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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO THE DISABILITY DISCRIMINATION ACT

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

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 25 JULY 2003, AT 9.13 AM

Continued from 24/7/03

MRS OWENS: Good morning. Welcome to the public hearing 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 on this inquiry. My associate commissioner is Cate McKenzie. We'll be having three breaks today - a morning tea break at around 10.30, a lunch break and an afternoon tea break. We'll be finishing our proceedings at around 5.00 this afternoon. We'll need to stick fairly closely to our timetable because we've got a number of participants today. You're welcome to break and re-enter at any time if you need to.

On 5 February this year, the government asked the commission to review the DDA and the Disability Discrimination Regulations 1996. The terms of reference of the inquiry ask us to examine the social impacts of the DDA on people with disabilities and on the community as a whole. Among other things, the commission is required to assess the costs and benefits of the DDA and its effectiveness in achieving its objectives. We've already talked informally to a large number of organisations and individuals, and we've received many submissions following the release of the issues paper in March. We're grateful for these valuable contributions.

The purpose of this hearing is to provide an opportunity for people to discuss their submissions and their views on the public record. This is the final day of the Melbourne hearings and we have already held hearings in all other capital cities. After today, we will prepare a draft report for public comment which we will release in October this year, and you will have another opportunity to appear at hearings later, after we've had time to look at the draft report.   We like to conduct all hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken.

I'll be allowing time at the end of today for people to make contributions if they would wish to do so. Participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. You're welcome to comment on the issues raised in other submissions.

Our first participant today is presenting his position to the commission in camera; that is in private. The remainder of today's hearings will be starting at approximately 9.30 and will be presented in public.

Continued from Transcript-in-Confidence

MRS OWENS: Our next participant this morning is Villamanta Legal Service. Good morning, and could you please give your name and your position with the legal service for the transcript.

MR GOODFELLOW: Good morning, commissioners.

MRS OWENS: No. We're Helen and Cate.

MR GOODFELLOW: Good morning, Helen. Good morning, Cate. My name is Jonathon Goodfellow, and I'm the coordinator with Villamanta Legal Service.

MRS OWENS: Thank you, and we've recently received a letter from you, and you've outlined a few discussion points.

MR GOODFELLOW: Yes.

MRS OWENS: Maybe the best way of handling this would be just to go through them.

MR GOODFELLOW: Yes, certainly.

MS McKENZIE: We might ask you questions along the way though. Is that okay?

MR GOODFELLOW: I'd be most happy to receive questions. Thank you for the opportunity to present evidence to the inquiry today. Villamanta Legal Service is a statewide specialist community legal centre assisting Victorians with disabilities to promote and protect their legal rights, and I've chosen a few topics today to discuss. The first of those is Australia and what I describe as the triple bottom line.

In Australia today we measure our achievements in predominantly economic terms. It's fair to say that we also measure it in human and environmental terms, but this is most common where economic measures are inadequate for measuring their success because they generally produce figures that are in the red. So it is with this inquiry, but why would I take such a cynical approach. After all, yes, the terms of reference are balanced. Yes, the wide range of individuals and groups giving evidence are representative of a broad and diverse Australian community and, yes, the cost benefits of disability discrimination laws surely outweigh the cost disadvantages of adjusting our behaviours, attitudes and environments.

So why would I say that this inquiry will measure the achievements of disability discrimination in largely economic terms and will still show a deficit. I guess I should point out that I don't think it's any reflection on the inquiry itself or on the commission, but it is for the very simple reason that today in Australia, people with disabilities are still largely excluded from the Australian economy, and therefore their true economic value must be understated, and their potential contribution to the community and economy undervalued.

Take earning capacity for example. A person with a disability who works in a sheltered workshop or business service, to use another economic measure, can earn in real terms approximately 12 times less for the same work done by their able-bodied colleague. In fact take just about any economic measure, and it's likely to be a similar story. Education: in general, Australians with disabilities have fewer educational opportunities and are less educated than their able-bodied peers and are more likely to enter vocational study resulting in lower earning capacity over their working life.

Transport: some people with disabilities - transport needs are extremely costly, and only a subsidy to offset the expense in some cases, such as with taxis, with the likelihood of ongoing expenses. Another example would be a highly specialised motorised wheelchair that needs to be replaced every few years - and so it goes on. Of course, a person with a disability in Australia is also more likely to live in poverty and be less likely to live independently or to own their own property. Of course, in purely economic terms, there are approximately 3.6 million Australians potentially under-utilised, potentially not as productive as they could be, potentially not as effective, efficient and innovative as they could be.

In our view, Australia should move formally to a new paradigm for evaluating the performance of this nation; one that encompasses - as many European states follow - social, economic and environmental indicators to measure our progress as a civil society. After all, economics should never be anything other than a subordinate servant that facilitates social progress and cohesion. Discrimination in this context is very costly, forcing some to live outside our economy when they could be meaningfully contributing to a wealthier, healthier and happier community. Next area I'd like to comment on - - -

MRS OWENS: Do you want to stop on that one first and then we can have a bit of a chat about that one.

MR GOODFELLOW: Sure.

MRS OWENS: I'd just like, in defence of economists, to say - or at least this economist to say that I don't think that we measure everything just in terms of what it means to the economy in a narrow sense, and if we look at costs and benefits, the commission would certainly look at the broader society benefits. We don't just look at narrow - look at that or define it in a narrow way. In fact, the commission - on what's called under the act the social commission - I think I've got some other - it's a more legalistic term than that, and we also have an environmental commission and Neil Byron, and I certainly think that Neil takes a broader perspective as well.

In coming down to some of the points you made about - that people with disability - their transport needs are costly and they need wheelchairs replaced and so on, their loss in terms of having to pay for taxis is the taxi company and the taxi drivers' gain. So there are certainly economic benefits that can be achieved elsewhere. Whether they're the right or wrong ones, that's another point.

MR GOODFELLOW: Yes. I guess it just contributes to the overall lack of resources that people with a disability themselves have.

MRS OWENS: But it's just a more complicated story than I think the one you were telling, and I certainly as an individual and as an economist - and my area is health economics, and I have a view of society which is a broader view than I think the picture you're painting.

MR GOODFELLOW: Yes. As I said, I wasn't reflecting on the commission itself or on individual commissioners; simply that we don't hear a lot about what the social capital is in our country.

MRS OWENS: We've just written a report on social capital that came out earlier this week.

MR GOODFELLOW: Great. I feel embarrassed that I didn't know that, but I guess that would be welcome, but in general we don't talk a lot about what social capital is and what its value is to our community, and I guess that's the real point that I wanted to make.

MS McKENZIE: The other thing I have to say - and I'm not an economist, I'm a lawyer - but the other thing I have to say is that it is clearly not possible to express every human value in economic terms It's possible to adopt a more - a broader view of economics when we're looking at things like economic benefit, and that's really what, if I'm correct, Helen is saying. One doesn't have to look in what traditionally would be called narrow economic terms when you look at economic benefits, but I don't think anyone would try to argue that every value is capable of expression in purely economic terms. There must be some values that are expressed perhaps partly in economic terms but partly otherwise.

MR GOODFELLOW: Yes.

MS McKENZIE: I suspect - and certainly there are a number of submissions that are telling us - that things like inclusion of people with disabilities in society and exclusion are matters that are not entirely capable of being expressed in economic terms. The previous submission was also saying that. He was saying that the consequences of being discriminated against while they involve costs to him, the emotional cost and the devastation is not purely expressible in economic terms.

MR GOODFELLOW: No, and I would agree with that.

MRS OWENS: Although economists do look at the emotional intangible costs and the intangible benefits. They're the bits that you usually can't measure. I've just done a study with a team in the commission recently on general practice red tape, and we looked at the stress factors for general practitioners that they expressed to us. Now, it's very hard to measure those, but we certainly took them into account. Whether you say that that's in an economic framework or not - I mean, I put it into an economic framework because that's my training, but we do go beyond the purely tangible costs and benefits as well.

MS McKENZIE: But see my training is law. I would not simply say that every element of life can be expressed in legal terms. I know it can't be.

MR GOODFELLOW: Yes.

MS McKENZIE: And I think our terms of reference in this inquiry are very board.

MR GOODFELLOW: Yes.

MS McKENZIE: They don't just relate to economic matters. They look generally at the effectiveness of the act.

MR GOODFELLOW: Yes, and as I said, it wasn't a reflection on the commission or this inquiry, but more that we don't emphasise that enough in the Australian community certainly would be our view. Shall I continue?

MRS OWENS: Yes, thank you.

MS McKENZIE: Of course.

MR GOODFELLOW: The second area of topic I'd like to speak to is the social benefit of the Disability Discrimination Act. The social benefits of the DDA are manyfold. We can highlight cases that advance the rights of people with disabilities in particular areas, and I note many submissions to this inquiry have highlighted these areas specifically. We can see the implementation of standards that provide an industrywide benchmark and create a stable framework for corporate citizens to operate within. We have seen a greater awareness and acceptance of disability and the needs of people with a disability, and it is this awareness and acceptance, the growing culture of disability rights in Australia - and I might add, one that is growing in all quarters of the community - that we need to continue and foster.

For example, corporate Australia has largely accepted and benefited from this rights culture. Some leading financial institutions are testament to this, having adopted action plans and social programs to facilitate the participation of people with disabilities, and yet they have seen no whole in the hip pocket emerge. Rather they have benefited from the image of a progressive and responsible commercial entity that values people, all 3.6 million of them, depending on which definition of "disability" you use.

Of course, there have been smaller gains too, and these cannot be underestimated for their contribution to the overall picture. Individuals play an important role in taking on cases that significantly contribute to the growing culture of rights, even though the complaints most often provide a remedy for them alone. To zoom out to the bigger picture again, we can see a growing acceptance of international standards and norms in relation to human rights in Australia that people recognise as a valuable and essential part of being an industrialised world citizen. You need only look to the hesitation the majority of the population expressed prior to the Iraq war about going it alone whilst that same majority supported our participation under the United Nations flag.

Of course, we still have some way to go to achieve a convention on the rights of people with disabilities, but I'm hopeful that the government will turn around its current ambivalence and support the convention with enthusiasm and determination. That's that topic. So any questions, comments?

MRS OWENS: You put up action plans as being a sort of a positive reflection of this rights culture, but there still haven't been that many of them, particularly in the private sector. Do you want to comment on that?

MR GOODFELLOW: Yes, certainly. I think one thing that could be done to make the whole mechanism of action plans more efficient and more effective is to bring some mandatory requirement into play with those. Now, I haven't explored at length what those particular requirements could or might be, but certainly for your large corporate citizens, there seems to me to be no reason why they shouldn't be expected to produce an action plan.

MS McKENZIE: How large is "large"?

MR GOODFELLOW: I guess that's something that the commission could probably comment on with much more authority than I could. However, I guess you have already distinctions of small, medium and large business and I guess you'd start with the top end of town presumably and look at what's feasible within the cost frameworks and turnover et cetera within the medium businesses to look at what could be done for them. I think with assistance perhaps there could be a particular unit of the Human Rights Commission - of course that would require funding - that could assist small business. You could have, if you like, sectorwide action plans that assist those smaller businesses so that they're not left out of that loop. They'd still have those compliance issues to deal with, but they have some assistance in meeting that obligation.

MRS OWENS: Some have suggested maybe tax incentives.

MR GOODFELLOW: Yes. I think tax incentives are certainly worth looking at, and certainly it would make some difference to corporate Australia without doubt, and probably to the smaller businesses et cetera that do find some costs related to access for people with a disability quite burdensome. They potentially could really offset those costs with tax incentives. So that certainly would be something we would welcome.

MRS OWENS: Some have said that some of the plans that are out there are very good and have got targets and are appropriately monitored and so on, albeit internally, but others are not really worth the paper they're written on.

MR GOODFELLOW: Indeed.

MRS OWENS: So do you think that HREOC should have some role in maybe monitoring those plans? I think they'd register them, but having some more formal process.

MR GOODFELLOW: Yes, definitely. I mean I think that that would be rather resource intensive, but I think that what you'd find is that you'd probably need a period of - a certain period of time - five years, something like that - where you did put a lot of resources into compliance, and that after that time you'd probably find that the resource needs would be less because I guess there's just that whole, you know, getting people to actually develop their plans. That would take a fair bit of time and quite a bit of resources. So I guess you could see a picture emerge where you do put a lot of resources into that initially and pull that back over a period of time.

You could also I guess see some other ways of deriving income to support that compliance mechanism. I guess I can't think of any off the top of my head, but there certainly are some creative ways that you could look at earning income, whether it's again through taxation et cetera that could help us set those costs. Okay. I'll continue on.

The next area of topic is people with disabilities' right to equality before the law. This is unfortunately an extremely vexed area and one which I feel the act has not achieved the progress that many would have expected. For people with an intellectual disability, equality before the law in Australia today is a joke. For example, let's look at one of the central tenets of our legal system; the notion of capacity and consent. Our legal system I based on the premise that you must be able to demonstrate your capacity in order to successfully participate in most of its processes.

Take complaints of sexual assault for example, which I've recently been involved in doing some research around. If you're a victim of sexual assault, you will be assessed for your credibility as a witness. Of course, the problems for people with an intellectual disability in complying with these assessments is well documented. People are more easily led in questioning, cannot often recall events in a chronological order, are more likely to miss the queues and underlying meaning in conversation, and have difficulties comprehending many complex concepts. So there is some irony in a system that seeks to protect its most vulnerable from abuse, but in fact ends up in many cases persecuting them.

In this regard, Villamanta would welcome an inquiry into the issue of equality before the law for people with an intellectual disability, and perhaps more broadly.

Such an inquiry could investigate the problems within areas of law and the possible solutions. If we can devise ways for greater participation in the law and the legal process for people with intellectual disabilities, it will significantly improve our legal and justice systems for all. After all, research has shown that many people appearing before the courts and incarcerated in Australia's prisons would be diagnosed as having a cognitive impairment or borderline disability: low literacy levels, limited functional adaptability and are socially isolated.

Justice has handed these people the heavy hand of injustice, and it is not just in criminal law. We can look at welfare rights, immigration, tenancy rights, consumer rights, to mention but a few. There are inconsistencies and problems in many areas, and little effort has gone into ensuring that our most vulnerable citizens have access to information and advice that meets their specific needs and provides a basis for their participation in the legal framework that regulates their lives. Once again, I call for a wide-ranging inquiry that will investigate these concerns.

MRS OWENS: Who would do that? You see, again as a bunch of economists at the Productivity Commission, that's probably not us.

MR GOODFELLOW: No. I imagine it would be the Law Reform Commission - Australian Law Reform Commission - who do have a very good history and track record of inquiries into the law and I think have produced some very good work, and certainly that's who we'd welcome to undertake an inquiry. I guess this inquiry could for example flag or suggest that a broader inquiry into the legal system might be required. So certainly that's something we would welcome.

MS McKENZIE: But more specifically looking at the DDA, which is our brief, is there anything - you say that that effectively is not achieved. Is there anything - any change that could be made in it that might help it.

MR GOODFELLOW: Yes. I mean, I guess one thing that I notice is that as you look through the objects of the act, you can see within the act obviously measures to meet the first objective, and I guess you could say that the third object is also provided for in terms of complaint processes, actually raising awareness of people's rights, but in terms of actually ensuring equality before the law, there are really no mechanisms in the act that can successfully do that. Obviously there's the capacity to review or look at Commonwealth laws and programs, but that hasn't really happened. I think that those mechanisms could certainly be looked at being strengthened.

I haven't noticed anybody commenting on that to any great length in the submissions that have been received to date, and we've certainly had a number of pressures upon us in preparing for today's presentation, but would be happy to enter into a discussion with the commission about how that might be achieved. I think that is one of the areas of fundamental change that still needs to occur, and that any movement toward would be welcomed.

MS McKENZIE: See, arguably at the moment the act may not even permit any kind of complaint about the court proceedings in what actually happened in court.

MR GOODFELLOW: Yes.

MS McKENZIE: We've had another submission where a father who had a son with a psychiatric disability said that insufficient consideration was given to that disability where the son appeared to give evidence. So it's in a way also a similar problem that you're flagging in relation to people with intellectual disability.

MR GOODFELLOW: Yes. Another example would be parents with an intellectual disability involved in care and protection proceedings who experience, you know, a large amount of discrimination often, sometimes before the child is born, and for them to take a complaint under the Disability Discrimination Act - well, firstly basically you wouldn't be able to because of the jurisdictional issues, but even if you could, you would be pitching the rights of the child against the rights of the parent, and that's a less than satisfactory obviously topic or subject for law reform.

So I guess again these things need to be looked at individually and fairly with a fair amount of detail to actually see what could be achievable within certain areas of law. I think this is one of the areas that does pose quite a problem for the community.

MRS OWENS: It will be one of those issues we will continue to think about.

MR GOODFELLOW: Yes, and certainly I'm most happy to be contacted and will leave my personal contact details so that that can happen.

MRS OWENS: Thank you.

MR GOODFELLOW: Next area of topic is the social cost of disability discrimination. The social costs of disability discrimination are also well documented, and I highlight those areas not subject to complaint . From the crisis account that the Victorian Council of Social Services and others compiled a few years ago to highlight a $1 billion deficit in the funding needed for programs to assist Victorians with disabilities access to specialist services, housing and supports to enable their full citizenship; to the removal of children from parents with disabilities for fear of neglect rather than actual neglect; to the sterilisation of young women with intellectual disabilities; to the compulsory treatment and care of people with disabilities whose behaviour is offensive to community norms.

All of these issues, whilst impacting greatly upon people with disabilities, also impact upon the national psyche and the hip pocket. Think of the dollars being spent on unnecessary programs of incarceration or alternative care for perfectly happy and healthy children, whilst people remain without basic services to facilitate their integration into the community. These issues impact upon a much wider circle of people in the community; the families, friends and loved ones whose lives are unnecessarily diverted into the care and protection of people with disabilities, where this would not be necessary if appropriate reforms and adequate programs were provided to people with disabilities.

So the social costs of disability discrimination in its broadest interpretation are social isolation, higher risks of neglect and abuse of our most vulnerable, limits to the significant contributions people with disabilities and their associates make to the economy, and limits to the social diversity and intellectual capital people with disabilities can provide. Are there any comments or questions on that area?

MS McKENZIE: No. That's very clear.

MR GOODFELLOW: The accessibility of the complaint process to people with an intellectual disability and other cognitive impairments is my next area of topic. As mentioned earlier, the legal process itself is not accessible for many people with an intellectual disability or cognitive impairment and the complaint process is no different. Whilst I acknowledge the good work done by the Human Rights and Equal Opportunity Commission to not let the cuts in recent years affect their complaint-handling section and also their good work in making the process as user friendly as possible, there are still significant barriers for people with an intellectual disability.

Firstly there is not enough effort put into ensuring that people with intellectual disabilities are aware of their rights and can exercise these rights. It is clear to me in my day-to-day work that most people with an intellectual disability are so used to abuse, so willing to please or not make trouble, so used to being victimised if they do so to speak or to make trouble, so reliant on others to help them identify issues, and so much outside of the mainstream of the community that they rarely identify discrimination as an issue. When they do, well, the problems can actually start then rather than begin to be resolved.

For example writing the complaint would generally require assistance, and whilst this is provided by the commission and state commissions, they are limited in resources and may find it difficult to provide the person with an intellectual disability with enough time to thoroughly assist them. In this regard, it would be of benefit for the Human Rights Commission to revisit its own accessibility to people with an intellectual disability.

Seeking appropriate legal assistance is difficult for many people with intellectual disabilities, and community legal centres such as Villamanta are limited in what assistance they can provide. Many pro bono providers of legal services will only take on cases where there is an element of the public interest, and most cases are simply individual in nature and so do not attract the significant legal resources. Also many legal practitioners simply do not have the time that is necessary to spend with people with an intellectual disability to ensure that their case has some likelihood of success.

On the other side of the complaint, the respondent is generally more than adequately represented and the power differential is the main difficulty experienced by people with intellectual disabilities who would likely be at a disadvantage even if neither party had representation. Responding to detailed technical, legal documents and arguments will also prove difficult in many cases for a person with an intellectual disability. Once the matter reaches the conciliation stage, the proceedings can progress very quickly, and there may not be the time to ensure the person with an intellectual disability understands what is happening. Where they do not understand, they rely on placing their faith and trust in their representative. How many of us would feel comfortable doing the same?

Many respondents seeing the coping capacity of the person with an intellectual disability would likely just withdraw at this point, believing that the complainant would be unlikely to continue to the Federal Court, and if they did, would be at a distinct disadvantage unless they have the best legal representation money can buy, which is very unlikely. Any questions or comments on that section?

MRS OWENS: That's also very clear and depressing.

MR GOODFELLOW: Very depressing, yes. The next area of topic is the accessibility of the Federal Court and the Federal Magistrates service. As noted, the legal system creates specific problems for people with intellectual disabilities. The court is formal, uses complex language, follows long-held traditions in its processes that are foreign to most complainants, and is ill equipped to assist a person with an intellectual disability who may require significant support to understand proceedings other than through their legal representative.

Aside from all of this, there is the central issue of costs follow the event. While I note in other submissions to the inquiry that costs orders have been met with great equity and balance by many judicial officers, there are some that do not believe this is appropriate, and in any case, the issue is up to the discretion of the court. Greater certainty about the outcomes of costs orders relies on taking into account the facts of the case and the nature and length of proceedings as well as the situation of the parties
.

The greater certainty in not making orders detrimental to complainants should be investigated, including a greater use of agreements to cut costs orders at reasonable levels. What is the point of having a human rights jurisdiction that can punish the complainant by awarding costs against them. It seems odd in the extreme that people should have to forego their complaint, accept the discriminatory treatment and get ready to accept whatever other discrimination comes their way simply because of the issue of costs. Given the historical legacy of the oppression of people with disabilities, it hardly seems appropriate that costs follow the event. Any questions or comments on that section?

MS McKENZIE: That's a matter that's been raised in many of our submissions.

MR GOODFELLOW: Yes.

MS McKENZIE: The capping of costs, would you be looking at a flat amount? In other words - first I assume you'd want to change the costs follow the event rule.

MR GOODFELLOW: I'm not suggesting that you could actually remove that. I don't think that would necessarily be the way to go. What you perhaps could do is in applications for capping costs, provide some mandatory form of the respondent considering and taking on that. Basically at the moment if the complainant applies to cap costs, the respondent can simply say no, and that's the end of the matter; whereas I think the court should really have some determinative power in that regard. After all, it can determine costs. So why should it not also determine to cap them at the beginning of a case, which would be done at a directions hearing early on.

I think that respondents are aware that they can carry the burden of some cost and therefore can use that as a bargaining tool in their proceedings - in the case rather. So some form of forcing respondents to consider and perhaps even taking on a capping of costs, I think would be a suitable mechanism. I think, you know, you just couldn't do it in all circumstances though. I mean, if you do have - I can't think of anything off the top of my head, but if you did have a situation where both respondent and complainant were very wealthy, I mean, I guess the issue becomes one of what's right in the matter of that case. But where you have people whose access to justice is substantially limited because of their finances, then I think we really have as a society a responsibility to ensure that that burden is not carried by the individual.

MRS OWENS: But that applies more broadly than just people with disabilities, doesn't it?

MR GOODFELLOW: Yes, certainly, and that's why I guess I'm not saying we need a blanket "You must cap costs" because I don't think that would actually be appropriate in all areas, and certainly it would be difficult I think for the Federal Court to provide for that in one small area of its jurisdiction and not others. So you would certainly need some fairly careful and clear guidelines around how it would be used and how it could be enforced by the judiciary.

Finally, I've noted some other concerns to us at Villamanta Legal Service that we believe are important to the inquiry. The definition of disability should include addiction in our view. It is extremely inhumane to expect that a person through no fault of their own - after all addiction is not a choice - should be allowed to suffer discrimination as a result. The definition should also encompass manifestations, as was the legislation's original intent. The measurement of the success of the act needs to consider many indicators from industry requirements to social cohesion and should be overseen by a body independent of government and the Human Rights and Equal Opportunity Commission.

I haven't considered at any great length what those indicators of the success of measuring of the effectiveness of the act could be, but I believe that there certainly has been many people who have contributed to this discussion through the Human Rights and Equal Opportunity Commission's summit a couple of years ago and certainly the Human Rights and Equal Opportunity Commission itself has some fairly clear ideas about how the effectiveness of the act can be measured. So I think that's a discussion that needs to occur and needs to result in some kind of body that has an independent mandate to review the effectiveness of the legislation.

MRS OWENS: So you're talking about an ongoing review process, an ongoing set of indicators that would be - so there would be some sort of accountability.

MR GOODFELLOW: Yes, and I think the benchmarks that you could look at could be devised by academics for example, people that are involved in social research et cetera, but you can't just consider those sorts of things alone. You really need to take a much broader view, and I think along the lines of the sort of discussion we had earlier around needing to make sure that that body is representative of the interests of a broad cross-section of the Australian community. I think you can't have the government doing it and you can't have the commission doing it. So you need an independent body of some kind. Certainly there are examples of similar bodies in other areas or other industries, so I think you certainly could look at the feasibility of something along those lines.

Villamanta Legal Service also believes that the Human Rights and Equal Opportunity Commission's funding levels should be increased to at least the levels prior to 1996 in order to allow it to undertake all its functions adequately, particularly its education and systemic advocacy, but of course also complaint handling. One of the things I've observed about the commission in recent years is just simply how it's juggling balls. There are too many balls without the resources really to do so, and I think it would be a terrible shame if some of its good work was limited because of its funding restrictions.

MS McKENZIE: I mean, it might be argued that some of that funding decrease was due to the fact that hearings were then going to go eventually to the courts rather than be done by the commission. In other words there was some allowance for that. I assume that you'd say that in any event the funding is - - -

MR GOODFELLOW: Yes. I mean, even it's pre-1996 levels were I guess what we would feel inadequate for it to undertake the broad role that its legislation and mandate requires, and I think also it's a measure of how seriously the Australian community now regards international human rights issues that we really need a body that can take the lead more than the commission is able to currently, and one too where I think the commission is in a difficult position to speak out and be very critical against government policy in certain areas, and I guess the risk is that they will lose some funding or even simply lose some of the effective communication that they may have with certain areas of government.

I think that really the commission needs some guarantee that it won't be affected by its actions in that way; that there will be no detriment as a result. So certainly, yes, in any case we would argue that there needs to be an increase in funding to the commission.

Alternatives to the legislation are not really viable in our view, and neither is repealing the legislation in favour of a mishmash of state and territory legislation. Any alternatives should support and supplement the act and provide for remedy for different areas of complaint, such as public vilification, harassment or humiliation. Greater effort should be put into reforming the current system to be more accessible rather than creating alternatives to what is a sound piece of legislation.

We also believe at Villamanta Legal Service that the areas of the legislation - certain areas of the legislation should be broadened; that it should cover areas such as immigration and other Commonwealth exemptions such as the Australian defence forces. That as everything I had prepared to present to you today, but I do look forward very much to participating further in the inquiry's remaining work and certainly welcome any questions.

MRS OWENS: Thank you.

MS McKENZIE: So what you said about immigration and the defence forces implies that you think those exemptions in the act should be repealed.

MR GOODFELLOW: Yes, we do. I think one of the examples for me was a case that, when I was at the Disability Discrimination Legal Service, we ran against the Australian Defence Force where they did not choose to use the exemption, and I think you're seeing a lot of goodwill now come from the ADF and from other large statutory and other government bodies to actually look at the issues of discrimination rather than just grabbing that exemption. In that context I think one has to ask is the exemption any longer necessary. I have no doubt that experts as the Commonwealth would have still had a similar outcome, regardless of an exemption.

So I think we've seen over time a very cautious approach to determination of cases, both by the commission prior to its hearing power being removed, and now with the Federal Court. So I think in that context, we really have to ask ourselves whether the exemptions are necessary.

MS McKENZIE: I can understand the wish perhaps in the other case you mentioned not to use the exemption, but of course the argument is that once it's there, it's there. You can't choose - if the act says that it doesn't apply, you can't somehow choose it at will. The act has spoken.

MR GOODFELLOW: I guess what we've seen though within the defence forces is a willingness to sit down and talk to the complainant and work through those issues.

MS McKENZIE: Rather than just saying - - -

MR GOODFELLOW: Rather than saying, "No - - -"

MS McKENZIE: - - - "Go away."

MR GOODFELLOW: "- - - we will not discuss this with you," and I guess that's because, you know, they see that many of the people that may want to or need to make a complaint are good, productive members of the force that they don't particularly want to lose. So in some sense I would almost argue that the exemption works against the interests of the force as well because it really is in a position to negotiate some of those finer cases and finer issues.

MS McKENZIE: And in the migration situation - - -

MRS OWENS: Just before you go off the forces, I think the other issue is who goes into the forces.

MR GOODFELLOW: Yes.

MRS OWENS: I'd just like your opinion about this, but the inherent requirement of the job provision in the act would cover that contingency, wouldn't it?

MR GOODFELLOW: Yes, that's right. I think there are enough checks and balances without requiring an exemption. So, yes, I would agree.

MS McKENZIE: And the migration exemption area, would you - - -

MR GOODFELLOW: Basically people are subject, as you would be aware, to a health and medical assessment, and that that can exclude and does exclude many people with disabilities. People may be aware of the case of - I think it was a Turkish family where a gentleman actually, in protest of his daughter with cerebral palsy not being able to be brought out to Australia even though he had residency here, poured petrol over himself in front of Parliament House and subsequently died in protest. I guess that's an example for us of how important it is that we remove that exemption.

There are people whose families are being destroyed by that, and we just believe that it's inhumane and inappropriate to do so. We're not talking about large numbers of people with disabilities, you know, streaming into the country if we reconsider that point, and I think with the security that Australia has in terms of its overall industrialised nature and its progressive approach to social issues and human rights, that certainly we're in a position to assist those vulnerable people with a disability who can't currently migrate to Australia.

MRS OWENS: Just before you move on, you talked about including addiction - I'm just going back a bit - - -

MR GOODFELLOW: Yes.

MRS OWENS: - - - in the definition, and somebody - I lose track of time, but I think it was yesterday; it might have been the day before - said what about gambling addiction. That should go in, and I'm just wanting your opinion about that.

MR GOODFELLOW: I haven't given any time to consider that. I guess anything that is compulsive in its nature could be argued to be a disability, and I think that's the point, isn't it? It's where people no longer have control of what could be termed compulsive behaviour. That might mean in some cases that's already accepted within the definition under the legislation. So I guess what we've seen is the courts coming a little closer to recognising addiction and then you've seen things like politicians speaking out against that, and the primary example would be the New South Wales state government which actually legislated addiction out of the definition.

So I think that is our fear, that you'll see that occur if not in the letter of the law, certainly if you like as a kind of, you know, non-legal directive from covenants, but it is against their notion of policy for addiction to be considered a disability under the legislation. I think it is inhumane for us to consider a large number of people in the community who are terribly affected by drug use and whose lives are really quite disjointed and disturbed, not being able to seek remedy when they experience discrimination. It is hard for these people to get rental properties, it's hard for them to receive appropriate health and medical care, and I think in that context, people should be given access to some remedy when discrimination occurs.

MRS OWENS: I've got another question. Just extending that point, what about smoking?

MR GOODFELLOW: Yes. Look, I guess there are issues or measures that we would probably consider are within the area of public health, and we already have, if you like, some areas where people with a disability cannot simply go and do whatever they like, given public health concerns. So I think that would probably be similar, and again I haven't given a lot of thought to that, but where something is such a serious public health concern, maybe that would perhaps put it outside of that, you know, potential for remedy. However having said that, I guess we'd need to really look at the sorts of situations in which people were experiencing discrimination and see really. I guess you've got a - you know, the term goes, "Suck it and see," and just see how the case law would go.

MRS OWENS: It would be very interesting because if smoking was considered in, somebody could decide to put a case to say that they were discriminated against because they weren't allowed to smoke in their office.

MR GOODFELLOW: Again I think that's covered by public health. That's what I mean by encompassing that within the Public Health Act or something of that nature. The Health Act in Victoria for example will not - well, makes it an offence for a person with HIV to knowingly have sex with a person and not have informed them of their HIV status, and you could certainly create similar provisions around smoking, that simply because somebody can make a complaint of discrimination on the basis of their addiction to smoking, that they couldn't do so in areas where that's already been determined a public health concern, such as public places, offices et cetera. So I think you could certainly balance those needs in the community.

MRS OWENS: Very interesting questions, aren't they?

MR GOODFELLOW: Yes, they are, and ones that I think need some broader consideration and discussion.

MRS OWENS: Because you need to think about the ramifications.

MR GOODFELLOW: Indeed, yes.

MS McKENZIE: You'd perhaps then be able to complain against those hotels who set aside rooms for non-smokers.

MR GOODFELLOW: Yes. There's also - we ran a case at the Disability Discrimination Legal Service many years ago, which was my previous employer, of a woman who had very, very severe asthma and couldn't attend a nightclub because of the smoke. You may be aware of that case. It's a very very tragic and sad case, because basically the commission decided that discrimination had occurred, but they didn't provide a remedy. So of course that was able to be taken on appeal. However, the complainant died before proceedings could be completed. So, yes, that was very sad.

MRS OWENS: I think I've covered - did you cover all your issues? I think I've covered all mine.

MR GOODFELLOW: Yes, I think so.

MRS OWENS: Have you got to the end of your paper?

MR GOODFELLOW: Yes, indeed.

MRS OWENS: Okay.

MS McKENZIE: That's a very helpful submission.

MR GOODFELLOW: It's a pleasure.

MRS OWENS: We asked as we were going along. It was very nicely structured, too, I have to say.

MR GOODFELLOW: Good. I'm glad that was helpful, and certainly I'll look forward to providing further evidence in the second round of hearings, and presenting a more formal submission to the inquiry.

MRS OWENS: Thank you very much.

MS McKENZIE: Thank you very much indeed.

MR GOODFELLOW: Pleasure.

MS McKENZIE: We'll now break.

MRS OWENS: The next participant this morning is the Victorian Equal Opportunity Commission. Welcome to our hearings, our final day of hearings. Can I get you each to give your name and your position with the commission for the transcript.

DR SISELY: Diane Sisely, chief executive, Equal Opportunity Commission.

MS BUCHANAN: Leanna Buchanan, legal and policy officer with the Equal Opportunity Commission.

MRS OWENS: Good. Thank you, and thank you for that excellent submission that we have read.

DR SISELY: Pleasure.

MRS OWENS: I don't know - I didn't ask you before we started - whether either of you would like to introduce the submission. Do you want to introduce your submission? Have you got any key points you'd like to make?

DR SISELY: The key points that we'd really like to emphasise is that while the DDA has been incredibly important and needs to continue, it hasn't achieved I think the goals and the degree of change in our community that would have been envisaged when it was first introduced. It's now some 20 years since disability discrimination was outlawed under the Equal Opportunity Act, and obviously 10 years since the Disability Discrimination Act was introduced. We still have extensive discrimination against people with disabilities. It's the largest cause of complaint to the commission and has been now for a number of years.

What we've got in place is an individual reactive minimal system based on individual complaints. That remedy is trying to address extensive entrenched systemic discrimination. We need mechanisms that can address the systemic issues as well as address individual issues. As we point out in our submissions, there are ways in which the DDA could be strengthened to address systemic issues. Some of these ways we are looking at the commission for the Equal Opportunity Act, and as we pointed out in the submission, there's extensive work that is being done, that has been done overseas, whether that be Canada, the UK, Northern Ireland or indeed through the European Commission itself now.

For the DDA to fulfil its promise and address the issues it was set up to do, we need to look at these systemic responses so that we put in place a proactive system that looks at employers, providers of goods and services, acting on their responsibilities proactively rather than reactively, and so that we increase compliance with the legislation. As you would note from the submission, while the DDA has provision and encourages organisations to develop and lodge action plans designed to proactively address issues, there's only been some 29 of these produced in 10 years; clearly a woeful result. Clearly voluntary compliance has not been achieved. We need to look at measures that rectify this situation. They're the major things that we would really like to highlight in relation to our submission.

MRS OWENS: Good. Thank you very much. Leanna, would you like to add to that?

MS BUCHANAN: No. I think that summarises the key issues really.

MRS OWENS: I understand from what you said before we came into this hearing that you have now got quite a lot of additional material on what's going on in Canada, and I think you said Ireland.

MS BUCHANAN: And the UK.

DR SISELY: And the UK.

MRS OWENS: And Europe, because that wasn't really mentioned in your submission.

DR SISELY: We're chasing some information in relation to The Netherlands in particular. We've heard reports that they're doing some very good work there. We're tracking that down. But what's particularly been happening recently - and Leanna could probably better inform you about this than me - is that they are recently, both in the UK and indeed in Northern Ireland, evaluating their compliance regimes there. It's been 12 months since the compliance requirements under the race discrimination legislation have been introduced, and they're looking at an evaluation of that and also Northern Ireland, but I might hand over to Leanna to fill you in on that.

MS BUCHANAN: What we - - -

MS McKENZIE: Sorry, Leanna, if you do track down the information about The Netherlands, it would be lovely if you could put it in to us as another submission.

DR SISELY: Okay. We'll look for that.

MRS OWENS: I think they've already got a bit of material that's come in in the meantime from one of the staff that's been overseas. So I've already begged and borrowed for that material as well.

DR SISELY: Good.

MS BUCHANAN: Certainly the information that we have, particularly about the view of the Race Relations Act, has come from the staff member who has been overseas and who attended a workshop that was held in July of this year - it must have been last week I think - where a range of stakeholders were reviewing the progress of the new duties that were imposed on public bodies particularly under the

Race Relations Act there. My understanding of the review that’s been undertaken is that about two-third of public bodies have made some significant progress towards achieving what’s expected of the under the amended Race Relations Act, but that there are a number of public bodies that haven’t made the expected progress, that haven’t necessarily made a start, that aren’t necessarily even aware of their new obligations

So the material that I’ve read indicates that the Commission for Racial Equality is starting to talk about the fact that they’ll continue obviously to inform about the duties and to try and assist public bodies to meet their duties, but also that they’re starting to talk about the fact that they will use their legal options if they need to, to try and compel public bodies to particularly fulfil the duty to promote racial equality under that legislation.

The information that we have from Northern Ireland isn’t yet formal. There’s some independent - I understand there’s some independent evaluation happening now because in Northern Ireland, they’re at the stage where most public bodies - and they cover a whole range of public bodies from local government, councils, schools, universities, as well as central government departments - they are at the stage where all of the public bodies have now submitted what they call and equality scheme; so a scheme saying how in every aspect of their work - service delivery, policy development and program development - how they will address inequality and tackle discrimination against the nine groups of people named under the Northern Ireland act.

It seems as though - and again this is informal information because the evaluation hasn’t yet been written up, but it seems as though the key things that are coming through is that slowly the duty to eliminate discrimination on a range of grounds, including discrimination on the basis of disability, is becoming mainstreamed into the work of public bodies. So it’s becoming part of the ordinary business and management processes that the full range of public bodies are going through. So that is having quite a substantial effect.

They’re also having some learnings about the usefulness of consultation. The Northern Ireland scheme is quite particular in setting out that public bodies have to consult with affected groups before they develop their equality scheme, and as they assess the impact that their policies are having on people with disabilities and other groups. So they’re having some really interesting learnings about some of the impact of heavy consultation on affected groups, and some new learnings about creative ways to consult effectively, but the key message that’s coming through from them and also from the UK in relation to the racial equality legislation is that the fact that there’s a legislative duty, that there are some sanctions in place, that the commissions - respective Equality Commission in Northern Ireland and the Commission for Racial Equality - have some power to take action, and if need be legal action, if public bodies don’t comply; that that’s the single most influential aspect of their new schemes, not necessarily because they have to use it, but because it’s there as the stick.

So if public bodies aren't cooperative, and both are saying that they prefer a cooperative approach and that that is working, but it's working because of the existence of the option of legal sanction.

DR SISELY: And this was the very same thing that Canada learnt and put in place in 96 when it introduced the employment equity legislation that put in the compliance system there. Canada had a royal commission early in the 90s and looked at why equal opportunity legislation was not having the effect that was designed in that compliance was low, particularly in relation to affirmative action, for women and other groups, including people with disabilities. It was following that royal commission that they then moved to introduce their current scheme, which is the one that we're looking at.

MRS OWENS: And has that one been evaluated?

DR SISELY: Yes. In fact we could get you this information. In the last 18 months, they've just had their second parliamentary review of that scheme, and that's come out with some suggestions for change, but with favourable comment from all parties including employers and people with disabilities and their advocates. So we could certainly supply you with some information about that work as well.

MS McKENZIE: The Canadian scheme, if I'm right, doesn't just apply to the public sector, does it?

DR SISELY: No. It's in fact all national employers - banks, financial institutions, transport organisations et cetera et cetera - businesses that go across state boundaries.

MRS OWENS: And the employers have been making reasonably favourable comments about it.

DR SISELY: Yes, and in fact what Canada has found, what the Human Rights Commission has found there is that they've got several levels. So they can issue a notice to comply, and if a company still fails to do that, then they can be referred to the Human Rights Commission for confirmation of that order. When I was speaking to them about a year ago now, they had not had to refer any employer to the transcript. Yes, they had issued some notices to comply, but firms had in fact taken the necessary steps that meant that final step wasn't necessary.

So it's similar to what seems to be coming out of the UK and Northern Ireland, and it's the importance of that legislative underpinning that in fact encourages compliance at the end of the day.

MS McKENZIE: Again the monitoring of compliance is done by paperwork which the employers have to submit.

DR SISELY: Yes, that’s right.

MS McKENZIE: And there is a capacity to randomly inspect I think.

DR SISELY: That’s exactly right.

MRS OWENS: What the transcript can do then is just issue an order of compliance.

DR SISELY: That’s right, but it becomes effectively an order of the transcript.

MRS OWENS: What if they don’t comply with that order? What’s the sanction then?

DR SISELY: The sanction then would be a fine?

MS BUCHANAN: I think that there’s provision for fine.

MS McKENZIE: My recollection is first there’s a notice of compliance.

DR SISELY: That’s right.

MS McKENZIE: And then that’s issued by the commission.

DR SISELY: That’s right.

MS McKENZIE: But if that’s not complied with, then the commission can go to the court in effect and get an order, and that order, if you don’t comply with that is subject to penalty, and my recollection is quite heavy penalty as well.

MRS OWENS: One of the aspects that employers are required to do is to develop a plan to remove barriers and implement positive measures to correct the effects of past exclusion. The parliamentary review itemises lots of positive measures that employers have taken. I'm just quite interested to know how far positive measures goes. Is it full-scale affirmative action or - - -

DR SISELY: It is in fact.

MRS OWENS: - - - where does it stop?

DR SISELY: They've got quite a sophisticated system and they work very closely with the Canadian equivalent of the Bureau of Statistics. So they do quite detailed and localised analysis of who lives in the relevant surrounding area, who you might expect to be employed given that, looking at educational levels and looking then at what you would expect to be a reasonable representative employee group, and then they'll look at the composition of the employees in a particular firm to see whether there are some obvious gaps, particularly in relation to women, people with disability, people who are culturally and linguistically diverse, and indigenous people are the four groups that Canada is concerned with, and if there are gaps, then the employer is required to identify a plan to identify any barriers and then institute steps to overcome those barriers.

This might be something that's achieved over a shorter or a longer period of time. It might be that if there are no, say, indigenous people with the required educational skills, it might be that the employer provides training opportunities or indeed scholarships for local indigenous people to be educated. So they take quite a developmental approach to the issue and quite a detailed and practical approach, and it seemed to me that it's a very sensible approach and it's probably why employers are comfortable with the approach because it recognises practical difficulties, it recognises that change when it's fundamental change will be over the longer time, but it does require employers to recognise some of these barriers and put in place reasonable steps to proactively address these barriers over time.

So the Human Rights Commission in Canada will have a worker based with an employer for perhaps up to - if it's a large employer and these are national employers - perhaps up to six months, and it's quite a hands-on developmental role that that worker will play with that particular firm or government department in really looking at what the steps are that are required to overcome the barriers in relation to these four identified groups.

MRS OWENS: What about the smaller employers? Do they get involved in this arrangement?

DR SISELY: Unfortunately - I think unfortunately - no. They are mostly larger firms. So - - -

MS McKENZIE: That might be a constitutional problem, too.

DR SISELY: I think it is. I think that's the reason why.

MS McKENZIE: Because Canada is a federal system.

DR SISELY: Yes. I'm sure that's the reason why.

MS McKENZIE: When I read the legislation, it occurred to me that that's probably the reason because they are differently structured from us, and what they can do nationally has some limitations.

DR SISELY: Yes.

MRS OWENS: So these are big large national firms.

DR SISELY: Yes.

MS McKENZIE: That's why they had to do it for people who operate across provinces.

DR SISELY: That's exactly right, but in thinking about how that might apply to Australia or indeed Victoria, one of the ways that I would be interested to look at is looking at the contractors to such employers; the providers of goods and services to such national employers, and what obligations might be placed there as well.

MRS OWENS: That was very interesting. Thank you.

MS McKENZIE: I'm just missing how that might work in practice. The one thing I find - I can understand why it's been done, but the one thing that all those pieces of legislation does is a bit hard to understand in a way. They have general duties, but actually when you go on to read the legislation, those general duties really don't operate until they're sort of spelled out in specific schemes or plans of action that each employer has got to make up. So what actually looks like a general duty, as if it applies now, really doesn't then apply to an employer or a service provider or whatever it does, one of these plans of action. Is my understanding correct?

DR SISELY: And more - sorry, you mean in the Canadian system?

MS McKENZIE: Yes, and even the Northern Ireland one too, I think. It seems to be you need to have one of these plans to kind of spell out exactly what you have to do before that very general duty - - -

DR SISELY: Before it becomes real.

MS McKENZIE: Yes.

DR SISELY: Yes. They've all got the general duty, the general responsibility, but it doesn't become real in an organisation until they start to work through the issues, until they start to actually try and implement the implications of that responsibility in the firm, and then I would go one step further, and until someone's able to monitor it. Unless there's monitoring, I think it will still be relatively ineffectual. Our experience is that many firms may have developed for example equal opportunity plans, and have, but sadly many of those plans sit on the shelf or are dependent on one person to have a passion about to implement, and then if that person leaves, whether it's the chief executive or the director of human resources or whomever, if that person leaves, then the commitment is not carried on.

It's not part - doesn't become part of the everyday routine experience of the firm, and that's where it seems that the Canadian experience, Northern Ireland and the UK experience is difference. When it is an obligation, when there is a commitment to develop some proactive plans, strategies, and when they're monitored - someone's going to check how they're working - that's when it does start to become real when you do get some real engagement with the issues, and some real looking at some of the barriers and the problems. Before that, it's easily done once and then forgotten about, and none of the culture changing, none of the barriers overcome.

MS McKENZIE: As far as the DDA is concerned, we've got at the moment a transport standard. It looks as if at some stage sooner or later we'll have an education standard, although they are not minimising the difficulties. If the DDA was going to be amended to include some sort of duty like that, should those duties be just confined to areas where we don't at the moment have standards?

DR SISELY: The one area that is the most important area I think is employment, and there was an attempt, I'm aware, several years ago to look at an employment standard, and that failed. The standards we have in place at the moment are mostly about technical black and white issues; how high is a ramp, how wide is a door, et cetera et cetera. It's much, much more difficult to get very broad general standards when you're talking about people-to-people issues, and I'm not sure that a general one-size-fits-all standard is appropriate in that circumstance. It seems to me that the approach of the countries we've mentioned that actually looks at a particular workplace in a particular situation is more likely to be successful than a generalised standard.

MS BUCHANAN: It's my thinking that the two can both operate, and that a general duty to address discrimination and also to develop a plan that says exactly how you're going to do that can also coexist with something more detailed like a standard where a standard can easily be developed, particularly in the more technical areas as Di has said, and then what you would see is the scheme or the plan that's being developed to suit the particular organisation.

So in a way I think the benefit of that is that you are placing responsibility and some degree of control with organisations to say how they're going to address the discrimination in a way that works for their circumstances, provided they meet the minimum that's set out in the standard, or if a standard doesn't apply, how they're going to meet the general duty. So I think that the two can coexist.

MS McKENZIE: They could coexist. One of the things that you said in your submission is that the standards in whatever area shouldn't lower the obligations which the DDA itself imposes. Do you want to talk a bit more about that?

MS BUCHANAN: I suppose from my point of view that's a fairly straightforward point; that the DDA should be taken as setting out the baseline requirements that require organisations, employers, educational institutions and so on to refrain from discriminating and to make reasonable adjustment to accommodate the needs of people with disabilities, and that whatever standards are developed, that as indeed is provided for in the DDA, that they not reduce those obligations in any way, and that any interpretation of the standards further down the track not reduce the obligations under the DDA in any way. So that was the point that we were making; nothing more complex than that.

MRS OWENS: But what happens if we had a standard under the DDA that was at a lower level than whatever was operating in an individual state like Victoria? What do you do then?

DR SISELY: Then Victoria would have to comply with the lower standard. That's precisely one of the issues. If there are higher standards in any of the states or territories and the federal legislation came in at a lower standard, then the states would have to comply with that.

MRS OWENS: Do you think there'd be any real danger of that? Did that happen, say, with the transport standard?

DR SISELY: I'm not aware of anything with the transport - - -

MRS OWENS: There was probably nothing really in Victoria at that stage anyway.

DR SISELY: Exactly, yes. No, I'm not aware of that in relation to the transport standard.

MRS OWENS: What about the education standard?

MS McKENZIE: There is an argument with the transport standard though because the transport standard allows a number of years for compliance.

DR SISELY: Exactly right.

MS McKENZIE: Arguably one could bring an indirect discrimination case in Victoria which argued that, you know, a particular kind of transport that the particular complainant was using ought to be accessible now - not later, but now. It's the same question we were raising with other people who made submissions where we've said, "Look, you know, the standard says so many percentage of buses have got to be accessible by such and such a date. What about the other lot which aren't accessible when you happen to live in the area where you can get an accessible bus? Can you make a complaint and could you succeed?" - because arguably then, you see, that would be actually imposing a higher standard than the DDA set itself.

DR SISELY: That's right. I mean, there have been cases where states have taken a different view in relation to say exceptions around the DDA. I'm thinking particularly at the time of the Olympics, and the buses were required to go to the Olympics to Sydney, and that was going to severely disadvantage people with disabilities both in Victoria and indeed Queensland. So we opposed it. So there are some problems.

MRS OWENS: What about monitoring standards? Do you think there needs to be some sort of enforcement situation?

DR SISELY: I definitely do. I definitely do. I don't think that people will take them seriously unless there's some enforcement, unless there is some risk of a consequence, a negative consequence for not doing it. I think any compliance regime that we might look at, whether it be in occupational health and safety or in the environment or business, unless there's a risk of a negative sanction, compliance won't be taken seriously.

MRS OWENS: So what's the negative sanction going to be?

DR SISELY: It could be staged like they are in fact doing both in the UK and Canada. So first there's a warning - if you like, a notice to comply - a sensible amount of time or a reasonable amount of time given for the organisation to comply, a further check, and then if there's still no compliance and no indication that the organisation is trying to comply, then there's a fine. Then there's public exposure. My experience is that different sanctions work for different levels or sizes of firms. Often for a small firm, a sizeable fine works. Often of a larger firm, it's public exposure that's more important. So it's a bit of a combination.

MRS OWENS: Presumably the notice to comply and the monitoring would be done by HREOC.

DR SISELY: I would expect so, yes. That would make sense, given HREOC is responsible for the standards and what the experience is overseas as well. That's the experience.

MS McKENZIE: Overseas with the various commissions that were to enforce - - -

DR SISELY: Yes.

MS McKENZIE: Were they then funded more greatly.

DR SISELY: Yes. Although there were particular sections that established precisely in Canada around the employment equality legislation; in the UK, in and around the racial equality legislation. The Northern Ireland commission was set up with that from the start.

MRS OWENS: So in our case it would be a matter of ensuring that HREOC got appropriately funded to be able to set up certain sections and so on.

DR SISELY: Exactly right, yes.

MRS OWENS: Can I just return just for a minute to affirmative action.

DR SISELY: Yes.

MRS OWENS: In your mind, Di, what would affirmative action look like if there was to be a stronger system based on say the Canadian model or the UK model or whatever? Where would you take it? Do you go as far as quotas?

DR SISELY: In a sense Canada has come at the idea of quotas but from a different way, in that when they've looked at who the population is and the composition of the population and then asked some questions about reasonable expectations or an employee base and educational levels and job qualifications, in effect while they haven't called it quotas, that's what they're in effect getting at. What might you reasonably expect? If people with disabilities make up 2 and a half per cent of the population and they've got the requisite education level and skills, well, then you'd expect 2 and a half per cent. If they haven't, it might be something less.

So in a sense it's not a rigid quota and they don't talk about it in those terms. In effect they're asking what's a reasonable participation rate or level for people with disabilities in that employer/employee quota.

MS McKENZIE: But might there not be an argument that given - and you yourself have discussed it in your submission which - in relation to participation of people with disabilities and education. So say we assumed that their participation rate is lower and then you take into account these educational standards that you need for your employment, and then because of that you fix your rate of people with disabilities in your workforce lower because of that very difficulty in education, that ultimately you perpetuate - - -

DR SISELY: They go a step further, and this is where the affirmative action comes in. What they would then require is for that employer to develop plans to increase - - -

MS McKENZIE: To raise it.

DR SISELY: Yes.

MS McKENZIE: Okay.

DR SISELY: So it's avoiding some of the knee-jerk negativity that we've seen over recent years in relation to notions of affirmative action or notions of quota, and get at addressing the issue without using those terms, and I think this is something that we've got to think about here in this country because as you quite rightly raise, unless we address the structural disadvantage that exists at the moment, we are simply - not only are we going to perpetuate it, but we will in fact entrench it and make it worse. So we really do need to address the idea of substantive equity rather than equity in name only. We must treat unequally or in different ways groups that are unequal at the moment, and that’s what that’s about.

It’s absolutely essential to take steps to address structural inequality so that we can get substantive equity rather than just equity in name only, and treating groups the same when they are in fact unequal will not address substantive equity.

MS McKENZIE: Has anyone tried this with education providers overseas?

DR SISELY: With education providers?

MS McKENZIE: Yes.

DR SISELY: I’m not aware of education providers, but we could check that for you.

MRS OWENS: Because that’s where it all starts.

MS McKENZIE: It would be really interesting if you applied the same philosophy to education providers and said, "Look, what’s the area from which you draw your main school community? How many people with disabilities in that area, and what kind of plans can you put forward to look at having a similar make-up of your school?"

DR SISELY: Yes, exactly, and what are the barriers.

MS BUCHANAN: Certainly the Northern Ireland duty rests with schools and with other education and training institutions. I don’t know to what degree they do the statistical analysis about how many children or young people within the school area would have a disability or would come within one of the other groups designated under the legislation, but certainly their plans have to address ways in which they'll promote equity and eliminate discrimination against the various groups. So as Di said, we can have a look and see to what degree they look at a statistical analysis in assessing how well they're progressing up against that.

MRS OWENS: I still worry about people that may have quite severe disabilities, whether they'd still fall through the cracks even if they were well educated, whether with your pseudo quota system, employers - if there's 2 and a half per cent to be found out there, they'll go for the best possible 2 and a half per cent that they can find. Maybe it's better than nothing, but I'm just wondering about that; whether they can abuse that system.

MS McKENZIE: We had a submission where they talked about that - I think in Germany - where they said that's exactly what happened; that there was not necessarily a system that was quite worded in the same way, but certainly a system of quota for employers and that that's what happened. Those with the most severe disabilities tended to be ignored, and those with the milder forms were taken in; were employed.

DR SISELY: That doesn’t surprise me. We see it here now. While generally knowledge levels are low, certainly there's much more understanding of physical disabilities as opposed to say cognitive disabilities. I think we all need to be alert to that fact and that would be I think one of the issues to pick up in the detail. It seems to me that it should be possible to be able to design a system that was alert to that and was able to audit in relation to that, and to see whether, if you like, there was particular attention to some disabilities and ignorance of others. I think you'd need quite a detailed description of disability rather than just one heading. I think you'd want to look at various clusters of disability particularly, and not just concentrating say on physical disability or some obvious disabilities, but also looking at cognitive disabilities as well - intellectual disability and mental health et cetera; acquired brain damage.

MRS OWENS: It does get quite complex, doesn't it?

DR SISELY: Yes.

MRS OWENS: There's a real potential for building a very complex system, unwielding system.

DR SISELY: I think the issues are complex, but I don’t know that a system - it doesn't necessarily follow that a system designed to address them needs to be complex. I think the thought and design that needs to go into a system is complicated and complex and needs to be very sophisticated, but I don't think the end product needs to be complex. I think there's a huge need for education on these issues that goes hand in glove with this, but I don't think it necessarily means that the end product has to be complex because obviously if the end product was complex, it will fail, and so that's to be avoided.

MRS OWENS: Have you gone across what they're doing in New South Wales in terms of affirmative action in the public sector?

DR SISELY: No.

MRS OWENS: I just wondered if you had; whether you'd been looking at that system.

DR SISELY: No. We haven't looked at the affirmative action, unless Leanna has got anything - - -

MS BUCHANAN: No.

MRS OWENS: Okay. Thank you.

MS McKENZIE: Can I ask some questions about complaints and conciliation. Just a couple of things, and they really arise out of a number of submissions that have been made to us. There have been some submissions where some concerns - I mean, I'm not wanting to criticise the commission unfairly in any way. I understand that HREOC has got difficulties as far as its resources are concerned, but there have been a number of submissions which have addressed the question of time limits of the handling of complaints.

I know that under the Equal Opportunity Act in Victoria there are time lines for the commission's decision as to whether or not to decline a complaint which then forces it to go to the next step; either to refer it to the tribunal or go to conciliation. Have you found that system difficult to comply with in any way?

DR SISELY: No, we haven't, and in fact while a bit more flexibility would be helpful, some complaints by their nature need to be done within 24 hours and some take much longer because of their very nature. But we haven't found the time lines difficult to comply with. The only exception might be where it is a large representative complaint. That is a different kettle of fish, but if anything people are requiring faster turnaround with complaints rather than longer turnaround with complaints.

Sometimes if harassment is involved and there are multiple parties involved however, it may be in the parties' best interests for a bit longer time to be taken rather than a shorter period of time so that issues can be explored and properly dealt with rather than rushed. But on the whole, we haven't found the time lines a problem to comply with.

MS McKENZIE: The second question is the expedition mechanism under which a party can apply in certain circumstances to have the whole process speeded up, and then there are even stricter or shorter time lines that apply. Has that been a problem?

DR SISELY: It hasn't been a problem, but we've found that it's not always conducive to the settlement of a complaint. One of the requirements we've got, as you know, is that if the matter concerns sexual harassment in employment, then expedition is automatic. That sometimes has impeded the settlement or the resolution of the matter. The matters are complicated, often long standing, often involving numerous parties, and for the adequate resolution of the issue, you need to tease those out. Expedition doesn't allow for that.

MS McKENZIE: 30 days to conciliate is not enough.

DR SISELY: Yes. To investigate and conciliate, it's very quick.

MS McKENZIE: The next matter that was raised in submissions for us are some concerns about conciliation, and there are really two that - let me go one step backwards. Sorry. There's one I've forgotten which I was supposed to have asked you. Some concerns have been raised by people with intellectual disabilities, and most recently this morning a person with dyslexia, about the actual complaints - the process of lodging a complaint, and the concerns were that when you’re faced with the need to write a complaint, that’s really difficult for people with cognitive impairments or impairments like dyslexia, and when you’re sent back information in written form and not in some other alternative form, that also is very difficult.

DR SISELY: Yes.

MS McKENZIE: Do you want to make comment on that?

DR SISELY: It’s for these reasons that we are also concerned to introduce systemic responses. These are effective barriers to individuals seeking redress when their rights have been abused. It’s too difficult sometimes for individual victims to bring a complaint or to have the issue successfully dealt with, and that’s an added reason why we're arguing for systemic and proactive approaches. So you avoid the situation where the individual victim has to attempt to fix the system which is what's happening in these cases. Sometimes the barriers even in the process itself do not help this.

It's also why it's very important to have the mechanism of a representative complaint whereby an organisation can bring a complaint on someone's behalf that can overcome these issues, but it seems to me that it's for these and other reasons why our estimate is that some 70 per cent of people who think they've had their rights abused, generally across the board, in fact elected not to bring a complaint. It might be because of fear of victimisation or the cost. Sometimes it's barriers, it's the nature of the process itself. They fear the legalism, they fear the cost, they fear the exposure that a complaint process can entail.

MS McKENZIE: But sometimes somebody might still want to bring an individual complaint and it's a matter of how do you make that possible for that person, and if they can't put in a written complaint, they don’t know where to go for legal advice or the legal advisers are so run off their feet they haven't got time for that particular person's complaint at that time. Do you allow for other forms of submitting complaint?

DR SISELY: You have to, whether it be verbal, whether it be via - email is still in writing; any form of communication must and should be allowed in relation to a complaint.

MS McKENZIE: And Leanna is chafing at the bit.

MS BUCHANAN: Because I suppose I think that one of the benefits of the system that we operate in is that we, as in the commission in Victoria, are required to assist complainants to formulate their complaint which means that, yes, a lot of that, because of resources and when it's appropriate occurs by way of writing. So a complainant will put their information into writing with the proviso that they'd like some assistance from the commission to help frame their complaint, and that's sorted out essentially in writing between the commission and the complainant.

But in situations where a complainant indicates that that's not appropriate for them for whatever reason, then attempts are made to try and arrange a face-to-face meeting so that some of that can be done verbally or to arrange some other means whereby the complaint is reduced to writing without the complainant actually having to work with the written material. So I think that there are - certainly it requires resources and we absolutely acknowledge that, and it's not always I imagine available as much as complainants may want or need, but I think that the fact that that capacity is there and the fact that we as the commission in Victoria are required to assist complainants to formulate their complaint, I think that that really helps to address that problem.

MS McKENZIE: My other question related to conciliation, and that concerned - quite a lot of the submissions said that it would be helpful in view of the people making the submissions if there were some publicity of conciliated resolutions so that - for educative purposes and of course so that people subsequently complaining could have an idea of what had been agreed on, and at the most extreme I suppose, to get over the cases where there's a solution adopted for an individual by an organisation, but that only helps that individual and not anyone else in the organisation in the same circumstances. Is that a problem that you've encountered?

DR SISELY: It's a balance between getting information out and the confidentiality provisions with all of the legislation, but it seems to me that you can still get the information out about types of situations, types of circumstances or abuses without breaching particular individuals' or particular respondents' confidentiality. Hypothetical case examples for example - now, these are not as strong or not as educative as a real live case that you can talk about publicly; for example one that's gone through a tribunal.

Certainly I think it would be much more powerful and effective if, under certain circumstances, we were able to talk about conciliated outcomes where parties agreed, and/or where significant abuses had occurred, and particularly I think obviously when things have gone through tribunals or Federal Courts they're available, but I see no reason why there can't be more publicity in and around those cases. The increasing trend though to confidential mediation before a tribunal is a problem though because that does mean that we're having less public exposure of the particular cases.

MRS OWENS: I've got one if you haven't.

MS McKENZIE: I did have another conciliation question, Helen. I've forgotten entirely what it was.

MRS OWENS: I've thought of one while you were sitting talking about that, and that is with HREOC. Because of their location in Sydney, they sometimes do telephone conciliations. Is that the one?

MS McKENZIE: She's telepathic as well.

MRS OWENS: We've been doing this long enough - it's almost like having my husband next to me in the room, but not quite. Do you want to run with that one?

MS McKENZIE: What I was going to say was one of the difficulties that have been mentioned in a number of submissions is that the commission of course is located in Sydney, and although the commission does come to some conciliations in states, quite a lot of conciliations are done by telephone. While there has been acknowledgment in the submissions that there is a real difficultly resource-wise for the commission, there's also been some real concerns expressed in the submissions about telephone conciliation, how effective that is. Do you want to comment?

DR SISELY: That doesn't surprise me, and I think it's one of the reasons why the number of complaints of disability discrimination that we've got at our commission have gone up. I think it's extremely difficult for people with disabilities to attempt to deal with issues long distance, whether it be by phone or whether it be by email. I think there are considerations in and around that, and certainly complaints of disability discrimination I think at most, if not all, state commissions have gone up in recent years since HREOC withdrew to Sydney.

MS BUCHANAN: Also in the consultations that we did and also through our inquiry lines, particularly up until earlier this year, when complainants who contacted the commission in Victoria were able to elect which jurisdiction they wanted to lodge a complaint in, two of the reasons that we hear why complainants would lodge in Victoria with the EOC rather than with HREOC - one relates to the very fact that there's a physical presence in Victoria - so not necessarily about the conciliation by telephone, but about the general issue about there's a physical local presence for the commission here, and that for some complainants that's important to some degree.

The other relates to a point that you made earlier which is around the time frame. So some people when they're made aware of the time frame, they know that they want their matter resolved as soon as possible in lots of situations. So for that reason as well they'll opt to lodge in Victoria.

MS McKENZIE: One of the matters that's been raised in some of the submissions is this question of conflict, particularly in HREOC's roles. In particular it's been raised where there's been a suggestion that HREOC should initiate a complaint in certain circumstances - perhaps where there's a public interest or if it's some kind of, if you like, representative complaint. But if in fact that power were given to HREOC, concerns have been expressed about how would the whole conciliation process then work. Have you got any thoughts about that issue? I'm not asking you these just to be difficult. They are difficult questions and we're trying to understand them ourselves.

DR SISELY: Yes. In fact we're doing some work at the moment. We're looking at recruitment agents generally in Victoria and their role. So in a sense if you like we've initiated an inquiry, although we're not necessarily calling it that, into the role and practice and relationship of recruitment agents to the Equal Opportunity Act. We're working with them at the moment in a cooperative fashion. So in a sense the notion of conciliation hasn't come into it at this stage. Our aim is in the long term to obviously increase compliance with the Equal Opportunity Act by employment agents. It might lead to the introduction of a code of conduct. The missing link here will be any audit because we don't have powers to audit, but we're taking the first steps.

My point is that simply because an organisation, whether it be HREOC or a body like us, initiates an inquiry or initiates a complaint - it's effectively the same thing - doesn't necessarily mean that there has to be a formal conciliation as such associated with it to address it. In fact you might not have a - you may; it would depend on the circumstances, but then you might be able to get the parties to come to the table voluntarily. You would obviously also need some compliance powers there if the parties wouldn't come to the table.

Under the Equal Opportunity Act we do have powers to require people to provide information to come to the conciliation table. In an individual complaint I wouldn't see that as being vastly different from where the complaint was initiated by the commission itself.

MS McKENZIE: Have you used them, those powers?

DR SISELY: Yes, we have.

MS McKENZIE: Often?

DR SISELY: Not often, but we do use them. Where there is usually a respondent that refuses to attend a conciliation and/or provide information, we've used them.

MRS OWENS: Can I ask you, while you're talking about initiating complaints, you make a suggestion in your submission that a representative body would be able to complain if it could demonstrate sufficient interest in the complaint, and we're quite interested to know what - how you actually demonstrate sufficient interest. You'd have a set of criteria that you would apply - administrative criteria? How would it work?

DR SISELY: Yes, you would. For example under the Racial and Religious Tolerance Act here in Victoria we've got representative provisions, and under those provisions an organisation has to have some connection to the issue or the group of people who are alleging discrimination. So it may be, if it's a Vietnamese, it might be a Vietnamese community organisation or it might be a community legal centre that has a history of working with Vietnamese people. There has to be some demonstrated connection to the people concerned and some concern with the issues involved, rather than none at all.

MS McKENZIE: Just a member of the public.

DR SISELY: Right, a member of the public.

MRS OWENS: What about, say, it was a disability discrimination legal centre that hasn't been actively involved with those particular people before? Would they be able to initiate - would they have sufficient interest in all your criteria?

DR SISELY: I would argue yes, because they've got an interest in disability discrimination and the very law that - so while it may not have been with this particular group of people they've certainly got a long-standing interest and expertise in the topic itself. So you would want to take a fairly inclusive - - -

MRS OWENS: So that would be another criteria.

DR SISELY: Yes.

MRS OWENS: But they wouldn't necessarily know the people involved or have had involvement with any of their cases before.

DR SISELY: Correct.

MRS OWENS: But they would have to have had some interest in the broad area of discrimination.

DR SISELY: Exactly, exactly right.

MRS OWENS: So an advocacy group would come in under your umbrella and so would a legal service.

DR SISELY: Exactly.

MRS OWENS: What about a pro bono lawyer? This is getting further away.

DR SISELY: Yes.

MRS OWENS: I'm taking it further away.

DR SISELY: If that pro bono lawyer was connected or engaged by either party, yes; I'd argue yes.

MS BUCHANAN: The point that we thought was particularly important around that provision with represented complaints under the Disability Discrimination Act is that we certainly have feedback and agree that, looking at the history of people speaking on behalf of people with disabilities that in any representative complaints we would want to ensure that there was some safeguard to ensure, as Di said, a connection, a connection and interest with issues of familiarity with the issues and some kind of relationship, in a sense, with the disability discrimination issues that were to be addressed by the complaint.

MRS OWENS: Some people have said this can be disempowering to have a representative complaint or an organisation running a complaint. Have you got any concerns about that, because what they're saying is that it goes back - it moves away from self-reliance and independence back to the dependence model, if you like.

DR SISELY: On the other hand I think there's a balance that needs to be struck because when you've got something like 70 per cent of people not making complaints on an individual basis, because of the various barriers - lack of money, isolation et cetera - I think you've got to look again and certainly, while not having experience of representative complaints in the disability area but looking at representative complaints under the Racial and Religious Tolerance Act, many people feel very comforted and reassured by the fact that the complaint is being taken up by another body rather than them as an individual. It lessens their exposure. It lessens their isolation. It lessens their fear of victimisation and backlash.

So I would argue - I acknowledge the argument coming from the disability sector. I think there's another argument in there and it seems to me so long as there was a choice so a person with a disability could elect to go either way, I think then we might have the best of both worlds.

MRS OWENS: Good, thank you. We're just saying there's a heap of issues that we could discuss with you, but what you've done is given us a very, very clear submission and I think we've covered many of the issues that we needed to cover. You made a point about not necessarily being in favour of going back to a formal cooperative arrangement with HREOC but felt that there needs to be more that could be done to work cooperatively through advocacy, legal aid, education - you know, have collaborative projects rather than collaboration in the complaints process.

DR SISELY: Yes. I think we do come at issues differently just because of the state-federal arena. It is the quirks of the legislation that can make it difficult to work together in a detailed way on individual complaints when you're looking at details. But I think definitely in relation to education, media campaigns or campaigns in and around particular issues. For example, all states and territories are working with the Race Discrimination Commissioner at the moment on a national project in and around countering racism against Muslims and Arabs.

So there are very effective ways that we can work together on those sorts of projects, on those initiatives. We, about six months ago, set up the Australian Council of Human Rights Agencies which is a formal council of equal opportunity and anti-discrimination bodies around the country. So there is significant work that can be done cooperatively through that mechanism as well.

MRS OWENS: I suppose what was concerning us is that there's some people that are quite confused about having a dual system. Well, going back one step, there are people that don't really know much about their rights under any act including the Disability Discrimination Act. If they are aware they don't quite know what to do, where to go. I mean, they mightn't even get to first base going and finding somebody to help them go through the minefield. But then, when you've gone through the minefield a bit then there's these two systems and then somebody has to make a choice as to which one is going to work best for them.

DR SISELY: That's right.

MRS OWENS: And, you know, the argument I always run is it's better for people to have a simpler system rather than a complex system and one-stop shops always seem to me a good idea. But it has got to be made to work so there's a trade-off.

MS McKENZIE: At least at the choice stage there needs to be - I would have thought there's a good argument for both bodies at least giving information to people who approach them about both systems, so that those people can be helped to choose. There must be some - - -

DR SISELY: I would agree with you and until very recently that's what happened in Victoria. In fact we lodged complaints under both state and federal legislation. But HREOC made the decision, as in all other states, that it would handle its complaints from New South Wales.

MRS OWENS: That raises another issue which I won't go into with you, which is a lot of their - you know, a body of their work is relating to Commonwealth government programs and Commonwealth departments tend to be located in Canberra.

DR SISELY: Exactly, yes.

MRS OWENS: There are geographic issues that arise.

DR SISELY: There are, and there are certain sorts of complaints, for example, against such bodies that can't be handled under state legislation because they are covered by Commonwealth legislation.

MRS OWENS: Yes, that's right.

DR SISELY: That's quite right.

MRS OWENS: I think we've covered everything.

MS McKENZIE: I think we've covered all the matters that I wanted to raise. It was an excellent and very wide-ranging submission.

DR SISELY: Thank you.

MRS OWENS: And we look forward to getting some more information about the countries we talked about and anything you find on the Netherlands as well, to add to it would be great. So we'll come back to you on that.

DR SISELY: Okay, our pleasure, thank you.

MRS OWENS: Thank you very much. We'll just break for a minute.

MRS OWENS: We will now resume. The next participant this afternoon is Job Watch. Welcome. Could you each give your name and your position with Job Watch for the transcript.

MS BYTHEWAY: Yes, I'm Zana Bytheway and I'm the executive director of Job Watch.

MS DICKINSON: I'm Louisa Dickinson and I'm the senior solicitor.

MRS OWENS: Good, thank you. Thank you for the submission. We've just had tabled an addendum which I know you want to talk to and introduce the submission, so I'm going to hand over to you, Zana.

MS BYTHEWAY: Thank you. Just firstly we'd like to thank the commission for this opportunity to speak today. We have provided a submission but it is helpful to be able to speak to it as well, so thank you for that opportunity. I will just very briefly outline that originally we gave you our submission in May. We've expanded upon that today and I will take you through that verbally. I will just try and recap what we did try to highlight in our May submission, and that was basically to try and first of all provide you with some case studies with the real experiences that we have on our database.

I might add that Job Watch takes in excess of 20,000 calls per annum on our telephone advisory service which is a free and confidential service provided to Victorian workers. Whilst the Equal Opportunity Commission gets a lot of discrimination complaints and harassment complaints, equally so does Job Watch, obviously in the employment forum. So I just wanted to alert you to that, that it's a very large database. So we've tried to sort of extract some case studies to assist and to highlight the difficulty in proving a complaint of disability discrimination and to highlight some of the relationships between the DDA and other acts; also to highlight the need for community education and awareness, which I'm sure has been the subject of many submissions to you, and to also highlight some of the issues arising with the business services, which I know is not strictly within the terms of reference, and also what we thought was the appropriate role for the supported wage system.

So that's just to recap what was in our first submission. Today what we'd like to do is add to some of that, basically expanding on the original submissions and adding some new main features for you today. I'd like to start by just giving an overview that from Job Watch's experience from the 20,000 or so calls and clients that we see, we feel that the profile of HREOC is certainly not high enough. I think HREOC in its existing arrangement is not a well-known commission and I think often that parties actually participate in the Equal Opportunity Commission forum because of little knowledge about the alternative.

In relation to that there are many aspects of course of improving HREOC's profile. I won't go through them. There's some basic ones obviously of media, community awareness campaigns, extensive publications and production of resources. I will say that we've taken a bit of the lead in that area and that Job Watch has approached HREOC and we will actually commence filming with HREOC in September of this year, trying to highlight the conciliation process through HREOC. That particular video shall be distributed nationwide and we hope there will be an extensive distribution and then also a greater insight into what HREOC provides and who they are.

MRS OWENS: Who is going to see the film? Is it going to be employers or employees?

MS BYTHEWAY: It will be both, Helen. We're just trying to make it in terms of employers and employer agencies and advocates and the like. You would know this; that a lot of HR personnel are now responsible for implementing certain policies, et cetera, so there will be a lot of those positions that will also be helpful in their training. From our perspective, from the employee perspective, we will focus and direct our videos to the community organisations within Victoria where we think it would be of great assistance to them.

The next aspect that I'd like to raise is that of what we believe would be a necessary path for HREOC to take, and that is to make conciliation conferences compulsory. In our experience, given the disadvantage that disabled people have - and in our case disabled workers - we would like to see a system whereby there is more opportunity and a greater opportunity to resolve the matter before the hearing process. You've heard so many times, I'm sure, about the barriers associated with making disability complaints. I'm not going to take you through that. But I would like to stress the following, that making a complaint and following it through to the final determination by way of hearing is extremely onerous. Likewise, responding to a complaint and seeing that through to its final determination by way of hearing is extremely onerous.

A compulsory conciliation where parties are required to attend, would be a means of alleviating that onerous burden. Our experience has been that in dealing with the conciliation process - and I've got a recent example - the complainant was very keen to conciliate. We thought that we could conciliate effectively. However, the respondent was not interested in conciliation. It was a major - what could have been a major test case on IVF and the respondent wanted to force our hand to take it right through. That created a very unfair position in our circumstances, given the limited resources in our possession.

As a further attempt to try and resolve matters before the hearing process, it is our submission that people with a mental or psychological disability have an added advantage in terms of resolving the matter before hearing. That would be a two-tier process whereby, firstly, I would once again ask that there be the compulsory conciliation process and then once again prior to the hearing or prior to invoking that next step, that there be a compulsory mediation. It is our experience of Job Watch that in terms of a person with a mental or psychological disability, cognitive, intellectual - the whole range of those disabilities - find the entire process extremely difficult. Therefore, to assist them in that process, we need to make it easier for them to resolve their matter before hearing. For most of our clients in that position, a hearing is not a viable option. I have had situations where I've had to settle matters for meagre amounts or resolve them simply because I could not get meaningful instructions, it was extremely stressful for all concerned and my clients suffered the consequences of that.

I'd like to also perhaps at this point in time speak to you about the expansion of HREOC's role, just a couple of key features. First of all, as I said, the profile needs to be raised in terms of HREOC, and HREOC's educative role needs to be improved. Another way that I think this has been the subject of at least the submission before us is that we'd like to see HREOC's power to initiate complaints reinstated.

MRS OWENS: There's been many submissions that have raised that.

MS BYTHEWAY: Yes, and I won't go into it any further, just to say to you that we support that.

MS McKENZIE: You support them, yes, fair enough.

MS BYTHEWAY: We haven't seen the benefit of other submissions so you will have heard this before. We'd also in light of this expansive role say to you that we would like to see HREOC undertake a more vigorous investigation process whereby that discovery, compliance with what they're asking actually take effect. So we would like them to have a much more vigorous and compliant investigative process. Once again I'm sure these have been the subject of other - - -

MS McKENZIE: No, not as many, I have to say.

MRS OWENS: One or two.

MS McKENZIE: There have been some other submissions but not many of them.

MRS OWENS: I suppose it raised the question of why they don't have vigorous investigation processes in place now is it an administrative decision not to, or is it because of the resource constraints on them.

MS BYTHEWAY: It may be a combination of both. Certainly if it's an administrative thing, that's something they may be able to rectify. Resources of course is a different matter. But I think it's very timely and worthwhile that our resources be pooled at that level because if we can do that, think of where the savings would be, how we'd create savings in not having to take matters further down the track. So it's a matter of prioritising perhaps those resources. Now, I'm sure that you have had an abundance of submissions in relation to the cost consequences for unsuccessful litigants.

MS McKENZIE: Yes, we have.

MS BYTHEWAY: I won't go into it. You know the barriers, you know what's involved. I simply want to say to you that we would like to support a costs scenario which is very clear to a complainant and obviously to the respondent and on that basis that we seek something like section 109 of the VCAT Act, basically saying that complaints or costs be limited to those relating to vexatious or frivolous cases and cases along those lines. So we fully support that, so that in terms of - to be in line with the Equal Opportunity Commission and VCAT scenarios at present.

Guidelines and advisory notes. That's clearly terms of reference material there and you will have lots of submissions on that. Once again we'd like to say to you the following: in its present format the DDA is in our view a complex piece of legislation, in my view one of the most complex of the federal acts in the human rights area. I think because it is, it's very difficult for it to fulfil its educative role and then beyond that it's difficult to create the awareness, because if there's no understanding it's very difficult to create awareness. Simply on that basis, our position would be that guidelines and advisory notes are essential and that we don't believe that the present frequently asked questions format serves as the proper educative material in the area of employment.

I actually think that the frequently asked questions format at the moment is terribly unstructured, is difficult to understand and provides little or no practical examples which to me I believe are the greatest tool in creating understanding.

MS McKENZIE: I mean, one of the problems about having guidelines and frequently asked questions and so on is that to get any understanding at all you've got to read three things: you've got to read the act first and then all these other things and then you've got to try and work out what might apply to you. Would it be better for some of these to be actually in the act?

MS BYTHEWAY: No. My belief is no. I believe that the act is in my interpretation deliberately broad and I'd like to see it like that because I think it allows for creativity, it allows for greater expansion of - or allows change in an ever-changing work environment. If it's any more confined I think that flexibility is taken away. What I do believe, Cate, in particular is perhaps leave the act as it is and then dispense with frequently asked questions. Just have really one good set of workable guidelines. I'll give you examples, such as, I think the HREOC's pregnancy guidelines, I use them all the time. They are to me a brilliant source and in an excellent format. They have a check list. They have a summary. They have an abundance of examples, and I think that's a fantastic format. I favour excellent guidelines simply to accompany the act as it stands.

Also in relation to that, Job Watch favours or recommends that there be guidelines as opposed to disability standards. Once again that's the same reasoning that with the guidelines we're creating understanding without removing flexibility. So that would be our preferred option on that basis.

MS McKENZIE: There have been a number of submissions which raise different points about the standards. One set of submissions really says that the standards are good because (a) at least they create some certainty in the area. They tell you, you know, "You've got to have a door this wide or a ramp this long and with this kind of gradient," and another set of submissions says something to what you've said. They say, "But they become inflexible," and the other big worry about them is that they might then be regarded as just setting the benchmark and so no-one is ever going to progress beyond that.

MS BYTHEWAY: Yes, look, I see both points of view and I have examined them. I would rather that there was flexibility and creation of certainty. I think that comprehensive, good guidelines can create both, because with an understanding created through the guidelines there will be a greater understanding of how the act is to be applied and then there will be greater certainty as to outcomes. Then when there's greater certainty as to the case law, that will be self-perpetuating. That's how I perceive it at the moment.

One of the terms of reference paragraphs - and we've chosen simply paragraphs that we feel that we could make some contribution to; we haven't necessarily gone through all aspects of the terms of reference and made comments on them One of the issues was who should bear the financial burden of reasonable adjustment, and that is of course one of those big issues which is not defined. I think everybody uses the terminology, but it doesn't appear anywhere as such.

What Job Watch recommends is that where a reasonable adjustment needs to be made for a disabled worker, that in the case of a large corporation - and obviously "large corporation" needs to be defined - that the corporation should pay the costs of the reasonable adjustment. That is if you weigh up the community responsibility and you weigh up the costs to the corporation, I think the responsibility to the community is greater. We then go to say that:

> Where the reasonable adjustment is required of an employer who si not a large corporation, the cost of the reasonable adjustment should be paid by a federal government-funded scheme set up for this purpose.

I don't know if you've had any sort of suggestion of that in the past.

MRS OWENS: We've had people suggest tax incentives and so on, but I suppose it raises the question as to the underlying rationale for doing one thing with the large corporations versus the small businesses. Is there an argument for example to say that governments - this is a broader community objective to have more people with disabilities in the workforce and in jobs. If that is a broader community objective, should government be the one that's responsible for that? Where should the burden lie with government, and it's a broader question that applies regardless of the size of the business in some ways.

You've based yours on really who can afford to pay and you've said that larger corporations have a community responsibility, but some could say so do smaller ones in that regard. It's a complex question really.

MS BYTHEWAY: It is a complex question. I've chosen to divide it in that way I suppose along the lines that - and I was thinking of the maternity submission that was presented last year, and that was that in that sort of capacity to pay. I do believe that overall it is an overall community, government obligation to make the work environment for disabled workers as accessible as possible. However, sometimes of course there'll be the argument, because at the end of the day it's the taxpayer that funds it, and there may be some argument about, "Well, why should taxpayers always foot the bill?"

So therefore in making it a shared responsibility, I think large corporations can carry some of that burden. So in terms of it being a taxpayer-orientated responsibility, which ultimately it would be, and a large corporation one, it could be from that sense a shared arrangement. I don't know in terms of the actual mechanics, but in terms of the maternity scheme, we're basically saying pretty much the same thing; that based on a means type of arrangement, the capacity to pay, we're saying, "Well, the government can step in and pay up to a certain threshold, and the rest of it is the responsibility of the employer."

MRS OWENS: Of course, the employer may get some benefit from employing people with disabilities. So there might be an argument to say that there is a benefit so that it may be worth investing money in making these adjustments to achieve that benefit.

MS BYTHEWAY: Yes.

MS McKENZIE: I think the real crunch comes when you have to look at, where a business is so small, that making the adjustment would actually make the business non-viable, and that might be a case where the government has to step in and say, "Well, the adjustments are necessary. We don't want to lose the business. What do we do?"

MS BYTHEWAY: Yes. I think there must be a concerted attempt by the government and community at large to make it viable for the business, and it may be because they fund the reasonable adjustment, because let's look at the overall picture. If we have perhaps government-funded scheme or something like that, let's see who benefits. The disabled worker benefits by being in the community, working in a community environment and having the self-esteem issues and being part of a community environment. That's an important progressive step for them.

The employer benefits because it's important that all aspects of community are reflected in the workplace. It's like everything that we do. We need to make sure that our community, including the workplace, has a combination of all the people that make up our community. I think that's such an important thing, and that employers and co-workers and the like all benefit from having that rich mix of people in the workplace.

MRS OWENS: You and I and Cate might see it that way, but some employers may not necessarily see it that way. They may see that the main game for them is to make profits for their shareholders. So it then comes back to ensuring that is there a way that all employers can recognise that the broader community benefits.

MS BYTHEWAY: I think that's right, but I think in terms of the various committees that I've been on in particular, we've been trying to create this shift from this bottom line, and I'm not suggesting it's going to happen overnight, but we're sort of simply saying that the bottom line is not just about profits. So therefore diversification and all those issues come into play. I know it's a big ask, but I think that if we work toward it gradually, maybe we may get there. Profits are not the bottom line in the overall scheme of things, and if it's a question of viability, at that point in time we say, "Fine. We want the business to survive, and hence that's why we think a government assistance program would be beneficial."

So it's not to create a burden on the employer, but to make us all responsible overall for what we believe is a community responsibility. Added to that, there's much greater incentive for all concerned for the disabled worker to be in the workforce making some contribution, because of course there will be a meaningful contribution to their output as opposed to receiving a pension at home. Then at the end of the day, what is the gain? There's only one, and that is the financial gain to the disabled person, no other real gain.

I think that the last thing that I probably would like to say and then I perhaps might want to pass on to Louisa to address the last three or four points, and that is the need for a proactive compliance system. I'm absolutely positive that you've had this in your submission because we've been discussing this at a current steering committee and I want to raise this with you: at present the DDA operates on a complaints driven basis which I think you well know, and that is an employer's responsibility comes under review by virtue of a complaint of an individual, and this is a reactive approach of course, and that is attending to the issue after the event.

A proactive approach we believe is required in the DDA to enforce compliance with disability standards, and Job Watch recommends a proactive compliance system which would require the employer to plan and devise a system which prevents disability discrimination - that is the preventative aspect - and which system is not dependent upon an individual making a complaint.

Part of the employer's plan as a prevention mechanism should be putting policies and procedures in place. There's nothing new about that, but what we would ask then is that HREOC be involved in this process of setting up a proper compliance system, and then monitor and audit that system, and then if there's failure to actually adhere to the compliance system, a certificate would issue - this is probably along the lines of WorkSafe and the system that operates at the moment there - and then of course if there was no improvement in accordance with the certificates, that the matter be prosecuted.

We believe that in terms particularly in the area of disability discrimination, that much more proactive measures need to be in place, and the objective of the proactive compliance system is to assess the work environment and then plan and implement preventative measures. This plan is then required to be adhered to and then, as I say, the employer would be subjected to compliance checks and ultimately prosecution. This will make those difficult process, a complaint process that the complainant must go through, hopefully somewhat easier because they would never have to go to that stage.

MRS OWENS: It sounds a bit like the Canadian model.

MS McKENZIE: It does.

MS BYTHEWAY: Yes. Look, there are various models along those grounds, but just in very broad terms, irrespective of which model that you may adopt or look at, I think that this is the requirement. This needs to be done at some stage.

MS DICKINSON: I'll just take over at this point. The next point is one I'm sure that's been made many times by a number of the submissions; that's the retention of the arrangement for HREOC's intervention in court proceedings. We just would say that we support the current role that HREOC has in intervening in Federal Court proceedings with the leave of the court. We think the proposal contained within the Australian Human Rights Commission legislation bill in March of this year is inappropriate; that is that HREOC seek the attorney-general's consent before it can intervene. We think that the current arrangement should be maintained.

MS McKENZIE: The difficulty we have with that - I mean, there are a number of issues that have been raised that are not quite within the bounds of our inquiry, but which we are intending to list in a chapter of our report so that those issues at least can be flagged, but the problem about the boundaries of our inquiry is that basically it's an inquiry into the DDA. We've regarded the complaints mechanism as so intrinsically linked that it's impossible not to consider that as well, but the problem about the intervention power is that it relates not just to the Disability Discrimination Act, but to all the acts under which HREOC has a role, and of course none of those other acts are referred to us. It just seems difficult for us to consider - this is rather a narrower inquiry. While certainly we can list it as one of the issues raised, it seems difficult for us to actually consider that as part or our inquiry.

MS DICKINSON: Certainly. We just thought that it was of sufficient importance.

MS McKENZIE: Yes. I'm not saying that you can't mention it to us. Of course you can, and of course it could be part of that list.

MS DICKINSON: Thank you. The next recommendation that we've put forward relates to request for discrimination information; that is the provisions contained in section 30 of the DDA. In the first instance we'd suggest that the clause is pretty cumbersome and it's pretty hard to understand. We'd point to the provisions within the Victorian Equal Opportunity Act contained in section 100. They're a lot more straightforward, and we just say as a matter of clarity - we'd suggest that some consideration be given to that.

We'd also suggest there could potentially be a new system for investigating complaints relating to requests for discriminatory information. In our experience many complainants are upset by the questions that they've been asked at job interviews, but really they found it hard to know where to go next. Generally people have got an innate sense that it's wrong that they've been asked about their mental health history, to be asked about injuries that they've had, to be asked about their general state of health, and a lot of people contact us and say, "I've been asked this. Surely it's wrong." They really just want some sort of endorsement that there is a law protecting them from this.

Mostly people don't want to take it further. They don't want to become embroiled in a lengthy conciliation process. They don't want to incur any costs. They don't want to enter the legal arena, and they certainly don't want to commit the time to it. So basically people want to know (1) whether there's a law protecting their rights, and (2) how and if the employer can be stopped from doing it again.

We'd suggest that there'd be some consideration to HREOC receiving complaints about this, but rather than it being the usual complaints process whereby, you know, you go through conciliation, basically if a complaint is received and it I guess provides reasonable evidence that discriminatory information has been requested and if the commission is satisfied that's a prima facie breach of the section, that the commission just write a letter to the employer setting out a number of things, basically just alerting them that a complaint has been made, "It appears that there may have been some unlawful conduct." It just alerts them to the requirements of the DDA or the prohibition - - -

MRS OWENS: It's just really a warning, is it?

MS DICKINSON: Yes, basically just saying, "Look, it has been reported to us you did it - - -"

MRS OWENS: "You mightn't know about this, but we have this act - - -"

MS DICKINSON: Yes, exactly, and "Please don't do it in the future and if you do we might have to take further action." I think that would satisfy the needs - it would potentially reduce complaints and it would satisfy people, and again it would add to the body of knowledge on the issue. So that's just a quite straightforward, simple procedure that possibly could be adopted. Just a final point I'd like to address is the supported wage system. In our initial submission we give quite a bit of information about the experience of workers in the business services industry, that is within sheltered workshops. We don't make any specific reference to open employment and people working on the supported wage within open, that is, mainstream employment.

Basically we just want to confirm our support for the support wage system as the most appropriate mechanism for assessing productive capacity and there are a number of reasons for that, which we've set out within the submission in more detail. But what we'd propose is, although it's a matter that really relates to the Australian Industrial Relations Commission and state courts and tribunals that make awards and approve certified agreements, et cetera, there's no specific requirement on them that a certified agreement only be approved if it contains that model, supported wages clause. We would suggest that there should be, and one way of potentially addressing that would be an amendment to section 47(1) of the DDA. It talks about - basically it says that an employer is not acting unlawfully if they're acting - - -

MRS OWENS: Within a prescribed law.

MS DICKINSON: Yes, all of those things. But they just say - the act says if it's in accordance with a wage assessment tool we think it should specify the supported wage system as that tool. I mean, it's accepted by unions, employer bodies - the federal government and the Industrial Relations Commission has accepted that as the best model, so we think the DDA could support that explicitly as the best one. Unfortunately people in business services - there's under-resourcing there. There's not enough advocacy for those people. Recently there have been some certified agreements that have been knocked back that contain alternative wage assessment or productivity assessment mechanisms, which are actually unjust and incompatible with the needs f those workers and the objects of the DDA. So we would suggest the position of the supported wage system be really firmly entrenched within the DDA. That's our final recommendation.

MRS OWENS: Good, thank you. The supplementary submission, just for Cate's benefit, has got 12 further recommendations listed.

MS McKENZIE: Which have been dealt with.

MRS OWENS: They have all been dealt with now, so thank you for that.

MS McKENZIE: We've had various submissions on the supported wage system in business services. Some of them say that if the same work has been done it's simply unfair that the workers ought not receive the same pay. They say also that often there's profit, extra profit, because lower wages are paid. Because you will have obviously dealt with people in these systems, what is your view about these things?

MS DICKINSON: It depends. If we're talking about in open employment, for example, I would say that the system has its own safeguards. Someone is assessed a number of times and there are annual assessments that take place. Their working capacity is tested alongside, say, 100 per cent capacity to an able-bodied or whatever worker, and there is an objective assessment done between the productive capacity of the two workers. So if it is the same worker and there is full capacity, there should be full pay. But if an objective assessment finds that someone is working - you know, they're producing 70 per cent of the output in the time - I mean, obviously it's much easier to do in say a production-type job, but it really is quite a detailed assessment. After 12 weeks there's an examination, there's an initial assessment, and then after 12 weeks into the job, and then on an annual basis productive capacity is assessed. So I do think it's an appropriate mechanism that way.

MS McKENZIE: You think in open employment that works?

MS DICKINSON: Yes, to my knowledge. I mean, it's administered through the Commonwealth Department of Family and Community Services. They're independent assessors who are separate and outside of the workplace. So we can only presume that it is a relatively objective process that's followed.

MS McKENZIE: In business services?

MS DICKINSON: Within businesses services themselves I think it's extremely complex. Even the dynamics within business services and the role that they should play, and to what extent people are doing the same type of work and what the arrangements are. Look, I would have to say I can't comment on how effectively the supported wage system does pay people for the work they produce in business services. The main concerns that have been brought to our attention have been about people not even being paid in accordance with the supported wage system, it's other mechanisms that are incorrect. People are paid - there are sort of notional minimum hourly rates that have got no objective basis. That's been more the concern rather than people being inappropriately paid under the supported wage system.

MS McKENZIE: So it's really a question of not being properly assessed at all.

MS DICKINSON: That's right.

MS BYTHEWAY: What we'd like to see in terms of the business services arrangement is that at the minimum they should have the supported wage system in place so that there's that protection, because at least we can rely on the supported wage system for some objective analysis of the worker's capacity.

MRS OWENS: I think this issue has been addressed fairly recently. There has been a business services review which involved ACROD and people with disabilities, and the government looking at this whole question. They made a series of recommendations which I understand are being implemented and it's meant to involve the imposition of a quality assurance system under the Disability Services Standard and that in turn involves a new wages system. I don't know whether you've got across this. I don't know very much about it myself, but I'm just wondering how that would fit in with the supported wages system. I wonder if the two things come together.

MS BYTHEWAY: Any mechanism, I suppose, in terms of - if there are checks or mechanisms to ensure the proper payment then we welcome either. We're simply, I suppose, saying that whatever the mechanism is in place to ensure appropriate payment then it should be a requirement rather than a full-on requirement and that the DDA should actually make it a requirement at the Australian Industrial Relations Commission in terms of approving instruments and going beyond that. But certainly if there is another avenue of business services, having greater checks and making sure that there is the appropriate payment then that's welcome as well.

MRS OWENS: I suppose it's a matter of seeing what that measure is all about, vis-a-vis the supported wages system and see whether there is some inconsistency or whether one is better than the other.

MS BYTHEWAY: Yes.

MS DICKINSON: One of the problems that we've had that's probably specific to Victoria, because we've got a lot of low-paid workers not covered by federal awards and certified agreements who fall through the cracks in that schedule 1A, under schedule 1A an employer can apply to get a certificate effectively I think for a worker to be paid at a reduced wage, but there's very few applications for those. So people are imposing their own - they're not paying the supported wage in accordance with an award requirement. They're just assuming their own wage or they are paying some lesser rate of pay without basis. We're saying that really is in contravention of - I mean, it breaches the current provision, I guess.

The section 47 exemption wouldn't apply for that because it's not in accordance with the law, but that's happening. But if it was more expressly considered that people are not just contravening the industrial law, it's also the DDA by paying people with disabilities less and imposing their own wages system. I mean, there are people being paid very low wages.

MRS OWENS: We've been hearing about $1.70 an hour, those levels.

MS BYTHEWAY: Yes, that is the reality.

MRS OWENS: We've covered quite a number of issues in the material you've just presented today, the new material. Do you have other issues you'd like - - -

MS BYTHEWAY: I think we're just about done.

MRS OWENS: You mentioned earlier that business services is outside our terms of reference and I guess we're still trying to tackle that one. But as Cate said, where things do fall outside the terms of reference, we are taking an interest in quite a few challenging issues which we will be at least referring to in our report. How far we take them, I don't know yet; it's too soon to tell.

MS McKENZIE: Also some of the exemptions are obviously the things we look at. If in fact those relate to business services then in a way we need to look to see whether those exemptions should remain.

MS BYTHEWAY: I think we just wanted - we were very much aware of the fact it was outside the terms of reference. But as you had indicated, it was something of sufficient importance in our experience to raise and obviously you will deal with that as you will in due course.

MRS OWENS: Yes. Anything else you wanted to raise with us?

MS BYTHEWAY: No. Thank you very much.

MRS OWENS: Thank you very much, and thank you for both submissions now.

MS BYTHEWAY: Thank you for your time.

MRS OWENS: We'll have a break and resume at 1.30.

(Luncheon adjournment)

MRS OWENS: We will now resume. The next participant this afternoon is Kevin Balaam. Welcome. Could you please repeat your name and the state the capacity in which you're appearing.

MR BALAAM: My name is Kevin Balaam. I've made a submission in an individual capacity. I have a hearing impairment that I have had for over 20 years, so a lot of my submission is based on my personal experiences as a person with a disability. I also have certificate 4 in community services in disability work, so I do have some qualifications in the field as well. Firstly, there are some points in my submission that I would like to clarify. I'd like to point out that the examples that I have used were not definite examples. I am willing to compromise on them, I am. I'm still personally trying to develop definitions of needs, as I mention in my submission. My submission is really a way of me putting down on paper my thoughts and helping me to clarify them and all that. So don't take the examples I use as a definite example. That can be changed - and all that. I will point out some errors in the way that I have defined the needs and all that, and also any other point of my submission.

MRS OWEN: Good. Thank you.

MR BALAAM: I start my submission about definitions - I would like you to define any words that you might use in the report. The example that I use is "victim". I think it's wrong to label people according to the actions of other people. A person who would be labelled as a victim is being labelled according to the actions of other people. So I think it's wrong in a sense to label the person as a victim. It might be more appropriate to somehow label the person who has performed the action.

MRS OWEN: The perpetrator.

MR BALAAM: "The possible discriminator" - "the respondent to any complaint", for instance. I think you should be careful about how you assign any labels to people. Another definition is the word "volunteer". I have a lot of trouble understanding how a volunteer can be unpaid. If it's their agreement that they be unpaid then that's fine. But the United Nations Universal Declaration of Human Rights - which, by the way, is hanging on the wall outside this room - says in part in article 23 that workers have the right to receive just and favourable remuneration. It can be just if they have agreed to a level of payment that is basically zero, but if that person happens to complain about poverty, about the risk of them being in poverty, then I don't think that it will be favourable that they receive no payment.

As far as I'm concerned, a volunteer is a person who makes a decision of their own free will. Yet just about everywhere, in most examples, it is only implied that a volunteer is unpaid. Very rarely do you see a definition where it says that a volunteer is someone who is unpaid. It's basically left to the individual person to decide that a volunteer is someone who is unpaid. There's the potential there then for people to be misled into accepting no payment, if they have been misled into believing that a volunteer was someone who was unpaid. I do have some interesting theories - I suppose you could describe them as interesting - about money. Terms of reference for this inquiry does include costs. As far as I'm concerned, an asset is something that a person controls and from which they benefit, and I don't see that money is something that can be controlled.

So as far as I'm concerned, money itself should not be an asset. That would have a drastic effect on the economy. It will have a drastic effect on the way that people manage their businesses and all that. I believe it would have a positive effect, in that regard, if they didn't treat money as an asset but rather more like a weight - a level with importance, and all that. So I think we should be careful about how we define the words and be important to clarify the definitions that you are using in the report. But perhaps the most controversial one might be the definition of needs. It's often said that people with a disability have special needs. As far as I'm concerned, it we will never eliminate discrimination if we make the suppliers and other people think they have to go out of their way to satisfy the needs of people with a disability.

Describing the needs as "special" is a way of implying that the person has to go out of their way to satisfy the need. It could be that the solution to satisfying their need might be something special and might not be something normal, but it's not the need itself that will be special. I think the Trades Practices Act says about a supplier having to satisfy the need. If a customer relies on the salesperson's advice - on their expertise about something to satisfy that person's need, then they have to satisfy that need. As far as I'm concerned, the product, the goods or services is not the actual need. It's a solution. It's something that I've been trying to define myself - something I've been trying to clarify. I'm still in that process.

MRS OWEN: There's an interesting thought process in economics about what is a need versus a want versus demand.

MR BALAAM: As far as I'm concerned, the difference between a want and a need is simply one of importance. It's up to an individual to apply the level of importance themselves. It can be represented in monetary terms of course, because money is a weight. It's a level of importance. So that's the only difference between a want and a need, really - the level of importance. Another issue - I go on in saying that people should be able to do anything they want. I think that's good in theory. The practice is a bit more difficult. It is. But if you agree that people should be able to do anything then you wouldn't really use the law to force people to do things. You would more like - use the law in a way to convince yourself about what you yourself should do, about how you should behave and act, rather than how someone else should behave or act.

In that sense you wouldn't really be holding other people accountable for what they do. You would accept what they do and you would simply basically cope with it. I wouldn't be surprised if people who use the law to try to get other people to do things are not very happy people in themselves. Because they are all trying to get other people to do something and you cannot force people to do something if they don't want to do it. If you take it to its logical conclusion, I suppose what I am saying is if someone wants to discriminate, let them. You simply have to cope with that. We are supposedly a free enterprise capitalist society. So if you are being discriminated against, if you have identified a need that is not being satisfied then perhaps you should go into business yourself and satisfy that need, gain the profits yourself, and all that kind of thing.

You would gain from it all yourself, rather than try to force someone else to do something that they don't want to do. I have tried that personally. I haven't been successful in that. I have had lots of ideas for businesses, but it's very difficult to start up a business, you know. It's very complicated having to write business plans and all that kind of thing. I would tend to agree that that's the right way to go about it. So rather than use the law to insist that other people do something, if the law was more directed in what you yourself can do, that it gave you some kind of mechanism to assist the person with a disability to get their own needs satisfied rather than telling other people, "Do this, do that," I think that would be better than simply trying to get them to do it.

I am not really concerned with the rationale - for the reason - that people might actually do an act. I think what's more relevant is the effect of that act on people. For that reason it might be wrong to say that people should be able to do what they want. It might be better to say that people should be able to create the effect that they want - undecided about all that. Creating the effect means that the actual act, the method of going about creating that act, might be limited and in that sense the law might be relevant in telling people that, no, they cannot do this, or they have to do it like this or something like that.

What basically I suppose I'm saying is that laws are not good. As far as I'm concerned, people might still break the law. People still break the law, people still kill and all that, despite there being a law that you cannot kill. So it's not a 100 per cent guarantee that people will obey the law. So there must be some way that people with a disability should be able to rely more upon themselves than upon other people that are discriminating. Despite that, I do have some suggestions on how the Disability Discrimination Act can be altered, amended in some ways. As far as I'm concerned - this would be controversial, I know that - psychiatry illnesses, psychiatric illnesses, I don't see that that would really be a disability. I know that I wouldn't want people to say that I have a disability simply because of the way I act or behave.

It might be wrong to treat people badly because of the way they act or behave but I don't think that really is the concern of the Disability Discrimination Act. I do suggest in my submission that the maybe the act should not refer to any punishment. I did previously say that if you accept that people should be able to do whatever they want then you wouldn't really hold them accountable. The punishment really is a way of holding them accountable. I do also say about replacing the Disability

Discrimination Act and other items of similar legislation with another act detailing the rights of all human beings that perhaps could be based upon the universal declaration of human rights or similar. That in effect would prevent or prohibit discrimination on disability grounds.

Is it really relevant to understand the reasons for a person discriminating against you? It might help you to control the situation but if you can cope with the situation you wouldn't really be interested in the reason for it and it is difficult to know, for instance, if someone has a psychiatric illness, such as depression or something like that. All you can do really is go by how they behave, how you witness their behaviour. For instance, I mean, surely people who might recognise themselves as being able-bodied, this is, not having a disability, surely other people have affected them in ways that they don't like. How do they know the reason for that? How do you know that that other person doesn't think that you have a disability? You might think you don't; that person might think you do. How do you know? Does an autistic person understand that other people think they are autistic? Because autism is about having trouble with the senses, about understanding the world around you.

The same argument could possibly be made about intellectual disabilities, if there really is such a thing as intellectual disability, because if you define intellectual disability as - based on IQ, well, it's probably wrong to define someone's disability relative to other people's IQ. It might be appropriate to define an impairment or a handicap according to other people, but possibly not a disability. I see a handicap as being what might be termed a social disability. A handicap tends to be imposed by other people creating the barriers for that disabled person, a person with a disability, to overcome and if you want people to act in a certain way that's really what needs to be overcome. It's not disability itself, but the handicap that results from it and if the person with a disability can cope with the actions of others, well, there's not really any handicap.

I, myself, have previously tried to use the Disability Discrimination Act against an employer. I didn't really believe that I would have a case, because I didn't believe within me that it was actually due to my hearing impairment, but I did investigate the possibility and I did receive some legal advice. But I didn't really have a case and frankly, from what I went through, I'm not surprised that people don't use that very much, as I've read in the submissions, because it's just too much bother. It's too hard to actually prove a case. There's the presumption of innocence, which is good. You've got to basically prove that they did it, that they're guilty, basically, and it's very hard to prove something like that, especially for someone with a disability who might experience the difficulty in developing reasonable argument, reasonable and unjustifiable are basically argueless.

Who has the better argument? That's basically what they mean, I believe, and a person with a disability or anybody else who experiences a barrier in accessing information for any possible arguments that they could use, how do they convince people that the act was unreasonable? A lot of legislation, I believe, has these unreasonableness clauses in them, ruling beyond reasonable doubt, for instance, a phrase, but if a person can't develop the arguments, they lose. If a person with a disability is known to experience those problems in developing a reasonable argument, well, the law is against them in the first place then.

MRS OWENS: Have you finished?

MR BALAAM: If you have any questions.

MS McKENZIE: What you bring up about the reason why people do things, it is a problem that people have raised in the submissions. They say that it's very difficult, say when an employer doesn't give you a job if you've applied for one. It's often very hard to tell why the employer did that. All you can say is that that has disadvantaged you, I mean, the person who has been refused the job. It's very hard to prove the actual reason that was in the employer's mind.

MR BALAAM: That is very hard to prove, that they need to give a reason really, you can't really force them to give a reason as to why you've been refused the job or the job interview, or anything. I have applied for several jobs myself. No reason why I haven't been granted an interview or anything like that, but that's just something I accept. I accept that those people, that that employer, I accept that they will do that. That's what they want to do, so well, basically they've got to do it. If I were really interested in earning an income, for instance, I will take care of it myself, I accept the responsibility myself and really, really try to develop a business, one that can be profitable, one that I can control, rather than place myself in a position where other people have power over me. An employer has power over the employees.

MS McKENZIE: The complaint or the - when you thought about making a complaint, a disability discrimination complaint, did you actually get to the lodgment stage or did you just get advice?

MR BALAAM: I was basically only getting advice. I did go to two or three different places. At that stage I was - I personally was confused about a lot of things at that time, I was. I might have just have been looking for a scapegoat, or something, that might be why I didn't actually have a valid argument, but I do believe that what the employer did was unfair, but I doubt if it was actually discrimination based on disability, or anything, I just investigated - I think I did get some advice, I did. I didn't get to the stage where I documented the complaint in writing and submitted it, though I did start to document it in writing.

MS McKENZIE: But is must be quite hard sometimes to determine whether the unfairness is because of the disability or because of some other factor.

MR BALAAM: Yes, it is quite hard. That's partly why I developed these feelings, really, to try to justify what other people do. So it's just basically too hard to do it like that, it's too hard to prove that it's based on disability. So really, why bother trying that way. It might be easier or better to try a different tack. That's really what I try to do.

MRS OWENS: Well, while we're talking about your philosophies, you do say in your submission that you think the law is the preserve of the weak, but most of the people that we've spoken to during these hearings and most of the submissions we've received have supported having some sort of legislation and usually support the Disability Discrimination Act. Isn't there a good reason for having some laws like the Disability Discrimination Act to at least attempt to protect the rights of disadvantaged people?

MR BALAAM: Yes. Well, as I did say, the theory that people should be able to do what they want, it sounds good in theory. The practice is a bit difficult to implement, so there probably should be something like the Disability Discrimination Act or something. But if you saw legislation as how you yourself should act, not how other people should act, it tends to become like a standard, an optional standard, preferably one where people have had an input into developing and all that. We'll probably never get to a stage where - look, we might never reach Utopia. So there might have to be legislation covering it.

So even though I have expressed my opinions on that, I do understand that you would just want to totally eliminate the act. I am willing to compromise of course, even though I expressed that opinion about eliminating the act. I do go on in my submission and offer some suggestions on how it can be changed and all that. In that regard I am a bit of a realist. I might just concentrate on the theories.

MRS OWENS: Again, with one of your suggestions and one you mentioned earlier, you talked about psychiatric illness not really being a disability, whereas I think most others that we've spoken to are very keen to have a broad definition of disability in the act which would cover that and much more. I mean, we've had people arguing that behaviour, for example, should be explicitly recognised. So it's enormously difficult for us. We're getting diametrically opposite views here.

MR BALAAM: Yes, you'd probably be getting a lot of opposing views in the submissions made to this inquiry. I certainly wouldn't want to be in your seat.
But - - -

MRS OWENS: But not many on that issue, apart from you.

MR BALAAM: Yes, but I don't think that - I just don't believe that behaviour, or the way you think, is actually a disability. I want to think whatever I want to think. I don't want people to say, "You have a disability because of the way you're thinking." If I don't trust you because I'm worried about you possibly hurting me, then I don't want people to say I have a disability.

MRS OWENS: I think where others may have had more in agreement with you would be on your view that the act, in some way, should reflect human rights in a more direct way and I think a number of people had made that suggestion. They tend to say that the act focuses on a medical model, rather than a broader social model. So there's probably quite a lot of submissions that are in agreement there.

MR BALAAM: If it's based on a medical model, then maybe the word "impairment" may be better than disability, impairment being something different, something like some function not operating the way it's designed to function, particularly to say that were designed. If you're thinking in terms of a social model, then you might be interested in "handicap", or something, but of course there are a lot of different opinions on the definitions and all that. I do agree that it's good that there is legislation pertaining particularly specifically to disability. It's always nice to feel that you're wanted, or like that you're thought about like that.

I do realise that there are different definitions of disability in different acts, that possibly they cannot all use the same definition, but the barriers are more important than a person's ability to do something really, because we move the barriers that are imposed by society and the person wouldn't really have a disability.

MRS OWENS: Thank you for that.

MS McKENZIE: That's quite right; that's a - many submissions would agree with you about that. That's a really interesting submission. Thank you very much for making it.

MRS OWENS: Yes, thank you, Kevin. Did the system work well for you?

MR BALAAM: Yes. I would like to thank the inquiry commissioners for providing the caption service, too, it's very useful. It is, it is a big help, yes. One thing though that I would like to say is that having to warn the organisers of a meeting or whatever about having a requirement for such a system, I consider that to be discrimination. It's a requirement that's not imposed on other people, really, it's not, but I don't blame the organisers for having that requirement if there is really no available service - commercial service - that can be done on demand, with just a few minutes warning, basically.

MS McKENZIE: That's right, Kevin, that's the problem. There are very few captioners and those few that are around, we have to book them in advance because they're used so much by the courts. That's the real reason why we had to find out when you were coming, so that we could make sure that the courts weren't going to have snaffled all the available captioners at that time.

MRS OWENS: Yes, we took the advice of HREOC and the Deafness Foundation on this and they suggested that we ask people that are coming to the hearing to let us know because, as Cate said, people doing the time captioning, as well as auslan interpreters, are in great demand and the problem is if we book people for our hearings it means they can't be used elsewhere to assist other people with disabilities, so that was the dilemma we faced, but I really do apologise for you because it does mean that you are not able to participate in the same way as other people and I think we do really understand your frustration.

MR BALAAM: Yes. I think though defining a need, as I suggested, that is not based on the solution, is not based on the technology. If that was more widespread I think it would be easier to do it then, Because what exactly is the need that the captionists are providing? Depending on how they define that service, they will have to basically go along with that. If they knew their market very well, and how they define it and all that, it's the way that they define the need that they are satisfying. Obviously it must be based on some kind of geographic location, because the captionist has to be there with them. So if they defined it without basis to geography, to being in the same location, then they should be able to provide that service by using telecommunications, or something like that. But of course the equipment that they use might not be capable of that, so their suppliers in turn would have to be capable of how they define the need.

MRS OWENS: But what you're saying is there's an unmet need now that needs to be thought about.

MS McKENZIE: Well, he's saying that the solutions have to be thought about.

MR BALAAM: If there is an unmet need or there's possibly a business idea there, where it's profitable or not it doesn't matter, so the existing suppliers, the existing captionists, they obviously are not satisfying that need, possibly because it's not profitable to do it like that, though I expect that using telecommunications it might be more profitable for them, because they would widen the market for them. There would be more customers that they could use, but of course if there's not enough captionists themselves, well, you've got that problem, but being a captionist, being able to stay in one position, they should be able to satisfy more people.

MRS OWENS: Is there a training issue as well? Do people get an opportunity to train in this area?

MR BALAAM: I realise that there might be a relative shortage of captionists, especially ones that use that special keyboard that the captionists use, but frankly at times it might not be a captionist that is necessary. If you think of a student doing a training course, for instance, the provider of that training course might ask, "Do you need a captionist," or something like that. It's not really the student's responsibility to answer that question. If the student knew that answer they might be providing that service themselves, but the student does not know what kind of service would ensure that the tutor, teacher, whatever, would be able to communicate with that student. There's simple note taking with a pen and paper; there's the captioning onto a notebook computer; there could be a projector attached to the computer for many more people to see. There could be an auslan interpreter or a teacher might simply have notes for the student to use themselves; It all depends.

The teacher themselves have to decide that and whether they will be able to communicate with the student. You can't expect the student to know that, "I will need captioning," or "I will need an auslan interpreter," or something, because it depends on how well the teacher is going to do their job and teach. How well are they going to communicate? The student can't be expected to know that before they attend the course. I thank you for letting me appear.

MS McKENZIE: Yes, thank you very much indeed. Thank you for your submission.

MRS OWENS: Thank you. We'll just break for a minute.

MRS OWENS: We will now resume. The next participant this afternoon is the Advocates for the Survivors of Child Abuse. Welcome to our hearing this afternoon, on Friday. Would you like to give your name and your position with the organisation for the transcript.

MR CONSTABLE: Certainly. My name is Michael Constable and I'm a director on the board of the national organisation and I'm horrified to find that I'm the acting president of the Victorian Branch of that, because somebody else resigned, so - - -

MRS OWENS: Okay, well, thank you, we've got the submission and I understand you just want to make a few comments about the submission or about your own views, so - thank you. I'll hand over.

MR CONSTABLE: Thank you. I read Dr Kesselman's submission and I was a little bit concerned or perplexed as to how that might fit into this inquiry. A bit hard to demonstrate discrimination happening against the people who are survivors of child abuse exactly and I was reading through the issues paper that you sent out and when I got to the end of it I found that actually there was nowhere any mention of survivors of child abuse in it and reading our submission, also, I found like, "Well, what's the disability here?"

I mean, it's entirely appropriate that I should be talking to the Productivity Commission because the effects of child abuse on people's ability to realise their potential is massive and their use of health services; their involvement with the Criminal Justice System; their dependency on welfare, all the social indicators which are mentioned in here are massively increased for the population of survivors of child abuse and costs the nation, well, goodness knows, inestimable amounts of money and effort. But then how to we find - where do I find discrimination against survivors of child abuse, because in fact the survivors of child abuse as a group of people, as a subset of the population of Australia, are fairly silent, in fact, you know. They are picked up for secondary effects of child abuse in a huge way, so we hear of them as people who suffer from, you know, all the social pathologies that you're well aware of and in fact that are mentioned - some of which are mentioned in the discussion papers, just as the effects of disability.

Survivors of child abuse tend to suffer all of those things and many more, so they're picked up in psych hospitals, in depression, suicidality, obsessive/compulsive disorder and in the dissociative identify disorders; personality disorders, which are - you know, or borderline personality disorders which are very common between personality disorders, or borderline personality disorders and depression I think you've captured a very large section of the non-psychotic users of psychiatric services. So there's a huge use of psych services and certainly the disability discussion paper here, you've mentioned about psychiatric disabilities, but often survivors of child abuse aren't classified as having a psychiatric illness.

For all that, many might come into the psych facilities for care, the cause of suicidality or depression, the emphasis is on management of that risk and so - you know, I've spoken, I mean I've worked in there, I'm a psych nurse actually and I've worked as a community health nurse in a lot of these areas with survivors and people want to talk about their abuse experiences and heal from the trauma, but in fact the psych services is more geared to managing their suicidality and so medication to suppress the symptoms of that abuse rather than to heal the abuse itself.

MS McKENZIE: And is that really the problem, that in a way survivors of child abuse have fallen through the gaps; the symptoms are often treated, but not the root cause.

MR CONSTABLE: Absolutely, yes, and I'm informed also by my personal experience as a community health nurse and trying to get some recognition of a person's childhood trauma in being removed from a family and raised in an institution. Similarly there was no recognition of what she had been through as causing any disability and yet she was massively disabled by her lack of self-confidence, her inability to cope by herself and always it kept coming up about, "Well, but she hasn't got a physical disability," you know. The recognition of psychiatric disability revolves around probably the major psych diagnoses, of schizophrenia and bipolar effective disorder and those sort of things, but the concept of an emotional disability seems not to exist in the legislation and often people do not present for treatment of emotional disabilities. Survivors of child abuse very frequently have got such a deficit of self-esteem and self-confidence that they may not seek help with that problem until well into their middle-age or mature years, so many, many years are lost without approaching for help. So nobody is really discriminating against them in that case, if they're not declaring their needs or their disability.

MRS OWENS: But it may be part of the very condition that they actually can't do that.

MR CONSTABLE: That's exactly right, yes, that's a point I'd like to emphasise and part of it is the invisibility of this problem as a disability in itself. I mean, it's a predictor of all these other disabilities which I mentioned and you've seen the submission and the sort of statistics that apply for people who have been abused as children and it's not just sexual abuse, of course, which is a common assumption that sexual abuse is the main sort of abuse. In fact, they're something like 25 per cent it mentions there of actual abuse cases that are reported, where that is the main or the most serious part of the abuse.

So the abuse experience, the traumas - and not just the traumas, the neglect is also traumatic - the abandonment and the effects of abandonment and neglect are similarly sort of life-long and reaching into every aspect of a person's development and their opportunity to participate in society which is, sort of, very much one of the key sort of terms as being an aim of the legislation.

I'm not quite sure where to go from here, except about one of the criteria in here was something about people having effective therapies, where there's some lack of an effective therapy or support or aid to somebody with a disability. Now, (a) just being the victim of child abuse isn't a recognised disability and under the social models of disability perhaps that could be reviewed and - I'm not quite sure which page I'm up to here, where there's a mention of needs, yes, on page 11, about possessing - people needing access to effective therapies, is it, on that page?

MRS OWENS: I'm sorry, I don't have it in front of me.

MS McKENZIE: Don't worry about the page number, it doesn't matter.

MR CONSTABLE: But there is very little research. In fact, I don't really know of any that compares or seeks to evaluate therapies that are effective for people who are survivors of child abuse of different forms.

MS McKENZIE: In a way this is a slightly similar case to - we had an association called the Deaf-Blind Association which appeared and made submissions to us and one of the things they were saying was that people who are deaf-blind, you can't just say, "Okay, they've got deafness; they've got blindness, let's treat them one by one." What they were saying was, "If this is a different kind of disability when they're combined you've got to treat them holistically," and in a way you're saying the same thing. People when they just look at the symptoms of survivors of child abuse treat all the symptoms one by one, without recognising that they have a common cause and should be treated - - -

MR CONSTABLE: Right, absolutely, yes.

MS McKENZIE: - - - with a common therapy.

MR CONSTABLE: Well, this is similar to the effects of people being - because I worked with an Aboriginal community for a considerable time and people being removed from their families and the effects of that traumatic removal, traumatic, you know, separation in childhood from their family was not - was similarly not - it was the progenitor of lots of disabilities and health problems and so forth, but it was not seen as justification for special consideration if somebody was applying - as somebody applying for a pension, they needed to justify that by the secondary effects of that trauma.

So somehow systemically our society discriminates against survivors of child abuse. I mean, there's lots of reasons for that: (a) it's sort of so far-reaching in its effects and so ill-defined. I mean, you can't say, "Well, this is a child abuse syndrome," because you read the lists in our submission of the effects and of course it just about mentions every pathology and possible physical health effect as well. So there's no nice, neat syndrome. It's pervasive in its effects on a person's life. So that's one reason: it's just too complex, too big.

MS McKENZIE: The other thing is too, a lot of people who have various kinds of mental illness or psychiatric disability have talked about that adjustments aren't made for them in employment to help them when they become ill and in a way that problem is even worse for people who are the survivors of child abuse, who have such a combination of symptoms.

MR CONSTABLE: Yes, that's true. The other thing that makes it difficult is that perhaps people who are survivors of child abuse are not going to go around saying, "Well, I'm a survivor of child abuse."

MS McKENZIE: Yes.

MR CONSTABLE: Because of the shaming, of victimhood and particularly the shaming around sexual abuse, and then again also for males particularly but the population generally. I mean, people don't want to be seen as victims and for males particularly, perhaps it's against the culture of masculinity in traditional terms to admit to having been a victim of anything apart from a hangover perhaps. So there's that problem too, that people don't identify, and the other thing is also that society is in a great deal of denial about child abuse. We've heard recently - and I can't quote who it was, but somebody was saying, "Oh, yes, but the effects of child abuse don't affect the person's whole life." But of course that's just what it does and so - sorry, I've lost my thoughts here. I worked last night so I'm a bit sleep deprived; I plead that as an excuse.

MS McKENZIE: We've had a few people like that, very unfortunately.

MRS OWENS: We had a man yesterday who managed to get one hour's sleep.

MS McKENZIE: One hour's sleep on his writing a submission.

MR CONSTABLE: Yes, okay. The denial of society about the extent of child abuse, if you read the stats, are commonly talking about 25 - and this is just sexual abuse, talking about 25 per cent of girls and perhaps one in eight or one in 10 of boys have been sexually abused before the age of 16 and that's just what's recognised. It's just the tip of the iceberg. That's what is reported or come to attention. I mean, it's just by itself a massive section of the population. You know, 25 per cent of women may be survivors of sexual abuse and half that of men. Now, if you take into effect all the physical abuse and neglect and emotional abuse, then what percentage of the population are suffering from the effects of child abuse. Yet somehow this is not recognised as a disability or a cause for alarm or, you know, "We don't want a Royal Commission," for instance.

But in terms of this country's productivity, in terms of those people's ability to participate in society, to realise their potential, to access the opportunities in education and employment and, you know, general enjoyment of life then the effects are massive and very, very costly to our society, as they are to the people who have suffered child abuse in various forms. The lack of treatment is, I think, something that does fit well with this inquiry, that somehow there isn't research into what works for people recovering from child abuse is an assumption often that, you know, counselling will do it or that psychiatry will somehow take care of it. But in fact the experience of ASCA is, through the stories of its members, that very often those do not provide what's needed - which is not to criticise, it's simply to state a fact that there's a lack of research about what approach works. The lack of some effective therapeutic strategies means that most survivors battle through on their own as best they can and we then have the transgenerational effects of their abuse.

As a community nurse working in one place at one time I was looking after families where there was three generations of abuse from one to the other to the other - and that was sexual abuse - but applied across the board for things like the secondary effects of various forms of abuse, of substance abuse, of domestic violence, of abandonment and so forth. Difficulty with relationships, of course, can't help but be one of the major effects of child abuse. That lack of research into effective therapeutic strategies is costing hugely in the further use of health services, welfare services and the involvement in prisons. Again that's secondary to the substance abuse that's necessary for people to prop themselves up.

The criminalisation of substances, other than alcohol, creates a massive criminal class out of people who actually are suffering the effects of child abuse. I think there's a need to - well, I'm not sure how this Productivity Commission might be able to intervene or see this as relevant, except somewhere I notice that the Productivity Commission can actually have - I'm not sure if the Human Rights and Equal Opportunity Commission has the ability to raise inquiries of its own if issues are brought to its attention. I'd suggest this might be a very relevant issue for the commission to look into because it's invisible. It's not mentioned in our discussion paper here for just that reason, you know.

MS McKENZIE: Certainly we can list issues which, while they're not quite within the scope of the actual inquiry, are related to it. Clearly, as far as disabilities are concerned, anything that gives rise to multiple disabilities - and that may in a way in itself be regarded as one - is something that can be raised. The other thing, I suppose, is it's not just a question that there should be research and some holistic treatment developed but also perhaps social attitudes, a real lack of understanding of these matters, all complicated by often the ability of the people who have difficulties to disclose what the root cause of them is.

MR CONSTABLE: Thank you. I knew you'd help me.

MS McKENZIE: To my mind that's clearly - these are matters that in one way get raised here as well - social attitudes, lack of awareness, lack of understanding and so on.

MR CONSTABLE: I think so. I just recently had another effect that came to mind which while I was doing midwifery I never thought of. It was just recently a person with repressed memory wanted me to support them through their pregnancy and birth and this was just the effects of child abuse, particularly sexual abuse on women, access to obstetric services and preventative gynaecological services. This woman - and certainly she's not alone - found it traumatic to be attended by a doctor for internal examinations even though she chose the doctor, the doctor was very understanding, and was a female doctor by the person's choice. So every support and consideration was given to her and yet it was still very, very difficult for her to deal with. In fact, in another earlier pregnancy there had been post-natal depression and all sorts of things that had been again very, very costly to society in terms of the impact.

I know as a community health nurse when I was working, the reluctance of people to access those typical women's health strategies because of effects of abuse, was quite common too. So, yes, in every area of people's ability to access services and the impact on the health budget makes it to me really relevant for the Productivity Commission but just for the alleviation of people's suffering and lack of opportunity or inability to access that without some support.

MRS OWENS: I was just going to say there are other areas as well where it can have a direct impact and that is on the prison system.

MR CONSTABLE: Sure. I work in a prison and 85 per cent, I think it's 85 per cent or thereabouts, of female prisoners have been sexually abused and amongst the general male prison population the figure is again somewhat lower in terms of sexual abuse but it's almost a sure bet that a percentage have been abused in other forms. It would be close to a complete 100 per cent. Certainly I'm familiar with a lot of abuse and the prisoners themselves, male prisoners particularly, won't identify themselves as being victims of child abuse, particularly child sexual abuse, because of the male thing again. There's even a belief amongst prisoners: if you're a male and you've been sexually abused as a child it's because you're a poofter and you've asked for it somehow. It's just damning for the person who has suffered that abuse.

There's the criminal side and then of course there's the victim side of that criminal activity, the people who are re-victimised because of unresolved patterns of abuse from childhood, and again not just in sexual assault and rape, which is very common amongst - commonly found that people who are abused in adulthood have been abused in childhood and that no less applies to males who beat their heads against a brick wall by challenging the police force, you know. A confrontation with police officers or authority figures becomes a replay of the pattern of abuse and helplessness and being overwhelmed which they experienced in childhood with fathers or other authority figures; not necessarily fathers, of course. It goes on, the patterns repeat, and every time they repeat it costs the person dearly and it costs society dearly. It involves all of our resources in health, welfare and criminal justice and so forth.

So I'll leave it at that. My plea is that we need certainly funding to be directed to further research the effects and also regarding the finding of effective therapeutic strategies and I guess I must plug for a survivors' group like ASCA - Advocates for Survivors of Child Abuse - because it was initiated by Survivor of Child Abuse and it is largely run by survivors of child abuse and on a voluntary basis. It reaches across the nation as best it can by using those voluntary efforts and by other survivors. Other survivors are more likely approach and talk to people that they know are survivors. Of course it's the same thing as women's health, Aboriginal health, Alcoholics Anonymous and so on, that principle. So it's not surprising to find one of the most effective treatment strategies has been devised by survivors themselves in the healing centre at Maya Murray in the Hunter Valley in New South Wales and those healing weeks are now run interstate as well sometimes.

You can read in our submission the effects and benefits of those healing weeks to participants who have often had a long history of frustrated efforts to find help in conventional therapeutic services. So I think there's a need to somehow encourage funding and awareness of this problem and encourage funding that can enable research by an expert body which ASCA represents. There are many professionals in ASCA who are also survivors of child abuse, including myself. So there's a lot of talent within ASCA's membership to conduct research of this sort. There's also in the membership a ready body of subjects who would very likely participate - many of whom would very likely participate in data gathering - if that research was being conducted by somebody, you know, appointed by ASCA or by people who are ASCA members themselves who have the qualification and experience to conduct the research. So I'll put that plug in there, got to put in an ad, sorry, about that.

MS McKENZIE: Thank you.

MR CONSTABLE: Yes, I mean, it is a very relevant point though because everybody who's not effectively supported and treated in their recovery and healing from child abuse just costs society many more dollars than the cost of running a program that's effective. So I'll leave it at that. You might have some questions you want to ask me.

MS McKENZIE: I've asked you the ones I need to ask, I think, as you've gone along, which is the easiest way for me to do it.

MR CONSTABLE: Yes, it's been helpful, thanks.

MRS OWENS: No, I'm fine. I've just written down a few of your recommendations as you've been going, just thinking about it, because I there is an issue, as you said about, awareness. We're thinking about that general issue in the context of this act, about people's awareness of their rights under this act. A lot of the people that the Survivors of Child Abuse will have from time to time - you list all these things that can happen, all the physical and mental symptoms, and that makes them prime candidates to perhaps be at the receiving end of discrimination and hence want to exert their rights under an act like the Disability Discrimination Act. So I've just been thinking about that issue as you've been talking to Cate. I don't know whether your organisation has ever come up against somebody who has gone through a complaint under this act.

MR CONSTABLE: On the basis of being a survivor?

MS McKENZIE: On having disabilities which result from that.

MRS OWENS: It's probably hard to run a case on the basis of being a survivor.

MR CONSTABLE: That's right.

MRS OWENS: That's the point your making.

MR CONSTABLE: This is the point I'm making.

MRS OWENS: It's the symptom of the underlying cause which would be the basis of the complaint and it's probably the basis of the behaviour of whoever did the discriminating. They're not discriminating on the basis of them being a survivor of child abuse, they're discriminating because of some other symptom.

MR CONSTABLE: The secondary effects, yes, absolutely, and the percentage of membership who are welfare dependent I suspect is much higher than the general population, of course, and there would be many who probably have, you know, had some use of this act, I'd say. But we don't - you know, I can't tell you that.

MS McKENZIE: They've not declared it to you.

MR CONSTABLE: That hasn't been declared or indeed been asked - - -

MS McKENZIE: Yes, to the association, and that's understandable.

MR CONSTABLE: - - - as part of their membership. Again this is some of the sort of research that can be done. I mean, our current membership is a reasonably small number but the turnover of membership is, you know, reasonably high. So, you know, asking people these sorts of questions as they come through as an assistance to our understanding and research and body of knowledge about the effects of child abuse would be wonderful. But, you know, again it takes somebody to collate the information and I'm happy to do it at the moment because I'm being paid to look after prisoners at night and being well paid and in between rounds I can do some of that sort of stats work. But otherwise it's people donating time out of their day to day life to manage that.

MS McKENZIE: Like I said, we can mention these issues in our list of issues which we'll hopefully raise at, you know - and you're right. It's something that people I think don't necessarily understand, that there's a whole framework of disabilities that come with this particular cause. It's not as if - it's like a whole series of separate ones, all with different causes.

MR CONSTABLE: Yes, thank you.

MRS OWENS: Thank you very much, Michael. We'll now break for afternoon tea.

MS McKENZIE: You did mention, and I don't know whether you wish to talk about it, but you might want to even put in another submission to us if you'd like, that you had done some work with Aboriginal communities.

MR CONSTABLE: Yes.

MS McKENZIE: I know that it has not strictly got to do with the subject that this submission is about, but it is an issue that obviously we're concerned about, disabilities in indigenous communities. We've been to Alice Springs and we've had some discussions with people from South Australia and Western Australia about this matter and they've just raised general questions of the compounding difficulties because of remoteness, and in those areas where there's other languages spoken there are other compounding difficulties, second languages, and cultural factors, and just a number of matters that really are sort of separate issues but are very relevant to our consideration. Would you like to add anything for our information and help.

MRS OWENS: You can take it on notice if you like.

MS McKENZIE: Or would you like to make another little submission to us.

MRS OWENS: The submission can be a one-page letter.

MS McKENZIE: Yes, just the one-pager.

MR CONSTABLE: I'm surprised you haven't received a submission from the Aboriginal Health Service in Melbourne. Perhaps they weren't aware of the opportunity. But I can say that when I worked with urban Aboriginal community, and the distance could be a problem, as it is for all Victorians who live in remote areas or near borders, borderline issues, but overall there were a lot of parallels with what I've just been talking about in fact, because they're pervasive and pervasive effects of discrimination compounding what was actually very commonly, you know, the experience of abuse in childhood. That whole generation or two of people who were separated from their families who became institutionalised as a result of, you know, running away from welfare authorities and then got caught up in that, sort of, string of, you know, or that graduation from orphanage to wayward girls' homes to jail.

The inability to access to many services simply because of that - those questions of reduced self-esteem and self-confidence and awareness of difference. The cosmetic difference was something that, you know, in somebody who already had damage to self-esteem would simply compound that lack of confidence to access services which were after all part of a mainstream - you know, part of the dominant culture which had destroyed their own culture. So big institutions were often seen by the older generation as, you know, allied to the welfare system that tried to take the children and to, you know, other big institutions like orphanages and so forth. So there's a sort of phobia of big institutions.

MRS OWENS: So big hospitals - - -

MR CONSTABLE: Big hospitals and - which, you know. It wasn't just there was this racial difference but there was a sort of whole cultural class difference approaching doctors. I mean I - we're just talking in the last, you know, 20 years I was working in this capacity and the fact is people would go to doctors' appointments - now, I know this is not confined to Aboriginal people but it's - very frequently accompanies these questions of lack of confidence in approaching a service and who will go to the doctors - forget half the things that they were going there for; would come out and forget what they had been told.

You know, I'd say, "What was that about?" "Oh, it was my liver or my kidneys or something." You know, I mean, to that level of lack of understanding because of fear and because a doctor might assume that somebody has a working knowledge of the body or so forth, you know. So all sorts - there's a whole range of things that - and that people who have experienced abusive - you know, child abuse also is very common in Aboriginal community because of the family breakdown and the high incidence of substance abuse and so forth. You know, that family dysfunction, the breaking up of family by welfare intervention, just had so many of the same sort of effects.

MRS OWENS: And that's particularly difficult presumably in the culture, even though there is - as you said, the dominant culture has made indigenous cultures more difficult - but in a culture where the family is really important, is so important. That sort of dysfunctional family of a complete breakdown perhaps makes it even more difficult for a child.

MR CONSTABLE: Family breakdowns were very common from the period of time where people were on the hop or, you know, institutionalised because of their Aboriginality and because of associated definitions of what was a right sort of a family or environment to be raised in. So often people were taken for no better reason that they were being raised by their grandmother instead of their parents, for instance. So they would be taken and then denied access to their family while they're - you know, heart-rending stories of people seeing their mother or relatives come to the gates of the orphanage and come into the orphanage and then being turned away; you know, walking away and children then being angry, you know, with their parents for walking away and actually blaming their parents instead of the system because how does a child discriminate like that.

So there were all sorts of traumas then because of this lack of continuity of family tradition and family connection and a lot of - I mean, it's just very ambivalent. People can't be reunited with families although there was some effort to drive that and that was certainly helpful and as it should be - but of course, you know, it was often irretrievable, the relationship between families, and yet other times it was wonderful. I mean, I had a person work with me from the very north of Australia and had been, you know, taken from the family, given to a white family; went to South Australia; came back to Victoria and then eventually found her family, you know, when she was 21 and they had a place for her. Her part in the society was still preserved because there was a more intact culture that she had been taken from.

So, you know, I'd have to really let Aboriginal people talk for themselves about their issues. But, I mean, they are just in broad terms my impressions and there are some things being done where Aboriginal people are running their own health service, Victorian Aboriginal Health Service, which made a massive difference to people working, particularly, or living in the metropolitan area. A lot of people are still in rural areas who found it very difficult and then they started appointing liaison officers who could help bridge that cultural gap and give support to people attending services.

There has been some progress for sure but the challenges continue and the compounding effects of child abuse are mixed in there with that. I don't think that it's getting better in fact. I think it's getting worse because you have so many people who are pain affected by their child abuse that the effects of two of them forming a relationship and having children and then those children being subject to various forms of abuse or abandonment, you know, I think - and it's shown in the figures, I mean, the stats in the submission - and the problems are compounding and I think, you know, it's urgent that something be done about it.

In terms of childhood trauma generally, a lot of what I've said about Aboriginal communities' difficulties would be addressed as well. So there is a need to see how far-reaching the effects are. Sorry about that - wandering off the point again.

MS McKENZIE: No, thank you. We stopped you leaving. Thank you very much for coming back and answering my questions.

MRS OWENS: We will now break.

MRS OWENS: The next participant this afternoon is the National Library and Information Services. Welcome to our inquiry. Is it "Services" or "Service"?

MR HARDY: It's the National Information and Library Service, NILS.

MRS OWENS: Just on one of our bits of paper, it has got "Services".

MR HARDY: It's been transposed, has it?

MRS OWENS: Yes.

MR HARDY: Otherwise it wouldn't be a nice acronym that you could speak.

MRS OWENS: Okay.

MS McKENZIE: That means you can never change your name.

MR HARDY: Yes.

MRS OWENS: Could you each give your name and your position with the service for the transcript.

MS STURROCK: Libby Sturrock, and I'm the national manager for information and library services.

MR HARDY: Brian Hardy, I'm the manager of information services development.

MRS OWENS: Good, thank you, and thank you for the submission. I will hand over to you both in whichever order you like to introduce your submission.

MR HARDY: Okay. Thanks for the opportunity. Our submission tries to raise a couple of issues that we thought perhaps others hadn't really been in a position to raise. The first of them relates to the impact of the Disability Discrimination Act on the Australian information, communication and technology industry, and the second probably is a bit more mainstream to the inquiry, which is the issue of addressing systemic matters and systemic problems which cause inadvertent discrimination and trying to find a which in which the act and HREOC can work effectively in that area, so they're the two issues that we want to cover today.

Perhaps if I start with the first one: the National Information and Library Service, through one of its owners, the Vision Australia Foundation, is part of a consortium called IT Test. IT Test consortium was running a project for the Department of Communications, Information Technology and the Arts to actually introduce the ICT industry in Australia - that's information and communications technology industry in Australia - to the sorts of accessibility rules, guidelines, procurement preference clauses and things that are starting to be implemented around the world. The reason why the national government was interested in this is because they are looking to promote export of Australian ICT products and services and they want to make sure that products and services developed here can meet international standards. So they had a program called Test IT, I think it was - it had a proper name but that was its short name - and they funded about 20 different organisations to establish testing facilities and services that ensured that small to medium enterprises had a capacity to test their products to meet various international standards and guidelines. They funded this consortium which includes RMIT University and a group called PTG Global in Sydney, with Vision Australia, to set up testing services in relation to accessibility requirements around the world.

As part of that, we did a roadshow to all states and territories except Darwin to talk to the industry and introduce why this was important, why it mattered, what was the impact of ignoring it. This is nothing to do with social responsibility or anything of that sort. It was simply if you want to export to the US and you want to sell to the US government, you comply with section 508 or you don't sell. So it's a straight commercial decision, sure, with some social benefits going along, but the whole purpose of this is part of their industry development. I visited every state and talked with industry people throughout the country and the message that came to us very loudly and clearly was that for most small companies, the domestic market is their first place and the export market was where they went to next. Now, there are some exceptions; there are some companies that see themselves in niche product markets and export is where they start off. But for most companies therefore, they build products and services to meet the needs of their purchasers within the country, within Australia.

For example, there's a small company in Brisbane who has got a fantastic product for student employment services which has been bought by about half of the Australian universities. Their competition is monster.com which is a huge multinational American based product. I met them because the University of Tasmania was interested in their product and they said, "We've got to have stuff that's accessible." That's the first university that had actually said that as a requirement, so I met with these people in Brisbane to have a talk about their product and they said, "We've never thought about this." Fortunately they had built the product very well, so it's actually not going to be very hard for them to make it accessible, but they had never thought about it. The problem will be, say, when the education standards are proclaimed later this year under the DDA that all the universities are going to say, "This is a student service. It's covered by the standards. We've got to buy products that meet it. Your product doesn't." monster.com - because they're selling in the US with the US acts and the pressure that the universities and things in the US have been under for the past three or four years really to make their stuff accessible - will be able to come in and say, "Yes, we're accessible," and this little company which has got a much better product will disappear and no-one will even know it's gone really. It's a sad thing.

So the point of this whole long and tedious saga is that we've got to get the domestic regulations setting out international benchmark best practice standards, not behind protective wall standards. So if we set the DDA requirements at a lower standard than perhaps would be expected under the ADA or some of the rules in Europe or Canada, then we're not driving the Australian industry to meet international best practice, and then when they're confronted with competition from overseas or trying to sell overseas, their products simply won't meet the market and they will disappear. It's not very expensive to make a product accessible if you do it from the design stage.

MS McKENZIE: So that's a real cost; there's a competition argument and a costs argument.

MR HARDY: Absolutely, yes. It's the sort of issue that will be picked up; the Internet Industry Association believes it's one of those sort of issues that will get picked up within the free trade negotiations that the government is negotiating with the US at the moment, and it is in the interests of all of the big US based ICT companies to push everyone else to have the same standards or at least as strong a standard as the US, because then their investment that they have made, kicking and screaming in many cases, to make their products and services accessible will be leveraged up by being able to sell to other markets and it will, in their interests, blow away the competition.

Just this week I got a newsletter from the UK that reported on the latest developments in Europe and it says the parliament - the European parliament this is - has voted to adopt a proposal, the public sector procurement directive. Included in this is that it requires that wherever possible, a contracting authority should take into account accessibility criteria for people with disabilities or design requirements when laying down specifications. Now, the European union processes are interminable and take forever to actually turn into anything that means something. But this is a process that has been going on for some time and they expect the European parliament to adopt this by the end of the year and then it will trickle down I suppose, or trickle out to the various member countries.

Now, a number of countries already have them - the Irish government, the Portuguese government. The UK government has some things although it's more on it in the breach than in the conformance, and in the area of web accessibility a number of governments are really pushing very hard in this area. So it's not going to be a big leap for them to start to do so and then he big European ICT companies will know that this is coming and they will start to make sure that their products and services are accessible.

In fact the nice story from the US, the very first contract that was let under the new section 508 requirements was for a photocopier contract for the Department of Social Security and all the usual players put their bid in. This is a relatively small contract, $US10 million for sort of mid-range photocopiers. So all the usual players put in and one of them was Osaf from the Netherlands and they sent a couple of engineers over from the Netherlands to talk to social security and said, you know, "What does this mean in practice? What are the problems people face?" So they had a look at it, had a look at what problems their particular copier would meet, went back and changed it and won the contract.

Well, it didn't take long for the likes of Xerox and things to be knocking on social security's door and saying, "Now, just explain to me exactly what the problems will be with the copier that costs $300,000 that the contract is going to come up for renewal in the next two years, et cetera. So very quickly the big companies learned that you had to take this into account and the Europeans, as I said, some of them have already seen this as a little market opportunity to break into some of the US markets. So I don't think the Europeans will be far behind the big US companies. That leaves Australia in a mess if we don't get our regulations and our procurement arrangements mirroring those best practices around the world.

MS McKENZIE: So I suppose it raises the question in Australia, how do we go about doing this? Do we have like a European directive that says to the public sector, "Your procurement arrangements are going to change in this way," or is it done through some regulatory arrangement or mutual recognition with Europe or - - -

MR HARDY: I would vote for the European approach. I think that would fit more comfortably with the Australian style of doing things but in my discussions, as I was traipsing around, I spent a bit of time talking with David Mason from HREOC about the fact that none of the Australian governments really have taken this matter of procuring products and services that are accessible seriously. The reason the US government has taken it so seriously is sort of - it follows from what's happened with the Americans with the Disability Act. If you go to a US government department it is quite surprising how many people have an obvious disability. You know, it is very contrasted - it contrasts quite a lot with just sitting in the foyer of an Australian government department, it would be rare to see someone with a dog or, you know, someone with a vision impairment or someone in a wheelchair. You wouldn't see that many.

You sit in a US government foyer and it is really quite striking, the difference. Under section 508 of the Rehabilitation Act they have to make appropriate accommodations for all those people and this is costing them a fortune and so it makes good sense as the biggest purchaser of ICT products and services in the world they actually have the market power to drive change in the industry. That was one of the big drivers for section 508 was that they could drive change in the industry so then they could purchase products and services that were natively accessible and then there's a whole lot less cost and a whole lot better outcome for their employees with a disability.

What's happened in Australia of course is that it's been impossible to buy products and services that are accessible in most cases so there wasn't a lot you could do and even the Australian government isn't a big enough purchaser to really change the industry. The contrast is really quite surprising. As Vision Australia we went and bought - I used to work for Vision Australia. We've just been transferred which is why you will get a bit confused with "we", but they're a part-owner of NILS so it doesn't really matter. Vision Australia bought a new finance system about three, four years ago. We've got a lot of employees with disabilities and so we asked our potential supplier, "Will this work with things like screen readers and magnifying programs and the like?" and they said, "I don't know. Well, you can have a look and test it out if you like." They said, "Well, what if we find there are problems? Would you fix it?" "No."

Vision Australia is looking to amalgamate with the Royal Blind Society and RVIB and so of course they all have different finance systems. So one of the things they did was to check out the options for the various finance systems and so they went back to the same company and asked them the same questions. This time they said, you know, "Yes, here's a copy of our voluntary product assessment template which we prepared for the US government. Have a look at that. Tell us if there are any issues. We'll talk to the developers in the US and see if we can make any changes that you might need." The difference was enormous. So really there is now an opportunity and no real reason why people like the Australian government and the state governments and things don't have procurement policies that say, "We should be buying accessible products."

If we don't get the Australian industry up to speed, the inadvertent impact of that will be to wipe out a large part of the Australian ICT industry which is in no-one's interest so we need to push the Australian Disability Discrimination Act and get it out to the industry and talking about - this is where HREOC can play a role if they're allowed to, if the act allows them to take this sort of proactive role in pushing systemic change which has the impact of reducing discrimination which is generally inadvertent.

MS McKENZIE: So you would like a power for HREOC to be able to develop standards for accessibility of IT?

MR HARDY: Or at least be involved in - have a clear role for going out and working with industry and I think that really leads us into our second point about the act's role in systemic change as opposed to dealing with individual complaints, because an individual complaints based act can never deal with a systemic problem across the Australian ICT industry who don't think to design their products and services accessibly. I mean, you go and you say, "Well, I can't use this accounting program so I can't do my job as an accounts clerk, or I can't get promoted into this job," or whatever the complaint relates to, and the employer says, "Well, I can't buy a product that would meet your needs."

So, you know, sad as that might be, the person ends up being - their opportunities are constrained, whereas if HREOC can look at this as an issue and has a role, and a clear role, in raising this issue, convening groups, et cetera - which we'll talk about a couple of examples of where they've done that very successfully now. But they need to be resourced and it needs to be very clear that they have that role.

MRS OWENS: Just coming back, before you go onto the next issue, to HREOC's role you said that it should be working with industry. Is that the ICT industry, to make sure the products are accessible, or is it - - -

MR HARDY: It needs to raise the issue of Australian government, for example, not having procurement requirements that require it to purchase accessible product.

MRS OWENS: So it's working with governments to educate them that they need to make sure that these products are easily accessible.

MR HARDY: So that's part of their role. But then HREOC and the government then need to go and start to work with industry so that products and services are available that would allow the government to then purchase things that are accessible without just purchasing stuff from the US, which would be what would happen if we simply said, "Bang, now you must purchase everything that's accessible," in the same way as the section 508 requirements do with the US federal government. Then there would be very few Australian products that they could buy. It's hard enough for an Australian company to sell to the Australian government anyway.

So we don't want to put any more barriers in their place and of course why we're interested - and we don't have a brief for the Australian ICT industry, but obviously these benefits have enormous benefits for people with disabilities in all employment, education, everything else. If the products and services, the tools that they're using, are built accessibly as a automotive of routine then that makes life a whole lot easier for everybody involved and hopefully will make a big difference to the opportunities that people have.

MRS OWENS: But just coming back to HREOC again, it would work with government departments to make sure that they have procurement policies.

MR HARDY: Yes.

MRS OWENS: Which would be procuring of accessible ICT products. Now, that's a different approach to the European approach where there's a directive, a government directive saying, "You public agencies, thou shalt procure accessible products." You've recommended two slightly different approaches. You could have both but you see, the HREOC approach is a softer, cooperative - you know, provide the information, encouragement and so on.

MR HARDY: Yes, and that's a very important role for HREOC.

MRS OWENS: The other one is more hard-hitting.

MS STURROCK: "You must do it."

MRS OWENS: A "you must do it" approach.

MR HARDY: In a sense that's about the constraint in government's response to its obligation to comply with its own act. So the government has to respond, or any employer or any organisation has to respond, to its responsibilities under the act. So HREOC's role is to educate someone about what their responsibilities are. That organisation's role then, as I understand it, would be to take the necessary action to respond and in this case the necessary action relates to the Australian government putting in some sort of arrangement like the Europeans are doing, et cetera, taking the existing wishy-washy procurement rule, which basically says that when you put out tenders you must take account of the Commonwealth disability strategy and when you look at the Commonwealth disability strategy it says you should take account of your responsibilities under the DDA.

In practical terms this is meaningless. So they need to take that and make it into something meaningful, but that's not, I don't think, an issue for this hearing. So I'm trying to focus on what the role of HREOC on the DDA is. The DDA already says very clearly that you have a responsibility as an employer to make sure that you're not discriminating against employees and one of the ways is to purchase products that are accessible. But that hasn't happened because there hasn't been products that are available, et cetera. But that has changed: now there are. So now HREOC can be starting to push and saying, "Well, you people really aren't doing a good enough job. You have to start purchasing products that are accessible."

But then there's an issue, which is the one I was raising, about making sure that we don't create a problem in the economy by doing that. We do it in a way that actually expands the efficiency and effectiveness of the Australian economy rather than destroys industries and really that's the choice and we want to do it in the way that adds to the efficiency of the Australian economy, promotes export competitiveness and all that sort of stuff, and it can be done relatively easily.

MRS OWENS: What about the private sector, how would you deal with the private sector? You've talked about government procurement.

MR HARDY: I think that in this sort of area government really provides a lead. So if the government is leading and the government purchasers are saying, "You have to provide me with products that are accessible," then private sector people are going to buy the same products. Now, the big private sector companies, the banks, the utilities, et cetera, the ones with disability action plans, I mean, they're already sort of thinking along these directions and if they're advised that this is happening and that the products and services are available and this is what the government is doing, then I think it will trickle out, at least to the larger companies, and the smaller companies, the smaller things, I mean, they don't know what to ask for.

So really they've got to make sure that even when they don't ask they get stuff that works. If we can get stuff that's in the market and everything in the market just works, then the small to medium enterprises, they just won't have a problem. If they employ someone with a disability or someone with a disability applies for a job, they can check, "Yes, you can use my software - great." I mean, that's hopefully how I would want it to work. Big private sector companies like the banks and things are really, sometimes willingly and sometimes not so willingly, actually making some big steps forward in making some of their customer services stuff accessible. But I don't think anybody is really focusing on their employees and I think this is where the software industry and the hardware industry is so critical.

MRS OWENS: Thank you.

MR HARDY: So the other issue relates to HREOC's role in addressing broad issues. When I had a bit of a look at the HREOC submission as I was writing this one, it identified that there were some problems with the act that prevented them from addressing some systemic issues and certainly there are problems with resourcing. So we would like to just talk about a couple of examples of where HREOC has had a role so that it explains why it's important and how that role is so positive, and simply encourage that whatever changes and recommendations you make to the DDA and to HREOC's role - - -

MRS OWENS: Take that into account.

MR HARDY: Yes, and enhance that rather than restricting it.

MRS OWENS: Yes.

MR HARDY: So, Libby?

STATUTORY: Brian has picked up on a very important point in terms of inadvertent discrimination and what I want to talk about is how the Copyright Act inadvertently discriminates or perhaps doesn't actually, in practice, do what its intent is and the intent of the Copyright Act, as I understand it, is to protect the intellectual property rights of the writer or the owner of the copyright. The law requires people to take account of that when they're purchasing. It requires people to take account of that when they're reproducing in alternate formats.

We as an organisation that actually create audio or braille or E-text for students and recreational readers have to take that into account. But we have a special licence which assists us in doing that and we can produce items quite readily and merely indicate that they have been produced under that licence and report that to the Copyright Agency Ltd who is our licensing agent under the law. However, when we're doing that, what we're finding and what we have found in practical terms is that the publishing industry is not aware of its own obligation. They often put, sometimes consciously and sometimes unconsciously, quite big barriers in our way and I'll give you a couple of sort of anecdotal examples.

Questions, some basic questions: why can't a child who is print handicapped obtain an alternate format version of Harry Potter at the same time as it's released in print? Why did student X not obtain his music braille score in time to sit his examination and thereby failed his course? Why does NILS who are funded by a combination of taxpayer and charity dollars have to expend a large amount of their own limited resources in searching national and international databases for material before they can produce it themselves, and why does NILS have to approach publishers over and over again with the same sort of requests for E-text to expedite the process of producing an item for which a person is already waiting and which may be time critical for their studies or other reasons?

The reason why all of those things happen is because of copyright. HREOC in its role has initiated a round table on copyright with people like ourselves, the National Library, the Copyright Council, publishing industry representatives, people from universities, to try to bring those sorts of questions to the table, work out ways of getting around it. The Copyright Act that was recently amended, about two years ago, has left out, for example, entirely forgotten about music and music is one of the few areas in which a print handicapped person can actually compete with a person on equal terms. So whenever we want to put something into music braille we have to seek copyright permission. This became such an onerous task for us, because we were constantly being refused permission to do it, that we actually negotiated a blanket copyright with CALD's assistance, with the music industry.

But my question is: why should we have had to do that? We have extraordinarily limited resources. Every time we need to produce something we have to search to see if it's available and I think the terminology is something along the lines of "in a reasonable time at a reasonable cost." Now, that search might be something as simple as accessing our national database, the kinetica database from the National Library but that costs us 80 cents each time we do the search. It costs us a staff member to do the search because they have to be a skilled person to investigate. If we have to go internationally and we often do - and Harry Potter is a perfect scenario. It's not available in Australia. We found that it was available in America. We had to pay American dollars to acquire that. We're obliged to buy the commercial object because it's there before we produce it.

So there are various steps in the way that HREOC is helping us to address by bringing together all of those people to the same table to discuss them and it's particularly relevant for students, as you can imagine, because to actually produce something in braille for example - and I'll give you some figures here - if we were to produce an average-size braille book of about four volumes, 200 pages roughly, if we had to transcribe it ourselves using a trained transcriber and proof-read it, it would take about 131 and a half hours to do. If the publisher has provided us with an E-Text at the same time as the item is produced or even after the item is produced, it takes 62 hours and 10 minutes which is a huge saving.

For the student it may mean the difference between passing and failing - as simple as that, passing or failing your course. What we would like to see is HREOC to have some more resourcing and empowerment to continue the good work that they've already begun. We'd like to see many more of these issues to the table. What would solve the problem, of course, and this isn't the role of this commission, but what would solve the problem is to have a copyright requirement, and I was amazed to actually receive just before I came out today an email from somebody to say that there's been some recent changes to the law in the US, and I'll just read the email out to you. This I guess is what nirvana would be like for us.

> On June 26 the senate committee on Health, Education, Labour and Pensions, HELP, approved the Individuals with Disabilities Education Improvement Act, IDEIA, which provides students who are blind or who have other print disabilities a civil right to receive textbooks in an accessible format in a timely manner. It requires states to adopt the national instruction materials accessibility standard which will then be established by the secretary of education. The IDEIA also adds a new provision to the individualised education program that would require schools to consider providing specialised education and related services to students who are blind. It's tentatively scheduled to reach the floor of the senate on 23 July.

So that is actually a requirement that when you're producing something, getting it ready for publication, that you think of people like NILS, you send the e-text of that thing before it's produced so that there is sufficient time for us to prepare it in an alternate format for a student who may be blind or vision impaired. So that like the counterpart sitting next to them in the classroom, they'll have that textbook at the same time and they don't have to go back to their lecturer or their school teacher and say, "I couldn't do this test, I couldn't do this exam, I couldn't do anything because I didn't have them in time."

So HREOC have already started the process of helping publishers understand the complexities of the business in which we work. But like us I guess, you know, I feel that they're under-resourced to actually have any real power in that area. It's been quite a heartening experience to hear publishers suddenly begin to recognise that, but we've been saying this for a very long time on an individual basis each time we go. It's a cost to us, and as I said, we're funded by a combination of taxpayers and charity dollars that are spread pretty thinly.

MS McKENZIE: So you have to go for each new book. Is that how it works, in effect?

MS STURROCK: We have to first research to see if it's available already.

MS McKENZIE: In the public domain?

MS STURROCK: In the marketplace, yes. For braille we would tend to just search in Australia because there aren't many other braille producers in Australia that would meet that in a reasonable time at a reasonable cost criteria. So we wouldn't necessarily go and buy a Canadian braille book because, you know, it might take us yonks to get. Audio is a different scenario because audio is quite a competitive market with some big overseas players. But we'd like to see the perfect world, of course, where a blind child has a right to Harry Potter at the very same time as a child who can read the item.

MS McKENZIE: If it's not available in braille - - -

MS STURROCK: We then have the right under the statutory licence to produce it ourselves without going and approaching the publisher. But we want to approach the publisher about is to get the e-text so that we can do it simply and, you know, effectively and efficiently and in a timely way.

MS McKENZIE: But that copyright legislation applies to other countries as well. Is that right? It doesn't matter - - -

MS STURROCK: I'm referring to the Australian copyright legislation here at the moment.

MS McKENZIE: Yes. So how does that - - -

MR HARDY: There are similar provisions in the US copyright laws.

MS McKENZIE: That's what I'm asking. How does it measure with international copyright?

MS STURROCK: The UK recently rewrote their copyright legislation in really, I believe, a very, very meaningful way, in which they talked about people's rights to have whatever format suited them. They were even so specific as to nominate that someone has a right to expect a particular font size if that's what they need. So they've taken that on board in a great deal more detail and I believe more powerful way than our current legislation. Our current legislation is under review and I guess that, you know, submissions will be made to reconsider some of the anomalies, particularly the music one, which was just a forgotten thing. In America there seems to be very much this movement to at least make sure that students, that that right is enforced and reinforced under law.

MRS OWENS: I just want to understand, that's all. So, okay, you want a particular book. You've looked in Australia, it's not in braille, can't find it. Perhaps you look overseas, it's not in braille, still can't find it.

MS STURROCK: Yes.

MRS OWENS: Then you discover that the people who publish this are overseas publishers. What do you do?

MS STURROCK: We approach them. Well, we do one of two things. We either buy the print version and scan it, which takes an immense time and also runs a greatly higher risk of error because scanning errors can require proofing once or twice, or we approach the publisher and say, "Can you please provide us with e-text." They may do one of four things. They may say, you know, "Don't want to, don't have to." They may say - and this is particularly for overseas, we're talking about - they may say, "Don't know what you're talking about," give you the run around, send you over a lot of different places. They may say, "Fine, but we're going to charge you 10 times, eight times, 15 times what the print copy will cost you."

MRS OWENS: You then have to pay, or ultimately the student has to pay.

MS STURROCK: Yes. Or they may say, "Fine, you can have it for $20." So there's a number of different scenarios. But often to us it seems to be a whim rather than a conscious effort.

MRS OWENS: But once you've got that, then the law will permit you to reproduce that for the student.

MS STURROCK: Correct, the law permits us to, yes.

MRS OWENS: But whatever we did at this end is not going to alter your relationship with overseas publishers.

MS STURROCK: No.

MRS OWENS: So all you can hope for is if things are tightened up at this end is it will help you with the Australian publishers.

MS STURROCK: Yes.

MRS OWENS: With the Australian material.

MS STURROCK: Yes. I see there's two aspects. There's a change to the copyright law, which is not within the boundaries of what we're discussing now, and that's why I called it really nirvana, you know, it's something that we as an agency will continue to work toward. But the other is to empower HREOC to at least pursue it at the moment and to encourage publishers to understand their obligations and that they can't outright refuse. It's a justice issue and it's an accessibility issue. We're prepared to pay. We're not suggesting we don't pay. But refusal based on whim or misunderstanding is not an excuse I don't believe. That's the issue. Particularly for smaller publishers who often say, "No, can't have it, sorry, forget it." So I think that it's an educative supportive advocacy role that - - -

MS McKENZIE: Take the publisher in America you find, to continue my example. Any obligation that that publisher might have in the States to provide accessible formats for that material doesn't sort of translate in any way to Australia. In other words they don't - - -

MS STURROCK: No.

MS McKENZIE: If you had been in America you could have asked for that and you would have had a right to it.

MS STURROCK: Correct.

MS McKENZIE: But if you're here you have no right.

MS STURROCK: No.

MR HARDY: I mean, much the same issues had been happening in the US in terms of publishers not understanding their responsibilities and so a number of states had started to introduce their own regulations, and the American Publishers Association went - I'm trying not to swear.

MS STURROCK: They were thoroughly perplexed.

MR HARDY: Yes, about the differing rules and standards that were going to apply and they had to provide material in different formats in every state that introduced its own laws. So this federal law that's in the process of going through now really has had the support of the American Publishers Association after they finally woke up to the fact that they had no choice. They're going to have to do this so what's the way we're going to do this in the most efficient way possible. So then they worked with the disability agencies, the ADA administration and the like to try and come up with a sensible approach, and this new IDEIA act and the standards that will be developed is really that response. So that all the American publishers, it's easy and cheap and the safeguards are there to stop the e-text being ripped off and sent over to somewhere else to produce thousands of the pirate copies of their book and all that sort of stuff that they're worried about. It's a good example of where, if you can get a body with reputation and standing who can work with an industry to say, "Look, you have no choice here, you're going to have to do this. Let's work out the best way of doing this in a way that it's going to be economically efficient and practical and useful for the people that the law is intended to benefit."

MS McKENZIE: The real difficulty of applying this to the DDA is that it's not particularly helpful in this area because the people who it looks at, as far as the provision of accessible material is concerned, take education for example, is the school. The school, if it's an independent school, the state, if it's a government school, and it's not looking at NILS, for example, who, if you take one step back, are the people who might be trying to produce this, this material, and it's not looking at the publisher who's the one behind NILS.

MS STURROCK: Yes. The school can ask us as a third party under the same legislation to prepare or produce that item on behalf of the student. So there's a link there, I guess. We become the outsourced agent for the production of the item.

MS McKENZIE: Have there been complaints made against NILS itself?

MS STURROCK: Not to my knowledge, no. There certainly has been discussion in the tertiary industry about delays, and that's to do with again, you know, thin resources, that we have thin resources, and if the demand is great - but I don't believe formal complaint has been made, no.

MS McKENZIE: Certainly in one of the other submissions - I'm sure Helen will remind me who it was, but there was a question raised as to the cost, one of the school submissions, I'm sure. There was a question raised as to the cost of obtaining materials in braille for students.

MS STURROCK: We've recently moved to a model which is cost recovery, because until recently I guess the model that we worked under was the pure charity model. As demand has risen, and funding is not assigned directly to us, it's assigned to those educational institutions, we've said, "Well, let's sit the cost back where it belongs," which is with those educational institutions and worked to cost recovery. We're not permitted to make money on those things and we don't intend to or have any desire to, but we have to recover the costs. So that may be a comment relating to that subtle change if you like from providing these below cost.

MR HARDY: Not so subtle we have to pay bills.

MRS OWENS: It may have been the Blind Citizens of - - -

MS McKENZIE: Maybe.

MRS OWENS: It may have been, because I can't remember either.

MS McKENZIE: But certainly there was a comment made.

MR HARDY: Obviously it's much cheaper for us if we get the e-text. Then it's half the price to produce a braille book than it's going to cost.

MS McKENZIE: Then you'll pass that on, pass that saving.

MS STURROCK: That's right.

MR HARDY: It's not the cost of the braille paper really that's significant, it's that hundreds of hours of time.

MRS OWENS: Do you follow the new Department of Finance cost recovery guidelines that we helped develop?

MS STURROCK: I'm sorry, that's not my area of expertise.

MRS OWENS: Okay.

MS STURROCK: I wouldn't like to say yes or no. I just don't know, because, you know - - -

MRS OWENS: It's just an interesting issue because we at the commission a year or so ago did an inquiry into cost recovery by government agencies and developed some guidelines which have been adopted for practice. Those guidelines give indications of when full cost recovery is appropriate versus partial cost recovery or zero cost recovery in some cases. I'd be really interested to know how your policy fits in with those guidelines. Maybe you could come back to us.

MR HARDY: I guess if we were 100 per cent funded by the taxpayer we could have that luxury, but - - -

MS STURROCK: Yes.

MRS OWENS: But there are guidelines that are now meant to be followed, that's all I'm saying.

MS McKENZIE: But before you didn't have full cost recovery, so how did you bear those costs previously?

MS STURROCK: We bore them by not producing items in a timely fashion. We bore them by stretching out thin resources even further and by managing demand to such a degree that it was pointless to continue that way really.

MR HARDY: And the deficit just grows. It's just been growing every - and the agencies said we cannot - the owners, the three agencies that own NILS, simply can't keep putting more and more and more. I mean, just running a library is not a - you know, the government funding doesn't - it's about a quarter of cost, something like a quarter to a third of the cost of actually running the library. So we're already putting in, or our owners are already putting in a vast amount of money each month to run that. That's not unreasonable, that's okay, it's why we go out and raise money. But we don't go out and raise money to help a university or a school meet its obligations to its students under the Disability Discrimination Act. That's not why we've gone off and, you know, rattled the tin or sought that charitable bequest or that trust donation or whatever it is.

I mean, that's somebody else's responsibility and by us subsidising it, it meant that that's what - we were taking the money that had been given to us for one purpose and using it for a purpose that our donors certainly wouldn't have thought was reasonable, and we just couldn't go on. Part of the reason for the cost is because of the way that we have to get the material in the first place makes it very difficult and very expensive for us - - -

MRS OWENS: Yes, very time consuming - - -

MR HARDY: - - - and terrible for the students because of the time delays.

MRS OWENS: We're not doing an inquiry now into cost recovery - - -

MR HARDY: No.

MRS OWENS: - - - but it's an issue that was raised in this case.

MS McKENZIE: No, no, but it's just a matter - I wanted to raise it with you because I'd much prefer to find out what you say now than leave that matter in the air, as it were.

MRS OWENS: And it's just to alert you that that issue has been raised by another participant.

MR HARDY: The last issue that we mentioned in our submission, the last example, is really about the - if I put my glasses on I can actually read what I've written here - the accessibility - access to accessible digital information and the means to manipulate it. It's not sufficient to access information, you've got to be able to do something with it. In the digital world we're no longer passive recipients of information, we actually manipulate it, do things with it, use it ourselves, send it back somewhere, et cetera. I thought it was interesting to compare the HREOC's experience with trying to understand how well governments have complied with their own policies about accessible web sites, compared with what happened in Sweden. In Sweden the National Audit Office commissioned an organisation to do a thorough review, an audit, of - I think it was about 92 government web sites and they had had about three years, I think, of very clear and quite strong requirements to deliver accessible online services. The outcome, I think it would be fair to summarise it as abysmal and it's caused quite a stink in Sweden, because, you know, a lot of people have been very embarrassed because they've been telling government inquiries and things that they comply and when actually somebody at an audit office actually checked the answer was no, they did not. So it's a very hot political issue - I mean, this report has only happened in the last couple of months, so it's a very hot political issue.

HREOC wanted to do something a bit similar and actually see whether the accessibility requirements that governments had set in Australia had actually made any real difference, so did they have online services that actually worked for people and they called for an expression of interest from people who thought they could do this and to talk to them about how they might do it and they haven't done anything because basically the cost is far beyond their resources and I think it's just - it's a good illustration of HREOC could have made a very strong contribution to the public debate in the area and to helping to shine the light on practice as opposed to rhetoric, but they've simply been unable to. The nature of their resources and their capabilities just means that they haven't been able to do it. I mean, they're trying all sorts of creative ideas, et cetera, but so far, as far as I'm aware, they haven't come up with any way to do it within their very stretched and limited budget.

MS McKENZIE: So they are simply unable to say whether the policy of having accessible government web sites is being implemented or not.

MR HARDY: No. I mean, they can say that people - that the National Office for the Information Economy sent out a survey and asked all of the government departments if they'd conformed and they all said yes. Well, they didn't all say yes, some of them even said no, but you know - that was a bit like happened in Sweden. Everybody said yes, but the reality was they had no understanding of what it meant, even if they'd tried and often they just simply said yes without bothering to check. You know, it's a pretty easy thing to - some middle-level official simply ticks a box that says yes in some survey or other and the chief executive simply hopes that nobody notices. I mean, you know - so unless somebody is looking and somebody is checking, really it depends on the goodwill of various organisations.

I mean, some federal government departments and some state government departments are fantastic. They've done - they put enormous resources and efforts into trying to make sure that their products and services really are accessible to the whole of the Australian community and they do a fantastic job, you know, way beyond what anybody could reasonably expect. You know, people like the Electoral Commission and the like and Centrelink and places like that, where they really have - take their mission to the whole Australian community incredibly seriously, but most of the other ones do not. So it's lip-service and tick a box and - so, really, to make online government or e-government accessible, which is really what's - down the track it will be very difficult for anybody to be able to function at a reasonably high level in Australian society without being able to access digital material.

MS STURROCK: A continual disenfranchisement really.

MR HARDY: Yes. I mean, you won't die, but your chances of living a full, participatory life without being able to access digital material within, I don't know, 10 years probably, would be - it's already limited, but it will become increasingly impossible.

MRS OWENS: I'm just wondering if HREOC is the right body to have this ongoing role of monitoring what is happening.

MR HARDY: Maybe it's like the National Audit Office in Sweden, but somebody needs to have it.

MRS OWENS: What about - I don't know whether this would be appropriate for the Australian Communications Authority, or would that be the wrong body? It's just - it needs to be something that - - -

MR HARDY: I would be an expert in their act, but I wouldn't think - - -

MRS OWENS: - - - that's done regularly, because otherwise there's the potential of slipping back and if HREOC has got a lot of other things that it's doing, I'm just thinking aloud about other bodies that could take on this role.

MS McKENZIE: There needs to be clear understanding also of what it is - what accessibility is, as long as they understand that.

MR HARDY: Well, the OnLine Ministers Council have all adopted that work content accessibility in the pipeline as 1.0 as the benchmark, so there's no dispute or discussion about what the benchmark is. It's a matter of determining whether anybody is complying and - - -

MS STURROCK: Monitoring and ensuring compliance - - -

MR HARDY: Yes.

MS STURROCK: - - - are two different things, too and I guess that's the issue that once it's monitored and it's shown not to comply, what happens then? How is that compliance enforced?

MR HARDY: I guess that's a real question about whether the DDA has a sufficiently broad scope to start allowing bodies to talk about that in a proactive way, rather than simply just responding to individual complaints, which certainly has its strengths, but this is perhaps one of the limitations.

MRS OWENS: Another way of getting at it could be through action plans. If, as some people have suggested, action plans were made mandatory, say, for government departments, that could be an inherent part of the action plan to make digital information accessible and then those plans would be monitored and that could be HREOC or it could be some other - - -

MR HARDY: Does anybody monitor the plans now?

MRS OWENS: No. Well, we're looking at that issue as well. I'm just thinking through - - -

MR HARDY: Exactly.

MRS OWENS: - - - all the different options, there must be a few ways that it could be attacked.

MR HARDY: We've been working with a number of universities and the first thing we do when we start to go and work with them is to pull up their disability action plan; we check on the HREOC site and look to see whether they've lodged one and I just read something - no, I won't say which university it is, it's probably not fair, because I'm quoting from someone else's work and I haven't looked at it myself, but this is an organisation that lodged an action plan very early in the process and was widely commended for it and there are a number of policies that require staff to comply with it, et cetera, but you cannot find it on the Internet, the Intranet or in any other way and the reason is because it is so out of date and so irrelevant to current needs, that they've simply withdrawn it and they're doing a review, which has been going on for about three years, I'm told.

MS McKENZIE: It's not a priority by the sound of it.

MR HARDY: Sort of every year there's a change of staff and so it goes back to square one. I mean, yes, again it's the monitoring and the taking it seriously. It gets taken very seriously at the time it's done, but these things have to evolve and be living documents and plans, rather than dead things that just sit there and - - -

MS STURROCK: And that's what happens very much with us when we're approaching publishers, because you can often find somebody on a personal level that you can communicate with quite profoundly and who understands the obligation and understands the need and will do - you know, walk on water for you. That person leaves, or is moved, and then you're back to square one.

MS McKENZIE: That's a submission that's been made on a number of occasions, it's very unfortunate. But it needs to be something that's made part of the culture of the organisation, so that it's not just the baby of one person, that's the whole problem.

MR HARDY: So I guess the points that we wanted to summarise is really the issue that the DDA has to be at the best practice end of international laws in this area and it has some very significant impact for anybody trying to export out of Australia and increasingly - particularly in the ICT industry. Secondly, that those issues that were raised in the HREOC submission, I presume they're right, about things that the act doesn't allow them to look at, need to be addressed so that they can step back a little bit and look at the causes of discrimination that they're confronted with with individual cases and to step back and try and tackle some of the root causes, rather than just dealing with the symptoms and lastly that HREOC's role in addressing broad areas or systems that cause inadvertent discrimination, need to be clarified, strengthened and better resourced.

I mean, the impact of when they had the reference from the attorney-general for the access to electronic banking and services was profound. It has had a huge impact and all of the banks are working to really make things a lot better and that's really been driven by that inquiry, but more importantly by HREOC's capacity to follow it up and to work with the banker's association and to continue to push the issue so that it doesn't just - it isn't just a sort of one-day wonder and then disappears. That role of being able to push and continue to strengthen it has really been an important - and my sense is that it's been a bit of a stretching of the mandate a little bit, you know, except when it's a reference from the attorney-general. But it has been because people have seen the need and done it and hope that no-one sort of says, "No, no, this is not part of your role," and it needs to be clear that it is part of their role and they get enough resources to make it meaningful.

MRS OWENS: Good, thank you, and I'm very grateful that you came on a Friday afternoon. Your submission is a different sort of submission for us and it's something that we need to think about because it's one of the underpinnings of a lot of other things that we're thinking about, let's say access to information and accessible formats and so on, so thank you very much.

MS McKENZIE: That's tremendous.

MS STURROCK: Thank you very much indeed for the opportunity.

MS McKENZIE: Yes, thank you.

MR HARDY: I mean, if you want to follow up anything, obviously feel free to - if in writing up the report you want some clarification or references or anything like that, you know, very happy to provide it. I think all our details are with the secretariat, so - - -

MRS OWENS: Thank you.

MS McKENZIE: We'll just break for a minute.

MRS OWENS: Okay. We will now resume. The last participant for the day is the Breast Cancer Network Australia. Hello, and thank you for coming and could you each give your name and your position with the network for the transcript.

MS TIMBS: I'm Susan Timbs. I'm the policy officer for the network.

MS EVANS: And I'm Gerda Evans and I'm the Victorian state representative for the network.

MRS OWENS: Thanks very much. We haven't got a submission but I know that you want to tell us a little bit about the experiences you have at the moment with women with breast cancer and insurance issues. So I might hand over to one or both of you, whoever wants to speak, to lead us in on this.

MS TIMBS: Okay. We have found over the last couple of years that we have had a number of our members raise with us difficulties they have had in obtaining various types of insurance, once they disclose that they have had a diagnosis of breast cancer at some stage in their life.

As I say, we have had comments about a range of insurance types and because of the consistency of the issue being raised, we actually sent out a survey to all of our members in June, asking a number of different questions, but in relation to the insurance we asked whether the members have experienced difficulties in obtaining either trauma, life insurance, income protection or travel insurance. To date we have received over 700 responses to our survey, but of those, 181 have indicated difficulties in relation to obtaining insurance. So it is a high number of those people.

MRS OWENS: Out of how many members in total?

MS EVANS: Actually, it's about 7000 on the mailing list but a lot of those - this survey was sent out in The Beacon, a newsletter, and a lot of those, The Beacons, even though the total mailing list is 7000 plus - a lot of them go to doctors' rooms rather than individual members. So it's a little bit difficult to assess how many individuals are receiving them.

MRS OWENS: But 700 seems like a pretty solid response anyway.

MS EVANS: In a short time. We were fairly impressed with that response - actually fairly shocked by it - because the women needed to fill out the survey and actually post it in. So that's a step that often people don't take that.

MS McKENZIE: Well, that's about - it roughly comes to 28 per cent-ish that are saying that they have had problems with - - -

MS EVANS: That figure was actually just with the travel insurance, actually.

MS McKENZIE: That was only travel insurance.

MS EVANS: That was just with the travel. I took that out because we were looking at that initially.

MS McKENZIE: Have you got figures for the rest?

MS EVANS: We have, but I haven't got them right here. But we will actually put all that detail in our submission when we write it.

MS McKENZIE: But it's not - I mean, others also indicated that there were problems with insurance as well.

MS EVANS: Yes, absolutely.

MS McKENZIE: It's not just travel insurance.

MS EVANS: No, we've got - yes.

MS TIMBS: What we've done to date - because the closing date for the survey response was the end of June - so to date we have called 80 of the women who indicated that they had experienced difficulties, but what we had done is focussed on travel insurance just because we are getting constant query about travel insurance. So we have put that as our first priority in terms of reviewing the survey responses.

At this stage we are still going through those responses but what we are able to provide this afternoon is the flavour of what the survey respondents are telling us, highlight some trends, and then as Gerda had said, we will be providing a written submission when we are in a better position to report on the results.

I thought it would be useful just to explain some background with the travel insurance. What we have found, if a person seeks travel insurance and they have had a pre-existing condition, then they don't obtain cover for that pre-existing condition unless they specifically seek the approval of the insurer to that pre-existing condition. So the first issue becomes, do you get approval for the pre-existing condition? What we are finding is women often do not get approval for the pre-existing condition and also, if the cover is actually granted, it's granted on conditions which exclude cover for cancer-related activities or incidents.

So there are the two issues. Firstly, they don't actually get approval to be covered for the pre-existing condition; plus, there is a limit in terms of what the policy covers.

MRS OWENS: Or is there a third which is the premium is higher?

MS TIMBS: There is the issue of - and I will come to that because it comes up in two different ways. But certainly you would normally expect that if you did receive approval for the pre-existing condition, the premium would be higher. What we are finding is that we have had a number of women tell us that they have made application for pre-existing condition cover and had that refused. They had been granted insurance on the basis that they do not have cover for cancer-related incidents but they have also been charged a higher premium.

MS McKENZIE: So they have been refused cover for the pre-existing condition but still they get charged a higher premium for the rest.

MS TIMBS: That's right, yes, and a number of women have reported that to us.

MS EVANS: 22 so far just out of that 80 - out of the 80 phone calls we have followed up. So 22 have been charged a higher premium but given no cover for the condition.

MS TIMBS: What we have found in terms of issues that are coming out is that the definition of pre-existing condition varies between the companies. We are finding from talking to the women that, particularly when women have had breast cancer many years before, they don't think of it as a pre-existing condition because there has been a number of years pass since the initial diagnosis. Therefore they are not disclosing a pre-existing condition.

We are also finding women who have the impression from other people that if they do disclose that they have had breast cancer, then they won't obtain insurance at all. So that is leading them to not disclose. They are obtaining the travel insurance but they are not making that disclosure.

From talking to the women we have found that there are a range of different risk assessment processes being used by the insurance companies in deciding whether or not to grant insurance. Some companies use a very much individual specific risk assessment which is undertaken by a team of medical people in an independent company. We have also found that there are companies where you complete a form on the Internet site. As soon as you disclose that you have had cancer you automatically get advised that cover would be granted, but not for cancer-related incidents.

What we are finding is that the word "cancer" is treated in a clump so there is no thought given to the type of cancer, how recently the person was diagnosed, what their prognosis is - - -

MS McKENZIE: Or its severity.

MS TIMBS: Exactly. So once you tick "cancer" you automatically go into a different box, if I can put it that way. Another issue that has come out of speaking to our respondents, is that some travel agents are actively discouraging women from seeking travel insurance if they know the woman has had breast cancer. Gerda has spoken to one lady, if I can pass it to you.

MS EVANS: Yes, one lady described her situation where she and her husband and two children wanted to go to Queensland for a holiday and she came from a small country town - well, it's actually not all that small but there was only one travel agent there - and the person at the desk was a parent at the local school. So she knew this woman had had breast cancer. She said, "Nobody will insure you or your family," and this woman couldn't get past the travel agent person to even obtain insurance cover for her husband or children. She was quite indignant and felt quite hopeless in the sense of not being able to have any other avenue because it was only one travel agent and one insurance company. She was worried - she said for the entire trip in case one of the children was sick or anything happened and - you know, it was very distressing for her.

MS McKENZIE: Of course.

MRS OWENS: That's just misinformation on the part of the travel agent.

MS EVANS: Well, it is really.

MRS OWENS: They usually have access to a few insurance companies that they can advise. Some of them have a favourite but they should have at least suggested she go to an insurance broker.

MS TIMBS: Yes, the concern was that the woman didn't get the chance to even explain to a medical person what her history was. She was really put off going down the track.

We have also had two women report that because they have suffered lymphoedema and have disclosed that, that they were not able to obtain travel insurance.

MS EVANS: At all.

MS TIMBS: That's what we have been advised by them.

MS EVANS: And another one who was covered, she actually went to a number of companies and ended up obtaining cover for cancer-related incidents but not lymphoedema. Lymphoedema was cut out altogether. She was unable to obtain any cover for that.

MRS OWENS: I can't even understand what the insurers - what the problem is with the insurers on lymphoedema.

MS EVANS: I think it's probably related to the possibility of cellulitis developing and that sometimes requires hospitalisation. So whether that's in their minds, I don't know. But again, the risk needs to be looked at and she was not asked those sorts of questions or who she had seen about it.

MRS OWENS: I'd just really like to see the underwriters' information on that and just how that is written and who has done the research - what the probabilities are. It would be very interesting.

MS McKENZIE: And then one has to take into account truly individual circumstances - severity and - you can't just have a blanket.

MS TIMBS: And another specific example, we have had some women report difficulty in obtaining cover where they have been taking Tamoxifen and that they have been told they could reapply once they had stopped taking Tamoxifen.

MRS OWENS: Again, what was the issue with Tamoxifen?

MS EVANS: Well, the problem there I suppose from the insurer's point of view is that Tamoxifen has a risk of blood clots and the association with blood clots and travelling. That will be it, I suspect. I mean, I'm speculating here, but that will be the reason. Again, I mean, that brings in another group of women that we haven't looked at yet because some people are on Tamoxifen as a cancer-preventative treatment and I don't know whether they are being denied insurance or whether they are even declaring it. I mean, I don't know how they would answer an insurance policy to have that identified. But it's possible that they are not. But they are people without cancer.

MS TIMBS: So that really is in summary the flavour of what we are getting from the responses.

MRS OWENS: It's fascinating. It would be really good to see what happens with the other forms of insurance as well. We have spoken to the group that represents the life companies - not the general insurers but the life companies - investment, financial - - -

MS TIMBS: IFSA.

MRS OWENS: IFSA - I'm just trying to - - -

MS TIMBS: Financial Services Association.

MRS OWENS: Yes. We spoke to them in Sydney. You might like to look at our transcript on that. But they did talk about the need to have appropriate risk rating in insurance and the need to have access to underwriting material, statistical and actuarial information. But they are not responsible for the travel insurance business.

MS TIMBS: No.

MRS OWENS: And we haven't had anybody from that side of the industry talk to us as yet but hopefully once we get this material onto our web site it may trigger the interest.

MS TIMBS: Might prompt someone.

MRS OWENS: But one of the questions I wanted to ask you and you can take this on notice, is there is an exemption under the Disability Discrimination Act for insurance which relates to the ability of insurers to discriminate based on actuarial, statistical or other relevant factors, so it's quite an open provision? "Other relevant factors" seems to be a bit of a catch-all so you might like to give us your impressions of that particular clause at some stage, whether it's today or when we get your submission. That would be very helpful for us. Some people have said that they don't think that exemption is necessary at all. Others have said that they're concerned about having an open-ended exemption and maybe that the wording "other relevant factors" is too open-ended and some - we've asked IFSA to look at the possibility of other words that could replace those words.

It's really a matter of getting your views about where do we go from here. You're going to have a number of case studies and examples at some stage which will show all the problems but our responsibility is to find a way of dealing - you know, seeing how important these issues are and then if there are major problems finding solutions to the problems.

MS TIMBS: Well, we'll take it on notice and my initial comment, if the exemption operated on the basis that if you were - if the insurer did choose to discriminate in terms of that exemption, so that they proceeded - if they were to be required to provide reasons and to explain the basis upon which they have either refused cover or granted it on different terms or at a higher premium, it would certainly make it - I think that would improve the provision.

MS McKENZIE: It still wouldn't - I mean, the reasons might be completely unacceptable and so it - I mean, really the way it works of course is that if you modify the exemption currently in the act then you will increase the scope of the normal prohibitions on discrimination in exactly those services, in the insurance services.

MS TIMBS: I agree.

MS McKENZIE: Yes, so the question is how much should that coverage be extended, if at all? I mean, should there be some limitation by way of specifying what factors can be taken into account in these decisions and perhaps some specification that the risk factors must relate to disability. I mean, in this case - with travel insurance what really seems to be the problem is that there's a refusal which relates to far more than factors of circumstances that relate to the disability. There's a refusal of, for example, loss of luggage insurance.

MS TIMBS: Except that what we're finding is women are obtaining travel insurance in most cases but not in respect of cancer-related incidents. I think that's - - -

MRS OWENS: Although the initial refusal of the young woman in Adelaide that we spoke to, she was actually - they rejected their application for any form of insurance including the luggage. I mean, that was the total rejection.

MS TIMBS: Yes, that's right.

MS EVANS: We've had 15 in the phone calls - 15 total rejections that I've counted up, unable to obtain any insurance.

MRS OWENS: So it's happening. In her case I think eventually they managed to get insured through another insurer but it was still this one insurer who had knocked them back. I don't know how common that practice is and whether it still is applying now. For your 15 I don't know how long ago that happened.

MS EVANS: Yes, we've got those figures. We're actually trying to ascertain whether - we're asking them what year they're applying for the insurance, this episode, to see whether there has been a change or if there's a change happening.

MRS OWENS: That will be good to know that. We spoke to a woman yesterday who had a friend who had been denied travel insurance many years ago. She was - the friend is now 12 years post diagnosis of an early breast cancer and she had to tick the box on the question, on the appraisal form, "Have you ever been denied travel insurance?" The friend told - the woman I was talking to yesterday was called Linda - the friend told Linda, "Never get yourself into a position where you have to tick that box because once you've ticked it once you'll be refused without any proper assessment."

So Linda made sure she didn't get herself into that position, so she approached six insurance companies and asked for their paperwork and then she rang each of those insurance companies and spoke directly with their medical assessors and told them over the phone what her situation was and asked if they would be giving insurance and they said, "No, we wouldn't, no we wouldn't, no we wouldn't."

So when she got to six knock-backs on her history, which wasn't all that bad, she then was very frustrated and rang the Cancer Council and got onto somebody very senior at the Cancer Council and suggested that she contact a particular person at a particular insurance company and this insurance company went through her medical condition with her and agreed to grant the insurance. She explained to me that she needed to go through that procedure because she had to travel to the states once or twice a year as part of her work and she needed to be reassured and she was happy to pay any extra premium that they nominated so that she could have cover if there were any cancer related incident.

She said the difficulty in obtaining that was just extraordinary and if she was asked to give advice to anybody she would also give that same advice: don't fill out the form and just deal with the person at the desk. Make the phone call to the assessor and determine who's going to grant the insurance first. So it was an interesting situation really.

MS EVANS: But a lot of running around for her.

MRS OWENS: A lot of running around. She was a woman with nous who knew how to go about it. I mean, a lot of the women we're talking to are just terrified that they can't get any insurance. And another one with another family member who couldn't obtain the insurance also because her mother had had breast cancer and that was distressing, and she then approached another company and didn't declare that she'd had breast cancer so that her daughter could get the insurance. So the women are distressed because they say they're being forced into a situation of lying so that they can obtain basic insurance.

MS McKENZIE: And then of course it's got the side effect that you put your insurance in jeopardy.

MRS OWENS: That's right.

MS McKENZIE: I mean, if that's discovered later all your insurance might be refused.

MRS OWENS: That's right, but a lot of the women don't appreciate that either. There are problems, yes. Thank you for that. I'm very pleased. Is there anything else you want to raise at this stage?

MS TIMBS: No. As I say, we will provide more information about the survey results and certainly take up your suggestion of reviewing how the exemption works under the act and we will provide comments about that.

MRS OWENS: That's tremendous. Thank you very much.

MS EVANS: Thanks. I'm very pleased you could come and at least inform us of where you've got to to date. I think that's very timely for us, thank you very much.

MRS OWENS: Thank you very much indeed.

MS TIMBS: Okay, thank you.

MRS OWENS: I think that concludes today's proceedings and I think concludes our proceedings for this round of hearings. For the remainder of the inquiry we'll be preparing a draft report for public comment which we will release in October this year. There will be another round of hearings after interested parties have had time to look at the draft report. Our final report will be handed to government by 30 April next year. So thank you.

AT 4.58 PM THE INQUIRY WAS ADJOURNED
ACCORDINGLY

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