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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO DISABILITY DISCRIMINATION ACT

MRS H. OWENS, Presiding Commissioner
MS C. McKENZIE, Associate Commissioner

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON MONDAY, 1 MARCH 2004, AT 9.30 AM

Continued from 27/2/04 in Melbourne

MRS OWENS: Good morning and welcome to the resumption of hearings for the Productivity Commission inquiry into the Disability Discrimination Act 1992, which we will refer to as the DDA. My name is Helen Owens and I'm the presiding commissioner of this inquiry; my associate commissioner is Cate McKenzie.

On 5 February last year the government asked the commission to review the DDA and Disability Discrimination Regulations 1999. The commission released a draft report in October last year. The purpose of this hearing is to provide an opportunity for interested parties in Brisbane to discuss their submissions and to put their views about the commission's draft report on the public record. Telephone and public hearings have been held in Melbourne and public hearings have also been held in Canberra, Hobart and Sydney. Further telephone hearings will be held in Melbourne this week. When we complete the hearings in March we will redraft the report and submit it to the government by the end of April. It is then up to the government to release and respond to the report.

We would like to conduct all these hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason, and to assist people using the hearing loop, comments cannot be taken from the floor. participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be available on the commission's web site in Word format following the hearings.

I'd like to welcome our first participant today, the Department of Family and Community Services. Welcome to the hearings. I'm sorry about the bit of noise in the next room. It's auditions for Big Brother. Could you please give your name and your position with the department for the transcript.

MR BARSON: Certainly. Roger Barson, assistant secretary, office of disability in the Department of Family and Community Services.

MRS OWENS: Good, thank you. Thank you for coming all this way to see us at such an early hour. We received from you, your points that you'd like to cover today. What I thought I'd do is just hand over to you to introduce those points and we can have a discussion. Thanks, Roger.

MR BARSON: Thank you. Thanks for the invitation. I thought what I'd do is provide some context to our comments by covering the department's interests in this particular inquiry and the interest of the office of disability. I understand that you had a series of questions the commission was seeking some responses to, so I thought I'd cover some of that and make some general comments about the DDA, and in particular about the Commonwealth Disability Strategy in terms of Commonwealth

programs and legislation.

The area covered by the inquiry is of particular interest to us because the Department of Family and Community Services was formed in 1998 specifically to bring together government programs that covered the range of income support and social welfare programs. It not only covers the traditional areas of income support and the provision of financial assistance, but also covers the provision of a whole range of community care programs ranging from child care to emergency relief and including programs and support for people with disabilities.

The office of disability was established in 1985 following the major review of programs and services for people with disabilities done in the early 80s and was specifically established to provide a direct link between people with disabilities and carers and families and supporters and government, to influence, contribute, develop and implement policies that deal with the needs of people with disabilities and their families, with a particular focus on social and economic participation. As part of that role, of course, we deal with intergovernmental disability coordination through the Commonwealth-state-territory disability agreement and through our relationships with the state and territory governments, and the office manages the social security payment programs that are within the area of disability and carers and their interactions with compensation systems.

I guess the first way to describe that is our interests in the area of disability cover virtually everything except the area of direct employment assistance, where there is another part of the department that is responsible for that although, because of our broader interest in employment and social participation, I'm able to cover off any questions on general employment as well. We are the part of the department that is most closely involved with the Disability Discrimination Act and in that way arrange liaison between, say, Attorney-General's Department and the Human Rights and Equal Opportunities Commission, and the rest of the department in discussing issues around discrimination and disability.

We also have a particular responsibility for monitoring the Commonwealth Disability Strategy which is the government's response or government's program around the Disability Discrimination Act itself. The Commonwealth Disability Strategy dates from 1994 and was intended initially as a planning framework to assist Australian government agencies to ensure access to all their policies, programs and services for people with disabilities. So it was covering off the Commonwealth laws and programs, I guess; areas of disability discrimination concern.

That's been revised a couple of times now and in this year 2004 it will be revising the strategy again, reviewing and revising the strategy. The major focus of the Commonwealth Disability Strategy is to require Australian government

departments and statutory authorities to report annually on implementation of the strategy and the degree to which they are pursuing goals compatible with the Disability Discrimination Act. This identifies five key roles for departments and agencies being as policy advisers, as regulators, as purchasers of services, as providers of services and as employers.

The strategy lays down the outcomes that organisations should achieve in reporting against each of those roles and includes performance indicators and measures that address key barriers. From 2000-2001 all the departments have been required to assess their performance and report, as I said, annually in the annual report. We provide departments and agencies with advice on how to implement the strategy. We provide advice on consultation with people with disabilities. We provide assistance in providing information in accessible formats and we provide guidelines and materials and information on how they might take action in line with the Disability Discrimination Act.

Because we have a broad brief in disability, that splits mainly into the income support area - which I've covered - into the Commonwealth-state liaison around state and territory and Commonwealth programs for people with disabilities, but also into areas of access and equity, in that we manage the advisory council to the minister, the National Disability Advisory Council, and the newly-formed National Family Carer's Voice, both of which are advisory bodies appointed specifically to provide advice to the minister and the government on disability and carer issues respectively.

There were a series of questions the commission had indicated it had an interest in and I thought I might cover those in general, if you wish.

MRS OWENS: Just before you get on to the questions, with the Commonwealth Disability Strategy, as you say it's going to be revised this year, or there's going to be a review - that timing I presume is going to be outside our time frame for April. Will there be any - - -

MR BARSON: Yes, it wouldn't be started or completed by April, no. I'd imagine that we'll start the review process as the annual reports become available from last financial year, but I think the more important question for us is what we seek to do with the strategy from then on. I guess I can comment in general on the strategy at this time, if you wish.

MRS OWENS: Yes. We get a sense that it may not have been as successful as people hoped, in terms of employment of people with disabilities in the Commonwealth sector and departments and agencies. It seems to have gone down and we're just wondering if that's your sense as well. When we talked to your department very early in our processes, I think there was a bit of an acknowledgment

that things could still be better in the Commonwealth.

MR BARSON: Unfortunately, it's probably true; things could always be better. But, yes, it's also true that from the office's perspective and the department's perspective, the Commonwealth Disability Strategy has not achieved some of the goals that it would have liked it to achieve and hasn't taken us as far as we would have liked to have gone by now. I think there is a whole series of potential reasons for that, that we won't fully understand until we've done the review. But certainly, whether we're looking at areas of provision of and access to information, programs and services that respond well to the particular needs of people with disabilities and their families, or in the operations of the public service itself, in terms of employment - the point that you raised - yes, it's perfectly true that we haven't moved as far as we would like to move.

In employment, in particular, we're very much aware of the general decline in public service employees reporting that they have a disability. We still, I think, are trying to work through the reasons as to why this might be, together with the Public Service Commission, who is responsible for employment in the APS. But even within that we're even more disappointed that the performance of our own department has reduced; in fact, it's reduced to below the public service average. That's not a good position to be in. It's not one we're terribly comfortable with. I think in terms of - - -

MRS OWENS: Have you explored why that is the case? We've heard all sorts of theories like the lower level positions are going, so there are fewer lower level positions - - -

MS McKENZIE: And increasing multiskilling, so that it becomes more difficult to do some of these jobs.

MR BARSON: Yes, and I guess where we're not comfortable with some of those reasons is that there is an implication there which - I know you weren't making it but there is an implication sometimes drawn by others, that somehow it is the lower level jobs which are appropriate for, or available for people with disabilities, and we'd certainly like and expect to see employment right across the board. However, having said that, it's certainly true that the lower level positions which often serve as entry level positions for people have reduced enormously throughout the public service.

That, I think, has had its greatest impact on the employment of people with intellectual disabilities, where perhaps some of the jobs that would have been taken up by people in the past no longer exist. They may be contracted out. It may be that multiskilling has removed, for example, the sorts of jobs in filing and other routine tasks that were done. I think from our own perspective there is still a reasonable

amount of employment of people, sometimes with very severe disabilities, across the public service, including in our own department. But certainly it's true that the numbers have reduced. I think one of the reasons is the reduction in base level positions; another would be the changing nature of the jobs in that there are more demands today than there were before, and the job expectations tend to change more quickly.

But also, I think, as we've said in a previous conversation, why we have not encountered any positive discrimination that is direct discrimination that is occurring, we are concerned that there may be a level of passive discrimination and one of the things that we want to look at in the review and in the next strategy is how to encourage positive actions to ensure equal access. I used the example in a previous conversation of employment of a graduate program where a personnel area told us that in fact there had been no applications for the graduate program for that year from people with disabilities.

While that's true, and while no-one would claim there was discrimination in that process, I think the question we need to ask is whether it's satisfactory to simply rely on applications for positions. In similar vein to other areas of potential discrimination, whether there are things we need to be doing to actively encourage people to apply. I think we're satisfied, as I said, there is no discrimination involved when people have applied, but I think we need to be far more active in encouraging people with disabilities. There is a whole range of graduates in the universities who we deal with but, for whatever reason, sought not to apply for graduate positions. Now, it's something we are very interested in examining - why that occurred.

MS McKENZIE: And also I would have thought it might be worth looking at some job design, whether there are inbuilt disincentives in the way the jobs are advertised.

MR BARSON: Yes, I think that's true. Jobs still tend to be dealt with and advertised at a level, so they still tend to be generic positions, which are generically described which have selection criteria and job descriptions which can cover virtually anything in the department, and they're not as tailored to particular positions - they're not tailored to particular positions in ways that may attract people to those particular jobs. So, yes, that point is taken.

MS McKENZIE: Yes, just tell them exactly what it is that the person really is going to do.

MRS OWENS: I suppose the problem is that people in the public service tend to move from position to position, but once they're in there, then there is the whole question of promotion and do you get a sense that there are also barriers - there may

be barriers to promotion for people with disabilities, or do you think that the main problem is just getting people in, in the first place?

MR BARSON: We're not aware of any particular barriers. I mean to say we work across departments with the diversity councils or disability councils, but also within our own departments in terms of the same areas. I have people within the office who actively monitor that. They are not reporting any particular difficulties in promotions. They are reporting, I guess, a continued level of difficulty in modifying the workplace and modifying the jobs accordingly. When I say a particular level of difficulty I'm not saying that that's high but we're certainly not satisfied those barriers have been eliminated. One of the issues for us is the modification of workplace and the way in which those arrangements are made in different departments and there certainly seems to be a feeling - although I wouldn't put it any more strongly than that - that sometimes the perceived costs of modifying the workplace and the issue of who pays those costs may be seen by some recruiters or promotion panels as a disincentive to recruit or promote particular individuals.

So I guess one of the things we are interested in - in the new review - is looking at the way in which those programs are dealt with at an agency level, the degree to which there is no disincentive, let's say, at the local branch or section level to employ someone, and they are recognised as a corporate cost, not an individual area's cost.

MRS OWENS: That was another argument for the decline in employment that people have put; that you have increasingly seen in the Commonwealth public sector a departmental responsibility for budgets and then that going down to individual divisions and so on, so maybe there is a budgetary driver as well to the decisions. Do you think that that would be fair to say?

MR BARSON: We'd certainly like to ensure that that isn't a factor. I think it is possible that it is a factor and as you say, once you devolve budgets to departments and then to divisions or groups or branches, and then down to section or team level. You may, in fact, be dealing with a budget for the employment costs of, say, five, six, 10 people and at those levels, even if a department is of the view that it expects those things to be done and it's covered within the overall per capita cost for the organisation, it does get more difficult, I think, at the team level. So there is certainly an issue for some of the major costs to be borne corporately rather than locally.

I guess it's then up to departments and agencies to work out how those funds are distributed and how one might call on those funds. Neither do we want to see a separate negatively special arrangement made that somehow differentiates those people from the rest of the departmental staff. It should be something routine that can be organised at the local level but where there is no financial disincentive to

carrying that out and getting it into place.

MS McKENZIE: The other thing that some of the participants mentioned was, with the decentralisation devolution of the culture of command into smaller and smaller units, some of the knowledge and expertise has gone, as well. I would have thought your office can play a very important role in this one. There might have been one or two people centrally in a department or agency who would have known lots about what workplace modification schemes there were and what kind of adjustments were feasible and who to go to, but once these things have been devolved down and you are looking at much smaller units, often that expertise has been lost, except perhaps to one or two units where those people happen to be.

MR BARSON: Look, I think that's even true within our department, even within our office. I mean, as workloads generally have increased and the broad span of things the office is concerned with, we often have to ask ourselves the degree to which we need to get engaged within, say, the operational areas of our own department versus looking across the board. That's one area in employment where we are working with the Public Service Commission to try and identify the reasons why employment has been dropping, but also through our own personnel area into the personnel areas of other departments, again trying to disseminate those same messages.

I think it is true that, as units and teams have become smaller and more self-contained, then yes, some of those central resources have dropped off. Within the Department of Family and Community Services, though we have a fairly active - a very active - disability stakeholders group which has reporting access direct to the secretary and they, for example, just recently raised an issue around the financing of modification of the workplace needs and equipment. So I think it can be done but I think you are right, that the devolution into smaller teams means sometimes the interest and awareness gets diluted.

MRS OWENS: While we're still talking about the Commonwealth and what it is doing, at the moment there is no provision in the act for the Commonwealth to claim unjustifiable hardship and we've made a draft recommendation in our draft report that the provision of unjustifiable hardship should be extended across all areas of the act, including Commonwealth laws and programs. Do you have any views on that particular draft recommendation? Have you had an opportunity to think about that one?

MS McKENZIE: There has been some disagreement in what the submissions have to say about that.

MRS OWENS: Yes.

MS McKENZIE: Some people thought that the Commonwealth should be a leader and so should not be able to claim that.

MR BARSON: I simply am not aware of the recommendation. We looked at that one with some interest and, yes, I'm not surprised that there have been different views expressed on it because I think at the moment we have a mixed set of views on that. Yes, on one hand one would like to think that the Commonwealth demonstrates the optimal practices and therefore wouldn't need to seek recourse behind an unjustifiable hardship banner. On the other hand the reality is, in that sense, the Commonwealth and its departments and agencies are just as bound by economics and by available resources as other organisations of service providers and employers are bound.

I think it's equally difficult to expect that the Commonwealth government and its departments, simply by being the Commonwealth, have a sort of uncapped source of funding and expertise to deal with those issues. Having said that, I think the principle that the Commonwealth must, of course, fully observe all its own laws and regulations and not only observe them in the sort of "black letter" approach but observe the principles and intent, for us that would be the dominant view and for that reason I don't think that it would be - I think it would have to be extraordinary for a department or agency to wish to claim unjustifiable hardship, if one takes that view that you not only follow the letter of the law but also the spirit and the intention of the act.

Having said that, we did note some of the reasons that were given for putting that in, that it may enable some of the very real issues that face departments and agencies about their finances and the restraint on those, it may enable some of those things to be put on the table, but as I said, on balance we think that the principle of the spirit of the Disability Discrimination Act should be dominant and it shouldn't be a need to claim unjustifiable hardship.

MRS OWENS: Do you think, from your knowledge, or do you feel there have been any problems in the past, because there has been no unjustifiable hardship defence in Commonwealth laws and programs? Are you aware of any problems that may have arisen by that lack?

MR BARSON: No, I'm not. Our experience so far has been the departments and agencies have not only been willing to do whatever is seen as the right and appropriate thing when they are made aware of it, but haven't actually sought as organisations to use that. I think on a team level - on a small, local team level - there have certainly been those issues raised: how can we be expected to do this and still operate within our budget? For us, though, that gets more down to questions of how

budgets are managed and allocated, as departments and agencies, rather than a question of a positive or a negative around unjustifiable hardship. Certainly, we've seen some reasonably expensive and complex arrangements made and we and departments have seen the positives that have come out of those.

MRS OWENS: Has anybody done an evaluation of any of those sorts of modifications that have been done, and looked at the benefits and the costs?

MR BARSON: We are in the process of looking at that within our own department. That's one of the questions that we have for this year's review of the Commonwealth Disability Strategy. I guess, getting back to the strategy, one of the concerns over the last few years is, yes, we still have a process by which agencies are reporting against those roles. I think that along the way some of the intensity of that has declined.

MRS OWENS: There has been a much more generalist set of answers there.

MR BARSON: Much more general set of answers and I guess there is an issue for departments and agencies which - there may be a bit of overkill in that they are expected to report against what they're doing in a vast range of areas these days and I think one of the results has been this dilution, that it's not as special and unique and different to be reporting on how you're dealing with disability issues. It is simply one of a series of special additional reports and without a focus on that and without a commitment to that at the agency level, there's a real risk that they just deteriorate into repeating the same words as before.

MRS OWENS: A bit of paper compliance.

MR BARSON: A bit of paper compliance without necessarily the innovative thought going into what we might be doing or what we might not be doing. Now, that's a bit of a subjective judgment, but certainly we're not comfortable with the expectations that are placed on departments and agencies and the degree of active involvement that goes into reporting on those. That is something we'd like to see addressed in the next period of the Commonwealth Disability Strategy, if that's the decision that is made.

MS McKENZIE: What happens when you see in a department's or an agency's report the same sort of general statements repeated again and again? Is the matter raised with the particular department or do you simply include it in your own stats and your own reporting?

MR BARSON: There is a set of - kind of internal processes that are happening for the office, so we have a responsibility for the Commonwealth Disability Strategy. That is also somewhat diluted, in that the responsibility for that actually lies on every

department and agency. It is sometimes a little difficult to take up a whole range of issues with departments that have their own responsibilities for those things. Having said that, we've just been through a process of examining the annual reports of a sample of departments and agencies from last year and looking at the degree to which we think that they not only reflect the intentions of the strategy and the act, but also give the reader sufficient information to judge whether or not that is happening.

I think that's where we see them falling down. We see them falling down, not so much necessarily in the actions or the programs which are becoming unsatisfactory or discriminatory, but for the ordinary reader there is not enough information there which provides any assurance that the departments and agencies are actually doing these things. So what do we do? I guess our path for doing anything would be to report to our own minister and to have our own minister take it up with her ministerial colleagues or with the government through cabinet.

MRS OWENS: Is that survey that you've done a sample available or is it a departmental document?

MR BARSON: Not in its present form. It was an initial examination of the reports that were available to us at the time to give us a sense of, if you like, the temperature of the reporting process. That was enough to tell us the temperature is much cooler than we wish it to be. As part of the review we will be doing that properly across all the departments and agencies and that is something we'd expect to advise our minister on and for her to advise the government and perhaps the commission.

MRS OWENS: Another survey that has been done recently, as I understand it, was by the Public Service Commission, which looked at the whole issue of bullying and harassment and discrimination at work. I'll just quote a figure from that, a couple of figures: it was found that 39 per cent of public servants with a disability considered they had been subject to bullying or harassment or discrimination, compared to 17 per cent of their colleagues without a disability. I don't know if you are aware of that survey, but if that is the sort of experience that is happening out there, have you got any views about the action that departments could be taking to reduce in-house discrimination of that type?

MR BARSON: It's interesting, isn't it? Those sorts of actions, bullying and discrimination, are not acceptable for anybody in the public service, and I guess it would concern me just as much that there's a figure of even 17 per cent of people who felt they'd been dealt with in that way, and from the figures you've just quoted, the feelings and concerns of people with disabilities are twice as high. No, I'm not aware of the report. It's something I'll look at when I get back. Again, in part there's an information and understanding role which I think again has been diluted by the range of pressures the departments and agencies are subjected to, but there are

minimums beyond which performance is mandatory, and those sorts of statistics - if people with disabilities are feeling more disadvantaged or more discriminated against, that's not satisfactory and that's something we'd look at.

MRS OWENS: I don't know whether the Commonwealth Disability Strategy covers harassment and bullying. I presume it does, but maybe that's something again for this review this year, to see how far it does cover it and whether it can be strengthened.

MR BARSON: I guess it does and it doesn't. Where it doesn't is inasmuch as those things are fundamental to the sort of code of practice within the APS, and they're simply not acceptable for anyone, and so I don't necessarily see a need for the strategy to add to that and to say, "And, by the way, if it's a person with disability, we don't want you doing it either."

MS McKENZIE: Unless you need specific responses because it appears that there is a disproportionate number of people with disabilities being harassed.

MR BARSON: Yes, and that concerns me, and what I'd be wanting to look at are the areas that's occurring in because it may be that specific issues around disability need to be dealt with, and it depends in part how that's happening. Is that in feeling that they're not able to ask for or seek to be dealt with in particular ways, or is it more overt activities against those people? That's a question of perceptions; something we'd want to look at.

MRS OWENS: I'm sorry, that was a very long diversion away from your other list.

MS McKENZIE: That's a first point.

MRS OWENS: But it's actually an important group of issues to discuss, so I found that very helpful.

MR BARSON: The summary point on that is that when the Commonwealth Disability Strategy first occurred, I think it was paid a great deal of attention within departments and agencies and had some very positive effects and we don't think that's gone away. I guess we're just concerned that it's not having the same active level of effect as it did have, and that means that if it's being allowed to slip or becoming diluted, we have to look at how to again bring it to the forefront.

You had a series of questions, so I thought I might just briefly respond to some of them and then you may have some questions around those. One of the issues the commission raised was around definitions of disability. We actually spend quite a bit of time thinking about those sorts of things because as part of our

Commonwealth-state role we're involved with the state and territory governments in trying to work out how to report in a comparable way across the country on how governments are pursuing the goals and principles of the Commonwealth-state and territory disability agreement. I know the commission has faced some of those same issues in terms of comparing the outlays and activities of governments.

I guess the point we wanted to make, though - because I think the question was around differences in definitions of disability. Even within our own area we use different definitions according to the purpose of that definition, so very different definitions for example are used in the Social Security Act and the Disability Services Act and the Disability Discrimination Act, because there are some very different purposes within say the Social Security Act in terms of income support payments. The definitions are not of disability as such but they're defining the target group of a particular piece of legislation - that is, people who are eligible for disability support payment - and so it's not in that sense attempting in any way to define the person's disability.

In that piece of legislation the primary focus is on whether or not a significant impairment exists in some area which makes it not possible for the person to work for 30 hours or more a week at full award wages. So the definition is one part of the eligibility but the primary eligibility is an inability to work. We don't, for example, spend a whole lot of time or collect a whole lot of information through Centrelink on the nature of the disability or impairment of a person and its current effects or its changes over time. We do get asked questions from time to time, for example, whether we know the number of people in receipt of a disability support pension who have a particular medical condition or a particular impairment or disability. We don't know because we don't collect that information because it's not something of concern.

Even within the Disability Services Act, which both at the Commonwealth level and in state and territory governments covers the provision of employment assistance, accommodation support, community support et cetera, we've certainly tried to ensure that the Commonwealth, state and territory governments are using consistent definitions, and there's a fair bit of effort that's gone into a national minimum data set and data guides and data dictionaries to try and ensure that things that are being reported are being counted in the same way, but even there those are definitions for access to a service rather than attempting to define the disability as such. So they have different purposes.

The Disability Discrimination Act has a very broad definition. In our view that's entirely appropriate to what it's trying to do. We wouldn't see there's any particular need for greater congruence between the definitions in the legislation. In that sense it just seeks to identify a group of people who may be discriminated

against on the basis of some area of impairment of functioning or imputed impairment of functioning, and that's entirely appropriate.

MS McKENZIE: I think we accept that horses for courses is appropriate, but the difficulty it presents for the commission of course is you have various collections of data but they're based on different definitions of disability so it's very difficult to compare them.

MR BARSON: Yes.

MS McKENZIE: And of course the second problem is - and the commission has struggled with this - that there's relatively little data about the effectiveness of the act - by which we can measure the effectiveness of the act. That's still a problem we struggle with.

MR BARSON: Yes, I think that's true, even within our own area. We said at the start the Department of Family and Community Services - one of the primary purposes was to bring together the social security income support components and other community based services. The fact that there is a difference in definition, if you like, between let's just say people with disability in the broadest sense and a person with a disability for the purposes of disability support pension, and for the purposes of the Disability Services Act, causes sufficient confusion for anybody because we may at some stages be talking about people with disabilities in the broadest sense or we may be talking about people who are in receipt of a pension which is a very definite subset, or people who are in receipt of disability services, which is again a different subset.

If you looked even at the nature of disability in each of those three groups and for example tried to say, "What's the biggest issue?" the biggest issue in disability support pension is actually musculoskeletal and psychiatric impairment. They're the two largest groups of conditions of people presenting for the first time with a claim for disability support pension. So what are the major characteristics of people applying for a disability support pension? The two largest groups are musculoskeletal and psychiatric. But does that imply necessarily that those two conditions are increasing amongst the population of people with disabilities? We'd say it doesn't. It simply in some ways reflects a need for income support by people in those groups.

MS McKENZIE: And perhaps a growing awareness that there is this possibility of being able to apply.

MR BARSON: I think there are a couple of things within that. The age range of people applying for disability support pension seems to be changing. There are

larger numbers of people 50 and above applying for disability support pension for the first time, and those conditions may in fact reflect labour injury or, I guess, the stress of modern life, but they may reflect the age group of the people, the major growth in the disability support pension, rather than a change in disability across the board.

MS McKENZIE: Following on from that, a number of participants have told us, and there's some data to support them, the fact that relatively few of those receiving DSPs are moving into the labour market, and there's a change of emphasis and some changes in conditions I think that are contemplated that are going to be designed to try to increase employment participation by people receiving DSPs. What do you think are the reasons for the relatively small uptake, at least so far, of moving into the labour market by those recipients?

MR BARSON: That's a great question. Thank you. I should thank you for asking that question.

MRS OWENS: How long have we got today?

MS McKENZIE: I have to ask you though because - - -

MR BARSON: It's an area of obvious interest to the office, given that we say we manage the policy around disability support pensions. There's some attention recently been given to the fact that disability support pension is one of the largest growing payments, there are more people on disability support than are on unemployment benefits or Newstart payments, and it has increased substantially since 1991, say, over the last decade and a bit.

There are various reasons for that. The deliberate move from what was the invalid pension to the disability support pension in the early 90s, with criteria not only of medical impairment and incapacity but of being able to not work in award wage positions for 30 hours or more a week, was in some ways a deliberate broadening of the criteria and a recognition that this payment was about income support for people whose participation in work may be limited rather than a payment for people for whom work was not considered to be an option, such as permanent invalidity.

That certainly resulted in some changes in employment and it resulted in fact in an increase in the percentage of people on that payment being in receipt of earnings from employment, going from something like 3.3 per cent to currently 9.4 per cent. Depending on how you look at that, you might claim a 300 per cent improvement in people with earnings from work, which is true. Having said that, of course, 9.4 per cent - - -

MS McKENZIE: Is not very high.

MR BARSON: - - - is not very high. I started from a very low base, though.

MS McKENZIE: Yes.

MR BARSON: Which I guess shows the degree to which the invalid pension was a major disincentive to employment. I guess where we're interested is that with criteria of, you know, 30 hours a week or more at award wages, that is arguably very much out of date now. Part-time work, for example, plays a far greater role in society today than it did 10 or 15 years ago. To imply that a person is somehow not capable of working because they are unable to work 30 hours a week, ignores the fact they may be very capable of working 15 hours a week.

That's a policy challenge, in that how do you continue to provide the necessary income support? How do you not have disincentives for seeking employment and how do you more actively encourage people with disabilities perhaps who are on DSP to seek employment at some level? That's difficult, because any changes that you want to make around the pension criteria are sometimes seen as not providing the support that you want to provide, so the legislation that was put to the parliament last year to change the eligibility criteria and to reduce that to a person who is not capable of working 15 hours a week or more - the government's intention was not to remove income support, because people who could work more than 15 hours but who weren't employed, would of course be eligible for Newstart or other payments.

I guess it was the expression of the government view that thought the 30-hour criteria was still describing people as less employable than they were; that it was acting as a disincentive; that the rates of earnings of people on DSP, despite your more generous means test taper rates, were not producing results quickly enough. That legislation, as it turned out, hasn't been passed. We will wait for a government decision on what it intends to do about that.

That goes along with, I guess, the increase in employment assistance programs provided through our department, the welcome increased interest by the Department of Employment and Workplace Relations and the Job Network in providing employment assistance for people with disabilities. Those things are good. What we would not like to see happen is any concern or views that somehow government was removing the income support component. From our point of view, it's important that we continue to provide the necessary income support, along with the employment assistance.

We have seen wages increase slowly. One of the challenges for us, I think, over the next couple of years, is going to be to work out how we can encourage

greater participation in the workforce and perhaps make it clearer to people that the provisions of the disability support pension continue, the ability to get back onto a pension after you have moved off is being improved all the time and that it's not a black and white question of, you know, all pension and no work or, alternatively, all work or unemployment and no pension.

MRS OWENS: Are you involved in the pilot that's going on at the moment - that is being - - -

MR BARSON: The pilot is actually being run by the Department of Employment and Workplace Relations, through their Job Network.

MRS OWENS: I know that, but I just wondered if you were involved in establishing it or are you on any sort of committee relating to it?

MR BARSON: It would probably be too strong to say we're involved in it.

MRS OWENS: Yes.

MR BARSON: Because, as I say, it's something that the department's doing. In terms of trying to - supporting the department in making Job Network programs more accessible to people with disabilities, yes, we're involved in that and we're involved in continual discussions with Employment and Workplace Relations over the interaction between pensioner and employment services. The ability of Job Network providers to assist people with disabilities, improved assessment at - contact with Centrelink and work capacity assessments, which are now going along with medical assessments and being able to feed results of work capacity assessments for new applicants through, if necessary, to Job Network or anywhere else, that's all part of a single picture.

MRS OWENS: Can I just return to the - - -

MR BARSON: Sure.

MRS OWENS: We got a little bit sidetracked onto this issue and we hadn't quite got off the definitions yet.

MR BARSON: Definitions, that's right, yes.

MRS OWENS: With definitions, we have made a recommendation that the definition be amended. This is our draft recommendation 9.1, just to basically spell out what is included, just to make it clearer. We refer to things like genetic - we call them abnormalities and conditions, behaviour, medically recognised symptoms

where a cause has not been medically identified or diagnosed. I wondered if you had views about whether those sort of clarifications are required or would you think the definition is adequate as it is currently stated?

MR BARSON: We have some of the same issues. The definition may be adequate in the law inasmuch as the interpretation of it may be seen to cover those groups, but if there's doubt as to whether an area of impairment is included or not, then it is useful to expand on it. The Disability Services Act, for example, was adopted by all the state and territory governments as well, in the mid-80s or early 90s, as part of a drive to have consistently worded or consistent approaches across all the jurisdictions. Each of those details definitions, within what is essentially the same legislation, has changed over time. Some of the legislation that was passed more recently has added conditions in, again to remove any doubt that it may or may not be included.

We believe the original legislation, if interpreted properly, covers those things. Others have sought to add things in to make it explicitly clear that they are covered. That's entirely appropriate. These days, I think, we are moving toward a sort of more overt description than we perhaps were when we passed our original legislation, so, yes, we think it's appropriate to make it clearer. Of course one will never get it completely clear, because even the addition of categories tends to lead to the next question of whether this one is now included or not; so it never deals with it completely. Certainly in the areas of acquired brain injury, for example, in our own areas of legislation there's no explicit reference to it. There is reference in the Disability Services Act to physical, intellectual, psychiatric or sensory impairment. The brain injury lobby groups and supporters have argued that there should be something explicit. I think if we were drafting legislation afresh today, that would probably be a widely held view.

MRS OWENS: We have had groups coming to us with multiple chemical sensitivities and chronic fatigue syndrome and saying, "We don't know whether it's included or not," and there's a bit of uncertainty. We were trying to embrace that. There was a question mark over behaviour, although that has been resolved to some extent recently through the High Court; the Purvis decision. We are still grappling with this issue. Some said, "It's already made clear, the definition is so broad, don't tamper with it," because then it may raise questions as to why you're tampering with that definition.

We have had a submission from the Australian Institute of Health and Welfare that have suggested we should be updating the definition to come in line with more recent international definitions. I don't know whether you're aware of those arguments.

MR BARSON: We work very closely with the Australian Institute of Health and Welfare on national collection of data under the Commonwealth-State Disability Agreement. Yes, very much aware of the arguments about the definitions and perspective from a data collection point of view. I guess the only observation I would make is that sometimes the clarity of definition that you may wish from say a data collection or statistical point of view isn't necessarily the same objectives that you try to achieve in a description of legislation which is, in the end, about behaviour between individuals.

MRS OWENS: Correct. Thank you. We will move on to your next point. We're probably covering things as we go.

MR BARSON: Yes, that's fine with me. The next point was probably the most difficult of the lot; the effectiveness of the DDA in achieving objectives. I can give sort of an easy out answer there, that our view is that the Disability Discrimination Act has been a fundamental part of the evolution and of attitude change and of changes in practices. If we didn't have the Disability Discrimination Act, I don't think that those changes would have happened anywhere near as quickly or as extensively or as effectively as they have.

Do we think, though, that the Disability Discrimination Act has achieved all its possible objectives? No, we don't. I mean, discrimination still occurs. People do not behave fairly toward other people and the message of the DDA and the educational impact of the DDA we think is very important. I think it's difficult - as I think you said before - to actually point to a change that has happened and say, "That has happened because of the DDA," because there are a whole lot of other legislative and social developments that have happened, but there have been some stand-out issues and I think some of the test cases, if you like, that have been considered in a DDA area and some of the messages that have come out in the areas of transport or employment or education are - they've having a slow effect, but they're having a very significant and major long-term effect. It's a good thing, but it's hard to measure.

MRS OWENS: It has been a problem for us. Because of that difficulty in measurement, you cannot pin it down so explicitly and say, 'This has happened here because of the DDA."

MR BARSON: No.

MS McKENZIE: No.

MRS OWENS: Or, "It hasn't been effective in this area." One of the areas where we said in our draft report we thought it had been less effective was in employment, for example, but then when we've talked to the employer groups, they say, "We don't

see that you have actually convinced us that there is a real problem there." It's very difficult to do that. We have talked about it being more effective in some areas than other areas and some of it is impressionistic. We have had a lot of people come to these hearings and some of it is based on research and studies that we have used and so on, but it's still extremely difficult to actually prove something is happening.

MR BARSON: It is. That's something which I think challenges us all the time in the broader area of social welfare; that it's very hard for us, too, to be able to pin down a particular result and bring it back to a particular government policy. I think there are areas where the DDA has been more obviously successful than others. It seems to us that in areas which are seen as a community or a societal responsibility, it has been more effective than in areas which are seen much more as a contractual, you know, direct person-to-person responsibility. That includes employment.

Some of the messages we get are that, yes, it's appropriate that society or communities not discriminate, but getting down to sort of more individual arrangements, there is give and take and, as I said, individual contractual arrangements, which should take precedence. I think that's one of the factors in employment where perhaps transport has been an easier one to deal with because it's more publicly understood and seen as something that has to be available and fair to everyone. Education, I suggest, will be the next one of those to have a significant effect.

MS McKENZIE: Yes.

MR BARSON: Having said that, we have sort of pondered ourselves the question of disability standards and whether or not they have had an impact. Again we think they have been a significant boost, because they have brought into black and white the intentions of the legislation and made it easier for people to actually relate to. We are very much aware that there is no disability standard being promulgated around employment. One of the issues with the standards, of course, is their effectiveness in part relies on them being a consensus between government, industry and the community and that has been very difficult to get in employment.

MS McKENZIE: Yes, and I think there is a recognition also that employment is quite a difficult area to make a standard in because there are so many variations, and because of the flexibility that would be required in the standard it might make it almost meaningless.

MR BARSON: And there are many different standards that already apply, again from discussions that we were having the other day in trying to work out an issue around the Disability Discrimination Act and its interface with the Workplace Relations Act, and how one could make the desired adjustment to one without

getting into broader issues of workplace relations and union bargaining, et cetera. Our own experience, for example, with pro rata award wages in supported employment, Business Services - - -

MS McKENZIE: That was about to be my next question.

MR BARSON: Was it? That has been an area of, I guess, perceived conflict between the attempts to move forward in employment assistance and the requirements of workplace relations acts and expectations of all the parties. So what question would you like to ask me?

MS McKENZIE: I was going to ask you the question about Business Services. We have discussed the exception that currently exists in the DDA concerning productivity based wages and it's linked, in that particular version, to the DSP. We've talked a bit about the wage assessment tool. What is the progress as far as that's concerned?

MR BARSON: The progress is that one of the standards to which the employment assistance services have to comply with by the end of 2004 is that they have to be paying some form of productivity based wage. That is still an emphatic part of the standards. The requirement to comply is still there. The discussions that have been going on around safety net arrangements have been focussed on people in Business Services for whom this process of productivity based wages may in fact result in a view that they are not employable on pro rata award wages, and will we back away from that standard? The government's position is, no, that it won't back away from that standard, that it believes it's both necessary and essential to have a fair wage determination process in place even for people with disabilities in Business Services. The question is more one of how you ensure that people who may otherwise be disadvantaged in that process are dealt with, but the process of productivity based wages, according to one of several tools, will be in place - says he confidently.

MS McKENZIE: So we're looking at the end of 2004 as a - - -

MR BARSON: We're looking between now and the end of 2004, correct.

MRS OWENS: So what do you think the impact is going to be on employment overall, as a result of this? Do you think it will increase or go down? Where do you think it's going? What's going to happen out there in the Business Services sector?

MR BARSON: I think employment assistance for people with disabilities, whether it's in the Business Service area or in the open employment area, is continuing to increase, because the government is spending more money on that employment assistance and there are more employment assistance places being made available in

each year, and therefore the numbers are increasing. In terms of what impact it will have on Business Services, I think in part we have to wait for government to make some decisions around the safety net consultations and what actions it intends to take to firstly, assist people who may not be productive at this stage, or to assist organisations which may face significant financial difficulties as they move on to case based funding and as they have to deal with these issues. I think the view that is already out there from government is that it does not intend to see any person disadvantaged in this process, but we do have to wait for the results of the safety net consultations in government to announce some decisions, before we know exactly what that is going to look like.

MS McKENZIE: There are some other interesting issues around this that some participants have raised, two I might mention and see if you've got comment about. One participant raised with us a question of what Business Services do. This is a chap who has got a computer company and who found it difficult to understand why so many Business Services have very simple tasks which - some are quite difficult to do for people with certain muscular disabilities for example - when it might be possible to do some relatively simply, but computer based tasks instead. So what he was concerned about was the limited nature of the tasks that are available to people with disabilities that work in those services. The second aspect was what some participants saw as the difficulty for people to move from the Business Services area into open employment, partly because Job Networks don't have the understanding yet to try to gauge whether these people would be suitable for open employment and partly perhaps because if you are working in one of these services you are almost stereotyped and it's difficult to move out.

MR BARSON: I now have, I think, 15 years or so experience in the different aspects of disability employment assistance, and certainly the department focuses on Business Services and on open employment services. A lot of effort over that 15 years has gone into increasing open employment service models. In fact, it would be very rare for a school leaver these days to go into a Business Service. Virtually all of them would go - where they go into employment assistance would be in one of the open employment services. So in that sense, yes, Business Services do face a challenge between trying to walk the path of employment and productive and, I guess, profit-making employment in order to pay wages, and the one that is put to us very often is the difficulty of who copes with the non-employment related services.

MS McKENZIE: Yes.

MR BARSON: I think in some ways, and without setting too many things running, there is a significant Commonwealth-state issue there, because if we go back to 1990 and the first Commonwealth-State Disability Agreement we separated the roles and responsibilities with the Commonwealth taking a very clear role in employment, but

the state and territory governments taking a clear role in what are called day services, which in part were the old activity therapy centres or services which, by their definition, were not completely employment. The definition at that stage was that they spent around 50 per cent of their time in employment-related activities and the other 50 per cent in social activities. We drew a line between them.

I think that has had a consequence and, as the Commonwealth has continued to refine its approach to employment, I think where the gap is - well, two gaps - firstly, the consequent growth in non-employment services hasn't occurred in the same way and it tends to have been seen as falling on one side or the other; people regarded as being in employment assistance, a Business Service if you like, for five days a week, perhaps getting accommodation support for seven nights a week. Accommodation support services structure themselves around the assumption a person would be at work Monday to Friday, which causes all sorts of problems if you were sick a particular day or had a day off.

The nature of employment is changing, particularly in the open employment services. You might find a person working weekends, nights or whatever. So the models of service types, and I think the assumptions that were made around people's involvement in them at that time, tended to be that you were in one thing or another thing, or another thing. Today we have to recognise that people might in fact be involved in employment assistance two or three days a week; they may be involved in some community support program another two or three days a week. As part of the safety net examination, that means we've got to develop a few bridges back with the state and territory governments so that we can be collectively involved in some of those services where perhaps the employment component of a service is funded by the Commonwealth government and other components are funded by the state and territory government, but for the person it is a holistic service.

MRS OWENS: It's seamless, that's right.

MR BARSON: A seamless service. Obviously there will be extremes within that. There will be people for whom our only involvement and interest is ordinary supported open employment, but equally there are people who require a mix of services that I don't think our agreement arrangements really assist with very much at the moment.

MS McKENZIE: One of the suggestions made in the submissions is that there should be some power for the president of HREOC to intervene in proceedings before the ARC where those involved Disability Discrimination Act issues. Different participants have expressed the power differently. Some have thought that it should relate more to Business Service issues and others have seen it broader. Have you got any comment to make about that suggestion?

MR BARSON: No, I don't think I do have any comments to make on the specific suggestion, except to comment that it would be useful for HREOC or its office holders to be able to add value to any sort of proceeding by - in that sense - appearing or intervening on the issue of potential discrimination against people with disabilities. So without going into the specifics of that suggestion, yes, it would be useful in our view for HREOC to be able to take a more active intervening role.

MRS OWENS: Can they intervene at the moment, or do they?

MR BARSON: No, I think at this stage they're certainly able to offer opinions, but they're not a part of the proceedings as such. I understand that's - - -

MS McKENZIE: That may be difficult, because it might be difficult for the commission then to take account of the submissions in the same way that they take account of submissions by people who are actually part of - - -

MR BARSON: If I understand it correctly, that is the difficulty, yes.

MS McKENZIE: Yes, I understand. That seemed to me to be - - -

MRS OWENS: We probably should go back to the list that Roger has - - -

MS McKENZIE: Yes, I think we've strayed from your list.

MRS OWENS: I thought we may be - unless you wanted to - on Business Services.

MS McKENZIE: No, they are all the questions I wanted to ask about that.

MR BARSON: I don't really have that much left anyway. There was a question about competition and economic effects. We note that while the DDA has had a positive impact in rights generally, there is still discrimination in the labour market and people with disabilities are significantly underrepresented in the workforce. Our challenge is to ensure, as I said, that employment assistance incentives and income support incentives assist people to move toward employment and not away from it. We think we have most of the policy levers right. There are certainly though some issues in people not completely understanding what they're able to do.

We get a lot of concerns, for example, expressed as "Disability support pension means I cannot work, or I cannot earn money." In that sense we've been active in those individual cases pointing out that the means test is fairly generous and in fact a person can work and they are protected until they are either working 30 hours a week

on award wages or earning a reasonable wage, and there is ability to return to pension arrangements. But just more broadly, most of the levers are right but possibly the understanding and the actual implementation of some of those arrangements means that the pensions and income support payments are still seen as a disincentive. That's something we need to work on over the next year. I mentioned disability standards.

MRS OWENS: We've got to get on to the standards. I'd like to just pause for a moment on competition and economic effects. One of the issues we raised in our draft report was about who should pay, because there's been an understanding that if a person comes, say, to the door and wants to get a job that employers would be responsible for the adjustments up to the point of unjustifiable hardship - there's now been a question mark over the act about whether that requirement is actually a real requirement. Nevertheless, I think there may be resistance out there because of the potential costs impact. You talked about that before in terms of Commonwealth departments and agencies.

So we did go through a discussion of to what extent should it be a societal responsibility versus an organisational responsibility or an individual responsibility. You talk about the Workplace Modification Scheme as being one of the government programs. I suppose there's a general question as to what that program and whatever other government programs are in place add up to: whether they are just peripheral programs or indeed whether they represent a significant government contribution to making changes in the workplace. I'm not clear in, say, the case of the Workplace Modification Scheme what criteria are used. Who gets that? What sort of employer is going to get access to that scheme? Do people know about the scheme?

MS McKENZIE: And how quickly? That's the other really important question that's been raised by some participants who have said that the scheme is great but you've got to go through lots of forms and the employer has to sign some of them. The nod might happen within a couple of months, but of course in that period the employee would be presumably unable to do the work required, so would that deter an employer from taking the person at all?

MR BARSON: I can make some general comments around that, that are within my area, that are things that I'm aware of. I think what's interesting is that in 2002-03 we spent $303 million on employment assistance programs - opened employment to Business Services.

MS McKENZIE: Some of that will be wage support?

MR BARSON: Yes, some of that. That's employment assistance in training, assisting people to get into jobs; and a further 113 million on vocational

rehabilitation. Within that we spent $7 million on various - Workplace Modification Scheme, Wage Subsidy Scheme and similar. So, yes, $7 million out of the 3 or 4 hundred million dollars spent on employment assistance and rehabilitation.

MS McKENZIE: And even that 7 million - is that only on equipment and modifications?

MR BARSON: No, it's on a group of employer incentive programs which includes the Workplace Modification Scheme, the Wage Subsidy Scheme, supported wage system and disability recruitment coordinators. Workplace modifications - in that year, the scheme approved 236 applications for assistance.

MS McKENZIE: Do you know how much the total was?

MR BARSON: I don't have a dollar amount here but I'd be happy to provide that to you. I just have to find out what it is. What we do know is the people who were assisted into employment under those modifications since the scheme has been in place - that's 1998-2002 - 37 per cent have been for people with visual impairment and 33 per cent modifications were for people with physical impairment. They've been concentrated in Victoria, New South Wales and Queensland, so the eastern states.

MRS OWENS: What does that say? Does that mean that in the other states there's less knowledge about the schemes or is there less need for the schemes? Has anybody reviewed these schemes to see how they're working?

MR BARSON: Partly there's a population issue, in that the majority of the population is in those three states. I'm not saying it's exclusive to those states. However, when you add those up that's 94 per cent, which means 6 per cent in the other states, so there's certainly a disparity there. From the perspective of the office, given that we don't manage that scheme, we would like to see more effort going into workplace modifications and employer incentives than we're currently putting in.

MS McKENZIE: The other thing to say about the figures you've just given is, if I'm adding up correctly, that makes I think 70 per cent going to people with physical - if you like, sensory - impairments and every other disability presumably makes up the other 30 per cent.

MR BARSON: Yes. I have it listed as visual impairment and physical disability. I don't have any further breakdown into the characteristics. That wouldn't surprise me completely, inasmuch as the workplace modifications themselves would tend to be in those two areas.

MRS OWENS: Although workplace modifications could actually be much broader than getting equipment. It could be adapting your recruitment processes and all sorts of things; employment policies. Maybe this thing is about just providing equipment and that sort of simple stuff.

MR BARSON: That's it. I think the point has been made, in relative terms, that it is a very small scheme.

MRS OWENS: Are there other Commonwealth schemes to complement that?

MR BARSON: There are obligations of course in all departments and agencies to manage their own workplace modifications, just as there is in the Department of Family and Community Services.

MS McKENZIE: But for the private sector?

MR BARSON: Private sector? No, I'm not aware of any.

MRS OWENS: I was going to ask about the criteria for this money, the $7 million. What sort of criteria are used to allocate those dollars?

MR BARSON: I'd have to get you an amount for the Workplace Modification Scheme itself because, as I said, it does include the others. For the Workplace Modification Scheme a person must be employed for at least eight hours a week in a job that's expected to last for at least three months.

MS McKENZIE: That's really hard if you want to get work experience. It means that, if it's a short job, you can't get equipment to help you. One of things employers have said to us is that it's really helpful if people come to them having had prior work experience of some kind first, so it's like a vicious circle.

MR BARSON: Certainly from the office's perspective, when we look at what we're spending in other employment programs, we'd certainly like to look at how employer incentives can be increased.

MS McKENZIE: Can I ask, of that 236, that's private sector only or private and public sector?

MR BARSON: That would be private sector.

MS McKENZIE: Private sector only?

MR BARSON: Yes.

MRS OWENS: I'm still worried about the 6 per cent going to the states other than Victoria, New South Wales and Queensland. It really does reflect perhaps that the industry knowledge of this particular scheme is quite limited in those states.

MR BARSON: It may mean that. As I say that's something that we - in putting this together, it stands out. It does stand out.

MRS OWENS: Maybe there's room to actually evaluate those schemes to see exactly how they're going and what the impact has been. One of the things we're really thinking about is whether these schemes that are available are adequate. $7 million doesn't seem like a lot of money.

MR BARSON: The Wage Subsidy Scheme, which is an incentive for employers to employ people, allows wages fully or partly subsidised for up to 13 weeks to a maximum value of 1500. That had 2835 people assisted during that same year, so that's a significantly higher number. That tended to be used more by small businesses with less than 20 employees. The supported wage system, which was a basis of calculating partial wages - there were 3000 employees assisted in that. So, yes, we're very much aware that the 236 successful claims in the Workplace Modification Scheme doesn't look very generous.

MRS OWENS: It would be very useful when you put in your final submission just to give us a bit of detail about that scheme.

MS McKENZIE: That would be very helpful, because that's the first time we've heard statistics about this matter.

MR BARSON: Yes, and we've covered a number of those programs in our attachment.

MRS OWENS: The other program that's been brought to our attention just very recently is the Prime Minister's Business and Community Partnership Program. I don't know if you've got any details about that program and how long that's been working? Should we go to the Prime Minister's department to find out?

MR BARSON: That one happens within the Prime Minister's department but also in cooperation with our own department. I'll just look quickly. I don't think I have anything with me but I can certainly get some information on that partnership and provide it to the commission.

MRS OWENS: Is there money attached to that program?

MR BARSON: There is. If I understand it correctly, there is an amount of money that's available for grants under that program, but I'd rather obtain the accurate information and provide it to you.

MRS OWENS: Thank you very much. Now you were going to come to disability standards. We talked a little bit about standards in employment, but maybe you had some general comments you'd like to make?

MR BARSON: We talked a little bit about it, but I thought we'd express our support for the disability standards and the fact that we've participated in their development. We note the difficulty sometimes of achieving consensus on what the standards can and should be. One of the issues there is the one the commission has already raised, which is the issue about who pays. We think that where standards have been put in place that serves as a major encouragement over time to comply, but many would argue that it is still inadequate and still takes too long for those changes to be made. There are significant changes being made in public transport, but very long lead times are necessary for some of those changes to be put in place.

We think standards do assist in two ways: firstly, they enable people to understand what obligations may be placed on them in a more concrete way, but also they provide an easier issue to raise with people who may be deliberately or unconsciously discriminating. It is much easier to be able to raise a specific example or a specific standard to be complied with. We think the standards are good. We continue to work on them but I guess our major observations would be they are very difficult to do when you try to do them with the necessary consensus.

MRS OWENS: As we've gone around people have made the obvious comments about how long it's taken to, say, get the transport standard up and access to premises and so on, and the difficulty in areas like employment. In some cases, some groups have said, "Well, the consultation process was inadequate." The Australian Education Union said that they were involved very early on in the consultation process but not later, so that by the time the education standards were getting close to finalisation, they didn't have an input and they have concerns about those standards.

MS McKENZIE: Some of the disability reps also said that they felt that the consultations occurred with peak bodies but perhaps not much further down the line. It's a very difficult process. We recognise that.

MR BARSON: As I said right at the start, one of the purposes of the office was to be a conduit. We're very much aware of the difficulties of consultation on anything. Yes, there does tend to be a view that if peak bodies exist and are belonged to and receive financial assistance from government, then surely you should be able to go to peak bodies and get the view. But I think the nature of the beast is such that they are

not always the views of people at the grassroots. How you balance out the need for consultation at the lowest community level - and by that I mean the provision of first-hand information - and the ability to have a dialogue about that and to iteratively form a view is very difficult to do. Departments and agencies do tend to try and take the short cuts of dealing with peaks.

MRS OWENS: We've got a wonderful example at the moment of a suggestion that we made about perhaps having an accommodation standard. Some of the peak groups we've spoken to have said, "We don't necessarily want to see an accommodation standard because we don't like the idea of having institutional accommodation at all." We heard that last week in Victoria. Then you get individuals and family members of people with, say, intellectual disabilities who say, "The reality is there are different forms of accommodation. We want choice and if there's going to be that choice we'd like to see the standards in place as a protection." So you have a lot of tensions out in the disability community which are very hard to deal with.

MR BARSON: There is a view, I think, that setting a standard makes it a lowest common denominator, that everything immediately becomes at that standard. If you're pursuing a least-restrictive alternative view, then the least restrictive alternative for an individual may be very different from the standard that's attempted to be put across. We see it both ways. Our view is that there is a place for standards and guidelines around many things, including accommodation, if they are able to be done in a way that it's clear they're dealing with a particular model or a particular style of accommodation. For example, having a standard on accommodation which provides care and housing and all those things under one roof shouldn't be seen as necessarily recommending that particular model of accommodation support.

MS McKENZIE: It's really just to provide protection for those that happen to be in that accommodation.

MR BARSON: It should be around explaining what is expected of that particular model. It doesn't imply a - - -

MRS OWENS: It's not an advocate for that.

MR BARSON: No. It's a little like, let's say, having a standard of care in institutional services. Some would argue that that's inappropriate because institutional services are inappropriate. On the other hand, if you are going to have institutional services, then perhaps you should have well understood standards which you're expecting them to comply with.

MRS OWENS: That leaves just another question about standards and that is a

proposal I think we have put in our draft report and it's also the view of the Human Rights and Equal Opportunity Commission that the act should allow for standards to be introduced across all areas that are covered by the act.

MS McKENZIE: If that's thought appropriate.

MRS OWENS: If that was appropriate, but then there is an alternative view that if the act was extended in that way so that standards could be developed anywhere, that might create a false expectation that you can develop standards and, indeed, standards are appropriate in areas where they may not be appropriate. Hence it is better to specify areas, as the act does now, but maybe a broader range of areas. Have you got a view about that?

MR BARSON: The only thing we contribute there is - it relates to the last point I made - but one of the issues is that the areas of standard are very broad. That, of necessity, means the standards themselves are very broad. I think there is an equal criticism that the standards are not specific enough to apply in situations because they are attempting to deal with the whole nature of the problem, be that transport or access to buildings or whatever. So ability to set a mandatory standard for some things which are common across an area, and ability to set a broader standard or guideline for things that are not necessarily present or appropriate in every circumstances, would possibly be the only way of dealing with that. We think the major areas are covered and it's only a case of how the standards are expressed that perhaps is the issue.

MS McKENZIE: But you don't have any issue with the power to make standards.

MR BARSON: Not at all.

MRS OWENS: Are there any other areas that you wanted to cover with us?

MR BARSON: I think I was only left with one - Australian government laws and programs. We talked around the Commonwealth Disability Strategy and areas of future challenges. You have mentioned a couple of them actually.

MS McKENZIE: Genetics.

MR BARSON: The issues around genetic testing and acquired disability are of interest to us and we monitor to us. The issue of standard of employment we have already covered. I wanted to just cover one more issue and that is the interface between ageing and disability, or the disabilities acquired late in age.

MRS OWENS: This is not at all topical.

MS McKENZIE: It sure is.

MR BARSON: Some of the reporting and the discussion that goes on around disability and ageing and the difference between them, or the separation between them - in some sense we have contributed to that as well because we have a particular concern about people of working age who have disabilities - but for us the issue of disability is very much a continuum. Impairments can be identified in people very young or in people of advanced age and, as an office, we don't find it terribly useful to focus on chronological age as a characteristic of disability.

It does become an issue in terms of how you look at demographics and how you predict changing needs, but we are reluctant to adopt an approach whereby disability is seen as something that exists only during one's working life and when you retire you suddenly cease to have a disability and you have something called old age which carries disabilities with it.

MS McKENZIE: There may be a problem. We have got an Age Discrimination Act eventually and we've still got the DDA and clearly we have been looking at both those, the bill and the act. Age is not meant to include disability and the other way around as well. But a person might finish up falling between the two. If they get the categorisation wrong - if they say the employer discriminated against them because of disability but in fact it turns out it was age and they have made their complaint under the DDA, they may well be in trouble.

MR BARSON: It's possibly more of an issue the closer I get to it, whereas I must say I don't see age as an issue, as such. I certainly see limitations on what I can do and what my body will do for me as being an issue, but that's not chronological age. One thing that is often put to us the issue of people with disabilities whose, if I can say, bodies or minds are wearing out more quickly than the normal life span ideas would let you think. So people in that sense are experiencing the frailty of ageing when they are not aged. I guess it was just a point that we wanted to make that in looking at disability and looking at the Disability Discrimination Act the office's view of disability is a very broad one and covers people of all ages. It isn't just focussed on people of working age, but of course our colleagues in the Department of Health and Ageing have a specific responsibility around people who are aged and frail and there are a number of interface issues that I think we need to continue to improve, to make those two areas a seamless program. We just wouldn't want the Disability Discrimination Act to be seen as exclusively a working age piece of legislation. That's it.

MRS OWENS: Thank you very much, Roger.

MS McKENZIE: It was a really helpful submission.

MRS OWENS: It will help us to get a further submission from you and you can clarify some of those issues such as the Commonwealth programs and the Business and Community Partnership Program and some of the other issues you might feel that you want to expand on in your submission. It will be very helpful for us.

MR BARSON: Certainly. I also hope that we will be in a position to provide that in an even shorter time frame than the last time I told you that.

MRS OWENS: Thank you very much. We will now break until 11.30.

MRS OWENS: We will now resume. The next participant this morning is Olivia McMahon. Welcome to our hearings. I will ask you to repeat your name and state the capacity you are appearing in today for the transcript.

MS McMAHON: My name is Olivia McMahon and I'm appearing as an individual.

MRS OWENS: Thanks, Olivia. I've got a short summary from you about some of the issues that you wish to raise with us, but I understand you have a question for us which I said I may not be able to answer; Cate might be able to.

MS McMAHON: Thanks, Cate. I would like to clarify my position as an individual in making this submission in respect to any retribution or retaliatory action which may occur subsequent to my submission in this review.

MRS OWENS: I would like to think that there is no retaliatory action but your comments are on the public record and you are making this submission under the Productivity Commission Act. I'm not sure what the retaliatory action would involve. Have you got any comments on this, Cate?

MS McKENZIE: Again, I also don't know what the retaliatory action would involve, but you making this submission at a hearing and obviously you don't intend to defame any people, but certainly no action should be taken against you because you have come to make a submission to this inquiry.

MS McMAHON: Thanks, Cate.

MRS OWENS: As I understand it a lot of the comments you want to make are of a general nature about your own experience and you have got some comments about the act.

MS McMAHON: Yes. I have a prepared statement. If I could just read that in relation to who I am and how I feel my submission may be of value in regard to my personal capacity in family, et cetera. I am the sister and live-in carer for my only sibling, my 52-year-old brother, who has an intellectual disability of no known aetiology, with some mild hearing loss in one ear. He receives support from a local home and community care funded service provider for social and recreational support one and a half days per week.

He has attended a Business Service, formerly known as a sheltered workshop, since the age of 16 and currently attends three days per week. He receives a disability support pension and a small income supplement at the rate of approximately 52 cents an hour. I support my brother and other Sunshine Coast

families with sons and daughters in Business Services, residential care, special education settings and in the resolution of issues surrounding education, applications for funding and consumer issues through informal advocacy and as a community activist.

I am a retired schoolteacher and have worked with mainstream and special needs children from early intervention settings through to prevocational, with school students in both New South Wales and Queensland. Although I consider myself an advocate informally on behalf of my brother since the age of about seven - he is 18 months older than me - that has meant I have been involved in all of the schoolyard bullying, the community context when you are on a family picnic, when you are in the street on weekends; as he has grown older, in making sure he is not a target of victimisation and bullying by other youths; and in his adulthood in supporting him in his social contact within the community and in many other ways.

So I consider I have been his advocate for a very long time. I actually enjoy the role of president of a local parents group of a service organisation that works throughout the state with a range of different services. I'm also familiar and work with and beside other men and women who work for funded agencies in supporting people with a disability. So that is my perspective as an individual.

MRS OWENS: That's a very useful perspective because I think that we could discuss quite a range of issues with you in relation to your brother and your experiences with your brother in terms of Business Services, your position as a retired teacher and the experiences you have had with special needs kids in that context, and as a carer - they are all very relevant to our interests in this inquiry.

MS McKENZIE: Also the question of harassment as well. You have talked about harassment and bullying. That's one matter we have also raised in our report.

MS McMAHON: Yes.

MRS OWENS: And there may be issues relating to accommodation that you might want to raise with us, too.

MS McMAHON: I have identified the five particular areas that I have chosen to respond to today and if we could, I could move on to them.

MRS OWENS: Go ahead.

MS McMAHON: I haven't got my copy of the draft stopper, as it has been described. In respect to that I actually received an email about this submission and the hearings almost by accident. It took me a while to get my head around actually

what this was about, but in the limited time frame I have tried to respond in respect to the connections that I have already made and the advocacy that I already do, and I feel that I would like to make these submissions now.

MRS OWENS: Thank you. We are very grateful.

MS McMAHON: Response to the Disability Discrimination Act 1992 draft report number 1, "the act: promoting community acceptance which is discussed in the overview on page 33." There is a lack of community awareness and education about the act. I think I realised that there is a Human Rights and Equal Opportunities Commission but I did not know exactly what their role was, except that I thought it was an overarching role and would be superior to any state legislation. It was only when I started to read that I had a personal awareness and I wonder what the general acceptance and understanding is by the community.

Some of the questions that I ask would be: when and how does the act and its provisions come into effect? Who has the authority to action this? What precedence must occur before an application proceeds in the Federal Court? Is the Human Rights and Equal Opportunities Commission the first or last port of call for justice for people experiencing discrimination in everyday life? Can I make an inquiry before raising a complaint? Can somebody act on behalf of the person with a disability? Who can act?

Can I say that I have only just been made aware today of the Disability Discrimination Handbook which probably goes some way in describing some of those processes, so I suppose in that respect not only myself but other people probably have poor awareness, let alone acceptance of the act if they haven't been aware of any publications. There certainly are some questions in there that if I spent more time reading the act would probably be more familiar with the correct responses.

In the second part I would like to speak about the accessibility of the act. In particular I'm speaking in respect to the draft finding 7.2, the Human Rights and Equal Opportunities Commission's education and research function; the draft finding 7.9, raising awareness with professional associations and educators; draft finding 7.11, Human Rights and Equal Opportunities Commission's web site for distributed information; and the draft finding 11.1, shopfront for advice and complaint lodgment. I have just written a couple of paragraphs here that look at those issues, so if I could just continue.

MS McKENZIE: Sure.

MRS OWENS: That would be great because we have been doing these hearings

for a few weeks but not many participants in our hearings this time have discussed these issues, so this is very helpful.

MS McMAHON: I felt that when I went through that I certainly had some response to those areas, so I have tagged them and felt that there was a link with each of those findings and I could make a submission in respect to those. Might I say that I find the act itself fairly complex for the ordinary citizen, let alone people with an intellectual disability. Can I say that I have only just recently completed three and a half years postgraduate studies in applied science, library and information management of which a major component was research and research evaluation, so I consider myself a fairly skilled exponent and wonder how I might have dealt with some of these issues if I hadn't garnered those skills in more recent years.

As I say, for ordinary citizens who aren't computer savvy, et cetera, the complexity and the legalese that is inherent in an act actually makes it difficult for people to access it because of a lack of understanding. People can be doubly disadvantaged with accessing information due to limited cognitive functioning and/or limited communication or the need for accessible formats. I see that there is perhaps a need for a plain English version and see perhaps the handbook as being a helpful component to address some of those issues in explaining the act from both a state level - through the Queensland Anti-Discrimination Act - and understanding the Commonwealth DDA.

The desirability of a shopfront presence in each jurisdiction for the Human Rights and Equal Opportunities Commission for advice - I query whether support or redirection may be part of that role - and reasonable access for conducting conciliation. One of the problems that I have when looking at any process is to understand what potential outcomes might be. You hear of mediation and conciliation, but often you really need to know what expectation you have for a process before you go into that. Sometimes people have unrealistic expectations, or they don't really know, but just want to express that they're uncomfortable or unhappy about circumstances that have occurred.

Currently the Human Rights and Equal Opportunity Commission has a web site for information. Computer literacy skills and Web access are not universally available, while limited free library access to the Internet is offered at restricted times. Many regional areas lack suitable commercial Internet cafes outside of business hours and on weekends. I've experienced this myself recently where, in the town I live - which is Nambour - the only Internet cafe closes on a Saturday morning and is not accessible again until Monday business hours. So even though the information is on a web site it isn't always accessible for all people, and people have difficulty negotiating access, either through the free services that regional libraries do support the public and the community with, and that people lack the skills to know

how to access a web site or to enter the URL or the find that information.

I applaud the fact that there is a web site and that it is accessible for those who can get to a computer and have the requisite skills. A concerted education awareness program across all groups within the community should include businesses and service providers in accessible formats. This would be a positive move towards greater accessibility of the act.

Moving on, in particular dealing with people with an intellectual disability - as this is my particular area of concern - under the section "improving the DDA, overview 36" the draft recommendation 9.1 I feel should be adopted. This deals with the amendment of the current broad definition of disability to recognise genetic abnormalities and behaviours. I've written some little notes here that it's certainly my experience and of families around me, it is extremely frustrating to be constantly asked, "What is wrong?" with your son or daughter, brother or sister, when you cannot name the condition or know if they are affected to a yet to be named syndrome.

You might describe perhaps that their body or face shape has some anomalies, or that they have difficulties with speech and comprehension, or have challenging behaviours, but sometimes people with an intellectual disability look completely normal. It is no less frustrating to be constantly asked in reviews by Centrelink in regard to mobility allowance or other pension support provisions if your son or daughter's condition is likely to improve when the person has an acknowledged permanent intellectual disability of no known aetiology.

Recently I have had the experience of taking my brother for specific genetic testing as research has certainly improved since my brother was born and the types of interventions and strategies that were used when he was a baby in the late 50s have certainly been improved with DNA research and genetic testing and other devices that help people understand conditions and syndromes. Can I say that although my brother presents with so many of the physical and behavioural symptoms of a particular syndrome known as Fragile X, he actually failed the blood test. So nobody can actually say what is wrong with my brother and it's quite disturbing to think he seemed to have such a high percentage of the known reported behaviours, physical appearance, yet failed the blood test only to be told that it appears he may have another X-linked condition, not between mark 27 and mark 28, which is the deciding factor for Fragile X.

Many times people are frustrated and many families tell me that they don't know what to say or do when people constantly ask them, "What is wrong with your son or daughter?" When family members know and recognise, and the community recognises perhaps a person with Down's syndrome by certain facial irregularities or

characteristics, there is a much greater body of knowledge that supports that person with long-term research. Already there is an application at the moment to support those people with Down's syndrome in a special clinic that is being set up, that only gives those persons a chance to fully investigate and look at longitudinal research in that specific disability.

Clients with known intellectual disability can suffer from additional or multiple disabilities, such as progressive conditions linked to the ageing process. These include and are not limited to diabetes, gastrointestinal problems, early onset dementia, depressive illness and mental trauma. Of course, this is not excluding any other form of psychiatric condition. They can be double disadvantaged with accessing information due to limited cognitive functioning and/or limited communication, or the need for accessible formats. When people with an intellectual disability suddenly find that their body isn't working the way that it worked before, it can be incredibly frustrating. When they have poor communication it may be manifest in bizarre antics, because they can't understand what is happening to their body, and often require maximum assistance for toileting with colostomy bags - and this has been our experience, certainly with clients in some services - they need extra, extra help now to manage a medical condition which they didn't have previously.

Fourthly, proposed accommodation standard, equality before the law, draft findings 6.2 and 6.3. In respect to the proposed standard, I'm not quite sure what my reaction to that is, but I would like you to hear how some service providers look at the principles of human rights for clients in receipt of their services. Although many service providers suggest a commitment to the principles of human rights for clients in receipt of their services there appears to be a complete lack of suitable training and education, from management to all levels, and front-line staff in recognising duty of care, the principles of human rights and the responsibilities of reporting of alleged abuse, as outlined in their own service agreement with the state.

Currently one major service provider to clients with an intellectual disability does not recognise client rights in respect to block-funded clients in the provision of residential services or, indeed, regard to any other service which it provides in the absence of an individually negotiated service contract which includes the Moving Ahead Program, MAP, Options Plus for post-school activities, and accommodation support programs. When I discussed this matter in relation to some concerns raised by parents, I'm told that under viability things have stalled and clients are not protected by any current service agreements. So clients are paying for a service, yet no-one will tell them what they are paying for and they never know what their rights are, when they aren't expressed.

The new Residential Tenancies Accommodation and Services Act 2003, I think

it is, gives greater rights to individuals in hostels, institutions and group homes than what is experienced by many intellectually disabled clients residing in group homes owned or serviced by non-government service providers. This is actually in breach of the funding guidelines which specifies under the Disability Services Act for funded services, that the performance and outcomes of the service as well as clients' rights in respect to that service, must be identified. Families have reported that their sons or daughters have been moved from one residential to another without any form of consultation. The new Residential Tenancies Act provides for a minimum of two months' notice and also supports residents in many other ways.

There seems to be a huge inequity between this new legislation that protects people who pay for an accommodation service, and expressly people who are funded under an accommodation service funded by DSQ are exempt. They are supposed to be protected by the disability service standards but clearly this is not happening. I think there is a form of discrimination that exists there where a similar service, which isn't funded under disability services, but provides an accommodation service - that is, the provision of meals and perhaps personal care - have greater rights.

Lastly, under the "complaints" area: requests for information - L1, 51; harassment provisions and vilification of people with disabilities, the draft finding is 11.2, fear of victimisation; the request for information 54, LIV; the draft finding is 11.3, the financial costs, complexity, evidentiary burden, inequality of resources; the draft recommendation 11.2, the 60 days to lodge an application; the draft finding 11.12, organisations to initiate representative complaints, the request for information; demonstrated connection for disability organisations to initiate complaint. Now, I've just made some points here that are all relevant to each of those findings and hopefully give you some more information in respect to that request for information.

For clients with intellectual disability, poor cognitive functioning and/or poor or limited communication third party representation is necessary and desirable. Many parents and family members lack the necessary skills to negotiate the legal system. Representation can also occur through an organisation committed to individual advocacy - eg, Community Advocacy Sunshine Coast, or through an organisation committed to systems advocacy, like the Office of the Public Advocate, QPPD or QAI in Queensland, who can support and assist these clients. These supports can only be accessed if they are advised or made aware that an individual or a situation needs their support.

In respect to demonstrated connection for disability organisations, what other organisations will be eligible to act on behalf of people with an intellectual disability? Some service providers are increasingly xenophobic and actively resist outside support to clients in residential group homes and in supported accommodation, provided or brokered by packages funded by Disability Services

Queensland, by formal advocacy groups, family, local church community and other members of clients' informal support network. There are situations where families are not even encouraged to enter the premises where their son or daughter now lives.

Disturbing reports from parents indicate that they have actually been told not to speak with parents, yet other supports suggest that decision-making on behalf of a person with an intellectual disability acknowledges the rights of families to be involved in that decision-making and that decision-making should be in partnership with that person and their families. Sometimes it seems that a service provider can suggest, in empowering clients to self-advocate, that they might have asked that same question in regard to a change of service, to a person receiving those services, and the family were not told of that situation; they were not involved in that decision-making opportunity and feel powerless. When they are told, "No, your son or daughter has told me they don't want to do that," when clearly, sometimes the rights of the individual - although I accept that sometimes that can be compromised by families who might have a conflict of interest - you could equally say that the service provider has a conflict of interest.

Families, friends and advocates have been subject to verbal abuse, harassment and unfair treatment due to their presence as a visitor to a service or when a complaint is raised. Retaliatory and recriminatory actions are real and have been perpetuated on families and clients of services where there has been unjust treatment and victimisation. Parents have expressed real fear of loss of placement for family members receiving services under block funding, often non-transportable arrangements, when very few or no other suitable options exist, especially away from metropolitan areas. Impacts on families in remote and regional communities can be devastating.

The organisation responding to a complaint can often demonstrate a commitment to preserve its own image and to protect its board of management and staff before acknowledging any criticism or that a complaint is valid and will use all necessary financial and legal resources against a client with a disability and/or their advocate. The odds are stacked against the client with a disability who has limited financial, legal and intellectual reserves and can suffer ongoing physical and emotional trauma when the complaint is unnecessarily drawn out.

A person with a disability receiving services in the aged care sector is heartened by the sanctions, breaches and demerits systems which can act as a disincentive for improper conduct towards a person receiving those services. A lack of similar suitable provisions in the disability sector, including sanctions, allows many service providers to continue to abuse people in group homes, residential and others accommodation support. In respect to the rights of a natural person to achieve natural justice, it seems that in Australia there is so much legislation and there is a

difference between the level of funding that supports a person with a disability, that you are no longer just a natural person; you are bound and you are restricted at times by the funding arrangements that are meant to support you that are in place and by the overarching state or Commonwealth legislation and that people are not equal before the law. Thanks very much.

MRS OWENS: Thank you very much. Thank you for all that preparation that has gone into that. We are very appreciative.

MS McKENZIE: Yes. To start with, you have made some comments on the Business Services area. Do you want to expand on that at all?

MS McMAHON: In respect to that, within the organisation of which I am not only a member but president of a parent group, there has been a task force who have met to consolidate the role of the parents in decision-making on behalf of sons and daughters who are receiving those services in Business Services. In respect to Queensland probably 65 per cent of persons receiving support in Business Services actually live at home. So although there is a group who, I believe, are trying to use the Disability Discrimination Act against the provision of services in Business Services, families have already made that decision and two-thirds of those families also support that person in their own home.

For many people - although I quoted that my brother receives 52 cents per hour, I understand that underpinning that he is also in receipt of the disability support pension. There are issues in respect of the concept that all clients should be entitled to open employment, but realistically an amazing amount of support is necessary with community expectations or incentives that would allow that person to be supported sufficiently. Idealistically - ideally the idea of open employment is desirable if the supports are there. If that person then is subject to further bullying and harassment because he doesn't have the social skills to adapt to the workplace - it's interesting that in my brother's situation he has had a gamut of activities that he has been involved in since the age of 16 and, in fact, many of those work activities are now being repeated.

It was a cycle that was - for instance, industrial rags is an activity that my brother has been involved in that now is being tried again in the workplace and is commercially quite viable; but there are other aspects to do with productivity and the level of funding that will support individuals in Business Services. Although the minister has said that people will not be disadvantaged, the constant reference to productivity and money, either on the level of support that that person would need to be productive in the workplace - and I find that the context of a client in the Business Services is highly contextual.

Can I say that as a teacher of pre-vocational students in a special school in North Brisbane, we actually have a lot of the furniture manufacturing in that part of Brisbane and it was not uncommon for work experience that people went and had a trial at a work experience level and were later taken on as full employees in what is actually open employment. So the difference might be that an enclave has been created by the concentrated energies, where the Business Services is currently on the Sunshine Coast and there isn't an equivalent concentration of suitable industries to move sideways to. Also the fact that each Business Service decides what type of activities they are involved in can be highly prejudicial to the work context that the person being supported might like to be involved in.

MRS OWENS: Do you support the productivity based wages that have been introduced or do you see it as a wage assistant tool?

MS McMAHON: I find that there is an inequity in understanding that currently people see the income as a supplement. It sounds crude and rude to talk about a person who manufactures furniture that is sold in upmarket retailers around Australia, is paid 52 cents an hour. Yet if you look at the big picture, they are actually also being supported at a level of $260 a week they are also getting. So I can understand that there are problems with people's perception that it's slave labour and the fact that it isn't seen as a combined amount, and it actually is drawn out as an hourly rate, is quite confusing when you realise that the product is sold in the open market, that the supervisors are paid what they would normally be paid in industry and that the provisions for the clients and their supervisors under the new proposed award would be such that they are both under the same award.

The irony is that a person who is in supported employment is receiving support from the same provider who pays that income. I'm not quite sure I understand what the answer to that is but I know that for many people who are in the therapy training centres, they are given provisions to learn some work skills. Increasingly, those work skills are being given to clients in the day centres where previously these were true work contracts that were negotiated and clients actually were given this work in a Business Service setting. I also query whether the door really is open for people who are continually seen as being in a training situation, for whom no provision has been made to perform those same tasks yet be paid as a Business Services employee.

MS McKENZIE: So when they're doing it in a training centre context, what payment do they receive for that?

MS McMAHON: They don't.

MS McKENZIE: They receive no payment.

MRS OWENS: I think the other issue I'd like to explore further with you is this whole issue of the accessibility of the act. I think you made some very pertinent comments about people's access to computers, and even if they do have access they may not be able to use the computer in some cases, if they have an intellectual disability - - -

MS McMAHON: Can I say that I have not reported here, because I often forget - my brother actually can read and write, and he does have a level of comprehension that he can enjoy reading the newspaper, some little books, daily and weekly magazines, et cetera, but I often forget when I speak to other parents that their sons and daughters, apart from having communication problems - as in that they have no speech - often cannot read and write. I often forget that because my personal context is with my brother who has an awareness when he is in the community. He can read.

This is an added discrimination for people, who perhaps could benefit in the community awareness, in the accessibility of the act, with an education program that perhaps is in a context of not just COMPIC symbols but visual symbols, and where there perhaps could be a poster that could be put in the workplace or the residential, that is a reminder to those sessions so that people would link and remember, that there is some empowerment to them in understanding what their recourse might be; and in recognising that people with an intellectual disability often do not understand that they have been discriminated against. There can often be a time lapse between when a person from the community reports to the family something that they have seen, or in the context that a person who receives a service was in an outing and saw the way that that person was treated or another person.

So there is a time lapse and unfortunately it has been my experience that, when complaints are made to service providers, often what you say has occurred is denied. Not only is that person with an intellectual disability made not credible but also the people making the report or the concern are treated as if what they saw or what happened didn't occur.

MRS OWENS: How do you get over that problem?

MS McMAHON: It's very, very difficult. When somebody refutes that something has occurred yet you have multiple witnesses - as I have said previously, I do not take on face value anything that anyone says to me - when that person explains the context and how they might have seen it occur on more than one occasion, that they might have checked with another parent or another family or they have questioned what the policy might be, there is a context to what they have seen. There is always a concern and a query before a complaint is made. When people aren't made aware of what they can complain about because they don't know what their rights are, and clients are paying for a service where they aren't told what those service rights are as

a service user, it makes it very, very difficult.

MRS OWENS: Can your brother - you said he could read and write. Can he use a computer?

MS McMAHON: He has shown no interest whatsoever, but when he goes to respite, as he does occasionally, they use the computer screen for some of the games and he has been shown how to use the joystick controls. Because I use the computer at home for searching the Web and work documents and word processing, I have tried to get him involved. I know in the past he has been shown how to use an electric typewriter but he hasn't shown much interest and he has poor fine motor and does have difficulty with hitting something or focusing on a small area to do any task. But it's interesting that other people have had success in using computer-type games with him for enjoyment or recreation.

MRS OWENS: I'm just trying to think through what the solutions are to the accessibility problem and, as you see, there is this handbook there. The Human Rights and Equal Opportunity Commission does have guidelines relating to the act and some of these are on computer. I'm not sure in what other forms they are made available. I know there is material in libraries. I suppose in some cases that material is going to be directed more at the carers or the parents of the people with an intellectual disability.

MS McMAHON: I could say that I would find it highly supportive, the more information is made available in a visible way in the context of a residential or a Business Service setting for people to be aware that there is recourse within the law, even though the individual who may be affected by that doesn't understand that - and that is often the case; it's usually when a third party intervenes because they see it as a breach - that person can act, but they have to know the protocols and understand the context of what, where and how.

MRS OWENS: That's very useful because the idea of posters with visual symbols that can be directed at people so they can really try and understand what - it's very hard to get a picture of what their rights are but to actually explain that there is in some way something that they can do.

MS McMAHON: Can I tell you that I am aware that my brother has had some sessions to do with empowerment of clients because when he gets stressed in a family situation, he beats his chest and says, "I have rights, too." So I think this must come back to some information sessions somewhere that I wasn't involved in, where he had been told, "You do have rights and you do have choices."

MRS OWENS: Are you sure you haven't told him?

MS McMAHON: I haven't, no. It makes me realise that part of that did sink in to him, even though he does have a disability he can express in other ways dissatisfaction, or when he's hurt, or when he's angry and too often, clients' behaviour can be targeted without seeing the full context of what has occurred. By isolating the person with a disability and only looking at their behaviour, you are missing the whole context of them being allowed to express their dissatisfaction, their hurt, their anger, in something that they really can't get their head around, but they feel it and they do feel compromised. I think, unfortunately, it has been a situation of blame the person rather than to look at the contextual situation and the other factors that are really important to look at.

MS McKENZIE: So you would be looking at some sort of complaints body, almost like an ombudsman maybe?

MS McMAHON: I think at the moment the complaints process is so much an internal process. Continually people are told that this is independent, this is independent, this person is independent, when clearly they are not. I think you have to understand that the service operator really has an image problem in that they don't see the complaints resolution process as positive and win-win, and it can be win-win. If there is a policy that needs to be looked at, if there are processes and staff are expressing opinions that are clearly not right, there should be a process where complaints are taken on board as being positive, instead of a negative view of complaints. I see that as an empowerment from a consumer point of view.

You can say, "I don't like this; this upsets me," and not really know what the outcome is, but the other person has to be able to take it on board. If they constantly refute, they don't allow you to raise a complaint, they make it difficult for you to contact the specified person - when a complaints process does not have a time frame, it is actually in breach of the Queensland Disability Services funding arrangement. We have the polarities within a service organisation that has two paragraphs to explain the complaints and grievances policy and the Disability Services Queensland one which is more than 50 pages long, and neither help the client or the family. Neither do. To be told by the state manager of DSQ that he doesn't get many complaints - I think it's important to look at the complaints process.

People can be really put off by thinking, "This is too difficult." There is still the emphasis on the outcomes. When you raise a complaint, what is valid to you? If you were to understand, if you went through this whole process, which I have been doing on behalf of parents who fear retaliation and recrimination - I have signed off, not only to DSQ but to the National Disability Abuse Hotline in regard to certain incidents reported to me, that the families wish to be protected and they didn't want their sons and daughters to continue to receive this discriminatory behaviour, but in

that process, that you put your neck on the line, to not know what possible outcomes that would be fulfilling not to you, after the process, but to the person that received that treatment.

To understand, after you've read a 50-page complaint policy, that one of the outcomes might be that somebody gets their wrist slapped, metaphorically, is that satisfactory; that they could do it again? The idea of sanctions - and I know this probably sounds a bit severe, but what disincentive is there for people? They continue to abuse clients of their service because there is no power to stop them doing that. It appears to me that sometimes out of desperation people use the media, because there is a community interest in the rights of people with a disability and that even though people may not be directly affected by a family member with a disability, there is a concept of a fair go.

I think there are community expectations - especially when DSQ funds services to provide certain services to a very high level of support in this state - that there is a some accountability and there is some transparency as to how that money is spent and that the person who needs the services are getting those needs met. One of the problems, I think, that parents and families are experiencing, is that many families are locked in to a service provider who previously - and I mean 40 years ago - provided educational outcomes in special settings. Now that family member is still in long-term residential care and receives other services.

People feel trapped. Under the block funding arrangements, no-one will say what they're getting. There's no quality assurance of the quality of service that they're getting or what their rights are in regard to that service. There is a question of the funding being attached to the service, not to the people that need the service. I must admit that there appears to be greater flexibility in the provision of other service providers and I see that as a welcoming change, to allow people choice, but the reality is that to unbundle the money is not an easy thing to do and it's not encouraged. Instead, parents and families are told, "If you don't like it, lump it. Get out. Somebody else can take over your place."

That person who removes a family member from a service has the most immense amount of difficulty under the current funding agreements, even though some are new under the new DSQ funding policies - find that they cannot get people to support them and they have lost a service and they have burnt their bridges. It appears that there's no recourse for them.

MS McKENZIE: But then having an individual package is also difficult. Presumably that has to be negotiated.

MS McMAHON: Yes, but I think it's a matter of options. People are supposed to

have choices and the choices that the families might think are right for their sons and daughters may not end up being that way and people are being tied to those arrangements in an unfair manner. I think if you just look at the fact that so many clients in this state who receive services, have been receiving services from the same service provider for up to 40 years - and in respect that there is a range of services - moving across services is not easy.

MRS OWENS: We will have to move on, because we've gone 20 minutes over with you, I'm afraid.

MS McMAHON: I'm sorry. I had no idea of the time.

MRS OWENS: I just want to make it clear that this inquiry is about the Disability Discrimination Act.

MS McMAHON: Yes.

MRS OWENS: The Commonwealth Act. We're not reviewing the Disability Services Act.

MS McMAHON: No.

MRS OWENS: But people have raised issues, as you can imagine, about services as we have been going along and we will be acknowledging that in our report. That's all I can say at this point, but I'm afraid we will have to keep going. You have raised some very interesting issues for us.

MS McMAHON: My point being, insofar as discrimination - there is a different level of service from different service providers. When people are stuck with the one service provider, I feel that that is a form of discrimination.

MRS OWENS: It's not quite how the act is currently constructed.

MS McMAHON: I understand.

MS McKENZIE: It's a bit more limited in that sense.

MRS OWENS: I might just say at this point in the hearings - because we didn't have an audience when we started today - if there is anybody here in the audience that does want to say anything in relation to what has been happening today, we do allow time at the end of each hearing, where other people from the audience can have an opportunity to come up and say something. If anybody wants to do that, they can just tell one of the staff here that they would like to do that. Thank you very much,

Olivia.

MS McMAHON: Thank you very much. Thank you for the opportunity.

MRS OWENS: We will now break for just a minute.

MRS OWENS: The next participant this afternoon is Queensland Parents for People with a Disability. Welcome to our hearings and thank you very much for the submission, which we have both read. Could I ask you each to give your name and your position with the organisation, for the transcript.

MS COOPER: My name is Roz Cooper and I'm the president of QPPD.

MR TOMKINSON: Phil Tomkinson. I am vice-president.

MS KALMS: Sandra Kalms. I'm the executive coordinator.

MRS OWENS: Thank you. I will hand over to Roz to introduce your submission.

MS COOPER: Thanks, Helen. Firstly, we would like to commend the commission on the consultation process for the DDA inquiry, which has allowed sufficient time and opportunity for involvement of our members. QPPD is a statewide organisation, with members across Queensland. We have consulted with our members about their experiences of the DDA and of discrimination in general and this has informed our submissions to the commission.

QPPD is a systems advocacy organisation, funded through the National Disability Advocacy Program. I would like to clarify that QPPD is parent based. However, we advocate for people with a disability, not for parents. Our comments are based on our sincere efforts to represent the most vulnerable citizens with disability within Queensland. We are not lawyers and confess confusion over some of the more technical aspects of the act.

MS McKENZIE: Can I say I also feel confused sometimes.

MS COOPER: Ours is a voice of lived experience rather than of legal expertise. We agree with many of the draft findings and recommendations outlined in the report. However, as highlighted in our most recent submission, we believe the commission has been overly optimistic about the success of the DDA, particularly for people with intellectual disability, psychiatric disability, multiple disabilities and those living in institutions or institutional settings.

As a statewide organisation, it is interesting that we know of few cases of discrimination complaints being filed either under the federal or the state legislation. There is a culture in Queensland of recriminations against those who complain. Mostly we hear of situations where parents have complained through the formal processes offered by services or government and of those we rarely hear of positive outcomes. Often there is retribution by service providers who are the subject of the complaints. We hear of cases where the victims are moved from the service, where

the alleged perpetrators of the abuse are shifted to other positions and in general where the people who complain endure even further hardships.

In this type of climate there is little chance that people will make complaints. What they hear from others is that it is not worthwhile, that their complaints will not be redressed and that, overall, it is a far too stressful and energy-consuming process. That has certainly been my personal experience. In a state like Queensland, where many communities are isolated and remote, there is rarely a choice of services, so making a complaint may lead to a reduction or withdrawal of services. In other words, people really don't have a choice. They can be branded as whingers or troublemakers or otherwise find it too embarrassing. There are also instances, following complaints, where there is an increase in the behaviour, causing even further harm to the person and their family.

There is no independent assessment or review of complaints in Queensland. Complaints against DSQ, for example, are dealt with internally. We have yet to hear of any positive outcomes from such processes. DSQ also deals with complaints made to it about services it funds. Once again, this is proving to be an unsatisfactory process. Our most serious concern about this piece of legislation, the DDA, is that it does not protect some of the most vulnerable people in our society. It is difficult for us to interpret the legalese of this act. However, it seems that the discriminatory nature of some disability services in Queensland must somehow be addressed. We are deeply concerned that the act actually legalises some discrimination.

We note that you have found there is limited scope to apply the DDA in the area of institutional settings and that it has been less effective for those living in institutions. We believe that people forced to live in institutional settings are among the most vulnerable and the most discriminated against in our society. We strongly urge the commission to consider how to redress this situation, as we do consider that people who are forced to live in accommodations on the basis of disability are not equal before the law. I will just hold it there.

MRS OWENS: Thank you for that, Roz. You have raised a few issues that probably go beyond your written submission. I didn't bring your earlier submission with me.

MS COOPER: I have copies of that.

MRS OWENS: I apologise for not acknowledging that at the start and I should have said thank you for your submissions. No, I have it.

MS COOPER: You have it?

MRS OWENS: Yes, I have it. I think this very important point you're making, which others have also made to us, is that really the act is not so strong in relation to the really very vulnerable people with disabilities. It is an important point.

MS McKENZIE: And also you are saying that for those living in institutions or with disability services, the act quite simply doesn't give protection.

MS COOPER: That's right. The special measures are exempt. In our view of the world, it's those people who are receiving services from exempted special measures who are the ones that are probably the most discriminatory of all.

MS McKENZIE: Would you prefer some - I presume you prefer that the exemption wasn't there, although in a way the Disability Discrimination Act is - it's difficult to apply to services like that, because it always requires some sort of comparison between the disabled person and a person without the disability.

MS COOPER: Yes.

MS McKENZIE: That's really not a very appropriate comparison to use when you're looking at a disability service.

MS COOPER: That's right. One of the things that I've thought about is the use of the term "consumer". So many organisations call the people who receive the services a consumer and I think just using that as a comparator might be interesting. A consumer can vote with their feet and walk out, go to another business or another service or another supermarket or whatever if they're not receiving a decent service. That's where there is no provision for people to do this in these sorts of cases. I don't know if that helps at all.

MRS OWENS: Yes, Olivia made the point about people being locked into service providers without any choice.

MS COOPER: That's right, yes.

MRS OWENS: Whereas we expect to have choice about where we live and what food we eat and what doctor we go to.

MS COOPER: Absolutely.

MRS OWENS: Everything in our life - well, not everything, but, you know, largely we do have choices.

MS COOPER: Yes, that's right. I wanted to preface what we were saying today -

talking about the culture of complaining in Queensland - because even though it's about the local area, it still is something where people learn very quickly not to say anything. When people are locked into block funded services and they're told - as Olivia rightly said - "Well, you can like it or lump it," it's like a lesson and you learn to shut up, you learn to lump it. Maybe one of the things that the commission might recommend is looking at portable funding arrangements for people, so they can negotiate their own service provider. It's very true that in Queensland there is a monopoly in some areas. There is absolutely no choice and the government favours large service providers with block funding.

MS KALMS: We might add - it's Sandra speaking - that the culture of complaint goes across not just disability services. It's also within the education arena as well, so that this actually may be a huge barrier to people bringing any kind of discrimination complaints under the DDA.

MS COOPER: Under the DDA, for example.

MS KALMS: For example, when there were the consultation processes for the standard on education, we were asked to host a particular forum just for people who had taken cases to court under anti-discrimination legislation or DDA. Those people were too frightened to actually go to the other consultation processes to meet with the other people, because they were even afraid that people within the disability movement had negative opinions of them bringing complaints that set precedent that wasn't in the favour of people with disability. So the culture is actually quite insidious, it's there and families do say to each other, "Don't do it."

MS McKENZIE: How can that be sorted out, do you think? What do you think we can do by our recommendations to try and make sure that people feel free and without fear to be able to make a complaint under the DDA?

MS KALMS: One of the really interesting processes that I witnessed was through the then Community Services Commission of New South Wales when it first began. It actually did a whole complaint public awareness raising that went across the board and it wasn't just about how to make complaints to the commission. It was much broader than that, and what they were really looking at was the area that Olivia also raised in her submission - that is, it's okay to complain to service providers, so that they actually started to look at it in a very different way. Complaints were actually seen as something as part of community improvement or a continuous improvement.

But there are other mechanisms. We've been very interested in looking at an alternative complaints mechanism for the Education Department, because at this point in time, for people to complain - which is internally - they really have to go to their school, which may be doing something that they may not be dealing with. Then

it goes to district, which usually supports the school, and from there they have to go straight to the minister, so there must be some other kind of structures.

MRS OWENS: I'm just looking at the data that we put into our report about complaints raised. We got some material from the Human Rights and Equal Opportunity Commission and from the state and territory anti-discrimination agencies. I was just looking at that to see whether Queensland was lower than all the states in terms of the complaints going to HREOC and to the state anti-discrimination commission. In fact there are more complaints going through the DDA than, say, in Tasmania, South Australia - and New South Wales surprisingly - but there's a lot in the Northern Territory and the ACT for peculiar reasons, and quite a lot in Victoria.

But you have quite a lot fewer going into your state anti-discrimination commission than all the other states, so there's a slightly mixed picture with your complaints. But they're not right down the really low end compared with, say, South Australia. Maybe it's got some peculiarities about South Australia which I don't know about - I know there are in relation to their state act. But you're certainly not as low as, say, New South Wales.

MS COOPER: Does it say anything about the nature of those complaints?

MRS OWENS: No, it's just general data.

MS COOPER: So they might be more complaints about access issues rather than complaints about discrimination towards people with intellectual disabilities, for example.

MRS OWENS: Yes.

MS COOPER: Being kept out of clubs or not being able to join in, yes.

MRS OWENS: It would be good to unpick those complaints and see what is actually coming from Queensland.

MS COOPER: I think it would be really interesting. For example, my own son after entering a community race in our local area - and he had to pay $60 to enter this race, and his application was received - he has a visual impairment, and I informed them that he would have a guide for the race and that was all well and fine. Two hours before the race they told him he wasn't able to run in that race. We were devastated by this news - - -

MS McKENZIE: So would he be.

MS COOPER: He was. He'd trained very, very hard. It was a race up a mountain and he'd been training for months and months for this race. It's affected our lives to this day and it happened a few years ago, but at the time I considered both the state and the federal acts because I wanted to do something about it. Everyone I spoke to said, "Don't do it. Do not do it. You will be turned into a pariah in this community. It's just not worth it." I have access to many families through QPPD and I spoke to others who had made complaints and they just said, "Do not do it."

MS McKENZIE: But that's not shown by the complaint stats because that's something quite apart. It's only really through parents and others talking about this difficulty that it will come to anyone's attention.

MS COOPER: It's little things. A few years ago the Queensland Teachers Union wrote an article in the Courier Mail here in Queensland about litigious parents who put in education complaints. So there was a very powerful message sent not just to parents of student with disabilities and to advocacy groups, and they were named as parent advocacy groups, but also to the general community at large that parents are somehow overly litigious if you have a son or daughter with a disability. Even at that level we can also see that there's influence on the whole culture.

MRS OWENS: But until some parents do complain, like you, Roz, about your child not being able to go in this race - - -

MS COOPER: I didn't complain.

MRS OWENS: No, but until you do, it's going to happen again and again, and the next child will come along and they mightn't be able to participate in a race and they'll be sorely disappointed as well. There's a real balancing thing here, but it's very hard being the person who's out there in front making the complaint on behalf of the others that follow. Even if you make the complaint there's no guarantee that the next time it won't happen again because sometimes if you go through the Disability Discrimination Act and you go to conciliation, then the outcome is confidential.

MS COOPER: That's exactly right, and when you complain against organisations that are prestigious - there's a perception of prestige around them - like the Lions Club, then you're walking on very shaky ground. A lot of people have a great amount of respect - and, look, I just asked so many people, and even those who I thought would be absolutely avid supported of such a complaint said, "No way." I look back and don't know whether or not I regret having not done that. What we did was turn around and my son actually achieved an even greater quest later on - a couple of years later in his life - and did something absolutely wonderful for the community. So we turned around that perception - - -

MRS OWENS: But it could have gone the other way. It could have actually just dampened his enthusiasm and his confidence - - -

MS COOPER: And it did. It did. It was a couple of years, there was a lot of work, and it dampened mine. It broke my heart, and I'll never ever feel the same about that community again. I don't go into that community now feeling free. I always feel that discrimination in that town, and I drive through it whenever I come down to Brisbane. Whenever I go anywhere, I have to drive through the town where that happened.

MRS OWENS: Why did it happen? What was the argument about not letting him do it?

MS COOPER: It was a prestigious race, and when they knew who he was - they accepted his application without actually knowing who he was, but once they put the face to the name they said, "He can't be in our race. This is a prestigious race," and when he arrived for the race they then informed him. It was really hard. I think he handled it better than anyone because he has actually had a lifetime of discrimination. Everywhere he's been, just about, he has been discriminated against in one way or another, so his ability to wear that and his character as a result of that is just amazing. He's an incredible person.

MS McKENZIE: One of the things suggested in the DDA to try to cope with those cases where, for one reason or another, the fear of ostracism might be a good reason - we suggested that in certain cases HREOC, the commission itself, might be able to make a complaint or take a matter to court, or some representative organisation of people with disability might be able to make a complaint, and they could do this on behalf of a class of people, not just on behalf of an individual. Do you think that might help in a situation - - -

MS COOPER: I do. I think that would help. I think it would be a great asset for the act if the commission was able to do that. We know they can make inquiries and we have written as an organisation to HREOC to ask them to inquire into younger people in aged care facilities.

MS McKENZIE: What was the outcome?

MS COOPER: We haven't received a response.

MRS OWENS: They're coming this afternoon.

MS McKENZIE: They're coming this afternoon. We'll ask.

MS COOPER: Yes, if you wouldn't mind.

MRS OWENS: They'll be here at 1.30.

MS COOPER: Yes, I think that that would be a great asset.

MS McKENZIE: And also we are thinking about whether the victimisation provisions in the act where people are - some detrimental action is taken towards them, like ostracism, because they've complained or because they've threatened to complain - we're wondering about how those provisions might be made stronger. I think even HREOC says that there are very few actions taken under those provisions, perhaps none.

MS COOPER: Yes. I think trying to prove that - if that was the case in our local community had we complained, I just don't know how we could have established victimisation. It's fabulous that it's there and there's such a strong penalty for it but how do you prove it? It can be words that people say or just - - -

MS McKENZIE: Can I ask one other - - -

MRS OWENS: I'm going to ask Phil because he's sitting there quietly as a parent and he's looking as if he'd like to say something.

MR TOMKINSON: One of the things that I'd just quickly like to raise, things that affect the decisions parents make - I know you've discussed the Scarlett Finney issue. Are you aware that that child was never successfully able to enrol at that school, even though they did win - - -

MS McKENZIE: Even though the case was won? I didn't know that.

MR TOMKINSON: And the Purvis decision has, of course, had enormous publicity in disability circles, so I think you can understand the reluctance that parents have in coming forward. There's also one other thing I'd just quickly like to raise. One of the reasons in our first submission where we asked for stronger measures against people that are practising discrimination is because we believe that organisations are becoming much cleverer about the way they discriminate. Employers are easily able to conceal the fact that they've eliminated a prospective employee with a disability because they can say, "There were better qualified people."

Schools in the private sector are telling parents that they don't have the resources to meet that child's needs, and yet they offer large numbers of scholarships

without means testing, spend vast resources on other features to enhance their schools, but once the parents are informed that this particular school can only offer a very limited amount of aid time, that unfortunately there's no money available for training teachers, et cetera, then they take the hint and they just move on.

MS McKENZIE: If I read your submission correctly, are you expressing a concern that - this is in relation to special units in mainstream schools - are you expressing a concern that actually those special units might be really segregating the children with disabilities in those units rather than making them a proper part of mainstream education?

MR TOMKINSON: Yes. There's actually no way that you can accurately predict how a unit works, and those that actively promote the inclusion of their students into mainstream activities can from one year to the next change completely with a change of the people that run that unit or a change of the principal or a change in the attitude of the teachers, and suddenly those kids that were accessing mainstream classrooms are then kept confined to the unit. Parents are usually not able to complain about that. The issues raised may be that there's a large number of kids in the class, that there are behavioural issues that can't be dealt with, and the fact that they were dealt with previously doesn't figure in the equation.

But can I also say that we've held some teleconferences with parents around the state lately and one of the common complaints that we got about units was that the quality of education that's being delivered in those units is not there. One of the main reasons parents want to get the hell out of these units is because nothing is being delivered there. I mean, there's issues around segregation and that, but even the parents that are quite happy to put up with the segregation are complaining bitterly that the quality of education that is being delivered is - well, nothing is being delivered actually.

MRS OWENS: I suppose the schools argue, "We've got to bring some of these kids together, because there's economies in doing so. You know, if they've got one special need we can have one support person for three kids, whereas if they go into the mainstream class they are going to have to have more support services." So it's easier for the school, but I suppose if there's a need for, say, auslan interpreters, and I suppose in Queensland just like other states there's possibly a shortage of auslan interpreters, maybe there is no choice but to have some of these children in these special units.

MS McMAHON: Helen, can I just - - -

MRS OWENS: No, sorry, you can't talk from the floor, because we can't pick it up. I'm sorry.

MR TOMKINSON: There's an assumption that is made, that parents can never agree with, that kids with the same disability are all the same, and therefore they benefit by all being together.

MS McKENZIE: But that's not what the concept of mainstream education and mainstream school is, I would have thought.

MR TOMKINSON: It's the concept that units operate under, that all autistic kids are equal.

MS KALMS: The same, homogenous.

MR TOMKINSON: The same and homogenous - - -

MRS OWENS: And plonk them together.

MR TOMKINSON: - - - and can be grouped together. The opposite is true.

MS KALMS: Is true.

MR TOMKINSON: My daughter is autistic. I have always insisted that she be in a mainstream class. She has benefited enormously. She graduated from primary school as dux in the class with languages. I've looked at a number of units and just purely on education grounds I could never allow her to go there.

MS KALMS: If I could just add to the unit conversation to say that it's actually - we don't have a real clear picture of how many students are in segregated classes in units, neither does the Education Department. In trying to actually find the answer to this question they haven't, at this point in time, been able to provide that to us. So it really is an individual picture. The other thing about setting up a unit is it does attract resources. So if you're a little school out there and you're thinking of getting some more resources to your school, then it might be well worth your while actually ascertaining the students within your school to see if you can find enough to stick in a unit. That does mean - and we don't have stats on this - are we heading towards a picture where we actually are almost labelling children, that we wouldn't have labelled a few years ago, in order to build a unit so that we can get more resources to the school? It's a disturbing pattern that certainly QPPD has decided to put some energies into in the next two years, and finding out more about this.

MR TOMKINSON: Can I just quickly add too that some of the language that we use is being highjacked. We talk about inclusion, in that our kids are part of their own community, they go to a school and they mix with their neighbours and siblings.

We find that the term "inclusion" is being used to describe how special schools perform particular activities. We can't imagine a more obvious abuse of the word, but it has been highjacked to cover some rather strange activities I'm afraid.

MRS OWENS: I don't think I've heard "inclusion" used in that context. That's interesting.

MS KALMS: It's common.

MS COOPER: The magazine from the Queensland Education Department actually talks about "inclusion in special settings," so, yes.

MRS OWENS: It makes it sound good.

MS COOPER: It does.

MRS OWENS: We ought to go there.

MS COOPER: And the use of the inclusion indicator in - they're picking up that for use in special settings too, which it's clearly not designed for, yes.

MRS OWENS: I'm just checking - you just mentioned Purvis. What are your views about the Purvis decision?

MR TOMKINSON: It's a complex legal thing and I'm sure it goes over the top of most parent's heads. The thing that strikes us as being the most important factor there, was that there were - the commissioner did comment on this - that there were supports offered to support that particular child, to help him deal with situations and hopefully prevent particular behaviours occurring, but for a variety of reasons those services and those supports were refused or not implemented, and there were no consequences because of that. The child's behaviour deteriorated, shall we say, because he lacked those supports probably, and he bore the consequences of that.

But the people who had access to these services, and I think most of them were offered - they can't use financial grounds, because most of them were offered from another government department. I think the parents even offered the support of their own psychologists and - but all of this was refused. A behaviour management plan that was designed by head office somehow got lost in - and parents wonder - you know, the school system that constantly cries out about lack of resources - that so much could be refused when it was there repeatedly offered.

MS KALMS: A number of parents have expressed concern over the Purvis decision, particular in relation to the finding of behaviour and how it relates to

disability, and they're looking really at their own situations now I guess in a whole new light. One of the things that they are looking at is what have they offered, so it's in conjunction with that. Just last week we took a call from a parent who's son would be in a similar situation, whereas he's having his schooling threatened with exclusion and yet the school haven't done any other things to actually make reasonable adjustment at this point. But they are very concerned that the behaviour will be separated from his disability.

MRS OWENS: It's likely that we will be making some suggestions about making it clearer about requirements to make reasonable adjustment in the act, because again that was another outcome from the Purvis case, that it wasn't clear that there is such a requirement, and that might have meant that that school would have been in a position to have had to accept some offer of support, or to make some adjustment for the child.

MR TOMKINSON: It's very hard for parents to understand why that support wasn't accepted. That certainly raises some concerns about the attitudes of people there.

MRS OWENS: I think we've covered everything.

MS McKENZIE: Yes, I think we have covered everything.

MRS OWENS: Thank you very much for coming.

MS COOPER: You're very welcome.

MRS OWENS: We've probably eaten, so to speak, into your lunchtime. So thank you.

MS COOPER: We're a very flexible team.

MRS OWENS: Thank you.

MR TOMKINSON: Thank you very much.

MS KALMS: Thank you.

MS McKENZIE: Thank you very much for a very helpful submission.

MRS OWENS: We will now break and we will resume at 1.35.

(Luncheon adjournment)

MRS OWENS: The next participant this afternoon is the Human Rights and Equal Opportunity Commission. Welcome once again to the hearings and thank you for all the participation that you've made to this inquiry to date. Our recent meeting with you was very useful for us and we may today raise some issues from that meeting, and a number of other issues. Could I please ask you each to give your name and your position with the commission, for the transcript.

MR INNES: Graeme Innes, Deputy Disability Discrimination Commissioner.

MR MASON: David Mason, director of disability rights policy.

MRS OWENS: Okay. What I'm going to do at this stage is hand over to - I think Graeme, is it, to lead us through some of the points you wanted to raise with us.

MR INNES: Sure. Thank you. We've got four or five items on our list and we might do as we did on the last occasion and just talk you through those items, between the two of us. The first one is on the area of discrimination law and employment and some of the issues that have come out of the ACCI submission and some of the discussions that we've had.

I suppose we thought it was important to just emphasise the limited role of discrimination law in this area - that is, that we agree to some extent with the comments by ACCI that equality can't be achieved solely by providing stronger anti-discrimination legal provisions; that reduction or elimination of discrimination is really only a means to the end of promoting the equal enjoyment of human rights, including more equitable and effective participation for people with disabilities in economic and social life, in areas such as employment - but not only in areas such as employment - also in areas such as education, access to goods and services, as well as in rights and responsibilities as citizens in the legal system.

I guess we would hope that one of the many things that this inquiry can do is to lead to identification and implementation of means to reduce real or perceived costs of participation for people with disabilities in various areas of life. We agree with ACCI on the need to avoid perverse outcomes, where apparently stronger legislative requirements to deal with discrimination could have negative impacts on participation and equality, including through creating disincentives to employers. For this reason HREOC supports the flexibility provided in the DDA by concepts such as unjustifiable hardship, while also supporting measures to reduce uncertainty and of course the costs consequent from uncertainty, including development of standards and measures for recognition of industry based codes and that sort of thing.

HREOC has supported - and continues to - clarification of duties to make reasonable adjustments under the DDA, and that support should be seen in this

context and I don't think we need to go into details about that, because we've done so in at least one of our submissions. This is distinct, in our view, from possible positive duties to review and remove barriers on a systematic basis, which resemble non-quota based affirmative action measures applying to women's employment. In view of the concerns expressed by ACCI, we think it should be noted that submissions in this area appear to have proposed these affirmative action-type measures of positive process duties only for government and larger employers, and that may to some extent remove some of ACCI's concern.

I guess a concern that we have around these two issues is that they could become intermeshed or confused, and we think it would be disappointing if proposals to amend the DDA to clarify the issue of reasonable accommodation got lost amongst proposals to place a positive responsibility on employers and so I suppose we'd encourage the commission to make that clear distinction, so that if government is selective in its choice of the commission's recommendations, that one doesn't get lost with the other, because we think that that clarification of the reasonable adjustment issue is quite - we think they're both important, but they're different.

MS McKENZIE: So how do you think the positive employers' duty that we've floated is different? Yes, part of it is an up-front identification of barriers.

MR INNES: Yes.

MS McKENZIE: But the second part, the taking of reasonable steps to remove barriers, do you think it's very different from reasonable adjustments duty?

MR MASON: I think, commissioner, that's the distinction, and that's where we see some different concerns arising in the couple of employer submissions that we've seen on the issue, that a duty to respond reasonably and effectively to requirements to accommodate a particular person who is employed or seeking employment is one thing, and we see that as the reasonable adjustment batch of issues. The requirement to now and forthwith conduct an audit of barriers in your workplace, whether or not anyone is employed or seeking employment is, we would say, the wider possible proactive set of duties which obviously has beneficial effects in terms of avoiding barriers then arising inconveniently, but at the same time clearly does have some different implications that the industry bodies have been raising.

MS McKENZIE: We have been getting a lot of feedback on this idea of a positive duty and a lot of the feedback is - it is very difficult to identify some of these barriers ex ante. There might be a lot of dead weight losses, dead weight costs from doing that, because you might never be faced with a situation where somebody with a disability or that particular type of disability is going to come and seek employment, for example. A lot of people have been saying rather than do that they'd stop short

and just stick with the idea of making a reasonable accommodation rather than going that extra step. How do you react to that?

MR INNES: I suppose the first thing I'd talk about is the non-legislative measures as particularly important - and we've talked about that, but the sorts of facilities that make identification of those barriers easier, such as things like the job accommodation network, so that it's not such an arduous task to do that. There's then the requirement to get that message across so that it's not seen as an arduous task, because I can understand what employers are saying.

You said this morning that you had some discussions with the office of disability with regard to the schemes that operate in that area, but our assessment is that there's not the take-up because of - partly anyway - a lack of knowledge or a lack of information in that area. We tend to think that decisions are getting made when they're uninformed decisions. So it's important to inform those decisions and for that to be as easy as possible. That's the first thing I'd say

MR MASON: I suppose in terms of both minimising dead weight losses from duplicated and unnecessary effort by employers in terms of identification of barriers, but also in terms of reducing difficulty of making accommodations when the need presents itself, even in the narrower reasonable accommodation sense - it's those two factors that we would see as supporting improved - whether public sector based or industry based or a combination of the two - improved measures to provide access to information and advice for employers on what you do, so that not every employer should individually have to work out for themselves from scratch how to accommodate this particular disability issue in the workplace.

There ought to be more readily available strategies off the shelf than that, and if that's in place then if you've got a duty to identify the thing in advance, it's pretty much done for you. If you've only got a duty to go through those measures when someone presents, then it's more readily done.

MS McKENZIE: So who is responsible for developing those guides or measures? Is that HREOC or is it employer organisations?

MR MASON: We can attempt to assist, but I just don't think that we see it - correct me, Graeme, if I'm wrong - but I don't think we see it as realistic for HREOC to be able to provide detailed practical advice on accommodating the range of disabilities in the range of employment situations to exist; that's a slightly different task. I guess that connects into one of the other things that we've raised in our submissions before, which is that, at least for government, we think that some of these issues can be advanced by incorporating - whether by policy means or legislatively - the accessible procurement requirements that are now in place in the US, so that someone coming

along with a disability doesn't present the same kind of, "What do I do now?" issues, if your computer systems are basically configured to be able to either provide access or at least interact effectively with people's own adaptive equipment.

A very practical example that occurred in our own office within the last week was - because I had misread an email from a new staff member commencing with us - I had misunderstood the height at which she needed the desk to be placed. Because we have adjustable furniture in the place, something that was a problem at 9.30 was fixed by 10.00. If the equipment hadn't been adjustable, then we would have looked - I would have looked extremely bad - - -

MS McKENZIE: And it would have taken a week.

MR MASON: - - - and we would have lost a day's work and spent how many thousand dollars. As it was, it wasn't a problem.

MR INNES: So procurement which takes those things into account can often resolve the low-tech as well as the high-tech type of issues. But in terms of where might the responsibility lie, we've been encouraging for some time the government to look at either the development of or the funding of something like the job accommodation network, using a web based approach, which would be a database of these sorts of solutions and experiences of employers and employees, which could be a very useful non-legislative way of addressing just these sorts of issues and setting out the sorts of solutions that employers are constantly looking for.

As well, we can and will - and in fact as a result of the discussion through this inquiry we've recognised that we need to change the frequently asked questions on our web site to provide more examples of these sorts of solutions and maybe also address it in the area of conciliated complaints - but we're not sure that that's nearly enough.

MRS OWENS: David, you raise this example of the adjustable desk but there is going to be a lot of other equipment - not a lot but some equipment, say, for people with vision impairments which actually could cost a lot more than just a desk, and are you suggesting that you have that available just in case? I mean, it gets out of date.

MR MASON: No.

MRS OWENS: So you would have to have a policy that says - - -

MR MASON: It's more information on where it's available, but also recognising that one of the things being driven quite clearly by the US government requirements

is to have a greater degree of adaptability or universal design features built into the mainstream systems. It's very clear that the IT industry is responding to those requirements; that the degree of access features being built into Windows and related software, for example, is partly because of a genuine commitment from the companies concerned, but partly related to the fact that they won't be able to sell to the government of the United States of America if they don't.

MR INNES: That's, I think, section 503 of the Rehabilitation Act - I'm not sure that I've got the name of that quite right - which has driven that sort of change.

MR MASON: We are not experts on trade policy but it seems to us that it actually does some disservice to Australian industry if they're operating in a world where apparently these access requirements don't apply, because if they are going to export to a number of other countries then they will need to get on board with the same sort of requirements. So we think it would be a useful thing for the Australian government to consider.

MR INNES: I go further than that the other way with the free trade arrangements that have been determined; there is a risk if we don't do something like that we will become the market for the noncompliant equipment because the big market in the US has cut that equipment out.

MRS OWENS: Yes.

MR INNES: So there is a risk as well as an opportunity there.

MR MASON: The other thing I just wanted to say quickly, if I could, commissioners, was on the issue of dead weight costs - obviously some of those are real if we are requiring people to have warehouses of equipment in case they are ever needed - that is obviously a dead weight issue, but there are a lot of things that are more about thinking about flexible working arrangements. If we get away from the issue of hardware, or software for that matter, about how work is organised where much the same sort of considerations of flexibility that might assist someone who needs non-standard working patterns because of physical disability or because of psychiatric disability in particular, it may also assist in the pursuit of more family-friendly workplaces. I don't think all of this can be put down as disability-related cost.

MRS OWENS: If we went the positive duty route, would you have any monitoring or enforcement mechanisms in place, or would you just leave it as something looser?

MS McKENZIE: At the moment it will be done through complaints - our suggestion, if you want to float it, but would you have any other - - -

MR MASON: I'm not sure how a duty that didn't attach to a failure to accommodate a particular person could be handled through a complaint process because how one would have a person aggrieved by the lack of performance of that duty is a bit unclear. From my recollection one of the reasons why these sorts of programmatic measures were not incorporated in the act when it was first passed was, in addition to any concerns about a burden on industry, because it was not regarded as feasible to attain a Commonwealth budgetary allocation for an agency comparable to the, as it was then named, Affirmative Action Agency. There wasn't the couple of million dollars for monitoring and therefore the duty didn't come either. Is that a fair summary, Graeme?

MR INNES: Yes.

MRS OWENS: Are you saying no monitoring still? That might still be the case, mightn't it, 10 years on, 12 years on?

MR INNES: I'm not sure how you will deal with it, as David says, through a complaints based process though.

MR MASON: Clearly if one was to apply it only to government agencies then you could have them subject through their ordinary own reporting mechanisms and various other means of accountability to reporting on, amongst other things, their performance of this duty, and that might well be the place to start.

MRS OWENS: So that might be under the revised Commonwealth Disability Strategy. The strategy is getting reviewed this year, so maybe that could be something that could be incorporated into that strategy.

MR INNES: It could be but if you were going to go down that track I think you would have to have a fairly careful look about level of compliance with the current disability strategy.

MS McKENZIE: The other problem, if we are looking at some sort of reporting to Parliament and naming and shaming positions - there have been submissions to us in relation to the women in the workplace legislation saying it's not a particularly effective mechanism.

MR MASON: Yes, I think we are aware of those.

MRS OWENS: Where does that leave us with the duty? If it's difficult to name and shame, apart from Commonwealth departments which could put something into their report - their reporting through their annual reports could include something on

what they are doing. What else does that leave us with? Why would any employer still comply with a positive duty just in the same way - as now they wait until there is a complaint? Would anything really change?

MR MASON: No. I think to be meaningful there has to be some monitoring mechanism associated with it.

MRS OWENS: So we come back to who monitors.

MR MASON: Whether that be legislative or if it's industry based, via some voluntary scheme, I suppose, it would be possible, but if we are talking about something done legislatively then presumably we are talking about a legislative package which would bring its own monitoring with it.

MRS OWENS: So is that you? Is that HREOC or some other - - -

MR INNES: It would be a quite changed organisation if it was us, wouldn't it?

MR MASON: Yes.

MRS OWENS: It would certainly require a lot of resources.

MR INNES: It would, yes.

MR MASON: If HREOC was trying to take a comparable function in relation to affirmative action for women then we would need the staff of that agency, to draw the obvious parallel.

MR INNES: Yes.

MRS OWENS: What about areas other than employment? We talk in our draft report about a possible positive duty for employment. Would you stop short of employment or would you go and think of a positive duty, say, in the areas of education?

MR INNES: Again, for something like education we would come back to the sort of non-legislative measures that we have talked about. If you look at the job accommodation network that we talked about with regard to employment, I think education is another area where you might look at a similar process and you could do it actually at a relatively low cost by a tweaking of the national clearing house on education and training web site which has just been re-established with funding from DEST, and it's a web site which provides a whole raft of information on education for students with disabilities, mainly but not exclusively targeting the tertiary sector,

and I think that might be a more effective way to go than looking at extending the positive duty, at least until we see what the impact of the education standards are, subject to them being passed by parliament.

They are very much a more policy direction than sort of the bricks and mortar changes that the proposed access to premises and transport standards are, and it may well be that that has the sort of positive impact that we would be looking for, or takes us towards that. I'm not sure about a positive duty being the sort of solution in the education area, and in other areas I think maybe things like standards in industry codes might be a more effective way to address that sort of systemic change.

MRS OWENS: You said you didn't want to say more about reasonable adjustment, but before you move on, maybe we might - that is, we have been pondering exactly how to - if we were to clarify the need to make a reasonable adjustment in the act there are various ways you can do it, and we have made a suggestion in our draft recommendation at 9.2, which was to tweak the definition of direct discrimination, but another option is just to have an overarching statement.

MS McKENZIE: Duty.

MRS OWENS: An overarching duty that covers all areas within the act. Have you given that any consideration? Which way would you go?

MR MASON: I suppose one of the clearer things that came out of the Purvis decision in the High Court was that those people involved in the drafting of the legislation hadn't been quite as successful as they hoped with the inclusion of subsection (2) of section 5 which did attempt to incorporate a reasonable adjustment concept into the concept of direct discrimination. Whatever it does mean, it didn't achieve that objective fully and rather than spend more time and resources going around and around inside some of the drafting and conceptual difficulties that are now apparent in that area, what we would had put forward previously, I think, was something that was more a freestanding reasonable adjustment provision.

MS McKENZIE: One way of doing that would be to have a freestanding provision that applied to all areas. I can't see a need to repeat it in every area.

MR INNES: No.

MS McKENZIE: It should be possible to express it broadly enough to make it stick.

MR INNES: Yes.

MS McKENZIE: But to have perhaps a schedule of examples in each area so it's possible to see how it would apply.

MR MASON: Yes. We had internally tossed around whether you might need a provision that did go area by area, section by section, but yes, that would largely be repetitive and I think if we had examples incorporated then that would work equally well. To the extent that there is a need for a more detailed level of explication to what reasonable adjustment means in that area, then that's what the standards are for.

MS McKENZIE: Yes.

MR INNES: In fact the standards have done a similar thing with the unjustifiable hardship provisions whereby they have sort of extended on the explanation of that in the relevant areas of the standard.

MS McKENZIE: Perhaps this might be relevant.

MR INNES: Yes.

MS McKENZIE: That's a possibility. It's not easy but it's a possibility.

MR MASON: I suppose we should add that having said that we don't see legislative change as the answer to all issues with the legislation, we agree that some of the plain English techniques like the use of examples would be a good thing.

MR INNES: Yes.

MS McKENZIE: And better in the legislation, at least for some of the examples, because that would dictate the interpretation, whereas other intrinsic documents will not.

MR INNES: Yes.

MR MASON: I think, commissioner, not only from the lawyer's point of view of what is authoritative and what's not, but just in terms of people knowing where to look, because one thing that has been quite striking in submissions is the number of people saying that X, Y or Z piece of information isn't available - and it is - but obviously they haven't been able to find it.

MR INNES: We should make some recognition of that.

MRS OWENS: Do you want to keep going, Graeme, on your agenda, or keep coming back with ours?

MR INNES: That's probably all we were going to say on employment and employment-related issues, although we have strayed off those a bit. The next thing we were going to talk about is support for an enhanced HREOC role through a possible capacity for the commission or the commissioner to take proceedings in the court.

MS McKENZIE: Sorry, Graeme, having said you're moving on, I'm about to get you to move back.

MR INNES: Back again, yes, no problems.

MS McKENZIE: The one thing you haven't spoken about is that one of the other things that ACCI and AIG have said is that really they haven't seen any clear evidence that discrimination in employment is a problem and - before you blow up - - -

MR INNES: Yes.

MS McKENZIE: Really unless there is clear evidence we shouldn't be looking at changing - you might be looking at education perhaps but that there is just not clear evidence that there is discrimination. Have you got things to say about that?

MR INNES: I would have thought that the numbers of people with a disability who are unemployed sitting at - depending on what statistics you accept - up to 10 times the national average is fairly clear evidence that there is a problem in terms of the obtaining of employment for people with disabilities. If ACCI haven't recognised that - clearly the government has, particularly in the last few weeks, but even over a longer period of time in terms of their concerns about disability support payments - you then have to go into a process of reductive analysis where you try and work out what the reason for that is.

MS McKENZIE: Yes.

MR INNES: And I'm not asserting that the only reason is discrimination in employment against people with disabilities, but employment is the highest area of complaint, I think, under our legislation and that is pretty much replicated throughout the states.

MS McKENZIE: And inquiries that don't finish up in complaints - I assume that is also a high proportion of those as well.

MR MASON: Yes.

MR INNES: That's right, yes. I think we have already given you submissions on the stats. I don't have them in front of me but I'm pretty sure that is correct.

MS McKENZIE: My recollection is that that's including those.

MR INNES: I think that is evidence of discrimination against the people with disabilities, and I'm sure that the albeit not very scientific survey that you have taken in terms of receiving submissions will give you a clear indication from the disability field as to what they think of that assertion by ACCI. If you talk to people with disability - again and again I hear stories in terms of our discussions with people about employment situations where disability has been a factor for people not getting employment or not remaining in employment.

MRS OWENS: Let's just try and get underneath what the problem is. ACCI and Australian Industry Group - as Cate said - has said there is no problem and if there was it's not about discrimination; it's about what happens before people get into the workforce in education.

MR INNES: That's certainly true to an extent.

MRS OWENS: But in terms of the employers themselves - I think perhaps you have made this comment to us before in another context - that sometimes employers have difficulty or think they are going to have difficulty in trying to identify the true inherent requirements of the job and they may potentially overestimate the costs of making adjustment. Do you want to comment on that?

MR INNES: I don't quite remember what I said.

MRS OWENS: Would they find it hard to think about what the adjustments could be? This goes back to our positive duty, I suppose.

MR INNES: Yes. Clearly, in a lot of situations it's a more difficult thing for an employer to employ a person with a disability than a person without because of a number of things, one of which is the assumptions that employers make about people with disabilities and what they are not going to be able to do. That flows through into employment decisions. That's one of the reasons why we talk about non-legislative measures of informing things, making that sort of material more readily available so it's easier for employers to be informed.

In an employment situation, where you have options and choices, I suppose you are going to take the easier choices. Employing a person with a disability is a bit different. In some cases it might be more complex. The end result, once you have

embarked on the process, in a lot of cases may not be much more difficult, but because it's a bit different people don't take that path. That does constitute some form of discrimination.

If you look at the public service figures over the last few years - and I'm sure we have quoted those to you in previous submissions; I can't quite recall the figures now - there has been a decrease in the number of people with disabilities being employed in the public service. That too suggests that there are the sorts of issues that I've talked about.

MRS OWENS: We actually found this morning something that surprised me greatly, which was that the numbers employed in the Department of Family and Community Services is actually below the service average.

MS McKENZIE: The average.

MR MASON: On the issue of - - -

MR INNES: That's an interesting piece of information. I'm not sure - - -

MS McKENZIE: How to deal with that.

MR INNES: How to deal with that, yes.

MS McKENZIE: We just thought you'd like to know.

MR INNES: Yes. Thank you.

MR MASON: On the issue of costs and the employer's approach to costs, I guess that again reinforces what we've been saying about improving the availability of information and advice. Clearly there are two areas of costs to deal with here. One is that if you have to buy a piece of equipment then that's a cost to an employer. You can imagine that particularly for smaller businesses it is a far more significant cost; the search costs and time and effort to find out what's out there. It's not very comforting perhaps if the adjustment was free but it costs you six weeks of work to find it. We think that's something the public sector and/or industry based approach might assist in dealing with - some of those things. We are not asserting that it's always the case that industry or employers are always discriminating out of prejudice or, for that matter, a wilful form of ignorance. It's a matter of there being barriers in the way of people coming to terms with the issues.

MR INNES: I think that's right. That's an important point and I think that's one of the points I talked about last time that you might have been referring to. We are not

talking about, necessarily, ill will or - as David says - prejudice, but rather just lack of understanding, but it still constitutes discrimination. It's not acceptable because it's a different approach to perhaps making a prejudiced or a decision based on ill will about employing people with disabilities if it's an uninformed and incorrect - - -

MS McKENZIE: And even well-intentioned.

MR INNES: That's right. And even a well-intentioned decision based on incorrect assumptions is still discrimination.

MS McKENZIE: The other thing that some participants said to us was that this is not just a problem for employers, it's also a problem for the recruiters who get contracted out to do the early stages of interviewing for a particular job.

MR INNES: That's true, yes. Anecdotally, many people with disabilities suggested to me that the introduction of those sorts of broad recruiting processes has constructed a further barrier to employment of people with disabilities because there is an initial process set up which employees have to get through before they get to the second stage of employment. It might be - I don't know - some sort of a test in which a person has to be able to read and write to carry out the test. This is a very simple example. A person has to read and write to carry out the test, but that reading and writing requirement may not be a major factor in the employment for which they are being tested. So you are knocking out people with disabilities who may not be able to comply with that.

MS McKENZIE: As with driver's licences.

MR INNES: Exactly, yes. The requirement to have a driver's licence is another one.

MS McKENZIE: Even though it's not really necessary.

MR INNES: Yes.

MR MASON: I was just thinking we had in mind that this all links up with the issue around what questions can or can't be asked, particularly in an employment context. We noticed that there didn't seem to be much pick up on that issue of the discriminatory aspect of the DDA. Unless I've missed it I'm not sure there's anything actually in the draft report even.

MS McKENZIE: No. You are right. It's one of the issues we flagged as one we need to consider.

MR MASON: Yes, it's an area where, I think it's fair to say, we have taken a slightly different perspective, firstly, than a lot of our sister organisations elsewhere, including around the world; secondly, I think that a number of disability organisations, while accepting that people ought not be subjected to unfounded, intrusive questioning for no reason, we think that in general the more open the discussion between, say, a prospective employer and a job applicant there is on disability issues the more likely it is that issues of prejudice, ill-founded assumptions and so on will be addressed.

Also that's the start of an effective process of searching out solutions to adjustment issues, real or perceived. We think it's worth a look. Whether employers are feeling inhibited from honest discussion of adjustment issues because of some fear that they can't raise and that if the act is being perceived as saying, "Well, you can't talk about disability," then that could be seen as raising the research costs of information to - - -

MS McKENZIE: It's really irrelevant questions that you are on about.

MR MASON: We don't think that would be a good result.

MR INNES: Two things: one is that you start a dialogue between the person with the disability and the employer, a positive dialogue - if the person says, "Well, these might be the issues that you are concerned about and so here is some thinking that I've done towards it." The other thing is that - surprise, surprise - the person with the disability is actually quite a useful knowledge base on finding solutions to the problems that they might face in employment because - surprise, surprise - they have run into those problems somewhere else in their life and actually solved them, or somewhere else in some other employment. So to inhibit that sort of discussion you actually reduce the chances of a successful and effective match.

MR MASON: So we would be supportive of some clarification of the discriminatory questions section of the act, but so that it works to give people a remedy where they are subjected to over-intrusive questioning with no justification, but also so that it makes it a little clearer the purposes for which the information requests are - - -

MS McKENZIE: Irrelevant questioning is what the provisions should be directed at.

MR MASON: Sure. That's not just an employment-related issue, but it has perhaps the most bite in the employment area.

MR INNES: Yes.

MRS OWENS: One of the real challenges is trying to get to this issue of lack of understanding of employers, both about the costs and what they have to do and so on. One of my colleagues said that he felt - and this colleague is an ex-business person - that there really wasn't enough information out there about the benefits to employers of employing people with disabilities, in terms of having access to a broader skill mix and so on. He felt that perhaps more needed to be done to "sell" the idea to employers that this can actually be very beneficial.

MR INNES: There have been a lot of attempts made to do that over the past decade or so and quite a lot of resources put into doing it. I'm not suggesting that means it has been done effectively. I suppose I'd be a tad hesitant about going further down that path because - - -

MR MASON: At the least it's something you'd have to say that we, the Human Rights Commission, are not well placed to do. It's not going to be terribly persuasive for us to be appearing to lecture businesses on how best to run a business. I was struck by a comment in one of the submissions - and I can't remember which one at the minute - that one of the central themes of that sort of promotion tends to be that people with disabilities make more loyal employees and stay in place for longer. That submission made the point that that's evidence of more limited job opportunities and is therefore a cause for concern rather than congratulations. I thought that was quite - - -

MRS OWENS: Yes, that's quite right.

MR INNES: That's right. I don't know about that. It's going outside of our area of expertise, to a degree, but it seems to me the only way that we are going to get major change in this area is to get some major employers at a senior level to commit to changing their organisations. There are organisations, there are banks, that have at senior levels, at CEO levels, made a commitment to change the nature of their workforces to represent the diverse nature of the community, in terms of people's backgrounds, people's gender, and beginning with people's disabilities. It seems to me that that's the way major change is going to occur. There have been a number of campaigns of the sort that you describe in the last decade which have been - I don't know - to me, fairly glib, surface-level stuff that hasn't really started to impact on people's attitudes.

MS McKENZIE: The other problem is too, frankly, that often people's attitudes don't change unless they have some kind of experience; whether it's theirs or their family's or some close friends.

MR INNES: Yes. So ironically the best way to get people with disabilities into

jobs is to get them into jobs.

MS McKENZIE: Exactly. It's a common thing. Human beings don't - it's very hard for them to learn any other way.

MR INNES: That's right.

MR MASON: We would certainly agree that the objective is worthwhile. If it's possible to address issues around the ability of the working population to sustain reasonable retirement incomes - for example, by means of increasing both participation rates and effectiveness of participation while we are all in our working years rather than only by trying to extend them. Clearly that's a good thing economically overall, but it's not something I think that we've got an immediate handle on how to achieve.

MS McKENZIE: You might want to go on to your next - unless you've got any questions about this area.

MRS OWENS: No, I think we had better move on.

MR INNES: The next one on our list was support for consideration of an enhanced HREOC role through a possible capacity of the commission or the commissioner to take proceedings in the court. It was contemplated really only as a means of having systemic issues addressed, which may not be able to be brought forward most effectively by individual complainants. It's not seen as a substitute for the complaint process or as HREOC taking on a role of representing complainants or acting for them in large numbers of cases. It's recognised that a number of issues around the relationship of this sort of role to the complaint process would need to be considered, including any impact that settlement of an action by HREOC ought to have on complaints and the relationship of this to the exemption process. A capacity for the commissioner to go directly to the Federal Court or Federal Magistrates Service may avoid some of those issues.

MS McKENZIE: So the commission wouldn't be initiating the complaint at the commission stage, so you wouldn't have that potential conflict of interest?

MR INNES: That's right. We think that removes that conflict. If the commissioner had the capacity to initiate an action in the Federal Court or in the Federal Magistrates Service directly then you remove that conflict of the same organisation that is carrying out the reconciliation process. It's one of those types of functions which I think just the existence of, as much or more so than the actual use of, may well assist in initiatives towards redressing some of the broad systemic discrimination issues.

MS McKENZIE: You would be looking then at a kind of systemic relief. If you like, systemic orders could be made - - -

MR INNES: That's right.

MS McKENZIE: Whole classes or groups of people - - -

MR INNES: That's right. I wouldn't have thought that the courts would be able, in those sorts of circumstances, to make damages awards or something like that.

MS McKENZIE: No. I think that would be too - - -

MR INNES: That's right. We wouldn't be looking to that. We would be looking for orders which direct systemic change.

MR MASON: Yes, I think it's necessary to make that point about the systemic focus of such a proposal, particularly in response to the comments in some of the industry bodies' submissions: apprehending that you might have the commission turning up on behalf of each and every individual employee. We would agree, firstly, that that would be an inappropriate distribution of our resources.

MS McKENZIE: Yes, it would be.

MR MASON: Secondly, obviously it would fatally compromise confidence in the fairness of the process.

MS McKENZIE: Yes.

MR MASON: There would still be issues to work through about at least the perceived effect of such a role on the commission's complaint functions and it's fair to say there is continuing discussion within the commission itself on those issues. We think that clarification that we are talking about a systemic focus here goes some way to meeting some of those concerns.

MS McKENZIE: And the costs question was another matter that would have to be looked at.

MR MASON: Yes.

MR INNES: Costs? You mean in terms of - - -

MS McKENZIE: For this systemic complaint power. Assume you would almost

be saying because it is a public interest matter - - -

MR MASON: I don't know whether you could say that there was a different costs rule that ought to apply to the commission or commissioner as a litigant, than to anyone else. I'm not sure how that would go down.

MS McKENZIE: It's very difficult, though. If that were the case and there was a real costs threat the numbers of complaints that the commission might be able to bring would be very limited.

MR MASON: It would obviously be a serious factor in deciding - - -

MR INNES: It would be a factor in deciding what to run.

MS McKENZIE: Absolutely.

MR MASON: That's the case for any regulatory or any statutory body and I think there would be concerns on the other side if we were exempt from costs and they weren't. I suppose one of the things that - I think the Women With Disabilities submission raised the issue that some of these issues around costs in public interest litigation had broader implications, not only for the DDA, and they were recommending that that issue be looked at by the AIRC, which obviously has done an inquiry on standing but not, I think, on the costs issue.

MS McKENZIE: Not on costs.

MR MASON: We thought that was an interesting idea, rather than trying to evolve a unique regime for the DDA. It's something that merits a broader look.

MRS OWENS: I've got a few questions about this, and this is just because I'm probably three steps behind Cate, but I'd like you to answer these questions: what different results would you be expecting from having this power over your current inquiry power?

MR INNES: We've got several sorts of inquiry powers. There's the general inquiry power to run an inquiry and prepare a report as a result of that inquiry, so that's a power we can use in some circumstances but it's nothing more than that. The other inquiry power that we have is to run a public inquiry around a complaint or complaints. Really, the commission's only involvement in that is at the investigation and conciliation stage, but they're not our complaints and we don't have any control of or capacity to initiate the lodging of those complaints.

Frankly, sometimes in the resolution of the matter through the public inquiry

process there can be some conflicts between the position the commission might want to take, which is a public policy removal of systemic discrimination approach, as opposed to the individual complainants, who may get a solution which resolves the issue for them and not want to pursue the complaint. Quite an understandable position for them to take. If they then pull the complaint, we no longer have a complaint.

MS McKENZIE: Your inquiry falls, that's right.

MR INNES: This would be very different because it would be the capacity for the commission to initiate a legal action against a respondent or group of respondents to address a systemic issue impacting on people with a disability and to go to the Federal Court or the Federal Magistrates Service and seek a remedy in the same way as a complainant can. In other words, just skip the conciliation and investigation stage, but seek a remedy to that problem. The inquiries that we run attempt to find remedies through consensus and negotiation. This would be a stronger process whereby we could get, if we were successful, a court order.

MS McKENZIE: Even if the respondent wouldn't conciliate or negotiate.

MR INNES: That's right.

MR MASON: But at the same time, as with the availability of legal remedies to complainants at the moment, the end availability of a legal remedy is itself conducive to conciliation and negotiation. In such a process, that could occur at a number of stages. But if it's a matter of own practice and it's a matter of how we might be received in the court, you would expect that on a lot of occasions we would be entering into some sort of negotiation process with a potential respondent or whatever the correct term is when you get to court and, for that matter, with the community. We are proposing to take this form of, call it enforcement action. Let's talk about it. Also I think it has to be borne in mind that when you do get to court, the court retains the capacity to direct matters off to the mediation stream anyway.

MR INNES: And often does.

MR MASON: So that if not we, of course, but some future officers of the commission were disposed to handle such a power in an excessively bloodthirsty way, there's still the control by the court.

MR INNES: But I would be very surprised, if this power were made available, if the first that the respondent heard of it was receiving papers from the Federal Court. That just wouldn't be the way that you would utilise that sort of function.

MR MASON: And if you handled it that way, you'd expect some fairly adverse results in costs, quite apart from the political consequences.

MR INNES: Correct, and some fairly public interrogation of the commission by the courts.

MRS OWENS: How would you identify the sorts of areas that you wanted to take this sort of action in? Would it be through a whole range of other complaints on a particular type of issue and you'd say, "This looks like an issue. We can't just keep having these independent single complaints coming back to us. We need to do something bigger."

MR MASON: There are two relationships, I think, with the complaint process. One is where you're getting the same complaint over and over again and the other one is where you're not.

MR INNES: That's right. That's the point I wanted to make. Yes, complaints would be one way but we think that there are issues which just don't get complained about because they involve such levels of discrimination or the people involved are in such a disempowered position that they're not even complaining.

MS McKENZIE: Yes, and we've had many submissions about stuff like that.

MR INNES: That's right, so we would, I would imagine, try to weigh those sorts of issues in individual submissions that the commission gets, both public and private, but also in our interactions which we have on a very regular basis with peak disability organisations coming to us and saying, "Look, there are some systemic issues here," and us making inquiries about them. It may well be that things happen such as that we ran an inquiry in a certain area and attempted to find a way to resolve the issues, were unsuccessful at that and then thought, "Well, this is so serious and the respondent, in our view, has been so recalcitrant on the issue that we think we ought to utilise the further power that we have." It's not a power that would be used in isolation or without those sorts of processes occurring first.

MRS OWENS: Would there be potential with this power if something had immediately just gone through a complaints process and it got to the end of that and somebody said - it started off as an individual complaint but somebody gets to the end of that conciliation process and can't afford to go on, is concerned about the potential costs; you wouldn't use it in that instance, because it's not potentially a systemic issue?

MR INNES: If it wasn't a systemic issue, you wouldn't, but if the individual complaint was a demonstration of a much broader systemic issue, you might. That

would only be one factor in a range of factors that you have to consider. You certainly wouldn't use it to effectively resource individual complainants who were concerned about pursuing their own complaint because of the costs.

MS McKENZIE: I don't know how any remedy that you got from the court could then apply to that particular complainant, if their complaint - - -

MR INNES: I imagine it couldn't, if it wasn't their complaint that was brought, if it was a new action. The remedy might, in a sense of a systemic change - - -

MS McKENZIE: It might have a flow-on effect to them eventually, but it couldn't directly relate to them.

MR INNES: That's right, no.

MRS OWENS: It couldn't directly relate to them, so you're not really taking it to the court on their behalf at that point. You're just saying, "This is a systemic issue. If this stops at this point, we won't be able to - we'll take it further, but not on behalf of that individual complainant."

MR INNES: That's right.

MRS OWENS: Again, it keeps that very clear distinction between your role and not taking sides, but trying to - I suppose in a way you've still got the same respondent there potentially, haven't you?

MR MASON: But there could be a number of different ways of drawing that distinction. I think there were proposals around us or someone else having to be satisfied that the matter fulfilled a certain systemic character. Perhaps more obvious and traditional way of achieving the same result would just be to rule out the availability of damages in such matters. You'd still have access to declaratory relief, I suppose, or at least potentially injunctive relief.

MS McKENZIE: You'd want to make it clear you could have injunctive relief, otherwise the whole point of being able to take these matters to the court - - -

MR MASON: I guess that's right except, if you got a declaration from the court, then any complainant thereafter that likes to can line up with a guaranteed win. But I think it's probably more effective to do it in one go rather than two.

MRS OWENS: I'm afraid you've all lost me, because I have no idea what injunctive relief is, but I don't really want to spend time on you giving me a lecture now. I'll find out from Cate later.

MR INNES: Can I give you an example which might make the process a bit clearer? Let's assume that there is a problem with compliance with the transport standards by the owner of a fleet of taxis in a country town and there are half a dozen people who have physical disabilities in that country town who are really concerned about lodging complaints that the taxis aren't complying with the standards because they have to use those taxis every day. It's their only form of transport. To me, that would be the sort of situation that the commission might look at in terms of utilising this power, if there had been attempts at negotiation with the transport provider which had been unsuccessful.

MS McKENZIE: The order might be that the whole fleet has got to comply with the standard, or whatever the percentage is.

MR INNES: That's right, exactly.

MRS OWENS: Is that injunctive relief?

MS McKENZIE: That's injunctive relief, basically: an order that you must do or not do something.

MRS OWENS: The other group of people that potentially fall through the cracks - and we keep hearing about these people in terms of the ability of the act to deal with their problems - are those people really at the bottom of the heap: those people that have either intellectual disabilities or are in institutional accommodation. Could you use this power to take actions on behalf of say a group of people in an institutional setting?

MR INNES: Those are the sorts of groups that I was thinking about when I was thinking of very disempowered complainants.

MS McKENZIE: You've got a problem with the special measures exemption perhaps. We'd have to fix that up before you could - - -

MR MASON: You'd still need a cognisable act of discrimination.

MR INNES: That's what I was about to say, and that's why I didn't use that group as an example because you still need, as David says, a cognisable act of discrimination.

MS McKENZIE: What a number of the people who have made submissions to us are saying about this particular group of people who are in institutions is that they don't have the same choices that people without their disabilities have: that they're

moved between accommodations without being given a choice of what they want to do. There are various funding problems which I won't talk about but that's a simple example. Should the DDA in any way extend to these people? In other words, should the exception for special measures be limited? We've suggested it be limited as far as day-to-day administration is concerned, but we haven't gone further than that.

MR MASON: I suppose our view on the special measures provision is that it is limited and the ACT decision that said it wasn't was wrong, and it was wrong under its own legislation but would certainly be wrong under ours. We just do not take the same view. We agree that there's some benefit in clarification of that point, since people clearly are confused about it but we do not think, and never have thought, that the special measures exception means that, if you're doing something directed at people with disabilities, of a generally beneficial sort, then you are immune from liability for discriminatory things that you might do within that. It's just not the way we think the DDA works.

MRS OWENS: Is it worth us trying to clarify this in any way? Have you got any ideas about how we can do this?

MS McKENZIE: I think we should clarify it. It is still a matter of some lack of clarity.

MR MASON: We think that the submissions have indicated that there's enough lack of clarity out there that it's worth addressing.

MR INNES: It's worth addressing, yes.

MR MASON: The fact that we're clear in our minds doesn't answer the whole question.

MR INNES: We'd support the sort of direction that you've suggested.

MRS OWENS: But so far, correct me if I'm wrong, you've only really suggested that administration - - -

MS McKENZIE: I think you'd go a bit further, wouldn't you? But I'm not quite sure how far.

MR MASON: Quite independent of the special measures provision, there are going to be limits on what the DDA does in terms of regulating the extent of a beneficial measure. For example, we haven't thought that the DDA can compel state or local governments to have parking eligibility schemes for everyone with a disability if

they decide only to have schemes for some people with a disability. The act doesn't, and we think can't, compel someone who decides to do something to do everything.

MS McKENZIE: Maybe the exemption should be limited to the things that we really think it ought to cover like establishment. We've said clearly the establishment of those services should be exempt - perhaps social eligibility criteria, but I'm not quite so sure; and funding, I would have thought, should be exempt.

MRS OWENS: We just this morning spoke to some people who say that last year they wrote to you about possibly having an inquiry into young people living in nursing homes, which is an issue that has obviously been out there in the community for a long time and is a really very difficult issue to deal with. It's usually thought of as being something you would think about under a Disability Services Act. Is there some way that that sort of issue could be reviewed by HREOC or could be taken forward under the Disability Discrimination Act, or is it not applicable?

MR INNES: Well, we canvassed this issue in a presentation which Sev Ozdowski made to that conference last year, around June of last year I think, and we canvassed the pros and cons of a public inquiry. We thought that there were issues to be considered in terms of the running of a public inquiry but it would be one of a number of negotiating directions which those groups might choose to take. I think our assessment, on balance, was we could look at running a public inquiry in this area but maybe it's not the best way of getting to where you want to go, which is to address the issues and achieve some change; because the issues have already been fairly publicly aired in the disability field and to a large degree the issues are understood.

So a public inquiry wouldn't add much to the sum of knowledge on the question. I mean, what really needs to happen there is enough political will or momentum for the issue to get some funds available or redirected or whatever, to cause the sort of change necessary.

MR MASON: We have been looking at some possibilities for targeted research in the area, trying to find some of the issues around where the money is going and where it's not going, because there do seem to be issues in that area where people are occupying, perhaps, beds in a high-cost hospital because there is money for that and not getting to more satisfactory accommodation because there isn't disability money. That's not something that we think necessarily just raising the banner of a public inquiry can address, but some detailed research on the money flows might be more constructive and we've been working to try and identify who might best do that research.

MR INNES: So yes, we have been doing some work in this area but we haven't

formed a view that a public inquiry is necessarily the best way to canvass the issue.

MRS OWENS: So what issue do you want to address next? Do you remember any of your agenda after all this?

MR INNES: Yes. We've got it here in front of us. We haven't talked about the Cancer Council proposal for an amendment to provide general health and safety defence in the act. That was in one of the more recent submissions, I think - since we've spoken to you, anyway. The Cancer Council of Victoria raised a concern that since addiction to nicotine could be considered a disability, measures to reduce or ban smoking could be hampered by the DDA and that this should be addressed by providing a defence for measures reasonably necessary to protect the health and safety of any person. Now, it's correct that the DDA Amendment Bill of 2003, currently before parliament, fails to address addictions other than to prohibited substances. So in that respect, that's an issue.

However, I think it's important to note the only instances of use of the DDA in relation to smoking have been against rather than in favour of smoking being permitted in particular circumstances by people whose disabilities made them particularly susceptible to smoke. Neither the Cancer Council nor any other body has previously raised with us the concern now presented in this submission. The Cancer Council's concern that there could be liability for direct discrimination in not permitting smokers to smoke, we think can't be sustained following the High Court decision in Purvis, which makes clear that general bans or restrictions on behaviour, including smoking amongst a range of other things, should be approached by reference to indirect rather than direct discrimination complaints.

Under the indirect discrimination provisions, there is already contained in those provisions a reasonableness limitation, which is what the Cancer Council were seeking. So we think that their concern is not justified in this area. But it has raised for us a broader issue of occupational health and safety provisions and we are thinking it may be desirable nonetheless to consider means of improving coordination between anti-discrimination and health and safety laws. There does appear to be an anomaly, in that the DDA provides a defence for measures reasonably necessary to protect public health - - -

MS McKENZIE: But it doesn't go further.

MR INNES: - - - where a person's disability is an infectious disease, but not in other circumstances. There is a legislative history for that, but nonetheless it is probably an anomaly. So we wonder whether that ought to be addressed.

MS McKENZIE: I think that is a most helpful submission. I mean, it's a matter

that has occurred to me and that I've mentioned at various stages as people made submissions about this matter. The other thing that does make me wonder - we've had various comments and suggestions about the DDA Amendment Bill. Certainly if that safety element were added to the current exception provision, that might almost obviate the need to have a - - -

MR INNES: We wouldn't share that view. I think it's fair to say that.

MR MASON: Certainly a lot of the content - it's not for us to speak for the government on what their concerns are. But clearly for employers it ought to occupy at least a large part of the territory.

MS McKENZIE: And it has. The employers have made exactly those submissions. They have said they are concerned by, basically, the safety situation.

MR INNES: They are concerned about occupational health and safety. The inherent requirements provisions are currently there - - -

MR MASON: I'm not sure we want to speak at length on the addiction bill because it is before a senate committee and we have a submission in with them.

MRS OWENS: We have exactly the same problem, I think, in terms of running this inquiry. As ever, there are a lot of people who want to talk to us about it.

MR INNES: No doubt.

MR MASON: You might care to look at our submission, which is on the senate committee's site now.

MR INNES: Just going back to the related issue though, I think it is important that we say that we'd be concerned that any reform in the area of broadening that infectious diseases provision shouldn't lead employers or others to believe that people with disabilities generally present health and safety risks. It would have to be pretty carefully crafted. Or, for that matter, that discriminatory measures are a generally necessary and permissible response to such risks, because obviously those sorts at least would disadvantage people with a range of disabilities including, ironically, people who have or have survived cancer. So we wouldn't want that to be a factor - - -

MRS OWENS: Sorry, I can't see the connection between surviving cancer and being an infection risk.

MR INNES: - - - in the broadening of the provision.

MR MASON: No, I think there have been some cases in the US where people have been subjected to misconceived restrictions because they have had cancer, and those are some of the cases where, because you're not actually limited in life activity now; because you're okay, that means, "You're not protected under the American Disabilities Act. Go away." That's one of the reasons we continue to favour it now.

MS McKENZIE: Have a broad definition example?

MR INNES: Yes.

MS McKENZIE: With the lung safety?

MR MASON: Yes.

MRS OWENS: I'm just wondering - while we're talking, have we finished with occupational health and safety? Because this might be a good time to talk about the Australian Airports Association.

MR MASON: We just had a couple of points to make on that area, as well. Being happy enough to talk about an extension of the health and safety defence we wanted to emphasis some necessary constraints on any such expansion. I think that's where we are.

MR INNES: Yes. That's right. Just a couple of things - any such amendment we think should include consideration of a provision making clear that reasonable adjustments to enable the person to meet health and safety requirements should be made.

MRS OWENS: First?

MR INNES: Should be made, an example being maybe a person who can't use standard safety equipment but can use equally effective modified safety equipment, so they shouldn't be excluded. We thought that greater certainty might also be achieved through use of the capacity to prescribe laws in relation to OH and S and/or environmental standards. This approach, or inclusion of relevant environmental standards in future expansion of standards on access to premises, might also provide an appropriate means of addressing issues which have been raised in numerous submissions regarding environmental illness or chemical sensitivity. So those are the - unless you have any others in mind, David?

MR MASON: No.

MR INNES: Those are the provisos that I just wanted to flag.

MRS OWENS: Thank you for that. There are a couple of things that have just come out of that. One is this whole issue of safety. As you are aware, we got a submission from the Australian Airports Association about the CASA regulations and the potential conflict between the CASA regulations and the Disability Discrimination Act and I was wondering if you would care to comment about that submission. They came to our hearings in Canberra. I don't know whether you have seen the transcript for that but, David, are you - - -

MR MASON: No, I haven't had an opportunity to look at that transcript. I don't know whether you have, Graeme.

MR INNES: No, but I think we're across the issues.

MR MASON: There have been a few issues of interaction between the DDA and CASA requirements that have come up. Perhaps you can direct me if I'm talking about the wrong ones, but one which has been dealt with and we thought effectively, at least for a priority period, was in terms of people's fitness to fly or discharge flight-related duties, where there was applied for and granted an exemption under both the DDA and the Sex Discrimination Act, to confirm that it was permissible essentially to enforce the CASA requirements.

MS McKENZIE: That is not one of the ones they mention.

MR INNES: Fine.

MS McKENZIE: So you're right. They must have been happy.

MR MASON: Okay. That's one which, for DDA purposes, at least, we thought was only marginally necessary because the inherent requirements took care of it, in any case. So that's one. There is another raft of issues that have been raised in terms of the fit between the disability standards for accessibility to public transport and the safety requirements at airports and perhaps that is more the territory that we're talking about. I know that there was a range of issues where the standards contemplate that for passenger walkways there should be availability of support for people with ambulant disabilities, every so many metres, in terms of seating and hand rails and so on.

MRS OWENS: Yes. That was exactly one of them.

MS McKENZIE: The resting places, yes.

MR MASON: A number of airports have raised the issue that to the extent that people are walking out on to the aprons of the tarmac or whatever, you can't deliver those sorts of facilities. Well, frankly, that is why the standards contain the concept of equitable access and that concept has been discussed with the Department of Transport and with the Australian Airports Association and with a number of other parties on a number of occasions. Our understanding was that the airport operators and airlines between them were, as a matter of legal position, doing what they are doing in practice, which is getting people on to planes by means of wheelchairs or the electric carts that one sees, and were not feeling themselves compelled to get the jackhammers into the tarmac and install railings and then have planes running into them.

We're not sure the conflict is a real one. If they continue to think the conflict is a real one, then we have pointed out in a number of discussions that the exemption mechanism is available and that one of the purposes for which we see that power as legitimate is to provide people with certainty while legislative or regulatory issues are resolved. That gives the exercise of the power an appropriate degree of temporariness or a transitional layer, rather than just certifying that something need not change forever, which we obviously think is improper.

MS McKENZIE: I think their concern was it was only a temporary certainty.

MR MASON: I guess we think it is ironic that people are making submissions rather than applying for an exemption if they have a concern about the existing operation of the act and if they think that it's safety critical. It's a little like people thinking it's easier to make submissions to this inquiry than to make complaints. We find both those things puzzling.

MRS OWENS: Then it raises the issue of to what extent should it be the Australian Airports Association or the airlines saying there is an issue here? To what extent do you try and, as far as possible, get things sorted out through the acts? If there are conflicts between a set of Commonwealth regulations relating to airports - CASA regulations and the Commonwealth Disability Discrimination Act - should it be the airports or the airlines coming and saying, "We want a temporary exemption," or whatever, or should those sorts of problems, as far as possible, be ironed out in some other way? There is the potential for, say, prescribed legislation. Would it be possible to prescribe part of the CASA regulation through that route, so that there is greater certainty?

MR MASON: I guess there may be an issue about whether the prescribed law provision applies to the standards at the moment.

MRS OWENS: But I'm talking about - we're thinking about the act and where it

could be going, not just where it can be going at the moment.

MR MASON: Sure.

MRS OWENS: So think about that, that way too.

MR MASON: Yes. I guess I just want to make the point that it is an issue of apparent conflict with some of the specifics of the standards, rather than the act. That's where the concern is. It may well be that the standards treat aviation issues in a little less detail than they treat some other areas and there could be some historical issues about the engagement of the industry with that process to that. That said, there were some decisions made in the context of the development of the standards not to have a general let-out for any safety issue whatsoever, because of the concern that it would lead to people just being refused travel, rather than some sort of more intelligent processes going on. If people didn't have an all-purpose let-out, then they would have to do the work of deciding, "Okay, how can we meet both sets of requirements?" That was what the disability community, government people and industry people involved in the process at the time decided.

For the transport standards, maybe, some of those decisions need another look in the course of the review process, which is provided for, but it comes back to the issue that Graeme was making about health and safety issues more generally; that you don't want to give people the impression that if there's a health issue, if there's a safety issue, then discrimination is okay and that's the end of the story. You want a bit more work than that to go on, because otherwise people won't be able to travel. They won't be able to work.

MRS OWENS: I think you're probably overstating it, that they won't be able to travel. I think it's a matter of being clear about exactly what is being constrained. From where I sit, the idea that you can have Commonwealth regulations or legislation here and over here, that are in conflict, means that - my view is that potentially you try and get as much of that conflict resolved by the Commonwealth, rather than having to leave it to the players to say there's a - - -

MR MASON: We agree.

MR INNES: I think that's right, but there are some very processes, because before you can start resolving the conflicts, you need to be clear what, if any, conflicts, exist. We would agree with you on that point. The standards set up a review process which allows for these issues to be raised and there's an ongoing accessible public transport and national advisory committee process which has modal subgroups for bus, rail, taxis. The aviation one hasn't met as often as the others, but the capacity for it is there.

If there's a particular issue where there is clearly a conflict - and I think it's fair to say we're not yet persuaded that there is one - then the exemption process allows for quick addressing of that while some of these other things come into play. I think it's a bit premature to be talking about regulatory processes to resolve these sorts of issues before any of those others things that have been set up to deal with this very type of thing come into play.

MRS OWENS: You say that there's this standard review process.

MR INNES: Yes.

MRS OWENS: But that's not going to be like annual, is it?

MS McKENZIE: Isn't it every five years?

MR INNES: It's every five years.

MS McKENZIE: That's quite a long time to wait while this problem gets sorted out.

MR MASON: It isn't necessary for them to wait - - -

MR INNES: You don't have to wait.

MR MASON: - - - because there's a quicker exemption process. I'm not sure that it's credible for anyone to expect that there will be legislative action by the Commonwealth quicker than, let's say, the six-week period that we typically apply during an exemption process.

MR INNES: It's fascinating that we're having this discussion, because I had a similar discussion with a couple of people at the Accessible Public Transport National Advisory Committee meeting just last Thursday. There was major consultation on these standards before they were introduced and they then went through the normal parliamentary process.

MR MASON: The RIS process went for six years.

MR INNES: Yes, the regulatory impact statement process went for six years. These are not new documents that have just appeared and there has been lots of opportunity - and there still remains very clear process and opportunity - to raise these sorts of issues through the APT and AC process. At the moment we're on that committee compiling issues to go into the five-year review process. If there was a

pressing issue that came up - and one hasn't yet, but if there was a pressing issue that came up - I'm sure that if that committee formed the view that it needed legislative action, that could occur; but there are a lot more processes that can take place and are there ready to take place, including the exemption process, if there's a concern.

We have had a number of discussions with the Attorney-General's Department and CASA about these issues and apart from the one where they did apply for an exemption and were given an exemption, there haven't been any that would even raise the prospect of the need for legislation at this stage.

MRS OWENS: Can we - rather than the need for legislation - come back to this idea of prescribing laws under the Disability Discrimination Act and you said earlier, Graeme, that the potential is there to do that for occupational health and safety and environmental standards. Is there not potential to do it, likewise, for airline safety?

MR MASON: There could be for a range of matters and we have, in our submissions thus far, supported the continued appropriate use of that power with some potential augmentation of accountability and public scrutiny in terms of a sun-setting provision on perhaps a consultation requirement. We certainly don't think it's appropriate for people with responsibilities under the legislation to be confronted with, in effect, a choice of which act they comply with and having to toss a coin.

MS McKENZIE: Yes.

MR MASON: We do think it's appropriate that there be some mechanisms for coordination of legal requirements applying to people. We don't think, frankly, there's anything inherently evil or contrary to the objects of the act in laws being prescribed where it's appropriate that they be so.

MS McKENZIE: The other matter that the association raised - and I suspect you are going to tell me this has been raised, as well, before - was the question of equivalent alternatives.

MR INNES: Sorry, could you say that again?

MS McKENZIE: The question of equivalent alternatives and the standard, where they wanted to make use of that provision.

MR INNES: Yes.

MS McKENZIE: They felt they would like some more certainty about whether in fact they got it right. Is that a matter that has been raised?

MR INNES: No, not really. One of the things that - not in that context, but in a similar context, a discussion that took place last week, where one of the bureaucrats there responsible for state transport made the comment that one of the ways to address those issues is it work with or in consultation with people with disability or disability groups to determine appropriate and effective equivalent access measures. A number of the rail and bus operators in various states have done that very effectively.

That does two things: one is that it gets some pretty valuable input and also reduces the likelihood of complaints being lodged, if people are actually involved in the development processes. There is inherently a degree of uncertainty in these sorts of processes and I think it might be hard to prescribe it with too much more certainty - but you were going to say something.

MR MASON: One of the advantages that we see in the current process of harmonisation of the DDA and building law through the development and disability standards on access to premises, in conjunction with revision of the Building Code of Australia, is that the DDA doesn't have any up-front certification regime.

MS McKENZIE: But you have tried to do that, haven't you?

MR MASON: And it's not clear how we could try to have one, because you run into constitutional problems.

MS McKENZIE: But through the protocol - - -

MR MASON: Exactly.

MS McKENZIE: Yes, I know it's difficult. Through the protocol - - -

MR MASON: That's right.

MR INNES: Yes.

MR MASON: In this process we've got obviously the building law approval processes that do exist; buildings do get certified. As you say, commissioner, there is a protocol that the building code has sought to - - -

MS McKENZIE: No, I'm still Cate.

MR MASON: Which doesn't give absolute certainty either, but at least does run people through some of those processes of considering the right issues, consulting on

them and coming to good decisions which hopefully then will be more robust, as they say.

MS McKENZIE: I just don't know whether some similar kind of protocol could be developed in that area; in the transport area.

MR MASON: One of the things that is going on, or is proposed to go on, is that any of the built environment bits of the transport standard will migrate over to the access to premises standard, because there will be components of the Building Code of Australia applying to those things and, therefore, for the first time transport infrastructure operators will have available to them some of that sort of certification; whereas previously a lot of them, particularly government departments, have been in the business of self-certifying and therefore looking to bodies like us for approval of their plans. We think that a much more rational and effective position will be once they do have available to them the sort of mechanisms for scrutiny, approval or disapproval, that other builders have.

MRS OWENS: It makes a lot of sense.

MR MASON: Yes.

MRS OWENS: Just while we're talking about prescribed acts and then you can go back to your list of things, Graeme, HREOC - and correct me if I'm wrong - you have the power now to review existing Commonwealth legislation, haven't you? I don't know whether you have used that power, but one of our recommendations is to look at the issue of which acts are being prescribed. Basically say let's cut those out now and then review - this was in the context of the existing state acts that are prescribed, but whether there is the potential to be reviewing Commonwealth legislation to see whether there are any inconsistencies with the DDA and, if so, is there any underlying rationale for those inconsistencies?

In other circumstances, such as we've talked about now, is there potential for more Commonwealth acts to be prescribed? I am not sure whether you have ever gone through this sort of process or whether that would be a real overkill approach to thinking about prescribing laws.

MR MASON: There was one instance where we did a review of an enactment in relation to the DDA and that was some years ago now, but Medicare regulations reduced the number of psychiatric consultations that could be claimed and people attempted to make complaints about that. You can't make a complaint about the existence of an enactment, but that was taken by the commission as an appropriate trigger for exercising the power to review an enactment. We conducted a review and in the course of that review the Commonwealth modified those regulations and we

found the modified regulations didn't either contravene human rights or remain inconsistent with the DDA, so that was the end of that one.

That's the only formal review of an enactment that I can recall, but that procedure basically remains in place; if people make complaints and the complaints are terminated because there's no unlawful act because, in effect, what is being complained of isn't an act of discrimination but an act of parliament, then the commission has an internal procedure for streaming those for consideration by the commission for exercise of that power. I am happy to say that there haven't been terribly many instances where that has even had to arise for consideration. It doesn't mean there's no discrimination still out there embedded in Commonwealth law, of course, but I guess it does indicate that perhaps it's not the main game.

MRS OWENS: I was just wondering whether there is the potential to proactively look at these laws. It's not something that lots of people have said to us - I think we only had one submission that suggested it.

MR INNES: State discrimination systems have embarked on that exercise over the years. I'm not sure that I'm in a position to comment, without going back and looking at some of that work, how effective that has been. I suppose early on we took the view that since there was an administrative review that went on at both Commonwealth and state level - because the general exception under section 47 for actions in direct compliance with any law, expired after the first three years, therefore Commonwealth and state attorneys-general all did engage in some level of review. We thought it wasn't an appropriate allocation of our resources to do the same task at the same time or immediately following. Clearly it's no longer immediate, it's some years further down the track.

MRS OWENS: When new laws or new regulations are being introduced, the regulatory impact statement currently doesn't - or does it - ask whether there's consistency with other Commonwealth laws including DDA?

MR MASON: I don't think that requirement is in there and we have thought - - -

MRS OWENS: I'm wondering should it be.

MR MASON: Yes, we've thought from time to time that it would be a good feature.

MRS OWENS: Yes, it would.

MR MASON: Because it would more fully reflect to the decision-makers the regulatory impact concern.

MRS OWENS: So what you're really suggesting is that the new laws, new regulations, perhaps go through this process, but not necessarily go back and look at all the existing legislation - wait until there is an issue that arises, like the Medicare issue - - -

MR MASON: Yes, either it will arise through people complaining to us and perhaps not being able to proceed as a complaint, but it will at least trigger it.

MR INNES: Yes.

MR MASON: Or if it's raised as a concern from another regulator or from business then there will be a request for exercise of the power to prescribe a law and then there can be consideration of the appropriateness of the interaction between the two regimes in that context. But for new legislation the addition of a component into the RIS processes, Commonwealth or state, we would think would be quite a - an extra piece of information for decision-makers.

MRS OWENS: Not just in relation to disability discrimination.

MR MASON: No.

MRS OWENS: It would actually apply to sex discrimination, age discrimination, race discrimination, et cetera.

MR MASON: And any number of other - - -

MR INNES: Yes, that's right.

MRS OWENS: Okay, thank you. I'll hand back to you, Graeme.

MR INNES: Okay, I haven't got too many more. We noted in the Queensland Equal Opportunity Commission submission some concern about the application of transport standards and other standards if they are passed on how it might impact on the administration of the state legislation. I suppose just to clarify our position, it has been that we've always thought that the most effective way to deal with these issues would be for state and territory governments to either adopt the Commonwealth standard or mirror it in some form of standard of their own, so that it didn't preclude people from their opportunity to lodge complaints under the state system rather than potentially remove that opportunity if it was found that, as a result of the enactment of the transport standards, that removed the state or territory power to deal with complaints of discrimination in that regard. It's not the commission's intention to see those jurisdictions restricted. We would rather see them parallel as they are across

other areas of legislation where the standards don't apply. So I suppose we just thought we should - - -

MRS OWENS: I'm just thinking this through. So if the states were to adopt the Commonwealth standard then we have to rely on waiting for all the states to agree to the Commonwealth standard?

MR INNES: They could do it individually.

MRS OWENS: Yes. What happens if they all didn't - - -

MR MASON: The Commonwealth standard comes in anyway.

MR INNES: The Commonwealth standard is going to come in anyway.

MS McKENZIE: These will eventually, because life is as it is, start to diverge. They might want to make their own amendments.

MR INNES: They might.

MR MASON: We clearly think that a major benefit of standards under the DDA is to have certain and uniform rules on issues that require them. What we would not like to see is people lose the capacity to have local remedies for discrimination. But it is, I think, an inevitable consequence of trying to achieve certainty, that if a state wants to impose in, say, the transport area, a faster timetable than the federal standards contain, then they will have to do that by other means than discrimination law, whether by funding or whether by policy decisions for their own operations. That obviously remains open to them all.

MR INNES: I suppose implicit, but not explicit, in what we have said is that we think that the standards, when they are passed, cover the field.

MS McKENZIE: Yes, I think that's right.

MR INNES: So that they do potentially preclude the operation differently on the state legislation. However, we're not encouraging the removal of state remedies in that area and we would propose, and have done for quite some time, those two options as ways of maintaining the potential for local remedies - that is, adoption of the Commonwealth standards or mirroring of them at a state or territory level.

MRS OWENS: But they can't actually have standards that are going to be stronger standards - - -

MR INNES: They can, because the states regulate the transport mechanisms. So the states can decide that they are going to - - -

MRS OWENS: Doesn't that upset the certainty, the advantage that we've got with the standards?

MR INNES: That's an issue that they would have to take into account in any decision. It's outside our area to have too much of a view on that, but I guess what we're saying is we don't think that the discrimination law could be the tool to do that.

MR MASON: They can add certain - - -

MR INNES: However, if the state wanted to implement it at a higher level than the standards, in other words achieve accessibility of stations within 10 years rather than 20, I wouldn't have thought that would impact on - the question about certainty would then have to be a discussion that they had with either the people to whom they had subcontracted the system, or it might be a system they own themselves.

MRS OWENS: But if it's not it might be accessible buses, which is a private bus company.

MR INNES: It might, and so they might have an issue there. Those sorts of issues can always be resolved by changes in funding agreements.

MRS OWENS: I think we said in our draft report that if the states wanted to do something different it should be brought into the Commonwealth standard as a sort of subsection of the Commonwealth standard, so people are very clear that that's something that's happening in Queensland.

MR MASON: I guess we're not sure how that would work within the available constitutional framework of the standard. We think that standards can and should deliver certainty for perhaps the discrimination law; that if a state wants to achieve objectives more rapidly, or to a higher level of access, then a range of mechanisms remain available to that state firstly, and most obviously by spending money and secondly, by using other regulatory tools. Of course, any state transport department that contracts out services or licences them can build into those regimes what conditions it likes, and that could go quite a long way before you started to get into section 109 in consistency terrain I would have thought.

MR INNES: There's a number of areas already in the transport systems where states are going further than the standards require. There's a classical example in New South Wales where the State Transit Authority are implementing a process in the spaces on buses where people in wheelchairs travel, of installing a short seat belt

or safety belt-type strap that the person using the wheelchair, or for that matter the person bringing the pram on board or the shopping trolley - which they tell us is quite a regular occurrence on State Transit buses; I'm amazed that people bring their shopping trolleys home on the bus - can effectively tether that to the bus, to stop movement across the bus and back from the passive restraint. That's not a requirement in the standards, but STA in New South Wales have decided to implement that system and other bus operators, private bus operators, in New South Wales, and other bus operators in other states, are looking at that at the moment. So what that's saying is that the standards set are minima, but there is nothing to preclude organisations from - - -

MR MASON: If a state chooses to empower local government to impose in the building area a range of development control requirements that are more demanding than those of the building code and of the Disability Discrimination Act standards when they come in, then that we expect would remain a matter for them within the framework of ministerial agreements on how those matters are conducted.

MS McKENZIE: Probably because the standards - I think on the argument that the standards only operate within the discrimination area.

MR INNES: Yes, that's right.

MR MASON: Yes, that's our view.

MS McKENZIE: So the argument would have to be then that to regulate in another area, that is just not the intention of the standards. It's not the intention to stop regulation in any other area.

MR INNES: No.

MR MASON: No.

MRS OWENS: So which standard applies if there's a complaint?

MR MASON: The standard in the discrimination law area.

MS McKENZIE: So if you had a complaint of discrimination either in state or federal you would look to the standards.

MR MASON: Yes.

MS McKENZIE: But if it's some planning requirement - - -

MR MASON: That's right.

MS McKENZIE: - - - then the planning requirement would apply in a planning area.

MR INNES: Yes.

MR MASON: Yes, that's how we would see it.

MS McKENZIE: Even now to an extent, that sort of mess happens where you've got different legislation imposing different requirements. But it's valid because it's imposing it for different purposes. The only danger about the suggestion to have mirror enactment of standards in the states is if it were held that the reason why the standards operate as they do is because ultimately there's an intention to cover the field in that particular area, then I don't even know whether the state could enact standards.

MR INNES: That's an interesting argument. You might be right about that.

MR MASON: I suppose our issue has been not just with the cover-the-field type of inconsistency, but with direct inconsistency - - -

MS McKENZIE: Yes, I've got no problem if it's a direct inconsistency difficulty, because that - - -

MR INNES: Actually that's right, yes.

MR MASON: That's what we've thought was the main issue.

MS McKENZIE: That must be the - - -

MR INNES: Yes, I'm sorry, I misled you there. I should have said direct inconsistency rather than cover the field.

MS McKENZIE: Yes.

MR MASON: Because the DDA does have the disclaimer to attempt to uncover an otherwise covered field.

MS McKENZIE: Yes, but then it does that - unfortunately so far as it's capable of - - -

MR MASON: Yes, that's right. If there's direct inconsistency then that's - - -

MR INNES: Direct inconsistency is the more certain - no, that was my mistake.

MS McKENZIE: There's just that slight danger that might cast doubt over any state's attempt to enact - - -

MR INNES: Yes, no, but the direct - yes.

MS McKENZIE: The same standard.

MR INNES: Yes.

MRS OWENS: While we're on standards, one of the other views you've put to us in the past, and I think we picked up in the draft report, was that it would be useful to have a facility to introduce standards into all areas in the DDA, but we've had some informal advice from the attorneys-general that basically has argued that that might be a bit misleading to the extent that it might indicate there's a preference for standards to be introduced, it's possible to introduce standards in any of these areas and maybe it would be better to go the other route, which is to look at the areas where they can be developed now and say, "Have we covered the right areas and should they be increased?" and just specify them again in the act. Have you got any views about that? I think it was just that it was going to create an unreal expectation that standards would follow in other areas.

MR MASON: If the intent of the parliament when it passed, or if it passed such an amendment was made clear enough, that it was to create a capacity rather than it would be inevitably exercised then frankly we wouldn't think so, because it's not expected that the whole statute book will be prescribed. It's not expected that everything will be exempted, and those powers both exist in currently general form. Sorry, there are a few exceptions from the exemption power, but not many. I think you can't get an exemption for harassment, but that's about it.

MR INNES: Yes, I would share that view.

MS McKENZIE: I would very much doubt if all those expectations are - - -

MR MASON: And on process grounds you don't, consistently with current regulatory policy, know whether it will be appropriate to introduce standards in an area until you've done a regulation impact statement.

MR INNES: Yes.

MR MASON: I mean, how do we know? Now, it is the case that one follow the

other in the access to premises area, that until there was a decision that standards were wanted on access to premises, the capacity to introduce them in that area wasn't inserted, but that process would have saved - well, some time at least - - -

MR INNES: It would have, yes.

MR MASON: - - - and some confusion, I would say, if that power had already been in place at the start as one of the available options.

MR INNES: There isn't really, when you look at the provisions, a logic for the provisions that are covered by the act and then the different and limited provisions that are in the standards power. There's no real logical explanation for it.

MRS OWENS: No. There's no history as to why it isn't - - -

MR MASON: It's history rather than logic.

MR INNES: It's history rather than logic.

MR MASON: There's a lot of logic to the history; I still haven't understood it.

MR INNES: Political decisions were made at the time.

MR MASON: At the moment the suite of standards making powers that exist create an expectation or set of expectations that might well be thought - and we do think - is skewed towards the matters that are less well suited than others that might be included.

MR INNES: Yes.

MRS OWENS: So what are less well suited?

MR MASON: Well, I think our views on the accommodation standards issue are fairly clear, that most of the matters people have sought to pursue through that route are not well able to be pursued by that means. The immediate to somewhere in the future prospects of an employment standard do not look particularly promising.

MS McKENZIE: Yes, you've mentioned that.

MR MASON: And standards on administration of Commonwealth laws and programs, while potentially beneficial, are a curious priority choice given that anything the Commonwealth decides to do in parliament can be done by the Commonwealth without parliament, when it's about its own administration anyway.

MRS OWENS: Maybe it was meant to be just like a demonstration effect of how to do a standard. We've got the Commonwealth disability strategy in lieu of the standard, haven't we?

MR MASON: I think there are some matters where you could do things legislatively - the procurement requirements are one. There might be some advantages if it had a legislative base in terms of your ability to apply it, I'm not sure - rather than policy requirement. I don't know whether it would stand up another three weeks in some US tribunal or not if it was in legislative form. I suppose the point I'm seeking to make is that they're expectations created by the set of them now; why not change those expectations.

MRS OWENS: You're happy to have standards which expand on the act. Are you happy to have standards that go in the other direction and contract what the act is meant to do, or maybe change the purpose of the act?

MR MASON: I don't think you can change the purpose.

MR INNES: I don't think you can change the purpose of the act, but I don't think there's much doubt legislatively that standards can restrict the areas that are covered under the act, and that in fact is the case in some areas as part of the negotiation process of both the transport standards and the proposed access to premises standards.

MS McKENZIE: By taking them out of the complaints mechanism.

MR INNES: By taking issues?

MS McKENZIE: Yes, out of the - - -

MR INNES: Yes, that's right.

MR MASON: We think the standards power has to mean that it can both make things unlawful that are not or may not be unlawful now, and can make things lawful which are not or may not be lawful now - that that's what the power is, and that isn't anything.

MR INNES: I think there's been crown law advice that supports that.

MR MASON: As long as you remain within the four corners of the act, as long as it's consistent with the objects, then we think that that's what a standards-making power is.

MR INNES: Now, in several instances there's been a more cautious approach adopted and the act has been amended or been proposed to be amended, to make sure and certain of that, but we actually think that that hasn't always been necessary, although we're not unhappy about it occurring.

MR MASON: That admittedly rather strong effect of standards in relation to the act is why they're subject to a positive parliamentary approval process rather than the standard regulation disallowance provision.

MRS OWENS: The access to premises standard, there's no provision now for unjustifiable hardship defence - - -

MR INNES: For new buildings?

MRS OWENS: For new buildings.

MR INNES: No. That's right.

MRS OWENS: Can you explain why that happened?

MR INNES: Because the logic is that when a new building is being designed and built, there should be no reason why that building can't be built in a manner that makes it accessible for everyone, including for people with disabilities. Now, that's a different question when a building is being refurbished, an existing building is being changed and there may be some bases, some topographical or other bases for an argument that the changes can't make the building completely accessible to the level that the standards prescribe, and so that out is provided if it can be shown that it would cause unjustifiable hardship. The view with regard to the designing of new buildings is that that wasn't necessary.

MR MASON: That is being tested through the current round of consultations as part of the regulation impact statement process.

MRS OWENS: Just putting on my economist hat for a minute, what are your safeguards then to ensure that there's going to be a net benefit from the standards in that case? Because normally, even in the RIS process, one looks at the benefits and the costs, and if the costs are excessive then you might say that there is the potential to implement something like an unjustifiable hardship check and balance in the system. When you don't have it, then are you presuming that there's always going to be a net benefit in any new building, including very - strip shopping centres is the example people use, for example, that that is always going to be beneficial.

MR INNES: What, the fact of strip shopping centres being accessible is always going to be beneficial? I'm not sure that I quite - - -

MR MASON: I think what the RIS process, in this instance at least, is testing out is overall net benefit rather than cost, and I must admit I hadn't thought that the RIS process was seeking to establish that there would be net benefit in the application of this regulatory scheme in each and every instance - - -

MRS OWENS: For new versus existing?

MR MASON: - - - you know, that there might be a building somewhere in Australia under these standards built where, looked at closely, there wasn't a net economic benefit from introduction of these standards - I must admit I had not thought was the reason why the draft standards be rejected.

MRS OWENS: I'm thinking more generally about new buildings generally. The presumption is that there's a net benefit, and that will be ongoing.

MR MASON: One of the debates going on is - not building by building but category by category - whether the treatment of each of the available buildings is appropriate - whether it's feasible and on a net basis beneficial to require access to the second and third storeys of two and three-storey buildings - I think is clearly one of the live issues in the RIS process, and obviously there are some costs involved in that.

Fairly obviously also there are some costs - or lack of benefit - in not requiring it if people with disabilities continue to lack access to a whole range of services that might typically be provided in the second storey of, let's say, strip shopping areas where the doctors or dentists or whoever are located - - -

MRS OWENS: That's right, particularly when second storeys are often offices.

MR MASON: - - - in those settings. That's what the cost benefit on that process is for. It's very clear that all the people around the table and the building access policy committee from the disability community and various aspects of government and industry didn't all agree on all aspects of the draft as appropriate from their own points of view, but they did all agree that it was appropriate to put out for consultation, and that's where we are at the moment. A number of sectors obviously are putting quite strong views now, with their different hats on, now that it is out for consultation, on some of those issues.

MRS OWENS: We've made a recommendation in our draft report that the unjustifiable hardship defence be extended to all the areas of the act, which was to

pick up people in employment or - - -

MS McKENZIE: In education.

MRS OWENS: - - - in education. We also suggested it possibly could be extended to Commonwealth laws and programs as well. So what you're suggesting is - I don't know whether you support that recommendation at this point.

MR MASON: As far as the act goes, we have supported that, yes.

MRS OWENS: So as far as the act goes, then that's okay. But you're saying that once you get to developing standards, that sometimes that provision can be lifted in certain circumstances?

MR MASON: Yes, depending on - you know, it turned out to be necessary to include an unjustifiable hardship provision in the transport standards in order to get - - -

MS McKENZIE: The variety of circumstances?

MR MASON: Yes, that's right. The people around the building access policy committee table came to - - -

MR INNES: The majority of - - -

MR MASON: - - - a majority decision, yes, that the building code and therefore the standard could operate without a hardship provision, because of the nature of that code and therefore that standard, in sorting buildings into a number of categories and circumstances, rather than a hardship provision having to do it.

MR INNES: One of the reasons for that too, and one of the net benefits that not having that provision for new buildings brings, is certainty, because the Building Code is a code which has performance requirements and then how you achieve those performance requirements, and if you put an unjustifiable hardship provision - in other words, you allow an appeal from that process - then you're effectively meaning that the building code will be different from the standard, unless you were to persuade the Australian Building Codes Board to put an unjustifiable hardship provision in that bit of the Building Code, and that doesn't exist in any other part of the Building Code. So in that respect, that's one of the key benefits.

Now, you couldn't do that for changes to existing buildings because there just may well be circumstances where you do need to have that variation. But for new buildings that are being designed from scratch, the generally accepted view was that

you didn't need that unjustifiable hardship provision.

MS McKENZIE: I can understand the reason, but I still worry that it's not consistent with the act, and I have to say I prefer to see some provision. If it's going to be there - if that's going to be an option, I prefer to see a provision directly permitting that to occur.

MR MASON: I guess if we had the capacity to introduce a standard on television broadcasting, or television transmission more generally, and that standard incorporated the results of the agreement that we have with the broadcasters for increased levels of captioning, we wouldn't see it as necessary for that standard to incorporate a provision - unless you find it's too hard - we'd expect it to say, "Here's the levels of captioning to achieve over time."

Now, that's admittedly a simple situation where there's only a handful of industry players to consider, other than the building industry, but we don't think that just because the act has an unjustifiable hardship provision and that that's a useful mechanism for accommodating it to their own circumstances that that's to apply to, that each and every standard would have to have one. You might well have one if you had a standard on Commonwealth information provision, or Commonwealth administration - you might end up with an unjustifiable hardship provision in there to apply the thing appropriately to varying circumstances, or you might have a provision which does that sorting for itself.

MR INNES: But particularly when you think that one of the key advantages of this standard is certainty, then putting an unjustifiable hardship provision actually reduces that.

MS McKENZIE: I can understand why you do it, but I just think it needs more legislative authority.

MR INNES: Okay. I guess I understand that view, but we don't believe that it's a problem.

MRS OWENS: We might move on, because we've only got about another 15 minutes with you. What was the next - - -

MR INNES: Yes. I think we've probably covered - the only other thing - we talked about the sort of similar job accommodation network in the education area and looked at the national clearing house on education and training, and I think I've covered that. The only other one was the cost of community interest litigation. Did we talk about that?

MR MASON: Yes, we mentioned that.

MR INNES: We've mentioned that?

MRS OWENS: You did.

MR INNES: Okay. I couldn't remember whether you and I had talked about it or whether we had talked about it on the record.

MRS OWENS: You mentioned it.

MR INNES: Okay. We've finished our list, I think, unless you have any questions to us.

MRS OWENS: We've got a few more things.

MS McKENZIE: Can I first ask you about HREOC's powers in relation to AIRC proceedings. A number of the participants have suggested that there ought to be some power to intervene in AIRC proceedings. Particularly that suggestion was made in relation to business services, but it wasn't limited to that. But really it was made in relation to proceedings where some issue, some DDA-related issue arose. First I want to know, do you regard yourself as having that power already?

MR MASON: I think under the comparable provisions of the Sex Discrimination Act we've turned up in front of the AIRC at least once.

MR INNES: We're there now.

MR MASON: So the answer must be yes.

MS McKENZIE: That's under that act. What about this act?

MR INNES: Well, the terms are virtually the same.

MR MASON: So we think if there's power under the SDA then there must be power under the DDA.

MR INNES: Yes.

MS McKENZIE: The submissions were treated as submissions which could be considered in the same way and having the same weight as the submissions from the parties in effect?

MR INNES: Yes. We're there in the work and family case.

MR MASON: You're quite right, Graeme.

MR INNES: And we're there as a party.

MR MASON: And raising issues under the DDA as well.

MR INNES: Yes, we are. So we've used those powers.

MR MASON: You're quite right.

MS McKENZIE: All right. So that doesn't seem to be a problem.

MR INNES: No.

MR MASON: Whether there's a need for provisions comparable to those in the state regimes or some of them, directed not to our power but to conduct by the industrial bodies in terms of drawing issues to our attention, might be another matter. But again, I think that hasn't been a major problem thus far, because if the AIRC doesn't draw things to our attention, other people aren't slow to.

MR INNES: No.

MRS OWENS: But you're also meant to draw to the AIRC's attention any complaints about discriminatory awards and enterprise agreements. Have you had to do that very much?

MR MASON: I think the answer is it hasn't happened.

MR INNES: No, I don't think so.

MS McKENZIE: We want to raise Purvis again, although not in great detail. First looking at the definition of "disability". Given what Purvis said as far as disability is concerned, you'll remember we made a recommendation that behaviours which are the manifestations or symptoms of disability be included directly in the definition.

MR INNES: Yes.

MS McKENZIE: We've had some submissions which have said that's fine; we've had others that have said, "Don't do anything because the High Court has spoken," and our answer to that has been, "But not everyone is going to know about the Purvis case." What is your view about this matter?

MR INNES: I guess I tend to a general view that if there's a concern about the legislative provisions, you clarify it.

MS McKENZIE: Yes.

MR INNES: That would be my immediate reaction.

MS McKENZIE: I just think people are more likely to read the act straight through if they've got the act, than to then be sent off to the High Court judgment to try and work it out.

MR INNES: Well, yes, although we've noted up provisions and things like that on AustLII - it becomes less and less of an issue.

MS McKENZIE: Yes.

MR INNES: I don't know, David. What do you think?

MR MASON: There's two different concerns. One is from people who think that the High Court decision needs to be in some measure reversed, and I think it's fair to say that we don't think that. We do not think that the act has been fatally undermined or rendered inoperable, because the direct discrimination section is not the only available definition of discrimination.

MR INNES: Sorry. You're talking about the definition - - -

MS McKENZIE: That's - now I'm moving to - yes. The first was about definition of "disability", and now you're talking about "discrimination".

MR MASON: Yes, and they're connected. But, sorry, you're right, the meaning of "disability" under the act has not been narrowed or gutted by the court; it's been confirmed that it means what it says. Now, if there be a need for that to be further clarified in the act rather than by surrounding materials, then, as with a number of other things where we think it's clear enough but if other people don't think it's clear enough and that probably means there's a need for it to be addressed, then so be it.

MS McKENZIE: As far as the problems that led to Purvis are concerned, you're happy if they were dealt with as indirect discrimination claims?

MR INNES: Yes.

MS McKENZIE: And you don't feel that it's essential that some amendment be

made to the definition of "direct"?

MR MASON: We probably don't want to try and relitigate the whole history of the fact things, and Graeme particularly might want to excuse himself from that.

MS McKENZIE: Couldn't we do it in the next 10 minutes?

MR MASON: Yes. Sure. There were, according to the tribunal in fact in that matter - whose name currently slips my mind - some issues of the fact situation which weren't readily dealt with under indirect discrimination analysis because some of the treatment accorded to the student was found to be by that tribunal different and disadvantageous, and that brings you into direct discrimination territory. That's not what the subsequent courts dealing with the matter found. But on the core issue as they viewed it, if can you apply the same behavioural rules as are or would be applied to other people, then that's what indirect discrimination law is good at addressing.

MS McKENZIE: Yes.

MR INNES: So, yes, we think that all it's done is said, well, this is under indirect rather than direct discrimination. Okay, so you run your complaint there. It's just not a problem.

MR MASON: And should you be able to apply reasonable rules reasonably, then yes - - -

MR INNES: Then yes, that's why the provision is there.

MRS OWENS: There's just one other issue I wanted to raise, just really briefly, and if we run out of time, well, we can talk to you about this further - - -

MS McKENZIE: You can tell us as you're going out the door.

MRS OWENS: It was one of our requests for information in our draft report where we were asking whether there should be specific equality-before-the-law provision modelled on section 10 of the Race Discrimination Act. I just wonder if you've got any views about that. We asked also what the interaction would be with, say, special measures provision and prescribed law. Have you got any views about what we should say on that?

MR MASON: I suppose only that if you did have such full vision, that would rather confirm that you absolutely need to maintain the capacity to prescribe laws so that you don't have rather large areas of confusion.

MR INNES: That's correct.

MR MASON: Because there isn't any other up-front mechanism for certifying what's a special measure or what - although not a special measure for DDA purposes nonetheless a supervening or justifiable public purpose - so you would want something like that so that you don't accidentally knock down a whole lot of things.

MS McKENZIE: Basically it is true that whatever recommendations we make we need to make it reasonably clear that some of them are linked.

MR INNES: Yes.

MR MASON: Yes, that's right.

MS McKENZIE: So you can't pick up one and not pick up the other. For example, if we recommended a reasonable adjustments duty and also extending unjustifiable hardship to all areas it would be very unfortunate if the reasonable adjustments duty didn't get picked up by the unjustifiable hardship.

MR MASON: Yes, that's right.

MRS OWENS: That has occurred to me.

MR MASON: If you were going to incorporate an RDA section 10 equivalent you would want to make sure that at least the conceptual basis of each of the defences elsewhere in the act fed into that section as well, rather than those only being defences from discrimination otherwise defined. Let's say if you had a provision to coordinate the act with the health and safety requirements you'd want that to control or link with your section 10 equivalent.

MR INNES: There are some interesting analyses on that in some of the Western Australian Race Discrimination Act decisions. I'm trying to think of the name of the case. I was involved in hearing it initially and then it went to the Federal Court. It was discussed in both decisions that the primacy of that equality before the law provision and the impact of that on the specific provisions under the act - so with those sorts of caveats.

MRS OWENS: There are many other things we could talk to you about but we probably don't have the time today to do so because we don't want you to miss your plane. Is there anything else that you think we need to cover at this stage that's of vital importance? A lot of things are of vital importance, that's the problem that we have. One of the other issues is unjustifiable hardship and whether the criteria for

determining unjustifiable hardship are clear enough or whether they should be amended, and we talked about community-wide costs and benefits. That has created the provision we suggested, in terms of clarifying that the community-wide costs and benefits should be taken into account. It has caused all sorts of anxiety.

MR MASON: From a number of sides.

MR INNES: We would think - and certainly I would think - and I think it's the commission's position that they are included. In fact in Finney v Hills Grammar School is one example of where I thought they were included. That was accepted by the Federal Court. Again it may be another clarification of what is already the law.

MR MASON: Yes. I also would view that as a drafting clarification rather than having to get to those via a slightly messy kind of conceptual means.

MR INNES: Yes.

MR MASON: Not that your concepts are ever messy, Graeme.

MRS OWENS: Of course it's only one of the criteria, and it's a matter of how you balance those criteria.

MR INNES: That's right.

MRS OWENS: People have said, "You've got small businesses and can they be bearing on their shoulders the community benefits?" But there is a provisions for own costs.

MR MASON: It is an interesting difference in perspective, I suppose, to have both disability community perspectives and industry perspectives. This would mean that their institution would have to provide a comprehensive cost-benefit statement, either in making or in responding to a complaint. It's just not the way the act has worked. I'm not dismissing the concern, if it were to arise in a case if a court was to take it that way. It's not the way that the commission - - -

MS McKENZIE: No.

MRS OWENS: Thank you for that. I just need to close the proceedings.

MR INNES: Helen, just before you do, I guess we should say that the Human Rights Commission has appreciated the opportunity to participate in the inquiry and has regarded as very beneficial both the process and the recommendations coming from the Productivity Commission. The process has drawn a great deal of interest

from lots of different sectors in the community and we would certainly accept that we have learned from and benefited from the process. It has caused us to look at changes to our procedure and to assess some of the things that we have said in submissions. This inquiry has drawn that out, despite our attempts to do so in other forms of consultation which have perhaps been less successful. I have also appreciated the consideration that has gone into the draft report and that will no doubt go into the final report. I think it's important for us to put that on the record.

MS McKENZIE: Thank you very much.

MRS OWENS: Thank you very much. We appreciate the effort you have put in for us, too; it has made an enormous contribution.

MS McKENZIE: What has been particularly helpful is the ongoing contribution. As the report has evolved it's really helpful to have those additional comments. There are numbers of organisations who have done that, too. We are very grateful.

MRS OWENS: That concludes today's proceedings. I now adjourn the proceedings and we will be resuming with teleconference hearings at 9.30 am in the Rattigan Room of the Productivity Commission in Melbourne and more details about the hearings in all of our locations are available on the commission's web site. I can close the proceedings today. Thank you very much.

AT 3.58 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 3 MARCH 2004

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