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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO DISABILITY DISCRIMINATION ACT

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

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON WEDNESDAY, 25 FEBRUARY 2004, AT 9.37 AM

Continued from 20/2/04 in Sydney

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

On 5 February last year the government asked the commission to review the DDA and the Disability Discrimination Regulations 1996. The commission released a draft report in October last year. The purpose of this hearing is to provide the opportunity for interested parties in Melbourne to discuss their submissions and to put their views about the commission's draft report on the public record. Telephone hearings have been held in Melbourne and public hearings have been held in Canberra, Hobart and Sydney. Further hearings will also be held in Brisbane and again in Melbourne next week. When we complete the hearings in March, we will redraft the report and submit it to the government by the end of April. It's then up to the government to release and respond to the report.

We like to conduct these hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason and to assist people using the hearing loop, comments from the floor can't be taken because they won't be heard by the microphones. If anybody in the audience wants to speak - and I don't know if any of the team do; they probably do - you can do so at the end of today.

Participants are not required to take an oath but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be available on the commission's web site in Word format following the hearings.

I'd like to welcome our first participant this morning, Blind Citizens Australia. Welcome. For the benefit of the transcript, could you each state your name and the capacity in which you're appearing today.

MS DIAMOND: My name is Maryanne Diamond and I'm the executive officer at Blind Citizens Australia.

MS O'NEILL: Collette O'Neill, national policy officer.

MRS OWENS: Thank you, and thank you for yet another very meaty submission. We're very pleased to get it and we're pleased at the interest you're taking in our inquiry. I'm going to hand over to you now. I don't know which of you would like to introduce your submission. Maryanne?

MS DIAMOND: I will.

MRS OWENS: Yes, okay.

MS DIAMOND: I'd start by saying thank you for the opportunity to come back a second time. We did, through our organisation, spend quite a lot of time responding, as you identified, to all of the issues and draft recommendations and we're happy to discuss any of them with you today, and we have a few that we'd also like to build on, or provide more information. That's all I wanted to say in an informal setting.

MRS OWENS: Thank you. You have in your submission covered a wide range of issues and you've covered many of our findings and recommendations, so what we might do is perhaps focus on the areas where you have either disputed the finding or said, "Well, have you thought about this?" There are some areas where I think you have pulled us up. That's why we have these hearings, because it's good to get other perspectives. I don't know what you think, Cate, but maybe we could start at the beginning with Eliminating Discrimination and our comments that we have on effectiveness.

You're basically saying in your submission that you still think that there is a degree of discrimination out there for people that are blind, in terms of access to employment and access to information, and we had basically downplayed discrimination in certain areas and said that it was still very problematic in other areas, such as for people with intellectual disabilities and disabilities that were not quite so visible, but you're saying that for blind people there are still major problems.

MS McKENZIE: You talked to us about the employment issue and the other thing that I'd like you to turn your mind to is the comment we've got from employers' groups such as AIG and ACCI really to the effect that there's not a problem, that we are exaggerating the problem, that very little discrimination is raised with those groups, and also that if there is any problem it can be dealt with by education rather than changing the act in any way. I'd really like to know something about what the association's experience of employment is.

MS DIAMOND: I think the area you hit on of employment and access to information are two of the key areas where we continually encounter discrimination. Our experience is that many blind people don't even get to the stage of interview; that Job Network or organisations who refer people for interviews often don't even refer blind people to that stage, so there's not even a demonstration of a blind person being able to show that they are capable of doing the job. That is one issue.

MS McKENZIE: Is that because the job networks have a perception that the person can't do the job? Is that why?

MS DIAMOND: I think that is one of the reasons, and we are working with DEWR at the moment to undertake a project to develop a resource for Job Network providers on the issues about blindness and abilities of blind people, I guess answering some of those kind of common questions about what is blindness and how people function, and we will undertake some training courses for Job Network providers. I guess the idea behind that is that we need to educate them to realise that blind people are quite capable of doing lots of jobs, so that hopefully they will get to that next stage.

Specialist employment referral people also don't access, we find, work modification programs widely and yet they are supposedly the experts in disability placements. Work modifications - and I think we covered this in our last hearing - is a real problem. The timeliness - the process for applying for and obtaining the agreement and then getting the equipment - often makes it very difficult. As a blind person, I would say without my specialist equipment - for example, in my case I use speech. If I don't have the speech, I am not productive, yet if I have the speech on my computer I'm probably as productive as most people. So the timeliness, of course, is a really big issue. Collette might want to add some more.

MS O'NEILL: I think it pays to look at employment in different ways and to think about the situation of people who maybe have been blind from a young age and are going out and trying to get their first job, and looking at people who have been in the workplace and then lose their sight later, because they're quite different experiences. In terms of people who are trying to get their first job, often you've not had the chance to get work experience. You haven't done part-time work; you haven't had your job at McDonalds or whatever. It's really hard to get any first-time experience. There are not many opportunities to go and do a traineeship or to do any sort of placement opportunity, and in part that's because if you need that sort of adaptive equipment, you can't get that for a placement opportunity.

As our submission said, our experience is that if someone actually reveals in their application that they are vision-impaired they won't get an interview. We have also had cases where people have turned up to interviews - have finally realised not to tell anyone, have turned up, and then when the employer has seen that they're vision-impaired, has refused to give them an interview. We also know of people who have gone to a job interview taking all their equipment with them - in this case it was a CCTV, which is the closed-circuit television - and the employer refused to allow them space to set it up so that they could demonstrate that they could do the job.

The members of BCA who are young always tell us that one of the problems is that they can't go to a job interview with equipment all ready and say, "This is how I can do the job." If you're facing, in some cases, a three-month wait for equipment,

you have to go and convince an employer to take you on the promise that in three months' time, potentially, you will be able to do the job.

MS McKENZIE: And there's a three-month wait?

MS O'NEILL: Up to. It's not supposed to be that long, but it is taking that long, and we can talk about workplace mods in more detail later and the way that that program is running.

MRS OWENS: I wouldn't mind coming back to that, because others have said that rather than the employer being responsible for providing the equipment, maybe there could be some arrangement where people had the equipment up-front and took it to the job of choice; so that there would be some program to get access to the equipment earlier. But what you're saying is, there's still going to be a problem even getting to interview and taking the equipment, or to be able to demonstrate what you can do with that equipment.

MS O'NEILL: Essentially; although that would be an enormous step, I think, if people had the equipment up-front and had been trained in it beforehand so they could actually say to someone - like, if you can imagine Maryanne going to a job and saying, "This Braille Light is the equivalent of a whole range of things that you would use. This is my pen and paper. This is how I take notes" - all that sort of stuff. It's a much more powerful message than someone just sitting there assuring you that, with the right equipment, they can do it.

MS McKENZIE: What you said as far as either not being interviewed or being refused an interview when you turn up, or not being given the opportunity to demonstrate how you can do the work using particular equipment, are these isolated incidences you're talking about or are they frequent?

MS O'NEILL: The attitude that underlies not allowing someone to set up equipment I don't think is isolated, although that particular manifestation of the attitude might be. I think it's a comfort factor. I think when someone turns up who's vision-impaired, the employer just doesn't know what to do or how to react. It's not at all uncommon that people aren't getting interviews. I could point out to you heaps of people who are trying and not getting anywhere. The other thing that I wanted to raise is outsourcing of recruitment, and that, we have found, is just another barrier to people getting jobs. People aren't even getting through that first stage of the recruitment agency.

MS McKENZIE: So they actually never get to the employer.

MS O'NEILL: No.

MS DIAMOND: In fairness, I think the common path would be that employers are not seeing blind people, so although there are some cases where employers won't allow them to set up the equipment to demonstrate, in general I don't think most blind people are getting to the employer stage.

MS O'NEILL: And that really matters, because it's public service now that are really outsourcing and it's public service that you expect to have that commitment to equal opportunity employment, so if people aren't even getting there for them to apply their EEO policies, it's a problem.

MS McKENZIE: While we're on the subject of - sorry, before we go on to that, do you want to say something else about in-employment discrimination? We have talked about pre-employment.

MS O'NEILL: Yes. A lot of employers I think wouldn't recognise the discrimination that takes place because a lot of it is sort of couched in voluntary redundancy. There would be a whole lot of our members who were employed, lost their sight and left the workplace, and on paper they voluntarily left. But it's not voluntary; it's a systematic process of not meeting the needs of the employee. It's really complex, and I think our submission talks about that; certainly our first one did.

Sometimes it's because the person themselves won't reveal how bad their sight is getting, out of fear, but we also know of cases of really open and assertive people who have gone to their employer and said, "This is what's happening to me. This is what I need," and they have identified, "This is the equipment I'll need. This is the support." It was, in this particular case, a university, so you would expect there would be an environment of support for that, and there wasn't. The person, effectively, was given enough that they couldn't necessarily complain, but never enough that it was actually a supportive workplace. In the end, like a lot of people who are blind, they just said, "It's got too hard. Working isn't worth this." But the problem is that, once you leave, you are very unlikely to ever get back into the workforce.

MS DIAMOND: I think where Blind Citizens Australia comes into the picture is - often we don't know about the situation until it's almost hard to recover from. If people approached us and asked for some advice at the very outset of recognising that there was going to be a problem, as they started to lose their sight, we may have been able to give them some advice, or talk to the employer with them, but often the relationships are so broken down that they're hard to recover from. That's kind of a bit of the nature of where we come into the picture, unfortunately.

MS McKENZIE: That was going to be my next question. Have you sort of advocated for some of the people who have come to you, to employers?

MS DIAMOND: We do, but as I just said, I think that often it's hard. I would say of all the areas of discrimination that we might deal with, our success rate in employment would be probably the worst. Would you say, Collette?

MS O'NEILL: Yes.

MS DIAMOND: And it's because of that issue alone.

MS O'NEILL: Often what will happen is: someone loses their sight, so they need a workplace assessment done of that job so that they can work out what equipment people need to keep doing their job. The quality of that workplace assessment can really impact on things. We've had cases where a very poor assessment has been done and so the employer, who is in lots of cases seeking to do the right thing, is presented with a report that has suggestions for things that are very expensive but not needed and that goes off the track and talks about a whole lot of things that aren't particularly relevant. When we can, we can try to correct that by getting somebody else to do the workplace assessment and get a better one done, and that can go somewhere towards fixing the problem.

MS DIAMOND: That's true, and I suppose that highlights the point that employers, even with the best will, really don't know where to go to get the best kind of support or help in doing such assessments. That's a problem in itself, I think.

MS McKENZIE: Can I ask you about the equipment schemes now? We're on employment, so it's probably a sensible time to ask about the Workplace Modification Scheme and about the Commonwealth schemes that are around. You talked about three months' delay or up to three months' delay in getting equipment if you've managed to get employed. Can you talk to us about the schemes that are available and how you see them working?

MS O'NEILL: The problem with workplace modifications: there's always been a delay, and from the end perspective, it used to be because the equipment that people who are blind need is very expensive, so it doesn't normally fit under the cap. There is generally a \$5000 cap - I'm sure it's \$5000 - for workplace modifications. A lot of the equipment people who are blind needed was more than that, so it had to be approved. I understand that at times the budget is just full, so basically Workplace Mods say, "You have to wait till the next financial year because we have expended our funds."

But an issue that has come to our attention recently - and it ties into the

commission seeking information about who should pay for these things, how should the costs be apportioned - is that FACS, Family and Community Services, have introduced a new requirement that's not stated in the program, but they're implementing it, where, if a person is going to be employed by a public service agency, FACS require a letter from that agency explaining why they're not going to meet the entire cost of the modifications themselves.

We have been told that if someone is going to be employed by Centrelink or FACS, there is no point putting in a workplace modifications application because it simply won't be approved. Those agencies are expected to meet the cost internally, which is not a principle that we disagree with particularly. Government should have the money to do it. But in practice, particular agencies don't necessarily have funds that are identified that can be used to meet those costs. When I say "public agency" I mean down to people employed by local councils, maybe in a gym that a local council owns; that's the extent. There are a lot of factors there. That puts a particular slant on it, when you go to an employer and say, "Why aren't you paying for everything?" and it also is causing a big delay because it's not required and so people aren't necessarily doing it. It gets to FACS and they say, "We can't process it until you get this letter," which is something that they didn't actually need on the - because it's part of the form. It says on the form, "What contribution is the employer making?" so that's already information being collected by FACS, but now they're requiring a letter as well.

Strangely enough, that isn't being applied to business. No matter how big the employer is, in the private sector they're not being asked to separately justify that. You could argue that employers actually have much more capacity to absorb the extra costs than smaller agencies that may be government but don't necessarily have the budgets to absorb big additional costs. The experience of the people who are trying to get jobs is that it's really embarrassing to have to get the employer to fill out this letter to justify not actually meeting all of the costs, and part of the delay is because potential employees or current employees don't actually want to go to their boss and say, "You have to give me this letter explaining why you're not going to pay for everything." So it's not always the fault of FACS or the employment agency that's doing the application, but it is leading to delays. Three-month delays isn't uncommon, and it's now becoming more common because of this change, but it's always been a long delay.

MS DIAMOND: I think, as well as the delay, though, it's creating another barrier for opportunity for people with disabilities. One of the things we want to do is break down those barriers, so to create more isn't helpful.

MRS OWENS: It could potentially lead to resentment by the employer if they've got to write a letter and the expectation is they're going to put in some money, and

that employee could leave after a year and then what happens to that equipment? Does the equipment stay there? And then they mightn't have another employee that's going to need that equipment. So it raises the whole issue of: is this the most sensible way of doing it? We're not here to review this scheme, but when we find strange things we are prepared to highlight them.

MS DIAMOND: Especially because the move had been, in recent years, for the equipment to be owned by the individual so that if they moved employment they could take it with them, the theory being you wouldn't have to buy it every time. If you look at how it could happen, someone could get a job, the employer owns the equipment, they leave after one year, and they've got a piece of equipment that's useless to them - you know. The next employer buys it again. So I think the move towards the individual is probably - - -

MRS OWENS: Are you implying that that's happening now, that there is a move?

MS DIAMOND: There has been for the last few years, so when we've just recently come across this issue that Collette just alluded to about public service type employers having to pay it all, if they're going to have to pay it all or justify why they don't pay it all, they will own the equipment, surely. If you're going to pay for it, you'd want to keep it.

MRS OWENS: Yes.

MS DIAMOND: So that's actually, in some ways, a step backwards, I would have thought. I think the real issue is that it's being requested of public service employers but not of business at all; no question at all about business going through the system.

MS O'NEILL: And I'm sure you're aware of it, but in the meantime, if you've got even a two-month delay, you've got an employee who potentially can't do their work and they're just sitting there, and the effect on the morale in the workplace when you have someone who can't actually do their job - - -

MS DIAMOND: We've got experience in our own office.

MS DIAMOND: It's first-hand experience. Someone started in August and we still haven't got workable equipment. There are other issues there besides just the program - the program being a big one, but there's, you know, compatibility and that - but it means the person is struggling to do her job, yes.

MRS OWENS: That is another issue, isn't it: that sometimes that equipment may not be compatible with, say, the other computer equipment in the workplace, so you've got another issue to deal with there which could extend the cost implications

for the employer. Then they've got to adapt their existing computer network to take it into account. So it's quite complex.

MS DIAMOND: Yes, it is, and you can see a situation where this has been so much trouble, the next blind person who walks along - "I don't really want to go down that track again. There will be someone else who could do the job and cause us less problems." It's that long-term impact that concerns us, as well as for the individual.

MS McKENZIE: And then there's the feeling, you know, "We've done this work for a person with a visual impairment. Now we've got a person who's come along with some different kind of impairment and we have to start all over again."

MRS OWENS: I'm still puzzled. There is this ability now for the employee to own the equipment, which is paid for through the Workplace Modification Scheme, or partly paid for through that scheme. It doesn't always happen? How common is this?

MS DIAMOND: It's negotiation with the workplace, I think. My understanding is it's negotiable between the employer and the employee, and a lot of that is to do with the level of contribution made by the employer. In some cases the employee, if the amount goes way over the cap, offers to make a financial contribution themselves. That's certainly happened in equipment for blind people.

MRS OWENS: But wouldn't it be better to have a system where, regardless of who the first employer is, the equipment is made available and that person can use it in the education system, higher education, going to the first job, second job, going for work experience or wherever, and it's just purely transferable?

MS DIAMOND: We certainly support that system, because what we find is that there may be some programs around, say in school, where a computer or some equipment is bought for a student who is blind but it is owned by the school, so when they leave and go to university or go to the workplace they've got no equipment again, and if they go to university, for example, there are not really programs that they can get equipment by easily. Work Mods is if you go for a job, but ideally people would be better if there was a universal program, I guess - whether, as you suggest, it be for education, employment, pre-employment training, university, whatever. One of the problems of course is that the equipment changes - updates, versions, repairs - so I guess all of that needs to be built into whatever model. But I would certainly support a model where people are supported in whatever aspect of life they undertake.

MS McKENZIE: It's a tricky one. Take a school, for example. If a school has a

regular population of students with disabilities coming through, then if they adopted that mechanism entirely, when their students finish school they would take their equipment with them to university or to whatever their career or future life happened to be, so the school would just continually have to be buying equipment as students came through, because that's how it would be in the end.

MRS OWENS: So again it depends whether you set up a program where the school is purchasing the equipment or whether it's being purchased through some other type of arrangement.

MS DIAMOND: That's right. Schools themselves don't often purchase the equipment. The experience I have in schools is with my own child. The school, through various programs - I guess he was a bit more advantaged than most students because I know the system a little better than most parents, but we, throughout school, would buy a computer with the necessary adaptive equipment. He didn't have the same computer right through school, because your needs change and so does technology. But what the school did - and I thought it was a really good idea - as we got a new one, the one that he'd previously used - there was nothing really wrong with it - would be used for someone lower down the school system.

MS McKENZIE: Yes, who didn't need such complicated equipment.

MS DIAMOND: That's right, or had a slightly different type of disability - that you needed a word processor and that was all. So in the end he took, with their permission, the computer that he had at the end of the school year. He was actually permitted to take that and use it at university. So really, although the school lost that one, they recycled the computers over a number of years. That's quite okay when it's a computer that can be used by anyone. Some of our specialist equipment, unless you've got a blind population, isn't that usable. In theory, in this state of Victoria, in the government school system the region that school resides in is really, I think, officially the owner so that equipment can go between schools in a region, and that will vary according to a local arrangement. But the problem is that there is no formal arrangement, so some schools are more generous than others. Some people don't even know how to apply for them. So they're all other factors in education.

MS McKENZIE: And what if you change system? What if you change from the state to the private school system, for example?

MS DIAMOND: Therein lies an enormous problem; not just with equipment but with the support programs for students with disability, as well as access to information and materials. That's one we are more and more encountering, of course.

MS O'NEILL: When the Senate did its inquiry into students with disabilities in education last year or the year before, it actually made a recommendation that there be an equipment program, and the response of the federal government to that recommendation was, "No, because it is the responsibility of schools or universities to fund that equipment." But it's definitely the case that universities now are very unwilling to provide equipment to students. They expect students to get that equipment from other sources. They will not even provide pool equipment in some cases. It used to be that there would be a couple of laptops and you could take one of the laptops, and you gave it back at some point, but not even that is happening any more. I think that's mostly because of the cost of upgrades; that it's so hard to keep it up to date. That's my understanding.

MS DIAMOND: Up to date and maintained.

MS O'NEILL: Yes. It would be preferable for people to at least get a bit of a start on getting some equipment through a scheme that isn't putting it on any particular person to do it, because there's too much buck-passing between people about who's responsible for it.

MRS OWENS: The universities will be all right in future, because they're all putting up their HECS by 25 per cent, so they will all be able to afford to upgrade their equipment and buy more. No doubt that's how they will spend their money!

MS DIAMOND: I think they have other plans for that.

MS McKENZIE: Can I raise the question of access to information, because that was the second big issue that you flagged. Do you want to talk to us a bit about that?

MS O'NEILL: It's a big issue, and we wanted to raise something with you that's come up since we wrote our submission, and that is that access to literature, published material, and access to information that's provided on television but only in a visual form. We have had some legal advice from the Human Rights Commission which would suggest that if we tried to run a case against a publisher for not providing a book in an alternative format, we would lose, because the definition is that the service that a publisher has provided is a printed book. It's not the actual - - -

MS McKENZIE: It's not information.

MS O'NEILL: - - - information; it's the format that it comes in. That's a huge issue. It would effectively mean that people who were blind were locked out of ever getting information, and we think it certainly wasn't the intention of the act that it wouldn't cover information. We would highlight that as an issue that we would like

to see the commission make a recommendation on.

MRS OWENS: I suppose publishers would argue that people have got access to information in various ways, one of which is a printed book, but there are other ways of getting information. I mean, the difference from people with sight impairments is that their access to information is restricted because there are certain things that are precluded, like printed books.

MS O'NEILL: Yes.

MS DIAMOND: I would also say that it's a far larger group than people with vision impairment. People with some other disabilities - you know cognitive disabilities - all fit into that category to, you know, that larger group of print disabled - I think it's called print disability sector - which is quite large, but this is a concern to us because, I guess, we were of the view that maybe one way to move - or strategically to move forward in making information available to everybody in an equitable timely way would be to strategically use a publisher as an example and to then get this advice has kind of thrown us a bit because it's not what we actually expected. It comes back to the recommendation and the report that's about whether or not there would be a common electronic file format and that is something that is desperately needed, and we would think that the DDA should make it clear that it's unlawful for a publisher not to provide a book in that common electronic file format, so that it can then be easily adapted to whatever format is required, print being one of them.

MS O'NEILL: The other issue is access to information that's - say you're watching the news and they put up information about who is speaking but there's nothing to actually tell you who it is because it's only in print, or for example if you're watching a program that at the end puts up a little summary of what has happened since this program finished, and it's only ever put up in print. There's no voice-over.

MS DIAMOND: There's of course emergency announcements. We can give many instances where, for example, there's the bushfires and, "Call this number for further information," and it doesn't say the number. It's just on the screen. That is certainly one that has come to our attention in recent times.

MS O'NEILL: And again the problem we seem to be facing is that idea that it may not be discriminatory because the service that is provided by the television company is a visual service and - - -

MS McKENZIE: That's a harder one, I would have thought, to make out because television isn't just a visual service. It's both. That's a little more difficult than the publisher who publishes a book, because that is clearly just print. Television is

much better.

MS O'NEILL: Except that they often put them out on cassette and charge you a fortune for the cassette.

MS DIAMOND: But there's some precedents in the television industry with the advances in captioning that now is happening more and more. Really it is kind of another form of information access - overall visual - - -

MS O'NEILL: Except that again we've got advice from HREOC that we are unlikely to be successful in a complaint against a television company for not providing a voice-over of written material.

MRS OWENS: And why is that in this case?

MS O'NEILL: For the same reason that we have had a complaint against a television company and their argument back was that case law had established a precedent that the service was visual, not - it's not the information that's being provided; it's the formatting in which the information is being provided.

MS McKENZIE: If that's the case, then how can you make an argument that captioning has to be used?

MS DIAMOND: That's what I was getting at.

MS O'NEILL: We had thought about this, too.

MS McKENZIE: It doesn't make sense, frankly.

MS O'NEILL: It might be that that's something that's being done by goodwill and has proven to be successful but maybe if someone challenged it, it wouldn't have to actually be done.

MS DIAMOND: I actually think that captioning wasn't introduced as a thing of goodwill.

MS O'NEILL: No?

MS DIAMOND: I may be corrected, but I actually think that it - - -

MS McKENZIE: That's my recollection, as well.

MS DIAMOND: - - - was actually the threat of discrimination that led to that

outcome.

MS O'NEILL: There's a certain case - and if Aileen was here - it's a recent one. It's the Sims case and they're relying on the Sims case as saying that information is provided in a format and that's the format.

MS McKENZIE: And that defines the service?

MS O'NEILL: Yes.

MS DIAMOND: No. That was against the Age newspaper.

MS McKENZIE: That was against the Age and it's a Victorian case.

MS O'NEILL: This television company provided quite extensive legal opinion based on that and other cases to argue that they don't have to provide information in a voice-over and the advice from HREOC is that that's probably right.

MS McKENZIE: As I said, the Sims case is like the book. It is, I think, arguable that the service provider there is a printed service, but television is different because it's not just a visual service, it's both - and so there is always argument available, I think, that relates to the balance.

MS O'NEILL: That's true, but our position generally is that, with advice that we may not win, we can't afford to run the case and not have it said that in fact - - -

MS McKENZIE: Of course.

MRS OWENS: Maybe it comes down to instead of putting complaints, having some sort of voluntary code of conduct and some of these things you're saying, like safety messages and just doing proper voice-over - I don't think it would actually be too hard for TV to do that.

MS O'NEILL: It wouldn't be but, in this particular case, they were adamant that they wouldn't do it, and argued that it would affect the artistic integrity of the program to do it, so in this case it seems that we couldn't actually rely on any sort of voluntary action because it just wasn't going to happen.

MS McKENZIE: So not mentioning the telephone number 3 in case of fire affects the artistic integrity of the news?

MS DIAMOND: My view is that strategically that's the way we should go - by approaching emergency information first. That's a more winnable argument, I would

have thought, than emergency numbers and that and, at the same time, we're working with a private company to try and obtain some funding to do some trials on DVD - you know, the speech. What is it called, sorry? I've just gone blank for a minute. Captioning.

MS McKENZIE: Verbal captioning, but some speech version.

MS DIAMOND: Yes. I can't think of it at the moment.

MS McKENZIE: There is a name for it, as well .

MS DIAMOND: Yes. I'm sorry, but I have just gone blank for a minute, but also then bringing into that the idea of the emergency information, so that hopefully by demonstrating how useful it is and how easy it is to do really, we might be able to go further, but we are kind of working to get some resources to do that, but certainly a project is ready to go and we've spoken to FACS about some funding, too.

MS O'NEILL: The idea of - if there could be something done to make it clear that it's discriminatory not to provide access to information contained in whatever format that is, that it's the information that is actually the important service, not the format in which it is provided.

MS DIAMOND: That term is called audio description. I apologise.

MRS OWENS: There's a whole lot of issues I wanted to raise with you today and time is running on, but just while we are still on information issues: you did raise on page 5 of your submission the issue of access to - you were putting complaints relating to access to billing information, mortgage and other loan agreements, banking information, et cetera, et cetera, and what I'm not clear about is, is this just a problem that arises from time to time or are these all significant problems that occur all the time? I mean, how far have we got in trying to improve these things? Have you got any sense of that?

MS O'NEILL: The way it seems to happen is that we make individual complaints - it's constant, and we make individual complaints and occasionally something gets picked up by someone like HREOC and they might do an inquiry into access to banking services - like the accessible banking - and that leads to the broad introduction of things like accessible bills and stuff, but that happened because BCA coordinated strategic complaints against all of the major banks, but it took that, and we have ongoing - it's regular that we get people contacting us who can't get things like prospectus information in a format they can read, or other forms of financial information, but it's probably not the - I mean, the area we get most people contacting about makes sense. It's things like Centrelink information and stuff like

that, because that's what people are regularly - - -

MS DIAMOND: I'd say that's true; that it's regular but I think, in answer to your question, it has become more noticeable since the number of providers - for example, say in this state of Victoria, we used to have one organisation which provided power; one used to provide your gas. Now we have a whole lot of different companies who do it, so that complicates it a bit because you don't have to just negotiate or advocate or go and talk to one, and everyone moves house - as they do from time to time. They go into a different area and they might have got their gas bill in an accessible format and now the company that provides it for them isn't - so I think that has complicated the system, too.

MRS OWENS: One way of dealing with these sorts of ongoing - what you have called "regular problems" is to do what we've suggested, which is to allow HREOC the ability to initiate complaints. You've rejected that as an idea because you've said that it might undermine the perception of the independence of the commission, but these were exactly the sorts of areas where we thought it would be useful to have an initiating power - there are other reasons you might want that, where people don't want to actually - or find the barriers to making an individual complaint too great, but you don't see that there are areas where it could be useful, rather than having an inquiry, HREOC could actually take it and run with this idea?

MS O'NEILL: I think it would be easier and more successful to do the other suggestion you made of allowing organisations that represent - organisations like ourselves to initiate complaints. Part of the problems about HREOC would be that we'd have to still - you'd have to identify the issue and HREOC will identify that it's an issue because of organisations like us going to them and saying, "This is a problem" - and that is one of the ways HREOC knows what's happening on the ground - is that people like us tell them. I think if we could do it, it keeps it that step removed from HREOC and doesn't confuse the HREOC role.

MRS OWENS: Okay.

MS O'NEILL: I think it would really damage HREOC if - in the eyes of people who have made complaints - made against them - if HREOC was initiating complaints. It can be quite adversarial - you know, complaints.

MRS OWENS: We also talked about the Access to Premises standard and - I am just going back and forward in your submission, but you have expressed some concern that there are still going to be problems for the blind or vision-impaired in terms of accessibility of buildings when this standard is in place. Have you raised those issues with those who have been developing the standard?

MS O'NEILL: Absolutely.

MRS OWENS: What has been the response?

MS O'NEILL: The reason that that's going to be the case - that most issues for people who are blind won't be addressed - is because it was a deliberate decision made, and it's a decision that makes sense - that in this first stage of the Access to Premises standard they would just bring the Building Code into line with the DDA, and a whole lot of things - and you may know that the Building Code is quite minimalistic. It's about structural integrity, emergency exists, fundamental access and egress and stuff.

The Building Code, for instance, doesn't cover internal fit-out or tenant information because it's not concerned with what you do with the building once it's built - it's just concerned with the building of it and because fundamentally the issues are about access to information and basic safety stuff. The basic safety stuff will be addressed, but the access to information won't, and that will be part of the second stage of Access to Premises development, where they move on to looking at the broader issues - things like access to information about people, what's inside the building and the use it is put to. The Building Code doesn't even cover putting your number on your building out the front, so at this stage we won't even be able to have a situation where the building number has to be able to be read by someone who is blind, so it's quite restricted in the first stage of its development.

MRS OWENS: And then it doesn't cover the built environment around the building, either, as I understand it.

MS O'NEILL: It goes to the property boundary, so one of the good things is it does require that there be an accessible path to travel from the building boundary into the building.

MS McKENZIE: But not further than that.

MS O'NEILL: Not further than that, and unfortunately that was one area where the Building Access Policy Committee felt that they didn't have enough information to tell a builder or operator how to actually do that for a blind person, and there's research happening at the moment to look at that, about how you can actually make an accessible path of travel for someone who's blind. We all know how to do it but knowing how to write it in the way that the Building Code requires is a bit more complex. So that's happening. So until that research is done and that development has happened, there won't even be guidance in the Building Access to Premises standard about how you can make a path accessible for someone who's blind.

MS DIAMOND: But I guess from where we sit that it probably will go through as is now, but with an understanding that once some of this research is completed there could be some amendments, you know, like in a second round - well, not a second round; an update at another stage.

MS OWENS: But it might not get updated for, say, five years.

MS McKENZIE: It might be years before that.

MS O'NEILL: My understanding, and I hope I'm right, because the Building Code is actually updated once a year, is that there could be a process of actually updating it more regularly than that, although there will be the systemic reviews every five years. I understand there is a commitment that once research is done and subject to the RIS and all that sort of stuff, that it might go in earlier.

MS DIAMOND: We sought that agreement from them at a public hearing, so we're hoping they will stick to it.

MS O'NEILL: But your point is very important, Cate, that there's nothing - I mean, one of the big issues for all people with disabilities is that there's so little access out in the street that if you can't even leave your front door to get to the train station or wherever, you're hardly going to be able to get into a building for whatever purpose you need, including employment.

MS DIAMOND: And this impacts on everything. This is where employment, education, are such big issues, because not only is it just where you sit at your desk to do your job, but you've got to get there. You've got to get from your home to the building, into the building and to your office, so they're all interrelated really.

MS O'NEILL: The other issues that you raised about access to premises - and this is also important with the transport standards - is that the standards say that this is what you have to do to meet the standard but you're allowed to do something else if you can argue that it meets the same point, achieves the same outcome, and so a lot of people are doing different things and we argue that they don't meet - they're not equivalent; they don't actually achieve the same thing.

But in the meantime they have happened, all the money has been spent and it's going to be an extraordinary process. It will take ages to run a complaint, to hopefully win it and then have them retrospectively correct the situation, and it really matters in terms of things like tactile ground surface indicators, where there's a whole lot of operators who just don't like - I don't know what their problem is but they just don't want to follow the standard, and that's important. We would prefer that, in relation to things like that, operators didn't have discretion to use a different

approach.

MS McKENZIE: But the problem is there's no-one to actually say whether that different approach is truly equivalent. This is my understanding of the transport standard. The building standard - the premises standard has the protocol, but again there are difficulties thrown into that, but with the transport standard the only way you're going to find out whether it was truly equivalent is after the event, when you make a complaint and you win or lose.

MS O'NEILL: Yes, absolutely, and for people who are blind or vision-impaired, something like tactile ground surface indicators are only effective when they're consistent, where, no matter where they are, you know that they're going to give you the same information.

MS McKENZIE: This is what they need. That's right.

MS O'NEILL: Yes, and so for us we just - especially with tactile ground surface indicators, we just can't understand why you'd allow people to come up with idiosyncratic designs which actually make all TGSIs less valuable.

MS McKENZIE: Yes.

MRS OWENS: Could we change topic. Is that all right? Unjustifiable hardship: we'd made a recommendation which again I don't think you liked, on page 19, and we had said that the act - this was our recommendation 10.1; that the act should be amended to allow unjustifiable hardship defence in all substantive provisions of the act - I'm just paraphrasing this - including education and the administration of Commonwealth laws and programs, and you've said, "We disagree particularly in relation to administration of Commonwealth laws and programs," but you're disagreeing about allowing it to be extended into education, when the kid is in the school or when somebody is in the job, and you're also disagreeing about allowing it to cover Commonwealth laws and programs.

What's your objection? We were of the view that you needed to have checks and balances in the act, and there were going to be some circumstances where, say, a small school might not be able to do something for a child once that child was in the school, or circumstances might change once the child was enrolled, and the same could apply in some employment situations as well, but you don't think that that would be appropriate to have unjustifiable hardship as a defence in those circumstances?

MS O'NEILL: In relation to education - we didn't in our response separate it out but in relation to the extension of unjustifiable hardship beyond enrolment, we do

think that's reasonable. We don't like it but we can see why you would do it. But in relation to the rest of Commonwealth laws and programs, no, we don't. We think that the Commonwealth has a far greater responsibility to meet its obligations for people with disabilities and that that should be upheld, and there should be no excuse for a Commonwealth department not to meet its obligations, because if they don't, who will? If the Commonwealth don't set that example and if the Commonwealth can't afford it - - -

MS McKENZIE: No-one can.

MS O'NEILL: Yes. So it's about their position as a role model, I think, and they should have a much greater expectation put on them by the public.

MS McKENZIE: It's hard. Normally if you're looking at it logically, if you're going to have a defence available, it should be available to all respondents. Do you see what I mean? Normally you would not pick and choose between respondents when making a defence available. You would make it available to all. Whether or not the respondent happens to be a Commonwealth government department or a state or a big or small company - - -

MS O'NEILL: I understand your point but we think that it is all right to have higher expectations of Commonwealth and state departments in relation to their obligations under the DDA.

MS McKENZIE: I do have to say, obviously the more funds an organisation has, and the greater power and the greater breadth of coverage and so on, the more difficult it's going to be to claim unjustifiable hardship, so it would be very difficult, I would have thought, for the Commonwealth to claim that defence, but you just think it shouldn't be there?

MS O'NEILL: Yes - well, in reflection - - -

MS McKENZIE: Even in employment, in any of the areas?

MS O'NEILL: Yes, definitely, because it's the Commonwealth's duty to run its services in a way that everyone can - as it is everyone's, but it is particularly incumbent on the Commonwealth to run its operations in a way that makes them accessible.

MS DIAMOND: For all citizens - yes, for everybody.

MS O'NEILL: Yes, and that should be part of their expectations - from the community.

MS McKENZIE: So it's part of their different position really that makes you say that.

MS O'NEILL: Yes, definitely. And also we would love the Commonwealth to just be a bit more proactive. to actually set itself as a role model to implement innovative approaches to outcomes, which they don't actually do, but we'd love them to actually do that; to be a bit of a leader in this area.

MRS OWENS: Would that extend to affirmative action in employment?

MS O'NEILL: We'd definitely love things like traineeships and internships and apprenticeships, training opportunities, to be set aside for people with disabilities, yes.

MS DIAMOND: I would think in the past government was an employer of people with disabilities at a much higher rate than they currently are, and I think that's been unfortunately, really, that when people go round telling small businesses and everyone what to do that they're not even doing it themselves. Some of your big government departments are the worst offenders, I would find - from our experience, anyway.

MRS OWENS: We ran through some of the reasons why that might be happening in our report. It was either in the chapter or the employment appendix, but there's been a lot of changes in the Commonwealth where the budget responsibility is now with the individual departments and so on, and a lot more emphasis on increasing efficiency and - - -

MS O'NEILL: It's exactly those things that I think mean that you don't want unjustifiable hardship to be extended because you might have a department that - we've had cases where public service departments have actually been able to argue that it was unjustifiable hardship for them to employ someone because of that individual budgeting and everyone has their own little allocation and you can't go beyond that, and it could actually lead - I mean, you're right that there would be a much higher expectation in any case that went against them, but nonetheless it could happen. A department would say, "We only have this budget."

For instance, in some of these small sections, like our parliamentary secretariats and stuff, if you actually have - as we have had - complaints of their not providing reports in alternate formats and accessible formats, potentially they could argue that they can't afford it. How can a government department be actually arguing that they don't have the funds for that sort of thing?

MRS OWENS: I suppose governments have funds but they're the taxpayers' funds, ie, the community's fund, and funds are limited. There's always a resource constraint. That's the economists' argument about these things, and they've got to allocate their funds to a whole lot of other purposes.

MS O'NEILL: I agree, but it links to what I was saying about being innovative because if government departments know that they're going to have to do it, maybe they'll actually start producing them in the first place in a format that is easily produced in another format, and actually do something systematic and strategic within their departments. There's no motivation to make that systemic change.

MS DIAMOND: And I guess that's where the concept of universal design and single file electronic file formatting - you know, some of that is just strategic placement so that those costs would never be as high as they might otherwise be.

MRS OWENS: Another area where you commented was on the idea that we floated in our report about having a positive duty, and I think that idea was originally floated in your first submission, if I remember correctly. But you've said that you would prefer, if we were going to recommend on this, that it wouldn't be just for employment, and it won't surprise you to know that there's been quite a lot of opposition to an idea for a positive duty, and we've been thinking through this issue, but would you like to just expand on your views about what you think a positive duty would involve and why not just employment?

MS O'NEILL: Maybe this is one of those issues that we can let Aileen tell you more about, because she wrote the section. I have spoken to Aileen about it, and it was her sense that really it's not such a change from what's currently required in terms of the interpretation of the act that you should actually have to make adjustments. Well, that was certainly the intent, that it wouldn't just be that you would identify that there were things you could do, but then you'd actually have to do them, and that's quite different from then expecting people to give preference, I think, if positive duty is being construed by some people as affirmative action - no.

MRS OWENS: That's not what we were suggesting.

MS O'NEILL: No, but the opposition - I was thinking that maybe people are making that link from - - -

MRS OWENS: But I think what some employer groups have been concerned about was that what it was inferring in the draft report was that people or organisations would have to think ex ante about how they would adjust or adapt the workplace if somebody was to come along and want to get a job and so on, so to think through and develop policies about how they would handle those situations,

and they said it's very difficult to do that until you actually know who it is who is coming through the door. But there is a question mark about what's actually required under the act as it stands now anyway, so another approach is just to clarify what the intention of the act is, and make it clear that at least the act should require some sort of reasonable adjustment.

MS O'NEILL: We'll get Ails to come back to you on it. It comes back again, though, to the point that it's an attempt to try to get people to stop doing one-off adjustments for the one person but to actually make - this is the idea of extending it beyond employment - to actually try to get people to implement universal design and to stop thinking about how to modify something once they've already done it so that it suits people, and that would have great long-term cost savings because you'd actually be doing things right in the first place.

MS McKENZIE: What we were thinking originally, we were suggesting an employer's duty was that an employer could, instead of having to do whatever the adjustment might be when the person came through the door, if they had planned, they might then want to factor in some of the adjustments into their business planning over time, which again would be less costly than trying to do it in one go once the first person arrived.

MS DIAMOND: That's right, and also just the office design and layout, et cetera. That's where again universal design does come into it - that everyone can use the same facilities, and you don't have to then do the one for one when they arrive at the door.

MRS OWENS: I don't know if I have other issues. Do you have any other issues? Is there anything else that you wanted to raise with us?

MS McKENZIE: We haven't gone through every one that you have - - -

MRS OWENS: No. There are a lot where you've just basically said, "Yes, we agree with that."

MS McKENZIE: Or suggesting something that's quite clear what you want us to do.

MRS OWENS: Or suggesting we should be looking at jury duty, or whatever.

MS McKENZIE: The migration one, for example. That already we've had submissions about as well, but really we haven't thought broadly enough in the way - we haven't expressed what we've suggested broadly enough, but we should perhaps think again about some of the issues.

MS O'NEILL: They were two areas that we wanted to be noted. We were very happy about draft recommendation 6.3, about allowing complaints against acts. We think that would be a great step forward. We didn't address unfortunately in the first one the issue of vilification, and I just wanted to point out that the problem is that it's not clear how you would actually ever set the process in motion. If somebody has been vilified, how do you actually get section 42 of the act happening? There's a penalty of six months imprisonment, and that potentially makes it harder, because that's quite a serious outcome. I mean, if you're putting imprisonment, well, it's a criminal act.

MS McKENZIE: Yes, it's an offence.

MS O'NEILL: So who would actually do this? Would it be police?

MS McKENZIE: You'd have to have a charge.

MS O'NEILL: Yes. So we thought, just to raise it, it might be unworkable the way it's actually currently written.

MS McKENZIE: It would be better to make that the subject of a complaint, do you think, rather than an offence?

MS O'NEILL: Well, if it was an offence, not to try to do it through the complaints process. But, yes, Aileen generally does make it part of a complaint, and that having a six-month penalty might make people unwilling to pursue the complaint because it's such a serious outcome.

MS McKENZIE: That would have to currently go through the offence mechanism. They have to be charged and go to court. The standard of proof would be much higher and so on.

MS O'NEILL: You had a request for information about how complaints could be better enforced. We had a few ideas about not letting HREOC close the file until they had done a follow-up call, and that might be enough in some cases to get people to meet their agreement.

MS McKENZIE: This is under settlement agreements - mediation agreements?

MS O'NEILL: Yes. There were other ideas about maybe registering agreements by consent with the Federal Court, but Aileen was strongly of the view that that's quite a complex issue and that maybe there needs to be discussion just on that as an issue in getting people together to nut out these sorts of questions. In 11.1, there's

was the issue of appropriate referrals between the state and Commonwealth commissions, and we just wanted to point out that we're aware in Victoria, at least, it used to be the case that if someone rang up the Victorian commission and said, "Oh, I've got this complaint," they'd actually go through the options.

So you could go federal, you could go state - "These would be the benefits or costs of both" - and you'd then make up your own mind, whereas there seems to be a policy now that people, if they ring the Victorian commission, are just accepted as Victorian commission cases and that's led to some people being - it's a wrong referral. They should have been referred to HREOC, to the federal, for those cases because of the particular details of the case.

MS McKENZIE: We were suggesting at least a shopfront, where people could get general information about both areas to enable them to make some sort of decision without burning their bridges.

MS O'NEILL: Yes, absolutely. We would support that. This is just a final thing: 11.2 you have a request for information about whether or not organisations like VCA can run complaints for people. We just wanted to make it clear - it was in our submission - that you would have to be careful about which organisations you let do that, and that they would have to have a demonstrated commitment to the people that they're claiming to represent.

MS McKENZIE: They're all the questions I wanted to ask.

MRS OWENS: There are plenty of other issues but, as I said before, you have really covered those very well, so we will go away and ponder on what we've discussed today.

MS McKENZIE: For a very long time.

MS O'NEILL: In terms of the positive duty on employers in that section, you would just like more information from us about why we made the submissions we did?

MRS OWENS: If you could ask whether just making some recommendation on a reasonable adjustment, making that clearer in the act may suffice? We could actually give examples of what that means. That would be very helpful. Thank you. We will break now and resume at 11 o'clock.

MRS OWENS: We will now resume. The next participant this morning is Mr Melville Miranda. Welcome to our hearings. I'd like to thank you on behalf of Cate for the, I think at last count 25, submissions that you've sent to us over the course of our inquiry; so I thank you for the ongoing interest. You've obviously got a personal interest in quite a number of the areas that we're looking at. Could I get you to give your name, for the transcript, and state the capacity in which you're appearing today.

MR MIRANDA: My name is Melville Miranda. I'm appearing as a citizen of Australia. In terms of my background, I've been a solicitor in India for 20 years. I've been dealing with human rights, the constitution of India and various legislation and in terms of the cases that have come to me for 20 years, I dealt with the poorest of the poor including Mother Teresa, who was my client and good friend for 10 years. I experienced a lot of oppression and exploitation with the poorest of the poor in India and had to go to the Supreme Court of India to challenge legislation like land rights, the labour legislation, the employers' legislation, where a lot of oppression and exploitation was manifest in the act. During the tea break I was discussing with one of the honourable commission members that legislation is drafted by the elite for the elite and of the elite. It is not drafted for the people at grassroots.

When I came to Australia eight years ago - I landed here on 28 June 96 - I worked for various human rights organisations like Amnesty International Australia. I was a convenor in Melbourne for the refugees as well as a convenor for the Essendon group because I was living then in Essendon. There again I found that in terms of refugees, a lot of exclusion is done by the government. In fact I had to organise with my team to demonstrate and protest at Maribyrnong detention centre where refugees were kept without a hearing for years together and without any opportunity to be heard. So I advanced. I did my masters in social science policy and human services from RMIT, then my community development from Swinburne University, then I did my masters in bar ethics from Monash. Now I work and study. I'm doing my masters in public policy and governance from Deakin by distance education and I work for disabled organisations here.

I have found that organisations interpret this legislation to their need. The minute they are told of the interpretation according to law, they don't like it. They get hurt. I find in my dealings, in eight years in Australia and 20 years in India, that when it comes to law, to interpret the law in letter and spirit, for the vulnerable, disabled, disadvantaged it is not done in its letter and spirit. In fact, they misinterpret the law to suit their own needs and own whims and fancies. That is not my cup of tea, therefore I resigned from the present organisation and I go on to the next one.

My background I've given you. Today I make my further submissions on the honourable commission's draft report on human rights, from pages 15 to 18. I will

read out what Marcia Rioux had to say at the Stockholm Conference, which I have with me here: "Let the World Know" Report of a seminar on human rights and disability held at Almasa Conference Centre, Stockholm, Sweden. Rioux mentions that:

A strong case can be made for social wellbeing as a public good inasmuch as it has such characteristics as equity, shared communal benefits, indivisibility, non-rivalry and non-excludability. Yet governments have limited their investments of public funds directed towards this achievement. This disjunction between the political commitment and economic investment suggests the off-loading of government responsibilities to the private domain. Social wellbeing is increasingly market-driven and privatised. However, because there remains a political commitment to it as a public good, governments have had to rationalise their decisions to reduce their fiscal expenditure. The increasing governmental limitation on expenditures in this area has meant that public needs are being met selectively rather than universally. The coherence that social wellbeing as a reinvented public good offers is being circumscribed by political action rather than market conditions - political action that rationalises government disengagement from its own recognition of social justice and social wellbeing as public goods.

Applying Rioux is indicative of the fact that the federal and state governments in Australia have reduced funding for the disabled and therefore deprived them of their wellbeing. The political action of funding cuts has disengaged both governments from their own recognition of social justice and social wellbeing for the disabled in Australia. What is happening today is, for example the multipurpose taxi cuts, which has been recently introduced. It will certainly have a long effect on people with disabilities.

What strikes me and concerns me that Australia is a signatory to the UN Charter of Human Rights, which the honourable commission has quoted on page 15. In practice, where is this Charter of Human Rights practised? I rightly agree with Rioux who says that the social wellbeing of disabled people has been reduced because governments do not want to observe social justice in letter and spirit but only pay lip service in terms of being signatories to the UN charter. This is a very important paper. I've got a copy and photocopies can be made of this and be given to the honourable commission; I'd be very happy.

MRS OWENS: Thank you. So that's a document that's come out of the "Let the World Know" Stockholm conference?

MR MIRANDA: Yes, it was a conference. Marcia Rioux has also written a book,

Disability is not Measles. I had got that book, but it was an inter-library loan and I had to return it. The due date was yesterday, so I couldn't bring it here. There she says that the trend today is that governments do not want to recognise disability rights because they feel basically (1) it's a strain on the economy; (2) they feel that the best fit should get the service. How can you do this - apply it? If you say a democracy is for the people, by the people and of the people, you can't apply this principle that people with disabilities are not an asset to the economy, not an asset to society and therefore they should not be given finance. They should be cut; funding should be cut. I don't agree with this principle.

This principle - if you are a member of the United Nations, you've got to treat people with disabilities at par with able bodies. If you don't treat them at par with able bodies, you are certainly demonstrating manifestly that you are discriminating against disabled bodies. That is the trend today of new liberalism. Everywhere I go I find where people are disadvantaged, disabled, services are being reduced. The organisation where I used to work has a lot of people waiting for services for months together and nobody knows when that service will come to them, because today organisations are going strictly by the letter of funding.

If we get X funding, we will give service to that amount. If we get Y funding, we will do service to that amount. No more than that they are prepared to extend themselves. The waiting lists for nursing homes is increasing. The demands are increasing day by day. Document 2, which I would like to rely on, states here - - -

MRS OWENS: Melville, could you just read out the title of that document? What's it called?

MR MIRANDA: Plan and Deliver Access and Opportunity for All Victorians, VCOSS state budget submission 2004-2005.

MRS OWENS: Thank you.

MR MIRANDA: Here on page 41 they say:

Demand management: according to the Australian Bureau of Statistics 1998, Disability, Ageing and Carers survey, there are an estimated 834,700 people with disabilities in Victoria - around 18 per cent of the population - of whom 665,200 have a core activity restriction. VCOSS understands that the growth in demand for disability services is expected to increase significantly over the next three to eight years. There is real concern in the disability sector that the government's response to this projected growth will be to narrow the criteria for accessing supports and programs under the guise of "demand management" in order to avoid an

increase in costs. The recent announcement of cuts to the Multi-Purpose Taxi Program through price capping and tightening of eligibility criteria confirmed the sector's fears in this regard. The government rationalised its decision by claiming that it is developing a public transport system that is "compliant with the Disability Discrimination Act 1992".

I don't see this happening in daily life. There are still plenty of lacunas in implementing the public transport system in accordance with the Disability Discrimination Act. The attorney-general in 2000, Daryl Williams, had framed rules and standards for the public transport system in Australia to be implemented within two years. Still today I do not find a single letter of those rules implemented in any public transport system. I'll give you an example. I live at Burwood. At Burwood till today there are no ramps, no facilities constructed for the disabled. At Ashburton too, which is one stop away from me, there is not a single facility or ramp constructed for the disabled. How then do I see that what is supposed to be stated by the federal government that there is compliance with the Disability Discrimination Act for the public transport system?

MRS OWENS: I think the problem with the transport standard is that they've been given a number of years in which to implement the standard. I'm not quite sure how long it's meant to take before the stations are all accessible, but they probably can use that excuse: that they've got X number of years in which to comply.

MR MIRANDA: My reading shows that it ought to be implemented by 2002. Nothing has been done so far to implement what the then attorney-general, Daryl Williams, has said in his standards. So it only shows what sort of people do we have, or who apply the politics of exclusiveness to the people with disabilities.

MRS OWENS: I will take up your invitation, by the way, in one of your submissions, where you said, "Go and have a look at the Burwood station." I thought that one day, when I get time, I'll go and have a look around.

MR MIRANDA: Give me a ring. I think I sent the commission a letter to come and investigate the station.

MRS OWENS: Yes, you did.

MR MIRANDA: I speak to the inspectors on duty and they say, "Melville, just take it up." Recently my neighbour's son with epilepsy had a serious accident at Croydon station because of no facilities.

MS McKENZIE: The difficulty about having a standard which is complied with progressively - you know, so many per cent after so many years - is that when that's

applied to things like stations, it simply means that a person with a disability may have to go a very long way indeed to get to an accessible station; and even when they get to one, may not be able to go where they want to go because there's no accessible station there.

MR MIRANDA: What surprises me, my parish - St Michael's Church at Ashburton - has constructed ramps, specially for the people with disability to come in, but Ashburton station and Burwood station have not done any construction so far. So that is a very big concern in my area. Even the minister, Bob Stensholt, who is a member of parliament in Victoria and for the Burwood area, does not look into it. I've written to him twice. There's no response. So that very much concerns the area at Burwood, Ashburton: these facilities are not there. Further, there's not even a toilet at Burwood for people with disabilities. There's not a single toilet for able bodies nor for people with disabilities. The one reason advanced by the transport is, "Burwood is not a premium station." This argument is ridiculous. How do you treat them premium stations and non-premium stations.

MRS OWENS: I think it depends on which electorate they're in. Sorry, that was a facetious remark. I've just been given some information about the accessible public transport standard. It came into force in October 2002. That's when it was started. Then I think all the jurisdictions have got something like 20 years.

MS McKENZIE: A long period, 15 to 20 years.

MRS OWENS: A very long period to do certain things. There are things that have to be done in steps. It will be interesting to see whether the Victorian government now has a strategy to deal with all the stations and say, "We're going to look after the main ones first," whichever ones those are "and then gradually we'll get to Alamein, Burwood, Ashburton and - - -"

MR MIRANDA: But when? By that time these people will be dead.

MS McKENZIE: And you're right, Melville. The whole point of having a transport system is that you can get to where you want to go.

MR MIRANDA: Yes.

MS McKENZIE: Someone in Burwood, for example, if that station is not accessible, would have to - probably by taxi - try and get to a station that was, and even then might not be able to go where they want to go because there's no accessible station there.

MR MIRANDA: Yes. In my area, in my parish group, in my own small Christian

community, I have two visually-impaired who really struggle to go to work, and they have to go by taxi because they say, "Melville, we just can't go by public transport." So my concern is - assuming for the sake of argument it is 20 years - 20 years to keep these people without facilities? What are their pleasures? They have small pleasures in life. Why deprive them of their pleasures now, public transport? Why make a distinction between an able body and a disabled body? Why not construct a toilet which is essential for these people, because they urinate often - you know. They've got to have something that is congenial to them when they travel. Even coming by tram, I notice in the new trams, just two seats in the new tram for people with disabilities. It's ridiculous, just ridiculous.

MRS OWENS: And we're only just starting to see tram stops which make the trams accessible, and it's only really I think still on one line, which is the line that runs down Collins Street. I think there is a program there to increase the numbers of accessible tram stops over time. Again, I don't know how long that's going to take. But I think what the governments would argue is that they've got to expend money, they've got to have a budget for it, that's going to take so many years, and "we've got all these other budget priorities, and we've got a budget constraint so we can only spend so much and we've got all these other calls on our money".

MR MIRANDA: Yes. The argument advanced today by governments, I think it's not logical because if you have incentives - incentives to boost business, to boost the multinationals, don't you have budgets for the people with disabilities who are asking you small demands, of construction of toilets at railway stations, construction of ramps, construction of - these are small demands from them. They're not asking you - a big multinational corporation - they are small.

What I am trying to convey to the honourable commission, make their life happy. How long God will keep them alive, nobody knows. Nobody can wait for 20 years. Give them, as long as they are alive, the best. But where is the best given? In fact, the people in my area say, "Melville, we are paying more now because we have got to travel by taxi." Where is the income? Where is the employment? And now we're downsizing and cutting costs of employment, there's no employment available for them too.

MRS OWENS: I think the problem we encounter with the recent taxi cuts in Victoria and a lot of other government decisions, not just at the state level, is that governments tend to be driven by their own budget considerations rather than looking more broadly at the community benefits, the benefits to the community and the potential costs to the community. The commission that I work for, the Productivity Commission, does take this broader perspective. Our interest is not just in government budgets but in what are the broad benefits that can be achieved and, when you're talking about taxis, those broad benefits can include getting people from

their home to the workplace; it means they can have a job, they can have recreational opportunities, and there are a huge number of benefits for those people, which tend to be discounted because the obsession is with the \$30 million or whatever the budget is in Victoria for disabled taxis, which I think is cheap to get those people out and about. I think it was a knee-jerk reaction to some fraud that was going on, and the way you address the fraud is to deal with it directly, not cutting the budget.

MR MIRANDA: Yes.

MRS OWENS: So I think it was a very very unfortunate approach that has been adopted, because there has been no recognition of what those taxis mean to these people.

MS McKENZIE: I think there has been some moderation of that approach - at least according to the newspapers - I know nothing more than that. But whether the whole approach has been now changed, I'm not certain.

MR MIRANDA: See, that brings me to what Rioux says in a document. The social wellbeing is completely excluded for people with disabilities, because then where is the commitment to social justice? If budgets are a primary factor for governments in Australia and in the world today, where is the social recognition of social justice?

Another good book which I was reading and which I was studying today is by Owen Hughes, *Public Management and Administration: An Introduction* - Owen Hughes - where he discusses the traditional model of bureaucracy and the new public management. The new public management is driven by markets, cost-cutting, managerism, but how is all this going to help the person who is struggling? It is basically done for a few, by a few, and of the few. How this is going to help people with disabilities?

So while reading last night I said I would canvass this point today before the honourable commission, that how is the new public management going to benefit the people with disabilities who struggle day to day for their needs? This is becoming very much a primary model - in fact, it's the model today in new liberalism. This is becoming a very very primary model in new liberalism in Australia and all over the world, and this is what they call "globalisation". Globalisation for what and for whom, and why?

Yes, I would understand if there was an equity between the disadvantaged, the disabled, the poor - yes. But on the contrary, you're creating a system - nationally and internationally - to create a big divide between the rich and the poor. So when you talk of equity in terms of the UN charter and human rights and UN declaration

and all the conventions which we have signed as a nation, how do you observe it to the less fortunate? Further, one-fifth up to fourth-fifths of the resources in the world are controlled by one-fifth of the world's population. Now, how is this going to bridge the gap of equity?

So my humble submission before the honourable commission - which I said on page 15, about human rights, et cetera, et cetera - there is certainly no equity when it comes to people with disabilities. At the bottom of the page, the honourable commission observes:

This inquiry does not cover the foundation, but it does have to grapple with the important rights-related issues.

My humble submission is that there should be at least some comment or some recommendation from the commission stating it's time to recognise the rights of people with disabilities as human beings, to give them dignified self-esteem lives, in every respect because, as I see this new public management and new liberal economics, it is no more giving importance to the human rights approach of people with disabilities. Day by day I see it's going down and down and down, and employers and organisations and big organisations and multinationals take advantage, because the act does not spell out in detail that human rights should be to raise the dignity of the people with disabilities.

Yes, I understand valuing human rights, but I would say with my humble submission that it's very necessary that this commission recommends to the government it is time not to ignore the day-to-day rights of people with disabilities, such as public transport or education or nursing homes or hospitals or educational institutions. They have got to recognise that they are part and parcel of society, irrespective of whether they are rich or poor. Thereby you translate into practice the concept of equity, otherwise the concept of equity just becomes a figment of imagination and it just sits in the UN Declaration of Human Rights unless it is translated - unless the government translates this concept to the people with disabilities, thereby equity can be realised.

I see day to day there is no equity for the disadvantaged and for the disabled. They have to struggle and struggle - in fact, fight. I have to fight with my organisation not to charge \$50 for 15 minutes for advocacy. So it only shows where the corporate world is turning into.

MRS OWENS: Did you win that fight?

MR MIRANDA: Yes, I did win, after nine hours.

MRS OWENS: Do you want to comment, Melville, on our discussion in our report on page 17 about the conflict between rights? We talk there about how different rights can sometimes conflict. There's the right not to be discriminated against; that can conflict with the right of, say, employers to employ who they like or the right of service providers to provide whichever services they choose. That's a very general way of expressing that, but there have been instances we've heard about, about the rights of, say, children in a school to be able to receive their education and not have the class disturbed by one child that may have some behavioural problems, and so there's a potential conflict. Have you got any views on that?

MR MIRANDA: In terms of the liberal ideology, I think liberal ideology on rights is a concept which is dominated by markets. Markets determine. I am of the opinion that when you have an ideology which is dominated by markets, it cannot be equal to rights. Rights are something that a person gets from the time of birth. A child has rights right from inception, when he's born, when he is in mother's womb - that's the right start - so you can't equate markets to rights. What is happening today - the liberal ideology is to maximise profit, thereby maximisation of profit, if that is the ideology and that is translated into the real world, that certainly overrides the concept of rights. To me rights are crystallised. You get a right by being a citizen. You get a right by being born. You get a right when you are enrolled in school or college. My observance is this: in schools today, when there is certainly no special education demonstrated for people with disabilities - I find why this is so. Why should children go to special schools who have disability? Why can't they integrate with able-bodied children?

So what is happening today is that there is a huge segregation; there's a huge divide where if you're disabled, you go to X school. If you're an able child you go to Y school. Why not merge the able-bodied children with the disabled children, so that they live as brothers and sisters? The result is the education that is demonstrated. When a disabled child comes out of school he certainly finds himself at odds with able-bodied children because, in school, he's not exposed to able-bodied children, so my understanding is if you want to translate the concept of equity and if you say there is a democracy for the people by the people and of the people, why not merge able bodies with disabled children?

Same thing: there is a big chaos happening with disabled children in nursing homes today, so what is all going on? Basically the call of the market today is markets are dictating ideology to governments and I say this is wrong. In short, I cannot write economics equal to Melville; economics equal to the honourable commission. You cannot equate economics to human beings because human beings are an identity by themselves. They are a creation by themselves, having cells, all body cells, organisms, and a special creation. Therefore, if you want to translate the concept of equity and social justice and concept of wellbeing in practice, you

definitely can't be ruled by the ideology of markets.

Therefore, my submission is that the liberal ideology view on rights is distorted because it is dominated by markets, and markets can't be equal to rights. No way markets can override the UN charter, but unfortunately today the United Nations is dictated by nation states who say that the markets are the gods and the alpha and omega. My submission is that you cannot - never, never, never - equate markets to human rights because human rights deal with human beings per se. It's just like saying markets prevail over animal rights. Putting it in short, animal rights - do not have animal rights? The markets prevail over animal rights? This is ridiculous.

Just as animals, bats, et cetera, have rights, human beings have rights. You cannot say markets override animal rights, so my submission before the commission is that this box, which has put market pressure to maximum - prevent us from acting on prejudice, so therefore market pressures today are stimulating entrepreneurs and employers to maximise profits and prejudice the disabled from the concept of equity. I do not agree with this Calman and Lester (1997)

MRS OWENS: That was the box 2.3 that we've got in our report, yes.

MR MIRANDA: Yes.

MRS OWENS: There are a lot of interesting issues that we could explore with you, but there are issues of potential conflicts between different humans; you know, different humans have rights, but sometimes those rights can clash. There are also questions - coming back to the education example, we have already seen quite a lot of integration of children with disabilities into mainstream schools and we've commented on that in our report, but you may find that there are some parents that may prefer to have their child taught in a special school, for whatever reason, and there is a group of parents - say with children with hearing impairments - that want their children taught auslan.

At the moment in Australia there are not enough auslan interpreters. Now, that could be because there's been not enough trained because there hasn't been money for it, but it also could mean that not enough people want to actually become an auslan interpreter. I don't know which of those explains the shortage, but to the extent say that there aren't enough auslan interpreters for these children it's very hard - I'll rephrase that. It's probably easier to teach some as a group so that they can have an interpreter available in all classes. Can you see the problem?

MR MIRANDA: Yes, I understand your problem, Helen, but what I am trying to make my submission here is that there should be - certainly parents would like their children to go to special schools, but there's another aspect to that. What price do

you pay for isolating your children from the able-bodied children? Do you want them to come out in society and feel stigmatised? Do you want them to come out of that special school and feel diffident, because I see a lot of children from special schools who feel diffident to swim with able-bodied children. They're not able to get into it because they feel that they've got an impairment, but why is that diffidence given? It is given to them at the early stages.

You go to a special school because you have a disablement, but why is that put in their heads? I can meet with an accident today and become disabled, or you can meet with an accident and become disabled. Does that mean that society must label you and stigmatise you? That is what I am trying to drive at. Don't have that segregation. As the Russian saying there says, "Catch them young," so if these children are educated from an early stage - "Well, there's nothing wrong with me. This impediment is by virtue of circumstances and I am as good and as able as an able body," certainly can be an asset to society. But what is happening today? By taking them to special schools they are indoctrinating and drilling into them, "Well, I have an impediment. I'm no good. I'm in a special school. I feel different. The able-body students in an able-body school are better than me." Why? Let them merge.

The parents must be taught that in the long term who will pay the price? It is the child who is going to grow into adulthood who will pay the price of being a stigma to society and that is what I am canvassing here. Why create a label? Why create an exclusion? And, Marcia Rioux in a book, *Disability is Not Measles*, says governments today are trying their level best, including - she's a director of public policy in Canada, and she says that disability is treated all along - she gives the traditional concept as well as the post-modern concept that governments today are treating people, as well as children, with disabilities because they think they have measles, and she advocates that disability is not measles, and she calls that book, *Disability is Not Measles: The New Paradigm of Research*, and that is what I am strongly advocating. Why create an exclusion for them?

They're doing it in institutions today. They're doing it in colleges. When I was studying at university, to get services for a person with disability was a great task, so in other words I feel now it is time that the honourable commission should make this recommendation to the government: that rights emerge from the time you are born, and if you want to translate the concept of equity and if you want to translate a society for democracy by democracy and of democracy, you've got to have an equal merger of able bodies as well as disabled bodies. That is my perception.

That is the true concept of human rights; otherwise it just becomes a figment of imagination. It just becomes a joke. Another submission I would like to make is which I see in real life, disablement is an experience. If people who are able bodies

prior to being disabled they criticise the disabled bodies, but only when there is disablement in the house or there's an infliction, that experience opens the eyes, otherwise all along they don't even think of this issue of disablement, poor, disadvantaged - it's all Greek to them. It's all something which they do not want to open the eyes to, and they cover themselves with a way till such time there's a disablement to their own selves or to their families, and this is a very pathetic state in the West.

We don't realise that some point of time we are either going to grow old where we are going to experience disability or, who knows, if fate determines, anyone can meet with an accident - a train accident, a car accident, earthquakes, whatever - but till such time we are inflicted, we think life is damn good. It's excellent. Everything will go well, but nothing is perfect in this world. Nothing is ideal. Anything can happen (indistinct) or anything can happen at any time. We have not opened our minds to this - we are still blind - so people who sit and frame policies on disability, I always say they should have an infliction of disability before they write the policy - they should experience disability, either their relative, friend, neighbour or themselves - then they'll be able to write proper policies and give good grounds for legislation. That is my submission.

MRS OWENS: Thank you. Cate, have you got any questions?

MS McKENZIE: No. You have answered all the questions I was going to ask you, Melville. That's a very helpful submission. Thank you very much.

MRS OWENS: Thank you very much.

MR MIRANDA: Thank you.

MRS OWENS: We will just break until our next participant arrives at 12.00.

MRS OWENS: The next participant this afternoon is Mr Ivor Fernandez. Would you please repeat your name? You can stay seated.

MR FERNANDEZ: Thanks. My name is Ivor Fernandez.

MRS OWENS: You're here as an individual?

MR FERNANDEZ: Yes.

MRS OWENS: Thank you, and thank you very much for your submission, which we've read, and it has got a submission number now, so it's officially in the system. Thanks for taking the trouble to come today to see us, and I will hand over to you at this point, Ivor, and you can introduce your submission and the material you've just tabled for me from the Australian Industrial Relations Commission.

MR FERNANDEZ: I'll start with that. I gave a complaint in 2000 to the Equal Opportunity Commission. I had a lot of discrimination and harassment in my workplace that led to me coming under big stress, and finally I was stressed and I had to take almost a year off - stress leave - and because of that, my company started targeting me for redundancy, and they kept on pressing me to accept a redundancy, and I just refused and finally in February 2002 they made me redundant and I took up the matter to my union with the Industrial Relations Commission. All the arguments were given and the commissioner said he wanted to consider reinstatement, but the respondent said that it won't be appropriate because of my stress leave and the complaints I made to the Equal Opportunity Commission.

All that had caused ill feeling between the management and me and so he didn't want me to be reinstated. Surprisingly, the commissioner, in his finding, he said that he's not ordering reinstatement because of the fact of my relationship - "between the applicant and the respondent over the two years". So I thought that was a kind of victimisation that has been upheld by the commissioner but, unfortunately, once the commissioner gives a ruling I'm told that I can't appeal against it to any other commission, like Equal Opportunity or - I don't know what DDA now - - -

MS McKENZIE: Maybe you had to appeal to the court. Maybe that was the problem, rather than make a complaint here or to the commission.

MR FERNANDEZ: Not make a complaint here. What I'm trying to say is because I made a complaint to the Industrial Commission, under the DDA you cannot make another complaint. So if the commission or commissioner himself discriminates on the DDA, then I cannot take any action under DDA.

MS McKENZIE: It is a difficulty because it's like one commission trying to

overrule the decision of another. Maybe the better way might have been to try and appeal to the court against - if you thought the commissioner's decision was wrong, but I'm not certain what appeal rights there might have been in that case.

MR FERNANDEZ: No. My appeal would have been the commissioner himself is discriminating, so what happens if the commissioner himself discriminates? Can't I give a complaint against a commissioner? So that's what I'm trying to get at; that we're not able to give a complaint against a commissioner if he himself discriminates against a disability.

MS McKENZIE: It's difficult. Sometimes what will be said in that case is that the best way is to appeal to a court rather than to make a discrimination complaint, but I suppose really what you're saying is if you think a commissioner has discriminated, why shouldn't you be able to make a complaint?

MR FERNANDEZ: Yes, exactly. That's what I'm coming to. I'm coming to that point. He is supposed to follow the laws of the land and he can't discriminate, so if he indirectly or directly discriminates, I should have an option to take action against him. If I can do it for other people - if the other people discriminate against me, and I can take action against them, I can't see why I shouldn't do it because he's a commissioner and he's above the law, is he?

MRS OWENS: I suppose it's a question of whether the commissioner has - it's called "discrimination" or not. In his judgment he said that he had accepted the respondent's contention that the reinstatement is not appropriate, and the grounds he did accept that was he had regard to the nature of the relationship that you had with the respondent over the past two years and the fact that there's not now a position at the Dandenong site. So he might say, "There's nothing for you to go back to," as well. So whether that would be deemed to be discrimination - - -

MR FERNANDEZ: No, because he said, "I accept the respondent's contention that reinstatement is not appropriate." The respondent said that they didn't want me to be reinstated because of my disability.

MRS OWENS: He was concerned that, because of the stress you had suffered in the past, your reinstatement could well result in a similar situation.

MR FERNANDEZ: Yes. That's a discrimination by itself and that has been upheld - because I got an old thing on discrimination.

MRS OWENS: Would it have helped when you went to the Industrial Relations Commission if somebody from the Human Rights and Equal Opportunity Commission could have been present to provide advice to the commissioner on

discrimination issues? Would that have helped?

MR FERNANDEZ: I suppose so, because we have brought up all this. My union has brought up the discrimination: due to my disability, they make me redundant, but the commissioner is not taking that into consideration at all, and in the guidelines - I've got an old guidelines of the Equal Opportunities Guidelines on Redundancy and Anti-Discrimination Laws. It says, "It is also unlawful to discriminate against a person because he or she has or had a physical or mental disability." So I can use that also. I've brought you a copy also.

MRS OWENS: Thank you. Equal Opportunity Guidelines Redundancy and Anti-Discrimination Laws.

MS McKENZIE: So the commissioner found that the redundancy was unfair or that the termination was unfair or anti-discriminatory.

MR FERNANDEZ: Yes, he found it unfair due to other reasons, not due to my disability, because they do not follow the other norms, but then when he ordered my reinstatement he has not ordered my wages accordingly. He has just come to some wages what he thought fit and he didn't give me my correct wages, which also is discrimination under that paper I gave you. It says right in the beginning.

MS McKENZIE: And he wouldn't order reinstatement. The commissioner wouldn't - - -

MR FERNANDEZ: No, he didn't order reinstatement because my company had already wrote to them and said that they had done away with all the rest of the people so there's no more position for me. But that was actually wrong, because they were offering other people positions through a contractor, which was not offered to me. So they didn't inform the commissioner about that, so the commissioner automatically didn't apply that to me.

MS McKENZIE: What Helen asked was right. Would you think it would have been helpful to have someone from the Human Rights Commission perhaps making some extra submissions to the commission about the disability factor?

MR FERNANDEZ: Yes, that would have been very helpful, because then he could order something different.

MS McKENZIE: Then the other thing you talk about in your submission is about the confusion between whether you should go to the state commission under the state act or to the Commonwealth commission under the Commonwealth act.

MR FERNANDEZ: Yes. They didn't give me that option. Normally there's an option they give you, which you say before your complaint can be registered, because it's important that you're aware of the different scope and remedies for discrimination available under the state and federal laws which are now in force. You are required to select one law under which you wish to proceed, and so I wanted Disability Discrimination Act. I wanted that law to be covered on, but they didn't give me the chance, and they just rejected my application.

MRS OWENS: This was the Equal Opportunity Commission of Victoria?

MR FERNANDEZ: Yes. So I've actually given them a letter telling them that they didn't give me this opportunity, but they just say they can't do anything about it.

MRS OWENS: In our report we've suggested that perhaps there should be more cooperation between the state bodies and the Human Rights Equal Opportunity Commission.

MR FERNANDEZ: Yes, I read that.

MRS OWENS: There used to be such arrangements in Victoria until a couple of years ago, and that may have helped in your case because then they could have taken it and seen which act would have been better in your particular situation.

MR FERNANDEZ: Normally they send me - when I sent a complaint into the commission in 2000, they gave me the option.

MRS OWENS: Yes, but things have changed. They've changed their processes since then.

MR FERNANDEZ: Yes. Then it doesn't give me a chance - then they say I can't take it up again under DDA.

MRS OWENS: It's too late. It's not possible.

MR FERNANDEZ: It's not possible but then when I'm not given the option, you tell me you can't take it up.

MS McKENZIE: There must be many people in that situation and that's why we made this recommendation, that there should be like a shopfront where people can come and get information about both.

MR FERNANDEZ: They should be given information. Even when I get the finding from the industrial commissioner, he should give me an option that I can

appeal against a decision or something like that, but I don't get any option. So when I try to appeal, my union people are not available, and so by the time I fall out of that period of where I can appeal - - -

MRS OWENS: It's too long. So when you finished with the commissioner, there was no information given to you about your rights to carry it forward.

MR FERNANDEZ: Absolutely no rights.

MRS OWENS: You said in your submission to us, "Was I aware of the Disability Discrimination Act specifically? My answer is no, because I'm a bit confused."

MR FERNANDEZ: Yes, because I don't know if this is a different act altogether or it's connected to the Equal Opportunity or if it's connected to the Industrial Commissioner.

MRS OWENS: It's connected to the Human Rights and Equal Opportunity Commission, but I think your answer "no" is actually a common answer we're getting, isn't it, Cate, from a number of people saying they didn't really know about it.

MR FERNANDEZ: Yes. I didn't know they are a separate organisation until I saw it in the paper and I thought - something connected with the Equal Opportunity Commission.

MS McKENZIE: Many people say that they don't know about the Disability Discrimination Act.

MR FERNANDEZ: Yes, because they're not given the information.

MS McKENZIE: That's right, there's not enough information around.

MR FERNANDEZ: And then it is no use, because when we hear about you, we already apply to another commission and you say I can't apply to you again.

MS McKENZIE: Yes, that's right.

MR FERNANDEZ: So then your DDA actually is of no use to anybody.

MS McKENZIE: It's true that unless people know about it, it's not going to be effective.

MR FERNANDEZ: When I apply to the Equal Opportunity, they should tell me:

this is the option and once you apply to some commission, you can't go to another commission. Once they give me that option, then I know who I should go to.

MS McKENZIE: Yes, that's quite right.

MRS OWENS: You need to know what the options are and what the pros and cons of going to each one are.

MR FERNANDEZ: Yes, because why should I waste my time going to the wrong commission and then finding that I should have gone to this commission?

MS McKENZIE: Of course, that there's no guarantee that the Human Rights Equal Opportunity Commission would have accepted it either. We don't know that at this stage, but you need full information.

MR FERNANDEZ: No, we don't know about it, but at least I had the option and I took my option. I availed of the option I had.

MRS OWENS: Did they give you any information as to why they couldn't accept your complaint? Was that clear to you?

MR FERNANDEZ: Yes, I got that. I'll give you that copy also.

MRS OWENS: Thank you. We can get a copy taken after we finish. So this is from the Equal Opportunity Commission of Victoria but it says on the top that it's private and confidential.

MR FERNANDEZ: That's all right.

MRS OWENS: So we can't actually put it onto the transcript.

MR FERNANDEZ: Yes, okay. Anyway, I can give them my letter in reply to that.

MRS OWENS: Thank you. The status of this letter is that it's not private and confidential?

MR FERNANDEZ: No.

MRS OWENS: But it may actually refer to things from the previous letters that are. You've said:

I was under the impression that before my complaint could be registered

I would be made aware of the different scopes and remedies for discrimination available under the state and federal laws that are now in force. As such, I would be provided the opportunity to select one law under which I may wish to proceed. In the circumstances and in my case I would have wished to proceed under the Disability Discrimination Act, federal. I suppose this option is not available to anyone, and so it was not offered to me.

Well, it is available to anyone.

MR FERNANDEZ: Yes, but I just put it as politely as possible.

MS McKENZIE: Yes. You didn't know.

MRS OWENS:

I would also like to place on record that the Industrial Relations Commission had found that my dismissal was unjust and unfair because all processes used were deficient and, mainly, did not have a valid reason for the termination.

I'm just going through; I'll skip a bit of this.

This was even though my union representative submitted to the commission that these sections of the act -

and that's referring to 170CK - well, I won't read all this onto the transcript. What we'll do is take a copy and then have a look at it later. This was a letter dated 30 September 2003. Have you had a response from that one about your point about making a choice?

MR FERNANDEZ: No. They just reported to the VCAT. They didn't comment on that. They must have known that they had done something wrong and so they say that that's not any part-review, it's a decision, and cannot reopen a file. So that doesn't make sense, when they don't give you an option; they say they can't do anything about it.

MRS OWENS: Thank you. We'll table the confidential document, but we won't be able to use that in our report - and your response to Dr Diane Sisely.

MR FERNANDEZ: I can give you a copy of that. I've got you a copy of that document.

MRS OWENS: Thank you.

MS McKENZIE: Has the complaint you made been referred to VCAT?

MR FERNANDEZ: Yes, it has been referred to VCAT.

MS McKENZIE: So, although the commission's letter explaining why it declined the complaint you may not be able to table here, the commission's letter that - - -

MR FERNANDEZ: No. I'm sorry to interrupt you. It's been referred to VCAT, but then the company wanted it to be struck off because I'd already taken it up with the Industrial Commission, so that strike-off part of it has been upheld, you see, because I have taken it already - - -

MS McKENZIE: Because it's gone to the commission first?

MR FERNANDEZ: Yes. But the fact is, I didn't get my proper money and it didn't matter. While it's discrimination under the Equal Opportunity Act - if I don't get my redundancy payments like everybody else got, if I don't get paid like the rest got paid, it's discrimination, so that's why I brought it up before you, to show that a commissioner can discriminate and get away with it.

MS McKENZIE: Thank you for that. It's a very helpful submission. Education and awareness is something we're very concerned about, as we've mentioned in our draft report.

MR FERNANDEZ: Yes, because according to me, it makes no sense if there are discrimination laws, but certain section of the people, because of the policy in there, can discriminate. I mean, for the judge or anybody, the law should be the same for them.

MRS OWENS: You've touched on a number of policy issues for us, which are very useful, and as Cate said, I think the whole issue of education is very important.

MR FERNANDEZ: Yes.

MRS OWENS: The issue of the relationship between the different jurisdictions and cooperation between jurisdictions is important.

MR FERNANDEZ: Yes.

MRS OWENS: And the other issue that we are still grappling with is the role of the Human Rights and Equal Opportunity Commission vis-a-vis other commissions

such as the Australian Industrial Relations Commission, and where the two sit, and we're still thinking that issue through. So you've raised three very important issues.

MS McKENZIE: Very helpful issues from our point of view.

MR FERNANDEZ: Thank you.

MS McKENZIE: Thank you, Ivor.

MRS OWENS: Thank you very much for coming. We will now break and resume at 1.30.

(Luncheon adjournment)

MRS OWENS: Our next participant this afternoon is the National Diversity Think Tank. Welcome to our hearings and thank you for your submission. What I'll do, as I mentioned before we started, is ask you each to give your name and position with the Think Tank, for the transcript.

MS McCALL: My name is Andrea McCall, the project coordinator for the National Diversity Think Tank.

MR HENNING: My name is Andrew Henning and I'm the project assistant for the National Diversity Think Tank.

MRS OWENS: Good, thank you. Would you like to just explain for our edification what the National Diversity Think Tank is, when it got started, why it got started, et cetera? We would be really interested to know.

MS McCALL: Happy to do that. The National Diversity Think Tank is a group of private sector employers, I think 10 in number, who have set up a subcommittee specifically to increase the level of diversity in the workforce and to ensure that diversity is part of corporate strategy - not government strategy but corporate strategy. Companies such as IBM, Westpac, ANZ - some fairly senior, IBM in particular - Telstra and so on, have been members of the Think Tank since it began over five years ago.

My role has come in simply because they worked through diversity in relation to the increase of women in the workforce - haven't always achieved what we wanted, but we're getting there; the heightened awareness of non-English-speaking background and the indigenous communities and I suppose, I regret to say, the ageing communities - those of us who happened to be part of the baby-boomers era. Now what is happening is a recognition that we have neglected, directly or indirectly, people with a disability. The National Diversity Think Tank set up a subcommittee, which they funded in the early stages, to set up a feasibility study into how to get more employers to recruit, train and retain people with a disability.

I began on the project a year ago. Coming from a background of both the private sector and a member of parliament, it's been a huge learning curve for me - never having had any direct contact, other than problems, with people with a disability when they come into your electorate office and complain; never really understood the sector. The role of the Diversity Think Tank was, in fact, to educate people in general about people with a disability, but also particularly from the employer's perspective.

The early stages of the project were to find out what is world's best practice; what other employer groups existed worldwide for us to use and to draw on; there

was no need to reinvent the wheel if someone was doing it well somewhere else. The first line we worked from was that nobody wanted any form of quota system to be set up here in Australia, unlike say Canada or France or the UK, where there are punitive measures in place. But we did like, and we're pursuing, the use of the employer's disability forum that exists in the UK.

This morning I went with Alistair Mant, who is a bit of a guru in relation to this issue and we are now working on a feasibility report. The federal government gave us a little bit of money in order for me to travel around and interview employers from their perspective, and I have to submit a report to the federal government on this by the end of April. I stress that is an employer's initiative, so it was to be seen from the other half of the equation, if you like. Why do employers not employ people with a disability? What are their perceived barriers? What are the real barriers? What did they think was wrong with what was being done at the moment? What did they think was right? Which sectors of the disability services community were they happy with and were they not happy with?

Then your review of the Disability Discrimination Act came up and we thought, "How timely." We went through that with some care and obviously focused on the paragraphs related to discrimination in employment. I took these as the benchmark to go and discuss with employers: what did they like about it; what didn't they like about it? The short submission we put in to you was deliberately, if you like, to open the door for discussion.

MRS OWENS: Good, thank you very much for that. Andrew, do you want to add to that at this point?

MR HENNING: No, not at all.

MRS OWENS: Maybe what we could do is turn to the specific issues you've raised. I think, as we go along, there are other issues that we will probably raise with you because you're coming at it from a really interesting perspective. Your first issue here was in relation to unjustifiable hardship and the reference to relevant circumstances, all relevant circumstances. Maybe you could tell us what the issue was there.

MS McCALL: Certainly. This observation is based on having interviewed a number of employers and asked for case studies and also speaking to equal opportunity commissioners in different states and territories. The first comment was that employers will tend to use these phrases as the let-out clause. They will claim unjustifiable hardship rather than take the extra step to amend or adjust the workplace. Then they discover, if someone challenges the unjustifiable hardship, nine times out of 10 the courts have ruled against the employer. So the employer

starts from a feeling of "I'm being - I think it's unfair to the employer" attitude - which may or may not be real.

They raised issues such as, "A government department or a service delivery group telling us what is good for us does not encourage us to do it. We would rather talk to another employer who has done it." So there was very much this natural suspicion of government, unfortunately; that "No, if government tells us then I'm cynical and suspicious. If an employer says that they've done it, then we will. So the unjustifiable hardship will then reduce because we will in fact then be prepared to make the difference." They had difficulty quantifying what unjustifiable hardship meant and normally associated that with dollars. They normally said, "It's going to be too expensive to put in a ramp, to build a lift, to move the office, to adjust to someone who is visually impaired or hearing-impaired, or whatever." It was too hard. So they would say the unjustifiable hardship in their minds normally related to money.

MRS OWENS: You see, it's only really part of it. When you look at the act it refers to the financial circumstances, et cetera, but it's not the only factor. Do you think it would actually help to make that clearer?

MS McCALL: Yes, I do. They comment - and again, I was deliberately going to talk to small and medium business. Large business in the main in Australia I found are committed to the issue and many of them have strategies they report in their annual reports. The medium and small businesses were all putting it on the backburner. Unless it was a return-to-work disability issue, they really found it was too difficult to deal with.

MRS OWENS: But your sense was that the larger companies would have been aware that unjustifiable hardship was a broader concept.

MS McCALL: They are more in tune. They've got the facilities and the ability, if you like, to allocate someone the responsibility. IBM is a very good example. I think Telstra is, too, where they've set up a department within human resources that is responsible for diversity, that is also acutely aware of disability. In small to medium companies it goes in the too-hard basket. They don't want to know. They worry about the impact it will have on their WorkCover claims. That came out particularly in South Australia - they said that it was all, "No, it will affect my policy."

There were some case studies I thought were fascinating; going to an abattoir in northern Victoria: "What do you know about disability?" He said, "We don't employ anybody with 10 fingers here anyway. If they've got 10 fingers they're probably not very good to work in an abattoir."

MS McKENZIE: It's a matter of working in an abattoir before.

MS McCALL: Exactly. So there was, if you like, the humorous side, where the unjustifiable hardship wasn't an issue. The Cobram Bakery is a very good example. He rebuilt the bakery to accommodate his daughter, because she was wheelchair-bound. But he didn't do it because someone else told him to; that was an initiative of his own.

MRS OWENS: And he might not have done it if it wasn't his daughter.

MS McCALL: That's right.

MS McKENZIE: It's very difficult because often the impetus to make the change comes from knowing either a family member or a close relative who has some disability.

MS McCALL: And that was a particular learning curve for me, because it was the first time I, if you like, moved closer into the sector. So the lack of awareness in the community was terrifying.

MRS OWENS: So this idea of rather than get some sort of instructions from government departments, getting other employers out there spreading the message - how would you do it?

MS McCALL: That's really the project. What we would look to set up is the Employers Disability Advisory Council, which would be modelled very largely on the UK, without plagiarising too much because we don't want to get into the courts over this, but using the idea of employer talking to employer by network. An example: talking to a Tasmanian shipbuilder I said, "Have you ever recruited anyone with a disability?" "Good heavens, no, not in our industry." "What would persuade you?" "If I could talk to another employer in the shipbuilding industry who had."

MRS OWENS: And see what sort of adjustments they made and was it a problem.

MS McCALL: Exactly.

MRS OWENS: And were there workers compensation claims as a result?

MS McCALL: That's right.

MRS OWENS: It might just give them a degree of comfort if all of those things were okay.

MS McCALL: And that was the issue we were getting to. We found they would use the act as the excuse for not acting until another employer said, "But it's actually not as difficult as you thought."

MRS OWENS: So what you'd need to do is almost have a register of employers who have done things or been prepared to have their names used as a contact point by others.

MS McKENZIE: So your council would be the coordinating thing for that.

MS McCALL: Yes, and you'd look at probably putting a CEO in place; you'd have a 24-hour help line and Internet access and use some of the superb publications coming out of the UK from their equivalent body. So we'd probably tweak at the edges and make them more Australian; we might change the language slightly on a number of issues, because it's less punitive here - and rightly so.

MS McKENZIE: I know you said that employers are not happy about quotas, but the UK does have a duty under its act - - -

MS McCALL: It certainly does.

MS McKENZIE: At least in premises and employment to make reasonable adjustments to accommodate a person with a disability.

MS McCALL: It certainly does and, in fact, it has a much higher profile in the UK, I think, because they have the discrimination disability commissioner, which they have set up in recent years. It has a much higher profile in the community and in the awareness of human resource people as employers. We haven't got to that stage yet here. I think your review of the act is timely, apart from its anniversary - it's timely for raising the awareness of a sector of the community. It's also very timely to start shifting it, too, to say to the employers, "There's anything up to four million people out there with some form of disability. Why are you not recruiting them?" That's really what I've been finding in the investigations, too.

MS McKENZIE: Would a reasonable adjustments duty be sensible here, do you think, in some or all of the areas which the act covers?

MS McCALL: I think it just needs to be - if I can be cynical, it has to be written in such a way that the lawyers don't find the loopholes too fast. Given that I'm not a lawyer, but I've been surrounded in parliament with lawyers for a very - - -

MS McKENZIE: I have to admit to being one.

MS McCALL: Okay, I won't hold that against you.

MS McKENZIE: No, that's all right. I'm used to comments like that.

MS McCALL: Yes, it's got to be written in such a way that - I mean, employers are pragmatic, yes. They worry about their bottom line. They worry about, if it is a small to medium business, how much time out it's going to take for any member of their staff to, in their minds, make an adjustment. It's in their perception, not necessarily a real adjustment. So the language has to be written in such a way that it is positive. It's like, "This is a smoke-free environment," other than "This is a no-smoking environment." It's got to be written in a way that is encouraging rather than punitive or negative.

At the moment the act is written - I think it's the style of acts of parliament in some ways - it's the rap on the knuckles type of expressions rather than the encouraging ones. I think that's what needs to go into it somewhere. Not that you're not allowed to discriminate, it's that it is advantageous for you to - whatever. I don't know if I could phrase it - parliamentary counsels are much better than that.

MS McKENZIE: I am sorry, I have to admit to being one of those, too.

MS McCALL: I wonder if that's where I have met you before.

MS McKENZIE: They are the last of my missions, though.

MS McCALL: That's possibly where I've met you before, Cate, then.

MS McKENZIE: Yes, you are very familiar.

MS McCALL: Our paths have crossed, I suspect. But I'm a believer that if you make it street language people will be much more accepting of it. Employers will pick up a document of the length of the DDA at the moment and they'll panic.

MS McKENZIE: We've talked already about "unjustifiable hardship" and the difficulties of that concept and "reasonable adjustments", and that that might be a good idea but expressed in a particular way. What about having examples which go right to the bedrock of how it would be?

MS McCALL: I think that's much better.

MS McKENZIE: And also show that it doesn't have to be some huge expensive and impossible-to-make change.

MS McCALL: If you make the act user-friendly, you can put - for example, I notice travelling around that the Western Australian Equal Opportunity Commissioner had some excellent case studies on her documentation. They were written from the individual's perspective. If there was a slant that, say, made it easier and more accepting for the employer, I think those would go down very well.

MS McKENZIE: I'm sorry, I sort of side-tracked you slightly. You were about to talk about the numbers of people with disabilities who are around and who should be - - -

MS McCALL: Yes. It was quite interesting. In the Northern Territory, for example, I said to them, "Does the employment of people with disability come onto your radar screen?" and they all said, "Not a blip." They were aware there were people with disabilities but, as part of the recruitment process, they didn't rate. That was significant - which is why we raise this issue of employment agencies. Everywhere I went I asked them the question about mainstream employment agencies - when somebody went to an employment agency and said, "I wish to recruit an accountant" - or a whatever - "did you put restrictions on the job description, other than the inherent skills?" and they said, "No." I said, "Did you ever receive applications from people with a disability as part of mainstream recruitment agencies?" and they said, "Virtually never." Unless they specifically said to them, "By the way, we don't mind if a person with a disability applies," they never saw them.

MRS OWENS: Although there might have been applications from people with disabilities but they might not have noted on their application that they had a disability.

MS McCALL: Therein lies the problem. In fact, I'm not sure whether the employment agencies are indirectly or inadvertently screening out through ignorance, and that becomes a difficulty because then are you automatically screening out a group of people without considering them. I think that was a problem, too. They were comfortable with some of the specialist agencies who dealt with them specifically, but they said very often the approach from them made them feel rather uncomfortable. It was the guilt trip - "We've got Jim Bloggs here who's a really nice bloke and he's intellectually disabled. Don't you think you could find something for him to do?" - and then the employer would suddenly feel - "I feel really ill if I say no." The emphasis was going the wrong way.

MS McKENZIE: Yes. That's not treating that person as an equal or as being perfectly able to do certain jobs.

MRS OWENS: The specialist agencies should say, "We've got some clients."

MS McKENZIE: "They can do the job."

MRS OWENS: "They've got useful skills. These are the skills. Have you got gaps for those skills?"

MS McCALL: Exactly.

MRS OWENS: Rather than turning it round the other way.

MS McCALL: I think the practical advice perhaps is what the employers want, and if they then get that from other employers who have done the same thing, that makes it much more acceptable. It's not just, dare I say - present company excluded - another bureaucrat going in and saying, "Well, this is how you do it." It's another employer saying, "Well, I've done it and it wasn't too much of a problem." Then you get past the unjustifiable hardship bit.

MRS OWENS: You did mention in your submission about section 21 and employment agencies.

MS McCALL: Yes.

MRS OWENS: You've used the word "reasonable". Again, there's the potential for that to be as a let-out clause. Is that what you were raising that for?

MS McCALL: Yes, I think so. It's like "fit and proper person" - the expression, when it appears. What does it actually mean? Until it's challenged, what does it actually mean? I think in an act like this, words such as "reasonable", "relevant", or "inherent requirements", can be dangerously open to misinterpretation, depending on who's reading it.

MS McKENZIE: It really sounds like examples are necessary, I would have thought.

MS McCALL: I think so.

MRS OWENS: Although in some of these areas there should be case law.

MS McCALL: Yes.

MS McKENZIE: "Inherent requirements" there are; "reasonable" there is, but the trouble is what the law tells you you've got to do is take into account the

circumstances of a particular case, so it's quite difficult sometimes to work out exactly what that means.

MS McCALL: Yes. "Inherent requirements" - there was an interesting story about people recruiting sales reps, and the sales rep perhaps was visually impaired so couldn't drive, and they said, "Well, that therefore was an inherent requirement - was an ability to drive," and that was in fact challenged - "Well, why can't they go in a taxi?" These are the things that the employers find very difficult to deal with.

MRS OWENS: We had a finding on "inherent requirements" - finding 10.1 - which says that:

The inherent requirements provisions in the employment section of the DDA 1992 are appropriate and do not require amendment. Guidelines to explain how "inherent requirement" should be identified in practice could be useful.

Are you happy with the terminology in the act and guidelines to explain it further, or would you prefer to - - -

MS McCALL: I think guidelines to explain it further, because employers were saying things like, when I used the case of the taxi and the salesperson they were very resistant. Hackles went up. Employers are - not all employers but a lot of employers - fairly inflexible beasts. We went through this 20 years ago with equal opportunity with women. We're sort of revisiting old ground but from a different perspective - "Why should a woman do this job?" "Why not?" That's the same problem, I think.

MS McKENZIE: I do think that, yes, guidelines are useful, and maybe it's an adjunct but I do think examples in the act are important, because examples in the act would be taken into account by courts and guidelines will not. They will not be taken into account to interpret the act, because they're not legislation. That's the problem with just having guidelines.

MS McCALL: And maybe cases. People will relate to a specific example. They will be able to see and understand that that relates to their business as well, and maybe those are the things that are important. In Western Australia their view was, "Well, you leave us alone. We know what we're doing over here," and I thought that was quite interesting. Then when I said, "But I've come to talk to you about an idea," they said, "Oh, one of those eastern seaboard ideas again." There has to be a little bit of flexibility that circumstances are different but I think - - -

MS McKENZIE: You need a Western Australian chapter with your work.

MS McCALL: Yes. I'm tempted to do it.

MRS OWENS: Although there's a bit of inconsistency there, I have to say, because Western Australia employed Mick Reid who was the ex director-general of the Health Department in New South Wales to go over and review their health system. That's an eastern seaboarder going over and imparting his wisdom.

MS McCALL: It depends how much they're used, once they'd sent him over there.

MRS OWENS: I think his final report is just about due.

MS McCALL: It will be interesting. The Northern Territory: interesting again. When I asked the anti-discrimination commissioner about the disability issues, he said, "Look, we haven't got past the wet T-shirt brigade here. It's a bit difficult to start talking to me about those." It's very interesting. The Australian models will be very different, I think, in each state and territory. We are much more enlightened in Victoria and New South Wales, much more conscious; Tasmania less so; South Australia worrying about their WorkCover policies; and WA and the Northern Territory, I think, are still, dare I suggest, a little bit out in the boonies over some things.

MRS OWENS: Later this afternoon we'll be talking to the Australian Industry Group about our draft report. They've also raised this issue of the flavour of the act and the flavour of our draft report in terms of they think it's been weighted too heavily in one direction rather than the other. One of their suggestions is that employers could be working together with the Human Rights and Equal Opportunity Commission to undertake educative functions.

MS McCALL: Certainly.

MRS OWENS: Do you think that is something that would be supported by employers, or the employers that you have come across?

MS McCALL: Yes.

MRS OWENS: It's a bit of a hypothetical. I'm sorry to spring it on you.

MS McCALL: I think so. Given the climate in which the original DDA was written, the slant of the document - if I'm reading ACCI right - is inevitable. The review is therefore, yes, timely. The areas that relate to education and employment, and certainly discrimination in employment, I think can be beefed up, along with the employers talking with HREOC. But the proposal that I have worked on with the

Diversity Think Tank is probably precisely to do that. This group would not be a lobby group to government, but we would like it to be seen as a first point of contact.

MS McKENZIE: A resource.

MS McCALL: A resource.

MRS OWENS: It could be a resource that the Human Rights and Equal Opportunity Commission came to, saying, "Well, we want to get out certain information." Even the information about our final report and what's accepted by government, which may lead to changes in the act, that information has to get out in some form in a usable way.

MS McKENZIE: Exactly.

MRS OWENS: Maybe that would be one way for HREOC to get to the employers. It can go to the Australian Chamber of Commerce and Industry and Australian Industry Group, other employer bodies, but it could also - you might be the first point, given your current role.

MS McCALL: I think that's what we would be looking for. If it was an issue related to employment and disability, start with us, because maybe we would have the case history, maybe we would have the employer network. We've just mailed those brochures to about 5000 employers around Australia, very kindly financed by FACS I have to put on tape, because they feel very much that the employer talking to the employer and saying, "We endorse this. We think these amendments are good. They've moved in the right direction," they will be more accepting of the changes themselves.

MRS OWENS: We've got a lot of other issues that probably have a significant impact on employers and we will be talking to the Australian Industry Group later and we have talked about some of them with the Australian Chamber of Commerce and Industry. But one of the issues that we are required to look at in our inquiry is the impact of this act on competition. I don't know whether you've given that any thought.

MS McCALL: No, that hasn't come up. The area which did come up from the employers was this issue of part-time or piecework, and the discomforts. Employers had said, for example, "If we took on someone with an intellectual disability, we would employ them to stuff 500 envelopes and we would give them the money at the completion of the job, however long it took." A couple of them said we'd run into union disagreement over this, because it was pieceworkers opposed to job - time span. If you took eight hours, then you got eight hours' pay; if it only took three

hours, then you got three hours for the job. There was an element of discomfort about piecework, which they felt was a way that employers could be more accommodating to certain types of people with certain types of disabilities.

MS McKENZIE: The problem about that is in some cases that assumes at a very base level what people with disability can do.

MS McCALL: Absolutely.

MS McKENZIE: It sort of downgrades the abilities.

MS McCALL: Agreed.

MS McKENZIE: Even a person with an intellectual disability may well be able to do quite different kinds of work. In fact, we had submissions from a chap called Dr Graeme Smith, who runs a company called Ability Technology, where he said just that - that there are numbers of computer tasks which people with intellectual disabilities can do well.

MS McCALL: That's right, and I think IBM is a good model for that.

MS McKENZIE: But of course the assumption is that they can't; that they can only stuff envelopes.

MS McCALL: I think we are still in a generational curve - getting beyond the sheltered workshops. I think that still exists. Certainly in WA there's a group called Soundworks in Rockingham who do fabulous work but very much focused on the old-fashioned sheltered workshop. I think you're quite right. That still exists out there.

MS McKENZIE: I understand in some cases that might be an appropriate form of work, but there are many cases, I suspect, where the horizons are much broader.

MS McCALL: I think employers would like - certainly the feeling I got was the big word when you mentioned disability was "fear". They were frightened about the unpredictability, through ignorance, of the individual's disability, what impact it would have on their workplace, what impact it would have on the people around them at the workplace; all of which is probably unfair and extreme, but in reality that was what they were all saying - "We are frightened of taking on that which we are unsure of, so if you tell us about another employer who's done it and didn't get frightened, then we'll feel more comfortable."

MS McKENZIE: Yes, and it's something that has to be faced. We can't pretend

that by simply waving some kind of legislative wand everything is going to change. It is true that awareness and experience are really important.

MS McCALL: Yes. From my perspective, if we've done nothing else by trundling around and writing a feasibility report, we have in fact heightened that awareness for small and medium companies, and maybe put it as a blip on the radar screen - that suddenly they start to perceive there are avenues for employing people with a disability that they haven't thought of before.

MRS OWENS: I suppose the broader environment in which all this is happening is the environment in which the treasurer is going to be making his announcement or he might have already done it today, and that is we are talking about an ageing population, et cetera. The tendency now of government is to start thinking of ways of keeping people in the workforce longer, expanding who can be in the workforce, and this gets caught up in that broader push to keep people in the workforce, get people into jobs, keep people in jobs.

MS McCALL: The reality being, I think, of the baby boomers; there are three of us to one of the next generation. So the reality is there is a skill shortage emerging which means certainly the ageing population would be required to stay in the workforce longer, not only because we want to but because we may be needed to, but therefore there is clearly room for people with all forms of disability as well and that's the lot we haven't captured properly yet. They have just gone off at a side, and they have to be brought back into mainstream thinking, that they are part of the employment workforce.

MRS OWENS: You talk about the fear but the other thing that presumably employers fear is that they may end up incurring costs associated with employing these people in terms of modifying the workplace and so on, and I don't know whether you have got any sense of employers' knowledge of the government schemes that are out there, like the Workplace Modification Scheme. Are employers that you have met aware that these schemes exist and they could have access?

MS McCALL: They are somewhere on the periphery. Rural communities, for example, were an interesting contrast. The rural community said, "Look, the community tends to look after their own" - was the general view; a bit like the man in the bakery and it was his daughter and therefore he amended things. There was a sort of natural, "Oh, yes, there is a vague office somewhere I think in Horsham or somewhere and I think somebody" - the general view of the small-to-medium was that it didn't know. I mean, "Yes, they are there and occasionally we would use them and they might ring us up every so often," but they didn't see them as the resource that went from them outwards. It tended to be the resource coming to them. Except, I have to say, at SPC in Shepparton, who in fact had - a lot of their casual work were

deliberately going to the resource and saying, "Here are the seasonal jobs. What can you do to help us?"

MRS OWENS: Yes. Thank you. Anything else, Cate?

MS McKENZIE: No, that completes all my questions. Thank you very much. That's a very interesting submission.

MS McCALL: It's a pleasure.

MRS OWENS: It's very interesting to get a submission from just another perspective; just a different perspective. I don't know if you want to say anything further, Andrew? Has she done a good job? Has she covered everything?

MR HENNIG: She has done a very good job. I would like to further clarify just when Andrea said that from our perspective the employers tend to - especially the small and medium ones - they just want to bury their heads in the sand and because of the way that it's all written it's not a guide for dummies. They can't interpret it well. So they just decide it's not worth the effort, whereas the big businesses, like IBM and Telstra have their own departments that deal with it; that's all fine.

MS McKENZIE: They have got in-house legal staff and all sorts of things.

MR HENNIG: It's the small ones that we worry about.

MRS OWENS: So that's where the real energy and effort has to be directed.

MR HENNIG: Absolutely.

MRS OWENS: Thank you.

MS McKENZIE: Excellent.

MRS OWENS: We will just break for a minute.

MRS OWENS: We'll now resume. Our next participants are the Equal Opportunity Commission Victoria. Welcome to the hearings once again. Could you each give your name and your position with the commission for the transcript.

MS SISELY: Diane Sisely, member and chief conciliator at the commission.

MR RICE: And Ben Rice, acting senior legal officer at the commission.

MRS OWENS: Thank you. I can't thank you for your current submission but I know you have something you are going to table today as a submission, so thank you very much. When I was thinking about what we were going to talk to you about today, I went back to your original submission from May, and it was only then that I realised just how many of your ideas ended up in our draft report, and I'll just list a few because there's actually quite a few and maybe you're going to point this out to us too.

But it just struck me going back to that submission after all this time, you recommended that the definition of "disability" be changed to deal with the behaviour issue; you recommended changes in relation to indirect discrimination in terms of proportionality to tests and changing owners; that HREOC should be able to initiate complaints and similarly for representative bodies; standards be developed in all areas and positive obligations on employers, and quite a number of other things as well, which you will see have been reflected in our report. So I'd like to say thank you for those ideas and that when you do put in submission they don't go unnoticed.

MS SISELY: Thank you very much, and I should say congratulations on the draft report. We think it's excellent. Thank you.

MS McKENZIE: Do you want to run through some of these.

MS SISELY: Some of the issues, yes. In all seriousness, I think the draft report is very very encouraging in a number of areas, and it's very balanced. It recognises and acknowledges that there have been a number of improvements in the DDA over the past years but also identifies those areas where it has in fact been far less effective, particularly in relation to eliminating discrimination in relation to employment. We're particularly pleased with the recommendations in the report that would address systemic discrimination against people with disabilities. What we'd like to do briefly now is underscore some of those but look at some of the wider implications and pick up some of the issues that you've identified that you'd like some information on or some further discussion on as we go through.

As you know, the definition on the one hand recognises disability as a medical definition but balances that by a regime that looks at addressing the social factors

that impact on disability and really lead to detriment, hardship for people with disabilities, and it's vital in my view that the social factors and the social model be preserved and indeed better understood and that we really do look at what some people will call the social determinants of disability. This really means what are the social/economic factors that lead to a person with a disability being more severely handicapped or more severely disabled because of those social factors? I think that's where the systemic discrimination comes in, and I actually think we could push that a bit further and tease that out a bit more, but we'll come back to that.

We particularly think that this inquiry is a massive opportunity for reassessing the options that people with disabilities have for redress. I think both in the DDA and indeed in other human rights and equal opportunity legislation we've only just begun to explore the options in and around that are available for people to seek redress, and I think we need to go further along that line as well. For these reasons we think that there should be stronger emphasis in the DDA and what we might call achieving more genuine equality in the very broadest sense of this term.

MRS OWENS: You're talking about equality of outcomes?

MS SISELY: Yes, I am talking about equality of - - -

MRS OWENS: Not just equality of opportunity?

MS SISELY: Not just equality of opportunity. I'm talking about outcomes, about removing barriers without the need for people with disabilities to have to make individual complaints and be exposed to confusing and expensive legal processes, and for improving compliance with the legislation, and I think these need to be reflected in the objects of the DDA; put up much more up-front.

I think we need to look at ways in which we might be able to relax the somewhat rigid framework of the DDA and its reliance on adversarial and legalistic processes, and ways that we might be able to move away from adversarial and legalistic processes, because even where we have the complaint process, we have a complainant on one hand and a respondent on the other, and while bodies such as HREOC or the Equal Opportunity Commission of Victoria make efforts and quite significant efforts to redress power imbalances to make sure that it's low cost, at the end of the day it comes down to an adversarial process, and that has inherent difficulties. It puts significant barriers in place of people with disability and, as respondents are increasingly engaging legal advocates to at least support them, it puts people with disabilities at a very severe disadvantage, particularly, as we all know, people with disabilities are in the lower levels of the socioeconomic scale. I'll talk about that a bit later.

We particularly welcome the observation in the draft report that undercompliance with the standard provisions of the DDA, particularly in relation to employment, is a major stumbling block to the advancement of the rights of people with disability, and that the current mechanisms, the individual complaint model, have not been effective in achieving compliance, and we've now had the DDA for 11 years. I could equally say the same thing about the Equal Opportunity Act. We've had the Equal Opportunity Act in Victoria for 25 years, and compliance with the Equal Opportunity Act, which relies on a similar individual complaint mechanism, is similarly low. If I think about the situation in relation to not only people with disabilities but also in relation to women, compliance levels are low.

We need across the board to think about different ways of gaining compliance, and we only need to look at other jurisdictions, whether it's concerned with business or whether it's concerned with the environment or occupational health and safety. There are models at hand that we can look at and easily adapt for this particular jurisdiction. For example, in relation to the Equal Opportunity Act, disability complaints are our major area or our largest area of complaints.

What we'd like to do is in particular look at disability standards and tease out some of the issues here. In our original submission, as you've noted, we supported the extension of standards across all areas covered by the DDA, employment, accommodation et cetera, because standards as originally envisaged and still envisaged are a way of getting at some of the systemic issues and they're also a way of relieving the burden on an individual to have to lodge an individual complaint to seek redress, so they are and were envisaged as an attempt to be proactive to redress the systemic issues.

However, and as the draft report notes, they may be or may represent the lowest common denominator, and I think we need to be very careful when we're looking at standards and we're extending standards and assessing the impact of standards: we need to carefully weigh up the consequences and the effects they've had to date, albeit we're at a very early stage with both building standards and public transport standards. But I think we are beginning to see some of the negative factors, and the report notes some of the negative factors associated with standards, so I think we need to carefully look at the impacts of standards and carefully assess some of the unintended negative consequences for people with disabilities as a result of the introduction of standards and some of the rights people with disabilities have given up as a quid pro quo in relation to standards.

If we're thinking about extending them, we need to be very careful about the shape and content of standards, how they respond to diverse issues, some of which we've identified, some of which we may not have, and the process for developing the standards, so in all three areas the shape and content, response to the diverse area

issues and the process for developing the standards I think we need to step back and take stock and think about.

Particularly from our point of view in the state, there are some negative consequences for people with disabilities where other attributes other than disability are involved. As you'd be aware, under state based legislation is omnibus legislation, and we find that a person brings a complaint and the complaint is often brought on more than one attribute, so it might be disability and gender, it might be disability and race or it might be disability and age, and that is often the reason why a person will come to a state based redress mechanism, because they're able to deal with all of those aspects of their lives in one complaint.

If we've got a standard that comes in and says that in relation to one part of your overall issue, ie, disability, there is a standard operative there so you can't complain about that, it can set up some difficulties for resolving the issues in a satisfactory way for that person with disabilities. So there are some issues I think we all need to think about and tease out in relation to that, and what it means for a particular individual.

MRS OWENS: Di, in that circumstance, even if there is a standard, if the issue is a compounding problem relating to say race and disability, could somebody still come to you and put in some sort of complaint based on the race component or is it still going to cause you great problems because you've got this standard there?

MS SISELY: No. They could still put in a complaint in relation to the race aspects but we wouldn't be able to look at the issues in relation to disability, so there are difficulties in and around that, particularly when there are some long lead times with some of the standards, and I don't know that we've thought about the consequences of that.

MS McKENZIE: Have you thought of any specific examples where that problem might arise?

MS SISELY: It's often in relation to - well, increasingly, actually, in relation to age issues which are starting to come out, but we also have a particular number of complaints in relation to disability and gender, but they're less likely to be associated, particularly in relation to public transport and building access, but if we went down and looked at employment or education, I'm thinking that this combination would increasingly cause us some difficulties in resolving those cases, because we'd only be able to deal with one aspect of it. So I guess what I'm doing is flagging an issue for the future that we need to think about quite carefully, and later on I'll come back and make some more comments about the development of standards, and perhaps we'd take a different approach in the future.

MS McKENZIE: About the process.

MRS OWENS: I was going to ask you about that. You said that it's time maybe to take stock, and I was going to say what do we actually do, but if you're going to come back to that - - -

MS SISELY: I'll come back to that, yes. We also think that the co-regulatory approach proposed in the draft report is fine but perhaps doesn't go far enough, and one of the comments we would make or encourage you to consider is to look at focused monitoring and enforcement and taking a human rights approach to that monitoring and enforcement. It seems to me, as set out in the draft report, the co-regulatory approach is seen as a step before the development of a standard. So in effect it's an educative tool and if that fails we then introduce a standard. It seems to me what's missing at the moment is the requirement for monitoring or audit and then some compliance mechanism.

MS McKENZIE: With any code or with the standard itself?

MS SISELY: Pardon?

MS McKENZIE: With any code that might be developed?

MS SISELY: With any code or indeed with the standard. It seems to us that there is a gap in what has been put forward so far in relation to that monitoring in relation to compliance, and we would encourage you to look at that. We have done a little bit of work in this area ourselves, trying to look at how people have got compliance or what you might call proactive compliance, which is what I see a co-regulatory approach, trying to encourage, and standards trying to encourage but it's entirely dependent, I think, on education, on voluntary compliance.

We certainly know from looking at other schemes around, whether this country or in others, and from looking at various industry based schemes, that often such voluntary education based schemes can go so far but are not successful in getting total compliance or complete compliance with codes of conduct, with regulatory mechanisms. There is usually some further compliance requirement needed to get to that level.

So we would encourage you to certainly look at those and I think in our original submission we referred to the Canadian situation with the employment equity legislation; there has been work done in the UK, particularly in relation to their racial discrimination legislation and other places, but they are the primary ones. We would certainly encourage you strongly to look at those and think about what is

needed to actually get to a level of compliance beyond education.

MS McKENZIE: Are those systems - correct me if I'm wrong but it seems to me that they are really based on inspection audit and penalties for noncompliance. Is it fair? That's my general understanding.

MS SISELY: That's correct.

MS McKENZIE: So really it's that sort of regime rather than just an individual complaints based one you might be thinking of.

MS SISELY: Yes.

MS McKENZIE: Or some.

MS SISELY: Yes. That is precisely where Canada has gone to, but also more recently the US, for example, is requiring public sector organisations as a first step to report where they have had complaints of discrimination; report the outcomes and, if my memory serves me correctly, report what steps they have taken to rectify barriers or to dismantle barriers. So it's not quite to the stage of where Canada is with its employment equity legislation, but it's a step towards. I think there are a variety of mechanisms that can be put in place that just move the bar in place to compliance, or move the requirements in relation to compliance a bit further, not just solely leaving it up to voluntary mechanisms.

MRS OWENS: What you are suggesting is a voluntary mechanism for, say, a particular industry to go down the co-regulatory code of conduct type route.

MS SISELY: Yes.

MRS OWENS: And saying to that industry, "Okay, if you do this - what we have said is you do this, there might be a standard imposed," and we have been told now that is a pretty heavy-handed way of operating, but you're saying - and if they don't comply then there is this other possibility of inspection and audit.

MS SISELY: Exactly.

MRS OWENS: At least those industries have gone some way to doing something voluntarily, and what we are saying is, "If you do the voluntary thing you could potentially be penalised at some time in the future" - what about those industries that just say, "Well, we're not going to get involved in any of this?" What do you do about those ones?

MS SISELY: No, what I was saying is it would need to be for everybody.

MRS OWENS: It's not voluntary then.

MS SISELY: No. I'm talking about a mandatory code. If an industry developed a code of conduct and it was voluntary, and particular firms complied, you would want to applaud not penalise those ones that complied. You would want to have a stick that you could apply to those who flouted the voluntary code; didn't take any steps towards complying. So it seems to me voluntary codes, standards, are about carrots, and you would want to give some positive reinforcement for people who complied at that level, but precisely what about those who don't take up voluntary compliance, who thumb their noses at the DDA or a voluntary code? What is the mechanism for ensuring compliance by those bodies? I think that's the gap currently that we have got.

What is a mechanism to get those organisations, whether they are government or whether they are private sector or whether they are non-government organisations - what are the mechanisms for getting those organisations complying with the code of conduct or complying with the standard? Currently I don't think we've got any.

MS McKENZIE: What about naming and shaming - not done here, of course, but take the example of the equal opportunity for women in the workplace legislation?

MS SISELY: I think naming and shaming is limited. It's our experience that some firms take perverse delight in being named.

MS McKENZIE: They are not shameable.

MS SISELY: They're not shamed.

MS McKENZIE: They might be nameable but they're not shameable.

MS SISELY: And it might be fine or an effective mechanism for resolving a particular individual complaint but it might do nothing to address the systemic issues. It's our experience that some organisations are likely to settle an individual complaint if they fear being named and shamed publicly, but then not go on and address the underlying barriers or the underlying systemic issues that have led to it. So I think naming and shaming is limited, although in some instances has its uses, but it's of limited value. It doesn't address the systemic issues.

We would also like and encourage you - as you have got in the draft report - to think about codes of practices and how they might work in conjunction with other strategies such as representative complaints. As we said, standards can be blunt

instruments. They can lead us to adopt the lowest common denominator because they are a negotiated standard at the end of the day. It seems to me that it might be useful to think about standards as covering some areas but perhaps not all in a particular field, so you do leave the way open for complaints and particular representative complaints to still come forth; so that you can allow creativity, to allow novel issues to be brought up, to allow some flexibility and growth in the development of standards.

MRS OWENS: So you're suggesting that we don't recommend standards be introduced across - or the potential be there for them to be introduced across all areas but be more selective?

MS SISELY: Yes, be more selective, and even within an area, not attempt to encompass the whole area but go for particular areas where you know that there is reasonable consensus, it's reasonably clear but in areas where consensus is going to be hard or that deal more with relations between individuals that are less amenable to standardisation, that standards don't go there. We looked to other mechanisms, whether it's codes of conduct or representative complaints to address those issues.

MS McKENZIE: There still should be power to make standards across the board, but your recommendation would be that standards shouldn't occur in all areas.

MS SISELY: Exactly. Not in all areas and in one particular area, say, whether it's education or employment or goods and services, that we don't attempt to be all encompassing, say, for goods and services, but we use the standards selectively and allow for other mechanisms to come up. I think that might give us a bit more flexibility.

MRS OWENS: I mean, there are two ways we could go. One is to say that the power should be there to be able to develop standards in any area. The other is to say that - at the moment the act is saying standards can be developed in this area, this area and this area, and we could say they should also be developed in these areas X, Y and Z as well, and here are where the priorities should be. We could be more prescriptive or we could be very general and leave it open with some guidance as to what you are saying, that it's not necessarily appropriate to develop them in all areas, and in some cases it's almost impossible, like they are found in employment.

MS SISELY: Exactly right.

MRS OWENS: But it doesn't preclude possibly having standards in particular areas like particular industries or whatever.

MS SISELY: I agree, exactly.

MRS OWENS: So that's the way you would go.

MS SISELY: Yes.

MRS OWENS: You would keep the power open but be more selective under that power.

MS SISELY: Exactly, and look at the interaction of different mechanisms to get compliance with the DDA as well and how that might work - particularly in relation to that, remembering that standards often have very long lead times, that some are up to 30 years. That means that people with disabilities who now have given up rights to complain are not going to get the benefit of that. So I think there are particular issues that we face in the short to medium term in relation to that, that I think we need to think about again.

MS McKENZIE: Yes. A number of people who made submissions have made the point that really a whole generation of people with disabilities will not have the full benefit of the transport standard, for example.

MS SISELY: And it was thinking about these issues as we were preparing to come here today that we thought about the reviews that are built into the standards process, and we might be able to use the reviews more creatively as well to address this situation. It might be useful to give some shape or set some priorities that these reviews might meet. For example, it might be useful that the reviews look into the enjoyment or lack of the enjoyment of progress in relation to achieving the standards - are all sectors that are covered by a particular standard meeting them, or only some? What are the impacts on people with disabilities in relation to that? What have been the technological and other developments over the period since the introduction of the standard or the last review?

We all know that technology develops in strange and wonderful ways and usually quicker than what we initially anticipated. So has that occurred? Do we need to review the standard? Do we need to shorten the time lines? Are there other issues or modifications we need to make in relation to the standards? I think these are some of the issues that we should explore in the standards, so they are less blunt than what they otherwise might be and so that people who have given up rights perhaps can get some of the benefits in a shorter period of time. I think there are some possibilities in and around the reviews that we could look at as well.

MRS OWENS: So it's really also a matter of keeping those standards up to date.

MS SISELY: Exactly, and really not shying away from adjusting the standards if

it's fair and reasonable to do so.

MRS OWENS: I suppose there is a trade-off though with certainty. If you set up a standard process and you say to the transport sector, as has been done, "Well, you've got 20 years to do that," and then you change that, it could actually cause quite a lot of difficulty if it was changed.

MS SISELY: It could but, on the other hand, if there is agreement that because of technological developments or whatever it is feasible to meet that standard in 15 years rather than 20 years, you might be able to get that by agreement.

MRS OWENS: But they might have already made their investment based on a 20-year horizon rather than a 15-year horizon.

MS SISELY: They might have.

MRS OWENS: That's the difficulty.

MS SISELY: Yes.

MS McKENZIE: But there could be other problems that might be able to be sorted out. Take, for example, a transport operator who is obliged to have a certain percentage of vehicles accessible, and complies with it, but then only uses those vehicles on certain particular routes, while other routes have no accessible vehicles at all. That would be something that could be sorted out, one would have thought, with less cost than having to sort of rejig the entire transport fleet. They would be costs that one wouldn't want to look at.

MS SISELY: Exactly. Also you might have two or three transport providers being able to meet the standard, or meet it earlier, and another one not. What are the reasons why two or three can and the other one not? There might be particular issues that you'd want to look at in relation to that.

MRS OWENS: The other might just be much smaller, and you don't want to knock that other one out of the game.

MS SISELY: May very well be, but that other one also might just not agree.

MRS OWENS: No, I'm just being very generous to the other one.

MS SISELY: I know, but I think it would be helpful if some of these issues could be looked at in that review process, and I would encourage the commission to have a look at those issues and the potential of using those reviews in a progressive and a

positive way, because I think they are reasonably undefined at this stage and would benefit from a bit of definition.

I'd like now to look at the implications of the recent Purvis decision in the High Court. As the draft report properly identifies, confusion exists around the coverage of the DDA in relation to people with disabilities and behavioural manifestations associated with their disability. Since the High Court decision in Purvis, this issue takes on greater urgency. It's our view that the recent High Court decision has the potential to erode the human rights of people with mental and psychological conditions to enjoy equal opportunities in education and also with other people - not just those with mental and psychological conditions.

We come to this position because we believe that the notion of substantive equality is firmly embedded in international human rights instruments that Australia has voluntarily agreed to and accepted and this does require us to accommodate the needs and aspirations of people with disabilities, whatever the definition of the disability is. It's for this reason that we endorse the view that recognises that people with disabilities often require a level of accommodation that allows them to participate on an equal footing with others and, indeed, this is the view expressed in the minority judgment in the Purvis decision.

We take the view quite strongly that, because of the international instruments on which the DDA is based, there is a requirement to look at substantive equity and to allow for substantive equity. That is, in fact, the goal of the indirect discrimination provisions of the various pieces of legislation, and it's a view that we take at the commission. It's because of that that we strongly support the proposal in the draft report that the DDA should clarify that employers and education providers, et cetera, have a positive obligation to provide appropriate accommodation or services to people with disabilities. As the report notes, courts have inconsistently applied this obligation, and this is a very negative development for people with disabilities.

MS McKENZIE: You'd want that to be across all the areas covered by the act.

MS SISELY: Absolutely across all the areas covered by the DDA.

MS McKENZIE: We suggested it in our report as a clarification of the concept of direct discrimination, but - if I'm understanding you correctly - you'd really prefer to see it as a proper duty.

MS SISELY: Yes. It's consistent with proactive compliance with the legislation, which is where we're going with the standards. That's the purpose and intent. We have the DDA, we have laws and we're all meant to abide by laws, not to abide by

them in the breach when someone makes a complaint. Yes, we would encourage you to see it as a duty to comply.

MRS OWENS: In our draft report we both suggested that there could be changes to the definition of "direct discrimination", but we also floated the idea of a positive duty on employers. It was slightly different. It was similar, but different.

MS SISELY: Yes.

MRS OWENS: I have to say there's been quite a negative reaction to that, because it was basically set up in a way that required the employer to think in an ex-anti way about what they might do to facilitate the employment of people with disabilities, even if there was nobody in the workforce at that time. People said that it would be very hard to comply with that, because you never quite know who's going to turn up, but this other idea of just having a positive obligation to make a reasonable accommodation basically is saying that - in the case, say, of employment - if somebody is already there or comes for an interview, then it's incumbent on the employer to make accommodation up to the point of unjustifiable hardship, so it's a slightly different - - -

MS SISELY: Yes.

MRS OWENS: It's going back a couple of steps.

MS SISELY: Yes. I would query that it would be difficult for employers to judge who might be walking in the door with a disability. The numbers of people with disabilities and the types of those disabilities across the community are fairly well known. The ABS brings out regular, if not annual, surveys of people with disabilities - who they are, where they are and what those disabilities are - including the people with disabilities who need particular sorts of support. I think that knowledge is well known.

MRS OWENS: What about among the very small employers, such as the local hairdresser or newsagent?

MS SISELY: Okay, that may not be. I'm generally speaking of larger - - -

MRS OWENS: Between the ANZ Bank and - - -

MS SISELY: Yes, but whilst employers with less than, say, 10 employees might not be as cognisant of ABS as others, I would think that an employer with, say, 50 or more employees that's also in the business of providing goods and services would have a fairly clear idea as to their customer base or their local area, who is likely to

come in their door or whom they're selling to. If they're a successful business, however big they are, they're likely to have a fair idea of who's in the local area and who's coming in - who they're marketing to. It seems to me it's a short step from that to think about who may have disabilities or not. I think it's clearly not - -

MRS OWENS: In terms of potential employees?

MS SISELY: In terms of employees, but I think if people are only concentrating on employees they're missing an opportunity. We know that about 20 per cent of the community has a disability. People with disabilities also have carers, they have family and they have friends. If you add those in, we're talking about many more people in the community than 20 per cent - more likely 50 per cent - and they're a strong customer base.

Certainly, this is the experience, I know, of the Employers' Forum on Disability in the UK. They have strongly looked at these issues and provided guidance to employers on how they proactively meet their obligations in relation to people with disabilities in the UK on a customer focus. Certainly, there's experience in the UK and Canada of how employers have proactively - not reactively, but proactively - addressed their responsibilities in relation to ensuring that discrimination doesn't happen against people with disabilities, whether they are employees or whether they are customers.

We are encouraged by the proposals in the draft report about a limited positive duty in relation to taking reasonable steps and would like to see that extended in relation to other areas, whether it's service provision or education providers, accommodation, et cetera. We think that there are some clear and strong models from other places that can be of assistance here.

MRS OWENS: You'd do that as well as have this stated up-front about reasonable adjustment?

MS SISELY: Yes.

MRS OWENS: You'd do the two?

MS SISELY: Yes, I'd do the two. I'd do the two very definitely. That's the evidence from elsewhere. It's been successful in Canada and the UK. I don't see why it couldn't be successful here. We have got more information on that, if you'd like that. We're actually doing some work ourselves into systemic discrimination in the recruitment industry. We've been working with industry bodies in the recruitment industry now for over 12 months, and we've got some options for improving compliance in this industry in relation to equal opportunities generally.

This is with the Equal Opportunity Act. That work is coming to a close now. It's looking very promising. It's work we've done cooperatively and quietly with those industry partners, and there are about four industry bodies we're working with.

We've gone into this exercise in a quiet way, with the idea of trying to get some changes introduced cooperatively rather than having to introduce more punitive, if you like - shame and blame - compliance mechanisms and so far it's looking good. When that inquiry is finished in the next couple of months, we'd be happy to share the outcomes of that with you. I think there are ways we can do this, but I think we really do need to be clear about responsibilities, with responsibilities being met proactively and systemically, rather than in the breach.

MS McKENZIE: You've talked about almost an educative process and awareness raising and, in fact, some of the employer groups who have made submissions to us say that really that should be the mode we should adopt rather than making more onerous, if you like, amendments to the DDA. What's your view about that? I mean, you've just talked about a process which you said you've undertaken quietly and it would appear, from what you say, to have been successful. Really, that's what the employer groups are saying - that that is a better process to follow than making more onerous amendments.

MS SISELY: I think it's a process that has to be gone through. It's a process that has to be attempted. It's a process that we'd all like to think would be successful. I think, if we look at the evidence from other jurisdictions - and it's certainly the way that Canada went - it got so far and no further. Yes, there were the good corporate citizens who took it on and complied with the letter and the spirit - - -

MS McKENZIE: Preaching to the converted?

MS SISELY: Exactly, and there were a number that didn't. Along with that, you must always introduce mechanisms to monitor or audit, so you know who is complying and who is not, and then you've got to have mechanisms that address those who are not complying, who aren't convinced by educative measures and who aren't convinced to comply proactively.

MS McKENZIE: So you think there's got to be, if you like, that stiff backbone there.

MS SISELY: Absolutely, and that's certainly the lesson that Canada learnt and that led to their current regime. They had purely and simply voluntary mechanisms; they had education. It wasn't enough. It was clearly shown not to be enough, and that's when they added the auditing and added their compliance regime.

MRS OWENS: You said that you got information about what's been happening in Canada and in the UK. We'd be very grateful if we could get that, because the team has been trying to collect some information about this, and I think Cate has also written away to the UK, but - - -

MS McKENZIE: Yes. It's not easy to get.

MRS OWENS: It's a matter of how you're defining success. Is it success in terms of more people with disabilities getting jobs? The other side of the coin is that that might be happening but there are costs associated with this to employers, there is potentially an impact on business, potentially an impact on the economy, and I'm not quite sure whether there have been studies done that have looked at it from both perspectives. We have to, at the commission, think about the benefits and the costs of doing things. It's terrific getting more people into jobs, but if it actually is going to have a detrimental effect on the economy, we've got to know about that as well so that we can balance everything.

MS SISELY: Yes, I understand completely. My understanding is that there's been some work done in Toronto on these issues at York University. For example, recently at a forum I heard the figure mentioned that in Canada the cost of, say, reasonable adjustment for a person coming into a workplace was, on average, \$50. That was said in a forum. I'll follow up that information and follow up that comment to see if I can get you some more information about that.

MRS OWENS: That would be tremendous.

MS SISELY: I think the reality is that currently the costs are being borne by the individual with disabilities and I think what we would all think would be fair and reasonable is that those costs be shared. Some may be shared by employers, some may be shared by government, and the individual may bear some as well, but I don't think we've yet got a good handle on what those costs are and who bears those costs. We need to get a better handle, and it is difficult. But certainly I think the costs overwhelmingly are being borne by people with disabilities at the moment and it seems to me that that's unfair. We'll attempt to get you some more information along that line.

MRS OWENS: Thank you.

MS SISELY: In the draft report you mention improved cooperation between HREOC and the state and territory bodies, like the Equal Opportunity Commission, and the notion of a shopfront, and we certainly advocated for improved linkages at the national and state level and, as the report appropriately notes, the Australian Council for Human Rights Agencies is the appropriate body to pursue this issue, and

indeed we are. We need to be careful. I'm not quite sure what you have in mind when you're talking about a shopfront. I'm assuming that that might be a metaphor rather than actual, or you might mean actual but it might be - - -

MRS OWENS: It can be both. It could be through the Internet; it could be through the telephone; it could be through a shopfront. I know in your original submission you were fairly cautious about that, given your fairly recent experiences, but the problem that we keep encountering all the time is that people don't really understand the system. They don't understand that there is a state system and a Commonwealth system. We had an example this morning of somebody who went to your commission and was knocked back but didn't understand that they could have gone to HREOC. There's still a lot of confusion, and we're thinking about the individuals.

MS SISELY: I understand that completely. Clearly there needs to be, and can be, improvement in relation to that, and people's knowledge and people's choices, so that choices aren't foreclosed or are unknown. I think when we enter into such conversations and arrangements we do need to be cognisant of the widely varying environments, if you like, that are encountered. For example, we'd need to make sure that it wasn't a "one size fits all" and that how we handle a complaint or deal with an issue in Victoria is going to be vastly different from how we handle it in Broome or Darwin.

MRS OWENS: But we might not necessarily be talking about you handling the complaint. It goes back to the old postbox.

MS McKENZIE: It's more like first point of contact, in a way.

MRS OWENS: It's just the first point of contact. It's not you making a decision about what happens to it, except to provide that person with advice about what can happen under your jurisdiction versus HREOC.

MS SISELY: Which is what we used to do.

MRS OWENS: Which is what you used to do, and I know it probably ended badly - maybe not so badly - and you stopped the shopfront in 2002, you said, because of a lack of demand.

MS SISELY: Yes, that's right.

MRS OWENS: And you did do this complaint-handling arrangement with HREOC until February 2003.

MS SISELY: Correct.

MRS OWENS: And HREOC withdrew. So there's probably a bit of tension there as a result of whatever went wrong at that stage.

MS McKENZIE: It's really information at the first point of contact that was our principal concern.

MS SISELY: And that's about agreeing and getting agreement on pro formas or protocols or whatever at that point, because the reality is, as you would know, when someone walks in the door, or via email or in actuality, they have an issue, and at that point in time you actually can't make a decision as to whether - you don't know whether - it's going to be more appropriate that it be handled under federal legislation or under state or territory legislation. That's an issue that comes up later down the track. So we agree with the suggestion, and that's why we persevered with a common entry point into the general for as long as we possibly could, until HREOC withdrew to Sydney, precisely because we thought that it was in the interests of people with disability to do so, and I think we have to look at that again.

MRS OWENS: I'm sure it's not beyond the wish of the organisations to sort this one out. I think it's just an administrative blip.

MS SISELY: I'm sure you're right.

MRS OWENS: Maybe I'm underestimating the difficulties, and I recognise that the systems are different, but that raises a whole other set of issues which the employers have raised with us as to the confusion out there relating to all these different acts and lack of consistency between acts and so on. I know you've got other things, Di, you want to talk about, but that's another, I think, important issue for them, and we just touched on it very briefly in our draft report.

MS SISELY: Exactly. Yes, there are different pieces of legislation and, yes, there are some different provisions in some pieces of legislation, but in the main and in their intent and purpose, the pieces of legislation are very very similar, so I think differences can be overemphasised.

I would like to conclude, though, by coming back to the issue of systemic discrimination and applauding the proposals in the draft report that you have put forward that do make an important contribution towards addressing systemic discrimination, particularly, as we've discussed, the positive duty on employment; improving service provision to people with disabilities in how complaints are addressed and handled; looking at removing barriers to some of those services - and in fact we've just been talking about that; improving the statistical database; providing HREOC with powers to intervene in IR cases; and implementing a

co-regulatory approach. But we really would strongly encourage you to think about looking at the monitoring or the auditing and to look at a more rigorous enforcement framework and taking that from a human rights point of view.

How do we deal with people and organisations that simply will not pick up their responsibilities under the legislation and only do it grudgingly when a person brings an individual complaint? I think at the moment in all the legislation, whether it's the DDA or the equal opportunity legislation or others, there's a gap in our current suite of mechanisms to reduce discrimination. We know from other areas that, until there is some risk or consequence for some organisations in not complying, they won't comply, and I don't think we're going to be able to achieve the objectives of the DDA until we are able to come to terms with that and get some means to address it. So we really do strongly encourage you to have a look at that area and other legislation, whether it's business legislation or occupational health and safety legislation or, indeed, environmental legislation. There are a number of models around in Australia today that we can learn from.

Finally, then, I would just like to take this opportunity to clarify one particular comment in the draft report. The draft report on page 284 looks at the rate of conciliations across the board. Just to clarify here, it talks about the Equal Opportunity Commission as reporting a conciliation rate of 21.5 per cent. What we need to be clear about is that that is of all complaints. If we look at the complaints that we have declined as lacking substance, and take them out, then the successful conciliation rate of those where we think there is substance to the complaint and we have attempted to resolve it is 45 per cent. So if you just take the lower figure, it is somewhat misleading because it includes in that those that we think are complaints that don't have substance.

MS McKENZIE: So it's of those referred to conciliation?

MS SISELY: Yes. Thank you very much.

MRS OWENS: Thank you very much. I know we've run overtime with you, but there was just one other issue that you raised in your initial submission and it's the one thing, going back to our draft report, I don't think we did pick up. That was a suggestion you made that we review all Commonwealth legislation to ensure consistency and, if not, whether noncompliance is necessary, and mandatory assessment of all new legislation. We haven't picked that up. Where we got to was looking at the state laws that are currently exempted and saying that all those should be put back on the table and delisted unless the states request their retention, so what we haven't done at the moment is thought about Commonwealth laws. I thought maybe you might raise that with us because it's probably a bit of an oversight. Cate doesn't know I was going to say this, but I thought maybe we might come back and

give that a little bit more thought.

MS SISELY: I'd encourage you to do that, and in fact that's precisely what's happening at the moment in this state, in that there is a review under way by the Scrutiny of Acts and Regulations Committee of the Victorian parliament into precisely this topic. That committee has an inquiry under way that is looking at all Victorian legislation and its consistency or lack of with the Equal Opportunity Act.

MRS OWENS: What's the timing of that?

MS SISELY: That, from memory, has to be done by - - -

MR RICE: I think it encroaches at the end of this year, so the report is due either at the end of this year or early next year.

MRS OWENS: I suppose it's just, picking up that idea and saying that the review that's being conducted in Victoria, thought should be given to conducting a similar review at the - - -

MS SISELY: It could serve as a model.

MRS OWENS: We might come back to your - we'll try and get details of that particular - - -

MS SISELY: Okay, and at that time we can give you some more, because certainly when we looked at some - years ago we did a review in relation to same-sex relations and the law, and just in that particular area we found that there was more than 30 Victorian pieces of legislation that were opposed or discriminated against gay and lesbian people. So it is quite surprising, when you actually look at it, how much discrimination is sanctioned in other pieces of legislation. Now, some of it might be quite appropriate, but some of it might not be, and it needs a review.

MS McKENZIE: It's really to determine whether it remains appropriate, isn't it?

MS SISELY: Yes, exactly right.

MRS OWENS: Anyway, I just thought I'd point out that we didn't pick that one up but it wasn't because we didn't agree with it, it was just that we didn't do it. Thank you very much and we will now break and resume at 24 to 4.

MRS OWENS: The next participant this afternoon is the Australian Industry Group. Welcome to our hearings. Thank you for your submission. I think we've now got a replacement submission from you, from one that arrived a day or so earlier, or maybe earlier the same day. Thank you very much for that. Could you each give your name and your position with AIG for the transcript.

MR SMITH: Yes, I'm Stephen Smith, director, national industrial relations of the Australian Industry Group.

MR MARASCO: I'm Renato Marasco, senior adviser, workplace services, of Australian Industry Group in the Victorian branch.

MS IRWIN: My name is Christine Irwin. I'm an adviser, workplace services, with the Australian Industry Group, again in the Victorian branch.

MRS OWENS: Thank you. I'll hand over to you, Stephen - are you going to be the one to introduce your submission?

MR SMITH: Yes, thank you. AIG welcomes the opportunity to participate in the Productivity Commission's review of the Disability Discrimination Act. We support the objects of the act which, of course, seek to eliminate discrimination against disabled people and to protect and promote their right to a quality of opportunity. The written submission that we have provided is directed largely to the impact which the act has in the employment area. We agree with the view expressed by the commission that, given its relatively short period of operation, the act appears to have been reasonably effective in reducing the overall level of discrimination.

We say that due to the fact that recommendations arising from this review will undoubtedly have implications for other federal and state anti-discrimination legislation, that the approach which we submit the commission should adopt is to only recommend changes to this legislation where there is clear evidence which supports the need for change. We recognise that significant economic benefits would flow from increasing the participation of people with disabilities in employment. Of course, each additional employed person - not only would earn wages, spend money on goods and services, et cetera, but there would be substantial savings in welfare costs and also, of course, it would lead to a better quality of life for people with disabilities. We've considered the commission's comment - and I quote - "That compliance costs under the DDA could affect competition if costs are imposed on some businesses and not others." In that regard we say quite strongly that concern about competition effects is not a sound reason to impose additional compliance costs across all employers.

With regard to the definition of "disability" some of the definitional changes

which are set out in the draft report, we believe, would cause significant operational difficulties for employers, particularly the proposal to extend the definition of "disability" to ensure that it includes behaviour that is a symptom or manifestation of a disability. It's absolutely essential that employers retain their ability to deal with unacceptable behaviour in the workplace, without being faced with discrimination complaints from persons arguing that their unacceptable behaviour was a symptom of, say, their depressed state or - in the light of the way the case law sits at the moment - their addiction to a prohibited substance.

Under occ health and safety laws, employers have a duty of care and very large penalties apply and, as I've said, employers need the ability to deal with unacceptable behaviour on its face. We point to federal and state unfair dismissal laws, of course, which are there and unlawful termination laws which provide protection against dismissal for situations where people have been involved in unacceptable behaviour and employers, of course, have obligations to make sure that their responses are not harsh, unjust or unreasonable.

Given the Full Court of the Federal Court's comments in the Purvis case, there was, of course, specific rejection of the concept that the legislation at the moment includes within the definition behaviour that is a manifestation of a disability. Not only was it rejected from an interpretation point of view, in the decision it is set out in some detail which we've duplicated in our submission as to why the Federal Court came to that view. They used terms such as "counterintuitive" and "draconian" to describe HREOC's interpretation which - we could not understand why the Productivity Commission would adopt that interpretation in its draft report.

Not only, of course, has the Full Federal Court adopted that view, but in a majority decision - five to two, if I recall correctly - the High Court has also not only rejected that interpretation but has set out once again these important issues of policy and principle about why HREOC are not correct in their interpretation and why that interpretation is not fair. So we not only put the view that we oppose very strongly the definition, including that; we say that if there is to be any amendment to the definition, it should be to reinforce the High Court's current interpretation.

MS McKENZIE: Do you want me to interrupt you at this point and make a comment, Stephen, or do you want me to wait until you've gone through all your issues? Which is easier for you?

MR SMITH: It doesn't matter, commissioner. I was only going to highlight about three areas. That was one of them.

MRS OWENS: Maybe we'll go through the other areas because I want to come back to competition as well.

MS McKENZIE: Yes. Perhaps we'll deal with all the areas first and then come back.

MR SMITH: Okay. The next issue I just wanted to touch on was the disability discrimination amendment bill and the decision of the Federal Court in the Marsden case has created significant uncertainty and concern amongst employers about their ability to deal effectively with employees who are addicted to prohibited substances. The federal government has responded to that by introducing the disability discrimination amendment bill and we submit that the Productivity Commission should recommend that that bill be passed without delay, given the obvious merits of that bill.

The next issue is the positive duty that has been floated in the draft report, the positive duty on employers to take reasonable steps to identify and prepare to remove barriers to the employment of people with disabilities. It's our view that the proposed positive duty presents significant practical difficulties and would be unfair on employers. One of the biggest difficulties, of course, is that if an employer is to identify barriers to the employment of people with disabilities, there is a vast array of disabilities which people can have. Whether it is a physical disability or a mental disability, it is totally impractical to expect an employer to make adjustments, or even plan to make adjustments in their workplace when they have no idea what sort of disability a potential job applicant may have, and further, a person with a disability may never apply for a job with that employer.

With regard to that proposal that perhaps this positive duty should just apply to larger businesses, we say we don't support the idea of having different arrangements for different sized businesses. In fact, we say that the proposed positive duty is totally unworkable and shouldn't apply to any employers. Just in conclusion, as I've said, we do strongly support the objects of the Disability Discrimination Act but we believe that the Productivity Commission's draft report is heavily weighted towards imposing further regulation upon employers and doesn't focus enough on the benefits which would flow if more resources were devoted to educating employers about the issues in a positive manner.

Our organisation has already taken some steps towards improving the knowledge and outcomes amongst our members, but we are prepared and would like to take further steps and we believe that is the appropriate response, rather than all of these suggested changes to the legislation, many of which seem to be based more on doubts as to definitional issues and so on, rather than tangible issues that are certain in terms of what has arisen. Thank you.

MRS OWENS: Good, thank you, Stephen. Maybe we'll start with this positive

idea that you've got, which is this possibility of employers working with the Human Rights and Equal Opportunity Commission in undertaking some education of employers. I thought that was a very interesting idea. I don't know if you've managed to pin it down further than that, or whether you've talked to HREOC about this idea.

MR SMITH: We have done some things with HREOC and the state bodies in terms of inviting speakers along to seminars and conferences and so on, but there is a lot more that could be done in the industrial relations area, where I have a lot more involvement than this area. We have worked with the Department of Employment and Workplace Relations and state bodies extensively in developing different publications, different initiatives and so on for employers. Those have been successful initiatives. I think there is a lot more that could be done.

I recall a speaker that we invited along to one of our conferences and we had 150 or so senior managers there, at typically the HR director level, and this speaker was a very motivational speaker who spoke about the issue of - the benefits of employing people with disabilities and why this makes sound business sense. That speaker was ranked as the highest-ranked speaker amongst two days of the conference. That will have a far greater impact - the people in that room would employ tens of thousands of people. That has a much greater impact than a law that may or may not be well directed.

MRS OWENS: You heard earlier today from the National Diversity Think Tank. I don't know whether you've heard of this body which has been established, but they are working with employers and they're looking at the idea of setting up an Employer Disability Advisory Council. It has got a number of big companies involved in this, such as IBM and I think it was ANZ Bank or Westpac - one or the other - and a number of other big companies. They are looking at this idea of setting up an advisory council based on a UK model to provide advice and assistance to employers in terms of what they do under the act to facilitate employment for people with disabilities and to provide an educative function, which I thought was, again, quite an interesting idea. They said that they could be a link organisation with HREOC and work on creating educational programs. Are you aware of that body?

MR SMITH: I haven't had any personal contact with them, but IBM is a member of the Australian Industry Group and, of course, Mark Bagshaw from IBM is a leader in this area and we have worked with Mark from time to time on issues. Yes, it sounds like a great idea and that's exactly what we're talking about; those sort of processes are, in our experience, much better than increasing the level of regulation which may be counterproductive, as we have pointed out in our submission.

MRS OWENS: Thank you. Maybe we'll come back to Cate's issue of behaviour.

MS McKENZIE: I just wanted to talk a little more about the Purvis case. What the High Court said in the Purvis case was that clearly the definition of "disability" included behaviour which is a manifestation of some other condition. So for us to change that definition by excluding what the High Court has in fact said, you know, is included in that definition would be quite a step.

ut what the High Court went on to say was that, even accepting that that is the case, when you get to looking at whether you discriminated directly, if you treat everyone who behaves in the same way the same - in other words, if you hand out the same treatment to people with the same behaviour, whether they're disabled or not - say they behave violently or in a criminal way - then you don't discriminate. The High Court, in other words, got to that conclusion by a slightly different road, and you'd want to keep that situation as the High Court said it is. You wouldn't want that to be changed.

MR SMITH: But in the draft report - and I appreciate that was written prior to the High Court decision but the approach that is being floated in the draft report is the same sort of thing as the approach of totally excluding it, because both of them are the same sort of thing - it's overturning the High Court's decision, if you like. This is an issue that's been the subject of a huge amount of litigation; the issues are quite complicated.

That High Court decision of course is very lengthy, and to seek to overturn the High Court's decision in the way that the recommendation is framed at the moment, if that goes into the final report, we think is totally inappropriate.

MRS OWENS: I don't know if it's overturning the decision; it's just clarifying what is there at the moment. The act has also got a number of checks and balances and the way the High Court has interpreted the comparator is that it's another person with similar behaviour but without that disability, which means that it was legitimate in that case to expel that child from the school.

MS McKENZIE: And just in the same way, if we applied that to employment, it would be legitimate to either discipline or dismiss the employee without the disability with the same behaviour, or the employee with the disability with the same behaviour.

MRS OWENS: There are also other ways you can address this issue in the act, and there have been other recommendations we've made. For example, we've suggested that the unjustifiable hardship defence be extended to include situations within employment. At the moment it only applies to prior to the employment - the person entering into the job, it applies at that level but not once they're in employment, and

we've said it should be extended. So there's always that defence, if that recommendation was accepted.

If it came in as a case under indirect discrimination, there's a test for reasonableness there, so it would be possibly picked up with that test. There is also a provision which - it hasn't been used at this stage - to prescribe certain legislation or other regulations. So if you were concerned about, say, occupational health and safety issues or what it means in terms of unfair dismissal laws and so on, there is the potential to prescribe some of those laws under the act.

MR SMITH: But why is there any need now, in the light of all of this focus in the Federal Court and the High Court, to change the definition and potentially start another round of litigation about this issue? There is a definition there that has been considered exhaustively by the courts, with an outcome that interprets that definition. We believe it's totally inappropriate to run the risk of having to go through all of that again - and of course that happened in the context of the school student, but it is very easy to look at that in the context of the employment relationship.

We had a discussion just today with a group of employers about this issue and the concern of employers is probably more the exception, where you might have an employee that has been guilty of violence in the workplace, the employer then - after going through an appropriate process, of course - decides that disciplinary action is appropriate. That employee could identify that they are suffering from some sort of condition that would meet the definition of a disability, then there are all sorts of things that could flow from that. There might be an order made that the company not terminate the employee. There are significant time frames, as the Federal Court and the High Court pointed out, for these things to be dealt with, and employers would regard that as unreasonable.

If they have a situation where someone commits a violent act in the workplace or unacceptable behaviour in some other form, then they need to deal with that behaviour on its face within those concepts that exist within the unfair dismissal laws, which are that they can't be harsh, unjust or unreasonable and the person has to have a fair go all around, and that's the appropriate way of dealing with this issue, we believe, in an employment context.

MS McKENZIE: I suppose the concern is that if things stay as they are, an employer might not even think to try to accommodate - and I'm not thinking of now very violent or clearly criminal behaviours but behaviours of far lesser degree - that an employer might not even think about trying to accommodate that behaviour but might simply discipline or perhaps even dismiss that employee. Really I suspect that's at the heart of it. I don't think anyone would argue that an employer had to endure very violent behaviour, from anyone, in the workplace.

MR SMITH: But we have laws that deal with this issue very comprehensively. We have the unfair dismissal laws, state and federal, in most states, and we have unlawful termination laws which deal with situations where people may have a physical or mental disability, so those various different laws are already there to deal with the dismissal side of things. In terms of any unreasonable disciplinary action, we have industrial laws that can deal with those issues as well, through grievance procedures and so on.

MRS OWENS: But the definition in the act is actually covering all areas in the act, not just employment.

MS McKENZIE: And also, the dismissal laws only cover dismissal. Unless there are some specific award conditions that apply, they don't cover so much in employment issues of this kind.

MR SMITH: No, we accept that. Our interest in this matter is by far predominantly weighed towards employment matters, because that's what we are focused on in our role. But we would think it's very unfair, even from an education point of view - but it's for others to argue that - but here is a situation where the High Court has interpreted the existing definition, as has the Full Federal Court. They have both, not only from an interpretation point of view, but also from a merit point of view, made comments about how unfair HREOC's interpretation is, and we just see that it is a situation where it looks as though the Productivity Commission is recommending HREOC's interpretation, which all these courts have said is very unfair.

MRS OWENS: We're not necessarily accepting HREOC's interpretation about whether there was discrimination or not. But, I mean, whichever interpretation you're talking about, it was still clear - as Kate said - that behaviour was part of this broad definition of disability, and so where the question arose was whether there had been discrimination based on that. I'm not an expert on disability, but it is conceivable that there are certain disabilities where the behaviour is intrinsic in the disability. You can think of forms of autism, where there's particular behavioural characteristics that can come to - - -

MS McKENZIE: Some forms of psychiatric disability might result in certain kinds of behaviour.

MR SMITH: We don't dispute that, and we make the point in that section that deals with the High Court decision that, yes, the High Court has found that in terms of the behaviour there could be a whole range of reasons for it, and disability is one of several. But the main point we're making is that given that exhaustive amount of

analysis of the existing words, we strongly object to those words being changed when it's now relatively clear what those words mean. Those words have been interpreted in a way that still may cause some difficulties for employers, but there is some certainty associated with the existing definition that would just go out the door completely, we believe, with the wording that's being proposed as a definitional change.

MRS OWENS: But we're just suggesting that there be even greater certainty. I mean, a lot of people are not going to be experts on what has happened in the High Court, including some of your members, presumably, and this is just saying that behaviour is considered to be part of the disability. That doesn't mean to say that a complainant would win a case on that basis, because you've got to be able to prove that there's been discrimination based on the disability.

MS McKENZIE: So there are two things. One is disability itself - what's included in that. But a second one is, even accepting that there might be a disability which includes behaviour, has there been discrimination? And there are quite different criteria that apply.

MR SMITH: A way of achieving your aim in a far more acceptable way to employers, we believe, would be, say, to put a note in the legislation referring to the outcome of the Purvis decision, so that people know what the tests are, without changing the definition, because to change the definition and insert those words - you know, when you look at the High Court decision, it's not as simple as just putting those words in there. That, we believe, runs the risk that it will overturn, in part, the High Court decision, and we strongly oppose that.

MRS OWENS: I don't think it would have the effect of overturning the High Court decision; it's just reinforcing it.

MS McKENZIE: No. It's really for clarification. It's trying to say expressly what the High Court has said, for the benefit of people who don't read High Court cases.

MR SMITH: As we've said, the idea of putting a note in the legislation could achieve exactly the same thing, because it doesn't change the definition, it just highlights that there is a relevant case that they should look at - anyone that wants to understand this issue - in understanding that definition.

MRS OWENS: Now, have we finished with behaviour?

MS McKENZIE: Yes.

MRS OWENS: Competition issues. You said at the outset, and you've said in your

submission, that you couldn't see a sound reason for being concerned about competition if the compliance costs - you're more concerned about the compliance costs being imposed on all employers, and you felt that was a more dominant issue than the competitive effects. But we have had others that have said the compliance costs in most instances are not that great, and what the concern was more about was that it was going to have a greater impact on some employers than others; if one employer, for example, had got a complaint, that they had to make adjustments, and then another employer competing in the same industry didn't face a complaint and didn't have to do the same.

MR SMITH: I wonder whether that, though, was being put forward by an employer or a representative of employers, because the point that we seem to be seeing in that section of the report was that it can be unfair on one employer having to face this, so why not make all employers incur this cost and therefore it's fair. But we just disagree with the rationale for that. You know, take once again the unfair dismissal laws - because one employer has bad experiences and all sorts of costs, that doesn't mean you impose a regulatory regime that requires all employers to incur all of those costs just to make it fair.

We also make the point in the submission that we believe, wherever it's possible, that complaints should really be based on tangible facts relating to individual cases because once you get to very general concepts, then there's all sorts of problems that potentially arise from a procedural fairness point of view, as well as the merits of the issue.

MS McKENZIE: Yes. I agree with you, they shouldn't be based on hypothetical testing of some part of the law.

MR SMITH: Yes. I don't know how you can really get around this problem that it will be costly for an employer to deal with the implementation of whatever comes out of a particular case, whatever the outcome might be, or the whole process of going through dealing with a complaint - that's just part of the system, and it's the point we're making, that that can be costly for an employer. But we're not arguing against that, that's what the legislation says. We're just saying that you shouldn't extend unreasonable arrangements - we're not saying the existing ones are unreasonable, but you shouldn't extend unreasonable levels of regulation across all employers just because of concern about some employers facing costs.

MRS OWENS: But under the act there are requirements - well, there's a question mark about how clear the act is on these requirements - but there is an implication that all employers are meant to be not discriminating, possibly making adjustments - now, that's been a question mark in this High Court case, about what that actually implies - but there is an inference that all employers have a requirement on them to

do certain things now, and it's just that the poor unlucky one that got caught out is the one that's going to bear the cost, and the other ones won't bear the cost until somebody else complains about them.

MS McKENZIE: The act prohibits discrimination by employers, not just when a complaint is made; it just prohibits discrimination. So if a person with a disability comes to your door, theoretically the act means that you can't discriminate against them, whether or not they finish up complaining about what you do to them.

MR SMITH: We don't believe that is widespread, that the employers are discriminating, and I think your findings that the legislation in an overall sense has been reasonably effective highlights that. Of course, there's more that can and certainly should be done, and that's where the role for increased resources being put into education comes to light. However, if employers are discriminating at the moment, then I think you will find that the overwhelming majority of them are doing that because they do not fully understand what their rights are, and it is difficult for employers, particularly small ones, when there are so many state laws, federal laws, not only in this area, but you've got occ health and safety laws, industrial laws. It would be a nightmare for a small business to understand what it all means; impossible, in fact.

MRS OWENS: When we talked to the National Diversity Think Tank earlier, they made a really interesting point about employers. They said that there is fear and unpredictability; there's ignorance about what's required. There's concern about what the impact would be on the workplace, on the people around the person with a disability in the workplace, and possibly there are also concerns about potential future costs. They also talked about potential problems with, say, workers compensation, safety in the workplace and so on. Do you agree with that sort of view that there is this fear out there; there is this uncertainty and that's what might be holding some employers back rather than deliberately discriminating against somebody because of a stereotypical assumption about what they can or can't do? It's just the fear of the unknown.

MR SMITH: I haven't perceived that issue. It would be more a situation, if there is any fault on the part of a particular employer, that they really haven't invested the time and energy into putting in place strategies and so on to deal with this issue, and that's where education comes in. I don't think a lot of employers focus enough time on this particular issue, but it's not a matter of consciously discriminating. It's just that more education is needed. Once again, the Productivity Commission has set out in the draft report there is a relatively low level of understanding about the Disability Discrimination Act amongst employers and the community generally. Therefore, that finding points to the fact that great benefit would flow from education, at least in the first instance, to see what the outcome might be.

MS McKENZIE: I know I've made this comment to you before. It does concern me, I have to say, the act has been around for 10 years, which certainly - it's not 100 years, but it is a long time, and if education is still a problem, I have to wonder whether it will always be a problem.

MRS OWENS: Is it a matter of just throwing resources at it?

MS McKENZIE: Is it a resource issue? It's 10 years on and still you're telling me that there is substantial lack of awareness among employers about this legislation. Is it a resource issue?

MR SMITH: I'm not saying that there is a substantial level of non-awareness of the legislation. Of course employers know that there are anti-discrimination laws in place and what broadly those laws provide for, but what we point out in our submission is that far more could be done from a positive point of view, not just simply pointing out to employers what their legal obligations are, but also pointing out as many of the programs that are very successful in this area do: the benefits for employers in dealing with this issue in a very positive focused way within their business - that's where we believe more effort needs to be devoted, not just simply telling people what they have to do under the law, because that's only going to achieve a certain level of outcome; obviously, minimum compliance where far greater benefits will result from greater efforts.

MS McKENZIE: It's really an encouragement. It's based on encouragement.

MR SMITH: Encouragement, role models, case studies, et cetera, where we think far more can be done, and far more can be done in a far more targeted way. Rather than a broad-brush approach to these things, we believe that a lot more could be done by working through industry groups like ours, for example, where we have a close relationship with our 10,000 or so member companies. That is a strategy that is more likely to be far more successful than putting an ad on television, for example, where it's a very broad brush and extremely costly way of going.

MS McKENZIE: Yes, it is better targeted.

MRS OWENS: It's interesting but not surprising that your views about what should be done are down one end of the spectrum, and when we spoke to the Victorian Equal Opportunity Commission just before you today, they cited the example of Canada, which has got an Employment Equity Act, which is a much more hard-hitting act than we've got in Australia and what we've suggested in our draft report.

MS McKENZIE: It involves reports, audits, inspection and substantial penalties.

MRS OWENS: I don't know whether you have contact with counterpart organisations in Canada, but the Equal Opportunity Commission was saying that they've got evidence that this approach in Canada has been working well. We've now asked them to provide more evidence because, as I said to them, it might be working in terms of getting more people with disabilities into the workforce, but what I don't know is at what cost. So we've asked them to supply us with more information, but do you have contacts with your counterparts in Canada? And there are similar sorts of legislation in the UK in relation to racial discrimination, and we're really interested to know how those sorts of approaches work vis-a-vis the more light-handed approach that you're suggesting.

MR SMITH: We have very strong links with other employer groups in the US, UK and Western Europe. We do not have close links with employer groups in Canada. We have involvement from time to time with them but I couldn't comment knowledgeably about that issue.

MRS OWENS: It would be interesting because we've got the Equal Opportunity Commission advocating very strongly that we go down that path and introduce strong enforcement mechanisms and so on, and at the other end we've got groups such as yourself saying, "Let's see what we can do working with education and moral persuasion," I suppose, to bring employers up to speed with what the act says and what they could be doing and which is the legitimate approach? It depends on the relative benefits and costs.

MR SMITH: That's right, and we very much believe that our suggested approach is the appropriate one. If effort is devoted and there is a period of time to see whether or not that works, then it might be that some time down the track you might say, "Well, that hasn't worked," but we don't think at this point in time anywhere near enough effort has been put into that strategy, and that is the appropriate step at this point in time.

MS McKENZIE: The other thing, I should say, that the Equal Opportunity Commission said was that their understanding was that the approach in education and encouragement had been tried first in Canada before these more Draconic measures were introduced, and that approach hadn't been successful, but of course Australia is a different environment.

MR SMITH: It would also be very worthwhile, if you're getting the information from Canada, to perhaps explore that side of things as well, because it would be interesting to know whether that was the case.

MS McKENZIE: We also don't know, of course, what education encouragement was tried; what kind of approach that was.

MR SMITH: Yes, and whether it was our suggested approach of working with industry groups as one of several strategies, of course.

MRS OWENS: Would you mind if we get some more information on this to pass it back to you for comment?

MR SMITH: No, that's fine.

MRS OWENS: We may run out of time to do this. It depends how much information is out there now.

MS McKENZIE: And if you also had any from the UK, because that's another - it hasn't followed down Canada's path quite so strongly but it does have some - particularly the race legislation, which is a bit like Canada's. If there's any information that you would have from your counterparts in the UK, that might help.

MR SMITH: Yes, we'll have a look at that.

MRS OWENS: The next issue you raised with us was about the disability discrimination amendment bill and you've asked that we recommend that it be passed. It puts us in a slightly difficult situation because we're reviewing the act as it stands, rather than this particular bill, but I have said to other groups that have come to our hearings that we will be reinforcing in our final report the need to ensure that exemptions are minimised, and that the definition of "disability" be as broad as possible so that any potential disagreement or complaints can be based on whether there has been discrimination or not rather than what is a disability.

The bill doesn't try to redefine disability. It's introduced an exemption, and for this particular instance, which is people with addictions to particular drugs, to prohibited drugs, and we would, in most circumstances, say try and minimise those sort of exemptions, because as soon as you get into that, you get into the legal argy-bargy - in this case, what is a prohibited drug? Does the employer know that the person is on a prohibited drug? There is also this issue about - - -

MS McKENZIE: What does addiction mean.

MRS OWENS: What does addiction mean? What is appropriate treatment? And all of a sudden you get into this great legal minefield, not to mention what you do about privacy considerations about the person's right to privacy. Having said that we are not there reviewing the bill, there is a degree of discomfort, and I think Cate and I

probably share, that it undermines just the way the act has been set up to try and minimise as far as possible the potential for legal misinterpretation, and you can see even with that issue that the High Court dealt with, with Purvis, how complex it can get, and potentially the complexity here is even greater.

MR SMITH: Yes, but isn't it a similar issue to several of the other areas where in the draft report it highlights that various uncertainties exist and therefore recommends that certain clarifications be made? If that legislation isn't appropriate in its current form, and we're submitting that it is, but if the specific words of that legislation aren't the appropriate way of dealing with it, the issue is more the concept and the lack of clarity and the problems that have been caused for employers through those court decisions - the New South Wales government of course took a different approach to amending its legislation, and all of these issues about what is addiction and so on have come up, of course, in other countries.

In the US, for example, there are a range of laws and other instruments in various states that deal with these issues. and in some cases quite comprehensively. It is an issue that we believe needs to be worked through, even if the wording of that legislation isn't something that the Productivity Commission supports. The broader issue of the concerns of employers in practically dealing with that issue we believe should be considered as part of this review.

MRS OWENS: I can understand those concerns, but the act, as it has been set up, does allow employers to do certain things. There's not unjustifiable hardship there but there is this issue of indirect discrimination and what is reasonable.

MS McKENZIE: There's the issue of inherent requirements. If a person is so addicted to a drug that they can't do them, then obviously the employer can act. So the issue is addressed, although not directly, already. There may be some greater tightening of the safety exemptions relating to safety, perhaps, that might be a possibility because clearly, if there are safety considerations involved, that would be something that an employer ought to be able to take into account.

MR SMITH: Yes. It just seemed to be a whole relevant issue that hadn't been explored much in the inquiry. We haven't sat through, of course, everyone else's appearances and read all of their submissions; we've read some of them. It is an issue that we think is very relevant and it is of concern to our members. That's why we have raised it.

MRS OWENS: Quite a few people have raised the amendment bill with us, but we have this discomfort about how far we enter into the debate on this, given that it is in parliament at the moment and there is a committee looking at the bill. Most of those

that have come before us and talked about the bill have basically been arguing the other case; that is, that it shouldn't be supported.

MS McKENZIE: Some, to be fair, have raised uncertainties in the wording, which we are considering.

MRS OWENS: Yes, which we are considering, because you want a fallback. If the bill doesn't get through I think it's important to make sure that we can get the rest of the act worded as clearly as possible so that employers can have some comfort that they have the ability to do what they need to do in that circumstance where they are faced with somebody - - -

MRS McKENZIE: In some unsafe situation.

MR SMITH: Yes, and that was the other key point we were making, that that bill and the issue that underlies it needs to be considered in the context of the Purvis issue about behaviour as well.

MS McKENZIE: Yes, you are right.

MRS OWENS: There is a link there.

MR SMITH: Yes.

MS McKENZIE: There is a link.

MRS OWENS: But I think there are other ways you can deal with these issues in the act and make it much clearer for everybody. So we will try and address that. There is only one issue which you might want to comment on as well. That is, we have got a degree of uncertainty about what is required under the act, and this came up under the High Court decision about whether there is really a requirement for organisations to make reasonable adjustments. And this comes back to our request for information or views on positive duties. It has now become somewhat clearer that the act may not necessarily be very specific on whether a reasonable adjustment would be required under the definition of direct discrimination.

We are looking at whether we should be thinking about making that more explicit. We had a bit of a go at it in our draft report, in our recommendation on direct discrimination. We are now thinking about whether indeed that requirement to make reasonable adjustments - if you think it's appropriate, and you may not - should then be extended across all areas of the act and whether it should be a general provision in the act rather than something that is just set up under direct discrimination. This is a bit of a legalistic sort of thing and Cate can explain it much

better than I can.

MS McKENZIE: Perhaps I should just say that if there was going to be a duty to make reasonable adjustments, it would only, as far as I can see the act operating, occur when a person with a disability came to the door; it wouldn't have to be done up-front. An employer could choose to do that but it wouldn't have to be done up-front. And only those adjustments would have to be made which didn't cause unjustifiable hardship. In other words, there would be that defence and all of the other defences would apply as well.

Really, what has been said to us in a number of submissions is that it's that need to make at least a reasonable amount of accommodation for people with disability who come to the door that sort of underpins at least part of the act. What would you think of that kind of duty?

MR SMITH: Just to deal with it in a slightly broader way, what we have said is that we don't believe it is desirable to make changes to the act based on uncertainties about what something might mean unless there is very good reason, because in changing that wording you could then create as many uncertainties as what you solved. That concept that you've talked about addresses one of the concerns that we have about the idea of the positive duty. At least then there is a tangible situation.

It's not a matter of expecting an employer to accommodate an exhaustive range of different potential disabilities, and we don't think that there is only a limited range of them. Even if you look at the issue of physical disabilities, there is a huge range of potential different physical disabilities, of course, as well as mental disabilities. We don't see the evidence that the existing legislation is causing difficulties in that area and that's why we are not supportive of a change being made in that area.

MS McKENZIE: It's difficult, because it's really since the High Court case that this has become a problem. Previously, in a number of cases, it was thought that there was this obligation and it sort of underpinned a lot of the older decisions. Now, with what the High Court has said, the matter is far less clear. In fact it's probably the case that there is not that obligation. So really the question is - from being relatively clear one way it has now become the other way, although still somewhat unclear around the edges.

MR SMITH: We are happy to take that on notice. We need to study the High Court decision from that angle and we haven't done that yet.

MRS OWENS: I'm a bit worried about your view that we shouldn't be recommending changes based on uncertainty because we have got a terms of reference which asks us to review the act. I think one of the criteria that we are

adopting is where it's unclear, let's make it as clear as possible. When acts are unclear that's when you end up with a lot of potential problems in the courts and it can add to people's costs while you are going through all these processes of legal interpretation. It's not costless, going through a process where you go through conciliation, Federal Court, High Court. As much as possible we should be aiming at having an act that is easily understood, where there is certainty about how you interpret things and that what is in the act reflects what the original intention of the act was. So that's what we are trying to achieve.

MR SMITH: Yes. I probably haven't made our position very clear. What we are saying is that in some areas of the draft report it highlights that certain cases have resulted in different views on different issues. In one area the point is made that this issue hasn't even been considered by the Federal Court yet and we believe, in areas like that, it's premature to be changing the words of the legislation and potentially promoting another round of cases about what the new words mean until it's clear that those words are a problem. It does take time, of course, to bed down any legislation, to see how the legislation might be interpreted.

It's an extremely costly thing, not only for employers but for many other parties, to be constantly faced with expensive court proceedings until all of these issues are finally resolved and we do have resolution like we have with the High Court decision in the Purvis case. We do not welcome the idea of words changing to perhaps have the aim of achieving more certainty. Unless the legislation is extremely well drafted, it could have the opposite effect and suddenly you have years of debate about what those new words mean.

MS McKENZIE: That is, in a way, the nature of - I mean, whatever amendment you make, you can be pretty sure that at some stage or other there are going to be cases about it. We just simply took the view that if something seemed clearly uncertain, if we could do something to improve certainty, to make the legislation more certain, it was worth doing.

MR SMITH: Yes, if it's possible to achieve that. Our organisation has spent enormous sums on behalf of our member companies in the last 12 months on various industrial relations cases, one of which has gone all the way to the High Court. It is an extremely expensive issue to deal with interpretations of legislation. When the legislation has been clarified and it's clear what it means, we believe that there needs to be very good reason, based on a problem arising from that interpretation, as to why you need to change it.

MRS OWENS: We are going beyond just changing wording to actually suggesting that, for example, the unjustifiable hardship defence should be extended across the act to all areas, which would include "within employment". So there are various

things we are doing. We are looking at the wording, the definitions and areas where we think the act can be improved.

MR SMITH: Yes.

MRS OWENS: I don't think you would object to that particular change.

MR SMITH: No.

MS McKENZIE: To make it more workable.

MRS OWENS: Just to make it balanced.

MS McKENZIE: More workable.

MRS OWENS: We are thinking about having a provision so that standards could be set in any area covered by the act, although it may not necessarily be necessary to or appropriate to develop standards, like we found with the employment standard, where that process has ground to a halt because it was deemed to be unworkable, when you are covering so many different situations. So in that instance it's probably not going to work but there may be a situation where standards could be set for particular industries or particular sets of circumstances.

MR SMITH: The point we are making is not, of course, that the Productivity Commission shouldn't recommend changes, because that's the whole purpose of the review, of course, to see what changes might be required.

MRS OWENS: Yes.

MR SMITH: The point we are making is that you shouldn't make recommendations lightly. It has enormous implications, not only for this legislation but for others. If you are going to make recommendations it should be based very much on very good evidence that those changes are desirable and not just a view that there may be a problem. That's the point we are making.

MRS OWENS: So we won't make any gratuitous recommendations.

MS McKENZIE: It's a bit like marriage; don't undertake them lightly, unadvisedly.

MRS OWENS: No. I just have one other question for you, and that was your suggestion in relation to the definition of indirect discrimination. This is on page 16 of your original submission. It's probably on the second submission that you sent us, on a different page. You've made a comment about the proportionality test. We

have proposed that it be removed. You have said that if it is to be removed it should be replaced with another appropriate test and you have suggested that it be replaced with - and I will read out the words:

The requirement or condition has or is likely to have the effect of disadvantaging persons with a disability of the aggrieved person.

MS McKENZIE: That's wording that comes from, I think, the Sex Discrimination Act. Am I right?

MRS OWENS: Or the age discrimination bill.

MS McKENZIE: The age discrimination bill.

MR SMITH: Yes.

MRS OWENS: What's the advantage of that particular wording? I'm a non-lawyer. Maybe Cate can answer this, but I couldn't understand the advantage of doing that.

MS McKENZIE: I assume that what you are looking at is not just that the person's disability can't comply with the requirement. It's not some trivial noncompliance, let me put it that way. There has to be some real detriment involved before we go down this road. Is that really what you are on about?

MR SMITH: That's correct. We are happy to take that on notice and give you a more comprehensive answer because we did look at it in terms of those different pieces of legislation and the existing tests. Just off the top of my head, I would need to look at it in more detail to give you a comprehensive answer about those specific words. It's based on the ACT legislation as well as the age discrimination bill. Both of them were quite close and the wording has been modified.

MS McKENZIE: But you are really looking at some - it's not just a trivial noncompliance, it's something of substance.

MR SMITH: That's right. If you just take out that other test and just leave the other concepts that are there we believe it's not sufficient. You should go further than just leaving those other concepts and that wording there seems to be a very practical way of dealing with that issue - that it has to have some substance, yes.

MS McKENZIE: Yes.

MR SMITH: There is just one other important issue that we didn't mention in our

opening but is certainly covered in the submission. We do believe, on this issue of the role of HREOC, that it is totally inappropriate that HREOC try to act as an advocate as well as the regulatory body. We don't think your draft recommendation would work, even putting those safeguards in place.

MS McKENZIE: We have had a number of people who have expressed concern to us about that very thing.

MRS OWENS: Yes.

MR SMITH: I think HREOC itself has expressed some concerns about it in some of their submissions.

MRS OWENS: But I think people have been more relaxed about extending the use of representative complaints, whereby there is not an individual that's making the complaint but a representative organisation and, I presume, given your views about sticking with individual complaints, that you would prefer to not go down that route, as well, although there is provision in the act now to do that.

MR SMITH: The point we make there is that, yes, there is provision there at the moment. We don't think it needs to go beyond that and we are very concerned if it gets to the stage where a case might not be based on specific facts and specific issues. Of course organisations, including our own, often get involved in cases relating to individual, in our case, companies, but we assist those companies and we take those issues on for the broader benefit or the protection usually of our broader employer membership, and other organisations are open to do the same thing. Cases that relate to individuals of course are often used as ways of dealing with broader issues.

MRS OWENS: I have just remembered there was something else I wanted to ask you about, and that was unjustifiable hardship. You made a point in your submission that you oppose - one of our suggestions was that there be very explicit consideration of community-wide costs and benefits in assessing unjustifiable hardship. Would that be so much of an issue for you if there were - we said something more explicit about what the government's responsibility in funding adjustments should be?

MR SMITH: It would be very difficult to deal with that government responsibility in the legislation, of course. The proposal to insert that other consideration about community-wide costs and benefits we believe is not appropriate, and you have only got to think of the circumstances of a small business with limited resources: how could that small business person be expected to make accommodations based upon a broad community benefit? It's just unreasonable, we believe. It's not an appropriate test within the concept of unjustifiable hardship. It should be based upon the existing

tests, we believe, for all of those reasons we set out, including the fact that how do you possibly measure a community benefit and cost in a precise enough manner to apply that test?

MRS OWENS: So there's an implementation issue but, reading between the lines, if we were to say, "Well, there needs to be government assistance on this," you would be wary - if it's not in the legislation that could change. I mean, governments could withdraw assistance at any time.

MR SMITH: Yes, and they often do, and so if it's written in the legislation that an employer has obligations in this area based upon an existing scheme, most government schemes in this area aren't locked into legislation, so governments come and go, and so do schemes.

MRS OWENS: I don't know if you have got any comments to make about the existing schemes, like the workplace modification scheme. Has that been a useful scheme for your members or do they know about it? Have they used it?

MR SMITH: Personally I can't comment on that. I don't know whether any of my colleagues can.

MS IRWIN: I'm not aware of any of our members having utilised that scheme.

MRS OWENS: Because one of the things we do cover in our draft report is the whole question of who should pay, and we have said there are arguments for governments to pay and employers to pay and the individuals with disabilities, as well, to a point, so there is a shared responsibility and it's just the question of where that balance should lie, and there are reasons why employers - as being part of the society - may be expected to make some adjustments because they may benefit from those adjustments, but only to a point.

MR SMITH: But we believe the balance is right at the moment. Of course there are obligations at the moment on employers to make adjustments by putting that new test in that one of the criteria - and there is only a small list of them - is to be community benefits. That is unreasonable on an employer. The key thing, we believe, should be of course the disability of the individual, but also the circumstances of that company; what is reasonable in the circumstances. If a company has to devote a lot of resources to modifying its machinery processes - you know, buildings or whatever it might be - it should be based around whether that is reasonable in the context of the existing test; not whether the community is going to benefit, and that point I made before: how do you possibly measure that in a way that is going to be meaningful in, say, a court proceeding or in the way that in this case HREOC would interpret that?

MRS OWENS: So even if you had some sort of guidelines or examples, that still would be a potential problem.

MR SMITH: We think it's a problem, yes.

MRS OWENS: Sorry we've kept you longer than we probably told you we were going to keep you.

MS McKENZIE: There are many interesting issues, and you've raised a lot of them. A very helpful submission.

MR SMITH: Thank you. I appreciate the opportunity.

MRS OWENS: I should say just before we finish, I didn't ask your colleagues if they wanted to say something.

MR SMITH: No.

MRS OWENS: Are you sure you covered everything as well as expected?

MS: Yes, we were listening very carefully.

MRS OWENS: Is there anybody else who wants to appear before the commission before we close? I always invite people at the end of the day if they want to make a comment. Just come up to the microphone and introduce yourself.

MS MACALI: My name is Lucy Macali and I am the executive officer of the Association of Competitive Employment, which represents open employment services for people with a disability. We're not a very well-resourced organisation and I'm the sole paid worker, but we're very interested in contributing to this process. I haven't put a submission together yet but I'd be interested in knowing what information you were interested in specifically, and I've taken a lot of notes from today's proceedings, particularly from the Think Tank earlier on today, and also the recent presentation.

MRS OWENS: Well, it would be very useful for us - I don't know whether you have our draft report but you probably at this stage don't want to go through a document that's quite this large, but if you've got any feedback you could give us on what the employment matters are and what the employer groups are saying, that would be extremely useful for us, but also just to give us some background on your own association, because I don't think we've heard of it before today.

MS MACALI: No. We have an incredibly low profile and I've been in the role - we've had a full-time paid executive officer for a year, so there is a lot of developmental work that I'm involved in at the moment. I often say two things: I'd hate to be an employer wanting to employ a person with a disability, and I'd hate to be a person with a disability trying to work out how to navigate my way through employment assistance options. So there's a lot of complexity there, and I know there are many employers who are well meaning and would like to be able to offer opportunities, and I think there are a number of things that inhibit them being able to do that.

Whether or not they're directly connected to this review is the area that I'm unsure of, but I often talk about the ingredients that are required to get a person with a disability a job, and there are a number of things: there are the actual resources to assist that person - well, getting the person to the appropriate form of assistance, if they indeed need assistance in either preparing for work or finding work or maintaining work once they're in employment. The other thing is having the opportunities to go too.

I think it was the McClure report that made a series of recommendations when they did the review of the welfare system, about mutual obligation, and one of the things was looking at the business community's perhaps obligations in the area of creating opportunities. So there are a number of ingredients there about having places for people to go. Then there are also a number of tools that have been in place

in the past which are no longer in place, particularly for employment services that are funded by the federal Department of Family and Community Services, which is our membership base.

Some of the wage subsidy schemes that have been in place in the past are no longer there. There was an employer incentive review that FACS conducted in the last year, and I'm not sure if the commission is aware of that, but that may contain some interesting information that relates to what the Think Tank raised earlier about what employers are looking for.

MRS OWENS: That was done in the last 12 months, was it?

MS MACALI: I think so, yes. There is a series of recommendations that were made in a fairly comprehensive report about what would make employing a person with a disability easier for employers, one being a single point of contact for employers. I was a bit confused this afternoon because I'm aware of a number of organisations that are employer based who are trying to create opportunities, and I'm not sure if they're making representation to this review or not, but it's a very complex area and anything that could be done to simplify it would be great. The other thing is some of the things that I've picked up in the review about the decrease in entry level positions for people with disabilities, all those sorts of things that have already been identified.

MRS OWENS: Yes, we've found that particularly with public service jobs. At one point there were more entry level positions and they're gradually drying up, which means that, say, in the Commonwealth public service the proportion of people with disabilities is declining over time.

MS MACALI: One of the things that our rural members report - and we've got members from around the country in metropolitan, rural and remote areas - one of the things with regards to the entry level positions is that some of the other employment schemes in place have taken some of those opportunities as well. Programs like the Work for the Dole in some areas have replaced perhaps opportunities that would have been paid work, ordinarily. That doesn't seem to have been a problem in metropolitan areas, but that's been reported from our rural members.

The other thing that's happening just from our perspective is reforms to the way that our services are funded, and we're moving into a performance based funding model, and that will be fully implemented in January 2005. It's been trialed for the last couple of years, and the final model isn't finalised but there has been a whole lot of discussion and commentary around the model, and a lot of cooperative work done with FACS on making sure that it's the right model for funding services.

But one of the things that might be a spin-off of that is - one of the concerns that our association has is decreased opportunities for people with disabilities, even in getting access to employment assistance in future. I'm not sure if that's something that you'd like more information on or not, but some of the things that we're concerned about is just decreased opportunities for people to get assistance.

MRS OWENS: We are interested in this whole issue of who should pay, the role of government, existing government assistance programs, do they do a good job, where do they fall short, because as you could probably see from listening to the employer groups, there is some resistance because employers say, "Why should we have to basically pick up something which is a broader community responsibility?" We don't want to look at the community-wide benefits and costs, and so we have to think about what is the role of government and is government doing it right now? Are the current arrangements working? We're not doing a full-scale review of all those arrangements, of course, because that's not what we've been asked to do, but we need to acknowledge if there are any identified problems that those problems maybe need to be addressed.

MS MACALI: There are some significant problems, particularly in New South Wales at the moment, with insurance coverage, particularly for work experience for people with disabilities, and that's an issue that our association is looking into. Basically, it's near impossible to get insurance that will cover work experience through our sector for people with a disability, and my understanding is it hasn't really been tested yet, so we don't know how things would go if someone tested their insurance, but certainly loss of future earnings is something that's not covered by insurance generally, and there is increasing lack of access for FACS funded employment services to get access to some other programs that do have appropriate coverage. The Commonwealth Rehab Service has a scheme - it doesn't cover future loss of earnings but it is a scheme that does allow employers to host someone with a disability on a work experience or a work trial. That's something that our sector doesn't have, so there are a number of things that we are pursuing, to get some equity.

MRS OWENS: Lucy, you might be able to clarify this, and I probably should know the answer, but would people with disabilities doing work experience be covered under workers compensation arrangements?

MS MACALI: In terms of workers compensation, I think that's just the same as other people are treated. But work experience is not an area that I'm very familiar with, but I know it's particularly problematic for our industry, also because of the funding reforms that we're moving into. Part of the expectation from the department is that there will be an increase in work experience in the lead-up to people starting

with our services so that we can get some sense of what their support needs might be, because that will affect how much funding we receive for that person. So there may be an increase in work experience, and that's why the concern about coverage is becoming more of an issue in recent months, because we're realising that we'll need insurance if we're being forced into doing more work trials.

MRS OWENS: Just to clarify for the transcript, you said you're the Association for - - -

MS MACALI: Competitive Employment.

MRS OWENS: So what is that association?

MS MACALI: It represents open employment services for people with disabilities, which are funded by the Department of Family and Community Services.

MRS OWENS: So some of these employment services will be part of this trial to get people with disabilities on the disability support pension into jobs? Will some of those members be involved in that?

MS MACALI: Some of the people involved in that trial are members of our association but they're doing it because they're also job network providers, and that's the DEWR trial, yes. That's another whole conversation, that trial. I'm happy to talk about that.

MRS OWENS: Well, again, it's probably a bit beyond where we're going.

MS McKENZIE: Yes, it's sort of on the periphery of what we're doing.

MRS OWENS: But it does raise the question in my mind that you can have a trial but you still need to have positions for people to go into.

MS MACALI: That's right, and not only positions but appropriate support for people as well, and one of the concerns we have about that trial is people not being sustained - you know, not receiving support once they're in work, and then that sort of links to employers saying, "Look, I've tried employing a person with a disability and it was a nightmare."

MRS OWENS: Yes.

MS MACALI: And then the cycle starts again.

MRS OWENS: So hopefully they're thinking about these other issues in this trial,

as well as just saying, "You're going to go out into the workforce." They've got to think about the supply side as well - - -

MS MACALI: We're letting them know.

MRS OWENS: - - - and what you need to do for the employers.

MS MACALI: That's what we're concerned about, because there's a whole body of knowledge around assisting people with disabilities into work, and by conducting this trial, which was done not in consultation with our sector, so sort of bypassing that body of knowledge and perhaps reinventing rules that perhaps have been established, and also maybe trying things that don't work when the learning is already there - so not going to happen during the trial because the people in the trial know what they're doing, but it's more if it's applied broadly to the job network. We'd have a number of concerns about that.

MRS OWENS: Thank you. You're very welcome if you want to give us a short submission.

MS MACALI: Yes, I will. I've got someone I can speak to about workplace modifications in particular, so I'll do that.

MRS OWENS: Thank you.

MS McKENZIE: Thanks very much.

MRS OWENS: I now adjourn these proceedings and the commission will resume in this room tomorrow I think at 9 o'clock.

AT 5.04 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 26 FEBRUARY 2004

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