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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO THE DISABILITY DISCRIMINATION ACT

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

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 27 FEBRUARY 2004, AT 9.09 AM

Continued from 26/2/04

MRS OWENS: Good morning and welcome to the resumption of hearings for the Productivity Commission inquiry into the Disability Discrimination Act (1992) which we will refer to as the DDA. My name is Helen Owens and I'm the presiding commissioner on this inquiry and my associate commissioner on my left 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 an 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 be also 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 is then up to the government to release and respond to the report.

We like to conduct all 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 cannot be taken because they won't be heard by the microphones. Participants are not required to take an oath but are required under the Productivity Commission Act to be truthful in their remarks.

Participants are welcome to comment on the issues raised in other submissions. The transcript will be available on the commission's web site in Word format following the hearings. I'd like to welcome our first participant today, Janet Hammill. Thank you for coming, and it's very nice to see you in person this time after our teleconference last time. Could you please repeat your name and state the capacity in which you're appearing today.

DR HAMMILL: I'm Dr Janet Hammill. I'm a post-doctoral research fellow at Queensland University of Technology, and I'm an indigenous person and I'm here today really as a community advocate in the area of children's issues. I'm a member of the Australian Research Alliance for Children and Youth, and my concerns are about the numbers of undiagnosed pre-birth issues relating to children who have been exposed, in utero, to teratogens; that is, agents that can cause birth disabilities. Although it doesn't fit within the draft, I did raise the issues in my first submission last year, and I have actually had one young boy diagnosed by a child development specialist. I'd like to relate to you what happened here.

The paediatrician felt - it was a paediatrician specialising in child development issues who also had a team of early childhood specialists working for him; psychologists, et cetera, and the part that I'd like to comment on, the doctor wrote that:

> Another area of disability is within Ian's executive control. This includes attention control, impulse control, short-term memory, ability to self-monitor, an ability to work in a goal-oriented manner. A large body of evidence for this conversation converges on the conclusion that Ian's executive control is not only poor, but represents a functional handicap in terms of his ability to meet anything like the developmental objectives of his age.

Further through in the doctor's report, it said:

> In short, if Ian were a Caucasian child presenting with the same spectrum of problems, we would classify him as extremely disabled. He is a 14-year-old boy with the academic skills of the average seven-year-old. In functional terms, this is equivalent to a mild to moderate intellectual disability. He essentially does not have the skills to manage the present, yet alone build towards any form of optimistic future. I feel this is a tragedy that his situation could have reached this state.

I put that within the HREOC information sheet that I downloaded from the Youth Challenge to show there are seven dot points here for a definition of "disability" for the purposes of the DDA. The first is:

> Total or partial loss of a person's bodily or mental functions -

which Ian has:

> Total or partial loss of a part of the body; the presence in the body of organisms causing disease or illness; the presence in the body or organisms capable of causing disease or illness; the malfunction or disfigurement of a part of a person's body -

which he has -

> a disorder or malfunction that results in the person learning differently from a person without disorder or malfunction" -

he has that -

> "or a disorder, illness or disease that affects a person's thought processes, perceptions of reality or judgment or that results in disturbed behaviour.

This young man has been in and out of trouble with the police since his carer - an elderly carer who was not related to him, she passed away when he was 11, and since then he's been living mostly on the street and in and out of the detention centre.

Even when I presented this letter to the magistrates, to the police, to the legal services, there has been no safe place to keep him in Queensland. He regularly sniffs paint and he's now 16. But it's a tragedy. I feel that - I'm particularly concerned about him, given that his father committed suicide when Ian was younger, and also the fact that there's just nothing that exists outside of detention centre for a child in this category.

Last year in December - I think she was 13 - a girl from Aurukun was loaded screaming onto a plane and flown to Brisbane to be placed in a detention centre because she was sniffing - she hadn't broken the law, but she was sniffing paint and putting her life at risk. My advocacy is for all of these children I feel that we have got. one of my colleagues, an Aboriginal woman, who was working at Cherbourg in the health team - Lorian Hayes - has done her honours degree in foetal alcohol. She's also done a large part of her master of epidemiology there and constructed a birth data set over a five-year period of children born within a particular region.

Again there's been vital information missing from their birth data that the midwives should have collected. But it's the invisibility of these children until they get into trouble with the law. And then they're immediately in detention and then later into adult jails, and I feel that if we were to apply the Disability Discrimination Act immediately. We really need to be looking at these children pre-birth. We know the risk factors. We know the risk factors of them being born with neurodevelopment birth injury, but yet those sort of issues are being totally ignored. And even if they are diagnosed, as I've shown here with Ian's diagnosis, that there's nothing exists for these children, and I think that's a great tragedy.

Another issue that fits in with that is the - I perhaps should have mentioned this at the first hearing last year. The manner in which Aboriginal health is being measured is also very, very flawed because it looks at morbidity and mortality data which only measures a proportion of the capacity of indigenous people's social, emotional and physical health. In actual fact their health is much worse than these figures have been given, and the disabilities are not being identified right across the board at every generation level, and there's no further - - -

MRS OWENS: Sorry to interrupt there, with the morbidity data, you're suggesting that the morbidity data could be extended to a wider range of factors or are you suggesting that there should be some other type of information collected?

DR HAMMILL: The morbidity data is collected from health services - clinics, medical centres, hospitals et cetera - and it only measures people who go to seek help for an illness or an injury. We know that the greater proportion of disability is undiagnosed, first of all with the children and then also with depression, with adults. I could give an example. I was talking to an urban grandmother, trying to explain to her what morbidity mortality data was, and she said to me, "I get it." She said, "If

two fellows are fighting, the loser - if he gets hurt bad enough, he'll go to the hospital for treatment or he might even go to the morgue if he's killed.

MRS OWENS: So he'll be measured.

DR HAMMILL: Yes, and he's counted, but the loser goes to jail and doesn't get counted.

MRS OWENS: He gets counted in another form of statistic.

DR HAMMILL: Yes, he does, but - - -

MS McKENZIE: But not for that.

DR HAMMILL: He has to go to jail to get counted. So if he doesn't go to jail, he doesn't get counted, and I've noticed with clan groups, in particular two clans, two very large clans of women fighting; one woman was kicked to the ground and badly injured. She went to hospital and she became one statistics. But in actual fact I knew that both of those clan groups of women and their daughters who were taking part in the fight were all very disturbed. They all had dreadful degrees of depression, hopelessness and despair, and that was really what was instigating the fighting.

The woman who was injured, six months later had a stroke and now she has a permanent disability and has great difficulty in mobility. But as I say, the two whole clan groups of women had considerable issues that have never been diagnosed because the communities lack basic specialists, especially in the field of psychiatry. Physiotherapists are missing, and also people who could help women and men with disabilities. We know that many of our children are born with low birth weights for various reasons, and they are at risk of becoming obese adults, and this is happening across the board. And it also brings on early the chronic illnesses that they are likely to get, which of course as Prof Peter Nathaniel says, "The way we enter this world determines how we will leave."

So it is all those pre-birth issues. The foetal origins of adult disease are issues that are not being looked at. They're not being included in medical research. Instead the medical research seems to stay in a little tunnel, and there is very little depiction of what community life is actually like for the people who live there. It's really measuring the morbidity mortality.

MRS OWENS: I mean, the short-term problem is that while these conditions go undiagnosed, there's no way you can measure it. So somehow to improve the measurement, you've got to improve the diagnosis and you've got to - - -

DR HAMMILL: Yes, that's right.

MRS OWENS: You've got to get people out there providing the services so that it can be measured. So that's the first step that needs to happen.

DR HAMMILL: Yes.

MS McKENZIE: It's sort of got to be on site.

DR HAMMILL: That's right, Cate. That's the discrimination. The services are just not there because for - traditionally we've been funded on these figures that came from morbidity mortality statistics, and that's been grossly under-funded. For the - - -

MS McKENZIE: Because it doesn't measure the problem.

DR HAMMILL: No. It doesn't measure the burden of illness at all and the burden of social, emotional and physical health.

MS McKENZIE: It's got to be on-site diagnosis and on-site treatment as well.

DR HAMMILL: Yes.

MS McKENZIE: When we visited Alice Springs, that was one of the difficulties; that there's just not on-site treatment to the community. You've got to go somewhere else, and that involves another complete series of problems.

DR HAMMILL: Yes, and I think that was brought up with the young girl from Aurukun who was taken from one end of the state to the other to be incarcerated because that was - - -

MS McKENZIE: Away from her family.

DR HAMMILL: Away from family, but also they had no other facility that could keep her safe from sniffing paint, and we have many children like that. The other day, in the Courier Mail in Brisbane, there was an article about the police having to babysit nine youths who were found on the street sniffing paint, and the same - with Ian. He lived with me for a year when he wasn't in detention, and on three occasions the police took him to children's emergency at the hospital, and the issue there is that they have to - and at the time of course he was not himself. He was away - tripping, which is why he was sniffing in the first place. But by the time the youth mental health team arrived - they are not allowed to assess him retrospectively.

So if it takes two or three hours for them to arrive and he has come out of that hallucinating stage, then he's then discharged, so they can't keep him there. That's

what happens regularly. I actually took him myself to the children's hospital on two occasions.

MS McKENZIE: But the paint sniffing is a problem. It might take days to explain why it all happens, but what do you think are the causes or the - - -

DR HAMMILL: I think, Cate, it's to do with the early growing up periods. I know that from my work in violence and working with women, with my sisters, that there is a profoundly damaging rate of sexual abuse as children, and one community leading up to Christmas, one of my colleagues tells me they were having two cases per week of child rape. That was in the two to five-year-old bracket, and children then being left with sexually transmitted infections.

MS McKENZIE: Yes.

DR HAMMILL: So it's the hopelessness and despair I think of community life, but also of the inequalities in life and seeing other people have possessions that you don't have, such as growing up without a car in the family, without status. There are just so many areas of violating structures that are still in place within institutions and government that - it's a constant reminder that you don't have equality. I will leave you with a paper talking about that. I'm sure there are many other issues I'd like to discuss there, too.

The child sexual abuse has reached such rates that before - just a few weeks ago, the women of Cherbourg went public in the Courier Mail and across national television.

MS McKENZIE: Yes. I saw.

DR HAMMILL: And their difficulty has been in getting satisfaction through the courts. They presented an issues paper to both the leader of the opposition before the recent Queensland elections and to Premier Peter Beattie after the elections in which they clearly outlined what the issues were and how they could be solved. There were issues around the magistrate, the police, the courts themselves, the actual structure of the court and the manner in which the child's complaint was dealt with through all those channels.

But they had a solution that was, you know, reasonably achievable for each such as there is no juvenile aid bureau at Cherbourg, even though the rates of juvenile offending are very high. Premier Beattie has agreed to fix that. He's agreed actually that all of these things could be fixed. One issue was two years ago, a matriarch died, and there were 12 people in handcuffs at her funeral from the youth detention centre and from the adult jail. They came to the funeral in two huge vehicles that looked like - they're people transporters. They are airconditioned, but

they look like the floats that they take horses to the races in. Of course because the warders accompany these people, there is then a period en route and on the return route where the prisoners are left locked up in this transporter while the staff stop for meal break.

But at the funeral, there is also two vans with sniffer dogs. A few years ago, the sniffer dogs would be exercised during the church service and up at the gravesite, too. So that was reported and acted on. The dogs are no longer exercised during the funeral. But we still have people going to say goodbye at the coffin with handcuffs on, a prison towel wrapped around the handcuffs or actually being a pallbearer, too, and there's children with handcuffs. So the women about two weeks ago asked Premier Beattie if they could have a different device, a tracking device, such as is used in the UK for times of funerals, and that's also being investigated and probably implemented within the next six months, we're hoping.

MS McKENZIE: What about the court processes? What do the women think could be done to make those less harsh and less unapproachable?

DR HAMMILL: We were having difficulties - one case was a 10-year-old girl with an intellectual disability who had been sexually abused by her mother's partner, a non-indigenous man. When he was charged, he was released on bail, but to the little town nearby, and he was able to walk backwards and forwards past the school where the child was involved. The mother supported her partner in the court. The women sought every - the women who were supporting the child went out and sought information from various legal aspects about how best to be good court support workers, and about the CCTV situation, because we didn't have that locally and they had asked for it to be moved to a nearby metropolitan centre where it was installed. But instead they decide to install it back in another regional court, and they built a special box for the child to sit in.

It was right in the middle of summer. There was no airconditioning. There was no facility for the court support worker, a grandmother herself, to sit next to her. She was not allowed to hold the child's hand or touch her in any way. She could stand behind her in the heated box or she could stand outside and, as I say, a 10-year-old child with a disability. The women were actually very confident after the evidence was all finished that they had got a conviction, and were dismayed then to find they hadn't, and they couldn’t find feedback.

This happens regularly in the court systems and before that it was a three-year-old child, and the defence barrister said to me, he said, "As usual, the police report was substandard," and he said, "This really needs to be worked on." That was one of the things the women put on their issues paper to the premier, and that's going to be acted on, too.

My idea is that we should go out into the communities and sit down and work on issue papers with communities and find solutions for them before we actually take the issues paper any further, because there are solutions, and often it's something that's rather simple that can be instigated.

MS McKENZIE: You see, the point - sorry, Helen.

MRS OWENS: I was just going to interrupt at this point because I want to bring the discussion back to our report, and in our report we've made a recommendation that the attorney-general should commission an inquiry into access to justice for people with disabilities with the particular focus on practical strategies for protecting their rights in the criminal justice system, and I was just going to float something with you which would be that when we're talking about that recommendation, we raise the issues that you've raised today on the transcript, and say that particular attention should be paid to these issues among the indigenous community in terms of court processes and so on. I'm wondering what your response would be to us developing that recommendation further.

DR HAMMILL: Helen, we'd be very grateful actually, and I'd be grateful, too, if you could run it past some of my colleagues in the community what you've had to say; you know, how you prepare that because I'm sure they would like some input.

MRS OWENS: We have to do our final report by the end of April. So we're running out of time for a sort of an ongoing consultation process. But at least we could raise it, and this idea that you've said about developing issues papers among the community, those issues papers then could feed into this process. If the government was to accept that, those could become very useful documents that could be used in the context of this inquiry.

DR HAMMILL: Yes, that would be very useful. There is another problem, too. When I was speaking about the number of child victims we have, we know that victims become - in most cases where their environment is quite toxic, that they become perpetrators, and we are seeing this. In the last 12 years in particular, the women I work with have been monitoring this. And they're seeing within shelters, the children that came in with their mothers years ago are now coming back as victims. But also that these young children now are speaking to their own children the way they were reared, and with the boys, they become sexual perpetrators.

Recently one of those boys that I'm talking about, he's 12, and he was charged with raping a four-year-old. And this is the sort of thing that was happening, and I think the fact that there are no particular programs in place to stop that happening. I think we need specialists who can work with women and children so that we can prevent that happening because that's the inevitable sort of pathway now for children. When we're talking about issues related to youth, you'd say, "Okay, we need

parenting programs in communities," but that is not the solution when you've got a child who was born with neurodevelopment birth injuries. They have that part of the frontal lobe of “the brain that hasn't been wired correctly”, as Fiona Stanley says, you know, and there is very poor executive control. You can't just automatically - - -

MS McKENZIE: Yes. You can't just talk about a parenting program.

DR HAMMILL: No, you can't.

MS McKENZIE: It's completely different.

DR HAMMILL: That's exactly right. You've got to be looking at something more effective than a parenting program. You have to really be looking at a whole of community regeneration than just a targeted program.

MS McKENZIE: The other thing I was going to raise with you, just applying some of the things you've said to the Disability Discrimination Act in particular and the difficulties that have happened with the courts, one of the ways to, as you know - if you feel you're discriminated against under the DDA is to complain; to complain to the Human Rights Commission. But that would be really difficult in the sort of situations you've been mentioning. You're on a remote community. The Human Rights Commission is in Sydney. You may not have access to the means of complaint. If you haven't got an adviser - - -

DR HAMMILL: That's true, Cate, and the grandmothers - most of them don't have telephones. But this little boy, I took his case up myself. I contacted Disabilities Queensland. I was referred from one department to another and eventually told nobody could help me; that in actual fact he didn't fit within this criteria or that criteria. So I got absolutely nowhere, and he went back into the prisons. When I started speaking about that he may have foetal alcohol effects, nobody knew what I was talking about. So there is a very big gap in knowledge with the professional services. As a matter of fact, a psychiatrist in one of the institutions when I mentioned the possibility there may have been foetal alcohol spectrum there, she said to me, "What is that?"

MS McKENZIE: What about the schools' ability to cope with a child like that, too?

DR HAMMILL: These children drop out and then they're no longer on the roll. Once they've been missing from school two weeks, they're crossed off the roll and we don’t have a tracking system in Queensland that tracks these children if they're removed from one roll and whether they appear on another. That has been missing.

MS McKENZIE: There's been a recent High Court case which dealt with

discrimination and disability. On the one hand it said - where there's behavioural manifestations, and you've been talking about where the symptom of some particular disability is, among other things, a lack of executive control which will affect behaviour.

DR HAMMILL: Yes.

MS McKENZIE: One of the things the High Court said in that case was that if you're looking at discrimination, you had to compare the person with the disability and that behaviour - the resulting behaviour - with the person without the disability and the same behaviour which meant then that in effect you could - you were not protected by the DDA in that circumstance. In other words, the school, if they found your behaviour really difficult, could just send you away.

DR HAMMILL: Yes. Well, these children, if they're shamed at school, which has been the case - being publicly shamed - many of them don't go back to school. So after a fortnight, as I said, they're crossed off.

MS McKENZIE: That's a particularly difficult process for an Aboriginal child, isn't it?

DR HAMMILL: Yes, it is, but even within your own community, to be shamed in front of your own people also is not ideal. And in Cherbourg for instance, Brother Paul Wilson who was working with Youth and Community Care (YACCA) in Murgon - YACCA, as it's called - he noticed the large number of children walking around when they should have been at school, and he applied to the Edmund Rice Family Foundation and they started a school. So he goes around and he picks up children in the mornings, calls at their home, picks them up, takes them into Murgon to the YACCA facility and teaches them and tries to get them work experience and things like that.

With the children, they have purchased some land out of Murgon. They're now trying to get some money to build the school out there so that if the children - if there's drinking and things like that going on at home the children don't have to go home that evening. They can actually be accommodated there as well. They get given breakfast before they can work with them. It's annexed now to the Murgon High School.

MS McKENZIE: That sounds like a really good initiative.

DR HAMMILL: Yes, it is, but then again it's the difficulty for that group of getting money for the next stage. Everything we do is tied into applying for a grant, and in communities, that in itself is discriminatory. Unless they've got somebody who can write a grant application for them, they miss out on these opportunities. And

even if they did get a grant, they're competing with their own people for that small pool of money.

MRS OWENS: You've raised a lot of very big and difficult issues, some of which I think would be very difficult to deal with under the act. I mean, as Cate said and as you responded in relation to making complaints under the Disability Discrimination Act, it's extremely difficult given the circumstances. But you've raised issues both today and in your earlier submission about the need for early detection, proper services when detection takes place and you talked about protocols in your submission and you talked about having cross-disciplinary teams and so on. So there's a lot of things need to happen both when the child is born, in the early years and in the schooling system and in the justice system and so on.

One way of dealing with it would be for example the Human Rights and Equal Opportunity Commission to set up an inquiry in this area or perhaps it's such a broad and big issue. It might need something bigger than that.

DR HAMMILL: Personally I think the biological impact, the biological damage that has resulted over generations and of people being moved - the social engineering being moved from thousands of years of a hunter-gatherer diet onto the mission diet of white flour, sugar et cetera et cetera is probably what - there's no doubt about it, that that's what underpins the chronic diseases that we always labelled as lifestyle illnesses in Australia. In actual fact, the pre-historical factors, and you've got that major change there that's the biological damage. Then you have children who are exposed now because people were incarcerated and accultured and moved in together - so 40 different tribes who were traditionally hostile to each other, and each group was robbed of their traditional customs and things, and given a foreign language, foreign food.

What we have got now is this is the implosion from that. We've had a major biological alteration. Then there's the major biological damage from being exposed to teratogens that people self-medicated with - with tobacco, the marijuana. Marijuana is very much an unidentified epidemic at present. It's used across all levels of community - and the alcohol, and for several generations now we've had paint or inhalant sniffing. So what we're looking at is a biological implosion, and that's not recognised at all by authorities.

MS McKENZIE: There's really got to be some sort of holistic inquiry, not just into discrimination I think.

MRS OWENS: Yes. It just goes far beyond this.

MS McKENZIE: It's really - I don't know - an attorney-general's inquiry.

MRS OWENS: We do in our report have a chapter where we talk about other issues. There have been quite a lot of issues brought to us that don't quite fit within our terms of reference or under the Disability Discrimination Act directly or are so - they're bigger and they're related to service provision more generally. So we have got this chapter where we're saying, "By the way, government, there are these other issues that have been raised in this inquiry. Perhaps you need to think about these other issues as well."

So we can't go too far beyond our terms of reference, but we are acknowledging the sorts of issues you've raised, and they're such important issues, and this is such a critical one. In terms of a priority for our Australian community to deal with this, it is no doubt a priority that should be addressed sooner rather than later. The solutions are not going to be simple.

DR HAMMILL: No, and of course they're not going to be dependent on grant submissions either. It's going to be something that just has to be put in there and not quibbled over really. The women actually called it biological genocide, because truthfully that's what it is.

MRS OWENS: You've got a number of documents there you are going to table for us so - - -

DR HAMMILL: Yes. I'd like to leave you with Ian's - - -

MRS OWENS: - - - we can look at those - - -

DR HAMMILL: - - - diagnosis.

MRS OWENS: - - - at our leisure.

DR HAMMILL: Yes, certainly, and there is one here that I presented in Canberra a couple of weeks ago to the ARC network collaborative group within the Australian Research Alliance for Children and Youth, and it's called Indigenous Children: Invisible Yet Invincible, and I'd like you to have that, too, please. And if there's anything else that I can contribute to in the future, I'd be most grateful.

MRS OWENS: Thank you very much, Jan. That was a very good contribution.

DR HAMMILL: Okay.

MRS OWENS: We'll now break, and we'll resume at 11.00.

MRS OWENS: The next participant this morning is Prof Lee Ann Basser. Welcome to our hearings, and thank you for your submission. Could I get you to just repeat your name and state the capacity you're appearing for the transcript.

PROF BASSER: My name is Lee Ann Basser, and I'm appearing in an individual capacity. I wanted to start by commending the Productivity Commission on the tenor and scope of the draft report, and I wanted to speak to a number of the issues that arise out of the report, specifically - and fairly briefly - in relation to the definition of "disability", in relation to provisions for discrimination, the duty to accommodate and the corresponding defence of unjustifiable hardship, exemptions, complaints and regulation, and my submissions on each topic are fairly brief.

MRS OWENS: Do you mind if we interrupt you when we get to the end of each of those bits - - -

PROF BASSER: Not at all.

MRS OWENS: - - - and then we can cover them as we go.

PROF BASSER: Yes.

MRS OWENS: That might be more efficient than you going through the whole lot and then we have to try and revisit.

PROF BASSER: With pleasure.

MRS OWENS: Okay. Thank you.

PROF BASSER: In relation to the definition, it's my submission that the current definition is very broad and should be maintained. Personally I don't believe that the definition needs further clarification. I think as it stands, it is wide enough to cover the issues raised in draft recommendation 9.1. As far as dot point 3 is concerned, the High Court in the Purvis case clearly recognised that the definition of "disability" is inclusive; that it can't be divided down into the component parts, and that the definition includes behaviour that's a symptom or a manifestation of a disability.

A distinguishing feature of the DDA and one reason that it's been as successful as it has in achieving its objectives is that the focus of any complaint is not on whether or not a person has a disability, but is on whether or not there's been an act of discrimination and whether that act is unlawful. I'd like to make some submissions in relation to disability discrimination.

MS McKENZIE: So now you're moving to the discrimination area.

PROF BASSER: Yes.

MS McKENZIE: Okay. The only - I agree with you about what the High Court said about behaviour, and clearly after what the High Court said, "disability" includes behaviour which is a manifestation of some other condition. But I must say I still wonder whether we shouldn't do something in the definition or perhaps by way of a note to tell people. Not everyone is going to have read the High Court case of Purvis.

PROF BASSER: This is true.

MS McKENZIE: That's the simple fact of the matter, and my suspicion is that quite a lot more people will have actually read the act itself to find out what their duties or rights are then specifically the High Court in Purvis. I'm not running down the High Court. It's just I suspect not many people are going to read, you know, every case that comes along. Where I'm coming from how is I wonder whether we shouldn't do something to make it clear that that's what the High Court has said or at least put some kind of a note.

PROF BASSER: What might be useful, which I haven't thought of till you've said that, is like a further clarification within the statute that the definition is inclusive. I think it is, but I think it is because I'm a lawyer reading the act, and it might be that the wording needs to be altered so that it is very inclusive. I actually thought when I went back and looked at section 4 that the three issues that you raise in 9.1 were all really dealt with by the wording of the act. But I do take your point, Cate. I think it would be helpful for the non-lawyer reading the act for that to be clarified.

My fear with fiddling with the definition comes more from the fact that at the moment there is an amendment to the DDA before parliament which I've written a submission objecting to, but I'm just kind of concerned - I don't want them to start fiddling with the generality of the definition.

MRS OWENS: We don't want them fiddling with the generality either.

PROF BASSER: No. I realise that.

MRS OWENS: I take your point also about genetic conditions and so on, that they are covered as far as we can see, but there's some people that felt that there might be uncertainty, and people with multiple chemical sensitivities and chronic fatigue syndrome saying, "Are we covered?" So we were trying to make it as clear as possible. Maybe you don't need it in a definition but in - I don't know how acts are designed, but Cate does. Maybe it just needs some explanatory memorandum or something.

MS McKENZIE: It's better to have it in the act than try and rely on outside material because what courts can say about outside materials like that is, "Well, to us, the act is skewed. It actually doesn't include these things. So we're going to ignore the outside materials altogether." That's why I keep saying to you, guidelines are not helpful if you really want the act interpreted in a particular way.

PROF BASSER: I was a bit concerned in relation to genetic abnormalities, but once they manifest in some way or even if they don't, even if it's just that the employer knows that the person has some genetic issue, that is in my opinion covered by the wording of the act because it relates to a disability that exists now or may exist in the future. I was a little bit wary that if you extend - if you put this in as a specific descriptor - not if it actually gets in; I'm not worried about it if it's in the act. I think that's fine. But I'm worried about the response to an amendment that puts it in, but then says the act is going too far; it's too wide.

MRS OWENS: So you think it might highlight the fact that it's there.

PROF BASSER: Yes.

MRS OWENS: And people might try and do what they're doing now with this bill that's currently going through.

PROF BASSER: Yes. I'm being defensive in my response. I mean, I have no problem with those things being included, but I'm just being a bit defensive and I don't know whether my strategy is good or bad, but I am concerned that they'll say, "Well, anybody can claim," because in one way, all of us can make - could fit within the definition of "disability", and we want that broad definition. As I said just before, it's a real strength of the DDA. It stands in stark contrast to overseas experience, such as in America where people with disabilities - clearly with disabilities - are found to be not people with disabilities for the purposes of the ADA. So I kind of bear that experience in mind.

MS McKENZIE: I have the same - and this is by the by I suppose, but I have the same trouble with the suggestions that say you need to put more social things into the definition of "disability". I mean, there are numbers of arguments you can make about the act really doing that anyway. The act is about what barriers society erects in relation to people with disability. But more specifically as far as adding to the definition of "disability", I just think they add uncertainty and the potential for fights and potential for technicalities.

So when people have suggested at various stages, "You should add - you know, that you've got functional limitations in some area of major life activity," and of course what the courts will then do is say, "What does 'limitation' mean? What does 'functional' mean? What is a major area of life activity?" In a way that will all direct

attention away from what's actually been done to the person to what the person has.

PROF BASSER: I would a hundred per cent agree with you, Cate. I think we would just be getting into really deep waters from a point of view of legal cases if we added that kind of limitation. It's that very limitation in America that has caused all the problems. So I do think we have - it is a somewhat medically oriented definition, but it's so broad that it really means that anyone who has suffered disability discrimination has standing to bring a case in my opinion.

MS McKENZIE: We'll bear what you say in mind though about adding to the definition.

PROF BASSER: In relation to discrimination, firstly in relation to draft recommendation 9.2, direct discrimination, I agree that the provisions with respect to direct discrimination need clarification, especially in light of the Purvis case, and I also agree that the act needs to clearly state that failure to provide different accommodation or services that are required by a person with disabilities is something which amounts to less favourable treatment. I do believe that needs clarification.

I would go further than you've gone in the report, particularly in light of Purvis. I believe, as I said in my written submission, that there is the need to include in the DDA a general duty to accommodate. We need that general duty to cover all areas of the act. There might be some twigging of defences in particular areas, but we need there to be a general duty to accommodate, and I say this because in the minority decision in Purvis, McHugh and Kirby, applying a very textual reading to the DDA, say that the way it is drafted now, it only operates to confer a negative obligation. So I think we need clearly a positive obligation.

I've actually shifted my position slightly from my written submission because in that I talked about a general duty to make reasonable adjustment, and I would resile from the use of the word "reasonable". I think if we have a general duty to accommodate that is up to the point of unjustifiable hardship, we provide an appropriate balance between the person with the disability, the employer or service provider, the respondent to any claim. I'm quite concerned that if we include the word "reasonable", we will limit severely what accommodations might be made.

MS McKENZIE: My only problem about that is that if you look at it the other way for a minute, what if someone asks for an accommodation which is - say you've got equipment for example. You've got the minimum equipment that works well. You've also got Rolls Royce stuff which certainly is better, but costs three times as much for perhaps another per cent in improvement. It's a bit - I'm not talking fiction.

PROF BASSER: No, I know.

MS McKENZIE: It's the case with screen-reading equipment for example; there are all sorts of costs and there are all sorts of kinds and some are better than others. But there are medium quality good ones and then there are some really expensive ones that are better, but not much better; bit like scanners as well. If you've got a duty - if an employer has got a duty to accommodate a person with a disability, if they ask for that equipment, the employer may well be able to afford it, it might not be an unjustifiable hardship to give the equipment, but it just seems as if that's a demand that's going too far.

You certainly don't want a situation where the employer refuses on the basis that no demand for any accommodation is reasonable. I agree, but equally you've got to find some balance so that an employer doesn't have to comply with manifestly unreasonable demands - not unjustifiable hardship, just manifestly unreasonable.

PROF BASSER: I'm quite torn on this point, Cate.

MS McKENZIE: Yes. I find it difficult as well.

PROF BASSER: Obviously I'm fluctuating, because initially I said "reasonable" for the kind of reasons you're putting forward. Then I just started to get worried about the way cases run.

MS McKENZIE: It's going to work the other way, in the way I mentioned.

PROF BASSER: And that anything bar the absolute minimum - and there have been some cases where there have been some kind of token accommodations, but they haven't really enabled the person to function in the job, and I'm just a little bit - I'm torn as well because I'm concerned that putting the word "reasonable" in - on the one hand it's terribly reasonable and anybody who is reasonable should - it shouldn't be a problem with, but I'm just concerned that it might be interpreted in a way that it reads down the duty to accommodate too greatly. I don't have a final fixed point on it.

MRS OWENS: You really want reasonable, but not token.

PROF BASSER: Yes, exactly.

MS McKENZIE: Is it adequate or sufficient? Is that really what we're on about, more than reasonable?

PROF BASSER: Probably, yes.

MS McKENZIE: I'll think about that.

PROF BASSER: Yes, I'd have to think about that, too, but probably.

MS McKENZIE: I'm just musing because that gets closer to what both of us are saying I think; that on the one hand it's not completely over the top, but on the other it's not inadequate, not insufficient.

PROF BASSER: That's right.

MRS OWENS: I suppose it's being used - the word "reasonable" is being used in other jurisdictions in this context - you know, in other acts in other countries.

PROF BASSER: Yes, but they're struggling with what it means.

MS McKENZIE: And no reason why we can't - if we can work out a better alternative, use it.

MRS OWENS: Can I go back to your position about having a general duty in the act, and you've agreed with our recommendation 9.2 about the value to provide different accommodation would be regarded as less favourable to treatment. Why isn't that sufficient? Why do you need to go further?

PROF BASSER: Because of the way that the Kirby and McHugh have actually approached what the current provision actually means, because what they say is that there's no positive obligation to make an adjustment, and if you don't make an adjustment, you could be in breach of the act. But all we can do is - you could be in breach of the act, so someone can bring an action for unlawful discrimination. But they can't actually come along with an - effectively what it means - - -

MRS OWENS: I understand where the High Court got to, but then we've had a recommendation - our recommendation 9.2 - which has said that that should be - the definition of "direct discrimination" should be amended to - and to make failure to provide different accommodation or services required by a person with a disability less favourable treatment. Okay, so to make that really clear.

PROF BASSER: Yes.

MRS OWENS: The question is why do you need to go further than that and have a general duty as well?

PROF BASSER: I just think a general duty - - -

MRS OWENS: Is clearer?

PROF BASSER: - - - is clearer. That's all, and I think if you come back to the point about some layperson reading the act, if they see they have a duty to accommodate - - -

MRS OWENS: Okay. Then the question is if we put in a general duty, do we need to have that in the definition of "direct discrimination" as well or is that overkill?

MS McKENZIE: I don't think so.

PROF BASSER: I don't think you need it if you have a general duty.

MS McKENZIE: An even more interesting question is if we have a general duty - I notice in the UK DDA - you know what I'm about to say. I notice in the UK DDA they have turfed indirect discrimination altogether and they've just simply got a reasonable adjustment duty. I haven't looked at education to be fair; I just looked at premises and employment. But do you think we could turf indirect discrimination?

PROF BASSER: I wouldn't want to. I don't think it would be used very much, but I wouldn't want to turf it. They have problems in the UK - they have an issue in the UK in working out what the general duty actually - how far it extends and how it sits with the direct discrimination provision.

MS McKENZIE: Do you know of cases? I wrote to the - - -

PROF BASSER: I can give you a document that actually has cases in relation to one reasonable - in relation to reasonable adjustment.

MS McKENZIE: That would be very helpful. I wrote to the president of their Employment Appeals Tribunal and have received no reply, and I wasn't sure whether that meant - - -

PROF BASSER: I'll have to just get clearance to give it to you, but there is - I've got an issues paper which goes through a number of the cases that have come before their tribunal.

MS McKENZIE: That would be very helpful.

PROF BASSER: One of the interesting things that comes up out of that is when I was reading those cases, it was really interesting to see that the practice in the UK is quite different to the practice here. When you look at the cases here - I'm just confining myself to employment, although I think it's true of education as well. The cases here always occur at the point when the employment has been terminated, so that the remedies are always fashioned around damages. People are not reinstated because it's not practical to reinstate them in their jobs. When you look at the UK

cases, they are brought prior to termination. They are about whether or not an accommodation has been made or whether or not there has been some discriminatory conduct.

MS McKENZIE: Maybe that's the effect of the positive duty.

PROF BASSER: I think so. So the remedies are then fashioned to keep the person in employment. It's not just a matter of giving them some money to compensate them at the end or rapping the employer over the knuckles, and I think that's much more effective, and I do think it comes out of the general duty.

MS McKENZIE: It's an interesting thought.

PROF BASSER: So I thought that was a very interesting comparison.

MS McKENZIE: If you could get clearance, that would be enormously helpful.

PROF BASSER: I imagine they'll be all right about it, but I have to ask first.

MS McKENZIE: Yes.

PROF BASSER: So on the point of - I'll come back to unjustifiable hardship, but I wanted to just again agree with the draft recommendation 9.3 in relation to indirect discrimination. I think the proportionality test should be removed, and the burden of proving that the requirement or condition is reasonable having regard to the circumstances should be shifted to the respondent. It would make the indirect discrimination provisions - although we generally don't need to use them because of the breadth of the direct discrimination provisions, it would make those provisions I think more accessible and would meet the aims of the act - the objects of the act.

In relation to unjustifiable hardship, I think any general duty to accommodate does have to be limited by an extension of the defence of unjustifiable hardship to all areas of the act so that the duty to accommodate is to the point of unjustifiable hardship. I'm a little concerned as I was previously about specifically including an assessment of community-wide costs and benefits in the criteria of how you assess unjustifiable hardship. Those costs and benefits are taken into account in specific cases now on a case-by-case approach. My concern is that - and I think that's entirely appropriate. My concern is if it's mandated in - if it's put in as a specific issue to be taken into account, it could be given undue weight.

So at the moment, the act is flexible enough or the defence of unjustifiable hardship is flexible enough to look at a small business and say, "This accommodation is not appropriate because it's beyond the means of this small business," but on the other hand, if it's a large organisation with big resources, you can say that

accommodation may be required.

MS McKENZIE: Even though it's not necessarily going to be of community-wide benefit.

PROF BASSER: That's right.

MS McKENZIE: It will benefit the individual, and that might be enough.

PROF BASSER: That's right, and I'm a bit worried that if you bring in community-wide benefit, you just tip the scales so that it's much easier for the provider employer to argue that the balance is against making the accommodation.

MRS OWENS: Actually couldn't it go the other way, because you're looking at community-wide costs and benefits. So there might be more emphasis on the community-wide benefits. So it makes it harder for the employer.

PROF BASSER: Yes, but - it's perfectly possible it could go the other way, and they are taken into account on an ad hoc basis at the moment. I'm just obviously quite defensive in my submissions in the sense that I am just concerned that those community-wide costs and benefits can be added into the balance in a negative fashion so that they tip the scales where it otherwise wouldn't be unjustifiable hardship.

MRS OWENS: The employer groups have been arguing against putting this provision in, which may not surprise you, and I think that's because - - -

PROF BASSER: Because they read it the other way.

MRS OWENS: Well, they're reading it the other way. They're saying, "Okay, it will enhance the benefits side of the equation to the extent you're taking account of community-wide benefits, and that means the adjustments are likely to benefit more than one person" - other people in the community. "So that will go against us. So we don't like it," is basically I think what you can imply from their position. Whereas you're concerned it will go the other way.

PROF BASSER: Yes, I am.

MRS OWENS: I still don't quite understand that.

MS McKENZIE: It is difficult. It is difficult.

PROF BASSER: Yes, I think it's difficult. I don't think I can take it any further, Helen, just at the moment.

MRS OWENS: When I look at the list of relevant circumstances, I presume it's only in relation to (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned. Is that where community-wide costs and benefits are picked up now in some cases because it wouldn't - - -

MS McKENZIE: You see, arguably that could just mean the complainant.

MRS OWENS: Arguably. That could be read very narrowly.

PROF BASSER: You're right. It could be.

MRS OWENS: And (b) is the effect of the disability of a person concerned. It's not that.

MS McKENZIE: It's always the person concerned. That's what really concerned me, that one interpretation of that could be that you could never take into account broader community - - -

PROF BASSER: You wouldn't want to never be able to take into account. I would agree with that.

MRS OWENS: I'm surprised that there's been any cases where community-wide costs and benefits have been - - -

PROF BASSER: There have been.

MRS OWENS: - - - taken into account.

PROF BASSER: Actually one of the problems with the cases is that they quite often go to the spirit, not the literal - not like a High Court appeal case. So I find myself swinging the other way slightly.

MS McKENZIE: The most we can say, we'll certainly think about it. I mean, I see what your problem is. I mean, there may well be cases where ultimately it's not appropriate to look in broader terms; that you should just look at the individual.

PROF BASSER: It could be "and may take into account" instead of that being an absolute.

MS McKENZIE: Yes, and "may where appropriate" or something "take into account", to make clear that you don't have to in every case.

PROF BASSER: That would certainly - - -

MRS OWENS: "When appropriate".

MS McKENZIE: Yes.

PROF BASSER: Yes, that would certainly address my concerns.

MRS OWENS: I see your concern. I see the problem with small businesses. You take account of the community benefits, but the small business still can't afford to do it, and that's one of the other - the financial circumstances is part (c). I guess it then depends how those are weighted. But it's very uncertain - even now the way it's written, it would be very uncertain for a small business or any other business to be able to work out how much weight is going to be given to the fact that they've done an action plan versus the other factors there. So I think a bit more guidance on that might be necessary.

PROF BASSER: Yes, I would agree with that.

MRS OWENS: Thanks for your idea.

MS McKENZIE: We'll take it into account.

PROF BASSER: It's a work in progress, isn't it?

MS McKENZIE: It is.

MRS OWENS: Sure is.

PROF BASSER: In relation to exemptions, I think it's particularly important to limit exemptions to ensure that the objects of the act are met, and I would support and commend your recommendations that general actions done in administration of exempt laws should not be included within the exemption. I don't see any reason why they should be. I have a particular concern I suppose about the Migration Act which is beyond really the scope of this inquiry. I think the provisions operate in an unacceptably discriminatory fashion, but as I say, that's really beyond this - - -

MRS OWENS: You mean in the context of the policies; the migration policies?

PROF BASSER: Yes.

MRS OWENS: Quite a lot of people have actually said that to us.

MS McKENZIE: But really they've said that we haven't gone far enough. We've said the exemption shouldn't apply to routine administration of the laws. But they

said we need to look more carefully at the policies and see whether - - -

PROF BASSER: I don't know that that's within the scope of your brief or that you could amend the DDA to do that in any event.

MS McKENZIE: It's just a question of how broadly we let that exemption operate. But how you go further than administration is a very interesting question.

MRS OWENS: The Migration Act has got its own exemption, but there's also this prescribed laws exemption as well, and we have a recommendation about that, that basically all those state laws that are prescribed at the moment should be looked at again - throw them up in the air and - - -

PROF BASSER: There should be a sunset clause for prescribed legislation.

MRS OWENS: - - - review that, but one idea we're just thinking through at the moment is the possibility of maybe going back and looking at Commonwealth laws and looking at their - how they're currently framed and their consistency with the act to make sure that if there are any departures from the act, that that is justified. So we're just thinking through that as well at the moment. I don't know whether you want to comment on that.

PROF BASSER: I think it's a very good idea, but I can't comment beyond - - -

MRS OWENS: But the Migration Act could get picked up in that.

PROF BASSER: Yes, could be, but I do think it needs looking at. In relation to complaints, I wanted to - individual complaints is the primary avenue for enforcement of the DDA, and we're all aware that the burden of conducting those complaints currently falls upon people with disabilities; really those people in some ways who are least able to bear the burden financially or emotionally. So I would support the recommendation with respect to costs, just to deal with some of the financial - potentially to deal with some of the financial burden, but more particularly with respect to allowing the Human Rights and Equal Opportunity Commission to initiate complaints.

I think that proposal addresses potentially many of the existing concerns with the complaints system, provided of course that HREOC is given appropriate resources so that they're actually able to carry that out, and obviously with the proviso which you have in the report that there's some kind of China Wall between the different parts of HREOC so that they're still able to be seen to maintain their neutrality for the purposes of conciliating complaints.

MS McKENZIE: We've had some interesting submissions. There have been some

submissions both from organisations and from organisations of people with disability that they're not happy about HREOC being able to initiate a complaint because of this feeling that HREOC really is stepping out of its impartial role. That's one set of submissions, and the other set come from the employer who feel that to permit this to happen, at least without some limiting parameters is tipping the balance in favour of complainants.

PROF BASSER: There's a big limiting thing because I don't think they'll have the resources to - I've again shifted my position because initially I thought there was a real problem about perception, but in talking to various people and in thinking about it, I think that you can overcome that.

MS McKENZIE: By very strict - - -

PROF BASSER: Yes, you have to have very strict rules, and I see it as being a good compromise in a way because the other way around this would be to have a disability commissioner outside of HREOC, but that's not going to happen.

MRS OWENS: One idea that I think maybe HREOC might put to us next week when we talk to them in Brisbane is that instead of them initiating a complaint from the outset, they take on a responsibility at the end of the conciliation process to take something to court or a representative matter; they can just go straight to court, bring an application.

PROF BASSER: I think at the minimum being able to bring representative actions to initiate a representative complaint, that would be a very strong good power for the to have. I think that being able to bring the - to initiate something in court at the end of the conciliation process, that's definitely not going to overcome the problem because employers or education authorities or whoever is feeling disgruntled is going to feel that it doesn't matter what they say in the process - - -

MS McKENZIE: The commission is going to jump in.

PROF BASSER: - - - the commission is going to jump in. So I don't think that addresses it. It might be that limiting it to representative actions might address the perception - well, it would definitely address the perception issues.

MS McKENZIE: That's very helpful.

PROF BASSER: The other draft recommendation related to using the state and territory anti-discrimination bodies as a kind of shopfront. I think that has a lot of merit. I'm not quite sure how they would juggle their different hats, but I certainly think in terms of accessibility, it is a - - -

MS McKENZIE: And confusion. That's the thing people keep mentioning; that they're really confused about what to do. They need advice up-front at the very beginning.

PROF BASSER: Yes. I think it would be very helpful. In relation to regulation and scope of standards which is in a funny way linked to that, because there is a big question at the moment about the scope of standards. There are two issues I want to address here. One relates to the obviously DDA issue, but at the moment it appears that the DDA can be read down by standards, and I think it should be very clear, as you've said in draft recommendation 12.1, that the DDA can only be amended by an act of parliament.

MS McKENZIE: Yes.

PROF BASSER: I'm not an administrative lawyer, but I understand from administrative lawyers that it isn't really probably administrative law why it's possible for the standards to limit the scope of the act. But at the moment the way the act reads, that's what it - - -

MS McKENZIE: It could happen.

PROF BASSER: Could happen. The other issue that's been raised - - -

MRS OWENS: Sorry, just because I'm a non-lawyer, "read down and limiting scope", you mean narrowing down.

MS McKENZIE: Narrowing the act.

PROF BASSER: Narrowing down.

MRS OWENS: What about the issues of standards potentially going beyond the act and even possibly contradicting the act? I mean, at the moment there are some standards being developed which are going beyond - potentially going beyond the act.

PROF BASSER: I think that was what the drafters of the act had in mind when they drafted it, that the details would be worked out in - the details - - -

MS McKENZIE: But not actually rewriting the act.

PROF BASSER: It's not rewriting it, but they could make it clear that the act had a more expansive scope than appeared necessarily on the face of it. But the corollary of that is that it appears on the face of the act that standards could read down, could amend the act to narrow it. I don't think that's actually possible. But it needs to be

clear that it's not possible.

MRS OWENS: There's one example with the access to premises standard that the new buildings, there won't be any reference to unjustifiable hardship. So would that be a narrowing of the act? As a lawyer, explain this to me.

PROF BASSER: I'd need the building provisions in front of me.

MRS OWENS: Or is it expanding the act?

PROF BASSER: It would be expanding the act.

MS McKENZIE: But either way, it's not consistent with the act.

PROF BASSER: It's not consistent with the act.

MS McKENZIE: That's frankly the - whether it's narrowing or expanding, it's not consistent with the act, and I just don't think - - -

PROF BASSER: And you can't do that by regulation.

MS McKENZIE: I think the commission doesn't agree with me, Lee Ann, but I'm sure they will make some more submissions to us about that at some stage.

MRS OWENS: You mean the Human Rights and Equal Opportunity Commission

MS McKENZIE: Not the Productivity Commission, but the HREOC.

PROF BASSER: Human Rights and Equal Opportunity Commission, yes. There is an issue which does need clarification which I think you refer to, which is the scope of standards in - how standards stand in relation to state law.

MS McKENZIE: We did.

PROF BASSER: I think that does need clarification. I think at the moment it's very unclear what that relationship is, but again I'm not an administrative lawyer. So I'm a little bit reluctant to say anything more than that is something that needs to be dealt with. I would also agree with draft recommendation 12.4 that we need clarification about monitoring compliance with disability standards. I think the whole monitoring of disability standards, of action plans, that really does need some further clarification.

So those are my substantive submissions, particularly I think there should be a general duty to accommodate up to the point of unjustifiable hardship; that the

defence of unjustifiable hardship should be extended to all the areas under the act, and I'll leave my submissions at that point.

MRS OWENS: Thank you. I don't know about you, Cate, but you might - - -

MS McKENZIE: I've got one more question.

MRS OWENS: I think it's the same question - I thought you'd be the better one to ask it.

MS McKENZIE: For once I think you're not right about the question I'm going to ask. I was going to ask, Lee Ann, if you've got any comment to make about the competition effects of the act.

MRS OWENS: That wasn't the question.

MS McKENZIE: No. As you know, we've discussed it a bit in the draft report; we'll discuss it more when we get to the final version. But is there any contribution you want to make to - - -

PROF BASSER: I don't think the act is anti-competitive It applies across the board to all organisations. I find it quite hard actually to see the relevance of - I know it's within your terms of reference, but this is a piece of social legislation which is designed to both redress inequality and to try and bring about social change. So I find it difficult to assess it in a light which is outside the objects and purpose of the act myself. I'm sorry.

MS McKENZIE: No. It's something which - - -

PROF BASSER: I feel very strongly that it's a very important piece of legislation because it has these social benefits and objects.

MRS OWENS: This is revisiting the issue of behaviour, and when you came to visit us, you made a comment - and this was about the comparator and the High Court's interpretation of the comparator, and the High Court said that it was - the appropriate comparator was a person without a disability who exhibited the similar behaviour, and you expressed concern at the time we saw you that - I think you said it could - that majority view could seriously undermine the operation of the act.

PROF BASSER: I think that's right.

MRS OWENS: I'm still a little bit puzzled about your conclusion there. You're happy to see behaviour as a characteristic that's intrinsic in the definition of "disability", but you're unhappy about this interpretation of comparison. I'd just like

you to try and explain that to us a bit more on the transcript.

PROF BASSER: I think that the comparator should have been a person with a disability who didn't have the behaviour, not a person without a disability who exhibited the behaviour. One of the issues is that a person without a disability who exhibits the kind of anti-social behaviour that goes on in Purvis is doing a deliberate act. They are acting up and acting out in response to authority or against authority. The person with a disability like the complainant in Purvis is acting in a way that they actually have no control over.

So it's not just a question of sending them home so that they will behave; it's a question of looking to see what causes the behaviour. The only effective way you can deal with it is to say, "Here we have a person with a disability. This behaviour is non-intentional." It's not entirely answering your question, but what in the environment is causing that. Quite often it might be the way the light comes into the room or the particular responses that people have to the behaviour thinking that it's responding as though it were deliberate. So the problem that I have is if you don't recognise that the behaviour in the person with the disability is completely unintentional, it's a response to the environment rather than where a person misbehaves and acts out who doesn't have the disability, it's a thought about process. I don't think I've answered your question.

MS McKENZIE: It's really hard though to sort that out. Originally - and we've made a recommendation about this or we've made some suggestions about this. Originally I thought we could just simply say that where you have a disability with a symptom or manifestation, you simply - to make it clear that in the comparator it must be a person without that disability, that is without that symptom or manifestation. But the real problem as perceived in some Federal Court cases, the name of which I now can't remember, is that that will always get you into a situation where almost an artificial comparison - if the action has been taken because of behaviour for example, you've got to compare it and you've got to make the comparison between the person with the disability and the behaviour, and the person without the disability and without the behaviour. Of course you must invariably and always get to an answer that says of course you wouldn't have treated that child in that way because the child didn't do that stuff.

It is quite difficult, it seems to me, because you get to a kind of ridiculous - it's comparing apples and oranges if you like. But maybe what you say shows me a way out of that difficulty in a sense that you're really wanting to compare almost with a child who might exhibit the same behaviour, but whose behaviour is deliberate, maybe the answer - maybe perhaps then - in a way the comparison becomes more meaningful. I mean, all of this led me at one stage to think that we should just talk about unfair treatment because of disability, not even bother about the comparator at all.

PROF BASSER: The comparator - it does make it very difficult, and the problem in Purvis is if you don't analyse why the young man is behaving - if you simply compare behaviours, you'd have to say it was fair enough to expel him from school. You can't come to any other conclusion. But then the consequence for that is that an awful lot of young people with disabilities will exhibit that kind of behaviour unless accommodations are made for them - - -

MS McKENZIE: That's right.

PROF BASSER: - - - in the school environment. Unless people are actually thinking about or recognising that the source of the behaviour is actually quite different to the kid who doesn't have disabilities who acts out, because it's not deliberate. It's a responsive behaviour. It's uncontrollable. It isn't controlled by sending someone home and rewarding them with a day off; it's controlled by my checking what's going on in the environment, maybe a little bit of time-out work, but very different responses are required in order to treat that child actually in a way which is the equivalent of the kid who acts out.

MS McKENZIE: Maybe there should be an additional requirement to this case. There are many other cases where the comparator works perfectly well without having to worry.

PROF BASSER: Yes.

MS McKENZIE: Maybe there should be some additional requirement such as that you've tried to accommodate or have accommodated, and it just doesn't work. I mean, there must come a point where you try, it doesn't work, and then ultimately perhaps it's then fair to compare.

PROF BASSER: To some extent what we're saying is that a general duty to accommodate exists in this area.

MS McKENZIE: Exactly.

PROF BASSER: A positive duty to accommodate.

MRS OWENS: That positive duty would potentially overcome this problem of automatically expelling the child, and we had a situation this morning when we were talking to our first participant about Aboriginal children who just - because of their particular problems, have behavioural problems, and it could be as a result of alcohol syndrome or whatever, sniffing petrol or whatever, and that means that they potentially act up in school and get expelled, and under this current arrangement, as the act is formed at the moment, that could happen. In some remote communities

there might be nowhere else for those kids to go.

PROF BASSER: Absolutely.

MRS OWENS: So if you've got this over-arching duty, that actually acts as a check on that happening.

PROF BASSER: I think so. It sort of shifts the balance, too. It wouldn't be possible for the school to get away with ignoring the professional help they're offered if there's a general duty.

MS McKENZIE: Exactly.

PROF BASSER: I think the issue with the comparator, the problem is not necessarily any wording in the act; the problem is the identification by the judicial decision-maker of the appropriate comparator.

MS McKENZIE: But in this case it is quite difficult to do.

PROF BASSER: Yes.

MS McKENZIE: It is quite difficult and quite artificial in a way.

PROF BASSER: I would agree with you because I actually - in trying to analyse that decision or that scenario, I had a lot of difficultly working out who I thought was the appropriate comparator.

MRS OWENS: I think your suggestion probably isn't going to work, given what Cate has said.

MS McKENZIE: I think it's very difficult, but I think basically looking at it in a much more broader way, the reason why adjustments duty might well work - and I mean, it occurs to me that one shouldn't - I know there can be arguments if you want to read Purvis narrowly, but this just applies for education. So it's distinguishable, but I think that's a very dangerous argument, and this could easily apply to things like for example employment where exactly the same thing could occur. You perform badly because of some particular symptom of your impairment that just stops you doing certain work. So you get sacked because of that, and the comparator would work in the same way. You could be compared with someone with that performance who didn't have the disability.

PROF BASSER: Yes. I think in every - we have so few cases, and the act is largely - although there are distinctive provisions for different areas of life, it's largely kind of consistent. I think any case in any particular area is likely to be used

to interpret another area. I think that's a very real concern.

MRS OWENS: Thank you very much, Lee Ann, for that. That was very useful.

MS McKENZIE: Very useful discussion.

MRS OWENS: You've obviously been thinking about these issues in great depth. So we appreciate your submission and coming along today.

PROF BASSER: Thank you very much.

MRS OWENS: Thanks very much.

MS McKENZIE: Thank you.

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

MRS OWENS: The next participant now this afternoon is Victoria Legal Aid. Welcome to our inquiry and thank you very much for your submission. I'll ask you each to give your name and your position with Victoria Legal Aid for the transcript.

MR STOJCEVSKI: Sure. Thanks to the Productivity Commission for inviting us. My name is Victor Stojcevski. I'm the senior policy and research officer at Victoria Legal Aid.

MS GOLDBERG: My name is Michelle Goldberg. I'm an article clerk and also a principal legal researcher for this review.

MRS OWENS: Thank you.

MS MILLS: And I'm Robyn Mills. I'm a solicitor and coordinator of the civil law service at Victoria Legal Aid.

MRS OWENS: Good. Thank you, and as I said, thank you for coming in. Sorry about the slight delay in starting with you. I'll now hand over - I think is it going to be Victor who's going to lead us into this?

MR STOJCEVSKI: That's right. Yes, I will.

MRS OWENS: Thank you for that.

MR STOJCEVSKI: What I'm hoping to do for the next 15 to 20 minutes with my colleagues is just to introduce Victoria Legal Aid and provide a bit of a context of the work we do in this area, and then hopefully lead on to some of the ideas that we propose in our submission and expand on some of those ideas and bring additional information that has become material over the last couple of months.

MS McKENZIE: You don't mind if we ask you questions as you're going along or would you - - -

MR STOJCEVSKI: Not at all. So we assume that will take about 15 to 20 minutes, and then we'll just open it up for questions that you might have about our submission.

MS McKENZIE: Great.

MR STOJCEVSKI: In terms of Victoria Legal Aid, it's a practice that is made up of approximately 170 lawyers. Most of those are in the criminal law section and many criminal lawyers do represent disabled clients, particularly disabled clients in custody, and the initial point of access for that is often via a duty lawyer service. We also have an extensive family law practice and civil law practice which is made up of

15 practitioners. Some of that civil law practice has specialisation in disability discrimination, and that's what we - and I guess that was the impetus for our interest in the inquiry.

We have 11 officers in Victoria. Our major office is based in Melbourne. In the global sense, we see over - we provide over 30,000 grants of legal aid a year. Once again most of these are in criminal law and family law, but there is a significant proportion in civil law. As I mentioned in the inquiry, over the period 2001-2002 and for part of 2002-2003, we only provided three grants of legal aid for disability discrimination matters, and I'll have to expand upon the reasons why a bit later in our submission.

We also provide over 35,000 advice and minor work files. These are initial advice that may lead to some form of minor work that is distinct from a grant of legal aid and ongoing work. We provide over 40,000 duty lawyer representations. Once again these are principally in criminal and family law, but we do provide them in civil law and have recently just started an anti-discrimination list at VCAT.

MS MILLS: Yes, that's correct.

MR STOJCEVSKI: And we provide over 80,000 telephone advice sessions in 13 different community languages; Macedonian, Greek, Italian, Arabic. So they are an initial referral advice facility that might lead into a grant of legal aid or it might be something that we refer out to a community legal centre, Equal Opportunity Commission, HREOC as determined by the needs of the client.

Lastly we provide over 350,000 publications across a broad range of legal matters. I've brought some of those publications, and I hope to submit them to the Productivity Commission; the Disability Discrimination And The Law booklet which comes as a braille version and it comes as a CD version and it comes in a standard text version, but there's also generalist-type publications that also have a particular focus on discrimination matters, like People And Work which is about employment and discrimination. As an example, over the last financial year, we provided 6034 using disability discrimination law publications to various community agency sectors, individuals, schools, whoever wanted one basically.

So I guess that's the sphere of our activities, and the only other thing I'll mention in terms of the context for our submission is we're funded both out of Commonwealth funds and state funds; Commonwealth funds are used according to a set of Commonwealth guidelines, and principally we can only use Commonwealth funds in Commonwealth law matters, and as a consequence of that, most of the state funding provided to Victoria Legal Aid goes to criminal - otherwise known as state law - matters. We have a budget of around $70 million a year to provide legal aid services to the broader community, but particularly to socio and economically disadvantaged

members of the community.

So that provides a bit of a context for our organisation. Now I'd like to, if there's not any questions, pass over to my colleague Michelle Goldberg who will basically provide an overview of what we're aiming to talk about today.

MS McKENZIE: Thank you.

MS GOLDBERG: In terms of the roll of Victoria Legal Aid and how it relates to this inquiry is that - it's referred to in our submission, but the objectives of the Disability Discrimination Act and VLA map onto one another quite significantly. Basically we're both concerned with facilitating equal participation of everyone in society, and especially marginalised people, whether that has to do with disabilities but also in terms of other types of marginalisations in terms of economic and cultural.

The issue is very much that Legal Aid focuses on access to a justice system and the DDA focuses on access to society in general. Our access to the justice system would facilitate people under the DDA to be able to attain redress of grievances under that legislation, but what's going to be discussed later on is the restrictions that are imposed on us in being able to provide that advice. Victor has talked about the types of services that we provide, talking about minor work files and advice sessions, but it's quite obvious that the fact that we've only provided a grant of legal assistance on three occasions restricts our ability to be able to provide that advice among other things, and we'll talk also about the technical aspects of the Disability Discrimination Act and how that also limits us being able to assist clients.

In terms of basically access to the justice system, we're going to talk about how it's important for clients to be able to have education in terms of their rights and responsibilities, but not only clients as well, but also professionals and corporations focusing more about responsibilities on that occasion, and that's going to be focused on in terms of the requirements of education.

Our submission talks a little bit about how Legal Aid needs to confine our submission in terms of our area of expertise. We don't have expertise in terms of social research in terms of the prevalence of disability discrimination, and we've mentioned that in our submission. But in terms of the number of inquiries that we're receiving in terms of advice and also the fact that other submissions refer to the facts that disability discrimination remains rife in our community, that's something of significant concern to Legal Aid, and that's going to be addressed later on as well. In terms of being able to provide that advice - yes, that's sort of as much as - I don't think that there's anything else that I need to add.

MR STOJCEVSKI: Thanks, Michelle. The nub of our submissions you may

recall rests around the Commonwealth guidelines on which we are able to provide grants of legal assistance, and it rests, in this particular instance in terms of disability discrimination, on a guideline that says that before people can receive a grant of legal assistance, they must meet a means and merits test. They also must meet a public interest test, and we say that as the greatest impediment to providing legal aid services to disabled people.

Our grants function doesn't allow us to get the people over the public interest test which is - I can't remember the exact wording, but any remedy needs to have a community benefit.

MS MILLS: It's got to be wide ranging, more than just for one individual.

MR STOJCEVSKI: Yes, .

MS GOLDBERG: And it's also defined quite restrictively in its application.

MRS OWENS: Of course it has to be a systemic issue.

MR STOJCEVSKI: That's right.

MRS OWENS: And you find that difficult to determine what is going to be a systemic issue?

MR STOJCEVSKI: It's quite a test to leap, you know. A person might have a disability discrimination case in relation to just an education matter. Will it affect, you know, that group of disabled people across the education system? Well, probably not. It's trying to affect the particular circumstances that this individual finds themselves in. So it's quite a hurdle to overcome and I think the data in terms of only three cases in the last two years is evidence of that.

We have provided submissions to the Commonwealth. In fact the Senate Legal and Constitutional Committee - as I say in our paper, the Senate Legal and Constitutional Committee in their inquiry into Legal Aid in Australia in 1998 recommended to the Commonwealth that that guideline be abolished. That wasn't taken up by the Commonwealth in 1998. In the current senate inquiry into Access to Legal Aid Services, we've also made that submission; that that guideline be abolished, and we made that submission to the Productivity Commission as well; that the guideline in relation to the public interest element for disability discrimination matters be abolished.

MS McKENZIE: How does it fit with the other guidelines - in other words, say when you deal with criminal cases or family law cases, is there a similar public interest guideline there?

MS MILLS: No.

MS GOLDBERG: That's very much reflective of the fact that we receive funding on a state basis and a Commonwealth basis. The Commonwealth funding is defined by specific guidelines. Most of the - just say in a criminal law context, we're able to assist people within that budget. But in terms of the Commonwealth budget, Victor will be able to provide some information of the fact that that budget has actually been in surplus because - is that right? - because we haven't been able to use the money according to the guidelines that we have. So the restriction in our circumstance has not necessarily been the money being available, but it's the guidelines which restrict our capacity.

MR STOJCEVSKI: Yes. Last financial year - just to follow up - we had a surplus of $2 million in terms of our Commonwealth grant. We'd like to spend the money, and there's a need to spend the money in the community, but we can only spend the money according to the guidelines that have been set by the Commonwealth.

MS McKENZIE: So in the other Commonwealth areas, do you have this public interest limitation as well?

MR STOJCEVSKI: No, not - - -

MS GOLDBERG: There's one other interest, like refugee - - -

MS MILLS: The refugee - we've got a restrictive guideline in relation to migration and refugee matters as well, but there's no per se public interest test case guideline as there is with the discrimination guideline in the civil matters.

MRS OWENS: I can understand why that public interest test was put in. I mean, at the commission we're big on what is going to be of benefit to the community. We think about community-wide benefit, but sometimes with these cases, you're really going to know that it is going to have broader benefits, and sometimes it can't because of confidentiality requirements on a conciliation. So sometimes it's hard to judge.

MR STOJCEVSKI: I think this comes into that, I guess, policy issue about the Commonwealth's role in relation to provision of legal aid funding and legal aid services.

MS McKENZIE: The legal aid service itself is really - the public interest as far as legal aid is concerned comes from the nature of the service. I mean, it's there to make justice accessible for those who might have some bar to accessing justice. It seems hard - having a service that really is established to promote certain aspects of

the public interest in that way, it seems hard to apply the test again when it comes to deciding whether an individual should have that.

MS GOLDBERG: That's what we argue in our applications for aid as well.

MR STOJCEVSKI: You know, we make the point that people's use of the Disability Discrimination Act - one of the primary triggers for that is access to legal services and legal advice and representation. If they can't get through the door in the first instance, their ability to access the remedies that the legislation provides is severely limited.

MS McKENZIE: So, say Commonwealth criminal law, you could act using your Commonwealth funding for cases under various Commonwealth criminal legislation.

MR STOJCEVSKI: Yes, we have guidelines - - -

MS McKENZIE: But they don't say that the case has got to be the public interest; you can still act for the offender - - -

MS MILLS: That's correct.

MR STOJCEVSKI: That's right.

MS McKENZIE: The alleged offender - without having to prove that there's some public interest involved.

MS GOLDBERG: It also reflects the difficulty in terms of the remedies that are available under the DDA. In terms of discussions with solicitors that practise in that area, the remedies that are achieved by applicants are very specific in nature; don't have those wide-ranging effects, and if there was a change in that case, we'd be more able to be able to get funding in relation to the public interest. So if there were remedies that were for example not just provided in relation to an individual circumstance and sought to be able to make sure that even if that person came back to that very same situation again, that they didn't face the same discrimination on the basis of their disability or that there was some type of remedy that sought to be able to far reaching as opposed to dealing with an individual's concern, that might then enable us to be able to argue that - to fulfil the public interest guideline.

MS McKENZIE: I suppose what concerns me is that if there's not a public interest guideline for, say, Commonwealth criminal offences, what it really means is a decision that - and certainly I agree that criminal offences - you know, they've got punishments attaching, they've got fines and they've got imprisonment. So a decision has been made that it is more important to provide legal aid for those cases than it is for disability discrimination in the sense that an additional hurdle has been put in

place that you have to jump before you can get legal aid for discrimination.

MR STOJCEVSKI: Just to clarify, the guidelines are set by the Commonwealth.

MS McKENZIE: Yes, I understand.

MR STOJCEVSKI: Just to clarify that.

MS McKENZIE: Yes.

MR STOJCEVSKI: In terms of the state guidelines, those are generated by the VLA board which is made up of statutory appointments from the state attorney-general. The Commonwealth guidelines however, whilst nominally called guidelines, act more as rules about how the funding is to be distributed. I saw in your draft report the point about commissioning - I think it's 6.1 - - -

MRS OWENS: The inquiry?

MR STOJCEVSKI: Yes, "The attorney-general commission an inquiry into access to justice for people with disabilities." I think one of the things that would really get more people through the door at Victoria Legal Aid would just be relaxation of the guidelines, and we've made submissions to the Commonwealth. They are aware of our submissions. The guidelines are being reviewed in the context of the new Commonwealth funding agreement which is - the current Commonwealth funding agreement expires on 30 June this year. The new Commonwealth funding agreement is to begin on 1 July this year.

So we're hopeful, and we have made submissions, that they will relax the guidelines not just in this particular matter, but in other particular matters as well so that the board and the individual solicitors who are providing legal assistance are able to exercise more discretion about the types of cases that can come up.

MRS OWENS: Do you get a sense that if there were no public interest test that it would open the floodgates or would it - it puts the pressure back on - what did you call it? - means and merits - - -

MS MILLS: Means and merits.

MRS OWENS: - - - test.

MR STOJCEVSKI: Yes.

MRS OWENS: But then I presume you'd be able to try and prioritise those people that come to you through that test, and that test could work quite adequately. It's not

going to - you're not going to have the opposite problem of huge pressure back onto your budget? It's not going to go from three to 3000.

MR STOJCEVSKI: I doubt it because the means and merits tests apply, and also the reasonable litigant test as well. So - - -

MS McKENZIE: I'm sorry, what does that test mean?

MS GOLDBERG: It's whether a prudent litigant - so whether a - - -

MS McKENZIE: Okay.

MR STOJCEVSKI: Yes, basically - - -

MS MILLS: I can maybe provide more information concerning your question. As coordinator of civil law, there are 15 solicitors in my section, and we do quite a bulk of case work in relation to the civil law matters including some discrimination cases. We have started, as Victor indicated, the duty lawyer service up to VCAT, and the guidelines - the question that you asked about the guidelines - causes us some difficulty to the extent that we have to do what's called minor work files which allows us to do about one hour of legal work on a file.

So we find it difficult in operating the duty lawyer service to VCAT or seeing clients in our discrimination clinics that may have merits, be a good case that a prudent litigant would take on, but the client is not going to get across the public interest test case criteria. So we will assist them on a minor work file basis that from a practitioner point of view, as you can appreciate, you're tampering around the edges because you've got such a limited availability of time and assistance. So you're assisting them complicated court documents, but you're only able to take the matter so far. You're not able to put yourself on record - the tribunal or court record - because you're not technically the solicitor on record because there is no funding, and you have got to give the client instructions on how to do a case that could be complicated that might need medical evidence, might need a specialist evidence in different fields.

So I would anticipate that if our guidelines were relaxed in any way, those minor work files that we've already assessed as having merit and the client should get assistance, would then be actually eligible for a grant of legal assistance which would give them a proper legal service. That's something that I was going to talk about. The great concern that we have that clients in this area, because of the funding limitations and because of the fact that there is a lack of resources going into this side of it are not really given adequate freedom of choice in relation to representation. They can go to a community legal centre which is under-funded or the Disability Discrimination Legal Centre or come to us who can offer limited - - -

MRS OWENS: Limited.

MS MILLS: - - - services within the best of our resourcing, which means that many people either drop out in the early stages because they find the whole process complex or they're quite fearful of going up through to the Federal Court which not only is a costs jurisdiction which causes people a lot of concern, because if you've got a disability and you've got an asset - your house for instance - you don't want to have that at risk by a costs order in the Federal Court.

From my experience, respondents know this - they're well aware of this - and I can give two instances at VCAT level and the Federal Court where it's been used against clients by insurance litigators who - and the one I did was a state one, and it was at the Equal Opportunity Commission. We were at mediation, and there was an offer that was made to settle the claim. It wasn't the world's best offer, but it was an offer that was at the lower end of the scale. The respondent's solicitor said to me, "We know you've got to accept this because we know there's going to be no representation at VCAT." So they've got you over a barrel, and for a client who has got something that may not be the best that they can achieve, the daunting process of going up to the next level without legal representation is insurmountable.

The other instance is - and this happened only a couple of weeks ago, and this was at the Federal Court - where the corporate respondent and the mediator both said to the client - and Victoria Legal Aid was assisting with the mediation - "Legal aid is not going to be available to continue running this claim to Federal Court level. Accept the offer," and the mediator went on to say, "It's going to cost 10 to 15 thousand dollars to run this in the Federal Court." Of course the client settled because of the fear of that cost component, and the fact that because the compensation can be low in this jurisdiction, you're running the risk of being out of pocket to achieve a low remedy.

That we find really concerning; that the system is actually being manipulated by corporate respondents to their advantage because they're aware of the imbalance and the inequities in this legal system which in turn is giving us a legal system that I would be as bold to say is discriminating against the litigants in the first place.

MS McKENZIE: We have talked about resources being critical to the success, fi you like, of the process under the DDA, and perhaps we should talk a bit more about it as well.

MS MILLS: Yes, and I really think that the resources do need to be put in, especially in relation to the Federal Court where you've got this cost burden that is just facing you if you're unsuccessful. I know some solicitors in legal aid would even go as far to say that, "If you're a successful applicant in the Federal Court, you

should actually get your costs fully paid by the respondents and not have any costs burden at all," and that is really causing Victoria Legal Aid quite a lot of concern; that and the access to HREOC. Since HREOC moved to Sydney and hasn't had such a presence in Melbourne, the evidence from the solicitors in this section is that more matters tend to be going towards the state and using state legislation because the Equal Opportunity Commission is easy to access, and VCAT is easy to access.

So we would also urge that there needs to be more funding in relation to HREOC, who is doing a fantastic job. They need more presence in Melbourne to redress that balance.

MRS OWENS: We suggested that there should be these one-stop shops - well, in Victoria's case, sort of reintroducing something that was there before - to help with that because we found a lot of people are confused about the systems, and we want something that's going to make it easier for the people out there to be able to have a reasonable choice.

MS MILLS: And the one-stop shop is good because you have that one initial focus, and then you could make your decision as to which way you wanted to go. I would submit some of that freedom of flexibility has been lost since HREOC has moved.

MRS OWENS: We've also raised the issue of HREOC funding as well.

MS GOLDBERG: In terms of resources as well in terms of the context of education, there's a difficulty that education needs to be focused on one of the objectives of the DDA in terms of changing community values as well, about people's attitudes; about, you know, people with disabilities being able to be employed, go to school and fully participate in the community, and it not only should relate to making our clients aware of their rights, but also making professionals and corporations aware of their rights and responsibilities as well.

MRS OWENS: We found that an awful lot of people don't even know that the act exists, far less that they've got rights under an act which is very worrying.

MS GOLDBERG: But it can sometimes work from a top-down approach; that if corporations and businesses sort of know about the act, then they bring their businesses and their work practices into compliance with the legislation, and then that comes back to whether compliance is regulated and whether it's enforced as well, so that if there aren't people following up compliance, then how are you going to ensure that the scheme is actually sort of being adopted/

MRS OWENS: Have you got any suggestions as to how that would happen?

MS GOLDBERG: I mean, we haven't addressed that specifically in our

submission, but it may be that there needs to be - I mean, I heard it being discussed earlier on with the submission earlier, about that there may need to be - I'm not sure whether it's appropriate for HREOC to do it, but some organisation that is involved in the compliance. I know within other schemes - for example environmental regulation - there are bodies that have the sole responsibility of ensuring compliance with schemes; you know, with regulation of environmental practices, and the same should be the case with compliance with this scheme as well.

MRS OWENS: There's compliance at different levels. There's compliance with the act and there's also compliance at a different level with the outcomes of conciliations, making sure that they are followed through, and we've been hearing that that doesn't always take place, and then the person who - the complainant isn't really in a strong position to go back and go through the process all again because the outcome hasn't been complied with. So it just lapses.

MS GOLDBERG: So it comes back to the access to justice and addressing grievances again, and the same issues come up.

MRS OWENS: Exactly.

MS McKENZIE: You suggested I notice as far as systemic matters are concerned some additional remedies that might be ordered in the way of change of policies rather than just remedies that are directed solely to the individual complainant, and they are - where it could be provided on the individual complaint I have to say I think that there's a good deal of merit in enabling that to happen, particularly in the cases where there's a complaint for example against an employer where the complainant has already been dismissed, and the complainant may get given damages, but normally nothing would be done in relation to the policies that the employer followed because already the complainant has finished that relationship.

MS GOLDBERG: Yes, exactly.

MR STOJCEVSKI: Which is a bit of a change to the traditional sort of remedying philosophy that we currently have in place, but we think the Disability Discrimination Act as a social piece of legislation and given how it originated is really in a position to push the envelope on some of those issues, especially where because it has a focus on community attitudes as well and you're going to affect community attitudes if you can remedy some policies or standards that are out there that might be part of an organisation that has, you know, hundreds of offices across Australia.

MRS OWENS: I was wondering if we could go through a few of your recommendations in your submission. Is that possible?

MR STOJCEVSKI: Sure, but I just don't have my paper here for some reason.

MRS OWENS: I can read them out to you as you go.

MS McKENZIE: Some of them are clear enough I think, but some of them need discussion.

MRS OWENS: On page 5 you talk about an investigation. I presume every time you're talking about a review or an investigation, you're talking about our investigation. It's written as sort of a fairly passive voice, but we're doing this review. So I've worked on that assumption, but you talk about in that recommendation that it should be - the inquiry should consider the importance of both formal and substantive equality to people with disabilities, and I suppose we've tended to focus more on the substantive equality and ensuring people have got equality of opportunity. But I'm just wondering whether you've got any views about the formal equality. I mean, are you after both? I mean, they're different - - -

MR STOJCEVSKI: Yes.

MRS OWENS: - - - as we've pointed out, and does it make sense to be aiming for both, because sometimes you might need to do more for people with disabilities than for the rest of the community, and we've had discussions with quite a few people about how the act can be framed so that it may reflect that need to do more, and we've talked about maybe having an over-arching provision in the act to make a reasonable adjustment, a reasonable accommodation. I was just wondering how you viewed that; whether you are really aiming for formal equality or substantive equality.

MR STOJCEVSKI: I think we're aiming for substantive equality as an emanation from formal equality. I guess it's proposed in the context that traditionally not just - traditionally discrimination legislation is really - and the interpretation of discrimination legislation by the courts is really focused on formal equality. So in that historical context, we're urging the commission to - using that as a basis, but using that as also really the starting point to figure out - you know, substantive equality is a term we used, and obviously we've been using reasonable adjustment, did you say?

MRS OWENS: Yes.

MR STOJCEVSKI: I think the recommendations in the context of the traditional ways that discrimination legislation has been interpreted.

MS GOLDBERG: And it was also in the context of our concern that the act didn't specifically articulate positive responsibilities, and that was our concern. So it

stemmed from that.

MS McKENZIE: A number of people have mentioned that to us, too. the company.

MRS OWENS: So we're thinking through how the act can be made a bit more active rather than passive.

MS GOLDBERG: Also the recognition of - there is built into the act that there's direct and indirect discrimination. So that's where we linked in the formal and substantive equality concerns as well. The reason why there's formal and substantive was because we were fearful that there will be a focus only on formal. So the formal is - we've very much got a big dissent in that respect.

MS McKENZIE: I one way, indirect discrimination would be looked at as a way to remedy where formal equality has gone wrong - - -

MS GOLDBERG: Yes, exactly.

MS McKENZIE: - - - where you've got an equal requirement, disadvantages.

MS GOLDBERG: Yes, exactly.

MRS OWENS: You said in your recommendation 9 that:

> The act be amended and should include discrimination on the basis of behaviour as a manifestation of an individual's disability.

We've got a recommendation to that effect in relation to the definition of "disability". Some people have said, well, behaviour is already covered, and the question arises whether you have to make that - should we be making it explicit? The High Court has already - the Purvis case has already made it reasonably clear. Is there a need to make it clearer?

MR STOJCEVSKI: I'm a big supporter of the parliament using the resources it has at its disposal to, you know, clarify any of the obfuscation that the High Court might have sort of provided.

MS McKENZIE: People aren't going to read the whole judgment in Purvis.

MS GOLDBERG: And it's also, when you have a specific judgment, it can be sort of distinguished on the basis of the set of facts of that particular case. So when it's actually articulated in the legislation, you don't have that concern.

MRS OWENS: So you would articulate it?

MR STOJCEVSKI: Yes, I think so, and I think it's, you know - I think in another recommendation we also support about the leadership that the Commonwealth needs to demonstrate in some of these areas, and I think rather than relying on the courts to - well, obviously they interpret and make the law and extend the law as the situation fits, but I think the Purvis case and the literature that has come out in this particular area suggests that there is a need for some clarification, and that as an active leadership, the Commonwealth should - you know, as an active leadership in the context of that they're responsible for the Disability Discrimination Act should amend the act to take account of it.

MS GOLDBERG: And that responsibility also translates across to the need to review other pieces of Commonwealth legislation in terms of its compliance with the Disability Discrimination Act, and we've addressed that in our submissions.

MRS OWENS: Yes, you had, and I was quite interested in that recommendation. That was your recommendation 27, and I have raised that idea with other people, as we've been doing in our hearings, because I thought it sounded like quite an interesting idea. So as I've been going around, I've been saying to others, "What do you think about this idea of just looking at Commonwealth legislation in terms of its consistency and being able to justify where there are inconsistencies." So we're going to take that on board and have a think about it.

MR STOJCEVSKI: The germ of that idea came actually out of the Productivity Commission's own formation because Productivity Commission in terms of its responsibilities for competition policy needs to engage in such a process whereas, you know, trust to make Commonwealth legislation consistent with competition policies. So we thought it would actually be very good if you extend not just the competition policy, but the Discrimination Act and say, "Well, there's a raft of legislation out there that would be good to be monitored in the context of disability discrimination legislation," so any inconsistencies or detrimental policies that flow from - and here I'll say policies that might be inaugurated through a Commonwealth department under the aegis of Commonwealth legislation - you know, so detrimental policy that might impact negatively on the Disability Discrimination Act might in fact be caught before they are actually enacted.

MRS OWENS: You could bring it into the regulatory impact statement process.

MR STOJCEVSKI: That's right.

MRS OWENS: Maybe it's an idea that extends beyond the Disability Discrimination Act to look at all the other human rights legislation as well. I don't know whether there's any rationale for cutting it off and not thinking about sex

discrimination and the age discrimination bill and race discrimination as well.

MR STOJCEVSKI: We'd recommend its extension.

MS GOLDBERG: And you also need to have a look at the context where you've got inconsistencies between Commonwealth and state legislation, like in the recent cases in terms access to IVF. It may be appropriate to also make some - I mean, I'm not sure if it's within your brief to be able to make these recommendations, but in terms of referring responsibility to the states, to review their legislation in terms of their inconsistency as well.

MS McKENZIE: We also talked about states being able to challenge state laws. We've discussed that, if there's an inconsistency with the DDA, and we had another talk about standards as well where state laws might be inconsistent with standards. We suggested a different approach there, too.

MRS OWENS: So thank you for that recommendation because it was just something that got us both thinking really about a good idea.

MS McKENZIE: I noticed you recommend - in I think recommendation 15 you recommend that a tribunal approach would be a good idea, but wouldn't you run into difficulties with the judicial powers problem and so on?

MS MILLS: You probably would at this stage, but we feel that the tribunal approach is much better overall because it's a less formal environment in which to run these cases, and we feel that that's very important to have a less formal environment; an environment that is not weighed down by the complexities of a judicial system, and you will, by having a less formal environment, be able to achieve more satisfactory results, not only with the end result, but with the whole of the judicial process which is important; if you're going to be running a case, you need to feel confident with the process, you need to be able to understand the process, and that's why we think that the tribunal system would actually be more effective than the formal judicial process.

MS McKENZIE: At least some less formal procedures.

MRS OWENS: I thought the Federal Magistrates Service was meant to be less formal than the Federal Court.

MS MILLS: But it's still a court.

MS GOLDBERG: And the evidentiary requirements and procedural requirements.

MS MILLS: And the need for complicated documents and everything is exactly

the same as the Federal Magistrates Court; in the Federal Court it's not.

MS GOLDBERG: And it comes back to also the ability to be able - for Legal Aid to be able to provide assistance to people in that context because there are so many more formalities and requirements for exchange of documents and complex documents. In a court context, that limits our ability to be able to assist people.

MRS OWENS: You suggested in your recommendation 24 that:

> Regulation of disability discrimination by the DDA should not be assumed to constitute both an economic cost and a negative influence on competition -

and I think we've taken pains in our draft report to highlight the economic benefits and the broader community benefits and have I think basically concluded that given the limited information we've got on this to date that there doesn't seem to be a significant impact on competition. I have to stress that we haven't had a huge amount of input on that issue.

So we've basically reached a judgment, and we've been hoping we'd get more information. So we are trying to ensure that we talk about the positives that come out of it. For example, in the context of employment, there can be real benefits from employing people with disability because it opens up the skills, it widens the skill mix that you can use and it just means that there are people that skills are being recognised, and it can also have beneficial effect on others in the workplace. So we do talk about all those things.

MR STOJCEVSKI: Yes, and I think there's - I'm not familiar with the research; I'm only familiar with the research via news reports, but - - -

MS McKENZIE: It's a very common kind of research.

MR STOJCEVSKI: But the health of a community, you know, and the wellbeing of a community is based on all persons' access to some basic citizenship rights, and I think there's more and more research in the area, and it might be worthwhile to track some of that research down; the research about social capital.

MRS OWENS: We're going to report on social capital.

MR STOJCEVSKI: There you go, it will be very handy for you.

MRS OWENS: We actually have cited our report in our report.

MR STOJCEVSKI: I think there's more of that research being presented be the

view is that the social indicator is speaking to the economic indicator.

MS GOLDBERG: And hopefully might be like in the past it used to be that women weren't able to take up jobs because of their sex, and in terms of people with disabilities, they're missing out on an amazing group of people that are intelligent and skilled, maybe not able to perform some types of jobs, but it's sort of in my mind an equivalent situation.

MRS OWENS: I think it is, too. I mean, there's certain jobs that some women don't perform or wouldn't want to perform - like very, very heavy carrying jobs. Not all women are - - -

MS GOLDBERG: But someone could - - -

MRS OWENS: - - - precluded from that either.

MS GOLDBERG: Yes, but some women could better than some men, too.

MRS OWENS: We hope for that day when disability is not going to be a barrier for people to do anything really.

MS McKENZIE: There's not assumptions that it's not possible to do things.

MRS OWENS: I don't have anything else.

MS McKENZIE: We haven't asked about every recommendation, but they're very clear and we've read the submissions. They're very helpful - all of them - to us. We found the oral submission very useful, too.

MRS OWENS: Thank you very much.

MR STOJCEVSKI: Thank you.

MRS OWENS: Have you got anything else you wanted to raise with us?

MR STOJCEVSKI: No. I think that just about covers it, but we would like to leave some of our publications with you - - -

MRS OWENS: Thank you.

MS McKENZIE: Sure.

MR STOJCEVSKI: - - - because we did see that obviously the education activity that feeds off particularly the Disability Discrimination Act is pretty important, so

just as an example of some of the work we do in the area, that is something you can take away and have a look it.

MRS OWENS: Thank you very much. We'll table it. Thank you. We'll break now and resume at 1.30.

(Luncheon adjournment)

MRS OWENS: The next participant this afternoon is the Australian Education Union. Thank you for appearing and thank you very much for your submissions. We've had a couple from you, and I'll ask you each to give your name and your position with the union for the together.

MS BYRNE: Thank you, Helen. My name is Pat Byrne and I'm the federal president of the Australian Education Union.

MR MARTIN: I'm Roy Martin. I'm the federal research officer of the Australian Education Union.

MRS OWENS: Good. Thank you, and I'll hand over, Pat, to you.

MS BYRNE: I just wanted to make a couple of brief comments, and first to thank you for your accommodation of our request to change the time of this appearance. I know we were originally scheduled this morning, but something came up that we hadn't planned. So we had to change that. So thanks very much for accommodating that.

MRS OWENS: It was absolutely no problem at all.

MS McKENZIE: No, not a problem.

MS BYRNE: Thank you. We really wanted to focus on just the two main issues today, although we're happy to take any questions, but we wanted to focus on two main issues, and the first being our view of the standards themselves, and Roy will talk about that, and also some questions about funding which we still see of major significance. We understand that your terms of reference don't allow you to make direct recommendations, but we think that it's an issue that we do need to raise. So thank you. Roy.

MR MARTIN: I think when we were here before, the standards had not been adopted I think, and I notice in the draft report, we are referred to as being very supportive of the notion of the standards and I thought it would be appropriate for us to put on record our reaction to the standards as they actually appeared and came out. We remain committed to the concept of standards. We believe that they have potential to solve quite a bit of strife and problem in terms of schools, but we're disappointed in the standards as they have come out because in our view they failed to resolve the major issues that we raised in our initial submission, and I think they do that in regard to two things.

Firstly in a public system they fail to locate the responsibility for the various implementations, and that's of considerable concern to us because as we said in our initial submission, in general, parents approach schools and often the conflict if it

arises or the discussion is between the school and the parent or even the individual teacher and the parent, and yet financially the onus lies with the system in terms of the way it goes. Our experience of what is happening is that the departments in a sense take the line of least resistance. So if the principal doesn't kick up, quite frankly, then it's dealt with at a school level and accommodated within the school, often putting pressure onto our members and the very issue of making the right arrangements for that person is not dealt with at an appropriate level, or of course it takes money out of the school budget that was intended for other purposes. So that's our first level of disagreement.

The second level of disagreement is that we don't think that it does sufficient to clarify what is actually the key area of contention which is the right of the parent or of the student and the parent in terms of a specific class and a specific school, and in some ways the guidelines seem to have two bob each way. They clearly imply a right of enrolment, but then for instance they say that in terms of unjustifiable hardship, you can consider whether there's a more appropriate location for the student to attend and the effect of the proposed adjustment on anyone else affected, which are the very issues that we raised. These are the issues that are in fact ending up in court, and we hope that the standards might do something to reduce the tendency to settle these things through trials of strength and through putting pressure on people. So we feel that the standards have failed to address the two major areas in need of further definition in the act itself.

MS McKENZIE: And the result presumably will be just as much disputation as there has been previously.

MR MARTIN: That's our feeling, yes. That still leaves all of those things open to disputation.

MRS OWENS: Roy, did you get involved in the standard-setting process? Did the union get involved? Were you consulted?

MR MARTIN: I'd have to say it was a long time ago. We were involved in some initial consultations. There was a pretty huge gap between the initial consultations and the time that these came up before MCEETYA, and I think I'm correct in saying that we were not consulted on a draft of the standards. We were consulted prior to the drafting of the standards, but we weren't consulted where we actually had a draft in front of us that we could talk about. That I have to say is one of the problems with the way that MCEETYA operates because once a document is headed for MCEETYA it's a ministerial document and is confidential to everybody else.

So they have this kind of paradox where they go through a consultation, but then once something is in draft form, it's not allowed to be seen by anybody but the ministers.

MRS OWENS: So there's a bit of concern really about the process which doesn't help you now with the education standard because it's gone through the process, but we are thinking about the process in the context of standard setting more generally for other standards. So you were consulted very early on in the piece, but when it came to the pointy end, you weren't consulted.

MR MARTIN: No.

MRS OWENS: And these two issues that you're expressing concern about, did you raise those in the initial consultations; the issue of - - -

MR MARTIN: Yes.

MRS OWENS: - - - the system-wide versus the schools and - - -

MR MARTIN: Yes. We did write a reasonably substantial submission in the first place, and essentially our argument was that what we wanted was a process and we wanted the standards to define a process which got the parties involved around a table and worked out what was best for everybody concerned, and what the needs were and those kinds of things, and then had processes of appeal and review and all of those kind of things.

But our view is that what currently tends to happen in some cases is that particularly some disability advocates - and I'm certainly not saying they're all the same, but actually say that, you know, the only way you get what you want is to go in and eyeball them and stand up to them, and that's not a good context to start discussing what the needs of people are in schools and so on. So we wanted a process where you would involve schools and you'd involve the parents. You'd involve the students, and very often what you can find out is that - I mean, if this is provided, then the situation changes and people adopt a different attitude and so on.

MS McKENZIE: And presumably the department. You'd want to involve the department as well.

MR MARTIN: Yes.

MS McKENZIE: I mean, it sounds as if one of the problems with the standard currently is you're almost being treated in a way as if you were single schools rather than part of a system.

MR MARTIN: I think the difficulty is we fall between the two. In a single school they've actually generally got more control over their budget in the way that they operated. But what happens is that the decisions and the implications are at the

school level, but the budgetary strings stay with the department, and indeed in our view the financial obligations stay with the department, and that's the difficulty as to where we go.

MRS OWENS: So your preference would be to have the system responsible for the making adjustments. So in say the case of Victoria, it would be the Victorian Education Department would assume responsibility which would actually make it quite difficult for that department to claim unjustifiable hardship, wouldn't it?

MR MARTIN: Yes, I think that would go into the other issue which is the extent to which the department can determine where it best provides the service which is into the other area there.

MS McKENZIE: So that's a grey area, that one. I mean, if a student turns up to a school - a student with a disability - and the parents say, "I want to enrol my child at that school and no other one," and you want to say, "Look, there's a school up the road that actually has got a unit that caters better than we can," the standard leaves it unclear where you stand.

MR MARTIN: Yes. I think we'd see that as a little bit cut and dried in terms of the way you presented it. We'd hope there'd be a bit more discussion around the thing and say, you know, the best interests of your child may be better served. It's not even just specialist facilities. I mean, as you will get to in the funding, there's the whole issue of training and of teachers' aides and so on. I mean, I've never actually worked it out, but it's mind boggling what they - the potential range of skills hat are needed by people to cope with any disability that might come along to a school. So again that needs to be dealt with at a departmental level so that you ensure that you get specialist assistance; trained for that specific disability.

Unfortunately at the moment, we've actually come across cases where a teachers' aide will actually go on a course because there's a student in the school with a particular disability, and in their own time off their own bat they go and train so that they're better able to cope with that student, and then the next year they might become the library assistant or something else. I think one of the most inadequate areas is the whole area of the recognition of the skills of the teacher assistants, teacher aides, and some kind of system that ensures that there's a match between the skills they develop and the skills they're required to use on the job. I mean, that would be to everybody's benefit.

MRS OWENS: I just want to clarify something. You are concerned in terms of that second problem about the lack of clarity in the standards, but you're of the view that it would be appropriate sometimes to think about a more appropriate location for the child rather than the parents say, "We want to enrol our kid in this school in this area." Sometimes from your perspective, it may be more appropriate to be able to

say to that parent. "Well, this school in this area - you might have a bit further to travel, but we do have the equipment there. We've got the facilities, we've got the aides." So you want that flexibility, but you want to put in place to ensure that that's worked through. So you're really looking for, like, a protocol?

MR MARTIN: Yes.

MS BYRNE: Yes. The capacity of the school to be able to provide a suitable educational program and suitable physical facilities is really important, and it seems to me that there has to be a balance between that capacity and the needs or the wishes, if you like, of the parent, and I think that too often that is left to a confrontationist approach if you like at the school level where a school that feels it doesn't have that capacity for whatever reason feels as though they're being obliged, if you like to enrol a student that they don't feel comfortable or able to deal with. That's I think the process that we're talking about.

There have to be clearer guidelines or a clearer commitment from the department, from the system, to actually enable the school to be able to provide the program that's required, and that's where teachers feel really - they feel the pressure because they want to do the best, but they're suddenly being asked to do something within the constraints of a budget that hasn't allowed for anything else or doesn't allow for anything else, and not necessarily with appropriate professional development for the teachers concerned as well. That makes people feel defensive, it makes them feel afraid, it makes them feel pressured, and you get all the wrong responses.

MRS OWENS: It's all too hard.

MS BYRNE: That's right.

MRS OWENS: There's another standard which is just being finalised at the moment which is the access to premises standard where there is a protocol that's being developed. I mean, it's a totally different context, but I'm just wondering whether that - - -

MS BYRNE: It's a similar sort of thing.

MRS OWENS: I'm sure you don't want to open up the whole standard again because it might take another few years to get it going again, but maybe there's - I'm just trying to think through what we can be recommending on this. So what are you wanting to do?

MS BYRNE: That departments develop protocols about it because that's what - in the absence of those protocols that are agreed, if you like, between departments and

schools, what's currently happening is that schools are feeling as though whatever they say isn't being listened to, and it's to do with budgets, and that's a really big concern for teachers in schools.

MR MARTIN: I think as well it goes even to sort of the automatic - I mean automatic in a negotiated sense, but provision of other resources. For instance sometimes it might require a reduction in the overall class size of that particular school or it might involve a certain amount of teacher assistance which is generally quite inadequate. I mean, in some cases you have one day a week where they clearly need it on a full-time basis and those kind of things. So the whole process involves discussion of all of the elements including the resource provision, not just simply should the student go there or not kind of thing in absence of other criteria.

MRS OWENS: So you've really got to address it on a systemic basis - on a system-wide basis - don't you?

MR MARTIN: Yes.

MRS OWENS: Because if you're talking about reducing class sizes there, then that actually has implications for the resources in general going to the school and the teachers that are going to be allocated to that school and so on. So you really do need to be aware - the department needs to be aware of what the needs are of that school in a broader context to deal with - - -

MS McKENZIE: It can't just be regarded as the school's problem.

MR MARTIN: No.

MRS OWENS: And I think probably there's a potential for greater efficiency - I'm talking as an economist now - in terms of how you allocate your resources and - - -

MR MARTIN: Absolutely.

MRS OWENS: - - - and maybe some sharing between schools. I mean, if each school is having to deal with it on their own, you potentially can have wasted resources, and you talked about the teacher's aide that goes and gets the training for the one kid, the kid goes through the school, there's that aide there going and working in the library when they've got these skills that could be used elsewhere in the system.

MR MARTIN: Absolutely.

MS BYRNE: That was the first major issue.

MR MARTIN: The other things on the standards, I mean, the way they were introduced was quite unsatisfactory. I mean, for them to end up in the middle of a row between federal and state governments and all that kind of thing and that wasn't resolved adequately - in fact in the end, the Commonwealth just pre-empted the whole thing by saying they would be adopted in the face of the opposition of some of the states, and as we say in our response, we haven't got the capacity to examine and go through the KPMG accounting process and so on, but there was obviously a sufficient discrepancy between the view of some of the states and the federal government for there to be a need for further consideration, not for it just to be pushed through in terms of where it went.

MRS OWENS: Are states concerned about these particular issues that we're concerned about - the same issues?

MR MARTIN: Absolutely.

MRS OWENS: So you might find that the states would be amenable to this idea of developing protocols at the state level, regardless of what the standards are.

MS BYRNE: They would be. In terms of the protocols, I don't think that would be a problem. The issue is the funding and who is going to pay for that; where is the money going to come from because clearly it's going to require significant amounts of additional funding.

MRS OWENS: That's another issue because under the act, I mean, some of these things are meant to be happening anyway under the act.

MR MARTIN: Yes.

MRS OWENS: The fact that there's a standard is not necessarily changing the act.

MS BYRNE: I understand that. I suppose what we're saying is that what's currently happening is happening because of insufficient resources in a lot of instances; that schools are being asked to make do basically, to do the best that they can, and they're struggling.

MR MARTIN: I think in the sense that's the nub of the Commonwealth's argument, that what they're saying is, well, this should already be happening. So the standards themselves don't increase the cost. But in some ways, the standards clarify what should be happening, so they can actually increase the costs over what's currently happening, even if you can say, well, something else should be happening, and I think that that's kind of the area that they didn't resolve.

MRS OWENS: It's a distinction between what should be and what is.

MR MARTIN: Yes.

MRS OWENS: The potential incremental costs are higher because some of these things aren't happening; in other words, you're really implying that some aspects of the act aren't being complied with now because there's a resource constraint.

MR MARTIN: Because they've been grey.

MS McKENZIE: That's right. The difference is a bit complex because currently the prohibitions are so broad, you don't know what the individual content of them is and normally only find out when a complaint comes, whereas of course the standards are more specific. So you know up-front and, if you like, there's no room for - there could be alternatives under the DDA as it currently is. It's very broad, but then there's no room for alternatives and, yes, you have to do it.

MR MARTIN: In a sense to link the two points, I mean in some ways we also acknowledge that the vagueness in regard to the public system is equally true or possibly even worse in particular ways in regard to the private system, so that the standards do leave the private system in quite a considerable degree of uncertainty in the same way. But our view is that that should not lead to the claims which they're currently making in regard to the nature of the money, and I've tried to explain in the submission the way that the AGSRC - the average government school recurrent costs - works. I'm afraid most people find it highly confusing and highly complicated, and the arguments become very bogged down in numbers and so on.

But the basic point we're making is that within the overall funding, that goes to private schools - sorry, the overall funding that goes to private schools is based on the funding that goes to public schools, and that funding does include funding for students with disabilities. So therefore to simply give a grant across on a per-student basis would be a form of double dipping.

I mean, in saying that, we acknowledge that what we're saying is that the money is in the sector as a whole and part of the problem is - and I mean the most obvious example is that if as a result of your inquiry states suddenly spend more money on students with disabilities in government schools, the effect of that through the AGSRC is actually to increase the per-student funding to every student in a private school, not just the ones with disabilities, and it's that kind of silliness I think which is producing this debate. So what we're saying is that the money is there, but because it's not collected together and apportioned in anyway, it's just spread generally over the sector.

MS McKENZIE: So you would be in favour of an approach which, say, took out of the calculation students with disabilities and then perhaps allocated money

specifically for their benefit, and if that were the case, then you could carry your funding as a student with disability from school to school if you were moving school.

MRS OWENS: It was one of the ideas we floated in our draft report. It was just this idea that you make a distinction between the basic educational needs of all students, which then get funded in whatever way is deemed to be appropriate, and then you think of the additional incremental needs of the children with disabilities which could vary according to the type of disability, and I'm thinking - I don't know if you're aware of the hospital funding arrangements, but I'm thinking case mix funding where the funding that is allocated in most states now to hospitals based on the diagnosis of the patient - and there's different levels of funding depending on the severity of the diagnosis.

So I was trying to think of the sort of more rational way of doing this than seems to be there at the moment. I cannot pretend to even get close to understanding how the funding arrangements are working because - I mean, you can clarify this for me in a minute, but I just wondered whether we should be standing back from this and saying there are certain requirements that all children have to an education et cetera et cetera, and then you've got these children that have additional requirements which need to be funded in a rational way. Maybe that's opening up some sort of Pandora's box that you don't want to see opened.

MR MARTIN: I think that we should - I mean, I think it's interesting to examine alternatives. I'll put up another alternative in a moment. The difficulty that I think I would have and we would have with that one - and it is actually typical of what's happened in the funding of private schools in general, but it's the individualisation of funding to a particular student when in fact they're system-wide students. So for instance the bulk of the money, that comes in terms of 16,000 - is that the latest figure of the independent schools or have they opted to - - -

MRS OWENS: It seems to vary a bit, but - - -

MR MARTIN: Right. I mean, the bulk of that 16,000 is actually made up of the extremely high cost of students in special schools. So to carry that forward to an individual in an ordinary classroom situation may in fact mean that particular student getting considerably more than an equivalent student in an equivalent situation in a government school. Also to average the cost, I'm sure you would be aware that the cost of 16,000 might represent 1000 for some people and 40,000 for another, and I think there are really difficulties in terms of individualising that.

The third one is the whole problem of I guess economies of scale that a fair proportion of that money actually goes on services like running a therapy service or these kinds of things; psychological advice, which you can't sort of say, "Well, we'll knock off 15 minutes of that person's time per week because that's the proportion of

money that is going to the private school," and so on. Even if you do, what you actually do is increase your per-unit costs back in your other system so you get into an escalating system of rising costs. So whilst I think the theory is worth looking at, I think the practicalities of it are extremely complex.

MRS OWENS: Actually I think it's more than complex, I think it's a mess. I think it's a total mess, because - - -

MS McKENZIE: I agree.

MRS OWENS: - - - we're not just talking about this funding - you talk about the average government school recurrent costs. I presume you're taking about the Commonwealth funding.

MS McKENZIE: Is that state or Commonwealth or both?

MRS OWENS: I thought this was Commonwealth funding.

MR MARTIN: It's used by some states. It's the system that the Commonwealth uses.

MRS OWENS: But isn't it the system used to allocate the Commonwealth funds.

MR MARTIN: Commonwealth funds, yes.

MRS OWENS: Then you've got a different system to allocate state funds.

MR MARTIN: Yes.

MRS OWENS: I think what's getting all mushed up in this is that some of the figures that the independent schools associations have been quoting have been the state funding, and then some other submissions have talked about Commonwealth funding. My interest is really in terms of at the school, at the receiving end, what are the funding arrangements wherever, whatever the source.

MS McKENZIE: Yes, and how can - - -

MRS OWENS: And how is it allocated?

MS McKENZIE: How can the needs of a student with a disability best be met by some sensible funding arrangement?

MR MARTIN: First of all I think we would accept that a student with disabilities should have the same rights as a student who hasn't. We might argue about the latter

in terms of it, but we accept that the two should apply. I think I'd have to say off the top of my head that should also include the fees presumably so that - I mean, if the fees of a private school are $15,000, then one would presume that that would be - the parents would still pay on the same basis as other people, not cover the full cost.

MS McKENZIE: Yes, absolutely.

MR MARTIN: An alternative way to look at it I think is to actually quarantine out or select out of the pool of money that currently goes to private schools that proportion of it that comes about because of students with disabilities in state schools, and then allocate that specifically to students with disabilities. These are just various ideas of ways you can deal with it.

MRS OWENS: You talk about this issue of distribution; once it gets to the school, you just say it just goes into the general funding arrangements.

MR MARTIN: Yes.

MRS OWENS: And I think that's the problem with the way this has all - it's all calculated now. I think it's so lacking in transparency and there is so much confusion that I think it's time to sort it out. I think that there is a real argument to sort out these funding arrangements so everybody is clear about what they're getting, and they're swings and roundabouts, because you're saying that this AGSRC brings in an amount for the amount that's allocated to the students in government schools and for spending on disabilities, but there's certain services that are available - system-wide services that are available to children in government schools that aren't available to children in private schools, and we heard about one yesterday which was - what was that service?

MS McKENZIE: It's the Statewide Vision Resource centre.

MRS OWENS: That's in Victoria.

MS McKENZIE: That's one, which according to the submissions made yesterday is available either primarily or wholly to state schools. In other words, they can access that centre and reduce the costs of some service provision, which of course private schools can't do. Similarly there seems to be some difficulty with the costs - the mother of another student made submissions to us yesterday that students at a private school - he's a visually impaired student, and there seems to be difficulties as far as the costs which that school must bear for the brailing of books for that student.

There may well be economies of scale if the state can access that service, you know, as a system, and the same goes for speech therapy. If you've got a central speech therapy system, it's going to be much better of course than independent

schools each having their own speech therapist. That of course begs the question - and I understand this - it begs the question of why independent schools can't band together and set up systems where, you know, you have in effect a central speech therapy system that applies to numbers of them.

MR MARTIN: And the other point is that often where the facilities are available, they're actually charged to the government system and are reflected in the AGSRC which is another sore point. I mean, there are instances of services that are available to both sectors, but which actually appear on the books of the government system and go into the AGSRC.

MS McKENZIE: So if the service is just not available to one sector, that might be a different matter.

MR MARTIN: Yes.

MRS OWENS: So we've got all sorts of different arrangements, and I'm just wondering - we can't, as you actually acknowledged at the beginning of this hearing, go into a lot of detail about these funding arrangements in our report because we're going well beyond our terms of reference. But we thought that we might, just like we did with the - in our last chapter, the one you were referring to where we talk about the funding following the child, we might just raise the complexity of these arrangements for further consideration.

I'm not surprised that they're complex. Any time you have a system where you've got Commonwealth and state, and then you've got government and private, it's the same for health service provision and financing. It's the same across the board. So it's not in the least bit surprising, but I just thought at least we could start to think about how we tackle this in a sort of a sensible way so that you don't have all these conflicts and, you know, the concern from the government system that maybe the private system - they shouldn't be complaining too much because they're probably getting more than enough which - and I'm not sure whether that's the case, and vice versa.

You don't need to set up these unnecessary conflicts between the systems on this issue. I think the kids with disabilities are too important.

MS McKENZIE: The one thing I have to say though is that the matters you've raised about resourcing and training when students with a disability come to a school are exactly the same as the ones raised by independent schools. They also have raised exactly - so they are common issues in both systems.

MR MARTIN: In terms of the system that I'm asking to be considered as well, I think there are people in DEST - the Department of Education, Science and Training

- who could actually work out what percentage of the AGSRC comes about through students with disabilities. It might be 3 per cent, it might be 7 per cent. I have no idea. That money could then be taken from the pool of money that's given to private schools and then divided up specifically for students with disabilities, and it would be interesting to see what kind of a figure that arrived at, and I think in our appendix we give you some work that's been done in the ACT in Catholic systems, and again it's even more complex as you look at more and more systems.

But certainly in some one of the size of the Catholic system, we believe there's reason to believe that it would be shown that they are in fact quite well funded for the number of students with disabilities that are in the system - - -

MS McKENZIE: You see, systems are one factor, but in a way, the small independent school which isn't part of any system is another complication factor there.

MR MARTIN: I find this very difficult to deal with because you certainly don't want to discriminate against a student, but the difficulty is in a small school, there is no reason why that student can't move on again the next year, and so on and so on. It could become quite resource intensive when you're dealing with one-off situations in small schools. So that things like training, the building of resources and those kinds of things, you've got no guarantee as to how much they're going to get used for the investment that you've put into them, and I think that raises a whole set of issues. I'm not quite sure what the answer is, but there are clearly some financial issues in that.

MS McKENZIE: Exactly. That same matter was raised with the independent schools, and it would be the same with a very small state school.

MRS OWENS: I've got appendix 1 open in front of me at the moment. You just referred to that a minute ago, and I'm just wondering whether the calculations in that are an overestimate. You might be able to take this on notice, but this just proves that I actually do go and read the appendices in detail, because I've been trying to get to the bottom of all this. But it refers to a figure of 70 per cent as:

> All expenditure on special education is included in the calculation of average government school recurrent costs, of which the CEO is currently receiving 70 per cent.

I understand it's a sliding scale and 70 per cent is at the top end, and that would be for the really small, small schools, and up the other end of the scale, you've got the larger - or in the Catholic school system, I suppose, you know Xaviers and those sort of schools which would be - they get 13.7 per cent. So there is a sliding scale.

MR MARTIN: That's true. I should point out there are only two schools in

Australia that get 13.7 per cent and Xavier is not one of them.

MRS OWENS: Which one? Was Xavier one of them?

MR MARTIN: No, it isn't. I think Sydney from memory. I can provide it, but it's a bit of a myth that a lot of them are at the lower end. The figure of 70 per cent there though is specifically the Catholic system. It's the CEO, and that was - - -

MS McKENZIE: So it's the system as a whole.

MR MARTIN: It's the figure for the ACT Catholic system.

MRS OWENS: It's the ACT.

MS McKENZIE: ACT aggregate system.

MR MARTIN: Yes.

MRS OWENS: So it's not really calculation that we can use to be representative of even the Catholic system across the board because the ACT - I don't know what the Catholic schools look like in the ACT, but that's inferring that those Catholic schools in the ACT are quite small.

MR MARTIN: Yes, and the - - -

MRS OWENS: And they're all on the 70 per cent.

MR MARTIN: The Catholic schools in the ACT are actually funded less than Catholic schools in all the other states and territories. So if anything, it would be even more true for schools not in the ACT.

MS McKENZIE: But as a school-by-school matter, it's impossible then to work out what actually the funding is. All I can say is it's very complicated.

MRS OWENS: But I think your calculation is interesting, but it doesn't really - we can't extrapolate from that to the rest of the system.

MR MARTIN: I think the same methodology could be applied to other systems.

MRS OWENS: The methodology, so long as we weren't using the 70 per cent.

MS McKENZIE: Not the percentage.

MR MARTIN: My view is that it would actually - would likely be higher

elsewhere because the Catholic schools in the ACT are the lowest funded Catholic schools in the country.

MRS OWENS: Yes, but you'd be applying elsewhere a range of percentages. To do it accurately and to be fair, you'd have to apply a range of percentages.

MR MARTIN: No, there's only one percentage.

MRS OWENS: No, this is a sliding scale of percentages. The 70 per cent is at the upper end of the - - -

MR MARTIN: No, but the Catholic schools aren't on the sliding scale.

MRS OWENS: No, I'm talking about schools generally. I'm just trying to get a picture in my head of what it actually all adds up to, and I was hoping that this appendix would be able to just be - I could use this as indicative, but I can't.

MR MARTIN: No.

MRS OWENS: Except for the Catholic schools and the ACT.

MR MARTIN: Yes. That's correct, but the other sort of interesting point to note is that the independent schools have less students with disabilities. So although they may be lower down the sliding scale, they've also - that's offset to some extent in the calculations by the fact that they've got less students with disabilities. So the figures could work out in some other way that would equally show that they were funded. That's the point. But we haven't done those calculations.

MRS OWENS: There's other points that Trevor Cobbold makes in the other appendix that you've got there about the role of government schools having to - they have a broader role. You need more schools and government schools have to provide access, and they may have some students with more severe disabilities and so on, and special needs. So again it comes back to a whole lot of other factors which would make it a very interesting exercise of really trying to beaver down and get to the bottom of it. Maybe we should move on.

MR MARTIN: I had nothing else to say.

MS McKENZIE: They're the two major points that you wanted to - - -

MRS OWENS: I wanted to deal with that schools issue, the private schools issue. I'm just seeing if there's anything else from your submission that I'd like to raise. Coming back to this issue of funding - and as I said, we can't get into a detailed discussion in the report about funding per se, but one of the issues that we have

raised in the report is who should pay for adjustments. So it's indirectly relating to the funding issue because we're thinking at the moment of making it clearer in the act that there would be a requirement to make reasonable accommodation. It's been very unclear in a legal sense whether the act actually was requiring that reasonable accommodation, reasonable adjustments be made for people with disabilities in the case of students with disabilities.

So in that context we have been thinking about, well, if there is a requirement to make adjustments who should pay, should it be the government, should it be the organisation - in your case schools or the system - or should it be the individual or in your case the parents of the student, and what should that balance look like? So to the extent that we are thinking about the dollars, we are thinking about it also in that context. We have heard from some parents including parents yesterday about how they end up having to actually pay quite a lot of money to provide equipment for their children and support their children over and above what other parents have to pay. But there is the question the extent to which schools or the education system or the parents should be paying within the schools for the equipment and the extent to which it should be the government more generally through government programs. Have you got any view on that?

MS BYRNE: Because we cover government schools, ultimately if we're talking about schools providing, then we actually mean government. We would be opposed I think to expecting parents to pick up that cost. We're saying that education is something that every child should have access to and the opportunity to maximise their learning potential. To the extent that requiring parents to pay for specific, you know, modifications or whatever that have to happen is going to preclude a child from being able to access that facility, then we would say that that's not appropriate, particularly not in the system of public education.

MS McKENZIE: Especially when you don't require other non-disabled children simultaneously.

MS BYRNE: That's right. We have an ongoing problem with the government as it is because parents, as you would no doubt be aware, are expected to pay more and more out of their own pockets for what is supposed to be a free public education system. Obviously our position would be that we would expect the government to pay for that.

MR MARTIN: The difficulty with leaving it to the school is that it can quite in my submission make a fairly big difference to that school's budget. So catering to the student with a disability would actually take money away from the student who didn't have a disability. I think that would enhance the tensions that already exist within the school in all kinds of ways. So it would be quite undesirable. So our view is quite clear, that a student with disabilities in the school should have their needs

funded as an addition, as a top-up to the money that the school would normally get.

MRS OWENS: That's all I had to ask you about, and I was wondering is there anything else you'd like to raise with us?

MR MARTIN: No.

MS McKENZIE: Very useful submissions.

MRS OWENS: Thank you very much.

MR MARTIN: Thank you.

MS McKENZIE: Thank you very much indeed.

MRS OWENS: We'll now close I think. Thank you very much for coming today, and I now adjourn these proceedings, and the commission will be resuming here at 9.30 am on 1 March at the Mercure Hotel in Brisbane, and more details about the hearings in Brisbane and Melbourne again next week are available on the commission's web site. I now close the proceedings today.

AT 2.25 PM THE INQUIRY WAS ADJOURNED UNTIL
MONDAY, 1 MARCH 2004

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