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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO DISABILITY DISCRIMINATION ACT

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

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON TUESDAY, 15 JULY 2003, AT 9.11 AM

Continued from 14/7/03

MRS OWENS: Good morning, and welcome to the public hearing for the Productivity Commission inquiry into the Disability Discrimination Act 1992, which we will refer to as the DDA. My name is Helen Owens and on my left is my Associate Commissioner Cate McKenzie. The hearing will have breaks for morning tea, lunch and afternoon tea, and we will need to stick fairly closely to the timetable.

On 5 February this year the government asked the commission to review the DDA and the Disability Discrimination Regulations 1996. The terms of reference for the inquiry asked us to examine the social impacts of the DDA on people with disabilities and on the community as a whole. Among other things, the commission is required to assess the costs and benefits of the DDA and its effectiveness in achieving its objectives.

We have already talked informally to a range of organisations and individuals, and the purpose of this hearing today is to provide an opportunity for interested parties to discuss their submissions and their views on public record. We will be holding hearings for the rest of this week in Sydney and in Melbourne next week. We have already held hearings in the other Australian capital cities. We will then prepare a draft report for public comment which we will release in October. There will be another round of hearings after interested parties have had time to look at the draft report. We like to conduct these hearings in a reasonably informal manner, but I remind you that a full transcript is being taken. For this reason, and to assist people using the hearing loop, comments cannot be taken from the floor, although that is not an issue at this stage of the morning.

If anyone in the audience does want to speak, I will be allowing time at the end of the proceedings today. Participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. You 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 now invite the Royal Institute for Deaf and Blind Children to appear. Welcome, and could you please give your name and your position with the institute for the transcript.

DR LEIGH: Certainly. My name is Greg Leigh and I am assistant chief executive for educational services at the Royal Institute for Deaf and Blind Children, and conjoined associate professor of special education at the University of Newcastle.

MRS OWENS: Good, thank you. Can we call you Greg?

DR LEIGH: Please.

MRS OWENS: And you can call us Helen and Cate.

DR LEIGH: Thank you.

MRS OWENS: Thank you for the submission. As I mentioned to you informally before we started, there are a lot of common elements in your submission with others that we have received from the independent schools sector, so we appreciate just having some of those points reinforced. But I understand, Greg, that you would like to introduce your submission briefly, so go ahead.

DR LEIGH: Thank you. The Royal Institute for Deaf and Blind Children is Australia's largest independent special educator. The institute provides special education programs across a range of types. We operate three special schools, all independent special schools, five special preschools. We operate a support service for students with sensory disabilities, vision impairments and hearing impairments, in regular schools, into the independent school sector, and we operate a range of ancillary support services for students who have sensory disabilities across both the government and non-government sectors. In addition, in affiliation with the University of Newcastle, we operate a centre for professional training and research called Renwick College, which is one of two major providers in the country for tertiary education and research in the area of education for children with sensory disabilities.

Indeed, we currently have over 80 students undertaking postgraduate degrees at the University of Newcastle through the institute, in the area of education for children with sensory disabilities. It's in that context of having, we believe, a reasonable perspective across the types of service provision for students with disabilities and the sectors in which those children are educated that we were moved to make a submission to the inquiry. We have, however, in the submission focussed in particular on one issue that we see as pre-eminent, and that is the issue of the adequacy of funding arrangements, which extend to provision of services for children with disabilities and, from our perspective, in particular children with sensory disabilities in the independent school sector.

The reason for that issue being so significant from our perspective is that, as I have already indicated, we provide a student support service for students with sensory disabilities who are educated in the independent school sector. In the state of New South Wales, not unlike many other states in the Commonwealth, children who are integrated into regular schools who have a sensory disability, are provided with support services in the form of itinerant teacher and specialist additional support variously, according to the sector in which they are educated.

In New South Wales, if a student attends a government school then the necessary support services, typically school based services and itinerant support services, are provided by the Department of Education and Training. In metropolitan Sydney, two of the three Catholic Education Offices provide specialist itinerant teacher support for students in their systemic schools, but until approximately nine years ago, when the institute commenced its service, if a student was enrolled in an independent school there was no specialist itinerant support structure available for those students in that sector.

Since the advent of that service provided by the institute as a service to the sector, the service has grown to the point that we now have 89 students with hearing impairments in independent schools supported under the scheme, and 38 students with vision impairments. Of those, more than half of the students are seen for in excess of three hours a week, anything up to 12 hours a week for a Braille-using student in a school. Only approximately 10 per cent of the cost of that service is borne currently by the schools, the rest coming from either government funding or the charitable support provided by the donors and supporters of the institute.

MS McKENZIE: Can I interrupt you and ask you a question?

DR LEIGH: Please.

MS McKENZIE: Is this the only service of its kind in Australia?

DR LEIGH: No. The Cora Barclay Centre in South Australia - - -

MS McKENZIE: So it's similar to that?

DR LEIGH: Indeed, yes.

MS McKENZIE: Okay. We've heard submissions from Cora Barclay. I just wasn't certain whether it was a different - - -

DR LEIGH: But the question is an important one, because it goes to the differential way in which these necessary services are provided across the country. In Queensland for example - a student in an independent school in Queensland is eligible to receive these services from the government system; not so in New South Wales and not so in any other state that I'm aware of. In other states there is no Catholic education system. In some states there is no Catholic Education Office systemic support for students with sensory disabilities in regular schools. In New South Wales, as I said, there is, but only in two of the diocese, so students in rural New South Wales and in one diocese in Sydney get support that is largely school based and not necessarily specific to their sensory disabilities.

An issue that I would add for the record, I guess, is that experience of working with students with sensory disabilities suggests, or tells us very definitely, that generic training, or generic support services that may be made available for a student with a learning disability, or even physical or intellectual disabilities, in a regular school are not necessarily appropriate to support the needs of a student with a sensory disability and the level of specificity of the support services that are required suggests the need for highly-trained and very specifically-trained teachers and adjunct service personnel to be available to provide those services. In addition, in the area of vision impairment, services such as ours provide an absolute necessity - and that is the provision of alternate format publications for the students enrolled in those programs - Braille, large print, to provide access to the curriculum on an equivalent basis to the other students in that program.

MRS OWENS: Can I ask, with the highly-trained teachers do you need them all the time or is it just to do additional work? Are they part of the core or could you rely on having teachers, generally-trained teachers, plus these highly-trained teachers for some parts of the course?

DR LEIGH: For the students that I've talked about, that are on our student support service, by definition they are all students who, for the majority of their time, are able to access the curriculum through the input of their regular school staff and teachers. However, they have needs, some of which are best met by the specialist input for a period of time each week, and all of them have needs which need to be understood and catered for in the day-to-day environment. Understanding and catering for those needs needs to be the product of specific information being provided to their teachers and specific understandings being in operation for them on a day-to-day basis. So our support services operate in part as a direct service to the students, but in the main as a service to the regular classroom teachers to ensure that the environment is accommodating.

MS McKENZIE: So it's really educative for both.

DR LEIGH: That's correct, and indeed we actually don't call our staff in this particular context itinerant teachers, we call them special education consultants on the basis that their work is, at least in part or in the large measure, consultative with the schools and the teachers who are working directly with those students.

MRS OWENS: Do your services cover all independent schools in New South Wales, or just - - -

DR LEIGH: Metropolitan Sydney.

MRS OWENS: Just metropolitan. So what happens outside the metropolitan area?

DR LEIGH: There are relatively fewer independent schools outside of Sydney, but at the moment those schools are not able to draw a service from us other than in a couple of cases through our remote service delivery on a consultative basis. We have in fact begun this year trialing a videoconferencing support service to independent schools in northern New South Wales, to see the extent to which that service delivery paradigm might be suitable for supporting a student in an independent school.

MS McKENZIE: And that's this year you're trialing that?

DR LEIGH: That's this year, yes.

MS McKENZIE: Can you say anything about how the trial is going?

DR LEIGH: Yes, it's incredibly resource intensive and, because the school concerned doesn't have their own videoconferencing facilities, it has necessitated the student and the teacher travelling into a TAFE college videoconferencing support centre. It has proved to be, in terms of teacher information and teacher support, a very valuable service and we would anticipate that continuing in some way, but for the direct service to the student concerned it's not necessarily proving to be either popular, from the student's perspective, or really practical from the situational perspective. But it does speak to the issue that we include in our submission. The irony of this is, in that particular location, there are government support services on the ground that are providing an itinerant teacher support to students in government schools in that same town but is not available to the students in the independent sector.

MRS OWENS: So that really does force those kids into the government system, doesn't it, at the end of the day?

DR LEIGH: Or if they choose not to then they make a sacrifice in terms of the quality of support that is available. Indeed, if you consider - I can't give you statistics on this, but anecdotally in Sydney we would have, I believe, a higher proportion of children with sensory disabilities in the independent school sector than anywhere else in the country as a consequence of the fact that there are specialised support services available to that sector through the institute's support. Over the nine years we've watched it grow from four or five students initially to the 80 or 130-odd students that we now have.

MRS OWENS: Can I just clarify what happens in New South Wales vis-à-vis South Australia. When we talked to the Cora Barclay people that came in Adelaide to see us, they mentioned that if the children receive services from them from very early years, that they were virtually locked into staying in the independent school sector; it reduced or limited their choice of where they could get their schooling. Do those sort of constraints apply in New South Wales?

DR LEIGH: No. If we look at our services across the board - and I realise now that I missed probably one of our most important ones when I was profiling the organisation, and that's our early intervention programs - we provide home based and centre based early intervention programs for children with both hearing impairment and vision impairment and those services, as a matter of policy, are not necessarily articulated with any other service that we provide. Children may - from the age of diagnosis - come into one of our early intervention programs and may or may not go into one of our preschools; may go into a community preschool or an alternative organisation's preschool and even at that point, out of preschool, may go into one of our independent schools, may go into an independent regular school, may go into a government special school. There is no sense of necessary articulation with any of those services. In fact, we have children moving in and out of sectors across their education experience.

MRS OWENS: So it's a much more flexible system.

DR LEIGH: Yes.

MS McKENZIE: But while I understand what you're saying about the early intervention programs being provided, wherever the children might go to school, is there a point at which - if they then continue with the government school system - the government services will in effect take over and your services will not be provided?

DR LEIGH: Indeed. In fact, from the perspective of our early intervention services, when children start in a formal school program the early intervention service is withdrawn for that student. If they were, however, to go into an independent school, then they would likely pick up on our student support service in that independent school.

MS McKENZIE: In the end it's a bit the same, I think, as I think it is with Cora Barclay, except the choice seems to be able to be made later.

DR LEIGH: Yes. If I understand the Cora Barclay issue, it's that they ideally would like to be able to continue their student support service into a government school.

MS McKENZIE: Yes, they told us that.

DR LEIGH: Indeed, it's partly the same issue that, I guess, we're making - that there is the potential for rationalisation of these services that says we could be providing for kids across the entire sector in a cooperative way that actually meant the overall cost of provision of those services was lower and the quality of opportunity - not necessarily even the equality - but certainly the equality and quality of opportunity for access to those services could be greater across the board.

MS McKENZIE: Yes. Cora Barclay made the same point.

DR LEIGH: In fact, the essential point of our submission is that it seems illogical that what is essentially a strong public policy initiative, to say children should have the potential - or family should have the potential to be able to choose the schooling sector that they wish to have their child educated in, is not necessarily met with an overarching structure that enables that in a cost-effective way. It's certainly the case that the cost of individual provision of these services does not differ across the two sectors, but the capacity of the sectors to respond to it - one with a large infrastructure and one that may in fact be a series, or is in fact a series of small independent businesses or independent enterprises with a relatively lower resource base - the potential for those two to respond in the same way is clearly quite different, and we experience that.

We only ask for a small contribution to the cost of our services from the independent school sector and even then we find schools often incapable of - sorry, either unable or unprepared to meet the cost of that contribution. If they were looking at the real cost, for example, for a Braille using student in senior secondary, the real cost of the sort of services we provide to that student extend up to approximately $70,000 per annum.

MS McKENZIE: In effect the additional cost that you bear is borne through your - - -

DR LEIGH: Through the donor support.

MS McKENZIE: Your other donations and funds.

DR LEIGH: That's right. If the real cost of that were to be passed on to the school, it would clearly be a basis for unjustifiable hardship under the act, which in itself seems self-defeating. The funding system is not there to actually support the principles of the act. Either requires a level of overarching consideration that says, "Is there a better way to do this, that we could fund a system that logically could provide for these services wherever the kid happens to be?" Or, alternatively, a system that says, "We need to look at this on some sort of means-tested basis prior to somebody bringing a claim under the act that says we should be funding services within sectors on the basis of their capacity to provide those services rather than on the basis of necessarily providing everybody with the same quantum," because the same quantum doesn't work in the same way across sectors when you've got the economies of scale associated with larger enterprise.

MS McKENZIE: You make a really good point about the relationship between funding and how the DDA works. Traditionally it's said that the DDA doesn't relate to funding, but indirectly it does. If the funding is not there and you provide a lesser service, you may well be discriminating. Similarly, if the funding is not there you may be able to claim unjustifiable hardship; whereas if the funding were there you couldn't do that.

DR LEIGH: Indeed.

MS McKENZIE: So in both ways it impacts on the act.

DR LEIGH: We see it as a little different to other services that are transient in their service provision and where there are clear alternatives. If someone, for example, seeks access to a retailer and on that one occasion cannot get access to it, then the choice of an alternative retailer or the period of time for which that person's lack of access is a significant impediment, is very sharply and temporally defined, but educational service provision is something that extends over a very long period of time and is one of those important life choices that really does come down to the need for a different set of structures and a different approach to public funding, we would argue.

It seems, whilst we clearly have been able to provide this service and support of the provision of this service, the sorts of levels of funds that are required to provide the service do detract from other things that we could be doing in other important areas of early intervention, for example. The level of funding available, even to us as an organisation, were it to be differently structured, could increase capacity across the sector for more students.

MRS OWENS: So your options with funding - let's try and work through them. The option is that the government steps in and provides full funding for the additional costs of meeting the full costs of educating the child in an independent school, which includes the additional costs of any support services that you might provide. So there is that option. The dollars could follow the child, so the government funds the children going into government schools and independent schools roughly at the same level, with possibly extra money for special needs or for infrastructure, or for whatever.

DR LEIGH: Indeed.

MRS OWENS: So that's one approach. Then you talked about means testing. Means testing always - you run into problems with means testing.

DR LEIGH: Indeed.

MRS OWENS: Because how do you apply it?

MS McKENZIE: Is it means testing of the school or the - - -

MRS OWENS: Yes, or the parents?

DR LEIGH: No, definitely we'd see it as - I would argue that it would be applied at the level of the school.

MRS OWENS: Of the school, right.

DR LEIGH: There's no question in my mind that the current capacity within the independent school sector differs very considerably between schools which under the old funding mechanism might have been identified as category 1 schools through to schools at categories 11 or 12. But the bottom line is still that it is an incredibly expensive process to provide support for a student - for example, a blind student who uses Braille. The capacity of the school to - we would argue it's not an issue that should be tested at the time that a complaint is made, but an issue that should be considered by the funding mechanism prior to the student gaining access to the school and either there needs to be a system that says, "We can assess the school's capacity to provide these services and augment that in such a way that it makes it possible for the school to provide the services," or alternatively there needs to be a funding mechanism that says, "All students will be funded according to the needs that they have to allow any school - government, independent, Catholic - to provide those services."

MS McKENZIE: Irrespective of the resources of the school?

DR LEIGH: Indeed.

MRS OWENS: I suppose there is the question of where the child might be best educated, whether it's in the mainstream school or in, say, a special school. In some cases, with a core group of kids, it might be cheaper to educate them in the special school, but then you're limiting the choice of the parents and the choice of the child to go wherever they wish. But there is a sort of conflict of objectives, isn't there? You either say the most efficient place for educating the child might be over in the special school rather than in the independent school sector or in a general government school - - -

DR LEIGH: Yes.

MRS OWENS: But then there's a mid-point which is to perhaps have a core of kids within the independent school that could be - where they are congregated together to get some of the special services.

DR LEIGH: Indeed. The issue of appropriateness of integrated versus separate education for kids with sensory disabilities - particularly for kids with vision impairments is virtually - is less than issue than it perhaps once was. There is almost no question in either education or literature or in practice now that a child with a significant vision impairment, in the absence of any other disabilities, is unequivocally best catered for in the context of a regular school education. Where there are other issues attending for that child the question of a separate special school becomes an issue. Indeed, one of our three special schools is a school for children with sensory disabilities and significant intellectual disabilities.

Where the child with a hearing impairment is concerned, though, that becomes a more significant issue of determination because the question of method of communication and language of choice comes into play. There is, without question, a significant number of children now and families now across the country where an alternative language - Australian Sign Language - or alternative communication mode, some form of manual communication, is the preferred option - that are seeking education in a regular school environment. The question then becomes what the best way of providing that is. We would tend to suggest that there are benefits both in terms of infrastructure costs, but also in terms of social and educational outcomes for children who are using sign language, to have some community of communication partners in that environment.

MRS OWENS: So a special unit perhaps attached to a mainstream - - -

DR LEIGH: Unit or a congregation of children using - drawing on a pool of sign language interpreters, for example. We've recently entered into a collaborative arrangement with the Department of Education and Training here in Sydney to provide a year 11 and 12 program out of a Sydney secondary college for children who use Australian Sign Language as their preferred mode of communication, the notion being that kids who want to access a regular curriculum at year 11 and 12, which is entirely appropriate and reasonable, but have the need of a sign language interpreter, would attend that particular secondary college as their high school of choice and they get access to the regular curriculum but they also get access to a sign language interpreter support.

MRS OWENS: So those kids are getting choice of type of school in that they are saying, "We want to be able to go to" - or their parents are saying, "We want the child to be integrated into the mainstream school system," but they're still not getting full choice of which school they go to.

DR LEIGH: No.

MRS OWENS: To fulfil their education needs.

DR LEIGH: Or, indeed, which sector. In fact all of the students currently enrolled in that program had been in an independent special school up until year 10 - in fact in one of our schools. But there are some inescapable consequences of the low incidence of occurrence of the situation that we're talking about. The very fact that in a city the size of Sydney we're talking at the moment of only a handful of students being in that particular circumstance does speak to the economies of scale that are available at that level.

But for every one of those kids, there are many more children who have significant levels of hearing impairment that don't necessarily use Australian Sign Language who do need considerable support to provide access to a regular curriculum regardless of which sector they might be in. Again, that might come down to the need for something like real-time captioning in class, for note-taking support in class or whatever. Again, we would argue rather strongly that there is the capacity to deliver those services more efficiently if there are some economies of scale associated with that and some organisation, or organisations whose central concern of the delivery of those services may be, being adequately funded to provide those services across a sector or across a range of schools.

MS McKENZIE: Can I ask you a related question about the unjustifiable hardship provisions in the Disability Discrimination Act. There's a proposal in the education standard, which is being developed still, that that might be extended to not just pre-enrolment possibility for refusing a child on the grounds of unjustifiable hardship as far as the school is concerned, but also to post-enrolment possibility of either changing the way in which the child is educated or transferring the child or - I suppose at the most extreme - excluding the child on the basis of unjustifiable hardship. It has some relevance because of what you were saying about assessing a student pre-enrolment as far as the student's needs are concerned. Do you have comments about the application of that unjustifiable hardship defence?

DR LEIGH: Yes, I do. I note its inclusion in the draft standards which were endorsed at least by the federal government this week. The notion makes perfect sense to me - that it is not something that's immutable because the support needs of a student may indeed change across their life in an educational situation - however, the issue is still the same as the one that we've spoken to in our submission. It seems illogical that one arm of government seeks to fund a system to support a student in a regular school environment but then does so in a way that allows any claim for undue unjustifiable hardship to be made, particularly illogical once a student is in a particular school situation that there would not then be a commitment by a funding body to sustain that enrolment across the period of time the student is in that situation.

Again, there are other ways to do that; there are other ways to fund that student's support than necessarily just relying on a one-off payment to a school. There may be support structures that can overarch a system. I keep coming back to the fact that there's not a huge difference; I know there's an argued difference between the level at which children with disabilities are funded in government schools as opposed to the independent school sector but if we ignore the bottom line differences for a moment, the way in which a similar per capita investment in educational support for children with disabilities can be used in a sector as large as the government school system in New South Wales, and the way in which one-off funding for an individual student can be used in a single independent school is hugely different.

On a per capita basis the actual funds may be very similar, but the capacity to do something with that across a sector that allows you to aggregate those costs and use them across a system is very, very different to what it is providing - being in receipt of perhaps several thousand dollars for a single student in a single independent school. There are economy of scale issues that need to be addressed and questions of what the most effective and productive way of delivering those services might be, particularly for students with sensory disabilities where the support costs can be so dramatic.

MRS OWENS: But you said per capita funding might be similar, but it's not really that similar either, is it?

DR LEIGH: No. There are significant differences. I know my colleagues from the Association of Independent Schools have argued that very effectively and pointed that out. There are also illogicalities from our perspective in there being capped amounts for a student with a disability in a school, given the hugely differential impact of different types of disabilities and different individual circumstances. The notion that there should be a similar level of funding associated with a student with, for example, a significant intellectual disability in a regular school, and a student who is blind and Braille-using, is comparing apples and oranges. The notion that there should be a one-off capped amount for both circumstances, rather than a funding system that seeks to address the real cost of supporting those students in that environment, seems illogical.

MRS OWENS: In other environments, like funding in health services, it is possible to classify patients according to their diagnosis, and I wouldn't have thought it would be beyond the wish of somebody to be able to classify these students according to the type of disability and assess the costs of that type - educating the children with that particular type of disability versus another sort of disability - and then linking the dollars to that classification system. I'm sure that it would be possible to design such a system.

I worked a number of years ago working on designing the funding system for Australia for the health system. I agree, it is illogical to have a set amount and say, "Well, that's what it's going to be." So there's the issue of how much money you put into the system, then there's the issue of how you allocate those funds, and then there's the issue of: should there be differential amounts for different types of students? I'm sure it would be possible to design some sort of logical system. Whether the government funds the full cost - usually governments don't fund the full cost of anything because they want to provide incentives for greater efficiency, so there's that question which would need to be addressed, but I think it would be possible to develop some sort of equitable funding arrangement.

DR LEIGH: I agree, and the question of whether it should be full cost or not is not one that we've necessarily sought to have an opinion on here, but the simple point that I keep coming back to is if that amount is so clearly demonstrable that that capped amount where children with sensory disabilities are concerned would routinely allow almost every school to make a case out for unjustifiable hardship, then the system is clearly not working.

MRS OWENS: Yes.

DR LEIGH: We have one arm of government saying, "This is, as enshrined in law, a right of Australian citizens to have access to services on an equitable basis with their non-disabled counterparts," and another arm of government says, "We will provide funding to assist service providers to make that a reality," but routinely to be able to be challenged under the same law that says, "It can't be done without it being an unjustifiable hardship," then something's not working. The cost of that, in the case of New South Wales, is largely hidden because the real differential is being picked up by an organisation like ours out of alternative support sources. If it weren't for the institute's input, then almost all of those students in the independent school sector would not be receiving services because the cost of delivery of those services would go way beyond what the funding system provides for and would easily be able to be defined as unjustifiable from those schools' perspectives.

MRS OWENS: Those schools wouldn't take the students in the first place. They'd just put in a claim, I presume, and say, "It's unjustifiable hardship. We can't take them."

DR LEIGH: Indeed. In fact I think largely, as was the case before the institute support services came along, that would be hidden. They would never come into view because parents would approach schools and schools would, by and large, say, "We can't provide the services," and it would never see the light of day. Some clearly would come up under the provisions of the act, but it's again a strange system that has that as the default - that you have to challenge something at law in order to get the system working the way that you want it to.

MS McKENZIE: But the results of that are simply catastrophic. You would finish up with a less educated underclass of people with disabilities, who would then be unemployable, with all the consequences of welfare payments and disaster that brings.

DR LEIGH: Indeed.

MS McKENZIE: Can I just go back to what you said about funding in government and independent schools. You said the funding of government schools was easier because you could have economies of scale, but I wonder whether that's true in all cases. Assume for example for the minute - and I know that the funding is not the same, but assume that the same child with a disability in a government or an independent school received the same funding, surely in the government school there would be only economies of scale if first there were more than one child with that disability at that school, unless somehow there's a sort of non-identified bucket of money that is given to the government school so it can in fact use other funds to fund the child with disability. What I'm saying is if the funding were the same and there's only one child with that disability at that school, whether it's government or independent, surely the results would be the same. There would be economies of scale.

DR LEIGH: Yes, I would agree, except for the fact that - for example, in the area of support for a Braille-using student, at least part of the required support for that student is production of alternate format publications. In the government sector, were there - as there are indeed numbers of students across an area like metropolitan Sydney enrolled in schools - then the aggregation of those resources into a single production unit for those resources makes that a more viable enterprise.

MS McKENZIE: So in fact those units actually exist, and that's why - - -

DR LEIGH: Indeed. Or indeed if there are two students across a geographical area that's close, reasonably defined, then a single itinerant teacher who's able to be employed as a full-time employee but spends part of their time in each of those schools where that student exists, it becomes a viable way of expending those funds. The alternative of trying to find somebody for two or three hours a week or whatever that amount of funding might buy - I can tell you from our own experience of trying to fund or fill part-time positions that come up is not a viable prospect. There are all sorts of ways in which the economy of scale kicks in.

MS McKENZIE: But there would be nothing to stop the independent schools grouping together and, for example, employing an itinerant teacher in that way?

DR LEIGH: Other than their independence, no, and in fact really that's what we've done for them in the area of sensory disability, but not at their cost necessarily. Their contribution to that is not the real cost of that provision. Again I make the point, it's our service in a way, and we're pleased to be able to provide it, but it does mask the reality of what the actual cost of service provision is, were we not to be doing it.

MRS OWENS: I was going to ask you about the education standards. I don't know if you've had any involvement with those - - -

DR LEIGH: I've had a look at it, yes.

MRS OWENS: - - - but as of last week the Ministerial Council on Education, Employment, Training and Youth Affairs failed to agree to implement those standards at that time. But supposing we get to a point where there is some agreement in the future, there is a question that those standards will actually raise the bar further and could, in fact, lead to potentially higher costs for schools.

The Independent Schools Association provided us with some material on what the impact of implementing the standards would be financially on schools, and we're talking about quite significant additional costs. I don't know whether you are across them sufficiently to give us an answer on this, but there is potential in the standards as written, for unjustifiable hardship to be claimed not just for pre-enrolment of students but also after students are enrolled, which is not the way it is written up in the act. The act only covers pre-enrolment. Have you got any views on being able to use unjustifiable hardship as a defence post-enrolment?

DR LEIGH: Only from the perspective of what I would see as procedural fairness. A school relatively small and not particularly well resourced - an independent school, for example - which may have elected to enrol a student with sensory disabilities with very high support needs on the basis of the existence of our services and if, for some unforeseeable reason, the services we're providing were at some point not any longer available then that school would be left in a situation where, as I have already pointed out, the real cost of support for that student would be many tens of thousands of dollars per annum. The fact that they had no recourse - as is currently the case at law - having enrolled the student, does seem to be procedurally unfair. But it keeps coming back to the same point I was making; it is procedurally unfair to the extent that there is not a funding mechanism in place that supports the real cost of what the support for that student is.

MRS OWENS: If the education standard never sees the light of day - and who knows at the moment where it's going to go - would you support having that sort of clause in the act itself?

DR LEIGH: I think I would, but I see the act itself as being in a somewhat Utopian light, but it would exist in an environment where the real costs were able to be met by the system for students. There is no question in my mind that if the standards were enacted tomorrow and there were not additional support services made available by organisations like ours that a sizeable number - I couldn't give you a figure, but a sizeable number of the schools to which we currently provide services would have to claim unjustifiable hardship if they were expected to provide services at exactly the same level as those students are currently receiving because their resource base, quite simply, is just not sufficient to be able to afford that level of service. In some cases we're talking about individual costs more than 20 times the per capita fee that school is charging for a single student enrolment and, for a small independent school, that is demonstrably not a possible scenario, so unjustifiable hardship would automatically come into play.

MRS OWENS: The other option is the school just ups the fees for all the parents - there's another option.

DR LEIGH: Yes.

MRS OWENS: Which then could potentially cause problems with the other parents - if they felt they were being burdened with additional fees.

DR LEIGH: We have schools currently which, for the modest contribution to our fees - the immediate question that comes into play when we begin discussing the enrolment of the student is whether or not they should be passing this onto either the family concerned - which we're at pains to point out, would be in our reading, a contravention of the Disability Discrimination Act - or amortising that cost across their fee structure. The latter seems the logical way to do it as a business. Whilst those costs are small and there is a large base to spread that across, it's possible that if we were talking about - as I have said - 70 or 80 thousand dollars per annum for a single student, much less one or two students, then that in a small school with an enrolment perhaps of less than 200 and an annual fee structure of 2 or 3 thousand dollars per annum, becomes an illogicality or an impossibility.

MRS OWENS: It raises the big question of who should pay: should it be the family of the kid with the disability; should it be the parents in the particular school where they choose to send the child, or should it be the community as a whole - the taxpayer - ie, the government? I think that's the big question.

DR LEIGH: Our considered view on that is that it should be all of those, but in the same logical proportion as it would be for any other person. As a community we say public education is a free and available resource. Education in an independent system is at some cost to the user and some proportion of that is borne by government. At the very minimum it seems to us the proportion of the additional support structures required for a student with a disability should be met in equal proportion to the regular contribution. If, as a society, we say to school X, "The government will fund you at 70 per cent or 60 per cent or 50 per cent of the cost of" - fund that school at 50 per cent of the cost of what it cost to educate a student in a government school, then at least that same proportion of the cost of additional support for a student with disability should be being met by government, as well. I think there is a strong public policy case to say that it should be 100 per cent but it simply - - -

MRS OWENS: Because you might see education generally as being different from government support for children with disabilities. You might philosophically see those as meeting different objectives. Parents of children with disabilities - this is an unforeseen event, having a child with a disability - and it's a matter of how much of the burden should the individual family have to bear for something which is often just one of those events that occurs unpredictably.

DR LEIGH: Yes. From a family's perspective - my view would be and, I think, our organisation's view would be that there should be no perceivable additional cost. The service provider's perspective is a different perspective. As I have said, at worst the costs borne there should be in the same proportion as they would be for any other student relative to government and independent or private sector support, so a proportion is met by fees and government funding should be at least no different to what it would be for any other student, albeit the overall cost was greater. From a family's perspective, both in the spirit of what the DDA is trying to do and the community value that it is embodying, there should be no perceivable difference. The cost of service should be the same as what it would be for any other child.

MS McKENZIE: Yes. On the basis that, for example, the parent of a disabled child at an independent school should have to pay the same fees as parents of other children.

DR LEIGH: Indeed.

MS McKENZIE: Shouldn't have to pay no fees.

MRS OWENS: No. There should be fees because they have chosen an independent school.

MS McKENZIE: That's right.

DR LEIGH: It should be the same as for any other.

MS McKENZIE: Yes.

DR LEIGH: The question then is, of that part which is not met by those fees, what proportion should be met by government and what proportion should be met by the service provider? At the very least it should be proportionally no different from any other student, albeit the overall quantum is larger - - -

MS McKENZIE: Yes.

DR LEIGH: - - - but I think there is still a strong public policy argument for saying that the additional services should be met in larger proportion by government because of the particular circumstance. That's really what we're talking about: how much of that gets covered and who actually bears it? Logically, it seems to us, at the very minimum it should be no less proportionately than the overall proportion met by government for all other aspects of that child's - - -

MS McKENZIE: Whereas you would argue in this case, of course, that the proportions are quite different - quite different.

DR LEIGH: Indeed.

MS McKENZIE: Currently.

DR LEIGH: Yes. They're nowhere near the same at the moment.

MRS OWENS: That was very useful.

MS McKENZIE: I have raised lots of things. It was a very interesting submission. Thank you.

MRS OWENS: I really enjoyed that. Thank you very much, Greg, for your submission and for coming today. We have taken the full hour with you, so thank you for that.

DR LEIGH: You're very welcome. Thank you for the opportunity.

MS McKENZIE: Thank you very much indeed.

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

MRS OWENS: We will now resume. The next participant this morning is Peter Simpson. Welcome, Peter, again. You were sitting here yesterday.

MR SIMPSON: Good morning, Helen.

MRS OWENS: Would you like to repeat your name and the capacity in which you are appearing for the transcript.

MR SIMPSON: Peter Simpson. I'm here as an individual, long-term unemployed job seeker - to my mind, and the evidence proves it, mainly because I roll up to interviews in a wheelchair and most of the interviewers either don't know what to do really, because they just have no idea of how to handle the situation. But they soon get around to it, to all the reasons for non-employment and everything like that.

MRS OWENS: So they see the wheelchair and not the person? Is that what you're saying?

MR SIMPSON: Yes.

MS McKENZIE: According to your submission you have applied for stuff that you're well qualified to do but - - -

MR SIMPSON: I don't apply for stuff that I'm not easily qualified to do.

MS McKENZIE: Yes, you are not going to waste your time.

MR SIMPSON: It's a waste of my time.

MS McKENZIE: But then they give you - according to the submission they give you ridiculous reasons for not - - -

MR SIMPSON: Yes. Some of them, on the submission - if I had heaps more time to sit down in front of the computer and get my voice recognition working properly on my computer, that would be a lot easier, but typing it is very slow for me.

MRS OWENS: Peter, you've got a few notes there I think you were going to run through. Do you want to run through those? You don't mind if we interrupt, if we feel inclined?

MR SIMPSON: No, that's okay.

MS McKENZIE: Yes, go for it.

MR SIMPSON: Two and a half years now it's been going on - my awareness of DDA and like that beforehand was minimal, but now it's a lot more evolved. But I found the total awareness of DDA and its implications in the general community is very limited really. Even for people with disabilities their actual awareness of DDA is sometimes non-existent.

MS McKENZIE: You are not alone in making that submission. A lot of people have said that's a real concern, the lack of awareness.

MR SIMPSON: Employers and - I must say also some government bodies - their awareness is very limited also. Some government bodies and other organisations are trying to do things about it, but really they've got no idea much on it. In New South Wales the RTA is working on their new parking permit thing for disabled people and that, but really I can't see it making any difference - the changes they're going to do.

MRS OWENS: What sort of changes are they going to do to it?

MR SIMPSON: They're going to issue like a driver's licence to put on your windscreen with your photo on it and everything like that, but parking inspectors aren't going to hang around to see who is using it, to see if the person on the photo is the person that gets in the car and that. There's that many parking tickets out there that just about anyone could get it really, and the number of people that are illegally using it - it's mind-boggling really and even when they don't have someone else's pass or that, they just park in the spots anyway.

MS McKENZIE: That makes it impossible.

MR SIMPSON: It's a mind-set. They just - excuse the expression - don't give a stuff. I mean, if you confront them they just don't give a damn, or if they have got a pass that they are illegally using, they say, "I've got a pass." But they walk off and have no disability at all.

MRS OWENS: So it needs to be policed better.

MR SIMPSON: Yes, but in private parking lots you can't - the council inspectors can't police it because they haven't got the authority to go into those private parking lots, unless the centre management or whatever actually sell the disabled parking spots to the council so that they can do it. Liverpool Council has done that, or Westfield at Liverpool has done that. They've sold the parking spots to the council at $1 each so that the inspectors can police it.

MS McKENZIE: That's a very clever - that's a suggestion I've not heard of yet, to get around a problem.

MR SIMPSON: That's what they did - $1 for each of the parking spots.

MRS OWENS: And it's good for those businesses, really.

MS McKENZIE: Yes, clever.

MRS OWENS: Because then you know if you need to go somewhere you'd go to that business because you know at least that's going to sometimes be policed and that that business has taken enough - used enough sense to make that arrangement with the council so it is policed.

MR SIMPSON: Yes. But even government departments - or governments are not at times real proactive because my local council - we're trying to get the state government to work an ID card for disabled people who don't drive. You've got your 19 to 25-year-old pass for getting into clubs and that for the kids, but once you're over 25 if you don't drive, you've got no identification. You can't even buy mobile phones unless you've got the identification - carry your passport with you or something.

MRS OWENS: You couldn't use a Medicare card.

MR SIMPSON: No.

MRS OWENS: Because it hasn't got a photo.

MR SIMPSON: Medicare card is not good enough. But government seem to be not interested really. Victoria has got it; South Australia has got it; Queensland has got it - but they just get it through the RTA like you get their licence.

MS McKENZIE: So there's not a system here for that at all?

MR SIMPSON: No.

MS McKENZIE: Not the same system.

MR SIMPSON: No. State Rail staff, some of them are very non-proactive in their handling of people with disabilities - some of them. Some are good; others won't even take your advice on how to put the ramp down to get on to a train and that.

MS McKENZIE: Then there's a problem if some of the infrastructure doesn't work, isn't there, as well?

MR SIMPSON: Yes. Some places around have got their toilets with what they call the MLAK key, which is a universal key for opening toilets and things like that. To get one of those keys you've got to jump through hoops with locksmiths and everything and signed declarations and all that sort of stuff to - and they say, "We've got all these public toilets around that are disabled friendly, wheelchair friendly," but you've got to have an MLAK key, or you've got to go 100 or 200 metres up to the centre management to get the key.

MRS OWENS: Can I just ask for clarification, do your railways here still have railway guards to help you if you need the ramp?

MR SIMPSON: Yes.

MRS OWENS: So they've still got a guard to help?

MR SIMPSON: Yes, still get the guard to - - -

MRS OWENS: In Victoria they've only got a driver, you see, so if you're in a wheelchair you have to be up near the driver's compartment and alert the driver to the fact that you need the ramp and then the driver's got to remember to get out and help you at the station where you're getting off and if they forget then you go on to the next station, so it's a bit of problem. So at least you've got guards.

MR SIMPSON: Yes.

MS McKENZIE: What about getting to the platforms? You've got to have the lift - - -

MR SIMPSON: Some stations have got lifts, but I think it's about 40 per cent of Sydney stations.

MS McKENZIE: So there is 60 per cent that - - -

MR SIMPSON: I don't think it's - - -

MS McKENZIE: - - - are not accessible.

MR SIMPSON: Yes.

MRS OWENS: Has it improved, though, over the years since the act has - - -

MR SIMPSON: Yes, it's improved over the years, yes.

MRS OWENS: Do you think that's because of the act, or because of the transport standards that have been introduced?

MR SIMPSON: I think just because of the transport standards because even non-disabled use the lifts and everything like that.

MRS OWENS: Yes.

MR SIMPSON: But if more stations were wheelchair friendly, disabled friendly, a lot more people would use it.

MRS OWENS: You've got people with prams and - - -

MR SIMPSON: Wheelchair people and prams and things like that.

MRS OWENS: Luggage.

MR SIMPSON: Yes. North Sydney station - - -

MRS OWENS: That's got the stairs, hasn't it?

MR SIMPSON: Can't take a wheelchair there. You've got to get off way down near the bridge at Milsons Point and wheel all the way up to North Sydney if you want to go to a job agency.

MRS OWENS: That would keep you fit.

MR SIMPSON: Yes. One thing I must disagree with our associate from yesterday afternoon.

MRS OWENS: HREOC, Human Rights Commission.

MR SIMPSON: Yes, human rights. Private bus companies don't seem to be complying all that quickly with standards of wheelchair access and things like that - very slow. Mainly out in the west but also other areas - it's very slow there, getting the low-line wheelchair buses. Even State Transit has got low-line buses but they're not wheelchair accessible and most people would prefer a low-line bus anyway, because rather than walk up three or four steps to get up to the thing, you've just got to walk straight in.

MRS OWENS: Much better for elderly people, or people who have had hip replacements.

MR SIMPSON: Yes.

MRS OWENS: Or people on crutches or anything.

MR SIMPSON: Yes, but even you - you'd prefer to just do one step on to a bus and - - -

MRS OWENS: Absolutely.

MS McKENZIE: Everyone would. But even they are not accessible for wheelchairs?

MR SIMPSON: No. Well, some of them are. I had a case - I went out to SCG and I was sitting at the bus stop for just over an hour and three low-lines buses when through, non-wheelchair accessible and the fourth one wasn't wheelchair accessible but the driver got out and helped me get on. I was there for over an hour.

MS McKENZIE: What about taxis? Of course, that's the other alternative that people talk about.

MR SIMPSON: Yes, but wheelchair taxis - if you ring up for special ones, it's at least half an hour before you get one.

MS OWENS: Do you give them plenty of warning, Peter? Do you ring the night before? How does the system work for you?

MR SIMPSON: For me? I've never rung them up before, but even people I know who booked the taxi for 9 o'clock, it might be quarter past 9 before they get there.

MRS OWENS: Is this because the taxis are also just doing general business, as well?

MR SIMPSON: In Sydney there are so many disabled taxi licences available - there's heaps available - but normal taxis, there's no licences available for them. But the reason they don't like the disabled taxis is that they've got a feeling that people, able-bodied people, won't get into the disabled taxi because they think, "Getting into a disabled taxi. How will that look?"

The other thing I must disagree with the HREOC guy is that he was talking about standards being self-regulation and that. You need to look at other industries, services where they've tried self-regulation and they're, most of the time, very poor self-regulation. Banking industry would be one and another is - - -

MS McKENZIE: So you're concerned about banking?

MR SIMPSON: Yes. You've got to have the rules there - set down the standards there - but you've got to have some regulation of it.

MRS OWENS: What - and monitoring?

MR SIMPSON: Yes, monitoring and regulating of them and that because if you leave it to self-regulate they'll say, "Yeah, we'll do that in 10 years' time" or, "We'll do that in 15 years' time, when we get around to it." They don't really get around to it. A lot of the problem in formulating standards is using commonsense. You get a lot of well educated people formulating these standards and everything, but when it comes to real life and real-life situations, they're a bit off the mark with their thoughts.

MS McKENZIE: Maybe not practical or not realistic enough.

MR SIMPSON: Yes, not practical or realistic for the real world. They may take standards from overseas and everything.

MS McKENZIE: Which maybe don't suit our conditions.

MR SIMPSON: Don't suit our conditions and they also don't look at how the standards are working overseas, and if they are working overseas. Most councils are proactive - some of the councils are very proactive in their DDA implementation and they've got their action plans and everything like that. Some councils say they are but, in reality, they are more looking at their own image than getting things done. I applied for a job with one of the north-western Sydney councils - they wanted a disability officer - and met all their criteria and everything; knew the manager of the department - or met the manager for the department and everything - and didn't even get an interview.

MRS OWENS: Did they explain why?

MR SIMPSON: Said there was such - - -

MRS OWENS: Don't tell me they saw the wheelchair.

MR SIMPSON: - - - a range of other applicants, but the other applicant that they had given the position to said, "Okay. I'll start in six weeks' time after I clear up all my other things." Six weeks came and, "No. I don't want to start there now."

MRS OWENS: Did they come back to you?

MR SIMPSON: No. The funny thing was we were having a Western Sydney Access Forum meeting at their council on the Monday the person was supposed to start there and the manager for the department - I was at the meeting - wouldn't even come near me.

MRS OWENS: I wonder why.

MR SIMPSON: Had to leave it to my associate at my council to ask what had happened and she told him what happened. It actually turned out, two days after that, I got a letter from the council saying that I didn't get the job, there were so many other good applicants.

MS McKENZIE: They hadn't even bothered to acknowledge what had happened to your application.

MR SIMPSON: That was like three months later.

MRS OWENS: It just raises the question about processes, employment processes, and you have raised a few other points about that in your submission, which I thought were very interesting - about style of telephone answering and so on and all the excuses. Would you like to comment more about that in terms of your experience with trying to get a job? What sort of work did you do before you became unemployed?

MR SIMPSON: I was doing warranty - I used to work for Outboard Marine - they make Johnson Evinrude outboards for the back of your boat and that. I was doing warranty cum spare parts cum customer service cum customer relations cum technical - - -

MS McKENZIE: So that's why you apply for all the jobs in that area.

MR SIMPSON: Yes. I know the auto industry. I did courses on learning the auto warranty systems and things like that.

MRS OWENS: But those skills are easily transferable, I would imagine, into a whole range of areas - like becoming a disability officer for a local government because a lot of your work would have been dealing with people and so on, wouldn't it?

MR SIMPSON: Yes, dealing with people and knowing how to deal with people - not like a lot of the younger generation these days. Talk about customer service - they don't know how to provide customer service. When they're on the phone it's okay. They ring up and say, "Got your application; very impressive - your credentials and everything; you're exactly what we're looking for in this position." Then roll up for the interview and they don't even get back to you to say you didn't get the job.

MS McKENZIE: It's really hard and it's a difficulty we have mentioned before - if in fact that's not the truthful reason - and you've got a very good suspicion what the real reason is and it's because of your disability that they then decide not to employ you - it's very hard to prove because first - - -

MR SIMPSON: Yes. You can't take body language to court. Over the past two years, I've learnt to pick up body language and, at times, I drop off applications to actually see the place - see if there is any access problems or anything - and when you're talking to the HR people and they won't even look at you while they're talking. A warranty job, warranty clerk position - and then they say, "It will also involve a bit of parts interpretation." I said, "Yes. That's no problem. I've done parts interpretation. I know parts systems and everything." "It will also include a bit of customer service; talking to the customers about warranty and all that." I say, "Yes, that's okay. We're fully conversant with things," and brushing our hair out of our eyes - - -

MS McKENZIE: It's a pity we can't get that action on the transcript.

MRS OWENS: Yes.

MS McKENZIE: Obviously uncomfortable.

MRS OWENS: Brushing his hair.

MR SIMPSON: Yes, very uncomfortable. Then, a week later and all the time taken - "We've had so many applicants for this job" - I think about five times she said it during our 10-minute call. Then a week later I'm talking to a gentleman I know at one of the automotive recruitment agencies and, as soon as he heard my voice, he said, "Oh, Pete. Got the job for you. It's up at North Sydney, a Toyota dealership." I said, "No, George. It's a Lexus dealership," and blah, blah, blah.

MS McKENZIE: Same job.

MR SIMPSON: That again. He's tried a hell of a lot with other automotive importers. He thinks I've got the job until he mentions the wheelchair. They say, "He'll have to go out to dealerships and look at cars to make sure it is warranty and that." "Yes, what's the problem?"

MRS OWENS: "Sounds terrific."

MR SIMPSON: Yes.

MRS OWENS: You've mentioned in your submission that you thought there could be a role for government or public service to be a back-up for people with disabilities. Are you talking about affirmative action type programs, where government departments would favour people - - -

MR SIMPSON: Yes, and into government employment because they must know there's a big reluctance out there in the private sector with disabled people. It's not only myself. I've been to seminars and heard other people with disabilities - mild intellectual disabilities. Before the Olympics I met the mother of a young lass with a mild intellectual disability who, before the Olympics, was working in motels, making beds and all that. Since the Olympics she hasn't been able to get anything at all. Even Centrelink didn't even know about their - what do they call it?

MRS OWENS: Disability support pension?

MR SIMPSON: No. You're paid by the employer if you can only perform - - -

MS McKENZIE: Supported wages.

MR SIMPSON: If you can only perform to 70 per cent of an able-bodied person you only get paid 70 per cent of the normal wage.

MS McKENZIE: Yes.

MR SIMPSON: The Centrelink people didn't even know about that. The motel industry just wasn't interested unless you can perform 100 per cent. Government as back-up: a couple of years ago, or last year I spoke to one of the federal ministers about the reluctance in the private work sector and everything. I said, "What can we do about it?" He said, "Well, apart from educating the employers that yes, we've got a disability, but that's it." Organisations that do that - one of them is on a six-month finance for their funding. It's on a six-month renewal.

Now, you can't go out and try and educate employers and have someone renewing their submissions and getting their submissions ready for funding and things like that, so there has got to be a longer funding period for those type of organisations than that. Also the federal public service - this is where one of my graphs come in; this is from actually from the federal Public Service Union. Disabled people employed by the federal public service since 1997 has dropped by about 20 per cent.

MRS OWENS: You've got your graph there somewhere. Would you be able to table that for us a bit later? We can get it from you after we finish.

MR SIMPSON: Yes. I've got a couple of graphs on that and if you look at it as a weighted - a different one - a weighted proportion of it, the people with disabilities has really nosedived. Indigenous Australians: Aboriginal and Torres Strait Islanders in the weighted series have gone up, women employed has gone up, non-English-speaking background employees has gone down a bit, but people with disabilities has really gone down. There are lots of positions in public service that people with disabilities - not only myself but other people - that you just can't get in there unless you're already in there, but it's very hard to get - as let's say an outsider. It's very hard to get into the public service. I've got another letter here from a PhD with a disability trying to get into the public service and - you can read this - I'll table it too. But it's mind-boggling what he was told and - - -

MRS OWENS: We will get that letter later. I was just going to say, Peter, that we spoke to the Australian Chamber of Commerce and Industry when we did our hearings in Canberra and we talked about this issue about jobs and people's inability to get employment. Their response was, "Well, over time, as the labour market tightens up, it means that employers will have to take on older people and people with disabilities. The problem will really solve itself." Would you like to give your reaction to that comment?

MR SIMPSON: In 20 years' time maybe it might happen, yes, but the age is also a problem out there too.

MRS OWENS: It's a compounding factor.

MR SIMPSON: The federal government is going to bring in their Age Discrimination Act. As I said in the submission, it won't do much; it will just give the employers - or the employers will just think up better reasons and everything. One job that I went for I know was an age thing. I emailed my application at 1 o'clock in the day. At 4 o'clock in the afternoon the person from the company rang up and said, "We've got your application. We're really impressed with it. I don't think we could afford you." "Okay, hang on, let's talk, let's talk." I could have done the job as easy as anything and he obviously knew that too, and then he says, "Okay, what were you on when you left Outboard Marine?" I said, "On 38 thou." "We can afford that. How old are you?" "49." "Okay. I'll get back to you."

MRS OWENS: They thought that was too old.

MR SIMPSON: Never heard a word from him after that.

MRS OWENS: I would like to see what happens when they get to that age; see what happens to them.

MR SIMPSON: Yes.

MRS OWENS: It's not really very old, I have to say.

MR SIMPSON: No.

MS McKENZIE: But this was a company and not the Commonwealth?

MR SIMPSON: Yes, that was a company.

MS McKENZIE: So obviously they didn't understand that age discrimination is a ground for discrimination in other places.

MR SIMPSON: Yes. For me being unemployed it must cost the government let's say 20 grand a year, from Newstart, not getting my taxes, paying the employment agencies and that to try and help me and everything. To overcome that 20,000 a year they could afford really a large investment in building, let's say, to secure me a job and that. If it was just a matter of a chair lift to get up a set of stairs and that, it would be worthwhile, that investment now, rather than having to expend 20,000 a year while I'm unemployed. But it has also cost me a hell of a lot of money to be proactive in the job searching, because you need a computer - - -

MS McKENZIE: Yes, you mentioned your computer.

MR SIMPSON: To get onto the Internet and everything.

MS McKENZIE: And you need to have the Internet provider.

MR SIMPSON: I killed one computer and had to buy another one, and that's in two and a half years. They are not cheap either.

MS McKENZIE: Absolutely.

MR SIMPSON: And courses that I've done myself for different computer systems and all that sort of thing; it's all costing me money. I'm doing TAFE at the moment. I'm doing community services certificate 3 and 4, disabilities and that. While that was no charge it still costs a lot of money just to go to TAFE and everything.

MS McKENZIE: There is your time and getting there, travel expenses and also the frustration of it all. That's different, it's quantified, but it's there.

MR SIMPSON: Yes, the frustration is there. There are reports out showing the psychological harm that it does to able-bodied people, not being able to get a job and that. Chuck in the disability and everything and it's a lot more. Like, my marriage is just about on the rocks really.

MRS OWENS: It's difficult for both of you. Did you have these sorts of problems getting jobs in your younger years, or is it something that has got worse?

MR SIMPSON: No, my previous job at Outboard Marine, I had been there for 27 and a half years.

MS McKENZIE: That's a whole lifetime.

MRS OWENS: It shows a great deal of stability and loyalty.

MR SIMPSON: Most disabled people are. Their employment record is far more stable than anyone else's.

MRS OWENS: We're hearing that quite a lot too, aren't we, Cate?

MS McKENZIE: Yes, that's right.

MR SIMPSON: While I liked the job I was in, it was a really good job, good company, I knew all the dealers around Australia and New Zealand, the Pacific Islands and everything, and they knew me, I realised while I was there that it would be hard for me to get a job outside, but I didn't imagine how hard it would be. We had a big employment agency come and give us a run-down before we all left, and they saw my resume and said, "Yes, you won't have any problems getting a new job." Little did they know. A lot of agencies out there, they just don't realise that there is a reluctance out there.

MRS OWENS: So your treatment by the employment agency, you would say, was good treatment, or did they also have some reservations? They said you wouldn't have any problem getting a job when they looked at the resume.

MR SIMPSON: Yes, that was a big agency and they said, "Yes, email us over your resume," and everything. We did that. I'm still to hear back one word from them.

MS McKENZIE: The small agency you thought - - -

MR SIMPSON: No, this was a big agency.

MS McKENZIE: But the small one has done a good job as far as you - - -

MR SIMPSON: Yes. At the moment I'm with a small one out at Parramatta that does do work for the disabled and everything. But the disabled, as soon as they register as unemployed, should be automatically put on the high-intensive job search with an appropriate agency, because Centrelink should be aware of what is going on out there. But I went in to register, registered with them and they said, "Yes, okay, you'll get your first Newstart in December of the year," which was eight months later, because of my redundancy. Then, "Bye-bye," and basically that was it. It was left up to me to do everything.

I am proactive. I go to all the conferences and seminars and do courses, but they will duckshove you from agency back to Centrelink, back to agencies. Half the time even Centrelink's records aren't up to date. I was registered with this Active Employment and then they said, "No, you'll have to go to a Job Network agency." You ring them up and they say, "No, you'll have to get on to Centrelink about that." Then Centrelink says, "No, you'll have to pick an agency and go to them," and all the time they haven't even got me registered that I'm with Active Employment. Even when the job agency people tell them, they still don't register it, so communication between Centrelink and agencies and everything leaves a lot to be desired.

With the public service employment, if you are a person with a disability - if they qualify for jobs and that, there should be an easier passage through to that employment I feel, as I have applied for jobs with the public service, state and federal. As I said before, I don't apply for jobs I can't do hands down, because it's a waste of my time if I do, a waste of their time and paperwork, sending out the packages and everything. But it's getting the selection criteria down and knowing how they want you to put it down and things like that. I haven't even got to an interview with a public service one. I know a few people in the public service and it's internal-type transfers that are more common than - - -

MS McKENZIE: Outside.

MR SIMPSON: Outsiders getting in.

MRS OWENS: Peter, when you write those applications - we'll probably have to wind-up in a minute because our next participant is here - do you actually declare on it that you're in a wheelchair or not?

MR SIMPSON: Yes, most of them, I do.

MRS OWENS: Most of them ask.

MR SIMPSON: It's a prerequisite. It comes in - yes, mostly in the covering letter I put that, because their selection criteria - they usually don't call for that but some jobs could target the disabled community, like some jobs target the Aboriginal and Torres Strait Islanders. That is one of the prerequisites: you've got to be Aboriginal or Torres Strait Islander before you can even apply for it. But there's nothing there to target the disabled community and there's a lot of jobs out there where our first-hand knowledge and our life skills would override a lot of the learning skills and everything.

I rang up for a job - the state has a body that advises local councils on different matters and they wanted an adviser for access issues. They said a degree in humanities - blah, blah, blah - these other requirements. All the other requirements I met hands down because I'm with the council's access committee and know all about access problems and housing standard access things and that. I rang them up and I said, "What's your minimum qualification?" "We'll take an arts degree" - for advising councils on how to build layback from the roads and things like that. I said, "You'll take an arts degree?" "Yes." I said, "What on earth would a person who has studied an arts degree know about access ramps and things like that?" "No, that's all we'll take." Very frustrating.

MRS OWENS: Very frustrating. That's a good place for us to stop, I think. Anything else before we wind-up?

MR SIMPSON: No. I'll table these other things.

MS McKENZIE: Yes. You table those documents and that would be great.

MRS OWENS: Peter has got quite a few documents.

MR SIMPSON: There was one here last year before our state election. They had a disability action alliance meeting where all the disability groups were getting together with some of the politicians to see what we wanted and what they could provide. They all said, "Yes, we'll have our disabilities policies out within a couple of weeks." Did not hear one word from anyone. I'll put these other bits of paper in.

MS McKENZIE: If you want to table those and we'll just put them with the submission.

MRS OWENS: Thank you very much. We'll now break and we will resume at 5 past 11.

MRS OWENS: We will now resume. The next participant this morning is the Physical Disability Council of New South Wales. Could you please give us your name and your position with the council for the transcript.

MR HERD: My name is Dougie Herd and I'm the executive officer with the council.

MRS OWENS: Thank you, and thank you for your submission. As I just said off transcript, we thought this was a good submission and I love submissions that have a series of recommendations at the front, because you can go through those very quickly and see what the main themes are of the submission. So thank you for that.

MR HERD: Thank you.

MRS OWENS: I note you're happy for us just to go straight into asking some questions.

MR HERD: Absolutely, yes.

MRS OWENS: We will start with definition.

MS McKENZIE: Can we start with the social model of disability?

MR HERD: Yes.

MRS OWENS: Do you want to talk a bit about how you think the act should be changed to accommodate that?

MR HERD: Yes, indeed. I said I didn't want to make a statement, but I should just paraphrase or say up-front - because most of what our submission says could be construed as being negative and looking at taking apart aspects of both the act and the commission - and so within that context I think it's probably appropriate for us to say that we are absolutely supportive of the idea of a Disability Discrimination Act and its objectives and we also seek to be, as much as it is humanly possible for us to be, supportive of the commission and the work that it has to do in a difficult set of circumstances. It's just important for us to put that on the record, because we wouldn't want anyone to believe that we either thought the act was a bad act in principle, or that the commission was not a valuable and useful organisation for all of us to try and support and encourage and strengthen.

MRS OWENS: And I think the main theme of your submission is really to introduce a number of changes to really strengthen the act, isn't it?

MR HERD: That's what we - - -

MRS OWENS: That's really where you're going with it.

MR HERD: Yes. On the questions of definition, our submission hopefully makes it clear that what we are attempting to do is to essentially shift the focus of understanding. Our view is that traditionally people with disability have been identified as problematic, as being the issue that needs to have something done about it, or about them and that the consequence of that view leads them to a position where they are seen as out with the mainstream of social activity and the population, and that any action that needs to be taken to redress imbalances or to correct disadvantage should focus on those individuals and their problematic relationship with an idealised world.

What we're suggesting, in altering the definition, is to move the focus away from those individuals but not to say that the individuals with particular impairments aren't important, but to relocate the emphasis on what we call the failings of society. There's a history, a tradition, a set of social assumptions, economic, political and other ways of organising the society in which we live and people with disability come to that from a disadvantaged position and we therefore think that redefining the relationship between people, society and the laws that govern the interaction between people and society would be a useful thing for the act to do, but to do it in a way that roots the act and its intentions clearly in an unambiguous definition of people who have an impairment and who can be identified as people with disability.

But we see a clear distinction between impairment and disability. Impairment is a fact: I'm a paralysed person, blind people don't see, deaf people don't hear. We're not suggesting that we could magic away any of those realities of the lived experience of people with physical, sensory, intellectual or psychological impairments, but the key issue of us is how society responds to the historical and contemporary fact that there are people with impairments in our communities. So that's where we see the shift of emphasis being required, and we've attempted to suggest some of the context for that shift, but like most people, we've not come up with a clear answer.

MRS OWENS: You think that's a philosophy that should be - if you like - reflected in the act?

MR HERD: Yes, we do, absolutely. We think that the act comes out of - not the act itself, but there is a social and political tradition here in Australia that is shared certainly with my own home country of the United Kingdom and in part, I think, with the United States, whereby that kind of post-war social consensus sees people with disability in terms of a welfare paternalism and that we need to shift that paradigm, clearly locating the intentions and objectives of the act to give people rights in society within a redefined philosophical point of departure. That's rather pompous, isn't it? But that's - - -

MS McKENZIE: No.

MRS OWENS: We might quote you on that.

MS McKENZIE: Not the pompous bit, but what you said before.

MR HERD: It's an attempt to articulate a slightly different point of origin.

MRS OWENS: When we spoke to HREOC yesterday - it might be worth looking at that transcript if you can get the time - - -

MR HERD: Sure.

MRS OWENS: But we raised this issue of using a social model and basically - and Graeme Innes is here right this minute, but he might say that I'm not doing justice to what they said, but basically they argued that the definition does apply and the construction of the act does apply; that the act is about changing surrounding society, it's about setting standards, it's about universal design approaches, it's also got object - there is an object which is about changing community attitudes more broadly and so on. I suppose the question is where you would go from that act - which is not just about an act about setting up complaints processes and so on, it's not just about discrimination; it is a broader act. Exactly how you would, say, define what you mean, how you would be able to set up an act in a way that could be used by the legal profession, if need be, without causing a lot of ongoing legal debate and argument, where you can quickly get lost.

MR HERD: Sure. Two responses from me: the first is that we operate in an environment in which it's possible to get lost in the current legal frameworks and arrangements, so it's really just a question of which bit we might get lost in. I think historically now and in the future there will be a debate about just exactly where we are and where we want to go, and that debate will take place inside courts as well as anywhere else. So I don't think we're suggesting that we can get rid of confusion all of the time, and the courts will decide one way or another what they think interpretations might be in law.

But the second point, I think, is this: elsewhere in the submission we make comments about other aspects which - for instance, reasonable adjustment or creating a new duty to make reasonable adjustment and shifting some of the focus and I think this may be, in some sense, a debate about how many angels are dancing on the head of a pin, and misses some of the fundamentals. But I think it is, for us, an important debate about what is the starting point for what then follows in the act. I guess, in the final analysis, the test is whether or not the outcomes that we can see flowing from the act and how it's applied are what is most important. But we simply are suggesting a shift of nuance, if you like.

We're certainly not suggesting that we abandon the notion of identifying people based upon impairment type. The act very helpfully does that. We wouldn't want to get into a position where we spend all of our time debating whether or not somebody has or doesn't have a disability, or an impairment, that qualifies them in terms of the act, because that really is a waste of time. But I think it provides for us a more clearly defined platform on which the rest of the act can be based, that would allow for our purposes, a greater clarity about where responsibility for change properly lies, and where the stress should be in any judgments or decision-making later. From our point of view, the change clearly has to come from an historically unequal social set of arrangements in almost all spheres of life and it's that which has to change - not people with disability. I know the current act and its definitions don't require people with disability to change, but it's a question of - for us: which comes first?

MRS OWENS: Have you got any good examples or models internationally? You talked about paternalism in the UK. I presume you don't see the UK system as being one that we should be looking at. What about the American system? What about some of the European systems?

MR HERD: We haven't got a template that we can suggest to you. The UK one - my recollection, and I don't have it in front of me - is not that different in terms of its starting point. I am aware that there has been, in the United States, debates over some of - an actress with a disability once described the American Disabilities Act as the most empowering piece of legislation ever for the lawyers of America.

MRS OWENS: I like that.

MR HERD: I guess what that person was trying to suggest is that there was plenty of room for confusion and debate about definitional questions inside the ADA. The short answer is that I don't have a template for you, which is why we suggested some discussion. If I had a template I would have given you one.

MRS OWENS: Yes.

MS McKENZIE: The other problem is that it's sometimes difficult to transplant legislation from another country's system into ours. It's not always easy just to pick up something and say, "Well, that's perfect, we'll just throw it in and it will be fine."

MR HERD: Precisely for that reason I was hesitant to cut and paste the sections on the duty to make a reasonable adjustment from the UK act. But I thought they were helpful.

MS McKENZIE: Yes, but you have recommended that that be a consideration.

MR HERD: Yes.

MS McKENZIE: But you're not - that's why you didn't recommend it - - -

MR HERD: No, I wouldn't recommend those words.

MRS OWENS: But it is helpful to at least have a starting point, then you can look at the starting point and say: what would we use and what wouldn't we use?

MR HERD: Yes.

MRS OWENS: You've really got to be able to justify why you might do it in a different way because some of the problems, the issues are going to be similar and some may be different.

MS McKENZIE: The difficulty is that often the legislative system is so different, and the way in which laws are framed in other countries is so different that there are dangers in thinking that it's just easy to pick up, and you have to explain why you're not making - doing it in that way. Sometimes you have to do it differently simply because that's how our legal framework is. So the American framework of laws, for example, is often quite different and quite differently worded from our own. We have to think about how we transplant, that's all. But you've mentioned the UK model and maybe that is a reasonable starting point at least.

MR HERD: In relation to reasonable adjustment, we think it is, but I hesitate - with my accent and point of origin - to say anything other than if that concept of placing a duty to make reasonable adjustment within the act was considered to be a good one, the formulation of words should absolutely come from the Australian tradition of law making and not any other. I'm not of that tradition, so it would be others who would make proper suggestions on how that best could be done.

MS McKENZIE: What are your views about exceptions and exemptions? You pretty much follow an abolitionist approach.

MR HERD: We do, indeed. I know this is a clear area in which we have disagreed. On at least one occasion I have directly disagreed in a jurisdictional debate, if you like, on the question of exemptions with HREOC. We simply think that the act has enough power to not require them. We have heard the argument put generally and persuasively at times, by HREOC, that they can be used as a tool that would allow otherwise well-intentioned providers of goods or services to have the necessary breathing space to allow them to effect change over time that will, at the end of that period of change, bring about greater access for people with disability to their goods and services.

But we are just simply not convinced by that argument. We think the act should recognise that the history of power in the relationships between the providers of goods and services and people with disability has predominantly lain with the providers of goods and services; that people with disability have had relatively less power in those relationships; that the act is a means by which some of the power in society is redistributed in a more equitable way and that exemptions haven't - certainly I can speak in the time that I've been here - we take the view that the exemption hasn't operated in the way in which the act or the commission, in particular, might have hoped that it would.

We simply think that it's time for all social actors in the country to accept the responsibility to effect change and that an act that is now 10 years old ought not to allow for the possible response, "We weren't quite sure either that we had to do it or what we had to do," because it has been on the statute books for 10 years and nobody should be surprised - running any legal personality that exists - that they've got some duty to make their services accessible to the broadest sections of the community. So we think that people have had a carrot long enough and they just need to be reminded that there is a stick, which is not to say that anyone should use that stick.

MRS OWENS: When we spoke to HREOC yesterday we talked about those special measures in the act - prescribed laws and so on. I can't recall what your views are on those but they did say that it might be time to review some of those.

MR HERD: We take again, I guess, the abolitionist view, if you like. Again, we think the powers exist in the act to allow decisions to be taken on a case-by-case situation. The examples we rather too smartly suggested in our submission relate to people with disability and the armed forces. We are not suggesting that I, as a C5-6 quad, have an absolute right to join the paratroops regiment, nor, I think, would we suggest that people with a vision impairment should be on the front line in the Solomon Islands or Iraq - although there is some suggestion from people, since I put in our submission with its qualified acceptance of that notion, that actually in this day of high technology information systems, that wars are fought from a long way away by people using all kinds of software, that actually you could have visually impaired people now joining the battle forces of the nation.

However, we are not suggesting that. We think that in relation to whether or not people can hold down jobs; for instance, if there is a clear person specification, a clear job requirement of the skills that anyone was required to have, if you meet that reasonable test you should be allowed to be considered as an applicant for the job. If you don't, then there is no discrimination by saying to me, "I'm sorry, Dougie, you can't be a parachutist," or saying to a visually-impaired person, "You can't be a bus driver," because there are essential components to do the job. We simply think that it's easier for everybody to operate on the basis of case-by-case judgment in all spheres. So we would therefore remove all of the exemptions from prescribed acts.

I understand part of the exercise that we are involved in is trying to simplify things and get rid of red tape and confusion, so we would simply take them all out and then as and when a problem arises the commission uses its powers to mediate and/or make decisions about whether or not discrimination has occurred.

MRS OWENS: So there probably wouldn't be a lot of change in practice, is really what you are saying. If there is already provision to use inherent requirements of the job, for example, it's not possibly going to make much of a change except make the act look a bit tidier. Is that what you are saying?

MR HERD: For our purposes we don't see that it would make a lot of change in relation to employment law, and therefore the armed services and police sanctions that are exempted - prescribed acts, is it?

MRS OWENS: Yes.

MR HERD: There's a likelihood it would make a change in immigration law. Does one have to declare an interest here of somebody who is currently a temporary resident and wants to be a permanent resident and is in the process of applying to become a permanent resident of the country? There clearly would be a difference in outcome if immigration law was brought under the terms of the act. We take a very simple, straightforward view on that, which we think is the right thing to do.

The government's argument, as we understand it, that they should at all times retain the power to decide who gets into and out of the country, is not compromised by saying that that decision should be taken on a non-discriminatory basis. Those were, I guess, the two biggest areas where we thought there was an issue. Most of the time I think we would take the view that there wouldn't be a huge change but that there could be, from time to time, significant differences for some individuals.

MRS OWENS: What about action plans? You say in your submission that they should be mandatory.

MR HERD: Yes.

MRS OWENS: We have talked to quite a lot of people about the idea of mandatory action plans and some have said, "Well, they shouldn't be." Some have said, "Well, mandatory for government agencies and maybe people entering into contracts with government." Some have said mandatory for everybody. I suppose there's the issue of: what do you do about really small businesses? I have read so many submissions but I think you might have said something like "Don't worry about the sole traders," or it might have been in one of the other submissions.

MR HERD: Yes.

MRS OWENS: But what about the really small private businesses?

MR HERD: I think a really small, private business would have a really short and simple action plan.

MRS OWENS: A really small action plan.

MS McKENZIE: Of one page.

MR HERD: In some senses it might be not much more than "We understand there is a Disability Discrimination Act. We will do our best to deliver our services in a non-discriminatory way. We will respond to our duty to make a reasonable adjustment to our service and/or provide alternative means by which it can be delivered and we will ask our customers if there are ways in which our services can be provided in a way that better meets their needs" - full stop. One side of A4, topped and tailed, with a bit about the business.

However, that probably wouldn't be acceptable as an action plan for any of the companies owned by the Packer family or any government department. It seems not unreasonable to us that the Packer family companies should have a duty placed upon them to create a disability action plan and that should be, from time to time, tested rigorously by the users of their services because we think it will not create an unreasonable burden on companies of that type, or small to medium enterprises won't have a great burden.

I don't know if anyone saw the employment pages of the Sydney Morning Herald at the weekend where there was an article that very helpfully, for our purposes, argued that a deeper commitment to diversity in the workforce - people with disability were cited as one example of the kind of diverse workforce that needs to be developed - is good for business and therefore companies should take on board a greater commitment to diversity, both within the workforce and considering the customer base. We would love to live in a world in which requiring people to do these things wasn't necessary, but 200 years of history in Australia shows us that some pieces of socially desirable activity have to be required of social actors.

Companies have to do accounts, so they can do disability action plans as well. That then places a responsibility, if that requirement is placed upon companies, to produce acts; to make sure that the commission is adequately resourced and has available to it the body of staff that it needs to give the necessary guidance on what would be non-intrusive, not unreasonable disability action planning guidance so that a company doesn't feel - I know here in New South Wales one of the concerns of government departments is that the process of developing a disability action plan is just simply onerous because the meat of the action plan, if you like, can be contained within two or three pages - but there is a whole set of other requirements placed upon them by the format for devising a disability action plan that senior officers in government departments just hate.

My understanding is that New South Wales is attempting to advise the way in which it issues its guidance on how action plans are to be produced, and it ought to not be beyond our capabilities as modern thinkers to devise a way in which a disability action plan could be required, but it could be required in such a way so that it doesn't place too great a responsibility or too onerous a set of tasks upon those who are devising it. So, yes, we'd make it a requirement and I think if it's going to be a requirement it should be something that is monitored; it should be evaluated. I recognise that creates an awful lot of problems in terms of available resource for the commission, but we - - -

MRS OWENS: So it is the commission, you'd say, that should have these tasks?

MS McKENZIE: It should be the monitor.

MR HERD: I confess that some of what I'm saying runs into some troubles about setting up conflicts, because we think HREOC has a bit of a conflicting role in that if it's offering guidance, it also has something to do with mediation and it can also be involved, to some degree, in decision-making about whether or not discrimination has taken place. Those roles can become confused.

I don't know if the commission said anything about it yesterday, but having roles and responsibilities clarified for the commission in its different powers, as it were, would be helpful for us all I feel because it is possible to imagine a situation in which the commission is mediating and may even be involved in decision-making about action plans that come about as a consequence of advice and guidance it has given. It seems to me to be asking any organisation to do more than is reasonable, to act with the wisdom of Solomon and decide about the efficacy of their own guidance.

MRS OWENS: The conflicting roles, if they are conflicting, become potentially more conflicted if, as has been suggested by some people, HREOC resume the role of initiating complaints. A number of submissions have said that HREOC should have that ability to initiate a complaint.

MR HERD: Yes.

MRS OWENS: Then that raises another conflict between that role and the role as a mediator or conciliator.

MR HERD: Yes. I think we are one of the people who add to that confusion because my recollection is that we say HREOC should have the power to initiate a complaint.

MRS OWENS: Yes.

MS McKENZIE: But many other people do also.

MR HERD: I guess it's which power it is more important not to lose. It seems sensible to us that the commission should have the power to initiate complaints because the commission has got expert knowledge that we don't have. It has got a broader view; it has got a bigger picture, it can pick up trends that we will never see, as a small statewide - four members of staff and an office in Sydney with a membership of 200 around the state and a 60-member organisation - we don't get that big picture.

All of our staff and all of our committees may indeed have brains the size of planets but we just don't have the experience that HREOC has which, added to the expertise of its staff, seems wasted if the commissioner or the acting commissioner sits in his office and can see something bad is happening and can't do anything about it except leak information out to somebody. I'm not suggesting the commission has ever done that, but by osmosis it comes out of this building here that there is something bad and can somebody please indicate there's a problem.

MRS OWENS: That may be another role for the commission, leaking information.

MR HERD: Yes.

MS McKENZIE: It's the first time I've ever seen that as a function.

MR HERD: It just seems sensible to say, "The commission has got that knowledge and expertise. Let it use it." However, recognise also that that does create potential for conflict of roles, because the commission is involved in mediation. Are you allowed to say in submissions like this that you're not sure which is the best way to go?

MS McKENZIE: Yes, of course.

MR HERD: You're really not. There is a conflict there that has been set up and it would be good if we all just, on the basis of all the evidence you're getting, take the best guess. I'm going to contradict myself further and say mediating seems like a good thing to do and somebody ought to do it. It's much better not to go to court. I speak as somebody who has been in court in another jurisdiction on matters relating to disability and discrimination. I lost, but it doesn't matter that I lost because I fought the good fight and I'm very happy I did that. But even somebody with the arrogance and insensitivity to the rest of world that I've got was intimidated by the process. I think for people who have less confidence than is found in the disability advocacy sector that I'm an actor within, find the notion of going through formal complaint mechanisms very, very difficult and intimidating and they therefore give up their right to complain, or they don't exercise their right to seek redress - not because they think they're wrong, but because they just feel daunted by the prospect.

So if there's a mechanism whereby people can go to somebody and say, "Look, I have got a problem. I want to make a complaint about it but I don't want to turn this into something that's bigger than Ben-Hur." Sometimes, in my experience, all people want is somebody to say, "Yes, you were discriminated against and it's a bad thing." End of story. Sometimes people will want $100,00 million dollars as a consequence of the injustice that has been done to them, and there's different paths for dealing with those different levels of response that people might seek. Maybe it isn't clear at the outset which path any particular complainant wants to go down so there needs to be somebody who can get parties in the room and say, "Okay, can we fix this?" If that's called mediation, then somebody needs to do it.

As I say, I contradict myself, because I'm probably going to say that of all the agencies around, HREOC again probably has the experience that makes it best placed to do it, but I recognise in saying those two things, there's a conflict set up between the roles. If there is a way of resolving that conflict within HREOC we would happily suggest that the commission be given the resources and develop the staff team further to make both of those roles possible for people with disabilities.

MRS OWENS: It's possible in other organisations - are included to set up Chinese walls. It is possible. It's often not ideal but, as you say, HREOC has got some very valuable experience. One of the other suggestions you made for HREOC was to become an advocate on behalf of people going to court.

MR HERD: Yes. The crown prosecution service of disability rights is one way of looking at it. That would clearly take the commission in one way rather than the other, and clearly it wouldn't be possible for HREOC to become the advocate of an individual and be a mediator. If we were asked to choose between the two, we would go for the advocate, I think, and try to find - - -

MS McKENZIE: Some other body would do the mediation.

MR HERD: Some other body doing the mediation. The reason we suggest that might be a way of doing things is because people with disability just need somebody on their side; it's that straightforward. I'm told stories. I've not been in a formal dispute here yet in which the commission has been involved, but I've been told by others of their experience of finding themselves making what they thought was a not unreasonable complaint about a service - as an ordinary person with a disability - unemployed as it happens in the case of the individual I'm thinking of at the moment, who, having registered that complaint, then goes to a conciliation meeting or a mediation meeting and finds himself sitting across the table from four suits from Melbourne.

Some of my best friends come from Melbourne. I've got nothing against people who live there. It's just that in those circumstances the complainant finds him or herself in a situation that they didn't think they were getting into, and particularly larger corporations who have got public image to worry about, who don't want to lose discrimination cases, may from time to time take the view that it really is a good idea to crack this nut with a giant sledgehammer and use that power, not because they've got anything against the particular individual, and not because they even think the complaint is that serious, but that's just because the corporate culture deals with these kinds of issues in that way. People with disability in those circumstances just need somebody on their side.

In those circumstances I'd like to have a suit from Sydney sitting next to me so that at least there's some sense of balance in the relationship around that notion of mediation. I say that I think is important with people with disability because we don't come to these discussions on a level playing field. The law may treat people the same, we are all supposed to be equal before the law and we wouldn't wish to do anything to undermine that principle, but the reality is that we come to that engagement with law from different relative positions and individuals are often, simply by exercising their rights, nevertheless straightforwardly at a disadvantage.

Equalising that and levelling the playing field would be a good idea and turning - essentially, police wander around and decide that, yes, there has been a crime and then they pass it to somebody who decides whether or not a prosecution should take place and making the same kind of arrangements possible in the field of discrimination might not be an unhelpful thing to do, but you can't do that and mediate - even I will concede that.

MS McKENZIE: There might be some other things to think about, too, where in fact the suits from whatever state arrive for the respondent and there's only one complainant, it happens occasionally that the mediator might consider whether there's such an imbalance that it will interfere with the capacity of the matter to mediate properly and that the disadvantage is too great, and there may then be thoughts of getting the respondents to pick a much lesser number of people who will attend the mediation.

MR HERD: Yes.

MS McKENZIE: Other more proactive - although arguably in the end perhaps unfortunate measures - were adopted I remember in the Northern Territory in their anti-discrimination jurisdiction where they just refused to allow any lawyers to represent any parties at all, but that's a much more problematic solution.

MR HERD: Two responses, if I may: one is that my guess is that the commission would probably tell me that I'm relating old history to you and that as the commission's role in mediating has developed over time it has as good mediation rules and guidances that any mediator has, and I'm probably picking the one bad example from history. I could accept that would be a legitimate criticism to level at my contribution here. But also I see no reason why I should particularly err on the side of considering the interests of respondents here, but I do think it's not unreasonable to imagine that if somebody comes and complains about a service that I'm delivering and I have a corporate existence that may be in some way jeopardised by what they've got to say and that the mediation may form part of some larger legal action at some stage beyond that, I would want to make sure that I had all my defences in place from day one.

If I were to argue as a disability rights advocate that we should enshrine that notion in the practice of equality before the law, I think that's a two-way street. It applies to the respondents just as much as it applies to the complainant. In these areas it's not like the Olympics in which taking part is supposed to be the reason for doing it. When you get involved in a complaint, mediation and a possible legal dispute, winning is what matters, and I think we just need to accept that's the reality of the relationship.

By the time a complaint has been lodged, if it has gone through mediation and it might be heading towards court - although that is something that happens less and less of course because of the changes that have taken place - we've gone past the point at which people are going to try and reach some kind of positive settlement.

We’ve got two people, one of whom wants to win, or both of them who want to win and neither of whom wishes to lose, and if I was a corporate entity, I just wouldn’t want to lose a discrimination case and I would do everything to make sure that I didn’t.

MRS OWENS: The other related issue that we’ve been hearing is about the lack of resources for legal aid organisations in this field, that they are underresourced.

MS McKENZIE: Advocacy.

MRS OWENS: Advocacy groups are underresourced. In some states there’s a limitation. There are not many lawyers working pro bono, so the other approach, apart from Cate’s approach, is to go the other way and put more resources into providing this support for people, for the complainant to try and at least partly balance. You’re probably never going to be able to fully achieve a balance there, because if you’re a very big company - if you’re Packer, you’re still going to be able to employ more QCs at the end of the day.

MR HERD: Yes. We can only concur with your observation, I think. We’ve been involved in one or two small pieces of complaint raising and we’ve never paid a legal fee because everybody who has given us legal advice has recognised that we can’t afford to get the legal advice that we’ve had and they’ve done it pro bono. Exercising people’s rights ought not to be dependent on the philosophical or social standpoint of individual lawyers or law firms, and that I think therefore means that part of creating the level playing field that people ought to be able to exercise their right upon, to be equal before the law, requires some investment of resources in the disadvantaged person’s articulation of their rights.

Give some money to advocacy organisations; better funded legal aid, because there’s all kinds of - it’s not just disability discrimination that creates problems in people’s lives. From what we understand, all kinds of legal support agencies find themselves overwhelmed by requests from time to time to act on behalf of disadvantaged people. People with disability join the queue in some sense in some areas looking for support and so to get that level playing field it would be a valuable investment of resources. I’m not sure by whom - society as a whole, probably through government, to give more access to representatives of people who feel discriminated against, which is not a plea for us to have more money.

Here in New South Wales it would be good if the Disability Discrimination Law Centre was better resourced; if the complaints service of People with Disabilities Australia had more resources, because the staff who work for just those two organisations - and I think this applies for lots of others - tell us that they are swamped for requests for assistance and they’re having to make very, very difficult choices and turn away people who, in other circumstances, of course one would wish to help, but they just can't because of the weight of demand that's placed upon their overstretched resources. If that's anything like the position - and I'm sure my colleagues - Philip French is I think appearing later today and he will have much more detail on these kinds of issues.

MRS OWENS: Yes, he's on last.

MS McKENZIE: Yes, he's on at the end of the day.

MR HERD: He would tell you that, but it doesn't matter because he'll speak for himself. I can say we believe that lack of resourcing of advocacy, legal representatives and other assisting agencies means that people don't have a genuine chance to exercise their right to be treated equally in society.

MRS OWENS: There are resource issues everywhere we look. We've heard about those resource issues. We've heard about issues relating to resourcing of HREOC and in other contexts when we've been talking to people say from the independent schools area, where there's a question of children with disabilities having a choice of where they go to school and then what support they get if they choose to go into the independent school sector.

MR HERD: Yes.

MRS OWENS: There's the question of how that choice can be exercised and who pays for it and the problem is accentuated to some extent if there is some thought of implementing, say, education standards, although as of last week there's a bit of a question mark on that because that could mean the requirement on schools will be even greater. So there is this question of resourcing in other areas - transport, access to goods and services and who should pay.

MR HERD: Yes.

MRS OWENS: You've made a very strong plea for this act to be about people being able to exercise their human rights. To what extent do you think then there's a community obligation through government to basically fund people to be able to exercise these choices?

MR HERD: Can I answer in three parts, maybe: the first is that - and this is a purist position, I accept, but why not be pure? I'm giving evidence to a commission that's going to make recommendations to government. You know, a right is a right. You either have it or you don't. It wasn't me who said, "We hold these truths to be self-evident," you know? It was the founding fathers of the United States, which is the quintessential declaration of what it means to have rights in a modern, liberal, bourgeois democracy, if you wanted to use those terminologies.

I think it's not unreasonable for people with disability to say, "We have rights." Rights, pregnancy, same thing - you're either it or not it and you either have it or you don't have it. That's the kind of starting point that we take. We didn't create the law. The law exists and, because it is a law, we think it should be enacted and that we should all share the responsibility for making sure that the rights enshrined in that law actually apply to people in our societies. There are practical questions then about how that right gets made real in the lives of people for whom it was crafted.

The second component of my answer, therefore, is that we're all already paying for not delivering people's rights. The argument that the introduction of rights or the making real of rights is costly as opposed to the current no-cost status quo is not supported by the evidence. We spend billions of dollars a year on disability-specific services that exist only because people can't exercise their right to engage with society and therefore find themselves out of the mainstream and because they're outside of the mainstream they have to be supported to get back into it and it costs a fortune, an absolute fortune.

So we're not suggesting that the introduction of a more rigorous regime for ensuring people rights is cost-free. We're saying it redistributes costs. It takes them away from the spending we currently have on keeping people outside of the mainstream and reapplies it to getting people into the mainstream and reshaping the mainstream. I recognise, therefore, there must necessarily be additional costs to get us from where we currently are to where we want to be. The reason why we believe that people should make that extra investment in changed management is because - and this is the third part of my argument - our argument is that proper application of people's rights leading to equality of opportunity is good for business. It produces dividends in the end.

The greatest stimulus to the bus manufacturing and coachbuilding companies of the last 25 years has been anti-discrimination legislation, because for 40 or 50 years - or take the taxi industry as a better example. Taxi industry I can speak for the UK, perhaps, not so much here; but the taxis running on the streets of the UK prior to the introduction of the 1995 - or whatever it was - Disability Discrimination Act, were basically vehicles that were constructed on a chassis that was designed in the 1930s. There had been no product innovation at all for 30 or 40 years and there had been some changes to the design of taxis as a consequence of just change generally.

Disability discrimination legislation and the requirement in the UK to have all taxis, all fleets of taxis, wheelchair-accessible by 2004 - which was commenced in

Edinburgh, which was the first of the cities to have taxis fully accessible by 1997 - brought into the market a new player, coachbuilding: Metro Cabs as opposed to London Cabs, and there were then two. There was then competition between the two to get the slice of the new market that was opening up. As a consequence, the 1930s design of taxi was radically altered. The fact that one of those companies failed is neither here nor there. That's what competition is about in some senses; but there was radical change, product development and new services that flowed from the new requirement to equalise opportunity .

Buses have been designed with axles for as long as buses have existed and it's only because of the pressure to introduce wheelchair-accessible buses that the concept of a low-floor bus without an axle has had to be introduced. What that does is generate new employment opportunities, new business markets and creates competition for that new market as it opens up and redistributes some of the share of market between old players; but people tell me that's good for business. New players come on the scene, old players either change or they go out of business and so we see here the potential to construct or bring about a virtual circle. Rights get applied. We manage change so that rights can then be realised but we also do what's good for the social actors on both sides of the equation if you like.

MRS OWENS: We're a bunch of economists at the commission.

MS McKENZIE: Except this person.

MRS OWENS: So we're always interested in things like competition and we're interested in costs and you've just talked about some of the costs and you've also talked about some of the benefits. We at the commission are also interested in broader, community-wide benefits, thinking even more broadly than what's good for business. There is a question of a broader benefit which is very hard to measure if not impossible - and that is, just the benefit to the community generally from having an inclusive society. You can't measure that. There's a qualitative benefit. It's a matter of what sort of community do we want to live in and what sort of things do we need to do as a community to ensure that everybody has an equal right to be on this earth and enjoy what everybody else has got. You never have full equity, full equality, but as a society it's a matter of we need to do our best. I don't know, that's not a question really, but you might want to comment.

MR HERD: We would agree with you, though. I understand that's why we have the act. You know, again I'm reporting hearsay having read the Sydney Morning Herald - so if it was in the Sydney Morning Herald, it must be true. There was a story on the front page of the Herald a couple of days ago about a remarkable piece of science, we're told, in which - I don't want to make any judgment about the parents involved or the people that are attempting to become parents; but the decision to use an IVF program to select out deafness. I think eight eggs were produced. They were tested for their genetic predisposition to deafness. They found what was described as "the good egg". They put the good egg into the mother again. She unfortunately did not become pregnant. She had waited. They tried another egg which was described as not quite as good because it was a 25 per cent likelihood of deafness coming from that egg. Again the woman did not become pregnant. But four of the "bad eggs" were discarded, because the combination of genes meant that there was a fifty-fifty likelihood of deafness. The story was presented as innovative, wonderful science allowing good choices to be made that raises some complex moral principles. I cannot wonder - that's an interesting thing, but what if the parents' name had been Beethoven?

MS McKENZIE: You've just chosen no child.

MR HERD: You know? We wouldn't have had Beethoven's Ninth Symphony. We'll never know, absolutely never know. This is rhetoric and politics but it's also truth, I think. You know, Beethoven never heard his Ninth Symphony because he was completely deaf; but we now have the genetic decision-making powers to decide whether or not a Beethoven will be with us or not. I think the world would be diminished if we didn't have Beethoven's Ninth Symphony. That's a value judgment on my part, because I think it's a good piece of music. What do I know? I know nothing about music, but I've seen people in the Sydney Opera House weep at the sound of that music and it comes from a man who would, in other circumstances, be described as having a deficit.

So one of the things that we would want to argue, not just in relation to this piece of legislation, is that disability is not necessarily deficit. It is certainly different but it's not necessarily a deficit. There's all kinds of examples that we could cite. One could cite - we all know them, from history. You know, from Claudius the first emperor of Rome through to John Howard, Prime Minister of Australia. All have an impairment of some description but nobody suggests that they're not making a valuable contribution to the society, are they? I would never suggest that of the Prime Minister. But for me, in the final analysis, that's what in some senses this kind of legislation ought to be about. You can't put a monetary value on Beethoven's Ninth Symphony. But do we have a position here in Australian society where the parents of a deaf child could go to a conservatorium and say, "I would like my child to study music?"

You know, we've got the technology apparently that can tell us that we can get - we can identify genes for schizophrenia now. We can if we want do something about that, but does that mean that we're not going to have Vincent Van Gogh's paintings? There's a possibility it does. You know, more money has been spent on the paintings of a crazy man than any other artist in the history of art purchasing. So where do we make the judgments about where value lies? Vincent might not have wanted to be the person he was, but he worked through whatever it was with his paintbrush; and a Japanese company spent $120 million or whatever it was buying one of his paintings. That tells you where value lies. But that doesn't answer your question about how we can - - -

MRS OWENS: Yes, it does. It wasn't a question, anyway.

MR HERD: No, sorry, it wasn't. That's right.

MRS OWENS: But you made a very significant point.

MR HERD: All right. Good, thank you.

MRS OWENS: I think that might be a very good place to end.

MS McKENZIE: It's a very convenient place to end.

MRS OWENS: Is there anything else that you'd like to say?

MR HERD: No, thank you. I'd just like to thank you for the opportunity to give our presentation and to ramble through it for an hour or so.

MS McKENZIE: Thank you very much.

MRS OWENS: It was an excellent presentation. Thank you.

MR HERD: My pleasure.

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

MS OWENS: The next participant this afternoon is Mr Richard Gailey. For the transcript could you please repeat your name and the capacity in which you are appearing today.

MR GAILEY: Yes. Richard Gailey, retired architect, a fellow of the Institute of Architects, and for my work in the community I have been given an OAM, which was basically in reference to the Cancer Council and accommodation for cancer patients. It goes back over a long time. I have practised in Lane Cove since 1957. I have lived there since 1950, and still do. In all of my practice, except for the last 12 years, I have been engaged by council on many projects, one of which was a 65-room hostel, which was the first local government funded hostel for aged people. I designed it, supervised it, and waited until it was sold - it had to be pre-sold. When it was all pre-sold it could then be built and, when it was built and finished, I could then collect my fees but, until that stage - if it fell down between then - I got nothing. That was a community contribution. That building is still there today, fully supported by all the residents, and is fully wheelchair accessible.

MRS OWENS: I was going to ask if it was accessible.

MR GAILEY: That was 35 years ago and it's still fully wheelchair accessible. The only spot that's not - there are three levels of it, coming off a sloping street. Every level has wheelchair access to the street. It doesn't have compliant access up the street or between floors, but everybody can get to their own unit or they can get to the taxi or the bus out the front.

MRS OWENS: And that was 35 years ago.

MR GAILEY: That was 35 years ago.

MRS OWENS: So you were thinking about these issues way back then.

MR GAILEY: I was thinking about those issues then and I still am.

MRS OWENS: Would you like to introduce your submission for us?

MS McKENZIE: Do you have some key issues?

MRS OWENS: A couple of the key points. We have read your submission and - - -

MR GAILEY: You've read it. Right.

MRS OWENS: - - - I have looked at all of your photos attached to it.

MR GAILEY: Before we get to the conclusion, the basis of the report is that no level of government is addressing the disabilities regulations. I'm looking at access mainly - not equal rights in the workplace or anything like that, but access to buildings - that's my main concern. Nobody in government is recognising these requirements. In Lane Cove - you have read the submission that went to the Disability Discrimination Legal Office - they looked at the problem and said, "We don't have a solicitor on staff, Mr Gailey. We cannot help you. You'll have to go to a pro bono group."

I went to a pro bono group and they said, "Mr Gailey, you're taking action against council, Coles supermarket is a developer, and we couldn't possibly support anything like that. I'm a one-man pro bono solicitor. I couldn't do anything." I finished up going to the Anti-Discrimination Tribunal. They accepted my complaint against Coles and council for breaching the mandatory regulations. It took 12 months to be resolved and, at the end of that, they said, "We cannot conciliate this. We'll go to the Administrative Decisions Tribunal."

I took it to that tribunal and, all through this - there were four complainants - myself, as an aged person; my daughter, who has joint deficiencies and has a wheelchair sometimes and a walking-stick most of the time; Ian Irwin, who is a thalidomide product - has his toes where his kneecaps are and nothing below; his wife - she works in the Attorney-General's Department, and she is the same. They both live in Lane Cove. They both try to shop in Lane Cove, but they cannot get into buildings and they cannot use the disabled parking there.

Council, in its submission to the tribunal, gave evidence that the council had a good record of upholding the Disability Discrimination Act because they had introduced in 1987 an access committee sponsored by the council and, in 1987, the first report - which was tabled to the commission - said that the most dangerous positions in parking in Lane Cove for disabled people were the conditions of parking behind the supermarket and the access from the supermarket to the street. That was in 1987 - a report from their own access committee - and that was the basis of my complaint back in 2001; exactly the same complaint. In their evidence they've said that they provided disabled parking spaces as suggested by their access committee. I just looked at one last night when I went to a restaurant in Lane Cove and the disabled parking has a grade of one in 15 on it - not one in 40 - so it doesn't comply, but it has got a nice insignia on it that says it's a disabled parking space but - - -

MS McKENZIE: But it's not useable.

MR GAILEY: But don't open the back door or don't open the side door or don't put your trolley or your baby's pram next to it because they will all run down the hill into the car next door. That's where it went to but, in researching this, I found that in December 2002 in Newcastle they spent a million dollars to put an access ramp from Stockton - which is on the other side of the river from Newcastle - so there would be wheelchair access to the ferry. The minister for transport and the local member, Gail Scully, were there. The lord mayor was there. Big hullabaloo, balloons and everything else, and a man in a wheelchair just like you - and he was delighted because he could not get his physiotherapy treatment in Newcastle because his motorised wheelchair wouldn't go there on one battery load; he couldn't afford the taxi fare, so he took one treatment in three. That was all he could afford.

He was delighted to get onto the ferry. He got onto the ferry; got to Newcastle, but there was no bloody ramp at the other side. They had spent a million dollars, and all this publicity - who in council could ever say that they acknowledge the needs of disabled people and meeting the disabled regulations? Lane Cove Council is the same, and there are instances elsewhere the same. I found on driving around - just a little tea-house which is in my submission - a weatherboard tea-house, built up three feet above the flood level of the river which seats 30 people for afternoon teas and light lunches. When I got there the timber ramp to it was being rebuilt. I spoke to the owner and said, "How come you're rebuilding the ramp?" I said, "How did you design your disabled toilets?" He said, "I submitted the plans to the council and they said, "You've got to have disabled toilets." He said, "What have I got to do?" They said, "That's your problem. You want to build it; you get someone to design it to make disabled toilets," so he did that.

He looked at the Building Code of Australia. He built two perfectly compliant disabled toilets; one for men and one for women - completely compliant. This was on a trip that I'd made up to Brisbane and back again, visiting some friends of my wife in nursing homes, going to every Leagues Club I could go to for cheap meals, and looking at all sorts of buildings, and every one I went to I went into the disabled toilets and I didn't find one other disabled toilet that complied with the regulations. Most of them might have been built that way - I doubt it, but some of them might have been built that way. The others, when the cleaner came in he put the wastepaper basket where you couldn't get your wheelchair to it and nobody to push it out of the way. Somebody else had come and put a towel dispenser in and that meant you couldn't get your wheelchair in. Just nobody has appreciation of it.

But when I got to this one, I spoke to the owner and he said, "I went and bought a copy of the disability regulations and I thought I complied with everything, and I looked up the Building Code of Australia" - which, as you know, is about that thick - "and in the front of it it says that access ramps shall be 1 in 8". He built it to 1 in 8. The building inspector came down to inspect it to say it was all finished, and he said, "No, it's not. That ramp has got to be 1 in 14." Says, "Who told me that?"

He said, "You look at the other part of the Building Code of Australia for disability access. It's over the back there. It's 1 in 14. You've got to have rests every nine metres. You can't occupy this building until it's rebuilt." That can be done there but in Lane Cove Coles were allowed to extend the supermarket and down one side they had a truck - car ramps on both sides of the building. From Burns Bay Road you drove down one ramp to a carpark at the back. That was the one the access committee complained about in 1987. You got into an area at the back mixed up with parking; truck service - trucks under the building. If you wanted to get back to Burns Bay Road you drove up a very steep ramp.

Coles applied to extend that store and the conditions in the development approval said, "All parking for cars and trucks must comply to the Australian standard" - must comply. That's a condition of the development consent. Another condition said, "The existing ramps must be retained and must remain while ever the building is a retail premises." So there's a conflict of those two conditions.

I knew the chairman of the Building Surveyors Institute, Bill Burns, who used to be a building inspector at Lane Cove. I said, "Bill, what's the situation?" and he said, "That's a noncomplying consent. It doesn't comply; it's invalid." I said, "Right. What do I do about it?" He said, "Well, jump up and down. That's about all you can do." I took the complaint to the legal office. They said, "We don't have solicitors," so I went to a pro bono and finished up with the Anti-Discrimination Board and they proceeded with it.

It got to the tribunal. As I said there were the four - there was Ian Irwin, with his toes on his kneecaps and his wife - they were there - but the whole of the 12 months in all of the other dealings I had represented the four complainants, and that was accepted for 18 months, through all the pro bonos, everybody - they accepted that. They then transferred it to the Anti-Discrimination Board. I got there and the council, Coles and the developer, weren't very interested until we got very close to it and, for an old bloke, who was 76, didn't have a fax, at 5.30 on a Friday night before the Monday morning, I got 35 pages of faxes on points of law and things like that. I looked at them. I could not read them. I did not have the stamina to read them. I threw them all in a bag. I booked into the Wentworth Hotel, so that I could be close for the tribunal hearing. I booked in there for three days because it was a three-day hearing.

When I got to the hearing, the chairman, Graeme Innes, who I was sitting next to this morning, said, "Mr Gailey, you're here. You lead the case." I'm said, "I'm Richard Gailey. I'm an architect" - and so-and-so - "and I represent Ian Irwin, Julie Harrickson, and my daughter, Diane Sutherland." With that, the barrister for Coles stood up and said, "Mr Chairman, under article so-and-so of the tribunal unless a complainant is in attendance for the whole of the hearing their complaint must be withdrawn, and we will be seeking costs."

In my introduction I said that two of the other three complainants could be available at an hour's notice if they were required for cross-examination. Graeme Innes said, "Mr Gailey, you have heard what the barrister said. I have to take credence of that. This is not a normal court. We have some leniency. I will give you until 12 o'clock to have those two people here." I said, "How am I supposed to get there? I'm sitting here." He said, "You had some people that you were talking to. That's your problem. You organise it." So at 10 past 12 Ian Irwin came up. He was asked was he aware of the conditions of the tribunal and he said no, so he read a copy of it. He said, "Yes, I'd have to agree with that." "Will you be here for the whole hearing?" He said, "No. I cannot get time off work. They wouldn't give me time off work." Where does he work? The Department of Ageing and Disability. They wouldn't give him time off to attend this tribunal. His wife could not be found and could not attend. Where does she work? In the Attorney-General's Department, and she is the consultant for the disability access to government buildings, and she couldn't get time off either.

Once that was declared the barrister then said, "Mr Gailey has submitted through himself and through council's evidence a report from an access specialist. Mr Gailey's access specialist says that he's not an expert in the Building Code of Australia, but he is an expert in the access regulations." The barrister says, "Our expert on access is an expert in the Building Code of Australia, as well as the access requirements. His credentials are so-and- so, his name is Mr Beardsmore." As his credentials are much better than Mr Gailey's access consultant credentials, I move that Mr Gailey's access report be not received" - and it was upheld.

They then decided that after the luncheon adjournment they would meet at the Coles site because in the 12 months that I had lodged my complaint the whole of the building had been built. The ramps still stayed there. You went down what was a 1 in 7 ramp. They redesigned and levelled it out halfway down, so you could get to a lower level carpark off that ramp. So the ramp was considerably changed. The supermarket was extended over that ramp, which was between the two buildings. It was three and a half metres wide - or 3.7 metres wide - and they put 500 columns up one side of it, so it made it much narrower.

MS McKENZIE: So the ramp can't be used?

MR GAILEY: It can be used for cars and it's still used for trucks, but the trucks when they go down have to fold in their side mirrors to go down that ramp. They have to fold in the side mirror. The Australian standard for trucks says the minimum ramp has to be four and a half metres wide. The minimum width for a car has to be three and a half metres wide, and this is about 3.2 metres wide. We went down and we made an inspection. We saw that the ramp wasn't right. There was an access from the lower floor - the Coles supermarket is on the street level.

They excavated the front of the site and put a lower level exposed to the street, for a greengrocer, a butcher and a delicatessen or something like that. From those shops there is a 1 in 8 ramp down to the service trucks at the back where these trucks go down the side ramps. A condition of the approval was that that 1 in 8 ramp had to be built to 1 in 14 to comply with the Disability Act. The completed drawings, as submitted to the tribunal, showed the ramp drawn on the drawings as 1 in 14. It has not been extended, other than 1 in 8.

MS McKENZIE: So it's still 1 in 8.

MR GAILEY: It's still 1 in 8. The council put a condition on the development consent for the Coles supermarket extension that Coles build 28 parking spaces on the adjoining allotment. That was a condition. What they did was say, "We can't get one on the adjoining allotment because there is no adjoining allotment." Behind the shops at Lane Cove there's a conglomeration of small blocks of land which were donated by the owners of the properties to create access to the rear of their premises. There was no one allotment. That was fully developed as parking on the slope, which was complained about in 1987.

Council agreed, without any reference to the community or anybody else, to approve a two-level carpark behind Coles, in the airspace above three of these conglomerates of allotments. The only access into it is down one of these steep ramps into the carpark under Coles and, until this extra carpark was built - which was only a condition of the consent - you couldn't get a car out of the carpark that you came down into because it relied on the future carpark built for council. That carpark has a top level, go down to half a level of the next level, up a level to the next one, down to the bottom.

It's a compliant 1 in 14 ramp, compliant in that it's 1.1 metres wide; no chance of passing anybody coming up and down. The rest points are there but you'd be pretty hard to find them. You know they're there because the end row goes on and goes level for a metre. The ramp itself sort of blends pretty close to it but doesn't quite give you a flat level. I'm sure you could not put a wheelchair on those flat spots that wouldn't run down that ramp. When you get to the bottom of the ramp, the one level of parking - still eight feet above the service area to get out of the building - the ramp stops, and the car ramp of 1 in 6 goes down there and there's a flight of stairs from there that goes down.

In the expert's evidence, he said - there's a photograph of that access - to quote him, Mr Beardsmore:

> I understand that the 1 in 14 gradient ramp system provided from level 2 to level 1 is proposed to be further extended down to Council Lane level, ensuring complying egress from level 2 for people with disabilities.

That was approved that way and six months or 12 months later it still hasn't been put in, so there is no disabled access from this building down to that area. The certifying officer of council has said in his evidence that the egress from Coles supermarket and the carpark leads to council's carpark, and council's carpark being a public road, meets the compliance for all egress from a building. A letter in the submission, from the superintendent of police at Chatswood, says:

> I cannot help you in your complaints, Mr Gailey, other than to advise that all of the access through that carpark and access from Sera Street to Austin Street is owned by council. It is not a public road.

So if it's not a public road, the certifying officer of the council has fraudulently or negligently breached the Building Code of Australia. Council have a register of all the council-owned land, which is in here, which nominates 30-odd blocks of land. The rear of lot number 27, the rear of lot number 29, council-owned, council carpark; operational land, not community land - operational land. This conglomeration of allotments services 12 shops from Lane Cove who, back in the 30s and 40s, had all of their deliveries made from Burns Bay Road, the front street.

Lane Cove Council was the first council to put a road closure in and build a plaza. When they built that plaza, it denied front access to 10 shops. The engineer's report - back in 1980 something - said, "If we proceed with the plaza, council will have to make a public road of the access right through, make that into a public road to maintain the rear access to all of these shops." I'm an architect that practised in Lane Cove. I've added to many of those shops, out to the rear, and every one of those had to have a rear exit to meet the requirements of the Building Code of Australia, ordinance 71 as it was.

Council accepted all of those, on the basis I assumed, that it was council community land and could not be changed without the approval of the minister. But in 1995 all councils were required to declare their landholdings as either operational land or community land. This was community land and could not be changed in any way without the approval of the minister. Operational land means that council can deal in that land in any way they see fit.

Typical of that was, there were three community buildings owned by the council - a community aid centre, a child care centre and there was an adjoining dentist's property next to it. The council bought that. That was bought as operational land because it was bought as land which they could deal with, ultimately consolidate all of these lots, sell it for home unit development and redevelop that in other areas of Lane Cove. That is the purpose of operational land. It wasn't the purpose to deny access to the rear of all of these premises - their legal access to it - to all of these property owners, for buildings the council had approved.

I've spoken to the senior surveyor of the Lands Titles Office and he has confirmed that the only way these property owners can have their legal rights readdressed is to take it to the Land and Environment Court, and they are all reluctant to do that because they say, "We cannot afford the risks and the cost," because they too will be taking on Coles, council and private developers.

MRS OWENS: Can I ask you, Mr Gailey, if you're aware of whether the Lane Cove Council has got an action plan, a disability action plan?

MR GAILEY: They were asked to have an action plan, but to my knowledge they don't have one.

MRS OWENS: We spoke to a council yesterday - Leichhardt Council - and they brought their action plan along. They've submitted it to us as part of their submission and it's a very interesting document.

MS McKENZIE: Very detailed.

MRS OWENS: And very detailed. It's a live document.

MS McKENZIE: Very comprehensive.

MRS OWENS: They're updating it. They're not only concerned with ensuring that their heritage buildings are accessible but also they're making arrangements for shopping centres on private land to be made more accessible. They're interested in ensuring that people have easy access along footpaths and they're not obstructed.

MS McKENZIE: And also disabled carparking.

MRS OWENS: And disabled carparking.

MS McKENZIE: They cover all sorts of aspects of that.

MR GAILEY: But, really, are these things relevant. I maintain they're not relevant because the Building Code of Australia and the Disability Discrimination Regulations say what have to be done. You don't really need it. You need an access plan to say, "Where it doesn't comply now, we'll have them upgraded gradually when funds are available," or something like that, but when you've got a major extension on a supermarket, you've got a negligent access to carpark from 1987 known to council, still dangerous, the regulations are there to address it.

MS McKENZIE: They're just breached basically.

MR GAILEY: No, they're just breached, they're just ignored. In the case of this little tea-house, they've been enforced. Bravo. There are plans in here which I put to council to say, "This can be resolved in a different way. There is a complying solution which would not cost any more than what you have done," but council and Coles didn't want to know about it. It is there and it is a complying solution. It would have cost the construction of a million dollar road which would have rectified all of the problems, but it wasn't done.

Going back to Coles, we had a site inspection and, as you know, Mr Innes is blind, so there was himself and two other associates. I was not well at the time because I had a bad heart complaint and I had a stroke a few months before that, so I was plodding along, a little bit tired, but the barrister of Coles took Mr Innes around and the other two associates and walked ahead and described what a marvellous thing - all the improvements they'd done in the building; didn't walk down the 1 in 8 ramp. They walked down onto the carpark and down the 1 in 14 ramp, but he didn't walk down the 1 in 8 ramp.

I was far behind him because there was about 18 people there. I couldn't get through them and right up to his shoulder. They got finally down to the service area and one of the associates said, "Well, this area should be prohibited from any pedestrians in here." What it comprises is a ramp coming down with trucks coming down it. You've got carparks coming under the building now because the building has been extended. You can drive out to either side of that undercover carpark onto the council-owned carpark that's been there since 1987. You've got children walking through that carpark to go to a kindergarten which is next door, and you've got new carparking areas all in the same area where trucks come and back in to fill and deliver their goods.

The associate said, "This is a lethal area. Pedestrians should be banned from here." I thought, bravo, at least somebody has heard what I'm saying; they've seen it. Then the engineer said, "I suppose you'd like to see the access through to the rear street," so they walked down to there and said, "That's it," and they walked back up. I wanted to show them the access complying from the council carpark since 1987. It's three or four floors below Burns Bay Road. The only access is up through a complete set of stairs up through an arcade, which are designed - which is the only way to get from the back to attract people up to the front, but they are complying stairs as stairs, not disabled stairs, but proper stairs.

There is another access which is a series of ramps at 1 in 8, steps of 10 inches high and a mixture of steps and ramps, which is totally noncompliant, and that’s through private property. The one that I designed is through private property. Two others, with 1 in 8 ramps and 1 in 5 ramps, are on private property. There is no other access from this parking space up to the village which it serves. I wanted the commissioner and his associates to walk along that lane and try and access those to the plaza, but they got to the top of the ramp and in their car by the time I got to the top, because I was puffing and blowing by the time I got up there.

When we get to the court next morning, or before we got to the court, I rang my son-in-law, who’s a barrister, the head of a chambers - a barrister as head of chambers. He would not be involved in anything I did because he’s a criminal barrister. But I rang him and said, "Look, I’d like to talk to you. I’ll show you my submission" - which he hadn’t read. He said, "Well, I’ll see you in chambers at half past 7 in the morning," which I did. He said, "I’ve got a barrister here that works in the tribunal. I’ll give it to him." He came back at half past 9 and he said, "I’ve read your submission. I’ve read everything you’ve said. I take notice that Mr Innes has agreed that unless a complainant is there for the whole of the tribunal, he must withdraw his complaint."

On the first hearing before lunch Ian Irwin was asked, "Will you be here?" and he said, "No, I can’t get time off work." He said, "Therefore, Mr Irwin, you will have to withdraw your complaint," and he said, "Yes." The barrister said, "Well, if you do withdraw your complaint now, we will not pursue charges." He said, "Well, in that case, I’d like to apply for my wife for the same," and he said, "Yes," and they agreed to that. I then asked if I got a letter or a fax from my daughter, who was in hospital, would the same apply to her, and they said yes.

They said, "What about you, Mr Gailey, do you want to withdraw because if we proceed we will be suing you for costs?" If we lose. I said, "No, I’m not going to withdraw." So when we saw the inspection, I thought, bravo, people have seen the problem. I went and saw my son-in-law barrister, and his barrister came out at half past 9 and said, "Dick, you are in a difficult position. You have been advised that if you lose you’ll have to pay costs. You’ve also been advised that the evidence which you are relying on, which is the disability access report" - I couldn’t afford to get an expert on the Building Code of Australia, I just couldn’t afford that, but I could afford the money to get the access reports and an access report on Coles.

He said, "As your evidence has been withdrawn, the other complainants have been withdrawn and, if you proceed, you will be looking at a massive claim for costs against you." I said, "How much?" He said, "Could be 70,000, could be 100,000. I’ve got no idea." I said, "What do I do? I’ve been warned three times." He said, "On a pro bono basis I'll come over with you to apply for you to withdraw without costs." He came over, he did that, and it was agreed. We went downstairs, had a cup of coffee. My wife and I went back to the Wentworth. I laid down for half an hour to have sleep. I couldn't sleep, so I said, "Let's catch a bus and we'll go to Manly and have some lunch and get some fresh air and a sea breeze."

We did that, got back at 4 o'clock, and I lay down and went sound asleep. At 6 o'clock my wife shook me and woke me up and said, "What's wrong with you? What's wrong?" I said, "Nothing." She said, "You're pouring water from there to the tip of your toes. The only time you did that was when you had a stroke," and the only time before that that I knew I had it was before I had four bypasses. She rang the desk. They sent up a doctor, they sent up the ambulance. The ambulance took me down to St Vincent's Hospital emergency. They admitted me because I was a patient there, but otherwise I wouldn't have got through the red light ban, and they found this, "You're exhausted, all of your facilities [sic] are all right, but you need at least three days' rest and then two months' rest before you can possibly proceed." So I spent two days or three days in the Wentworth Hotel, recovering from that ordeal, because I'd gone into the tribunal and, having read the introduction - it said, "This is not the normal court. This is a court where both sides of the argument have to be - those persons on both sides of the argument have to be able to present their case." My case was not presented. I was forced to withdraw, blackmailed because of the threat of costs, which I could not sustain.

MS McKENZIE: This was the New South Wales Administrative Decisions Tribunal, wasn't it? Is that right?

MR GAILEY: Anti-Discrimination Tribunal.

MS McKENZIE: This was before it merged into the Administrative Decisions Tribunal?

MR GAILEY: It's the Anti-Discrimination Board and the Disability Discrimination Act. They're the two.

MS McKENZIE: It wasn't clear to me. You went under the Disability Discrimination Act?

MR GAILEY: Yes.

MS McKENZIE: Or you went under - - -

MR GAILEY: Disability Discrimination Act.

MS McKENZIE: - - - the New South Wales act?

MR GAILEY: Because under the Disability Discrimination Act they can - anti-discrimination also covers discrimination against disabilities, and I got there because the Disability Discrimination Legal Office could not take my case.

MS McKENZIE: Okay, so you went under the New South Wales act at that time. Is that - - -

MR GAILEY: That's right.

MS McKENZIE: Okay.

MR GAILEY: But the result was still the same. The complaints were exactly the same under whichever one I would have gone to. So when I'd finished that, I said, "Well, that's the end of me." My family, my wife, everybody else said "You've done enough, working on this." Council sought a community proposal to resolve all of their traffic and parking problems in Lane Cove in 1994. They invited me to be the chairman of that because I'm an architect that practises in the community. I got the Chamber of Commerce and others and we did that, put it in a submission.

All the council wanted from that submission was a proposal to upgrade the appearance of the plaza. As far as traffic and parking or anything else, they didn't want to know about it. As soon as I got some submissions in that said, yes, we can put planter boxes in and we can put some umbrellas up, and things like that, the committee of which I was chair was given its sunset notice and it was abandoned. But in preparing that submission I sought the input of 12 practising architects in Lane Cove - architects living in Lane Cove, practising in their own practices - who knew the conditions in Lane Cove but, more importantly, their wives knew the parking conditions and the dangers of parking and pushing strollers and taking kids through dangerous traffic areas. Six of those put in very comprehensive proposals to meet the requirements.

I then consolidated all of those and put them into council. It was in council for six weeks and then I was asked to address the council on my report, which was distributed to the council three days beforehand. None of them had read it. That's where we got to with the council there. I complained to the Anti-Discrimination Board. I asked for a rehearing of my complaint because it didn't comply with their guidelines. I didn't get there. I got a copy of the transcript of the hearing and I got a tape of it and I transcribed that, and that's included in this document.

But when I then was rung by my daughter, who's put a submission in from the Media Alliance on access in theatres and all those sorts of places - she rang me and said, "Dad, you've got to put a submission in because you've had experience through here." The other experience I had was with Bluegum Lodge, which is a lodge for cancer patients which I designed in an honorary capacity with the Cancer Council, initially one at Westmead Hospital for 27 rooms for cancer patients, and then one at Greenwich Hospital for cancer patients at North Shore Hospital.

There was a disused nurses quarters at Greenwich Hospital which would accommodate about 12 rooms. I resolved with the Cancer Council - I was the chairman of an accommodation committee - that they could be converted for cancer patients to come down. Each room was a nurses quarters room which is about a 14 by 10 room and by putting in two two foot six mattresses or beds, a small wardrobe and a chest of drawers, you could put accommodation in for a patient and accommodation for her partner or his partner or their son or something like that. So that every person from Coffs Harbour, Casino, all of those areas, could come down to North Shore Hospital for a week's treatment or six weeks' treatment, stay at Bluegum Lodge in this accommodation for $15 a night, which was reimbursed by IPTASH, Independent Access for Distant Patients, and they got that money refunded, so they could come down to that accommodation for nothing.

That building was built with 37 rooms. I designed it. I handed it over to another architect who was registered to document it and supervise it, and I supervised it with him, it was finished and, three years after it was finished, they found that the community bus they had that took the patients from Greenwich up to North Shore Hospital, and during the winter months the partner would see the patient onto the bus when they left, and meet them when they came back, and all that they could do was sit under the bus shelter or carport where the bus came.

It was pretty cold in winter. They'd accumulated some funds and they said, "We'd like a waiting lounge where you can see the bus, where the bus stops," but they couldn't make it as an addition on the building. It had to be a separate building. So it was a separate building in this spot next to the carport where the bus came in, with visions of the bus, so that the patient could wait in that room until the bus came. If they wanted to get there half an hour early and talk to their friends, they could wait in comfort until the bus came to pick them up. The coordinator said, "We've got to have a toilet in it, because the last thing you want to do before you get on a bus and the first thing you do when you get home is go to the toilet, so it's got to be close." The other toilets were in the main building but they were about 50 feet or 60 feet away in the other building, so you had to go in and out doors to get to them.

I designed the extensions for that, handed it over to the - not to the architect that did the original building but the architect that worked for him that documented some of the other building, so I thought, "It will be fine to give it to him because he's designed the other building which is a completely wheelchair compliant building," as it is for all hospital sites. When it was finished, the coordinator rang me and said, "The builder is on holidays for a fortnight. Would you like to come over and just check it over and make sure we've got our check list - that everything's all right?" I said, "Well, there's three different colours on the timber skirting. They should have all been stained to match the same colour. There's two light switches that are upside down. But, more importantly, there's a seven-inch step into the lounge, and the toilet is six foot by three foot, an inward opening door, a toilet at one end and a basin at the other." I said, "It doesn't comply in any shape or form."

I rang the building inspector. He said, "Well, Dick, I've certified that building, I've given it a certificate of compliance. Nothing I can do about it." I said, "It does not comply with the regulations." I went to the Department of Local Government and they said, "The council is defending the indefensible, aren't they?" I said, "Well, you put that in writing." They can't do that. I said, "Do you agree with me?" "Yes, we do." I went to the Independent Living Centre, who I see are talking this afternoon, saw them, showed them my plans, and I said, "Without my comments, what do you think should happen here?" They came back three days later with a letter, "The building is a separate building. It has to have a continuous path of travel to it, and the maximum step in a path of travel is five millimetres, not 180 millimetres or 200. Any toilet in a separate building on this campus must be a wheelchair accessible toilet." Full stop. That was it. That was from the Independent Living Centre.

I took that to the Department of Local Government, I took it to the Department of Planning, I took it to the Ombudsman, I took it to the Disability Discrimination Legal Office and the temporary solicitor wrote back and said, "Mr Gailey, I have friends who have cancer and they have no trouble walking up and down stairs. There is a disabled toilet in the adjoining building. What do they want another one for?" I said, "These are the regulations. Don't argue the regulations with me. I want them enforced." "Oh, no, I cannot agree with you." They would not accept that submission, they ignored that submission.

I then went back to the hospital and said - went back to the Department of Local Government and they had an investigative committee. They came back and said, "The access is a requirement and we've instructed council accordingly. We won't be involved with whether the disabled toilets should be made accessible, because the council and the clients have advised that if there is no toilet adjoining that building things are satisfactory. So if we either demolish the toilet or take out the toilet and make it a garden store, we then comply with the regulations."

I said, "Well, I'm sorry, but if you do that I'm sure that Channel 10 or Channel 2 or somebody would like to know that you've taken fully 100 per cent public-funded money from all of these facilities and then you're tearing them up, because you haven't built them properly." Then the hospital said, "We will get the architect to put ramps in to it." So the architect put in a one-in-one ramp right outside the sliding door, down one-in-one to the slab underneath. So I went to the committee meeting and the chairman of the Greenwich Hospital said, "We rectified it. We've got ramps in now."

I said, "Well, if you think they can fly, go for it, but do you realise that if one of your staff opens that sliding door, steps out expecting to put their foot on level ground they will put it onto the slope. If they slide down that ramp they will fall down, the back of their head will come across the upstanding track of the sliding door and they will probably break their neck. Are you happy with that? You were happy to advise WorkCover that you comply with the regulations on your site." While we were arguing that the committee of Bluegum Lodge got a letter from council, "We advise you that the access to the waiting lounge, the toilet, does not comply. We are giving you two months to have it rectified." This is a building which they had already said complied with all the regulations.

That took 12 months and it was rectified at the cost to Bluegum Lodge. Not by the architect, not by the builder and not by the Greenwich Hospital, but by the Bluegum Lodge committee. I took a complaint to the Board of Architects, because the architect that documented it had on his drawings, "Member of the Institute of Architects." So I took a complaint to them, because he had breached his registration requirements, and they said, "I'm sorry, Mr Gailey, he hasn't been registered for three years. It's no good bringing a complaint here, take it to the Board of Architects." So I took it to the Board of Architects, and they had a hearing at which they upheld that the architect had breached his requirements for registration as an architect and he was reprimanded.

The committee for that Board of Architects was the previous chairman of the Land and Environment Court, so that the case was there that in the view of the Land and Environment Court, or an officer of the Land and Environment Court, the top officer resolved that the architect was negligent in allowing a building to be built contrary to the regulations. But it could not be resolved. So I could not get any of that up before the public until my daughter rang me and said, "Do you realise that all of these submissions will be put on a web site, they will be available for everyone to look at, people like you." That's a huge document. There are 40 or 50 copies of that now distributed, as I said in the introduction. There is a covering letter that they will go to all the people, the property owners, that have been affected by this and to all the people that are mentioned in the report, and they give me support on it.

On Tuesday last I got a message on my answering phone. One of the councillors of Lane Cove said, "Dick, last night I put an urgency of motion to council that council all be given a copy of the submission, that they be asked to read it, so that we do not continue to make the mistakes that we've made in the past." That was adopted by council last Monday night, so this document may do some good, because in it we have the complete breaches documented, whether the general manager and council - I'll read another bit off here - - -

MRS OWENS: Thank you, Mr Gailey, I think we will have to stop in a minute, but it sounds like you are finally getting some positive response to all this enormous effort that you've put in to - - -

MR GAILEY: I think that because of the fact this has now become a completely public document - all of the documents that were submitted in evidence to the tribunal are public documents, because they are submitted in here and can now be used by other people to say this has to be rectified.

MRS OWENS: Now that you have submitted to us, this submission, as you're probably aware, does go on our web site, people do read our submissions and we will be very interested to see whether the Lane Cove Council is prepared to put in a submission as well, and see what they have to say. So watch this space.

MR GAILEY: I think the thing that became obvious to me is that if the police can issue an infringement and a defect notice, the failure to comply results in disqualification of licence or cancelling registration. Very simple, "You broke the law, fix it or we will suspend your licence." Coles, "You've broken the law. We give you two months to rectify it or close your store." That should be enforceable. It shouldn't be relying on me. It bloody nearly killed me, literally. It cost an awful lot of money. Everybody said, "We all want it." We've got the Disability Discrimination Act, but nobody will enforce it. Thanks for your time.

MRS OWENS: Thank you, very much.

MS McKENZIE: Thank you.

MRS OWENS: We will now break and we will resume at 25 to 2.

MRS OWENS: The next participant this afternoon is Gary Betch. Gary, could you just repeat your name and the capacity you're here today, for the transcript.

MR BETCH: Yes, I certainly will. Gary Betch - B-e-t-c-h.

MRS OWENS: Thank you. You're here as an individual?

MR BETCH: Yes, I am.

MRS OWENS: Thank you, and thank you for your submission. As I said, we really do appreciate the submissions from individuals, because they really help inform us about experiences and people's views about the act and just generally the views about what's happening. I'll hand over to you. You said you'd like to introduce it and make some comments about definitions and so on. Do you want to go ahead?

MR BETCH: Yes. What is the definition of "disability"? I assume there are three different categories in disability, and they are illness, handicap and disability itself. Some people have illnesses, some people have handicaps, and some people have disabilities. What I meant in "three different categories" is, they're all totally different issues.

I have all three. I was born with a biological disorder, and that's a chemical structure in my body. I was born part brain-damaged, which resulted in learning disabilities. I found it very hard to go through schools, so education departments virtually kicked me out of school and told me - not the department itself, but the system told me it was no use to keep on going to schools.

MS McKENZIE: They couldn't help?

MRS OWENS: How far did you get into the schooling system?

MR BETCH: About a whole history of schooling - I had approximately about a year and a half, so I've virtually had no schooling.

MRS OWENS: You've written this very good submission.

MR BETCH: Yes, because I'm self-taught. I educated myself and I believe everyone should be self-taught, because now we're into the stage of learning what other people are learning, and there are bad habits.

MRS OWENS: Maybe you need a balance between teaching yourself, but also people do need a formal education, as far as they can go in the education system.

MR BETCH: Yes, and that's why I'm here today, because I thought by looking at the words "Productivity Commission" I presumed that must be something vital, because "productivity" means producing products for types of investment.

MRS OWENS: But we're interested in much more than that. We're interested in the community as a whole. We're interested in social issues.

MR BETCH: Yes. Some of the submissions I've read were partly irrelevant, because some of the submissions I've read outline what they stand for, you know. So that's why I think there's three different categories, because I come under those categories.

MS McKENZIE: So some have an illness - so handicapped - can you give me an example?

MR BETCH: Yes. I know people look at me particularly funny, because I'm big, and that's what biological disorder is. My body gains weight by not getting rid of - how do you say it - my body doesn't seem to fight off the sugar. What happens is, when you eat sugar, it produces energy, and it also produces fat. My body doesn't - - -

MRS OWENS: Doesn't process it.

MR BETCH: Yes. So my body gains weight. So if I eat natural sugars, I still gain weight, because it's sugar.

MRS OWENS: Has that led to other health problems for you?

MR BETCH: Yes.

MRS OWENS: Are you a diabetic? There's a range of - - -

MR BETCH: I'm not really diabetic. That's what I was going to bring up, the definition of "discrimination" because, again, there are two different types. There's "discriminator" and there's "discrimination". That's why I think laws should be brought in to bring in laws against people discriminating about people who are overweight or - - -

MRS OWENS: So there's an issue about possible harassment because of being overweight?

MR BETCH: Yes.

MRS OWENS: You don't think that would be covered by the act that we're reviewing, the Disability Discrimination Act?

MR BETCH: No, that doesn't cover - it doesn't come under the Disability Discrimination Act. It should, and I'm hoping it will be under an act one day.

MS McKENZIE: Of course, at the end of this inquiry we make a report about the act, and we can put suggestions for change into the report.

MR BETCH: Yes.

MS McKENZIE: So that might be one of the suggestions we could look at.

MR BETCH: Yes.

MRS OWENS: Did you personally experience problems, in your short time in the schooling system, with other kids?

MR BETCH: Yes. It's mainly just kids, and especially females - so in society, females.

MS McKENZIE: Making nasty remarks?

MR BETCH: Because females leads onto males, you know, and so on. But when you've got a learning disability, people think you can't learn on some particular things. Like, I can learn - I can fly, I can drive a train, but I just don't understand about the theory side of it.

MRS OWENS: I probably don't know very much about how planes work or trains, but it doesn't mean to say - I don't think I want to actually drive a train or fly a plane, and Cate doesn't want to fly a plane either.

MS McKENZIE: Want to bet?

MRS OWENS: You said in one of the other hearings you didn't really want to, so I'm just assuming that that was what you meant.

MS McKENZIE: I don't think I can. Actually, I wouldn't be allowed to, but flying might be fun.

MRS OWENS: But everybody has got their strengths and weaknesses in terms of what they learn and what they're interested in.

MR BETCH: Yes.

MRS OWENS: You can fly a plane, but not necessarily understand every element of how that plane works.

MR BETCH: Yes, but there’s only one thing I just can’t do - is pass theory exams. So if I get a job, I get into a dead-end job, but a dead-end job won’t last long because people say you’ve got the potential to learn, but when you don’t have the certificate saying you can do stuff, they won’t allow you to do anything. So you just get into a dead-end job, which doesn’t last for very long, and that’s what happens to me.

MS McKENZIE: And it’s true, because a lot of jobs these days, when they say what they want, what kind of qualifications they want, they always say you’ve got to have some certificate or other.

MR BETCH: Yes.

MRS OWENS: There’s a bit of a vicious circle that happens, because you go into a dead-end job, it finishes, then when you go I presume for your next job, they say, "Well, what did you do before?" and you’ve only had three months doing something, so they don’t think you’re experienced enough to do that job, because you’ve only had that other short-term job. Is that how it works?

MR BETCH: Yes. I think the government really doesn’t understand what it’s like to be in a position, you know, going to Centrelink or any job places and try and look for work. You go to Centrelink and you say you want to get a particular job, but you don’t have the qualifications or anything like that, so they send you out to a particular job, which that job might not last long, because the employers can’t afford to keep the person for that job, so they retrench them or fire them, and then they go back onto the dole again. Then once the person goes back onto the dole, they lose their benefits because they go into a vicious cycle of - you know.

MRS OWENS: Has Centrelink at any stage tried to help you with some training, to equip you to do better jobs? Has there been an effort made on your behalf to do that?

MR BETCH: They send you to training, but not real actual training, you know what I mean - mostly just in theory and not really actual practical.

MS McKENZIE: And the practical one you can do well, but the theory one you find a bit harder.

MR BETCH: Yes. So that’s why I taught myself how to be a computer technician, so virtually in the computer side of it. But the government doesn't bring out too many of these programs. They only bring out silly programs, like gardening or labouring work or something like that, which I can't do.

MS McKENZIE: So the computer stuff you learnt - you learnt to be a computer technician?

MR BETCH: Yes, all myself.

MS McKENZIE: Because you might have a learning difficulty, do you think people might assume you just can't learn at all? Is that one of the problems?

MR BETCH: Yes. My mental focus goes out of antenna range, because I've got to think constantly, because if I don't think logically, then I go off track and then I've forgotten what I was going to say or what I'm going to say.

MS McKENZIE: Yes.

MR BETCH: So that's why I get a bit nervous.

MS McKENZIE: You're doing a pretty good job.

MRS OWENS: Absolutely. Do you feel like you have been discriminated against, either looking for jobs or going into training?

MR BETCH: I get discriminated. That's why I was going to bring up the definition of "discrimination," because "discrimination" means being treated in an unfair way; that's what discrimination is.

MRS OWENS: Yes. Have you ever been in a situation where it's fairly clear that it's been discrimination and have you ever thought about putting in a complaint about that treatment?

MR BETCH: Yes, I put in a complaint, because I'd been really discriminated. But as soon as I made a complaint, when I told my situation - you know, like my illness and all that - they wanted me to get a doctor's report. But doctors, when they do examinations or something like that, they don't know what to call it so they can't fill out a report so they can send it into such a department. That's why I think they should be a separate - a broad or a separate organisation to HREOC, Human Rights Equal Opportunity Commission. I believe it should be a separate organisation to handle claims for people who have disabilities and want to make claims, because if you go to Human Rights, they don't have a clue of handling a person's complaint.

MS McKENZIE: Did you complain to Human Rights? Is that the people you complained to?

MR BETCH: Yes, but when I saw a person, she didn't know exactly what I was going on about.

MRS OWENS: I think you made a point in your submission where you said that you thought the act's effectiveness had been impaired by the fact that there's bias, and you were concerned about linking the act to the Human Rights and Equal Opportunity Commission.

MR BETCH: Yes, they're kind of biased in a particular way.

MRS OWENS: Which way is the bias going?

MR BETCH: More favourably for the people who are not actually born in this country - they look after more on that side than they do for people with disabilities.

MRS OWENS: We had two people from the Human Rights and Equal Opportunity Commission here yesterday, and it's a pity they're not here now, because they would probably say that they have a lot of concern for the people with disabilities and that they have processed quite a lot of complaints and they've had recently a 10-year anniversary where they've gone around the whole country talking about some of the achievements under the act. So they might be interested to see there's another perspective on their work.

MR BETCH: It's a very hard question because they're more like the Bureau of Statistics. They can falsify their inquiries to say, "This is a drastic measure," and then really they look on the other side and not actually looking at the most vital parts of the Discrimination Act. Everyone gets discriminated, even a government discriminates as well. So that's why I'm saying it should be a different organisation, branched off by the Human Rights.

MS McKENZIE: To help with claims?

MR BETCH: Yes, because there are some people who don't have the actual - what it's like to be having a disability and saying, "Hey, these are the particular types of problems I have," and then go in there and they find out, "We only deal with people who are having trouble, like they come from overseas and they can't speak English," and then they say, "Hey, that's a disability." It's not. If a person doesn't want to speak English or wants to learn English, it's up to that person. It's not up to the Human Rights to say, "Hey, that person should go out and learn English." Virtually they're wasting the taxpayer's money of having this organisation and saying, "If you don't want to learn English," and that's why I'm saying it should be a total organisation branched off.

MS McKENZIE: When you went and tried to complain to the Equal Opportunity Commission, who were I think the alternative commission - after you thought that they didn't have a clue, did you then just quit? Did you give up?

MR BETCH: No. I just walked out and I said to myself, "Gee, this is a joke." I also said to myself, "What are they there for? Are they there to handle my claims?" Then they told me, "If you don't have the documents there's nothing we can help you with."

MRS OWENS: They didn't offer to help you get the documents or point you to somebody that could help you put the documents together?

MR BETCH: Yes, they did in a kind of way, but as soon as I said, "Yes, I'll get that material together," and then go back - then they kind of sent me on a merry-go-round again saying, "We don't have the right person to see you," or something like that and I said, "Don't you have people here who know anything about a particular problem?"

MRS OWENS: What was the nature of the complaint? What were you going to complain about?

MR BETCH: Educational organisation.

MRS OWENS: You made a general conclusion in your submission - I think you were concluding - you said that discrimination will be improved and it's better than 10 years ago because - I don't know whether I'm interpreting this correctly - there are now some support services but there are still some problems with humiliating comments and so on.

MR BETCH: Yes.

MRS OWENS: You think there have been some improvements over the last 10 years but there are still problems out there to be dealt with.

MR BETCH: The past 10 years I think even till now or probably in the future because the population is getting higher, I think the comments about people with disabilities, like people who can't walk properly - I hear it all the time. I hear it thousands of times - kids saying, "Gee, look at that person. He's got the wobbles," or something like that which, to me, personally, I think is offensive.

MS McKENZIE: That's not being very nice.

MR BETCH: But I can't say anything to a child because that child could say anything.

MRS OWENS: It all comes right back to the children and what happens in their own families and how their own parents - in some cases, they've got single-parent families - but just how the parent or parents bring those kids up and what kids learn at school. There's just the need to educate kids that there are certain things that are just not acceptable behaviour.

MR BETCH: Yes.

MS McKENZIE: You say in your submission that there's a real need for more education, for more understanding by people.

MR BETCH: Yes, like for transport. I think that's improved immensely over the past 10 years because buses have ramps going off them. In a lot of areas, like in Queensland, they've got ramps outside the buses. The buses pull up and people on wheelchairs, they can just roll off and go down the ramp. In Melbourne - - -

MRS OWENS: They've got some at the tram stops now.

MR BETCH: Yes, and they've got ramps on some of them.

MRS OWENS: Not many.

MR BETCH: Not many but it could be improved.

MRS OWENS: I think they're working on it.

MR BETCH: So to the standards of transport, that's been improved, but people's behaviour should be more improved. That's what I think.

MS McKENZIE: You said education might help with that, didn't you?

MR BETCH: Yes.

MRS OWENS: So transport, there have been some improvements, but I think your submissions said that there are still problems, apart from people's behaviour, with employment and accommodation.

MR BETCH: Yes.

MS McKENZIE: That's all my questions.

MRS OWENS: Yes, I think that's all mine. Is there anything else you wanted to raise with us, Gary?

MR BETCH: No, that's fine. I get a bit tired after a while.

MS McKENZIE: That's a really good submission.

MRS OWENS: It was.

MS McKENZIE: It's really helpful for us to talk to individuals, not just organisations, but individuals as well. It's really good to do that. Thank you very much.

MR BETCH: Yes, no worries.

MRS OWENS: Sorry for holding you up earlier.

MR BETCH: That's fine.

MRS OWENS: The next participant this afternoon is the Independent Living Centre, New South Wales. Thank you for coming. I'm sorry about the slight delay. We've got two submissions from you.

MS BRINGOLF: Yes. The second one was really a set of appendices that I thought must just support the original application.

MRS OWENS: Yes. They certainly do. So thank you very much for that. Could you each give your name and your position with the Independent Living Centre, for the transcript.

MS BRINGOLF: Okay. I'm Jane Bringolf and I'm the executive director with the Independent Living Centre.

MS MUIR: I'm Jenny Muir and I'm an access consultant at the Independent Living Centre.

MRS OWENS: Thank you. I think Jane wants to introduce a submission.

MS BRINGOLF: Yes. I've got a couple of notes here that I'll just briefly go over. I think the first point that comes up in the terms of reference is the term of disability. I just wanted to reaffirm the fact that, certainly from my perspective, disability is not an attribute of an individual, and that it is to some degree socially imposed, by an individual being unable to do what they want to be able to do within their environment. So disability is the barrier between being able to do what you really want to do and not being able to do it.

I also think that it's not time to think about redrawing the line in the sand between what's considered mainstream, say, environmental designs and accessible designs; they should be the one design. If we think about inclusivity, then we would think about designing for everyone. It's important to think about the entire technology chain, because one break in that chain means that you stumble and fall in the cracks. The technology chain has links between the built environment and even the natural environment, but particularly the built environment; transport and mobility infrastructure and devices; assistive equipment - you know, things like aids and prosthetics and things like that, and the programs that we have in the community to encourage participation, and a general inclusiveness within the intelligence of the environment - what that means is, everything links together, to think about things holistically.

Let's just use an example where you might have a wonderful wheelchair that can get you from A to B, but if A to B contained some steps or it contained some other kind of barrier - the building that you want to go to may be accessible, but if the paths between them aren't accessible then you just may as well not even have started out from your front door. Also, when we're talking about the costs, we need to talk about the costs to society in general, not just to individual businesses or organisations. I think some economic modelling has already been done. I don't have access to it, but certainly I think Mark Bagshaw is well-known within the community for his economic modelling, to show that inclusiveness is good for everyone and that there are market opportunities for 100 per cent of the population instead of the 80 per cent that are not classified as having some disability or other.

Australia is a leader in many aspects in the developed world and it would be good to see Australia continue in that. It's about rights being delivered rather than being fought for. There's a cost to everyone in fighting for rights, and easily overcome with some thoughtfulness in the way things are designed and activated. In Australia we have a strong value on access and rights and inclusiveness, and I think this act is part of that as well. I guess, to use an emotive comparison, I've actually got a couple of notes here - comparing this legislation with, say, occupational health and safety and the act that applies there was particularly - the one that I know of in New South Wales anyway. The cost of implementing occ health and safety are great on businesses, but in the end lives are saved and injuries are prevented, so therefore other costs are saved, including the impact on families.

One of the things that happens is that people tend to visualise a person with a disability as being rather insular, that they don't have family lives, that they don't have people around them that also share in some of their difficulties. So while I'm again using this emotive argument, likewise the DDA should prevent the death of the soul and injury to the lifestyle and psyche of individuals and their families. Everyone should therefore want compliance. The penalties are too great to society in general and to individuals and their families in particular. I guess that's the heartfelt plea from my point of view, and whilst there are aspects of the act that could be improved and the way in which the act is implemented, and the way the complaints mechanisms are activated, certainly there is room for improvement but I don't think we'd like to see the act going backwards in any shape or form. That's all I have to say on that at this point.

MRS OWENS: Thank you. Do you want to add to that?

MS MUIR: I guess probably just from the tail-end of what Jane was talking about, about the act and being complaints based. From where I sit, working in the building industry, it's sometimes difficult to impress on people the importance of issues when they see it as only being a complaints base - when people are prepared to take the risk of building something that's perhaps not inclusive for everybody, because it's something that will only rear its head to them if somebody makes a complaint; rather than something like the Building Code where they don't get a certificate of occupancy ticked to say they can move in because various things haven't been built in the appropriate way. Sometimes I think it's a little bit difficult for people to take that on board, if they're prepared to take the risk, because they don't think people will complain.

MRS OWENS: You raised an interesting idea which - I think there's only been about one other submission I've read so far that suggests that the name of the act be changed. You suggest that it become the Equal Access - - -

MS BRINGOLF: The terminology - using more positive language.

MRS OWENS: More positive language. I suppose the counterpoint to that would be that some might see the act as doing more than just providing equal access, and that it's about changing community attitudes more broadly. Of course, disability discrimination doesn't necessarily embrace that broader objective either.

MS BRINGOLF: I believe language is important, and how things are labelled is very important. The World Health Organisation has relooked at the whole classification - disability, impairment and handicap I think are the three terms originally - and looking at things like participation. I can't remember what they are now. I did write them in the submission - using language that talks about what people are doing rather than what they can't do.

I think there's so much more that people can do, and when they're labelled as being limited in some way, then other people can see them as being totally limited. I think that's a disadvantage. I just threw in that as an example, Equal Access. I don't think that's a very good title. I was just trying to give an impression of maybe - there's two sides to the word "disability". It is a socially-negotiated concept. It's a construct, and that is one of the difficulties. On the one hand you've got the argument that people have, that we need to retain and enhance the word "disability", and in people who classify themselves or who put themselves under that classification there are some people who would be proud to wear that as a label, because they identify with that.

There's a whole lot of political processes. We've got departments with the name in it; we've got a lot of organisations with the name in it. How would they be if they lost the name? In our organisation, in the Independent Living Centre, we've tried to use much more inclusive language, because often the word "disability" - or when we think about disability and we talk about a functional impairment, it applies across a whole spectrum of people.

What we found was that given that most of our clientele were older people, they did not relate to the word "disability". So that was a difficult thing for us. Yet we are funded under the Disability Services program; we have to comply with the Disability Services Act, and there are standards applied to that. When we want to talk about funding, we have to talk about disability, but we don't talk about it at any other time.

MS McKENZIE: Because that's what your funding relates to.

MS BRINGOLF: Yes, on the one hand; yet on the other, many of our clients are in the older age group, and that's actually supposed to be a different area. I guess it's the problem between needing to talk about disability in the sense of getting rights, and then talking about inclusiveness as being something that is accessible and equitable; that there is no differentiation.

In one way "disability" as a label marginalises, but at the same time that group of marginalised people is saying they want to be included. I think we stumble over the language all the time because of this, and it's not just because of the act; I think it's right through the whole thing. By labelling something, you create it. If we had never invented the word "disability," if we'd used all sorts of other terms, I wonder what kind of act we would have named - or how we would have named the act, and I don't actually have the answer for that one. Anyway, that was a very long-winded way of answering your question.

MRS OWENS: But you label something as "disability discrimination" and by labelling "discrimination" doesn't mean to say you're creating discrimination, because everybody that we've spoken to says discrimination is well and truly there.

MS BRINGOLF: Yes.

MRS OWENS: I suppose if you label it in some other way - one of the objects of the act is to reduce discrimination, but there are other - equality before the law and changing community attitudes. So it's something that needs to embrace all of that, and more. People are saying, "It should be about focusing on human rights."

MS BRINGOLF: Anti-discrimination - there's legislation in various states that is anti-discrimination, and I gather that sort of tries to cover quite a lot of things. You've still got the word "discrimination" there, but it means "against discrimination" and it's what you put under that title that then starts to count. But then maybe that is too broad. Maybe there will come a time when inclusiveness will prevail and the need for having a separate Disability Discrimination Act may come. Maybe this isn't the time now, in 2003, to review that name, but maybe it will come in the future.

MRS OWENS: That's an optimistic scenario. But in the meantime, I don't think we're suggesting that the act is no longer needed, are we, Cate?

MS McKENZIE: No. Not for some time yet.

MRS OWENS: For quite some time. I think we're getting enough evidence put before us to suggest that there is a way to go yet. Anyway, we're thinking of all these ideas, and changing the name - because I personally can't think of what it would be - changing the name may have no more than, say, an educative role. But I acknowledge it can be quite symbolic, what you call an act.

MS BRINGOLF: Yes.

MS McKENZIE: But it is something we'll give thought to. I understand it's a question of emphasis, and that's something that many people have raised.

MS BRINGOLF: Right. Yes. I don't think there's an easy answer to that one, but given the opportunity to make a comment, I obviously took it.

MRS OWENS: You talk about the complaints system, and you said it makes a monster, in inverted commas, of the complainant.

MS BRINGOLF: Of the complainant, that's right.

MRS OWENS: I think we're getting quite a lot of input on this particular issue of the complaints system. Does it have to necessarily be that way or do you think it's because of the way the mechanism works; the way it's implemented?

MS BRINGOLF: Jenny is probably more qualified to answer this question but, just as an introduction to that, I think there are obviously circumstances where the two parties will get together and negotiate a suitable outcome and, therefore, no-one is made a monster of. However, just thinking back to what Jenny was saying, people who are willing to take a risk and say, "Well, I'm not going to worry about complying. I'll comply with the Building Code of Australia, but I'm not going to worry about the DDA" - if someone then does complain, I think they will see that the complainant is making life hard for them. It's their fault. They will be blamed for making a complaint, but I think Jenny has probably got a bit more experience in that.

MS MUIR: I think it's also quite a big personal step for people to do to actually make a complaint. I think it makes it hard for them that the onus is on them to actually make a complaint, but you can't just expect to be able to go where you want to go. If you do want to do that, you actually have to jump up and down a bit about that.

MS McKENZIE: First, you put up with the fact of a barrier.

MS MUIR: Yes.

MS McKENZIE: Not only do you have to put up with the fact of a barrier, you have to complain about it and try and get it removed yourself.

MS MUIR: That's right, and not everybody finds that easy to broach. People don't want to, I guess - - -

MS OWENS: Rock the boat.

MS MUIR: - - - rock the boat. They don't want to highlight their own needs. They don't want perhaps to have the spotlight on them. They don't want to be the one standing out. It means that they have to stand out and be counted or have to stand out and make a complaint to actually get access to something that everybody else can just get.

MRS OWENS: There are mechanisms whereby people can join together to bring a complaint or organisations - advocacy organisations - can help them with a complaint.

MS MUIR: I wonder if that's widely known.

MS McKENZIE: So do we.

MRS OWENS: We wonder that too, because a lot of people have been suggesting to us that there should be provision in the act for organisations to make complaints on behalf of individuals. A lot of people have raised that, but when we talked to the Human Rights and Equal Opportunity Commission yesterday they said that's already available for people and people have used that. I don't know if a lot of people do know about it, but others have suggested that perhaps HREOC could also assume that responsibility of introducing a complaint themselves.

MS BRINGOLF: I think we indicated that in our submission; that it would seem reasonable for HREOC to be empowered to do that. It's an organisation that does seem to be across the issues and in a position to see the many facets involved, and I think that they could bring some wisdom, with considered responses to improvements.

MRS OWENS: When we spoke to HREOC they said, "The best people to do this are the people out there that know what's going on. We're not necessarily in that position to know." I suppose it depends where you're sitting in the system. HREOC does run inquiries from time to time, but they do have limited resources to do that also. That's become another big issue in the inquiry; the resource issue.

MS BRINGOLF: It's a resource issue for everybody, and I think that is the point. I would imagine there are quite a few people who are unfairly dismissed, but how many actually make a complaint? You've got to get on with the rest of your life. That's what a lot of people will be saying. It's only people who have sufficient resources, even if it's only a well of anger that keeps them going. They've got to have sufficient resources to do it, and advocacy organisations - whilst they act not just on behalf of individuals for individual cases - of course, when they see the same issue arising time and time again it's obviously then a systemic issue.

The difficulty with that is whilst they're there to do advocacy work, they don't charge sufficient membership fees to their membership to pay for the resources to challenge the status quo on things, because if that involves the government in any way - who just happens to fund them to do the work - then they're now under pressure not to rock the boat if any government instrumentality is involved to make a complaint. It's a very, very difficult situation, and you're sort of trapped whichever way you go.

MRS OWENS: If an advocacy organisation was rocking the boat, do you think that the government would be bloody-minded enough to withdraw resources?

MS BRINGOLF: In New South Wales they've made it very clear that that is the case. For example, we're funded from a bucket of money that is for advocacy and information services, because our primary role is not advocacy, but it is information, and that's what the government funds us for. Because we've been thrown into this group with a lot of other advocacy organisations, we've been living through the last three years where everybody's funding has been under threat and what the government has been saying to us is, "We shouldn't be funding you to complain about us."

MRS OWENS: They've said this to you?

MS BRINGOLF: Not quite.

MRS OWENS: They haven't said it in writing, have they?

MS BRINGOLF: Not quite in that terminology, I should say, but I feel confident enough in saying it in that way, because that message has been made very clear to us. As personalities change and you get different ministers and so on, and there's a little tempering of that here and there, but basically peak organisations in general and advocacy services in particular have felt considerably under threat.

MRS OWENS: But, you see, you mightn't want to necessarily rock the boat about, say, government programs; it might be about something that's going on outside.

MS BRINGOLF: Yes.

MRS OWENS: Why should government be concerned about you doing that? They just think that you're not then focusing on what they perceive as your main role?

MS BRINGOLF: I think government, when it funded advocacy services in New South Wales, thought that it was going to be purely individual advocacy, you know, like helping someone to get employment, helping someone to have the proper telephone equipment installed, helping someone with their transport or employment or education or something like that. What I don't think they understood was that eventually different groups will band together and say, "We've all got the same problem. We're all experiencing the same problem. We're seeing the same problems out there in the community. Let's do something about it. If getting on buses is a problem for everybody, then we need to talk about public transport." Again, I'm using a government example, but I think a lot of them would be. They're not just a case of how to get into the newsagent's shop.

I'm short of examples at this point, but it is a difficult one for advocacy organisations at the moment. They know they're safe doing individual advocacy, but speaking out publicly about some issues - not all - can be a bit tricky. Whilst they might be able to say, "We are using our members' funds to do this, not government funds to do this," it's very hard to prove.

MRS OWENS: It all probably ends up in the one bucket sloshing around.

MS McKENZIE: That makes it very difficult, because the result of that situation is to leave the advocacy organisation with a real dilemma.

MS BRINGOLF: Yes.

MS McKENZIE: It could mean, at the worst, that they will only fund a certain kind of help for people with disabilities - that is, help in relation to totally non-government organisations.

MS BRINGOLF: This is not the fault of the personalities or the organisations involved, I don't think. I'm just sort of taking a broader view on this, but I think it's been brought about by the way that people with disabilities have had to fight for their rights. I think they're used to being in adversarial mode, and the organisations that they support with their membership and run with their volunteer time are always frustrated. From that frustration there comes some anger and, of course, then it makes it very difficult to negotiate in a less adversarial manner when that exasperation is always present.

I'm just using my own experience of mixing with advocacy group members - various advocacy groups within New South Wales - and I do find that their way of dealing with things is much more - I'll say aggressive. It's not really aggressive, but it has much more of an aggressive tone than perhaps some other organisations are able to relate to government.

MS McKENZIE: Sort of tinged with frustration.

MS BRINGOLF: Yes. It is, yes, and so that doesn't lead to good relationships or working relationships for developing solutions so much.

MS McKENZIE: It perhaps would make the negotiated solutions much harder to achieve as well.

MS BRINGOLF: Yes. I don't have an answer to that one, unfortunately.

MS McKENZIE: It's a very difficult matter.

MRS OWENS: You say right at the beginning of your submission that you've been actively engaged in the development of the Australian Standard 1428 and you keep abreast of industry developments, including changes to the Building Code of Australia.

MS BRINGOLF: Yes.

MRS OWENS: As you probably know, under the DDA there's work being done to develop standards, including access to premises standards.

MS BRINGOLF: Yes.

MRS OWENS: Have you been involved in that aspect of the work?

MS MUIR: Not on the standard, no. We have a member on the AS1428 committee.

MRS OWENS: But you have suggested in your submission that you think that there should be active monitoring and enforcement of the standards.

MS BRINGOLF: Yes. Jenny, do you want to answer that?

MS MUIR: You mean from a building point or view?

MRS OWENS: Any of the standards. In your particular case, probably you can talk best about the Building Code and so on. We were hearing this morning about how one particular council here in Sydney - there was a suggestion that this council wasn't necessarily following the Building Code and there wasn't a sufficient attempt to ensure compliance.

MS MUIR: Many of the councils are very progressive and are pursuing the highest level of accessibility, but I think there are inconsistencies across councils and within councils there are consistencies too. I think a lot of things are open to individual interpretation. It depends on whether councils are making approvals themselves or there are private building certifiers making approvals and the kind of process they use. It's open to a lot of different approaches and there are a lot of inconsistencies. I don't think it's easy to single out, saying any one council. I don't think it's any one council and I don't think it's - - -

MS McKENZIE: Is there a difference between the private certifiers and the council certifiers?

MS MUIR: I've noticed a difference. I certainly think that private certifiers are more vigilant and - - -

MS McKENZIE: Are more vigilant?

MS MUIR: Yes. I have found that, yes. We find that they get in touch with us. If they find they can't tick a box, they'll say, "You know, something has happened in this building and it's not right. We need you on board to help sort it out." So we get a lot of communication in that regard.

MRS OWENS: What do you do? Just explain then, if you got some communication do you go in and have a look or - how do you help them?

MS MUIR: It depends on what it is. If it's something already built, yes. If it's drawings, then we'll have a look at the drawings.

MRS OWENS: Do you personally get involved?

MS MUIR: Yes, that's what we do.

MRS OWENS: That's what your job is, Jenny, to get involved if somebody brings something to your attention?

MS MUIR: Yes. That's right. So we help try and find a solution.

MRS OWENS: Any example of what - - -

MS MUIR: If something has been built and it wasn't built correctly and the certifier says he can't tick it off because it is incorrect, it doesn't comply with all of the standards, he'll say, "Can you come out and work out some other solution?" - to what it might be, so we'll go out and have a look. It may be that it's a matter of millimetres out and we'll say, "You know, maybe that one is going to suit most of the people," or it may be that we'll say, "I'm sorry, but you'll have to redo that one. That won't work."

MRS OWENS: You'd use a bit of judgment there.

MS MUIR: That's right.

MRS OWENS: You're not going to be a stickler and say, "It's got to be - - -"

MS MUIR: We use our judgment based on our knowledge. I am an occupational therapist by training, so I use my judgment based on people with disabilities and knowing that the Australian Standard 1428 part 1 is based on 80 per cent of wheelchair users, so it's not including all wheelchair users, and it's also based on an age range, so depending on the facility and what its purposes are, yes, we'll make a functional interpretation. Sometimes there's also a functional alternative solution. For instance if the approaches to a door aren't going to comply with the standards but we'll say, "If you put an automatic door-opener on that, that will be functional for all members of the community."

MS McKENZIE: So you're really looking at the planning and building approvals process via the Building Code into the standard. Is that fair to say?

MS MUIR: Yes. We're looking at, yes, the Building Code, the Australian standards and local councils' development and control plans.

MS McKENZIE: They don't necessarily - the development and control plans could have additional things in them.

MS MUIR: They often do, yes.

MRS OWENS: Supposing there is just noncompliance after all this.

MS MUIR: If we didn't feel it was functionally satisfactory we would say so and say, "Didn't comply with" - and we'd state what it didn't comply with.

MRS OWENS: Should there be any penalties for noncompliance?

MS MUIR: For something that doesn't comply with the Building Code of Australia, they ought not get their certificate of occupancy if it doesn't comply.

MS McKENZIE: Presumably then that could be dealt with through the planning process, via enforcement orders.

MS MUIR: Yes, and in some cases that's when it comes to us. The BCA consultant comes to us and says, "I can't give them their certificate of occupancy until we sort this one out."

MRS OWENS: What about existing buildings, where it's not a new building and it's not a major renovation of an existing building? What do you do there?

MS MUIR: Existing buildings?

MS McKENZIE: Heritage buildings particularly.

MS MUIR: There's often solutions to heritage buildings.

MS McKENZIE: Can you give us some examples?

MS MUIR: There've been some examples where people have - the King Street Court is an example of a heritage building that has stair access into it and they've built a nice little brass signage plate and behind that they've put in a platform lift to take people up to the level they need to get to. So they've made the building accessible. They haven't destroyed the heritage character. I believe it still looks an interesting building. It's often achievable. It can be difficult. There's often a lot of debate between the heritage architects and the access consultants about what they think is acceptable to see, unsightly and what we think is acceptable. We're having a bit of a debate at the moment for some fairly public building - what they think is going to be acceptable in the public view and what isn't, so, yes.

MRS OWENS: You can't tell us more about that. That sounds fascinating. It's all right. We won't force you to do that.

MS MUIR: I guess we feel strongly that there is no other way of dealing with it. We will just say that this is what has to be. If we can find an alternative solution that is more acceptable to all parties and still meets the requirements, the functional requirements - I guess that's what we're looking at - is function. If we can find an alternative solution, we will - if we can help in that way, but sometimes there's just no alternative.

MRS OWENS: You've suggested also that there should be some accommodation standards for public housing.

MS McKENZIE: Public housing and multi-dwelling - - -

MS MUIR: We do a lot of work in multi-density residential work where the council has asked for adaptable housing. There's a lot of adaptable housing being built in Sydney but I don't know that anyone knows about it - and the building is sold to somebody. I don't know if the person who buys it possibly knows, that they may forget soon after and then it's sold on. You wonder what happens to it and it would be really nice to see that those buildings were available for the people who could use them or could really benefit from them most.

MS McKENZIE: But that's difficult if they go into the private market, isn't it?

MS MUIR: Yes.

MS McKENZIE: Because you can't track them.

MS MUIR: No.

MS McKENZIE: And also I don't know whether there's some register kept to show - - -

MS MUIR: There doesn't appear to be. I've approached some councils to ask them could they keep a register and they didn't think it was in their realm to do that. So it's a difficult one, without being a register and without people being able to know where there might be housing that was easy to adapt to their needs at a low cost. But while it's a requirement for it to be built, I wonder where it's going?

MRS OWENS: Whose requirement is it? Is it a government department requirement?

MS MUIR: Local council.

MRS OWENS: Development and control plans, is it?

MS MUIR: Yes.

MRS OWENS: Across all local councils or just some?

MS MUIR: Most of Sydney now, but I would say most of Sydney has a requirement for a percentage of all multi-density units.

MS McKENZIE: Does it vary? My recollection is that Leichhardt has said I think they're looking at 10 per cent. Is that - - -

MS MUIR: It's 10 per cent depending on the amount of units - so if there's up to 20; and then the percentage can drop down if there's say 200 units. It might come down to 6 per cent or something, yes.

MS McKENZIE: Do you want to say anything about the position of public transport and taxis? Is that something within your expertise?

MS BRINGOLF: Not mine. I don't know if Jenny has got some - - -

MS MUIR: I guess only just from the clientele we see at the Independent Living Centre. There is still a lot of frustration about - as we mentioned earlier on this afternoon some train stations, some tram stops, some buses are accessible but not all and there's still large gaps. People with disabilities still heavily rely on car transport, be it taxi or private car and then, as Jane was alluding to, sometimes there are links. There are links in the accessible path of travel between major destinations and where you can park your car. I guess the demand on taxis is high and that can be rather frustrating for users, to actually get a taxi. They might get there on their trip but to get the taxi on the return trip can be difficult, particularly in peak times like school pick-up times. It can be very difficult for other travellers.

MRS OWENS: Those taxis can be used for general transport and I suppose it's a matter of where the taxis are and who they're transporting; who's in them.

MS MUIR: That's right, and a lot of schools for children with physical disabilities use taxi transport to take children to and from school, so it's often a difficult time for other people who might need to make appointments and use a taxi.

MS BRINGOLF: I guess our immediate experience is board members who are wheelchair users. They might have to turn up - they have to think about a larger window of arrival time in order to make sure they arrive in time, which means sometimes they might arrive very early.

MS McKENZIE: Yes.

MS BRINGOLF: Then they have to book their taxi at the same time and have to guess what time they're going to need to leave. Often that means that they have to leave perhaps before a meeting has finished.

MS McKENZIE: Or pay for the taxi to wait.

MS BRINGOLF: Or pay for the taxi to wait, yes. So they don't enjoy the same freedom of catching a taxi the same as the rest of the population.

MS McKENZIE: What about the questions relating to - you talked a little about the metropolitan area. What about the rural areas and somewhat more remote areas?

MS MUIR: In transport I think there's one accessible taxi for the whole of the Blue Mountains area.

MS McKENZIE: One?

MS MUIR: One, so I think it's pretty shocking.

MRS OWENS: In the Blue Mountains - we're Victorians but I think up in the Blue Mountains there'd be quite a lot of elderly people who maybe are retired?

MS MUIR: Exactly, yes.

MS McKENZIE: Presumably that's why they remain in the Blue Mountains. You don't see them.

MS MUIR: They can't get anywhere, yes.

MS McKENZIE: That's right.

MS MUIR: Certainly all public transport in rural areas is I guess for communities. A lot of school buses and so on are funded by the local community and for them to fund another $20,000 for a lift on their bus is a big ask on a very small community.

MS McKENZIE: What about the built environments in those areas? Are there more difficulties? We've been talking about built environments and what happens in the metropolitan area, but do you have anything to do with the rural areas?

MS MUIR: As an access consultancy we've been to - even outside of the Sydney CBD, but they're more commercial areas. On an individual basis our clients at the Independent Living Centre have asked us for help with modifications for their home and to schools and that sort of a situation and I guess it's on a lower use and on a more individual basis. The modifications tend to be made on an individual basis.

MS BRINGOLF: In the appendices that I sent later - the point is made there that even when we're talking about these issues and we might be still saying that things are a problem, I think generally speaking things are better in urban areas than they are in rural areas, just by sheer weight of numbers causing things to happen. Particularly in the built environment the amount of new buildings going up proportionately, the number of councils perhaps that are more aware, that are using the opportunity to create a more inclusive environment generally and specifically - so, yes, I don't think the access and inclusivity aspects are spread evenly throughout the urban and rural areas. It would just seem to be commonsense and also generally from the feedback - as an information service we get lots of people ringing in with problems about all sorts of things and you start to get a feel for how things are even in different areas of Sydney.

MRS OWENS: Do you want to comment, Jane, on the issue of organisations, advocacy organisations, trying to get into very cheap accommodation and then being required to make adjustments to the premises?

MS BRINGOLF: Yes, we had an interesting example given to us just recently, whereby a community organisation, as many having very little funds and choosing to take a lease out on a building that they didn't understand - they understood occ health and safety but they didn't understand that they would as a public organisation be required to comply with the Disability Discrimination Act. It wasn't until they had to put - because they wanted to make some refurbishments to the rented premises, the council then required them to meet with the legislation, which because the building is cobbled together by rooms added on here and there is a situation - - -

MRS OWENS: Numerous level changes, I suppose?

MS BRINGOLF: Yes, there's about six different levels in the one building - a sort of mezzanine floors, steps up and steps down. Even the front door is right onto the footpath, so there's no way even of setting that back. Now that they're faced with thousands and thousands of dollars of costs in meeting the act and/or finding other kinds of ways in which - even if they don't spend all of that money right up-front, then they have got to have an action plan as to how they are going to improve things in the future - is that by not knowing that the act is there and that they came under it, they fell into a situation of choosing cheap accommodation without realising it was going to become very expensive accommodation. The issue there is, should it be their cost or should it be the building owner's cost? It's my view that the building owner should be the person responsible for complying with whichever act.

I gather that this particular building doesn't even comply with the fire regulations, but the owner is prepared to pay for the fire regulations to be put in, but is saying that he is not prepared to pay for compliance with the DDA. So they are stuck in a very, very difficult situation and I think that this is one example of many. Even just a small accounting practice that rents a little terrace, or even buys a little terrace in Paddington or a place where many of the houses and offices and so on are squeezed closely together and the door is right on the footpath, are caught out. It's not that they don't want to help. It's just that they can't afford to. If they had known that beforehand they wouldn't have chosen those premises in the first place. That's what it comes down to. So the issue there I guess is how much knowledge people have of the act, particularly in relation to buildings. People have some genuine knowledge of anti-discrimination in general terms, but not what it actually means in practice.

MRS OWENS: I suppose it really raises the question, as you say, about whose responsibility should it be. Should it be the building owner, should it be the tenant, or is it something where society generally has the responsibility for paying for some of these things? Maybe the answer is different, depending on what the use of the building is.

MS MUIR: It can vary in the use of the building, but it becomes quite difficult in a situation where council imposes those restrictions for someone going ahead with their development or having their business in that area, when the street topography really doesn't lend to someone actually arriving there in the first place, and you think - sometimes it's very difficult to know where you start and finish. Someone can get in the front door to the building but they actually couldn't have got - - -

MS McKENZIE: To the place.

MS MUIR: Yes, from the footpath or up the footpath. They couldn't have arrived there independently anyway. It's sometimes very difficult to know.

MRS OWENS: I suppose the building owner might say, "Well, if I have to do this that means I'll have to put the rent up," which means that for that particular group, and for anybody else, there is less opportunity to rent a building that is going to be affordable.

MS MUIR: Yes.

MRS OWENS: So there's a trade-off there.

MS MUIR: Yes, that's the difficulty. Most of the second-storey walk-ups are the more affordable rent for a small business, but they're the inaccessible ones and so it becomes very difficult to know what advice you give to people, where they can go and what they can afford.

MRS OWENS: We have encountered a few groups in our visits for this inquiry, advocacy groups, where their premises are upstairs above shops, for example, which is interesting. Primarily they choose those sites because it is low rent to rent above shops in certain areas, but we have encountered it and have commented on it from time to time. But we have also encountered in our visits here in Sydney, when we went to visit the Anti-Discrimination Commission, a very inhospitable building. I can't remember the name of the street. It was up opposite the park, Hyde Park, and it was what I think was a 1980s building with the beautiful marble foyers and so on, where there were steps up to one left bank and steps down to the other. One left bank was for the odd floors and one was for the even floors, and then there was - - -

MS MUIR: They both had steps.

MRS OWENS: And they both had steps. Then there was a small glass disabled lift, which was locked, and you had to go and find the concierge to unlock it. We were, on that visit, with our former associate commission, the late John Paterson, who was in a little scooter. We managed eventually to get up to the meeting, but we had terrible trouble getting out of the building again, because we got stuck in the lift. That was our first visit. I thought I would put that on the transcript. That was our introduction.

MS MUIR: Yes, it can be fairly typical unfortunately, and those lifts are locked and that's part of a WorkCover requirement. You know, the key is not there all the time. They have to be operated by someone who knows how to operate them.

MRS OWENS: But then the repairman came and told us that the reason it had stopped working was because we were too heavy, despite the fact that the weight limit on the lift was 350 kilograms, and we did not add up to 350 kilograms. So that was nice. Not only did we get stuck, but then we were - - -

MS MUIR: It was your fault anyway.

MS BRINGOLF: One of the other points here is that the particular service that we were talking about, most of what they would do, as we do, is by telephone or email, and the likelihood of many of their clients coming to the building was minimal, and if they did want to visit them, then - this is where the need to be able to have operational plans such as if one of my clients is in a wheelchair and wants to come to me, then I will choose another venue, for example. I think that there other ways of being inclusive, but if it can't be built into the environment then it needs to be built into the operational plans of how you run a service. For example, you have hairdressers that go from house to house. Unfortunately we don't have dentists that go from house to house, and they are often upstairs, but there are other operational solutions.

MS MUIR: There are some management strategies.

MS BRINGOLF: Yes, there are some solutions. If you take this case in point that we've been discussing, maybe one of the solutions is that they do whatever is possible to make their service as inclusive as possible, in a physical way and in a service delivery way, with a view to in five years' time they will move to more accessible premises. Instead of being penalised for an unfortunate decision now, in order to keep themselves going maybe there are other ways that could be sought to alleviate the problems.

MS McKENZIE: Because meanwhile those premises continue to be inaccessible to people with disabilities, perhaps forever. I think it - the owner has to do nothing.

MS BRINGOLF: That's true, but then maybe we need to introduce some other kind of system that - buildings are not assessed. We don't have anyone going down street by street assessing buildings. If we had the wonderful luxury of that and had someone saying, "Well, this doesn't comply and that doesn't comply. Next time you're doing work you'll need to think about this, or you won't be able to relet these premises until certain work is done." But it did raise the issue of cost and someone has to pay for that quite clearly. That's why I guess whilst I was making a strong plea for the act not to be watered down in any way, by the same token making a plea for saying, "Let's not make monsters and ogres out of people with disabilities who are demanding their rights, but find ways of working this out together. Find other solutions."

Providing ramps and lifts and things like that for wheelchair access is only part of the solution, and we need to be a bit more creative in finding solutions and having them accepted. Maybe some of them are short-term, but the advantage of that sort of thing, I believe, is the educative process. That's one of the missing links at the moment - education all the way round not just the whole issue of what it's like to live as a person with a disability, but what we have to do in our day-to-day work, and living as members of the Australian society, to think about inclusiveness.

MS McKENZIE: Do you have anything to say about action plans of the kind that - well, we have seen one, which has been shown to us by Leichhardt Council. I gather that there are other councils who do have action plans.

MS MUIR: A number of councils have action plans, yes.

MS McKENZIE: Do you have any comment to make?

MS MUIR: I guess action plans - similar to the case we've just been talking about. That's one of the things we discussed with them - was an action plan, because I think an action plan gives good time lines as to what they are planning to do and who is going to do it, it has got some good checks. The way the DDA accepts the action plans to be is that there are checks in place, that they are not just motherhood statements - - -

MS McKENZIE: You don't think they are paper compliance, which is another matter that has been raised?

MS MUIR: Sorry?

MS McKENZIE: You don't think they are just paper compliance, which is another matter that has been raised with us occasionally in submissions?

MS MUIR: I haven't had the opportunity to follow through. That's not something I oversee, follow through, but the way people are expected to write them they certainly involve some action to happen out of those plans, that there are time lines and people assigned to doing things.

MS BRINGOLF: Does anyone actually check up to see if someone has complied with their action plan?

MRS OWENS: Some people have said there should be - there's a few things people have been saying about these voluntary action plans. One is that perhaps they could be mandatory at least for government organisations, if not larger private organisations, and some have said mandatory for everybody. Others are saying that they should be monitored - - -

MS McKENZIE: Both when they are lodged, to see if they are okay, and then later for compliance.

MS MUIR: I imagined they were monitored. Are they not? I imagined that that was the process.

MS McKENZIE: Not at the moment.

MS BRINGOLF: I think we would certainly support the idea of them being, at the very least, monitored. I was alluding to that in the example that I was giving, that in saying in situations where it is extremely difficult to comply you can't just be let off the hook with, as you said, paper compliance, but who is going to do the follow-up? That remains to be the big question. Whoever demanded the action plan I think should be responsible for following up, but again it's a resource issue.

MRS OWENS: And indeed other people have said that to us. The other thing you mention in your submission about action plans, you didn't necessarily say that they should be mandatory, but you said at the moment there are no sufficient incentives to submit voluntary action plans. I was wondering if that was inferring that there could be other types of incentives. You said that maybe they could be linked to exemptions under the act, which they can be now.

MS BRINGOLF: Yes.

MRS OWENS: Is there anything else you had in mind there?

MS BRINGOLF: I didn't have anything specifically in mind. It's more thinking along the lines of giving people a second chance, particularly as education on these issues is very limited. Once people have been given the opportunity for exposure to education, and they still don't take any notice, then I think it's time to get a bit tougher. But whilst we know that not knowing the legislation doesn't absolve you from responsibility, we do know that, in practical terms it's about what happens to people with disabilities. That's what matters in the end. Getting people to do the right thing is what matters. Punishment is one way, education is another. A plan is not punishment, but it is a form of learning and, in that sense, should be mandatory. The learning should be mandatory. How you get that to happen I'm not quite sure.

MRS OWENS: We think we've exhausted our questions. We've probably exhausted you two as well. I was wondering, either Jane or Jenny, if you had anything else you would like to add at this point.

MS MUIR: I don't think so.

MS BRINGOLF: No, I think your questions have been very welcome and I think you have actually exhausted the limit of our knowledge on the topics that we've presented. We haven't pretended to be experts on anything much, other than the built environment and it has been a great opportunity to add to our submission. Thank you.

MS McKENZIE: You've made a submission that is really helpful to us, both written and oral, thank you very much.

MRS OWENS: Your perspectives are very useful for us too. So thank you very much. We will now break and resume at 3.30.

MRS OWENS: The next participant this afternoon is John Uri. Welcome John, and I'm sorry for the little delay in getting going. Would you like to repeat your name and capacity in which you're appearing today?

MR URI: My name is John Uri. I'm appearing at this inquiry basically as part of my submission on behalf of my wife. She has got a medical condition. It's kidney failure. I'm actually putting a submission on her behalf.

MRS OWENS: Thank you, and thank you very much for your submission. We do like to get submissions from people with stories to tell from individuals, because it really does help inform us about the issues that people are facing and you've given us yet another perspective on some of the problems that can arise, and today it will be very useful maybe if we talked about that, but also your role as your wife's carer and what that means for you.

MS McKENZIE: The other reason why we're very grateful you're making a submission is because it's perhaps easier for organisations to make submissions but it's harder for individuals to make submissions about matters that concern them so closely and that frankly are going to be upsetting for them from time to time. So we're really happy that you've made your submissions. Can you hear us okay?

MR URI: Yes. May I use the earphone?

MS McKENZIE: Okay, then you can tell us how it works.

MRS OWENS: Does that help? Would you like to introduce your submission, John, for us?

MR URI: Yes. The reason I'm here is basically, as I mentioned before, as a submission on behalf of my wife. She had a kidney condition early last year. At the time she got the condition she was working full-time in one of the nursing homes in Westmead. She had been at that job for over 12 years. I think for a period of two or three years she was diagnosed as having kidney failure, but she did continue to work until last year when she had a difficult situation and it was a seizure - that she actually had to leave work.

Over that period that, for me personally, I've been studying at university. Because of her condition I had to stay home and become her carer. So at this point I'm still the carer at home for my wife. I think the problem started when she actually left work, because in a way we didn't have any income at all. She had money that she owed to two or three creditors and there was no social support for her. Both of us actually were ill-prepared in that situation.

My wife did apply for sickness benefits with Centrelink but we found that very difficult because I think they wanted us to use long service leave, which means she really had to take all that leave. That was really the last money she had. So when she actually left the job she didn't have anything on her; no money, absolutely nothing. From that point we went to social security benefit but nothing else. She had money that she owed, but we also had difficulties trying to meet the payments for essential services.

MS McKENZIE: And medication as well.

MR URI: And medication as well; transportation as well. We couldn't take her to the doctor. We didn't have any vehicle at that particular time to take her to the doctor's for emergencies and stuff like that so we used taxis a lot.

MS McKENZIE: Do you have a subsidised taxi scheme where people with a disability can get a taxi card which the government helps subsidise? There's a scheme like that in Victoria.

MR URI: No, we don't have that.

MS McKENZIE: There's no such thing in New South Wales?

MR URI: No, we don't have that. After she left work there was a continuation of problems with the creditors, mainly because we had difficulty in trying to explain the situation that she was not working, and she was sent a lot of letters or litigations - court appearances and stuff like that. Every month we really had to plan how much we can actually pay or not pay in order to avoid going to court, and it has been two years - almost two years that we had to do that. What we found is the difficulty in actually trying to talk with creditors about her situation, because I had to do that all the time on her behalf.

MS McKENZIE: Yes, you had your caring responsibility.

MR URI: Yes.

MRS OWENS: Were they sympathetic or did they understand your wife's and your position in this regard?

MR URI: I'm not sure whether they understand - they only hear what I'm saying but I think they have a particular requirement that they send us this form and I had to take it to the doctor. So every time we need to prove something we had to go to the doctor all the time, just for the sake of completing those forms.

MRS OWENS: The forms that you take to the doctor's were really forms just saying your wife still had this illness.

MR URI: Long-term illness; permanent disability.

MRS OWENS: It's not going to change.

MR URI: Which is really a major problem because nobody is able to give us a document to say that my wife has a permanent disability. This assumption I think that my wife is sick and that perhaps next month she'll be okay or the next two or three months she'll be receiving rehabilitation and stuff like that - they don't really think that it's a permanent disability.

MRS OWENS: This is the creditors who don't think this?

MR URI: Yes.

MRS OWENS: The doctor should be able to - there should be a form that just says what type of disability - - -

MR URI: My doctor fills that out every month and her doctor fills that out every month, but that's the point: she has got to fill that out just for the sake of her creditors.

MRS OWENS: But there should be a mechanism where the doctor just says, "Don't send me back one of these forms. She has a permanent disability."

MS McKENZIE: "I'll certify when she doesn't have one."

MRS OWENS: "I'll certify that she does have one."

MS McKENZIE: "Yes, but then I'll make another certification when she doesn't have one. I don't have to make one every month."

MR URI: Yes, I do agree, because it's only now we realise there should have been a process available so someone in authority can explain or give us a document saying, "This person is such-and-such," in order for the creditors to actually perhaps be lenient in a way. We're now at the point where perhaps we have to decide whether she has to go and take out bankruptcy. Part of the reason why we're here today is because she'll be black-listed in a way, even though I believe she's not going to work at all in the future.

MS McKENZIE: The creditors, were they not willing to offer you some long-term solution; maybe pay less or postpone payments?

MR URI: There was one creditor who was prepared to go for that, but before that it was very difficult. I think it's only because he asked us to send a medical letter or send it from a doctor, so they were lenient on that point, but it's a long-term - because you're talking about paying for, what, the next 10 years? They're not really bothered for how long, as long as something is coming in.

MRS OWENS: Yes.

MR URI: But it will be long term, because although they agree, it's almost like it's $30 a month - that will take her another 10, 20 years to pay off.

MS McKENZIE: But at least the creditor agreed to lower the amount.

MR URI: In that case, yes.

MS McKENZIE: But others were not so lenient.

MR URI: Others were not, no. Very difficult, yes.

MS McKENZIE: Did you ever think of - and this is not quite on the point but in Victoria there is a law that says that if you've borrowed money for personal, domestic or household purposes, like to buy a car or whatever, and you have this kind of hardship where you get sick after you start the loan and the creditor won't help you to get a loan repayment, then you can come to a tribunal called Victorian Civil and Administrative Tribunal and get an order that the contract be changed so that the amount gets lowered. Do you know of - - -

MR URI: That's new to me. I'd be interested to know more about that.

MRS OWENS: That's Victoria. We don't know - - -

MS McKENZIE: That's Victoria. I'm wondering if the same thing exists in New South Wales; maybe not.

MR URI: I don't know if you heard about the early release of superannuation.

MS McKENZIE: You might want to talk to us about it because - - -

MRS OWENS: Yes, you mentioned that in your submission, too.

MR URI: Yes, because we did apply for that at the point where we were getting a lot pressure from the creditors, but we found out that the process for that - you've got to be on social security for six months and that, according to them, is actually the law. You've got to be receiving benefits for six months and then you put in your application - submission - and then the supervisor will determine whether they will pay out.

MS McKENZIE: They won't pay out, not as a maximum.

MR URI: They didn't pay out. We asked for about 40,000 because that would really wipe out a lot of our benefits - loan liabilities. But they've only given us I think 7800 - sorry, they approved 10,000 but they had to take out tax.

MS McKENZIE: How long will it be then before your wife gets her proper superannuation, her full superannuation? Is it age 55 or age - - -

MR URI: I don't know about the age, whether it's 55 or 60.

MRS OWENS: I think it would probably be a long time from now because your wife would be still relatively young.

MR URI: She is, very young.

MS McKENZIE: It won't be in the next couple of years or something like that.

MR URI: We did that but there was a lot of - getting around a lot of paperwork you had to do. Not only that, but we had to wait for another six weeks before they actually take the payment - come out. I think what other people don't realise is that from the time she left her work we didn't have any money and all the bills, like gas, were all accumulating.

MRS OWENS: So the problem keeps compounding.

MR URI: Just compounding one on another and we've got about two or three times to threaten to cut our electricity off and our power has been cut off once and gas has been cut off once.

MS McKENZIE: Did you talk to a financial counsellor? Sometimes they can help.

MR URI: We did have some consultation with the Smith Family. They helped us with the power and some payments with food but I think they only offer that kind of help once. They don't do it twice. We had to go to other services if you have problems again.

MRS OWENS: Your wife is on the disability support pension?

MR URI: Yes.

MRS OWENS: You get a carer allowance.

MR URI: I get the carer allowance, yes.

MRS OWENS: The amounts of those would only really add up to just covering your day-to-day living costs, wouldn't they? There wouldn't be a lot left over from those pensions.

MR URI: Actually there's not money left over to actually pay the bills - not the essential services but her loan as well because that seems to be one of the major problems she's facing as well.

MRS OWENS: Can you tell us a little bit about applying for the disability support pension and the carer allowance? Did you find that process a reasonable process or did you run into some of the same issues as you did with the creditors, in terms of having to provide medical certificates and so on?

MR URI: When we applied for the - I'm not sure. Did I mention about the sick benefit before?

MS McKENZIE: Just very briefly. You might want to tell us.

MRS OWENS: Yes. You did mention that she had gone onto that, and I was just interested to know your views about how she was dealt with in getting onto it, in terms of going through the processes with Centrelink.

MR URI: I suppose the way they assess - I can understand their assessing, because they want to make sure that you are disabled and stuff like that, but I think part of the reason that we were warned about it, because of the fact they - we initially applied for some sickness benefit. They really want my wife to actually take out her long service leave, and we did argue with them about she not having any more money, if in case something happened to her.

MS McKENZIE: Yes, she'd want to keep it for her sickness or - - -

MR URI: Yes, because it's like - - -

MRS OWENS: But they must have some sort of rule, I suppose, that you've got to run down those other entitlements first.

MR URI: They run down the entitlement and she got nothing. So when you go and apply, when you finally finish work and you come to Centrelink, you basically got nothing left. But I'm not sure whether they really consider that as well. That was my point - why I feel that we're both disadvantaged because she left her work because of her disability.

MS McKENZIE: Yes.

MR URI: From that point on, you got no support at all.

MS McKENZIE: Yes.

MR URI: Financially. Nobody really wants to know what your financial situation is - what about the money that you owe to banks? She's been really fairly good with her creditors up until that point.

MS McKENZIE: That surely should be taken into account because it's not the same as someone just deciding not to pay their debts. It's completely beyond her control.

MR URI: Yes, you're right. But I think if it is a normal general sickness or whatever, perhaps I can understand. But you're talking about a long-term disability and it would be a total separation from employment for a long time. That's part of the reason I said there is actually no body, no association to actually give you that kind of support when you leave your job, plus I think there should have been a process where a body - maybe Centrelink - should give you some kind of documentation saying, "This person has got a long-term disability." But unfortunately they're not giving any of that. It really comes to you. You have to prove that all the time. Every time you hassle, you have to prove that to the services or - - -

MRS OWENS: So you need to prove that, not just to the creditors but also to Centrelink, to stay on the pension?

MR URI: The pension, yes. You've got to prove that, if you want to have access to other services as well.

MRS OWENS: Do you think there should be some way that people that have obvious long-term disabilities to be able to get something that says, "This is a long-term disability that's not reversible," to stop you having to go through that ongoing hassle of going to the doctors, getting certificates signed, and so on.

MR URI: I think there should be, because my wife has been assessed by the doctors. She's already been done by the Commonwealth doctor, she's already been done in another assessment by her own doctor, so there's sufficient evidence already there for someone to actually give her some kind of closure to it. I don't know - maybe some kind of new identification saying, "This person has a disability." If the creditors want a reference or wanted something like that, all you do is just give them a copy of that.

MRS OWENS: I think you acknowledged at the outset, when we were talking about this, that you do understand the need to assess people, because I suppose the government doesn't want people cheating the system.

MR URI: Exactly, yes.

MRS OWENS: But on the other hand there's going to be a subset of people that go onto disability support pensions or sickness allowances or whatever that are not necessarily going to be reversible in terms of what happens to them. There will be some people in a grey area, in which case you can continue to assess those people.

MR URI: Yes, continue to, yes.

MRS OWENS: There are some people where it's obviously just a temporary condition that will right itself. But there are people like your wife where - I haven't met your wife, I'm not an expert on her condition, but it does sound as if renal failure is at one end of that spectrum.

MR URI: The other point is, when my wife realised that she had renal failure, she actually continued to work for two years, and she was allowed to do her dialysis at work. One of the reasons she wanted to continue - she could have stayed anyway, she could have stayed at home and received that kind of benefits, but she wanted to continue work because I had the feeling that because she felt it was the first time she had a very decent job in her life. That really motivates you - you want to go on. But because there was a lot of problems compounding - each time you apply for something at Centrelink, they come with all this material you had to fill out. You've got to go to the doctor, fill all those applications again, only to get one day's work - out of work - or two days absent from work.

MRS OWENS: The nursing home where she was employed - where did you say it was? It was at Westmead?

MR URI: At Westmead - Mayflower.

MRS OWENS: It sounds like they treated your wife quite well.

MR URI: They did. That's why she didn't really like to leave the job. She never really - - -

MS McKENZIE: That's why she was able to go on for so long, too - because they made an adjustment so that she could do her dialysis.

MR URI: They did. They made an adjustment so she can have certain breaks during the work hours to accommodate that kind of thing.

MS McKENZIE: That's really good to hear, because so often people are making submissions to us saying that it's very difficult in employment for people with disabilities. So it's nice to hear of an employer who has actually tried to make some allowance.

MRS OWENS: The nursing home didn't force her to leave the job.

MR URI: No, they didn't.

MRS OWENS: She just resigned at a point where she felt she could no longer go - - -

MR URI: They didn't play a part at all. In fact, I think she got more out of the work being understanding when she's sick all of a sudden, all that stuff. I don't think there was any kind of part where they really want to get rid of her. I think they loved her, because she's very experienced. She was employed in an area where she had a lot of experience in that particular area and, indeed, they didn't want to lose her in a way.

MRS OWENS: What sort of job was it?

MR URI: She was actually an enrolled nurse, and she's been in the same employer for 12 years.

MRS OWENS: Yes. I think the nursing profession - it's a difficult one at the best of times, when you're feeling fit, but I think if you become ill it must be quite difficult to carry on past a certain point because there's quite a lot of physical work that needs to be done.

MR URI: Yes.

MRS OWENS: You made a number of recommendations in your submission relating to the long service leave and perhaps having special concessions or consideration for people with disabilities when applying for bankruptcy and removing three-month waiting period if you apply for super payments, so we'll have a look at those recommendations when we're making our deliberations.

MR URI: Okay. I just feel I might raise that point because it's not - I don't know how many people really think about it, because when you have a problem in your family nobody really wants to know what's happened. You're on your own in a way.

MRS OWENS: It's just one of those things that could happen to anybody, what's happened in your family.

MS McKENZIE: Yes.

MRS OWENS: Because ill health can strike people at any time in their lives, and the unpredictability and the uncertainty of it means that the community needs to find ways of making the transition to another life, which may not be a working life, as easy as possible. What you're suggesting is that you've had barriers put up and also it's caused immense financial difficulty for you.

MR URI: I'd be really happy for the PC to actually look at those recommendations that I put there; just happy for the PC to actually have a look at those recommendations. I'm not sure how viable it is for the commission to actually look at making changes, but particularly to the people who have a long-term disability, what kind of support they're going to receive when they do finish work.

MRS OWENS: We'll be raising some of these issues relating to, for example, Centrelink. We're feeding back what people are saying about Centrelink processes and so on to that organisation and hopefully at some stage they'll put in a submission. But as a carer, did you have any problems going onto the carer allowance? Was that a reasonable process? I suppose some of the things you had to prove were related to your wife's illness, so there's an overlap there.

MR URI: Yes. The problems really for me, because I had to abandon some of my - I don't think I mentioned it on my submission, because I have been doing studies at university, but when she had this problem I had to stay home and become a carer. I had to cut down some of the hours at university.

MRS OWENS: But you've just finished, haven't you?

MR URI: I finished - this semester has just finished, and I'll be graduating in September-October.

MS McKENZIE: That's really great. Congratulations.

MRS OWENS: Are you going to try and get out into the workforce at some stage?

MR URI: Yes, that's the whole idea - go back to the workforce and - - -

MRS OWENS: And then somebody is going to need to look after your wife.

MR URI: Yes. But that really is the problem, because I had to cut out a lot of stuff that I normally do for her. Her condition really requires someone there all the time, not just casually. Someone has to be there all the time. She can't cook any more. I do a lot of the other stuff that you normally do - washing - and also when she had this condition, it was really a heavy use of electricity as well. That was the biggest problem, because in winter she had to have warm. She got to have airconditioner all the time, because without it - it can trip or something - I don't know what the condition is, but she's been having problems because of that, so we had to get the heater turned on every time the winter comes around. It's very, very difficult.

MRS OWENS: Very expensive.

MR URI: Very expensive, actually - very expensive.

MRS OWENS: She's on ongoing dialysis.

MR URI: Ongoing dialysis.

MRS OWENS: How many times a week does she go to the hospital?

MR URI: Four times a day.

MRS OWENS: Four times a day?

MR URI: Yes, a day.

MRS OWENS: How far away do you have to go?

MS McKENZIE: It's at home.

MRS OWENS: It's at home?

MR URI: She do it at home - peritoneal, yes.

MRS OWENS: Do you have to go in every now and again?

MR URI: But even now she has to go to Blacktown Hospital.

MS McKENZIE: To be checked to make sure - - -

MRS OWENS: How often does that - - -

MR URI: I think about once a month, because it appears when she had her period that there's a lot of pain in it and she had - because she lose a lot of blood, so they really wanted her - she had to go to the Blacktown Hospital.

MRS OWENS: All that adds up, too, as you said before - transport costs and so on.

MR URI: Yes.

MRS OWENS: So you've got all these additional costs.

MR URI: These are additional costs as well, yes.

MRS OWENS: As well as repaying the creditors.

MR URI: I have to do all the talking and a lot of companies they don't want to talk to me; they want to talk to my wife.

MRS OWENS: Thank you very much.

MS McKENZIE: Thank you very much for making the submission.

MRS OWENS: And for coming.

MR URI: Thanks for having me.

MS McKENZIE: We'll raise the issues with Centrelink, but also we're making a list of issues like this that arise and are of concern, and we'll take this one into account, too.

MR URI: Thanks very much.

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

MRS OWENS: We will resume. The last participant today is People with Disability Australia. Could you each give your name and your position in the organisation for the transcript?

MS FORREST: My name is Heidi Forrest. I am the president of the membership of the organisation.

MR FRENCH: My name is Phillip French. I am executive director of the organisation.

MRS OWENS: Thank you, and thank you for coming. I know you are both not feeling 100 per cent so we do appreciate it. I think we will just launch into a discussion; we don't have a formal submission but that has never held us back before, has it, Cate?

MS McKENZIE: No.

MRS OWENS: Thank you for that. Who is going to start?

MS McKENZIE: Raise whatever you want to raise.

MR FRENCH: I will kick off and Heidi will add as we go along, if that's okay. Thank you for the opportunity to appear without having lodged a submission to date. We will be lodging a fairly substantial submission which is almost complete, but I think it's relevant to note, because I did mention this to your staff, that we've had to prioritise our efforts earlier this year to do two other major projects. One was to intervene as amicus, in the matter of Purvis v State of New South Wales before the High Court, which, though our appearance was short, as these things are, it took an enormous amount of time and energy to actually get that submission in and so forth. But it's a matter that's highly relevant to the proceedings here.

The second thing that we spent a lot of time on in the first part of the year was to prepare for and participate in the proceedings of the ad hoc committee that has been established by the United Nations to develop a convention on the human rights of people with a disability. That may also be of some interest and relevance to this inquiry.

MS McKENZIE: Both are.

MR FRENCH: If there are any questions that relate to either of those two things we would be happy to address them, and we will try and weave in some of the relevant points from them to the issues that we were hoping to raise with you.

MRS OWENS: Excellent. You said, Phillip, that there were about five issues that you wanted to raise with us so let's just go through them.

MR FRENCH: Okay. The discussion paper that has been issued by the commission raises for consideration the question of the definition of disability used in the act and there are a number of points that we would like to make about that definition for your consideration. Firstly, as has been observed by a number of people, the definition of disability is very broad and in that sense is encompassing and non-exclusive and permissive. We think that's a very important feature for a definition of disability under an anti-discrimination act such as the Disability Discrimination Act, and we would compare the Disability Discrimination Act of Australia, favourably, in this respect, to the equivalent in the UK and the USA, which refer - I don't have the exact form of words - to a significant limitation or restriction in an area of activity.

If you compare the way that the courts have dealt with the two different models over time you would see that what the definition in the UK act, and particularly in the US act, has done is to mean that many people with disability fall at the first threshold, which is whether they are entitled to complain at all under the act. That has a number of major problems associated with it. First of all we say that a discrimination act ought to be about eliminating discrimination on the basis of some irrelevant characteristic or stereotyping of the individual and therefore there shouldn't be much need to inquire into whether the person qualifies to make the complaint.

The proper nature of the inquiry under the act should be: has the person been discriminated against on the basis of some irrelevant characteristic or stereotyping? That's where the substantial inquiry should be. It shouldn't be into whether this person has a disability that is capable of allowing them to complain under the act. If we take that approach what happens is that many people will not complain because what they face is the burden of proof of disability, which is extremely demeaning. It can often be very stigmatic and it increases, exponentially, the costs that are involved in pursuing a complaint, assuming that it isn't always possible to resolve it by way of conciliation before going to court.

Even under the Disability Discrimination Act we've seen a couple of cases - Marsden's case being one of them, and there are a couple of others - where there has been a significant dispute about whether or not the person falls within the definition of disability under the act, and that's even under the broad definition of disability. We would not want to see a situation where the definition was narrowed, and more and more the focus was on whether the person was entitled to complain under the act at all.

MS McKENZIE: I raised, in discussions with the Human Rights Commission yesterday, this concern I've got about people who have syndromes which haven't yet had any medical classification, which are sometimes argued about medically as to whether they are a condition, a disability or not. But certainly in the severest of those cases there is no argument that those people have medically recognised symptoms; they collapse or get taken to hospital or whatever.

MR FRENCH: Yes.

MS McKENZIE: My concern was that if there are medical fights about whether or not these things are conditions I'm troubled that they may not fall within the DDA definition of disability, however widely that's framed.

MR FRENCH: That is certainly an issue. One of the points that we make in our submission to you is that it's inappropriate, we think, to see the category of impairment, handicap and disability as fixed. That's inappropriate for two reasons. Disability has two aspects to it, which I will go on to talk about in a moment, that are very important to consider in definitional terms. One is a biological aspect, or an organic aspect I suppose might be another way of looking at it, and the other is the social aspect. I know that a number of people have made submissions to you about improving the act by including a social definition of disability. But neither the organic condition nor the social interaction aspects are fixed categories.

It's important to make that point because, for example, disability is often highly contextual. If you look at biological conditions or organic conditions - let's say, like a repetitive strain injury; like the increased incidence of depression, other forms of workplace trauma for example - they are highly specific to societies. They have an organic basis to them, but they are highly specific to post-modern societies. So that category of conditions is not fixed and the act ought to be able to accommodate changes in biology or organic bases for disability.

The second point, which I know has been made to you a number of times already, is that the severity of disability, in particular, will vary according to the accommodation in the social environment or its responsiveness to the impairment. So a person with an impairment - take for example the fact that I wear glasses, the fact that I wear glasses means that I don't experience disability in access to information. But if I were not to have glasses then I would be quite disabled in not being able to read documents and so forth, so that has a sort of social dimension to it.

Another example would be that buildings can either have steps or not. If they don't have steps then the person who uses a mobility device is not disabled. If the steps are there then the person can be very disabled and excluded from whatever it is in the building that may be of importance, whether that's employment or a necessary service or whatever it may be. So it's quite important, we think, that there be a broad definition of disability and that that definition is capable of accommodating changing understandings of disability, both in its social aspect and in its organic aspect.

Another point that we would want to make about the definition is that this is beneficial legislation, in the legal sense; it is intended to confer a social benefit on a disadvantaged group. In addition to that it's intended to be able to be used by that disadvantaged group relatively easily. Unfortunately, using the DDA is not as easy as it might be. It has become overly technical and perhaps overly disputed, in the sense of conflict between respondents and complainants, more so than perhaps we would have liked. But the intention of the legislation is that it should be easy to use by the group. Therefore it's very important not to set up, within the scheme of the act, lots of initial jurisdictional or interlocutory problems that the complainant would need to get through.

Having a complicated definition of disability, as I've said earlier, may mean that the person with a disability falls at the first threshold or exhausts all of their resources, whether they be emotional or financial, getting into the game. We would much rather see, in terms of the efficiency of this act and its useability and its benefit to the class of persons it's intended to protect, that the main dispute falls on the substantial issues in the case - has discrimination occurred or not; was that discrimination justifiable or not - rather than all of the energy and resources being expended on this preliminary point.

I might just draw breath there, if that's all right. That's primarily what we wanted to say. There is one further thing we want to say on definition but that's a convenient spot to stop if there are any issues coming out of that.

MRS OWENS: I thought that was a very clear run through those issues, particularly your description of the organic and the social aspects of disability and the changing nature over time. You have raised the points so clearly I think we will just keep going. Sorry you didn't get to draw breath for very long. I think, go for the next part.

MR FRENCH: The next thing I wanted to just highlight here - and Heidi may want to comment on this as well - is that this is one of the critical issues in the Purvis case, that is currently before the High Court. If you go back to the days when we were thinking about how the definition of disability ought to be cast in the act there was clear agreement among disabled people and disabled people's organisations in Australia, and indeed other constituencies, that this ought to be a broad inclusive definition that didn't exclude people, because that didn't make any sense.

The courts have struggled with that because the courts, in general, want to categorise and limit and define and so forth; that's the business they are in. In addition to that - and I say this respectfully - we must not underestimate the degree to which the legal system is infected by disability discrimination itself. So the courts have struggled with the definition of disability. In the Purvis case, right up to the High Court and indeed in the High Court, we have seen very distressing struggles among senior judges about what they understand to be disability and how the definition of disability, within the act, ought to be understood.

As you know, at first instance the Federal Court and the Full Federal Court have determined that a distinction is to be drawn between disability on the one hand and behaviour that results from disability. I assume that a number of people have said this to you, and certainly we would make this point, that that distinction is absolute nonsense. If you take the case of Purvis - it concerns Daniel Goggin, who is a child who acquired a brain injury early in his life and what that brain injury has resulted in is two things: firstly, it has resulted in damage to his frontal lobe and the consequences for him have been, on the one hand, that has produced blindness and, on the other hand, it has reduced his ability to adapt to his social environment, or reduced his adaptive behaviour.

Effectively what the Federal Court at first instance, and what the Federal Court in review has said is that whereas Daniel's impairment as it results in blindness is a disability within the act, his disability as it results in a deficit in adaptive behaviour - in that there is a manifestation of that behaviour - is not a disability that is covered by the act. How could the court come to such a result? It clearly doesn't make any sense. We're not saying that in an extreme form - and Daniel's case is far from an extreme form - it wouldn't be reasonable for a service provider - as it was in this case - to discriminate on the basis of the disability if they had made reasonable attempts to accommodate the disability or the behaviour that manifested the disability and that still presented a major risk to other people and the environment, but we say the unjustifiable hardship defence provides the basis for relief in that case and the analysis should not turn on whether this is a person with a disability or not. The High Court hasn't yet handed down its decision in this case, and of course we're hopeful that a sensible approach will be taken to this. That hope is not based on anything we heard or saw before the High Court, unfortunately. It is a hope against hope. The High Court clearly struggled with the matter. It may be that they get it right in the end, but it was a very pessimistic few days we spent there.

MS McKENZIE: So you got the feeling from the questions being asked that the judges were also having difficulties - - -

MR FRENCH: Yes, great difficulty.

MS FORREST: They were very much more looking at the meaning of the word than what the word actually meant in the way that it affected people.

MRS OWENS: This is the word "behaviour"?

MS FORREST: Yes.

MS McKENZIE: No. "Disability".

MRS OWENS: Or "disability"?

MS FORREST: It was sort of interrelated, yes.

MR FRENCH: If you look at the definition in the act there are two paragraphs. The introduction is, "Disability means" and then the next paragraph is "includes" - so the solicitor-general for the Commonwealth was trying to drive a wagon train through what he saw as a distinction there. We don't see a distinction. We think it is to be read additively - it means this and it means this and it means this and it means this - but they were trying to say that "disability" means this and that doesn't include what follows, so it was very concerning where that may lead to. Of course they haven't made a decision, but they were clearly struggling with it in the hearing.

MS FORREST: But it does overlook disabilities that are manifested in the behaviour - like autism, for example. Autism is the behaviour more so than anything else - and so that is the issue for so many people.

MS McKENZIE: In that case the behaviour is the disability.

MS FORREST: Exactly.

MR FRENCH: Not according to what the court may say. I say again - because it is important to say this - that the court may well just have been testing the parties' views on the matter, and even McHugh J in one statement said that he could see that adaptive behaviour, or deficits in adaptive behaviour, did fall within the definition of "disability" under the act, but the manifestation of that behaviour did not.

MS FORREST: But manifestation is a disability.

MR FRENCH: It clearly doesn't make sense to make a statement like that, so as Heidi says, people with autism, people with brain injuries, some people with some forms of mental illness, may find themselves on the other side of the definition of "disability" if the Federal Court's decision is upheld or if the High Court comes up with some other decision on the definition that separates behaviour from the meaning of "disability" under the act and, in such a case, we would urge the Productivity Commission - because this decision will be handed down presumably before your inquiry is over - to recommend that the act be amended to make it clear that the definition of "disability" in the act is meant to be broad and inclusive, and in particular inclusive of people who have behaviours that may result from an impairment disability or handicap.

MRS OWENS: Can I ask a question about this? Supposing we did this and we said that the behaviour was intrinsic to the disability, could there be situations where - say we've got two kids in a school and they're both behaving very badly; one of those children has been identified as being autistic and the other one is just being defined as being "a ratbag". Would that mean that one of the children, the autistic child, then has some degree of protection under the act and the other child that just wants to behave in a particular way doesn't? Could that lead to other problems elsewhere?

MR FRENCH: It turns on what is the reason for the discrimination and where does the behaviour come from. In the case of a child with autism it's that child's struggle to adapt to the social environment and struggle to communicate and, in our view, what that ought to result in is our community affording additional protection to that child's interests. If a child is being naughty at school but doesn't have a disability, then we would obviously want that child to have access to whatever support services she or he might need to be able to learn better behaviour, but the basis for the social intervention is different, in our view.

MRS OWENS: Just to keep the scenario going: there are two kids and they have both got similar sorts of behavioural characteristics at the end of the day, which makes it quite difficult for the teachers to deal with, and there may be a school camp coming up and the school says to the parents of these kids, "We don't really want Johnnie and George to go on this camp because they are both going to be too disruptive." Now, Johnnie has got the - - -

MS McKENZIE: You already have an assumption about this, which is that both of them are going to be male.

MRS OWENS: Yes, a lot of kids with autism are male. I think there are more male children with autism than female, so I have used male, and I have sons, so I just automatically think that way. I'm sure there are some girls out there who have the same behavioural problems.

MS McKENZIE: That's fine.

MRS OWENS: But the first child with the autism may then be able to bring a case that they were discriminated against based on their behaviour and based on their disability, and the other child hasn't got that protection under any act.

MR FRENCH: Our argument to that would be that the child with the disability is dealing with pre-existing disadvantage and what the act is about is trying to eliminate discrimination that results from that disadvantage.

MS McKENZIE: About which the child could do nothing basically.

MR FRENCH: Yes.

MS McKENZIE: But the other thing to say about the act is that it's a bit the same. Take employment and dismissal, for example - because it's a simple case. If the employer is really unfair and dismisses a person for no other reason than they just dislike that person, completely irrationally - that's one thing. The other is that if the same employer dismisses a person with a disability then even though both actions are totally unfair, one will have a claim under the DDA and one will not, and that is partly because the act draws boundaries. It doesn't try to right the whole world. It just tries to right some of it.

MR FRENCH: Yes.

MRS OWENS: We'll wait with interest and see what happens with the High Court.

MR FRENCH: Yes.

MS FORREST: In the case of the two kids, I would personally hope that they would look at what is triggering off the behaviour. Unlike with children with autism - you know, the hearing sensitivity and all that - I'd like to know that they look - if there wasn't something that was in the environment that they could fix up that was causing it.

MRS OWENS: Yes. There could be frustration on the part of the other child which is due to - - -

MS FORREST: Yes, exactly.

MRS OWENS: - - - something that has happened at home or - - -

MS FORREST: Provoked, whatever.

MRS OWENS: Harassment, whatever. Good point.

MS McKENZIE: And in fact one of the schools we visited - and I suspect it might have been in Alice Springs - talked about that very thing and said that they try to deal with behaviour in a general way. Obviously they look to the reason so they can do something about behaviour management, but they try to look to all the reasons. They try to deal with behaviour as a management question rather than it being due to disability: is it due to some other difficulty; is it because your family has just broken up, or whatever?

MR FRENCH: The last point we wanted to address you on in relation to disability is the issue of whether the act ought to be amended to institute a definition based on a social model of disability. This is an important point because it is true to say that the definition of "disability" in the act is medically orientated and it's a highly negative construct of "disability" in that what it sets out is a series of deficits or deviations from a theoretical norm and, in that respect, it can be quite stigmatising and unnecessarily demeaning of people with disability. We certainly see that as a problem and what a social model of disability would do is in particular to place emphasis on the barriers in a social environment rather than locate the problem of disability - in inverted commas - in the individual and therefore potentially set up a situation where it's the individual who is perceived as needing to change to adapt to the social environment.

What a social model would do is to substantially locate the problem of disability - in inverted commas - in the social environment and so say to the social environment, "What are you doing that excludes the person with disability from this situation?" Just to put it in very simple terms: it doesn't say to the person who uses a mobility device, "What is it about you that means you can't get into the building?" It says to the architect, to the engineer, to the building owner, "What is it about you that you put steps in a building, which means that it's not available for people who use mobility devices?" so it's a different location of the problem, and that is a - - -

MS McKENZIE: Yes, so it's not a person must not exclude you from that building, but a person must not make a building that excludes you - - -

MR FRENCH: Yes.

MS McKENZIE: - - - or must make a building that includes or provides - I don't know. Once you try to express it it becomes quite difficult. It's a trick.

MR FRENCH: As a matter of principle we would be supportive of any move towards a social model definition in the act, subject to this though: it's very important to recognise that social constructionist and social model theories of disability are as imperfect as are the medical construction or welfare construction or rehabilitation construction of "disability". They're different paradigm approaches and some of them have benefits over others - and one of the clear benefits that the social model has is addressing the social environment as being the location of many of the problems, but social constructionist and social model approaches to disability also have their problems; for example, a radical social constructionist or social model approach to disability ultimately says that impairment does not exist.

I am here in a representative capacity today, but I am - even though I might not look like it - a person who has a psychiatric disability of an episodic nature, and that is depression. I would say to you that whereas my inability, for example, to obtain income protection insurance and various other things is the result of discrimination, which is socially constructed, there is no reason in my view why I shouldn't be able to have access to that and so privately order my financial affairs - that is social construction. When I am not well - as I have not been over the last week or so - that is a reality that is of nobody's creation other than the organic condition that underlies it, so radical social constructionist and social model theories would ultimately deny impairment and say that it's only an issue of social barriers, and that would be wrong, in our view.

MS McKENZIE: Yes.

MR FRENCH: I guess what we would say is that while we would support a move to a social model approach to the definition we have not yet seen in any of the theoretical literature - and certainly not in the applied context, like in disability discrimination law an adequate social model definition that could be used. We'd certainly support efforts to develop such a formulation, including by the commission if it has the time and ability to do this, but we're not aware of any parallel anywhere in the world or in the theoretical literature which is sufficient to deal with a social model approach.

There has been, as you probably know, quite a degree of development by the World Health Organisation - unfortunately, situated in its revision of the International System of Classifications of Impairment, Handicaps and Disorders - to incorporate the social aspects of disability. That's been a positive sort of trend, but it still relies to a very significant extent on defining organic conditions, as well as looking at some of the social dimensions of disability.

The risk of having a social model definition imposed at this stage that wasn't properly formulated - particularly when it hits a court system that doesn't already understand the existing definition - is that people might fall outside it, so we'd urge a cautious approach to that, although we certainly support the principle of the issue.

MRS OWENS: Yes, thank you for that. We've been struggling with this with quite a few participants and quite a lot of submissions have raised this issue of the social model versus the medical model. What we've been struggling with is how you operationalise that into an act, and one of the questions we've been asking is, "Have you seen anything out there? Are there any international models where this has been applied in a legislative framework?" We really haven't come up with anything either at this stage, but it does raise the question of - as you say, if you have something that is not adequately formulated - what the lawyers could do with it. It could lead to problems of interpretation in the legal system.

MR FRENCH: There is some work by Jenny Morris. I'm not sure if someone has drawn your attention to that. I think she's at the University of Leeds in the UK, and she's not attempted to develop a social model definition for these kinds of purposes, but she has attempted to develop an assessment tool based in a social model. What it attempts to do is to ask the question, "What are the barriers you encounter in everyday life that prevent you from participating in this or that life activity?" rather than - many assessment tools, you know, seek to find out what are the biological dimensions of the disability. There is work going on and some of that work would be instructive in this kind of context. If it's any comfort to you, this was one of the critical issues debated at great length and unresolved in the ad hoc committee of the United Nations, where arguably some of the most important minds in the world were there to consider the issues, so it's not just here that it's unresolved. It's unresolved on an international level.

The Australian Institute of Health and Welfare also, as you may know, in its review of the definition of "disability" in Australia has pointed out that, to some extent, the DDA already complies with the revised World Health Organisation classification of impairment, handicap and disorder in that what it locates in its definition is, essentially, the impairment aspect and then, in terms of discrimination in activity areas of life, that's set out in the substantial provisions of the act, like education and services and so forth.

MS McKENZIE: Yes, and HREOC made the same point.

MR FRENCH: Did they?

MS McKENZIE: Yes.

MR FRENCH: That's an important thing to take into account. It doesn't get over this problem that the definition is quite stigmatic and demeaning and very deficit orientated, but before we throw that baby out with the bathwater we need to know that there's something that represents a genuine improvement in terms of the capacity of the act to function in what is often a very difficult environment of the legal system.

MRS OWENS: Perhaps it's going to be one of those things to continue working on and monitoring and be prepared to adjust the act at a time when everybody is satisfied that they've come up with the right approach and the right definitions.

MR FRENCH: Perhaps, yes. That's really all we wanted to say on the first issue. Can we move on now to the second point that we wanted to make?

MRS OWENS: Yes. You've got four more.

MR FRENCH: Yes. Tell me when I need to stop, by the way. The second major issue that we wanted to highlight is the problem in the act that ultimately comes down to the comparator test, but which has its origins in the fact that what we're attempting to apply in the DDA is a model of disability discrimination that ultimately comes from the Sex Discrimination Act. A point that we would like you to consider carefully is whether or not the model of sex discrimination is an appropriate model of discrimination to apply in a disability context.

What I'm about to say may be offensive to some people, but I want to state it in its sort of extreme form to make the point, recognising that not all of what I say will apply in every context. That is that, if you're looking at the area of race discrimination, say, or sex discrimination, you're often looking at that in terms of an equalisation of opportunity, in that the question is why is a person of this gender discriminated against when a person of that gender is not, in this particular case, whether that's employment, wages and conditions or whatever it may be.

In the case of the Race Discrimination Act, you ask the question why is a person of this race discriminated against or is experiencing this unfavourable treatment when a person of that race is not? So you invite a comparison and the comparator is the person of the other race in the same circumstances who doesn't experience the discrimination. Essentially, it's an equal opportunity model. It says that all people, regardless of their race or gender, are entitled to a quality of treatment.

MS McKENZIE: Because there is another race to compare with. There is another sex to compare with.

MR FRENCH: Yes, exactly.

MS McKENZIE: With age, for example, there is another age to compare with.

MR FRENCH: Exactly. The problem in applying that to the disability area is that there isn't immediately a comparator, unless you say that it's the child who doesn't have the disability in the same circumstances, which is what the High Court is struggling with in the Purvis case. It leads to what can be a farcical situation, where - just to highlight, again, Purvis on this - what the High Court was struggling with was, "Who do we compare this child to; this child who has pushed and kicked and punched a teacher and another student? Do we compare this child to a student without a disability who doesn't have these behavioural characteristics or do we compare this child to a child without a disability who does have these behavioural characteristics?"

The consequences often for one or other of those are profound. If you ask yourself the question, "Does a kid who doesn't have a disability who pushes, punches and kicks other students and a teacher get expelled?" the answer is, clearly, yes. There's been no less favourable treatment, but it doesn't deal with the issue of the discrimination that's faced by the child with the disability.

MS McKENZIE: The other point - and occasionally courts have made it - is that, by making a comparison like that, you finish up with an artificial result in a way.

MR FRENCH: Yes.

MS McKENZIE: You finish up with a result that is inevitable. As soon as you define the comparator in that way, the result is inevitable.

MR FRENCH: It's completely circular, yes. That was the point we wanted to make. We think the comparator test is problematic in the act and - - -

MS McKENZIE: These are questions, as you might gather, that I've thought about for a very long time.

MR FRENCH: Let it trouble only us then.

MRS OWENS: I haven't. I'm not a lawyer, so this is quite new to me.

MS McKENZIE: But it's a problem that arises in many discrimination cases, particularly in the context of this act.

MR FRENCH: Yes. What we would say there is that the comparator test can lead to perverse results and is not the most efficient way of dealing with what are the substantial issues in the act. Why we have a comparator test is probably historical and not necessarily very rational, and it relates to the fact that this act was modelled on the Sex Discrimination Act and the Race Discrimination Act rather than it being independently considered: what is the best model to take in the area of disability discrimination?

The extreme point that I wanted to make - which is not necessarily true, but I just want to make it for the sake of making it clear - is that, whereas it may be reasonable to have an equal opportunity model under the Race Discrimination Act and under the Sex Discrimination Act, that will not work in the area of disability discrimination, because treating people with disabilities the same as a notional normative person will entrench pre-existing disadvantage. That's one reason. The second reason is it won't deal with the active measures - the positive measures - that are necessary to produce substantial equality for the person with a disability.

That is a very different set of circumstances under the Disability Discrimination Act to, say, the Sex Discrimination Act or the Race Discrimination Act, in that the employer may have to make positive measures - take active, positive steps - in order that the person may be able to work in the workplace, whereas that may not be the case under the Sex Discrimination Act or under the Race Discrimination Act, to eliminate discrimination. The employer may need to have a height adjustable desk. The employer may need to install screen-reading software. The employer may need to stagger work hours, which is probably not a good example because the employer under the Sex Discrimination Act may also need to do that but - - -

MS McKENZIE: It's also not quite true - what you said is perhaps going too far, because one can imagine situations - also, again, taking the Sex Discrimination Act as an example - where you might need to adopt positive promotion policies, because women haven't been promoted in some particular area pretty much ever, and that might be the way to solve that particular barrier.

MR FRENCH: Yes. What I said wouldn't apply in that case. The acts operate in very similar terms on a whole range of fronts but, in terms of taking positive steps that would enable employment, I think there is a distinction to be made between the DDA and an equal opportunity model to produce substantial equality for people with disabilities.

The primary point that, I suppose, we want to make is that McHugh and Gaudron JJ have formulated a detriment test, which we think is a more appropriate test to apply than a comparator test in the area of discrimination, and we'd ask the commission to look specifically at that. The New South Wales Law Reform Commission has looked at this issue specifically in its review of the New South Wales Anti-Discrimination Act and has recommended a change to the New South Wales act that would incorporate a detriment test rather than a comparator test. I think that's probably all we wanted to say on that point.

MRS OWENS: Okay. Thank you for that. There's one of the acts - I think it's the ACT act - where there's no comparator.

MS McKENZIE: Assuming that there's a continuity of the view that that doesn't involve a comparator, they get very close to that. They just talk about unfavourable treatment, which means basically just disadvantage, detriment.

MR FRENCH: Yes. The third issue that we wanted to raise was - given that we would argue very strongly that discrimination is largely structural in nature - that it's very important that the act not only rely on individual complaints as a means of eliminating discrimination. It doesn't do that. For example, it permits the development of voluntary action plans and it provides for the development of standards, and we see those provisions as being very important in terms of dealing with discrimination in a structural aspect.

In our view it would be much better that the action plan process was mandatory and that there was some sort of monitoring agency established around it. As it is at the moment, organisations and service providers and so forth can develop action plans, but there's essentially no quality control around what is in those action plans and no real threshold that needs to be satisfied. Of course, a person with a disability can still complain and the action plan will only save the respondent to the extent that it satisfies the act, but that's a rather inefficient way for that provision to operate. It would be better we think that there would be some sort of mandatory action planning process, at least with respect to some service providers, and that there be some agency created around that function which would provide advice and support and monitoring of action plans that are developed.

MRS OWENS: Which bodies should it be mandatory for - government agencies?

MR FRENCH: Certainly government agencies and perhaps, if we're dealing in an employment context, with employers over a certain number of staff. I suppose we would take the view that we couldn't achieve everything that we wanted but it would be good that this provision applied to everybody, but if that weren't sustainable, then perhaps a model like the affirmative action reporting under the Sex Discrimination Act or something of that nature might be a way to do it.

MS McKENZIE: Is it 100?

MR FRENCH: You've got the better of me. It's about 100, I think, yes.

MRS OWENS: What sort of agency do you think should be responsible for this quality control that you suggest?

MR FRENCH: I think it could be called a Disability Standards Agency or something of that kind.

MRS OWENS: Not HREOC?

MR FRENCH: It could be part of HREOC's policy function. I guess what we would say at the moment is that HREOC wouldn't have the resources to be able to implement this currently, but it's not incompatible with HREOC's role and it may strengthen its arm in terms of its policy reach and so forth. With respect to the standards process, standards of course don't solve all of the issues around disability discrimination and some standards have been controversial in their development, like the employment standard in particular, but the transport standard was certainly controversial for a period of time within the disability sector as well.

There is a concern within the sector that the development of standards may limit potential extension of rights under the act and the development of principle under the act and we certainly see those points. However, we would say that the individual complaint based process also has fundamental limitations to it in bringing about structural change, and what the standards do is enable structural change to occur. If you look at what the transport standards will achieve over the next 15 to 20 years, in our view, that's going to be a much more significant achievement than could ever be delivered by just a complaints based system.

We're strong supporters of the development of standards under the act and have been active participants in the development of the transport standard and the education standard which will now go to the Australian parliament and we're actively involved at the moment in the development of the access to premises standard. We would in fact advocate that the act be amended to provide for the development of further standards in a number of areas. I suppose the areas that we could highlight are potentially limitless but the ones that we would put forward today would be a standard in the area of insurance and the specific reasons why we would put that forward; a standard in the area of genetic information, the use of genetic information and then more general standards in the area of universal design and flexible service delivery.

Rather than stop the standards process, which is maybe what the federal government thinks we're at, at the moment, we would see that the act ought to be amended to provide for further standards development under the act. Why have we chosen those areas?

MS McKENZIE: Only those areas? You think amendments should go into permit standards only under those areas or more?

MR FRENCH: We would be very happy if the act was amended to give a plenary power to develop standards.

MS McKENZIE: Yes, that's what HREOC has recommended, not necessarily that they're going to develop all the standards in one go but that they have power to - or that there be power to develop standards in all the areas covered by the act.

MR FRENCH: We would support that, provided there was a process of priority setting, I suppose. I hadn't appreciated that. As I say, I've been away, so I hadn't appreciated that they had put that to you.

MRS OWENS: It only just came in yesterday.

MS McKENZIE: It's only yesterday. So you're forgiven for that.

MR FRENCH: We would prioritise insurance, because this is an area where the individual faces an immense task in dealing with respondents because respondents rely on a range of actuarial information on morbidity and mortality but it's almost impossible for an individual complainant to contest simply because they don't have the resources to do so. It's also an area where - insurance particularly applies across disability groups, actually, but it affects people with mental illness in particular ways, in the sense that it can be potentially very stigmatic for that individual.

All sorts of speculation is factored into whether or not a policy will be provided to a person with a mental illness on the basis of morbidity tables and mortality tables and so forth, and it's an almost impossible ask for that person to be able to challenge that. The same point could be made about people with vision impairment, who often face all sorts of nonsense from insurers who refuse to insure them for this or that because of speculated additional risk and so on. We would highlight insurance as an area where some sort of structural response to the discrimination is the best way of dealing with it.

Genetic information is the same sort of situation. It's a highly controversial area, highly stigmatic, and difficult to see how the individual would be able to challenge much of the information that is relied upon when a person is excluded from a service or employment, or whatever it may be, on the basis of genetic information. The use of genetic information is proliferating at the moment, so it seems to us that would be a further reason for prioritising it. The issue of universal design and flexible service delivery are broad based principles that can apply to all goods and services and therefore we think there would be value in having some sort of guidance along those lines.

MRS OWENS: Just before we move on from that, coming back to insurance for a minute, as you're probably aware, there is a memorandum of understanding between the Investment and Financial Services Association and the Mental Health Council which is really a different approach to developing a standard. Have you got any views on that? It's sort of like a self-regulatory approach, if you like. Do you think that that has any potential or would you still prefer to see a standard based approach?

MR FRENCH: We would still prefer to see a standards based approach that is located under the Disability and Discrimination Act. I'm not convinced that a self-regulatory approach in this area will produce substantial equality for people with disability, although we would commend the insurance industry and the Mental Health Council for the work that they've done in this area to try and improve the situation. At the end of the day I would have to reflect our extremely negative experience of dealing with insurance companies as advocates for people with mental illness or blindness or physical disability, and we continue, in spite of those developments, to come up against absolute brick walls. Basically, the individual hasn't got a hope, in many cases, of getting through that. It's also a major issue in the area of HIV, I should say, where perhaps more progress has been made than in the area of mental illness. So we would see a standards based approach to be the best way of dealing with this.

MRS OWENS: We're talking to IFSA on Thursday.

MR FRENCH: It would be fair to say that the transport industry also thought that it ought to be left alone to sort of self-regulate the introduction of accessible public transport, and in some ways transport is an easier thing to complain about than is discrimination in the area of insurance. You don't deal with the same sorts of odds as you do in that area.

MRS OWENS: Although Maurice Cochrane who led the charge there a few years ago, I don't think, if you talked to him, would say it was easy.

MS McKENZIE: I think he would say it was stressful, but in the end worthwhile.

MR FRENCH: Yes, it was extremely stressful, but I'm just comparing our experience. I should have explained that we have a number of functions at PWD, including we provide individual advocacy for people who are making complaints under the act. So we represent over time anyway large numbers of people who are complaining about discrimination in the area of transport, discrimination in the area of insurance and so forth, and it is an easier sort of dispute to run from the point of view of the person with a disability in the area of transport than it is in the area of insurance - that has been our experience - because you face this sort of impenetrable, actuarial data. To put on a good case to dispute that, the individual would have to call all sorts of evidence which is beyond their resources to create to say why that actuarial data ought not to be taken into account or ought to be modified in their case and so forth.

MRS OWENS: With insurance there's also this clause in the act that refers not just to actuarial information but other relevant factors which is somewhat open-ended, so there may be issues relating to what those other relevant factors are and how that's interpreted.

MR FRENCH: Yes. I see we're rapidly outstaying our welcome, so just the last point that we wanted to raise, which we can raise very briefly, is the importance of advocacy in legal assistance to people with disability in order to be able to use this act. People with disability, by and large, are very disadvantaged, and they may not only have few financial resources but their disability itself may mean that they're not necessarily in a position to be able to easily self-prosecute a complaint under the act and certainly to take it on to the point of litigation.

The Commonwealth has funded a relatively modest scheme of specialist disability discrimination services around Australia. I think they have struggled with demand, that would be fair to say. In addition to that there's a range of non-specialist advocacy services which provide assistance to people attempting to use the act, but by and large they're a drop in the ocean. The cuts to legal aid over the last six years have resulted in a situation where it's very, very difficult for people to obtain legal aid, and that severely disadvantages them if they are unable to conciliate the matter in the commission and the commission terminates and they have to litigate either in the Federal Magistrate's Service or in the Federal Court.

This act can't operate unless people with disability have the support that they need to be able to effectively use the complaint process. Just very quickly, two other points that we would make about this - and I should have made these in relation to in a structural response to discrimination - is that we think it's very important that the act be amended to allow HREOC, the Disability Discrimination Commissioner to be a complainant in certain circumstances, because we don't think it's realistic to expect a person with disability to be able to bring some complaints, and I would highlight the issue of mental illness and insurance here again or perhaps HIV and insurance, again, as being an area where it's incredibly difficult for an individual to come up with the resources that would be necessary to successfully litigate that case.

Secondly, to point out how important it is that the commission maintain its capacity to intervene in legal proceedings or to act as amicus in legal proceedings, precisely because the commission has the resources often to bring scrutiny to a submission made by a respondent that an individual might not.

So, for example, to dwell on insurance again, an insurer may make all sorts of claims which an individual complainant would have great difficulty rebutting given their resources, but if the commission is able to intervene in either an amicus role or as an intervener, the commission is in a position to be able to put before the court a whole range of information, given that it has greater capacity than the individual to generate that information, and therefore perhaps assist in equalising relative party capability. I think we should stop there. Thank you for the opportunity.

MRS OWENS: Thank you very much. I think we've asked you all our questions as we've been going. You said that some of this will go into a submission as well.

MR FRENCH: Yes.

MRS OWENS: We do have it now on the transcript, which might make your life prior to your submission somewhat easier. You could just use the submission as an opportunity to fill in any of the gaps that are there, although having written myself some notes about what you are saying, I can't see that there are that many gaps. But I was wondering if Heidi would like to make any other comments.

MS FORREST: I think Phillip pretty comprehensively covered most issues.

MRS OWENS: Yes, he did.

MS FORREST: He is much more eloquent at expressing them than I am, anyway.

MR FRENCH: That's not true.

MRS OWENS: You did say, Heidi, before we started that you might want to add material, but you think he's covered it for you?

MS FORREST: Yes, I do.

MRS OWENS: He took the words out of your mouth.

MS FORREST: Yes. The main thing that I was really worried about was people with disabilities having an inability to go forward with the complaints. They might be in a situation where they're facing discrimination and they know they're being discriminated against, but they haven't got the resources or the knowledge to pursue it. Often that is worse in areas like - I live in a regional area and so it's even worse for people up in the regions because they haven't got access to the information that people in the city have. The ability to pursue cases of discrimination is really hard and they can't do it, so they usually cop it. In a lot of cases people don't know they're being discriminated against; they just think it's their lot.

MRS OWENS: Yes. That was a really important point to end on. We probably could go for another hour talking about regional areas and the problems in the regional areas, because the problems there are compounded, as they are for particular subgroups in the population.

MS FORREST: Very much so. What I get really angry with - I'm at university, and I've got to constantly, every semester, say that I've got a disability to access disability services - and I don't think that I should have to.

MS McKENZIE: No.

MRS OWENS: No. Do they ask you to fill in a form?

MS FORREST: Yes. I even had to get a letter to say I've got a disability. I just think that is really demeaning. If you've got a permanent disability and you are permanent - why I can't write this semester, therefore why should I be able to write next semester?

MS McKENZIE: They should know that from the beginning of the course and it shouldn't be necessary to do it again.

MS FORREST: I know, but it's something that you've got to do every semester, and that's just sort of typical of a lot of places.

MRS OWENS: We're hearing that about people who are having to deal with Centrelink to get pensions. Even people that have got a permanent disability have to still go through the hoops on a regular basis. I think there are some people where it's obvious that that disability is never going to go away. It does raise the question as to why they have to keep going through those hoops. You can understand why Centrelink has certain processes, because they want to make sure that the people that are entitled to benefits are the ones that get them, but on the other hand, there are certain people whose condition is not reversible - - -

MS FORREST: No.

MRS OWENS: - - - and things are not going to change, so it's a waste of society's resources asking those questions.

MS FORREST: Exactly. Resources that could be channelled a lot more effectively.

MRS OWENS: And, as you say, it could be quite demeaning for that person.

MS FORREST: Very demeaning. That gets hard enough to have to - my lecturer said to me this year, "Before I can give you any more exam assistance, you've got to put it in writing that you can't write," and I laughed, but he was really serious. It's typical of so many institutions. They talk about mainstreaming and inclusion but a lot of their practices aren't very inclusive.

MRS OWENS: So we've still got some way to go. That's one of the issues we have to deal with in our inquiry: how far we've come in the last decade.

MS FORREST: You've come a long way, but there's still ways.

MRS OWENS: Is that all we want to say today?

MS FORREST: Yes.

MRS OWENS: Thank you both very much. That was tremendous; really helpful That concludes today's scheduled proceedings. I will now adjourn until we resume on Thursday, 17 July.

AT 5.26 PM THE INQUIRY WAS ADJOURNED
UNTIL THURSDAY, 17 JULY 2003

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