrimination Act.*

For these reasons we believe the Bill and the current formulation of the Draft Standards require much more substantial consideration by the Senate, and consultation with the public, than the short period of this consultation will allow. We therefore respectfully urge the Committee to expand its terms of reference and time-frame for this inquiry to allow for this to occur.

Specific Comments on the Bill

The Explanatory Memorandum to the Bill (E.M.) states that the Bill seeks to amend the *Disability Discrimination Act 1992* (the Act) in order to ensure that the provisions of the Draft Standards are fully supported by the Act. PWD is of the view that the Bill in fact fails to amend the Act as necessary to fully support the Draft Standards. We give our reasons for this and comment on other concerns with the Bill below.

Clause 1 of Schedule 1 of the Bill

The E.M. 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)

Unfortunately, the terms of the Clause do not reflect accurately the intention indicated in the Explanatory Memorandum. It is clear that the E.M. suggests an expansive definition of education provider as it uses the term "includes" which creates a non-exhaustive list, whereas the Bill includes a definition that is limiting by using the word "means"," which closes the list. PWD foresees unnecessary problems for complainants in having to elect which type of *education provider* they are in fact complaining about, an unnecessary technicality that can be avoided through use of an expansive definition.

Clause 3 of Schedule 1 of the Bill

The new subsection 22 (4) would broaden the defence of unjustifiable hardship to apply across the full spectrum of educational activities covered by the Act. If enacted, we suggest the following amendment to that subsection (in bold):

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.*

We propose the addition of the word “necessarily” to make it clearer that the education provider cannot avoid its 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. Also, it is important to ensure that the obligation to provide non-discriminatory treatment continues 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.

In addition, it is important to note that while it was a recommendation of the Productivity Commission (*Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report,* 30 April 2004, Recommendation 8.2) that the unjustifiable hardship defence be extended to all aspects of the Act including all aspects of education, this recommendation was made in conjunction with a recommendation for an amendment to the Act to expressly provide for a general duty in the Act to make reasonable adjustments (Recommendation 8.1). The Productivity Commission saw the two issues as linked, referring to the extension of the unjustifiable hardship defence as a ‘check and balance’ to the proposed and even more fundamental general duty to provide reasonable adjustments. We say more on the matter of reasonable adjustments below.

Clause 4 of Schedule 1 of the Bill

The E.M. states:

The draft Education Standards require education providers to undertake a process to consult with the student as to whether any adjustments are necessary to enable them to participate in education on the same basis as students without the disability, and to identify and make any reasonable adjustments that may be necessary, unless this would cause unjustifiable hardship…. New subsection 31(1A) will clarify that disability standards made under this section may require the provision of reasonable adjustments in order to eliminate discrimination against persons with disabilities. (emphasis added)

The new subsection would import into the Act a new concept of ‘reasonable adjustment’, but only for the purposes of Standards.

It ought to be noted that up until the High Court of Australia’s decision in *Purvis v State of New South Wales* it had been assumed that the *Disability Discrimination Act,* 1992 (the Act) imposed a duty to take positive action, such as the making of reasonable adjustments, to avoid discrimination on the ground of disability. However, in *Purvis* two High Court Justices have explicitly negatived this view. There is therefore substantial doubt as to whether there is any duty to provide such adjustments on which the Standards provisions regarding reasonable adjustment can rest.

In our view this concept is of such fundamental importance to the operation of the Act and the Standards that it should be established and defined within the Act itself to ensure that the duty is clear and to avoid later legal arguments about whether the definition of *reasonable adjustments* conforms to the intent of the Act. In our view, in the absence of such a duty being established and defined within the Act itself, the Draft Standards will not be ‘fully supported’ by the Act, which we understand to be the primary purpose of the Bill.

Equally importantly, if the concept is to be applied to other Standards then in our submission it should be applied consistently and with a consistent meaning to avoid ambiguity, complexity of interpretation and unnecessary litigation. These comments all suggest that the Bill is deficient in not amending the Act to include a definition of

reasonable adjustments. Certainly the Productivity Commission was of the view that the Act required amendment in this regard.

In concert with a small group of lawyers and disability advocates (time would permit no broader consultation) we have formulated suggested amendments to the Bill that would provide for an appropriate definition to be inserted into the Act. (One of our objections to the definition of *reasonable adjustments* found in the Draft Standards is that the list of items enumerated at Section 3.4 are not found within the Act itself, and so provide a new and unnecessary evidentiary hurdle which people with disability must overcome in asserting their claim, or bringing a complaint about non compliance with the Draft Standards).

We would suggest the insertion into Clause 1 of Schedule 1 of the Bill the following, thereby introducing new definitions to subsection 4(1) of the Act ('Interpretation'):

> ***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.*

These definitions are drawn from the draft Standards supported by PWD in July 2002, the current Draft Standards, the E.M. (see emphasis added above) and Recommendation 8.1 of the Productivity Commission's *Review of the Disability Discrimination Act 1992: Productivity Commission Inquiry Report,* 30 April 2004*.*
In this respect it ought to be noted that the Productivity Commission recommends that:

The Act 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 current definition of *reasonable adjustments* within the Standards is not so defined to exclude adjustments that would cause unjustifiable hardship. Rather, that defence remains as a 'catch all' defence, while the definition incorporates a bundle of new criteria that, as indicated above, undermine existing rights within the Act by posing an additional evidentiary burden upon people with disability. In effect, the approach taken within the Draft Standards creates a new defence for education providers not otherwise found within the Act.

Implementation Costs

The Committee appears to have been particularly referred to issues of the "adequacy of Commonwealth support to States/Territories for transitional costs associated with the

Standard's implementation, particularly relating to professional development, and the Standard's implementation strategy".

PWD agrees with the statement within the E.M. to the effect that it is not anticipated that the passage of the Bill will have any financial impact. Further, PWD does not believe that Education Standards, when ultimately formulated, will have any financial impact either. Indeed, our view is that disability discrimination in education has been unlawful under Sate and Territory laws for upwards of two decades, and unlawful under the Act for in excess of ten years. Changes introduced by a Standard are likely to be only minor. Any Standards are likely merely to reflect what the law has required for nearly twenty years. It is therefore a fallacy for anyone to suggest that cost alone is a sufficient reason not to progress with the development of Standards.

We thank you for the opportunity to contribute these comments. Should your inquiry continue we would appreciate the opportunity to lodge a further more detailed submission in the future.

If you would like to discuss this submission further, please contact Matthew Keeley, Senior Legal Officer on (02) 9319 6622.

Yours sincerely

PHILLIP FRENCH
Executive Director