

3 March 2004

Mrs Helen Owens  
Presiding Commissioner  
Disability Discrimination Act Inquiry  
Productivity Commission  
Locked Bag 2, Collins Street East  
Melbourne 8003

Dear Mrs Owens

**Re: Review of Disability Discrimination Act 1992 Draft Report**

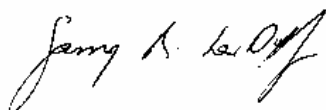
The Association of Independent Schools of South Australia (AISSA) welcomes the release of the Productivity Commission *Review of the Disability Discrimination Act 1992 Draft Report*.

AISSA would like to congratulate the Productivity Commission on the considerable amount of work they have undertaken in producing the *Draft Report*.

AISSA considers that the Productivity Commission have made a number of useful findings and recommendations, particularly in the area of funding. AISSA considers that developments in this area are an important step to enhancing the ability of Independent schools to effectively meet the objectives of the DDA. However, we have some concerns with the implications for Independent schools in relation to the recommendation to expand the definition of disability within the Act to encompass behaviour which is a symptom or manifestation of a disability.

AISSA does not intend to re-canvass all points made in its previous submission here. Rather we limit our comments to issues raised by the *Draft Report*.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Garry Le Duff', written in a cursive style.

Garry Le Duff  
Executive Director

A I S S A



ASSOCIATION *of*  
INDEPENDENT  
SCHOOLS *of* SA

**Association of Independent Schools of South  
Australia**

**Response to the Productivity Commission Inquiry  
into the *Disability Discrimination Act 1992* Draft  
Report**

**MARCH 2004**

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## **1 Introduction**

- 1.1 This response to the *Review of the Disability Discrimination Act 1992 Draft Report* is presented by the Association of Independent Schools of South Australia (AISSA). The Association represents the interests of 92 Independent schools with an enrolment in excess of 36,000.<sup>1</sup>
- 1.2 The fact that many school authorities and other non-government agencies have made submissions and appeared before the public hearings is an illustration of the importance of the education of students with disabilities, and the DDA legislation, to school communities.
- 1.3 AISSA considers that the Productivity Commission has made a number of significant findings and recommendations. In particular, AISSA notes the recognition by the Productivity Commission of the benefits of ‘special program funding’ following students with disabilities as they complete their schooling. AISSA is concerned, however, with the implications for Independent schools of the recommendation to expand the definition of disability within the Act to include behaviour ‘that is a symptom or manifestation of a disability’.
- 1.4 In this response the AISSA limits comments to the following specific issues.
- Expansion of Definition of Disability
  - Unjustifiable Hardship
  - Disability Standards
  - Funding
- 1.5 As in the previous AISSA submission, AISSA comments on these findings and recommendations as they directly apply to the education of preschool and school children and young people (including post-compulsory students in school).

## **2 Expansion of Definition of Disability**

- 2.1 AISSA does not support the proposal to include ‘behaviour that is a symptom or manifestation of a disability’ in the definition of disability within the DDA, due to the unintended consequences. For example, AISSA is concerned that this inclusion could severely impinge on a school’s ability to ensure appropriate behaviour management with possible negative consequences for the student, other students and staff.
- 2.2 The recent judgement by the High Court in the Purvis case recognised that if behaviour was recognised as part of the disability it would seriously hinder a school’s ability to respond to behaviour that was criminal or otherwise unacceptable.
- 2.3 The consequences of the proposed change in definition could conflict with a school’s various legal obligations for the safety and welfare of all students and staff. These include the extensive ‘duty of care’ obligations and Occupational Health, Safety and Welfare legislation. Non-government schools in South Australia are further required as part of registration under the *Education Act 1972* to provide ‘adequate protection for the safety, health and welfare of its students’ (72G3(b)). Schools will also be expected to report against a National Safe Schools Framework, which has been endorsed by education Ministers from all States/ Territories in Australia and the

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<sup>1</sup> See Appendix 1 for a more detailed profile of the sector.

Australian Government. Moreover, there is a clear community expectation that schools will provide a safe environment for all students.

- 2.4 Schools are genuinely struggling in trying to accommodate the needs of students with disabilities with their duty of care obligations to other students and staff. For example, there are numerous incidents where member schools have approached AISSA for advice about extreme situations in which the behaviour of a student with a disability has placed other students and staff at considerable danger of physical harm and/or emotional distress. Schools should have the flexibility and capacity to make decisions to protect the welfare of the student with a disability and the welfare of other students and staff. The inclusion of 'behaviour that is a symptom or manifestation of a disability', in the definition of disability within the DDA, we believe, will limit this flexibility.
- 2.5 The AISSA Special Education Advisers strongly encourage the use of individual student support plans for students with disabilities (as set out in the *Students with Disabilities Enrolment Guidelines for Independent Schools*).<sup>2</sup> Schools in South Australia are also required to present a wide range of policy documents (e.g. behaviour management, anti-harassment and bullying, etc) for assessment as part of the registration process under the *Education Act 1972*. In the main issues with the behaviour of some students with disabilities are currently managed through these procedures. AISSA is concerned that the legality of this could be questioned if the definition is changed.
- 2.6 AISSA acknowledges the position of the Productivity Commission that 'A broad definition of disability does not mean that all actions that affect people covered by this definition are automatically unlawful'. However, in many cases, clarification of what actions are not unlawful may only be obtained through case law. This has the potential to not only take a considerable amount of time but also to involve significant cost implications. As recognised by the High Court in *Purvis*, there are also often difficulties in ascertaining whether the behaviour is a manifestation of the disability.
- 2.7 Any changes to the DDA definition should not restrict a school's ability to ensure the health, safety and welfare of all students and staff.

### **3 Unjustifiable Hardship**

- 3.1 AISSA strongly supports the position that 'unjustifiable hardship' should apply after the enrolment stage. As we emphasised in our previous submission the application of 'unjustifiable hardship' only at the enrolment stage places a significant burden on Independent schools as it does not allow for the consideration of, among other things, the changing needs of students with disabilities as they mature or as their condition deteriorates.
- 3.2 Moreover, as we also indicated in the AISSA original submission, while it is relatively easy to determine immediate financial implications such as building modifications and necessary equipment purchase, the associated costs of educating students with disabilities, such as undue stress on teachers and other students (which lead to absences due to stress related illnesses), the required levels of additional assistance in

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<sup>2</sup> AISSA included a copy of these guidelines with our original submission.

particular as the student's needs change, and the effects on the whole school community are often very difficult to quantify with any accuracy prior to enrolment.

- 3.3 It is necessary to emphasise again that schools do not refer to the definition of 'unjustifiable hardship' in order to avoid their social and legal obligations. Independent schools are underpinned by an ethos, based on religious faith or educational philosophy, which supports the inclusion of students with special needs, including students with disabilities, in their schools. AISSA does not support the suggestion that the current situation may provide an 'unintended perverse' incentive for schools to 'claim unjustifiable hardship before initial enrolment (and try to deny enrolment) because they know they cannot do so later if needed.' This suggests a level of intention that is not borne out by the experience of the AISSA. Member schools continue to express their distress that parents choose an alternative placement for their child, because of their (parents) concern over lack of adequate resources.

## **4 Disability Standards**

- 4.1 AISSA does not consider that the DDA draft Education Standards will give the necessary clarity to schools and in their current format offer little practicable benefit to schools.
- 4.2 AISSA argues that detailed uniform standards provide minimal assistance in handling the diversity of disabilities and individual circumstances of each school. For example, the economic, social and cultural diversity of Independent schools in South Australia mean that there are significant differences in the ability of individual schools to provide adequate support levels to students with disabilities and at the same time meet the schools' educational and legal/legislative obligations to other students and staff.
- 4.3 AISSA is also concerned that the costs in many cases for complying with DDA standards will be significant, in some cases prohibitive, for a number of schools placing a significant burden on school resources. This may, in effect, limit access to non-government school education for other students, including other students with disabilities.
- 4.4 For example, as the Case Studies in our original submission illustrate there is a need for a wide range of Professional Development for teachers due to the extensive diversity of disabilities of students in Independent schools.
- 4.5 AISSA considers that 'guidelines and best practice', instead of uniform standards, will more effectively enhance both the inclusion of students with disabilities into school communities and the operation of the DDA.

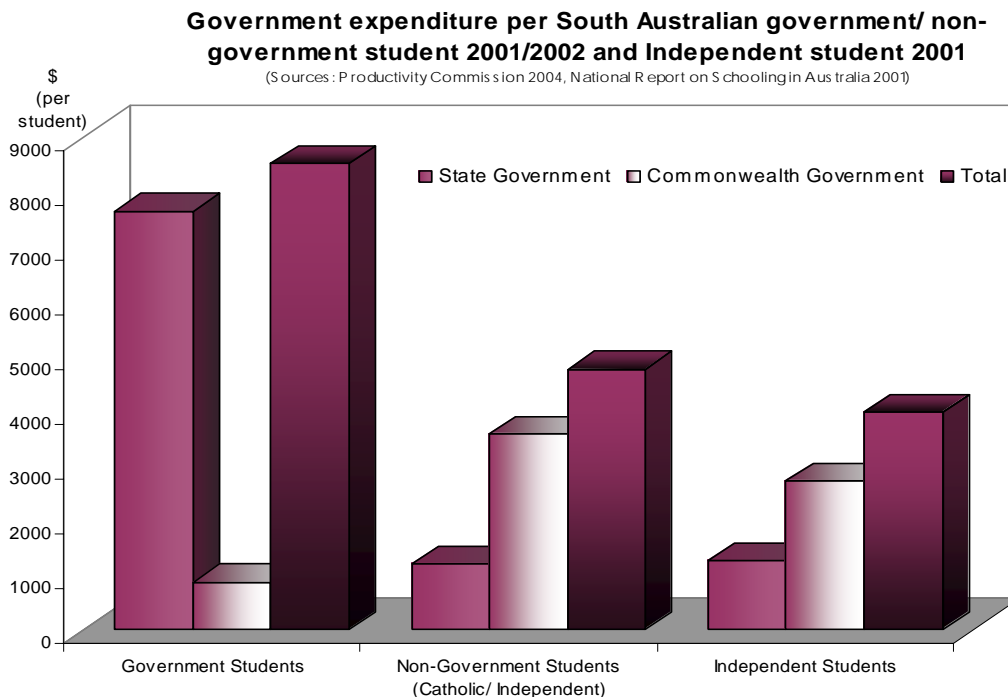
## **5 Funding**

- 5.1 The capability of the 92 South Australian Independent schools to meet the objectives of the DDA, and increase the levels of participation within the Independent school sector of students with disabilities, is directly related to a number of factors including:
- the size of the school
  - the level and sustainability of school income

- the current constraint on resources (for example funds, expertise and infrastructure) for students with special needs
  - the school location in relation to other support services.
- 5.2 AISSA is pleased with the recognition by the Productivity Commission that ‘a general objective of government education funding arrangements should be to ensure school students with disabilities have the same range of education choices that other students have’ (p378). AISSA considers that families of children with disabilities should have the same opportunities as other families to choose the school which best meets the educational needs of their child. Parents should not be disadvantaged by their choice of an Independent school simply because their child has a disability.
- 5.3 AISSA reiterates our position that legislation such as the DDA operates in the context of the wider policy environment. The availability of resources currently lags behind the intent of the DDA. Given the findings of the report that people with disabilities experience less favourable outcomes than non-disabled people it is essential that all students with disabilities (whether they are educated in government or non-government schools) receive adequate access to resources to support their needs.
- 5.4 AISSA is also pleased with the position taken by the Productivity Commission that a greater share of funding for special education could be linked to individual students ‘which would enable special program funding to “follow” an individual student with a disability, if that student chooses to change schools’. We believe this is an important step, which has the significant potential to lead to greater equity for students with disabilities and parents who wish to exercise choice of school for their children.
- 5.5 AISSA recommends that the statement be extended to include support services provided via State government agencies. In many cases these are not accessible to students with disabilities who transfer from a government to a non-government school, placing a significant financial burden on both the school and the parents of the child.
- 5.6 AISSA notes that comments have been made suggesting that non-government schools are over funded in regard to students with disabilities. The debate about public funding of schools across Australia has intensified in recent months, particularly since the implementation of a public media campaign by the Australian Education Union, which is focused on Commonwealth funding and ignores not only the substantial levels of State government funding received by government schools but also the complexity of the funding arrangements in regard to government and non-government schools. The fact that government schools also have access to private funds at different rates across various communities, depending on the socio-economic background of families supporting that school, is also ignored in this debate.
- 5.7 AISSA does not consider the current terms of the funding debate to be productive, as it acts as a diversion from what should be the real issue – ensuring that all Australian students, including students with disabilities, (whether in government or non-government schools) have access to an excellent education. Moreover, given the terms of reference of this review, which is to ‘report on the appropriate arrangements for regulation’, we do not consider that a long discourse on the funding of non-government schools aids the analysis. However, it is necessary to address claims

made, in relation to funding of non-government schools, as these claims relate to the funding of students with disabilities and this review.

5.8 The recent Productivity Commission Report on Government Services 2004 provides an independent analysis of recurrent expenditure per student in both government and non-government school across Australia. Government expenditure per student in South Australia for students attending government schools is on average almost twice that available to non-government school students. It needs to be noted that a number of Independent schools receive significantly less per capita allocations than the average.



5.9 AISSA does not accept the claim that non-government schools are over funded in regard to students with disabilities. Funding to non-government schools is based on a proportion of the Average Government Schools Recurrent Costs, which includes a small fraction of the cost of educating students with disabilities in government schools, as well as a number of other costs related to education. It needs to be noted that according to the South Australian 2003-04 Government Budget Paper 4 Volume 2, the actual costs for a student with a disability in a government school can vary between \$1343 to \$24 876 depending on the level of disability.<sup>3</sup>

5.10 The case studies in the initial AISSA submission and in the Independent Schools Council of Australia (ISCA, formally NCISA) submission clearly demonstrated that the cost of supporting the education of children with some disabilities is substantially above the public and private funds available to non-government schools. Repeat funding following the student will, we believe, enhance the effectiveness of the DDA and at the same time improve choice of school for many more parents who have children with a disability.

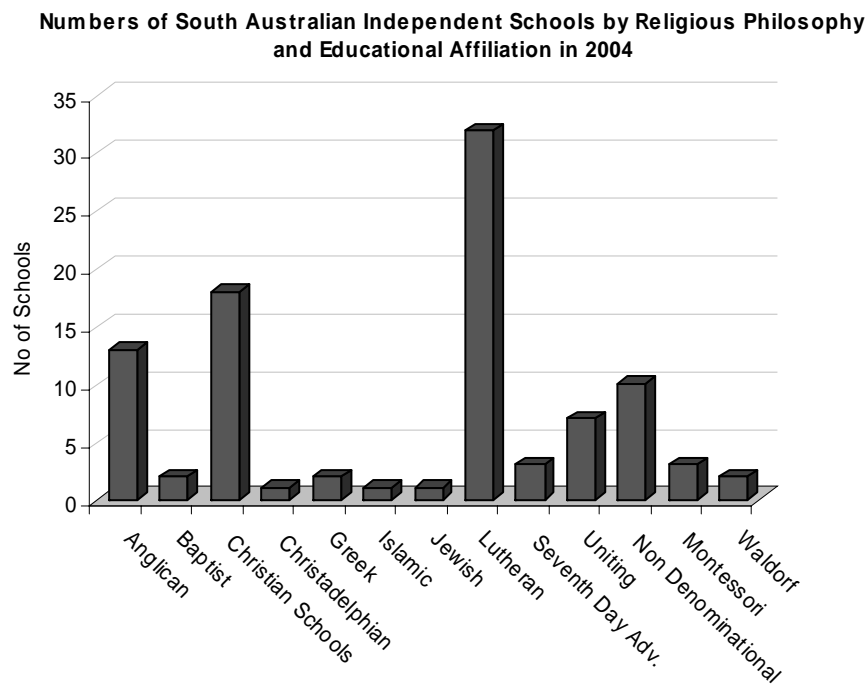
<sup>3</sup> *Portfolio Statements 2003-04, Budget Paper 4, Volume 2*

# Appendix 1

## Background: The South Australian Independent School Sector

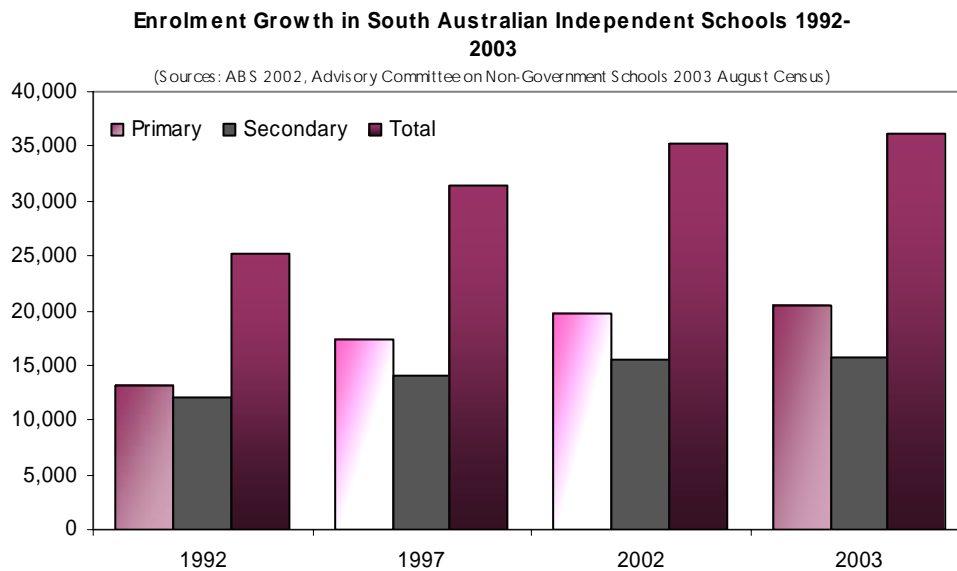
### Social and Economic Profile

- a) South Australian Independent schools educate students from a diverse range of cultural, social, and economic backgrounds. Parents have the choice in the South Australian Independent school sector of educating their children within a religious (including Anglican, Uniting Church, Lutheran, Greek Orthodox, Non-denominational Christian, Islamic, and Jewish) setting or within a particular educational philosophy, for example Montessori or Waldorf Steiner. Independent schools are 'not for profit' organizations and school income is directed back into the school to improve the education outcomes for students. A key element underpinning Independent schools is the ethos of providing care and support to all students.

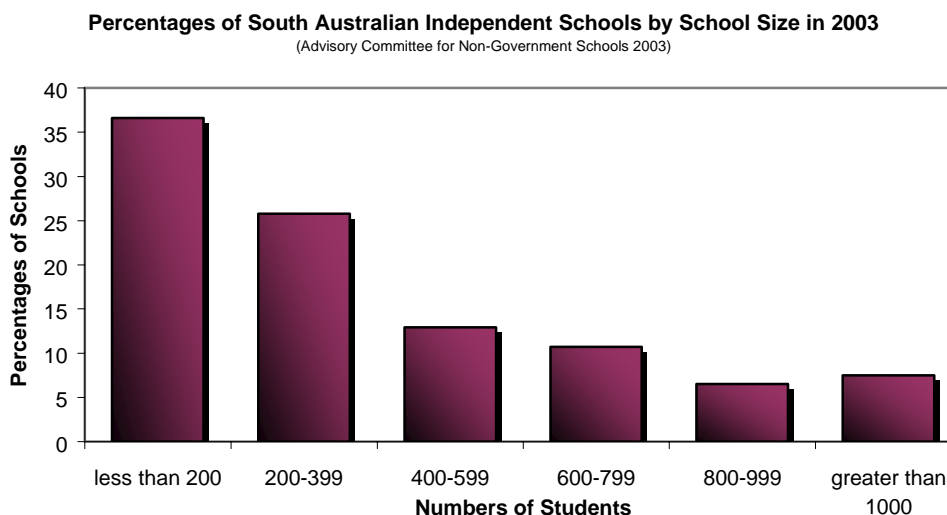




- b) The South Australian Independent School Sector has experienced a 51% growth in enrolments since 1994. The largest enrolment growth is occurring in areas characterised by low socio-economic conditions (ISCA 2003). Consequently, Independent schools have varying levels of resources to implement additional programs, outside of current curriculum, and employ supplementary staff.



- c) 50% of South Australian Independent schools have an enrolment of less than 300 students, while 7.7% of schools have enrolments over 1,000 students. 47% of Independent schools in South Australia are primary schools, 10% are secondary schools and the other 43% are combined primary and secondary schools (Advisory Committee on Non-Government Schools 2003).



- d) Parents of Independent school students pay on average 56% of all total costs. In some cases parents contribute over 75% of their school's income. In disadvantaged communities families in general contribute between 10-20% of the income of their

school. In many schools parents and others in the wider school community contribute most or all of the capital works funding (buildings and equipment).<sup>4</sup>

- e) In 2002 1,238 students with disabilities attended Independent schools in South Australia (Advisory Committee on Non-Government Schools 2002). This figure does not include all students with medically related or learning disabilities who do not fit the Commonwealth and State education categories of 'disability'.
- f) The Independent school sector also educates a number of children under the Guardianship of the Minister.

### **Governance Model**

- g) Independent schools are distinguished by a model of governance based on local management and accountability to school communities. A key element to the operation of Non-Government schools is that they are not in a direct sense accountable to the Department of Education and Children's Services (DECS). The right to autonomy is an essential principle underpinning non-systemic Independent schools.
- h) Independent schools are accountable to government through the requirements for registration under the *Education Act 1972*. Independent schools are also accountable to government and the wider community on a number of legislative levels in relation to child protection. Independent schools also comply with legislation such as Occupational Health, Safety and Welfare, *Children's Services Act 1985*, *Children's Protection Act 1993* and Commonwealth Privacy legislation.

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<sup>4</sup> These figures are drawn from information provided to AISSA by individual member schools.