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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO DISABILITY DISCRIMINATION ACT

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

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 20 FEBRUARY 2004, AT 10.25 AM

Continued from 19/2/04

MRS OWENS: Good morning. Welcome to the resumption of hearings for the Productivity Commission inquiry into the Disabilities Discrimination Act 1992, which we will refer to as "the DDA". My name is Helen Owens and I am the presiding commissioner on this inquiry. My associate commissioner is Cate McKenzie. On 5 February last year the government asked the commission to review the DDA and the Disability Discrimination Regulations 1996. The commission released a draft report in October last year.

The purpose of this hearing is to provide an opportunity for interested parties in Sydney to discuss their submissions and to put their views about the commission's draft report on the public record. Telephone hearings have been held in Melbourne and public hearings have been held in Canberra and Hobart. Hearings will also be held in Melbourne and Brisbane. When we complete the hearings in March we will redraft the report and submit it to the government by the end of April. It is then up to the government to release the report and make a response.

We like to conduct all of the hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason, and to assist people using the hearing loop, comments from the floor can't be taken because they won't be heard by the microphones. If anyone in the audience does want to speak there's an opportunity at the end of today's proceedings to do so. Participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be available on the commission's web site in word form following the hearings. I would like to welcome to our hearing our first participant this morning, so welcome Yvonne Batterham. Could you please repeat your name and tell us the capacity in which you are appearing today?

MS BATTERHAM: My name is Yvonne Batterham and I am here today because I am deaf and I have recently experienced the process of going through the Discrimination Act via the Human Rights Commission.

MRS OWENS: So you have come as an individual to tell us about your experiences?

MS BATTERHAM: Yes, and maybe some other small - no. I'll correct that. They're not small issues. Other things that I possibly would like to raise here in relation to discrimination issues.

MRS OWENS: Yes, please do. Do you want to make some opening points? What we do usually is just ask some questions along the way, but if you want to just go through what you want to tell us and then we could ask questions. Which way would

you like to do it?

MS BATTERHAM: I'd like to sort of carry on maybe from my written submission that I put in. I don't really want to go over that, other than maybe I might make a reference to it or something.

MRS OWENS: Yes.

MS BATTERHAM: What I would like to say is that at the time of my writing the submission I hadn't received a letter that actually told me that the council were actually going to install the audio loops, but I do now have that, but I guess what I'm concerned about now is that the consultation process about having it installed and which type of system to be installed - and there are two different types and which I will explain to you if you want.

MS McKENZIE: Yes, please.

MRS OWENS: We've probably got the wrong type.

MS BATTERHAM: No, you haven't. You've got the right type. I'll just briefly digress a little bit, but on the same subject. In the early 1980s I had a similar problem in that there were no audio loops in the cinemas or theatres and those sorts of things and I was in a position to actually instigate an audio loop being installed in a new theatre that was being built and so I had consultations with that particular council - which is nowhere where I live now - and, as a consumer, I felt as though I had some input in how it worked.

At that time the infra-red system - which is the other alternative - had come in and part of my job was to try all of these sorts of systems and I'd tried both and found that the infra-red, particularly for me and a lot of other people, was not satisfactory. It doesn't work. As you might have noticed in my submission, when I went to the conciliation meeting they had the wrong system and it was of no benefit. It was a distraction and eventually - and the fact that I had to wear the headphone, but anyway - - -

MRS OWENS: Yes.

MS BATTERHAM: I'm trying to keep it to the point. Back then I spoke to the council and I had my research. There were other people who had done research on the two different types of audio augmentations - as they call them now - but in the long term our views weren't considered whatsoever. The council just brought in an expert and they made the decision, even though we suggested that this sort of system be installed. They just went ahead; paid thousands of dollars for the installation, and

of course it never ever worked. I personally tried it. There were a lot of other people with hearing loss who tried it. It didn't work and it wasn't satisfactory and so I felt that our voice wasn't heard.

A similar thing is happening now, 20 years down the track: that I feel as though unless I can push the issue - and up until today there has been meetings at present council between the expert that is going to install it, some of the council staff, and yet myself, or the access committee that I belong to, as part of that council have not been consulted in any way about what is the best system. Is it going to work if it's installed that way? That sort of thing. I know they're the technical side of it, but I feel that the fact that people like me use these systems - why aren't we asked about it? Why isn't our point of view valued?

MS McKENZIE: Is one system cheaper than the other?

MS BATTERHAM: No. I don't think it is at all about cost. I think it is about new technology. This system has been around for a long, long time. It has been known to work in most instances. There is less likelihood of interference. What happens with the infra-red is that it works on local light beam, so when I tried one at home - if I was knitting, every time the knitting needle went across the beam of course it would cut out; somebody would walk across in front of me - across the room - because the light beams have to sort of line up and so that anything that comes through that beam of course you are all of a sudden off the air. The other thing that complicates the infra-red is that if you were installing it in a theatre, where there is a lot of lighting, of course the lighting is interference. 20-odd years ago my daughter and I and a couple of other people went and actually tried it and even my daughter and her friend, who were hearing people, all they could pick up were crackling noises and the sounds of the feet on the stage.

MRS OWENS: Can I ask you, Yvonne, is this council that you are now dealing with also looking at that infra-red technology, but an up-graded version?

MS BATTERHAM: As far as I know, no, because at the conciliation meeting - because the infra-red - you know we got the experience of how that didn't work. I was assured by the person that I was dealing with that the access committee - of which I am part - would be consulted in the process, and I strongly suggested that the infra-red not be looked at. As far as I know they are not looking at the infra-red. That's as far as I know, but it can be a bit of a "secret service", as well.

MS McKENZIE: Can I ask you how the other system works? How does the alternative system work?

MS BATTERHAM: Just by the light beam. Again you have got a box that sits,

say on the television - I'll try and explain it simply - and it has a light beam. It works really the same as this: like you've got the microphone and a receiver, so there's the microphone and I have the receiver. It works in exactly the same way in that respect, other than this works by a wire going around the room and the infra-red works just by the light beam.

MS McKENZIE: Now I understand.

MRS OWENS: So this council is looking at you say a new technology, but based on the technology that you prefer, but you said that the - - -

MS BATTERHAM: No. The infra-red is the new technology. This stuff has been around for - - -

MRS OWENS: I am still not clear. This council that you're dealing with at the moment is looking at infra-red then?

MS BATTERHAM: No, it's not, not as far as I know. They are looking at installing this system but, again, if this is not installed correctly - - -

MS McKENZIE: It won't work.

MS BATTERHAM: - - - it won't work properly either.

MRS OWENS: So you want to be consulted on how it is installed?

MS BATTERHAM: I want to know where it is going to be installed around the room and how it's going to affect like in council meetings, where people tend to sort of sit that way or that way, towards the mayor up the front, and I want to know how that all is going to work, so that if I am sitting back in the audience I can still be able to access the information by everybody in the room, not just one or two people.

MS McKENZIE: Can I ask you - perhaps I will let you go on with the way you want to tell me.

MS BATTERHAM: No, no. Ask it.

MS McKENZIE: I wanted to ask you about the conciliation. You said that they had the infra-red device - not the wire one.

MS BATTERHAM: Yes.

MS McKENZIE: So obviously that would have made it - I mean, we're really

sorry we have made this more difficult because our device doesn't work, but - - -

MS BATTERHAM: No. I am used to it really.

MS McKENZIE: But it must have made it more difficult for you. Conciliation is a difficult experience.

MS BATTERHAM: It's more stressful because I have to concentrate much harder.

MS McKENZIE: Did they offer to put off the conciliation and get - - -

MS BATTERHAM: No, no. Again of course probably a breakdown in communication. They assured me that the loop would be there. I never thought to actually ask which sort. I just thought, "Oh, the audio loop, yes, fine," and of course when I got there, I'm thinking, "Well, not working," and they didn't know anything about it. The person from the courthouse, where the conciliation meeting was held, had no idea other than to instruct us on how to use the solution to clean the headphones that I would have to use. I feel it's quite demeaning that we are subjected to having to put on headphones that have been used by somebody else, when we have our own system - either a hearing aid or a receiver that I have - which means that I can just sit down and just either switch on or plug into my ear and I'm fine.

Another thing while I am actually talking about this, again my daughter came up to visit me and, "Good, mum. We'll go to the movies." Coffs Harbour has got the cinemas up - I shouldn't mention names, I suppose. Sorry. We went to the cinema, knowing that there was an audio loop there - we'd been told that there was an audio loop - and when we arrived of course it was the infra-red, and the woman handed me a pair of headphones that looked so grotty and - well, not that I was going to use it anyway, but there was no way that you would put these headphones on your head.

MS McKENZIE: Yes.

MS BATTERHAM: They dragged them out from under the counter, "Right. Here you are."

MS McKENZIE: My goodness.

MS BATTERHAM: That is really, really demeaning, I think and also even if you are willing to go through that process and put the headphones on, then when you get into the cinema, it sets you apart completely.

MS McKENZIE: Yes.

MS BATTERHAM: "Oh, right, there's somebody over there with headphones," when there is an alternative.

MRS OWENS: Can I come back to this conciliation process, because I'm quite interested in this, and my interest is not just about the hearing loop that was used there, but while we're talking about that, did you then say to HREOC, "I've got problems with this and you probably have got the wrong technology?" Did you get any response on that?

MS BATTERHAM: Yes. Well, the woman was there from the human rights and she was just shocked, because she said, "Boy, I'm pleased you're here, Yvonne." She said, "I would never have known anything about this." So she thought it was a really good experience for her to actually know.

MS McKENZIE: But not for you.

MRS OWENS: The question then will be whether something happens as the result of your experience, and change their technology.

MS BATTERHAM: Yes. Whether they do anything about it. I'd like to see some sort of process to investigate how we can overcome that problem of the wrong sort of technology, and of course people, when you say, "That's not appropriate," they're shocked and then it's all my fault because, you know, the blame comes on to you. It was said on the day of the conciliation, "But this is the latest thing and it's all new and it has been installed."

MRS OWENS: Well, it comes back to the question of consulting with the users; those who are going to be the users of the technology and not just relying on technical advice.

MS BATTERHAM: That's right.

MRS OWENS: I'd like to find out a bit more about your other experiences with this process. You said in your submission to us that the staff were friendly and helpful and you said that the council's letter to HREOC was worded to use the financial hardship figures for the excuse not to install a loop, so there was a cost factor for the council.

MS BATTERHAM: Yes, in that instance. Yes. And I think - - -

MRS OWENS: And the conciliator didn't accept that.

MS BATTERHAM: But there's not a great deal of difference between the cost of either system. So it was just that they didn't want to do it.

MRS OWENS: Yes.

MS BATTERHAM: In plain English, they did not want to do it. One comment was, "Why should we do this for just one person?" It just so happened that I was the only one person that had complained. You know, if the council worked on numbers, well, "We haven't had anybody complaining." Actually, can I just mention about in the same process of trying to get the council to adhere to the Discrimination Act, the access committee that I belong to - the council did not have a disabled carpark up until halfway through last year. Of course, you know me, "This is not satisfactory. We've got to do something about this." Now, we really had to badger - well, "badger" is not the right word. They do the badgering. We sort of try and, you know - so we eventually got them to actually put it in halfway through last year. Then a couple of months later, one of the councillors came up with the idea that no-one was using it so maybe we should move it across the road. So they were going to move it across the road which, of course, is totally inappropriate for people trying to get a wheelchair off their car. You know all about that. I won't go into all of those details. Again, you know, the access committee had to really threaten, I suppose, that we would take it to the Human Rights Commission, and so they decided to actually leave it where it is, which is in the proper place.

MS McKENZIE: Is it lack of understanding that makes - - -

MS BATTERHAM: Yes. It is, but the problem is, even - we've invited the general manager and people from the council staff to come in and sit in on our meetings, to hear our voice on particular things, and it's like talking to the walls.

MRS OWENS: Have they got an officer who deals with access issues that you can go and talk to?

MS BATTERHAM: Yes. There's a community worker who sits in on the meeting, and she has the same struggle. Yes. We're trying to give them good advice and saying, "Well, we've got the Anti-Discrimination Act out there. You really do have to do these things whether you like it or not." Then the attitude is that, "But nobody is complaining, so we don't have to do it." Then when we put the carpark in, "Nobody is going to use it, so we'll just put it across the road out of the way."

MRS OWENS: Could I come back to this conciliation, and I'll ask you a question you mightn't have the answer to, but do you know of any other councils in New South Wales that have installed hearing loops?

MS BATTERHAM: Yes. Most of them do have now, as far as I know. I mean, I haven't done any sort of survey, but certainly there are possibly the more financial councils maybe. Certainly up in my area, you know, it is slowly, I think, getting out there that they're really going to have to do something, because all of a sudden they've been faced with, "Gee, somebody is actually complaining about these things," and, you know, I'll put my hand up for that. I actually just was reading a paper written about the process of this and whatever, and it was saying how it's so important to get the information out to people to realise that disability is not just about people in wheelchairs. I think that still where I live is sort of the attitude that disabled is just about getting somebody in the door. It's not about access to information, for one thing, and that's my really pet thing. We all need access to information, and in lots and lots of areas the access to information, even for hearing people, is fairly limited. What I'm suggesting even with the audio loop, everyone that comes to these public meetings will be able to access that information better, both for people like me and for them, because council at the moment does not even have a microphone.

MRS OWENS: It's not just about accessing any information. We're talking about accessing information so that you can exercise your democratic rights to local government services.

MS BATTERHAM: Yes. That's right.

MS McKENZIE: This is civic information. It's very important.

MS BATTERHAM: That's right. Yes. And I don't have that access.

MS McKENZIE: When you said that the council said to you, "But no-one has complained about this before," that's a reaction that I suspect not only councils might sometimes have.

MS BATTERHAM: It's pretty much a widespread view that's out there.

MS McKENZIE: But one of the things that the access committee can do is really tell council about the problems before anyone gets to complain.

MS BATTERHAM: Yes. But, see, that's not valued either, as I said in my submission. Really the council as it stands now would be so much happier if we just disappeared. They feel as they know it all, and they'll just do what they want. People that are on the access committee - we've got people with mobility, sight, me and other sorts of things, and yet our voice is not valued at all. Again, we have to specifically ask and get quite serious about asking to get any sort of council staff to actually come and sit and listen to our point of view. So basically our voice is not

valued at all.

MRS OWENS: Now, without giving away which council we're talking about, but we can probably guess, are we talking about an area where it's an ageing population?

MS BATTERHAM: Yes, indeed.

MRS OWENS: So these issues are not going to go away. They're going to get worse.

MS McKENZIE: No. They're going to get worse.

MS BATTERHAM: Yes. I mean, even since I've been living there, which is six years now, the people that are retiring, "We'll come up and retire," and so, yes.

MRS OWENS: And elderly people can often get hearing problems at a later age.

MS BATTERHAM: Well, of course, yes. The other thing, too, is actually where I'm living there are cinemas there that I've been sort of trying to encourage them to install the loop, and I mean, they did a refurbishment so they've actually put the wiring in but they haven't connected it up. Of course, they are still saying it's a cost issue for them, and I accept that, but interestingly enough, many years ago, long before I moved up there, there were refurbishments done at that particular cinema, and part of the council's recommendation and the access committee had recommended that a loop be installed in just the one theatre. Now, we discovered, after I started, new people had come to take over the cinema, and when I mentioned about the loop - well, I went and asked, "Do you have it and blah, blah, blah?" So when the present owner actually investigated, he discovered that we had been told that, "Yes. It had been installed and working," but of course it wasn't, and when he investigated, what we discovered was that all that was installed was an amplifier for the loop, but there was no wiring. Now, of course, they've got the wiring, but I can't convince them how important it is to actually connect it up so it will work.

MRS OWENS: It seems such a simple thing for them to do. It's so hard to understand why they don't do it.

MS BATTERHAM: Well, they're using the cost excuse that they've put the wiring in, but it's still expensive to actually connect it up, which means that they possibly might have to purchase the amplifiers. I really don't know how much they are.

MS McKENZIE: Can I just ask you a couple more questions about the conciliation process? We've got lots of questions. I'm sorry about this. If conciliation hadn't succeeded - in other words, if there hadn't been an agreement by the council - did you

think about going to court?

MS BATTERHAM: Yes. I was determined I would go to court. Again, as I said in my submission, to convince your opponent, I guess - and that's how I had to view it, that the person that I had to deal with was my opponent - I had to mentally set myself the target that if it didn't work, if I couldn't convince them to apply, then I would have to go to court, and then if I lost, how would I pay for the - you know? But I had to again mentally convince myself, well, this issue is so important that I have to risk having to sell my house to get the desired outcome, because with my opponent it was quite obvious from the first initial mention of having it installed, it was just rebuff, rebuff. They didn't want to know about it. They weren't going to comply, and then you have this general manager yelling at you on the phone.

MRS OWENS: Yes. You said in your submission that there were some intimidating tactics used. That was the sort of thing you were talking about?

MS BATTERHAM: Yes. Well, I mean, the letters that went to the human rights, I was making a personal complaint so it had really nothing to do with the access committee as such, because I was making a personal - but they mentioned that I was on the access committee, they mentioned to start off that I had only sent one letter, then they changed their mind and said there were two letters, and it was really - and then, of course, I happen to be the publicity officer of the access committee. The reason I got the phone call was to tell me that I could not say anything on behalf of the access committee or to write anything, to have anything put in the media unless I went through the general manager. It was probably a bit more than coincidental that at this time this happened that the complaint was going through.

MS McKENZIE: You said the commission staff was really helpful, but did you find the conciliation process daunting or stressful? Not just because of the device that wasn't correct.

MS BATTERHAM: Yes.

MS McKENZIE: Otherwise.

MS BATTERHAM: It is the mental process you have to get yourself geared up to and it's a matter of having enough confidence to actually take on this process, because it is about winning or losing, whether you like it or not.

MS McKENZIE: Yes.

MS BATTERHAM: I've worked really really hard to get the confidence I have, personally; that I am confident enough to come here today. Across the board, if you

look at people with disabilities, and probably particularly with people that have trouble with the communication, most of them don't get the confidence that I have and I don't really know where my confidence comes from other than there is a big, long, hard struggle.

MS McKENZIE: It's somewhere inside too, I think.

MS BATTERHAM: Yes. That's why I'm doing all of this. It's for the others that don't - I mean, I can just decide, "Well, I'm not going to do this any more. I will sit at home and just get on with my life." But it's for the people that don't have the confidence to take on those opponents that you are going to come up against if you are going to say, "Hey, you are not doing the right thing."

MS McKENZIE: We've gone all around the place, I'm afraid, but is there anything else you want to say to us that we haven't interrupted you and made you forget?

MS BATTERHAM: I'll just refer to my notes that I have.

MS McKENZIE: Of course.

MS BATTERHAM: Yes, I've covered them all, pretty much. What I found missing, I guess - and I don't really know how I'm going to explain this but I will give it a shot. It's like for me to take on an opponent - the opponent is there and I'm down here to start with, because of my deafness. So I have to start from there in the beginning. There is no avenue for me to get onto a level footing before I get to the conciliation meeting. It's like, "Yes, I went and spoke to the people at the human rights," but there's nothing that happens in the process that enables me to come up to a level playing field to start with. Is that making any sense?

MS McKENZIE: Yes, it does make sense.

MRS OWENS: What sorts of things would you think would have helped you?

MS BATTERHAM: Somebody that maybe - I know you can go out and get advocates and whatever. I don't need an advocate. I'm quite capable of advocating for myself. I guess what I needed was somebody like say in the Human Rights Commission, or part of that process, that could say, "Okay. Right, Yvonne, you know, there's this process" - and I don't have those answers really; I've tried to come up with the answers but haven't as yet - "to get you onto that level playing field." There needs to be a bit more assistance, I think, for the people who are making the complaint, some sort of process to raise their confidence to that level. I think it is about confidence. I really think it's about confidence.

MRS OWENS: Yes.

MS BATTERHAM: Getting that next step up; that you are confident enough. There are so many people that complain and then withdraw. I'm sure in most instances, even though they have a legitimate complaint, it's the confidence they lack: "Oh, it's too hard. I've got to go through all of this process. I don't have - - -

MRS OWENS: For others it might mean needing an advocate or somebody from a legal service to help them.

MS BATTERHAM: But then, as you can see I'm quite capable of coping and speaking up for myself.

MRS OWENS: Yes.

MS BATTERHAM: But I still felt there was something missing in getting me to a level.

MS McKENZIE: And really, it's not even advocacy. That kind of assistance is something that might come very helpfully from the commission.

MS BATTERHAM: I think it should come from the commission.

MS McKENZIE: Yes.

MS BATTERHAM: At the moment they are very much in the middle: you know, "We don't take sides." That's probably not what I - I don't want them to actually be on my side. I don't want them to take sides. I guess I want them to give me maybe that little bit of extra support that I need from that process because it comes back to the fact that that person over there that I'm against is already up there, and yet I'm still - until I get some sort of support then I'm still not on that level playing field.

MS McKENZIE: I can see how in some cases that might help even respondents too. Not all respondents are going to be huge councils or huge companies.

MS BATTERHAM: No. That's right. Yes, I'm sure that - actually, when I think about the process, the representative of the council that I had to deal with, he possibly was on my side once he heard my view of the thing. It's actually having to fight to get to that process.

MS McKENZIE: It's almost like a pre-conciliation adviser. That's what I was thinking.

MS BATTERHAM: Yes.

MS McKENZIE: Something like that.

MS BATTERHAM: Yes.

MS McKENZIE: That's interesting. I don't think anyone has suggested or talked to us about that before, so it's very helpful to hear about this.

MRS OWENS: No. It's helpful to hear from somebody who has been through the conciliation process.

MS McKENZIE: Yes.

MRS OWENS: I presume that the outcome was - was it a confidential agreement at the end?

MS BATTERHAM: Yes, as far as I know.

MRS OWENS: There are certain things you can't talk about.

MS BATTERHAM: As far as I know, yes.

MRS OWENS: I was going to ask you whether, in the agreement, there was something that said the council should go away and have appropriate consultations to determine what technology to use and so on.

MS BATTERHAM: No. Actually I should have brought that requirement paper with me.

MRS OWENS: But you may not be able to divulge - - -

MS McKENZIE: You may not be able to say, that's the thing.

MS BATTERHAM: On the day we were instructed that what happened on the day was confidential. The council and Human Rights and myself, we all got the final paper with our signatures. It just really stated that the council was required to install the audio - the PA - within the time frame of three to six months. That was basically what it was.

MS McKENZIE: That's been really helpful for us.

MRS OWENS: It has.

MS McKENZIE: Thank you very much indeed. Hopefully this wasn't such a scary process.

MS BATTERHAM: No. I don't get scared.

MS McKENZIE: We don't mean people to be either.

MS BATTERHAM: Even the conciliation, once you get the mental processes - this is what you are going to do and this is how I'm going to attack this process - then that's fine. I'm not intimidated, and that was certainly the case at the conciliation meeting. I think, too, that's what surprised the person on the other side, because he really did sort of try to just: blah, blah blah. You know, that's the way it is and nothing is going to happen. Of course I just kept firing back with what I know best and almost physically - "Whoa, we are dealing with somebody here."

Certainly the woman from - because she could also see that it could go to court because of what he was saying, she actually came in and just said things about what would happen if it did go to court and the likelihood of them winning or losing, and that type of thing. I think that - - -

MS McKENZIE: The access committee is very lucky to have you as a member.

MRS OWENS: Well, thank you very much, Yvonne, for coming.

MS BATTERHAM: Thank you for having me.

MRS OWENS: You were obviously a formidable opponent in this particular conciliation. I don't think I've met many people who have been prepared to go all the way and put their house on the line.

MS BATTERHAM: You have to, to get the required outcome.

MRS OWENS: Okay. Thank you very much.

MS BATTERHAM: Thank you.

MRS OWENS: We will break for 10 minutes.

MRS OWENS: The next participant this morning is Dr Jack Frisch. Welcome again, to our hearings. Thank you for making the time and thank you for the document you have just tabled. Would you like to repeat your name and state the capacity in which you're appearing today, for the transcript.

DR FRISCH: Right. My name is Jack Frisch. I am coming as an individual. I am a lecturer in economics at the University of New South Wales.

MRS OWENS: Good. Thank you. I will hand over to you, Jack, and then you can highlight the main points you want to raise with us today.

DR FRISCH: There are many points that I do have, but I think a lot of people, other people, will bring a lot of these up. So I just want to speak in my capacity as an economist in commenting on the draft reports. We discussed a bit in Melbourne some of this material and I went down there to talk to the Productivity Commission informally. The first point I want to make is on the box on table 2.4, chapter 2.4, where you outline how to measure social welfare and you outline the utilitarian approach, the Parado principle, the Caldor-Hicks compensation principle and the Rawlsian challenge.

My comment there is that I would like to see the Productivity Commission also talk about what is the most exciting development, I think, in welfare economics, which is the economics, if you like, of what ought to be, of what public policy should be rather than how it is, and in particular the work of Amartya Sen who is actually the only person to have won a Nobel prize in economics directly for welfare economics. Amartya Sen basically has shown through his mathematical work that the approaches mentioned here are all very special cases of a more general case. And so he has developed as a result an alternative set of criteria which is what is called the capabilities approach.

To give you a very simple example of the capabilities approach, of where he criticises Rawls, is he says that the equalisation of income really won't increase the capability, for example, of a wheelchair user. A wheelchair user needs more income to derive the same utility as someone else and they need more income to function capably. So his criterion for whether a particular public action, public policy is welfare enhancing is one which increases the capability of the individual. He shows that the utilitarian approach, that these other approaches are special cases based on limited information.

My own position in my teaching is to say that economics is not so much about demand and supply any more, but more about transactions costs as mediated through limited information. So he actually even talks about that: the limited information content in utilitarianism. So that within utilitarianism we don't ever look at the

capability - what a person is capable of. So that's Sen's approach and it has been organically evolving. I would like the commission to look at that because it's got some very interesting implications, particularly because unlike any of these other writers, Sen always has in mind, for his economics, the person with the disability, the woman, the person in hunger.

One quote I saw somewhere - I wish I had written it down; I'm not very good at noting where I read these things. He quotes an Indian philosopher of the 14th century and even then he says that life - effectively that the allocation of resources, instead of allocating resources as if the world was an entertainment park we ought to allocate resources as if the world was a hospital. No, not an entertainment park, it was the inn. Right, you know, the world is more like a hospital than an inn. So Sen takes that approach and so he looks at the people who are having a hard time. With that information it's a different information set which is richer and so therefore he claims more general.

So then we go to Nussbaum. Nussbaum is not an economist but she is probably one of the foremost philosophers in the United States today. She also critiques Rawls. Rawls was considered the great light of the 1970's after 100 years or so of floundering around looking for how to make the world a better place in philosophical terms, to justify it. Nussbaum also takes Rawls on, on the basis that what Rawls seeks to do is to deduce from first principles why one should be more egalitarian. His first principle - and I don't want to go into it too much here - is based on she says - and you've got to agree with her - the notion of bargaining between equals; people of equal power. That in the state of nature, and Hume's state of nature, we have a social contract so that the people of equal power won't destroy themselves.

So she, again, says, "Well, wait on. Again, this does not look at the person with the disability. It doesn't look at the person that is disempowered. It doesn't look at the person that is hungry and therefore doesn't have the bargaining power to go into a social contract." And so she points out how Rawls also is not using enough information and is, again, a special case. She, also, from a different perspective takes on the capabilities approach. Whereas for Rawls the capabilities approach is a method for assessing criteria, for Nussbaum it's sort of a method for developing a constitutionality.

So she maintains that the various capabilities - and she has a list of capabilities which I would like to read out; I haven't got them but I have got a web link to it in my paper. What is a capability? It is how a person is capable of functioning where the function is sort of the being and doing of what people value. What do people value? What do they want to do? What do they want to be? Material goods, then, is only an instrument of this, which is very important for economics. This, again, is the

inn. Orthodox economics, on which these issues relate, are all stories about apples and widgets and oranges, of how to - whether to buy beer or wine, whether to buy chips or peanuts et cetera, rather than how to lift people up so that they have a better life.

So you can hear where I'm coming from. I won't go further. Sen doesn't want to list capabilities. He doesn't want to list what these capabilities are because he thinks they ought to come by democratic process and that each community et cetera decides for itself what its capabilities are. It's a much more, if you like - while I have great reservations about post-modern thinking, it's very much within that framework. Let me just list some of Nussbaum's central human functionalities. The threshold which she takes as what ought to be in our constitution; that in creating a constitution, what do we really want? We want to be able to live to the end of a human life of normal length; not dying prematurely or before one's life is so reduced as to be not worth living.

So that is what we ought to aim for. So the data and the empirical work that the people using the capabilities approach look at, are things like longevity. He shows, for example, that in Kerala, which is dirt poor in terms of material goods, longevity of people is often greater than it is for black Americans who have got plenty - often not that much, but who have got the material goods and the material infrastructure, but don't have the longevity for whatever reason. So he says, and Nussbaum says, "When one of these minimum thresholds are not encompassed, we have a tragedy." Putnam, who is another philosopher, talks about this notion of tragedy. Nussbaum provides a constitutional theory.

So I say all this, you know, like this is all big stuff and it's not like your local government, but it provides a framework with which I think the Productivity Commission and government ought to look at disability discrimination.

MRS OWENS: In our report we talk about compounding factors.

DR FRISCH: Yes.

MRS OWENS: You have made the point about black Americans. When you look at indigenous Australians there is a double tragedy there because they don't have the material goods and they don't have the longevity. You've got a double problem.

DR FRISCH: Yes. Sorry, there is 10 things here. There is bodily health; being able to have good health, including reproductive health. To be adequately nourished. To have adequate shelter. So, for example, that implies that the goods that a lactating woman ought to have are different from that which non-lactating women ought to have, and that these are the criteria by which we ought to have programs.

Let me just say, Sen, of course, is a great respecter of the market so there is - no we won't. Bodily integrity; being able to move freely from place to place. So we have here the infrastructure demands of the accommodation principles.

Having one's bodily boundaries treated as sovereign. That is, being able to be secure against assault, including sexual assault, child sexual abuse, domestic violence, having opportunities for having sexual satisfaction, for choice in matters of reproduction. Sense as imagined thought. Emotions. Practical reasons. Being able to form a conception of the good and to engage in critical reflection about the planning of one's own life. So these are the sorts of things, like having consultation processes for people with disabilities. Having a sense of being able to put forward your complaint. Affiliation. Anyway, I won't go on. She has a list of these 10 things and all of these are directly focused much more on disability and they talk about disability in ways which utilitarianism and these others sort of just look at as, "Let's bring it in somehow? How do we bring it in?"

MS McKENZIE: Yes. Really, that's quite a fundamental criticism of our report.

DR FRISCH: Absolutely.

MS McKENZIE: Because what you're really saying is that in a way we have done just that: we have perhaps looked too much, you might say, at the economics of employers and service providers and infrastructure providers and not enough about the economics of people with a disability.

DR FRISCH: Yes, it probably is. Which then brings me to my second point, because I won't belabour that one. The second point relates to our good friend Epstein. In box 8.1 - and I mentioned this when I was in Melbourne - Epstein's view on the economic effects of disability discrimination legislation. He suggests that:

> However, a purely market-driven solution such as recommended by Epstein would result in occupational segregation.

Then the comment is:

> Such a solution would be difficult to countenance therefore as part of legislation that aims to reduce discrimination.

I thought that was a cop-out. That's political correctness which - you know. So I have actually spent about seven or eight pages here criticising Epstein.

MRS OWENS: So have you redesigned our box for us?

DR FRISCH: No, I haven't.

MRS OWENS: We will have a look at your 7 or 8 pages, yes.

DR FRISCH: Have a look, yes. Let me just say that the basic issue with Epstein is that I don't think that it is efficient. He looks at discrimination only from the point of view of single cost of accommodation; that the effect of discrimination can be aggregated in terms of cost. Therefore he says that, "Everything I have said about gender and race, where there isn't much extra expenditure, applies even more for disability."

MRS OWENS: Sorry, I missed that point.

DR FRISCH: He generalises. Apart from the fact that he spends some 248 pages on gender and race and only 14 pages on disability - he hasn't really looked at disability. He has just generalised and he has thought that, "I will define disability as the extra cost," and that's the only thing about disability. "I will summarise disability as the extra expenditure." Yes, there is discrimination; ie, the same sort of thing as, "I just don't like them," or, you know, "They should do this because we're part of family and it's the role of women to" - you know - kitchen, et cetera, and that sort of discrimination. So he says, "We not only have that but there's more reason to repeal the ADA," he says, because that's what he is calling for, "Repeal the American Disabilities Act," because there's extra cost.

So he says, "If I want to repeal the race and gender anti-employment discrimination, I even more so - for disability - which puts an onerous cost expenditure on employees." Okay, so what are the two issues? One, I don't think he has the right to generalise on race and sex. It's a big leap. First of all, I think that there are two particular aspects of disability which he ignores and which are absolutely fundamental and different from race and sex. Three, actually.

There's homogeneity. Every woman is a woman and that's the issue. All women are women. All black people are black people. That's the difference. That's the point, okay. There's heterogeneity and there's also relatively large numbers - relatively - 50 per cent for women; 10, 15 per cent for different ethnic groupings, et cetera, or more. So he sort of seems to assume that, "Okay, disability is much the same." Now, in fact it's not, because every person with a disability - there's only a small number with any particular disability; any particular impairment.

The second critical assumption is the geography. People with disability are dispersed right through the population. So are women but they're there in large numbers. Ethnic groupings often concentrate geographically.

MS McKENZIE: Not necessarily.

DR FRISCH: Not necessarily, no, but often. If you don't then what I'm about to say for disability applies to that as well so I would disagree with him on that. Geography makes a difference. Let me just give you an example and it comes down to the transactions cost issue again. He wants to put - the example I use here - let's say it costs $25,000 in fixed costs per employee with a wheelchair, okay, to put in a ramp. His basic argument is to say, "Well, let's put them all in the same place. Why build 25 factories with wheelchairs? That's 25 times 25 which is a large cost." So he basically says, "Let's minimise the transaction costs by having only one factory and we will stick them all in there."

$25,000 in fixed costs, annualised at a 5 per cent discount rate, is $1250 per year. Transport costs - if you're coming from all over the place - it's not at all inconceivable that many of those wheelchair-users will be spending more than $1250 worth of resources, transactions costs.

MRS OWENS: So you have got to look at the costs in a much broader framework.

DR FRISCH: Absolutely. So he is not being efficient once you look at geography. In addition, to put all wheelchair-users into the same factory assumes that they've all got the same skills. Some are going to be brilliant astro-physicists. That's their interests or that's what they are skilled into. Others will not be that bright and will be wanting to be fitters and turners or computer - you know, they're a whole different set of skills.

Once you take that into account, what are the chances that the same factory will want both astro-physicist skills and legal skills and fitting and welding skills, right? So it's just assuming a homogeneity that all wheelchair users have all got the same skill sets; they've all got the same brain capacity, usually in the past assumed to be quite nil and so therefore they were skilled to a very low level, ie to basket weaving.

This applies to education as well and the education authorities often also want to have segregation. I address that issue here too that, okay, let's have segregated classrooms. That assumes the same skill set or else, again, the transport costs issue came so a person with cerebral palsy, to get them into a group of peers with their own skills, you might have to go every day from Sutherland up to Allambie.

MRS OWENS: I presume that's a long way.

DR FRISCH: That's a long way. Therefore that kid will be spending up to four hours a day - you know, as they go and pick up other kids along the bus route -

instead of doing homework or playing. Therefore if they're not going to have time to do their homework on the bus then of course they're not going to achieve as well. Again that story doesn't hold so if you say, "Okay, let's have them all locally," then what sort of situation do you get? You will get, "Let's have them all at the same school in a special classroom." It sounds good if you have a homogeneous view of disability but what it means at the school which - they're trying this in my kid's school and we're fighting it. They want to put a very timid 12-year-old girl into a classroom where one of the boys has got very violent behavioural problems. There's going to be three boys, one girl - totally inappropriate situation. It just doesn't work.

Then once you set up that special unit there is a tendency, perhaps, to put in there people that just don't belong. "Right; they're misbehaving somewhere else, let's give them a label. Anyway, we'll get some economies of scale by looking after them." The skill sets they get - and this is historically what the case has been - they all get to learn basket weaving. Yes, you get skilled up to basket weaving. Then you have a homogeneity of skills to allow you that homogeneous occupational segregation; pay them nothing and that's our history. It's not efficient and it doesn't enhance and nourish capabilities.

So a whole lot of things on Epstein; I think he is not talking efficiency. He does not have the right, with 14 pages of generalisations, to generalise from race and gender. I'm not an expert on race and gender discrimination but certainly if he misses out some of the smaller detail - we're talking policy here. We're not talking totalitarian theory. What I detest is totalitarianism, both the left and the right. I personally think Epstein has got an agenda here. Yes, he puts himself as this - okay.

Epstein on the financing of the cost of accommodating disability: I agree with him that I don't think employers should have to bear the full - and we've talked about this. Where there is a monopoly, yes, I think that it can be. I do think - you know, looking at the regulatory impact statement on the building standards and where the industry, at a recent meeting I was at - they were talking about, "Well, the rate of return will be reduced and this will affect investors and investors are mums and dads and superannuation funds," et cetera. Absolutely right except diversification theory, diversifying of portfolio, means that mums and dads will not be hurt.

If you hit the building industry a bit hard, yes, the industry will have a lower rate of return. For those who can't afford it, the costs - there might be some passed on, but that's not an argument. Again, you can't generalise from the industry to mums and dads without looking at a reasonable way of investing is to diversify your portfolio across sectors, across types of investments, et cetera.

So I sort of almost agree with some of Epstein, however I do think that there are other issues which we talked about, the holistic approach. One of the reasons I

am of two minds is because clearly the empirical work is showing that the disability discrimination laws may be leading to a decrease in employment participation of people who have basically not been hired because people are scared of the ADA. That's the argument. Now, I think that there are counter-arguments and I think that the jury is still out. If that turns out to be the case I still wouldn't be surprised.

MRS OWENS: I think the jury is still out because we've sighted research on both sides on that.

DR FRISCH: I wouldn't be surprised, but I'm not surprised because the infrastructure preconditions are not in place. So therefore you don't get the increase in participation due to a more accessible environment. That takes a long time. However, the fear of the employer is immediate, so that's an immediate "Well, we won't hire."

MS McKENZIE: Who should bear the costs, do you think?

DR FRISCH: I think the government. We have different issues. For employment participation I believe the government; for infrastructure, the consumer - the consumer, the taxpayer, a little bit of everything. I can work around. There is a difference between standards that apply to a level playing field and those which don't. When you require a wheelchair ramp into a building, I think that the cost of that is either pushed backwards onto the owner of the land or forward onto the consumer; one or the other. Most of it I think will go back towards the owner of the land because the owner of the land - if the land is flat, then the cost of the ramp will not be great. It will only be high if the land is not good land.

So we get into the whole Ricardian story, namely the quality of the land - the owner of the land bears the cost of any inferiority of their land. By forcing the wheelchair - a ramp - I think a lot of it gets pushed back onto the landlords, the owners of the lands. Therefore, I would distinguish. For ordinary services, I think it gets pushed forward onto the consumer.

MS McKENZIE: So transport?

DR FRISCH: Transport, et cetera.

MRS OWENS: You raised some of that in one of your earlier submissions, didn't you?

DR FRISCH: Yes, but employment is going to go to the employer. The employer will bear that.

MS McKENZIE: But there might be some government assistance.

DR FRISCH: Unless there's government assistance, yes. Okay, so then we get into the whole problem of how do you provide government assistance, and I refer to the Productivity Commission's own report on the review of government service provision, and I'm sure you know all the problems with government providing - because clearly, if the government guarantees that they will provide accommodation, then both the employer and the employee will conspire to rip the government off by as much as they can, by building a silver bromide ramp, et cetera. You know all that story. We have a real problem in asymmetric information and bargaining, et cetera. Epstein does go on the insurance policy, I just did notice. I concur with Epstein, and I quote:

> No matter how healthy we may be, we all know that through misfortune or ill-health we could become handicapped tomorrow. There is thus a powerful insurance feature to the DDA.

Okay, so you asked me once about my insurance model. Epstein has got it here himself and Nussbaum refers to it. However, one interesting thing: it's interesting to note that insofar as the ADA is concerned, Epstein's language is far less dogmatic than in his language relating to gender and race. Thus he says:

> It is far from clear that a legally enforceable voluntary anti-discrimination law would form any part of the comprehensive strategy.

So he doesn't say it won't; he just says it's not clear - yes, nothing is ever clear - and he says:

> The better strategy might well be to concentrate on programs which deal with rehabilitation.

Yes, sure. Then he says, and I concur - and this is an interesting one, I think. Epstein suspects, and I quote again:

> Most people know in their bones that they can and should make accommodations in their daily life to assist the handicapped -

page 483 - and that's almost agreeing with Nussbaum and Sen that yes, we know in our bones. He assumes, however, that because we think it and want it, it will happen. I think he's ignoring the Prisoner's Dilemma model of game theory which suggests - and this is John Nash's stuff, amongst others - that people sometimes might not act the way they think would be right in their bones, ie what the Prisoner's Dilemma

game shows is that people, in pursuing their self-interest, actually end up not acting on it. You know, we don't get that as the final solution. Yes, I might know in my bones that that's right. However, if everybody around me is materialist and seeking higher income, et cetera, and think that other things are also good, the behavioural economics has shown that I also will take on those features.

The final result will not be like in our bones. I used to teach the hard hat story, whereby every builder's labourer, every workman on site, would rather have a hard hat, okay. But unless you make it law, none of them will wear a hard hat because to wear a hard hat on the building site would make them look like a sissy. So you have to force them to wear a hard hat on the building sites. Similarly, in our bones we all know we've got to accommodate, but that doesn't mean that we're going to in the big scheme of things.

I don't think Epstein would go as far as Singer in saying that utilitarianism - Singer is ready to give parents the right to kill non-person humans - I won't go into that - but Epstein instead wants to segregate. I think he's wrong on efficiency grounds and within his own - so therefore I'm not sort of suggesting here in any sense that you take out box 8.1 because that would be censorship.

MRS OWENS: But yours is, "No, no, we - - -"

DR FRISCH: But I think he can be criticised rather than - - -

MRS OWENS: You could do more justice to the other argument - - -

DR FRISCH: More justice to the critique. Okay, two more things - further thoughts on the Economics of Disability very quickly. Epstein's analysis, and indeed most economic analysis, is conducted within a static framework. If we learn from Kenneth Arrow's Learning by Doing theory - another Nobel Prize winner - he basically says we learn by doing things. Okay, implication of that for the DDA? The first buses, the first accessible buses, were clumsy and horrible for everybody and inefficient. It took 10 to 15 minutes for a wheelchair user to get on and off. Everyone stared, the driver had to get out, et cetera. It was only because the ADA forced them that the bus companies and people started, "Well, what can we do about this?"

In the process of doing things you now have buses that lean over and the driver doesn't even have to get out, and the person has to get in, and that is the whole story of technical progress. Technical progress - the Learning by Doing issue - and so therefore I would suggest that if we didn't have something like a DDA, nobody would put their mind to improving things and getting into the incremental issues.

The second issue - and this is new for me and it's a new literature in general. It's called Behavioural Economics, which looks at the psychological assumptions of economic man, and some of the results - I'm still reading some of this, but it shows empirically that it seems that in attitudes to risk there's asymmetric valuation of gains and losses, so people value a $1000 loss more than they value a $1000 gain. The value of $100 of experiential goods is greater than the value of $100 of material goods. Okay, so again important because of the participation story. What the DDA is about, I think, is increased participation, increased experiences.

The market, however - we have fundability. To a businessman $100 is $100 is $100 but the ultimate gain, the ultimate value, is to the human being. The human being, it seems, values experience and participation, rather than - and that's I think important and I'm looking at this and how it's going to apply to my work - you know, my stuff on - it seems that people underestimate the probabilities of big losses and overestimate the probability of small losses - this is what the research seems to show - which means that from the point of view of the insurance principle, people underestimate the probability of getting a disability and they overestimate the probability of small losses. But the issue is that they're not going to buy insurance against disability, so therefore some sort of - again we come back to my insurance story, et cetera.

The value of goods and services - I've alluded to this - depends partly on how other people value goods and services, so we're not each consumer and independent personality but we are interdependent, and this again applies to what I talked about before. These are all important issues and people underestimate the probability of profound disability - I've said that.

So anyway, that's all I just wanted to add - a bit of economics and a couple of comments on the draft report. In general I like the draft report. Within its own framework I think it's sympathetic and in general has a better understanding of disability than I've seen other government reports having, and I commend you for that. There's a few issues here and there, and I'm sure everyone will remind you of those other than me.

MRS OWENS: Thanks very much, Jack. I think you've given us a huge amount of material in a very short time and we greatly appreciate it. We'll try and do more justice to the Epstein box. I still think it's worth talking about Epstein.

DR FRISCH: Absolutely.

MRS OWENS: It is one extreme in terms of how this issue - - -

DR FRISCH: Absolutely, but let's not do it in terms of political correctness

because the people government will say you're prejudging the issue; Epstein might be right.

MRS OWENS: I'm not a politically correct person and I don't think Cate is either.

MS McKENZIE: No, I'm not either but I think really what we've done is just really set up the conclusion of why we think this is wrong - or the main points, rather than show how we get there. It's a fair criticism, I think.

DR FRISCH: Yes.

MRS OWENS: Also I think you quite correctly have pointed us in the direction of that box 2.4, back on page 25, and bringing in something there on Sen. You've probably done the work for us. We're immensely grateful.

DR FRISCH: Anyway, if you do want anything, if you want any of the material, I can email it down or send it on a zip drive. I was going to bring a zip drive with me today with all this stuff on it but my zip drive wasn't work and the people in the office weren't there.

MRS OWENS: Thank you very much. We'll just break for a couple of minutes.

DR FRISCH: Okay.

MR FORAN: My name is George Stanley Foran and I was born on 9 June 1935.

MRS OWENS: Thank you, and you are here as an individual?

MR FORAN: And I am here as an individual.

MRS OWENS: Thank you for coming. We've read your submission very carefully and you have provided us with some interesting information about your experiences and we've noted your concerns about alleged discrimination against you, but what I would like to do is to just stress that the Productivity Commission is a (indistinct) body.

MR FORAN: Excuse me for interrupting, but when I alleged the discrimination about myself, that is also about other people, too.

MRS OWENS: Yes, right.

MR FORAN: On 3 and 4 February this month I went to a Senate inquiry into children in homes and the horrific things that I heard there - Bryson was holding me together because I was that stressed out hearing the stories of rapes and bashings and all sorts of things like that that went on in the homes.

MRS OWENS: And you've had your earlier life experiences in that - - -

MR FORAN: Some of these were from my age group and some were from younger age groups. It's one of those things that happens in my class - - -

MS McKENZIE: And you have got personal experience of that, haven't you, from your early life? You said that in your submission.

MR FORAN: Yes.

MRS OWENS: What we're trying to do today is - we can't solve people's individual problems, but what we are trying to do is we're trying to draw out policy implications so that when we write our final report to government we can say, "Here are some ways that the legislation can be improved, so that it works better for people in the future." If you can help us with that we would be very appreciative, but I will hand over to you because you have got some new material to talk to us about.

MR FORAN: The way I had this worded was, "Good morning, ladies and gentlemen." Now I will have to say, "Good afternoon, ladies and gentlemen."

MRS OWENS: 10 minutes, yes, into the afternoon.

MR FORAN: Submission for Disability Discrimination Act 1992. Subject: Changes to the act 2004. William Shakespeare once said, "The choices we make in life dictate the way we live." He also said, "To thine own self be true." Then he said, "From the very day that we are born we begin to die." Two other words must be considered - "sanctuary" and "compassion". Many changes need to be done in regards to change this discrimination act of 2004. There are many forms of age discrimination and this means all ages; also all forms of discrimination against all of the people.

Disability parking tickets: disability parking systems need to change. They are not working properly. At the present moment in time one thing that can make this work properly is a huge fine for people who are using these tickets inappropriately. Something like a $5000 fine for those who use their parents' disability ticket to go shopping would be pretty good. Another way is for fines for issue to doctors who give out disability tickets to anybody who does not require them. An appropriate fine of $10,000 would be good enough for them. I think that would cure the problem. I see many people jumping in and out of trucks - work trucks - with no disability, who have disability stickers. If you need proof of this just ask the parking inspector or sit in the carpark and see for yourselves. By the way, I recently saw the new disability photo identity ticket. It has your photo on the identity ticket twice. You put it on your windscreen and it matches up with your licence.

MRS OWENS: And this is in New South Wales?

MR FORAN: This is in New South Wales. Now, that was the disability part but, as I have told you a little bit earlier, we need to look at that a little bit more because, as I go through the streets of downtown Sydney today, where are all the disability parking spots? There's a few of the streets I drove down and I finished up parking down near P and O boat line, shipping dockyards, way down near the Star City Casino.

MRS OWENS: How far is that from here?

MR FORAN: That's about a two-mile walk and I walked back up here.

MRS OWENS: We'll make sure you don't have to walk back.

MR FORAN: You seen what I was like when I got here. Anyway, Centrelink problems: there are many problems with Centrelink. For instance, recently I've had many problems with discrimination by Centrelink. This also applies to many people who are on inadequate pensions and discrimination against self-funded retired personnel. One case I know of was a man who married a younger person from

another country. He finally got her citizenship and permanent residence here, only to lose most of his money doing all this - from his pension fund that he put away - because she cannot get a pension, so she has to go to work to make the home more comfortable and be able to live in a manner of wellbeing. Then when this happens he loses more of his pension and then he is so stressed out he almost becomes suicidal. This to me sounds exactly like the teachings of Adolf Hitler from World War II. No freedom. There's another part here. I'm not going to read that because that goes into when I was in the armed services, and you already have that in - - -

MRS OWENS: Yes, that's in your submission.

MR FORAN: I'll give you a miss on that one. I can tell you this now: at the present moment we have an association that's called the 57 RAR Association. They have denied the fact that I was in Darwin on 27 December 1974. They're trying to tell me I was there on 16 January 1975 but, as you've got a report on that, you know that I was there in 1974. It says so on that doctor's report, which has been accepted by the Department of Veterans Affairs, which means that it has already been proven. The lies that they're telling cannot be backed up. That's all I'm going to say on that matter.

The breakdown in our public schools - it would appear that the federal government is not supplying enough money to these projects and give more support to private schools, which causes the breakdown to our public schools. When I talk about public schools, this also applies to schools where children with disabilities go to - that are in wheelchairs - that are deaf, dumb or blind or whatever - that they are all in the same boat. I look at it that way. It may be that the governments of all schools and also the federal government take a look at a school that is run in the Northern Territory called Yipparinya, which is situated in Alice Springs.

This school is an Aboriginal school that was set up by the local Aboriginal elders of Alice Springs. I have had the greatest pleasure of meeting these people while doing a field trip. This was during my studies at Macquarie University, but unfortunately I never received my copy of the field trip. This was caused by an Aboriginal upstart of Macquarie University. I'm not going to go and mention that part because it - but all I'll say is this, ladies and gentlemen - is the greatest school I have ever seen in my life, run by a dedicated group of black and white people who run this very school, which to me means that all the other states and territories need to look at this because this is a very successful story in regards to this school.

MS McKENZIE: Does it do some very different things from what is done in the other states?

MR FORAN: Yes.

MS McKENZIE: Can you give us some examples?

MR FORAN: They have what they call "two-way teaching", which is the Aboriginal language first and then the English language, but as I sat amongst the classroom, watching what was going on, I said to the teacher afterwards, "Do you realise that you're teaching more than two languages here?" and they said, "What do you mean?" and I said, "Well, a, e, i, o, u, the five vowels of the deaf and dumb language - you're using the deaf and dumb language to teach the children how to - - -"

MS BATTERHAM INTERRUPTS

MR FORAN: I'm sorry. I don't mean to be offensive by it. It was just meant to explain what it - - -

MS BATTERHAM INTERRUPTS

MRS OWENS: Sorry. Yvonne, you can't interrupt from the floor because you need to be up there. It just makes it very difficult for the transcript.

MR FORAN: I'm sorry. I apologise to you if it has offended you, but it was the way that I was taught when I was a young man, and I don't know about the policies that have changed on that rule over - you know - - -

MRS OWENS: We can make it clear on the transcript that a member of the audience found the terminology offensive and maybe we could move on.

MR FORAN: Yes, but what they were actually using - that language to teach the children how to spell. That's what they were using it for.

MS BATTERHAM INTERRUPTS

MRS OWENS: No, sorry.

MR FORAN: Then again they started using sign language and when they used the sign language that was a distinct international language, as far as I'm concerned, used by all people all over the world, and some of that has come from the Indians of America - the sign language - some of it, not all of it - but I mean that's the way I see it. I'm sorry if I offend you. I don't mean to. Anyway, that's what they were teaching and then I said to them, "Not only that, you're teaching them pidgin English," and I said, "And they're speaking in pidgin English." I said, "You're actually teaching about six different languages here." I said, "What you've done -

you started with nothing. 20 years ago the elders set this up. You had no money. You relied on donations and it took 20 years before the government come to the party to give you any funding." I said, "That is a great achievement in itself. This is the greatest school I have ever been to in my life - to see what you're doing here."

MS McKENZIE: Are there any other equivalent schools in the other states?

MR FORAN: They've tried it, but been unsuccessful. This is the first one I've ever seen that has been successful, and the way I looked at it - that every state in Australia should look at this. Go and look at this school. See how they run it, because a lot of these Aboriginals are nomads. They travel all the time and when they come to the classes, you know, they've got dirty clothes on and not fed properly," and they immediately give them a shower, a change of clothes, feed them, and start teaching them, and that, to me, is looking after them.

MS McKENZIE: And do children with disabilities go to that school, as well?

MR FORAN: I would say there would be the odd one or two that probably got a belt over the ear and are a bit deaf, or something like that. I don't mean to insult anybody here. I'm trying to explain what I saw and, to me, it was absolutely amazing to see that because I had never seen it done before and I saw how successful they were in teaching these children. What they did with the children was, when they got fidgety they'd say, "Stand up. Go like this. Go like that," and the kids would do it and then, "Sit down now." They were losing concentration by doing that. They got back into the concentration.

MS McKENZIE: It's just using different methods.

MR FORAN: It was using a different method that made it successful, and that's why I mentioned it because, as far as I'm concerned, it is one of the greatest schools I've ever seen in my life. At that inquiry, the Senate inquiry, most of them people that were in homes didn't have education. One woman had no education and her sister had to read out her submission because she had to write it for her. Now, that poor woman used to go and get on a bus and ask, "Does this bus go to so-and-so?" and she'd finish up five or 10 miles out of her way. People would give her the wrong information; the same with trains.

The compassion I felt for that woman was enormous and Bryson, my mate, was looking at me and he saw me slumping down in the chair and he knew. He rang me later and said, "George, you were turning yourself into a missile." I said, "I know I was." I said, "What stopped me?" He said, "I did." I said, "I know you did and if you hadn't been sitting alongside of me I would have gone straight to the blokes up the front and I would have started punching." That is how angry I was, because of

what had happened to these people.

But this is getting away from the age part of it; the aged part of it, the way there is discrimination against aged people, with the breakdown in the public hospital systems. I wrote something different about that, but I left it at home.

MRS OWENS: You know there is a bill in parliament now to address age discrimination?

MR FORAN: I've heard that, but I've also heard recently on the TV Danna Vale and John calling her a "flip-flop floozy" - what is John's name? Davis, wasn't it? Was it John Davis, the politician from Western Australia?

MR GUINN: Graham Edwards.

MR FORAN: Edwards, yes. He called her a "flip-flop floozy" because she gave out three different types of pensions for TPIs, which were $14,000, $16,000 and then $18,000 - no, not thousand - 1400, 1600 and then 1800. These were completely all wrong. She was absolutely wrong in whatever she said. She didn't address any of the problems and these don't only affect servicemen, they affect many other people.

I am in the unusual position of being a TPI but I never went overseas. I got my TPI for activities here in Australia. I'm the first Australia to receive a TPI on Cyclone Tracy alone. That's what I got it on and I got it because of evidence that the Department of Veterans' Affairs gave me. They didn't realise the evidence they gave me - how significant it was until I showed it to my advocate, who was a lovely lady, and she looked after me and I said - I can't remember her name. I said to her, "You are my rifle." She said, "What do you mean?" I said, "I make the bullets and you fire them." And she did and I finished up with that TPI. But I also finished up on an aged pension, so then the state government turned - or the federal government classified that as - the TPI - as income, which they shouldn't have been doing.

So what happens? They lower the age pension down, they discriminate against my wife and myself and as far as I'm concerned, the Housing Commission jumped on the bandwagon then - that is, the state government - and they charged us a higher rent. They put our rent up 97.10 per cent. They said, "This is what you should have been paying all along. Now, we won't charge you that, we're going to let you off with that." I said, "Big deal, you beaut." Of course I've been fighting with them ever since. I keep the Department of Veterans' Affairs - every time I ring up they hand the phone to somebody else, because I do do a lot of stirring unfortunately.

But I have to do it because I have to fight for the rights of people, and it's in me to do that. I believe that all people are equal and should have the same benefits, no

matter whether they're black, white, brindle or whatever nationality they are; they should be looked after, and that's the way I look at it. It's as simple as that. The simplicity of things is the easiest way to go, than going through a lot of gobbledegook and putting it in these big long words that the average person cannot understand, and they look at it - they just say, "What the hell is this all about?" They don't know, they haven 't got a clue, sometimes I'm like that.

MRS OWENS: You've made a very important point about just simplifying all these arrangements so they're readily understandable.

MR FORAN: That's right; it should be understandable.

MS McKENZIE: So they don't - often it's just because they're so complicated that the - - -

MR FORAN: It makes it so complicated that the average person does not understand, or has no idea what it is all about.

MRS OWENS: And often, if they are complicated, people really don't understand what their real entitlements are, too.

MR FORAN: Yes.

MRS OWENS: So people could be missing out on a pension because they don't understand - - -

MR FORAN: It's taken me 68 years to find out some of my entitlements, but I once was at a place where I had an argument with a young girl about - she said I couldn't say these words to these kids. I said, "Why not?" She said, "You're not qualified." I said, "I'm not?" I said, "Tell me, who sent my three children to university? Did you?" She said, "No." I said, "Okay" and I started to walk away and then I got a couple of paces away and I turned around and I said, "Listen, you've got a certificate for this, haven't you?" I said, "You've been to university and got this document that says you are a child care worker?" She said, "Yes." I said, "Okay." I took another two paces and I turned back and I said, "By the way, I've got a certificate you haven't got." She said, "What's that?" I said, "The certificate of life. I've been there, done it all, seen it all - you're yet to do it." I said, "Hooray, have a nice day." I said, "By the way, I now hand you back the control of all the children, you're on your own."

I walked away and that's when the kids at this home went berserk. They threw house bricks up on the roof and everything. I went down the pub and had a couple of beers; come back later when the bloke said, "Hey, George, can you take control?" I

said, "No, you are the ones who are the caretakers." I said, "You told me I'm not allowed to say these words." I said, "But what happens when I say the words." I said, "Who do the kids listen to?" I said, "Me, because they know where I'm coming from. They know I've been where they're at." I said, "I come from a broken home; so did they." I said, "They come here for annual holidays and I take them out and I blackmail." I said, "If you don't behave yourself I'm not going to drive the bus." The one thing they did do for me one Christmas - - -

MR GUINN: Am I allowed to ask you questions from the floor?

MRS OWENS: Not from the floor. Would you like to come up? Why don't you come up and sit with George and then everyone can hear you. We'll introduce you onto the transcript. We will just break for a minute.

MR GUINN: Yes, my name is Bryson Guinn. I am the pension and welfare officer with Ryde RSL and I'm also a mate of George and I just think that there's something that George should have probably made a little clearer when he was talking about his TPI and his aged pension.

MRS OWENS: Yes.

MR GUINN: Would you like to clear that up and just tell the people exactly what your TPI is for and what your aged pension - - -

MR FORAN: The TPI is for the fact that I have post-traumatic stress disorder.

MRS OWENS: So it's a compensation payment?

MR GUINN: It's a compensation payment.

MR FORAN: It's a compensation payment.

MRS OWENS: Yes.

MR FORAN: As far as I'm concerned, that is for services to my country. But as far as I'm also concerned, it doesn't matter whether you go overseas or stay here, if you are injured in the Australian - if you're in the Australian Army you've signed a document and that's allegiance to your country. Once you've signed that document you have sworn an oath to defend your country at all costs. Even if you get injured at home or at war, you are entitled to compensation. That's the way I look at it. I think Bryson agrees with me.

MR GUINN: Exactly, and where his age pension comes in then, that should have absolutely no - should in no way be taken into account. His age pension is a completely separate thing to his TPI and it should, in no way, be taken - like he was saying, they strip his - they say, "Because you're getting a TPI we're going to prune back your age pension." It's wrong. It's not a TPI pension. It's a compensation and his age pension shouldn't be touched.

MRS OWENS: I presume other people are in the same boat.

MS McKENZIE: There would be many other people in the same boat.

MR FORAN: There are hundreds of men in the same boat as myself.

MS McKENZIE: Yes.

MR FORAN: One of my nephews is in the same boat.

MRS OWENS: And I presume the RSL has put a case to government on this issue in another forum.

MR FORAN: They've had a fight going on for about 18 months now, I think.

MR GUINN: Yes.

MR FORAN: Or longer, with the department of - - -

MR GUINN: Often Centrelink will - do you get your aged pension through Centrelink or DVA?

MR FORAN: My age pension goes through Department of Veterans' Affairs.

MR GUINN: So they shouldn't touch it.

MR FORAN: And my wife's pension goes through Centrelink. They had her down as - what was it? Disability support pension or some damn thing, and then once she had reached the age pension, they changed it to aged. But then they got us both getting our pensions from Department of Veterans' Affairs, which is incorrect, on their paperwork, but the paperwork they sent is absolutely rubbish.

MR GUINN: At least your wife is now getting her pension from DVA.

MR FORAN: No, she's still getting it from Centrelink.

MR GUINN: You should get her transferred over to DVA.

MR FORAN: Well, she won't do that.

MR GUINN: Okay.

MR FORAN: I've already had the argument with her. Let's not start World War VI.

MS McKENZIE: I think you've had enough war service, don't you think?

MR FORAN: I'm talking about the home front one.

MS McKENZIE: Yes. The home war.

MRS OWENS: Hopefully those issues have been addressed. There is another inquiry into these issues.

MR FORAN: But it's still an ongoing thing.

MRS OWENS: Yes, I've noticed that in the newspapers this week.

MR FORAN: But I think you'll find that John Howard has done a bit of a backflip after Mark Latham has had a go at him about it.

MRS OWENS: I think it was some of the backbenchers.

MR FORAN: They're in election year mode, they are all getting into war mode for the pension.

MRS OWENS: Yes.

MR FORAN: To get the defence on side, but I don't think it's going to work for them. I think they're getting themselves too deep in the red here. I'm saying "red" but I mean another word and it's too rude to say.

MRS OWENS: I'm sitting her pondering the relevance to our own inquiry in terms of this issue and possibly it might be drawing a long bow but if other people in the community receive compensation payments from other sources for, say, an accident and that wasn't taken into account in terms of their pensions, maybe there is a distinct difference in the treatment. But I'm not sure about the information; I don't have the information on that.

MR FORAN: Yes, I'm also a member of the Injured Ex-servicemen's Association and the troubles they have are unbelievable.

MS McKENZIE: They're worse even than - - -

MR FORAN: Yes, and a lot of these blokes are in wheelchairs and to see them and - one bloke will be sitting there and he'll say, "Here it goes again." He knows he can feel it going on and he starts twisting and turning and says, "Sorry about that, but I had to have a scratch" - but it wasn't a scratch, it was a spasm. He is a lovely bloke to talk to.

MS McKENZIE: You see, one of the things we've done in our report is we've listed some of the other issues that aren't quite disability discrimination issues, but are really important to people with disabilities. It's like this pension issue, for example.

MR FORAN: I see a lot of the cases being lost because I think there's been inadequate paperwork done where they've lost cases that should have been won.

MS McKENZIE: Yes.

MR FORAN: And a lot of these people are unfortunate and they miss out on a lot of the things they are entitled to. When I heard Jack talking before about ramps and that in the - like, you know, you go to the Housing Commission and say, "Put a ramp in there, that person needs to" - you know, you get people with walking-sticks and the concrete moves because of the roots of trees and they won't come out and repair the concrete. That needs to be addressed; that needs to be done. They stay at home, you see, because the Housing Commission won't do anything. They won't even change a water tap for you. When I got onto them I give them heaps. I keep giving them heaps. I've stopped for a while. I'm just giving them a little rest ready for the next - - -

MS McKENZIE: You can go for it after a while.

MRS OWENS: George, was there anything else in the paper you've got before you that you wanted to raise with us?

MR FORAN: No. I think I have just about got through it all. It's just the public breakdown in hospitals - that, to me, is an absolute disgrace. I will read it out:

> One of the greatest problems with the breakdown of our hospital systems is not the fact that they are public or private hospitals; it is the fact that they do not follow the old system of not enough staff.

There are not enough cleaners. This work is all contracted out, which it would appear is not working in a credible manner. Nursing staff should be treated in a more respectful manner, as should many of the doctors. Many court cases are causing many problems where doctors are being sued, which means barristers and solicitors are making huge amounts of money, thus creating many problems of doctors and nurses leaving all the hospital systems. I personally don't blame them because they do a wonderful job while under a lot of pressure which is caused by people who are money-hungry while these professional people just want to get on with their work.

But then we do have some very greedy people that are only there for the money or for political gain. All other submissions written or supplied by myself are in confidentiality and I have signed that.

MRS OWENS: Thank you. With the hospital system, it's an issue dear to my

heart. Again, it's not something we're reviewing in this particular inquiry but the issues about shortages of different health professionals and staff - - -

MR FORAN: I have had people hired out again from hospitals.

MRS OWENS: It is an issue.

MR FORAN: There is one suspected case of euthanasia; an overdose of drugs to a patient. To me, that is murder, because they were short of a hospital bed. They wanted the hospital bed. Bang, kick that one out.

MRS OWENS: I think governments do recognise that there is a major problem and have been trying to take steps but sometimes these problems take a long time to fix because you have got to train people - - -

MR FORAN: They have been trying to fix this problem for 20 years, to my knowledge.

MRS OWENS: That's right.

MR GUINN: With the system, I considered in that hospital system a certain amount of discrimination does come into play and that is where you get people who are members of private funds not telling hospitals when they book in. They book in and go through the public hospital, even though they're in private funds. That happens quite a lot. It should be mandatory that if they're in funds that they are made to tell the hospitals.

MS McKENZIE: And be treated as a private patient.

MR GUINN: And be treated as a private patient.

MRS OWENS: I think the problem has always been with that idea - and that idea has come up a number of times over the years since the Medicare system was introduced - and that is that everybody has an entitlement to use Medicare because it's a universal system and people pay a levy to be able to use Medicare, so if you said to people that were privately insured, "You shall not be able to come in as a public patient, you can't elect to be a public patient," then they are technically not then using something which they're entitled to, which is their Medicare entitlement. That is the problem you have got with the system as it is at the moment.

It has been raised quite a number of times over the years and people have said, "Well, people should be electing to be one or the other," and if you've got insurance then you should elect to be covered privately.

MR GUINN: I mean, if I had, I would. I always did, when I could afford to be privately funded. I always did, because I figured that I was taking a little bit of the weight off Medicare.

MRS OWENS: Yes, and it also gives the hospital some additional resources.

MS McKENZIE: Yes, they've got some resources to give to other patients.

MR GUINN: Exactly. I mean, they even thought I was crazy. I went down to Concord Hospital and I said, "I'm a private patient," you know, "But we don't have any private facilities. You will be treated just like everybody else." I said, "I don't care. I'm privately insured and I think that Medicare deserves a break."

MRS OWENS: Thank you.

MS McKENZIE: George, that's all the submissions, I think - and Bryson as well - that you want to make. Like I said, we've read your submission as well.

MR FORAN: I think I already gave you some copies of what happened with my brother in the nursing homes and a lot of those homes - look, if you went into them - you probably already have. If you have seen some of them in New South Wales there, you wouldn't stay there five minutes. There's a smell in there - - -

MRS OWENS: There's some very good ones as well.

MR FORAN: It's terrible, you know, because - shortages of staff again and untrained people, nurses' aides - I had better not say any more because I am likely to get myself into some trouble here.

MRS OWENS: But it is a problem. It's a serious one.

MR FORAN: I don't want to create problems.

MRS OWENS: There has been another review of nursing homes going on - and I think they're about to report to government - called the Hogan Review. Maybe some of these issues about quality of care in nursing homes will be raised in that report.

MR FORAN: I don't know if I have mentioned the name of that hospital or not in that report but if I haven't, I will send it to you.

MRS OWENS: Okay. Thank you very much.

MR FORAN: I think that is about all I can say.

MRS OWENS: We will now break for lunch and we will be resuming at 1.30.

(Luncheon adjournment)

MRS OWENS: Our next organisation this afternoon is People with Disability Australia. Welcome to our hearings, and could you each give your name and your position with People with Disability Australia for the transcript?

MS FORREST: I'm Heidi Forrest. I'm the president.

MR KEELEY: Matthew Keeley. I'm the senior legal officer for People with Disability Australia.

MRS OWENS: Thank you. We have a revised list of points that you would like to run through with us, so I might hand over to the two of you and you can start to lead us through, and we'll talk about the issues as they arise.

MR KEELEY: Thanks, Helen. I guess initially I might preface our comments by referring to two key points in the draft report that in particular warranted some comment, and which may form somewhat of a theme in the comments that follow. I might say that in terms of the key points - they're listed at page XXIV - PWD agrees with those key points unreservedly except to the extent which I'm just about to comment upon.

In key point 1 it's stated that the Disability Discrimination Act was intended to give Australians with a disability the right to substantive equality of opportunity in the areas it covers. However, we would submit that the effect of the case Purvis v State of New South Wales is that the Disability Discrimination Act, the DDA, hereafter gives really only formal equality of opportunity for people with disability, and there'll be opportunity to comment on that further below.

The second key point I wish to comment upon, which also I think forms somewhat of a theme for these comments today, is key point 4. PWD has reservations about the statement that, "Access to education has improved more than employment opportunities," and, for reasons that will be given in what follows, we will seek to support that reservation.

So before going into those areas in greater detail, we were last before you on 15 July 2003 and we thought it was appropriate to comment upon some of our submissions on that day and, in particular, identify support for those submissions within the report and elsewhere. A major issue we discussed last time was the definition of disability. PWD agrees with draft finding 9.3 and draft recommendation 9.1, except now to the extent that they refer to behaviours related to disability. The issue of such matters being within or outside the definition of disability would appear to now be no longer contentious since the decision in the Purvis case.

If there is to be an amendment which expressly includes issues to do with behaviour, it will be most important that that amendment be very clear and, given the potential for confusion between the finding in the Purvis case and a new provision in the definition section, it would be PWD's preferred view that we stick with what we have, namely the decision of the High Court in Purvis that behaviours are part of a disability, and to be determined as such.

MRS OWENS: I suppose the reason we had the recommendation set up in this way - and I think it was before Purvis, wasn't it, Cate?

MS McKENZIE: Yes.

MRS OWENS: But some people are going to be attuned to case law and know that there has been the Purvis case, and there are going to be other people out there that are not going to be so attuned to that, and I think it was just a matter of saying there are some areas where there has always been that element of doubt. Now, Purvis has obviously meant that there's no longer doubt, but people may still not understand that. The question is really whether it's important to just make the act as clear as possible for everybody, including people that haven't got a legal background, to understand exactly what disabilities are covered. I mean, it's a very broad definition, but it was really just to make it clear to everybody.

MR KEELEY: Yes. Well, in terms of clarity, obviously we would support a proposition that would make that part of the definition clearer. I think the difficulty is in the absence of a concrete proposal to identify any likely problems, perhaps in much the same way as some of the problems inherent in the Purvis case itself weren't foreseen in the initial drafting. So that would just be our reservation without seeing something.

The other point I would make about that - if behaviour is to be included expressly, rather than as it is now - well, already expressly and construed by the Purvis case - PWD would be fully supportive of the proposition within the draft report that a failure to provide adjustments in and of itself would be direct discrimination, and that the link be very clear so that there is no confusion here that if behaviour is a consequence of a disability, adjustments therefore would include adjustments to address issues of behaviour required by the person with the disability, and that the failure to provide those adjustments would, of necessity, be direct discrimination in the way contemplated by the Productivity Commission.

MS McKENZIE: You see, there are two ways of doing this - and I suspect you're going to get to the next part of Purvis in a while - but there are two ways of doing this. The first one is a more limited way, and that was what we sought to do. This is before Purvis and the draft report. What we sought to do was to try to clarify, first,

the definition of disability in relation to behaviour; second, how you formulate direct discrimination - first, by trying to make it clear that you're not caught up by this comparators mess where you have to feed in the same behaviour in your comparator to the behaviour by the disabled person; and third, to make it clear that less favourable treatment can be constituted by a favour to provide reasonable accommodation. So we tried to clarify the way direct discrimination works as far as that's concerned.

We've had some comments since the draft report which says basically that direct discrimination is still a really difficult concept and in a way, by trying to sort it out, we've made it even slightly more difficult to understand. Especially given what was said in Purvis about reasonable adjustments, wouldn't it be better to have a duty, perhaps across the board, to make reasonable adjustments to accommodate a person with a disability who comes to the door, if you like? That would be positive. It would be clear. There are difficulties which I won't go into for the minute, but it would be clearer than trying to tinker with the definition of direct discrimination. What's your view about that matter?

MR KEELEY: Well, in terms of the three strategies used: that the definition of disability in behaviour as a consequence be clarified; that less favourable treatment by denying accommodation be clarified; and by keeping a comparator, we believe that with that proposition there are still problems with the attempt that was made to address the issue. I do propose to address it in more detail - - -

MS McKENZIE: No. That's fine.

MR KEELEY: - - - but I just thought it might be an opportunity to comment and brief you on it now. PWD fully supports the notion of the duty across the board; in other words, that the duty to provide accommodation should exist across all the substantive provisions prohibiting discrimination in the act and, indeed, the very failure to do that is probably at the heart of the Purvis case - both the facts and the decision on the law. Current failure within the DDA to effectively mandate that up to the point at which an adjustment might become unjustifiable hardship is, we would say, probably the number one reason why the DDA currently fails in its aim to be an act dealing with substantive equality and essentially remains an act that deals with merely formal equality.

So we support the duty across the board. PWD, however, believes that the comparator, as a requirement for direct discrimination, is fatally flawed, certainly in the absence of the positive duty, and certainly in the absence in this case, as it turned out, of the unjustifiable hardship defence. So I might suggest, at this stage, that there is another recommendation within the report suggesting that unjustifiable hardship extend across the full range of substantive provisions of the act. For reasons that I

hope to get to, we would maintain an opposition to that in the area of Commonwealth laws and programs. However, it was apparent to us; PWD was amicus curiae in the High Court in the decision of Purvis v State of New South Wales. It was apparent throughout that case that the lack of an unjustifiable hardship defence in fact drove the court to a decision which might have been avoided if an unjustifiable hardship defence was available.

So essentially the current comparator, we say, is fatally flawed - and again, we'll come to talk about that a bit later - and we say that the issues of a sort that would ordinarily be dealt with are issues of an exculpatory sort, and are adequately dealt with by an unjustifiable hardship defence which we would concede should cover the full range of substantive provisions, with the exception, as I've said, of the section 29 dealing with Commonwealth laws and programs.

MS McKENZIE: Including the reasonable adjustments duty.

MR KEELEY: And the reasonable adjustments duty. Well, we would say just "adjustments duty". Yes. So we would suggest that the appropriate balance between the rights of the individual, substantive equality and the situational context - be it education or employment - is adequately addressed by removing the requirement for a comparator. We've previously submitted that the ACT model, or the model proposed in the review of the New South Wales Anti-Discrimination Act, which we've called the detriment model, which is also consistent, we say, with an earlier decision of Justices McHugh and Gaudron, would provide an adequate basis for direct discrimination in the first instance; that thereafter the unjustifiable hardship defence be available to respondents; and that the balance in the equation - if you like, the in-between step - is that there be a duty to attempt to provide such accommodations up to the point at which it is found that the unjustifiable hardship defence effectively kicks in.

MS McKENZIE: Can I ask - one of the things that occurs to me - my understanding might be wrong, but I don't think it is. In the UK DDA, they've picked up something like a duty to make reasonable adjustments. In every one of these pieces of legislation it's differently worded and, of course, that will depend partly on the context of the legislation, but let's just work on the assumption that the duty is to make reasonable adjustments without worrying too much about the exact wording. As far as I can see, that seems to have replaced the concept of indirect discrimination. As far as I can see, in that act there is no concept of indirect discrimination. Would you favour keeping indirect discrimination as well as putting in a reasonable adjustments (indistinct) or do you reckon - I know it's a difficult question to ask you without prior warning, but - or do you think that there would still be some scope for indirect discrimination as well?

MR KEELEY: I think there still would be scope for indirect discrimination. I am just looking at section 6 now. Again just to address your concerns - and I hadn't thought about it as an "and/or issue", but I think there would still be cases in which a requirement or condition is imposed upon someone - for example, at the point of access to a service or access to a public good - and the question is of actually the reasonableness of the requirement or condition. It's not actually for the purposes of indirect discrimination about the reasonableness or otherwise of the accommodation.

MS McKENZIE: It almost comes before that.

MR KEELEY: Yes, exactly. I see it almost existing in that very clear case as an a priori consideration that sometimes indirect discrimination may prevent access to a service or goods, but once you are in the door oftentimes - most often the issue will be about the accommodation provided.

MS McKENZIE: Yes.

MR KEELEY: That might not be the only justification for retaining indirect discrimination. Certainly we strongly support the retention of both direct and indirect.

MRS OWENS: That's useful.

MS McKENZIE: That's really helpful.

MR KEELEY: May I also just say this about indirect, because the Productivity Commission has recognised that the proportionality test could or perhaps should be removed from section 6. When you look at the proportionality test it is a comparator test and it does seem unusual to recommend the removal of it for the purposes of indirect, but to retain it - admittedly a somewhat different comparator test - for the purposes of direct.

MS McKENZIE: I think it's justifiable and it's really because of the different natures of the concepts. One looks at requirements that actually aren't disability related. They are not imposed because of disability. They are just general requirements and so you can see why perhaps it might be justifiable to say, "Well, we need to look at what kinds of effects these requirements have. Why are we looking at them under a DDA?"

MR KEELEY: Yes.

MS McKENZIE: And so you take that particular comparator test as a way of, if you like, determining that this is a requirement that relates to a person with a

disability and relates to them disadvantageously. You could see why it might be done, but we just felt that ultimately it was enough if it was a requirement with which a person with a disability couldn't comply and it was not reasonable.

MR KEELEY: We would agree wholeheartedly.

MS McKENZIE: I have to say that as far as direct discrimination matter is concerned - I have to 'fess up to this now - I have in our state in Victoria at one stage suggested that all the direct discrimination test should deal with is unfair treatment because it is a disability and - - -

MR KEELEY: I think we accept that proposition as being actually not only commonsense, but an accurate one. One objection to that - and it is itemised in the report - is a perceived subjectivity that decision-makers will nonetheless have what is a - what would have been required of a nominal person without the disability in mind.

MS McKENZIE: Yes.

MR KEELEY: It's not terribly strongly put, that subjective proposition, and I don't think it is sufficient, frankly, to warrant the retention of a concept which, we would say, as a result of the Purvis decision has so effectively made problematic issues of addressing the functional implications of a disability.

MS McKENZIE: It will still pick up some things though, won't it? It will pick up - at least I think so - stereotyping. It will pick up workplace - dreadful comments - comments that wouldn't have been made to a person without a disability. It will still have some work to do, I think.

MR KEELEY: The comparator? We would agree with your proposition stated in Victoria - that those would amount to a form of detriment. However worded - "unfairness" or "lost opportunity" or however worded - it is a detriment that flows in the case of direct discrimination because of the person's disability, and that's where the equation actually needs to end. Alongside the duty to provide positive measures that has been mooted and with the application of unjustifiable hardship across the board, with the exception, we say, of Commonwealth laws and programs, we think that there are adequate exculpatory safeguards for any respondent facing difficulties, so we think the comparator test now should go. The other recommendations made by the Productivity Commission actually remedy some of the problems that have been presented by the decision in Purvis.

MS McKENZIE: I am sorry. I am mucking up the thread of what you want to say, but - - -

MR KEELEY: No.

MRS OWENS: We're jumping around a bit on the list, aren't we?

MR KEELEY: That's okay.

MS McKENZIE: It's just hard. They are all interrelated concepts and it is very difficult to look at one without the other.

MR KEELEY: Okay. In terms of the standards, PWD previously advocated the inclusion of a plenary standard making power across the board, and we're pleased with draft findings 12.3 to 12.6 and draft recommendations 12.2 to 12.4 in that regard. However, PWD recommends that in addition there will need to be a process identified through which the community can be engaged in setting priorities for standards development. Such a mechanism would need to engage all relevant sectors of the community, HREOC and the minister responsible for standards under the DDA of the attorney-general. We would be concerned that in the absence of a machinery provision, which would engage the community in that way, that it is possible that priority setting for standards would remain behind closed doors or be unclear.

MRS OWENS: We can consider that.

MS McKENZIE: Yes, that's a good suggestion. Almost like some kind of - I don't know - regular roundtable or advisory committee or - - -

MR KEELEY: Exactly, or strategic planning around standards meeting.

MS McKENZIE: Yes.

MRS OWENS: Has your group given any consideration to where the priorities would be in the short to medium term?

MR KEELEY: When last before you, commissioner, we advocated two areas for priority: that was in the area of insurance, where there are great difficulties - - -

MRS OWENS: That's right, you said insurance, yes.

MR KEELEY: - - - for complainants, and in the area of genetic information. We also believe that standards - depending on the way in which the provision is framed - might go to more universal concepts that may be of assistance; for example, concepts of universal design and flexible service delivery, so higher-order concepts, if you

like, under which more industry-specific or area-specific standards might fall.

In the area of advocacy and legal assistance, PWD agrees with draft finding 14.1 regarding the funding of the Disability Discrimination Legal Advocacy Services network of services.

PWD believes the same can be said of funded disability advocacy services funded under Commonwealth and state disability services acts. PWD also believes that a particular point needs to be made about access to legal and social advocacy services in regional and remote areas. In these areas the limited resourcing provided to advocacy, both legal and social, creates a major barrier to accessing the DDA complaints mechanism adequately.

In respect of HREOC as initiator of complaints and intervener, PWD wishes to place on the record its strong objection to the Australian Human Rights Commission Legislation Bill 2003 proposed amendments. That would require HREOC to obtain the Attorney-General's leave to intervene in court proceedings under the HREOC Act. Given the importance of international human rights law to people with disability, we regard this amendment as an unwarranted intrusion on HREOC's independence, and a major impediment to the human rights concerns of people with disability being heard in cases involving the Commonwealth in particular.

Similarly, PWD does not agree with draft finding 6.1 regarding the role of HREOC in intervening in the Australian Industrial Relations Commission. PWD instead agrees with the Anti-Discrimination Board of New South Wales, submission 101, and the New South Wales Office of Employment and Diversity's submission 172, suggesting that HREOC's intervention powers should be expanded to cover proceedings involving industrial relations issues in the Australian Industrial Relations Commission.

MS McKENZIE: Can you explain to me why? I need someone to explain it to me. We had thought that HREOC's power to intervene was wide enough, but you say it's not. Can you explain why?

MR KEELEY: I think because of the statutory provisions - I don't have it in front of me, but I think it's section 46 of the HREOC Act which provides for the referral of a matter to the AIRC, and the reference within the intervention power within the HREOC Act to courts would suggest that an interpretation of that could be very likely to restrict the ability of HREOC to intervene in the commission.

MS McKENZIE: Okay, so you would want section 46 to make it clear that that is a section about intervention - - -

MR KEELEY: That's correct.

MS McKENZIE: - - - and whatever happens with the other provisions - that has got nothing to do with the other provisions about court - whatever happens about those.

MR KEELEY: That's right. Our position is that we don't think it's sufficient to provide for the referral of those matters to the commission without also ensuring that in appropriate cases, such as the safeguard which currently exists within the acts, that HREOC can intervene at the commission. It might be in relation to the Workplace Relations Act and the issues to do with discrimination within that act, or it might be more broadly an ILO convention, having broad scope and perhaps applying, for example, to people with disability in business services and issues of the wage subsidy scheme and so forth, taken in the context of say the national wage case.

MS McKENZIE: We just wondered whether - to put it bluntly - this might not really be a case of one commission telling another how to do its job, particularly when, in the Workplace Relations Act, there are already provisions about discrimination. One would have expected the AIRC to - because its own functions deal with certain issues of discrimination - have some understanding of these issues. In other words, where I am coming from - one wouldn't want duplication or, for that matter, intervention where really it's not necessary.

MR KEELEY: No, and I wouldn't, commissioner, wish to be taken as saying that intervention should be anything other than something that is necessary or a considered action by the president of HREOC, but there are cases - whether they be in commissions or courts - in which the human rights of people with disability, or their non-discrimination rights, are a matter for some discussion, and the statutory functions, the accumulated expertise - indeed perhaps the credibility of HREOC itself - may be, we would suggest, sufficient justification for that organisation having a role in intervening in proceedings that go wider than just within a court in this instance - - -

MS McKENZIE: Yes. Maybe also the problem is that there may well be proceedings where the commission just doesn't have the right material for it, if you like - doesn't have the right submissions before it - and it may be there are some cases where that might be a role.

MR KEELEY: Absolutely. There would be no doubt that there are many people with disability bringing their matters before commissions who are doing so unrepresented and where there may be major public interest issues that are going unaddressed as a result.

MRS OWENS: I don't know very much about how the AIRC operates at the

moment, but could the AIRC invite the Human Rights and Equal Opportunity Commission to provide advice at the moment, under the current arrangements? Would there not be provision for a friendly discussion on issues?

MS McKENZIE: It may be doubtful. Without some sort of specific power for participating in the proceeding, there may be a doubt that the commission could take into account those submissions if they were made. That's my - it may not be clear. It's certainly something that we will - now I understand what you're saying about section 46 of the HREOC Act. We will look at it to see whether we now consider it to be wide enough.

MR KEELEY: Thank you, commissioner. PWD also believes that the role of HREOC in initiating complaints in certain circumstances should be reinstated and as such supports draft recommendation 11.4. Concerns for conflicts of interest, we say, can be managed by maintaining the administrative separation, not only between complaints initiation and complaints handling functions, but in this respect between legal and complaints units.

PWD also wishes to address two matters that have arisen since our previous submissions. The first is the imminent expiry of the current term of the Disability Discrimination Commissioner. PWD believes that there needs to be a permanent appointment to the office of Disability Discrimination Commissioner. The current temporary appointment expires in April 2004. Soon after the passage of the Commonwealth Disability Discrimination Act in 1992, Ms Elizabeth Hastings was appointed as Australia's first Disability Discrimination Commissioner. Her term of office was completed at the end of 1997. Since that time no permanent Disability Discrimination Commissioner has been appointed; instead people already appointed to full-time roles in other areas of the Human Rights and Equal Opportunity Commission have been appointed for short terms as Acting Disability Discrimination Commissioner.

Ms Hastings was a woman with disability who possessed a clear understanding of the discrimination which people with disability face every day in Australian society. Furthermore, the fact that she had a disability sent a clear message to the Australian community that people with disability are valued citizens and that the government recognised that such a person was an appropriate appointee to this role. Since the end of Ms Hastings' term, none of the acting commissioners has identified as having a disability. In recent years there have been a number of administrative and other barriers which have prevented the role of acting commissioner to be fulfilled effectively. The commission has attempted to address these issues by contracting a Deputy Disability Discrimination Commissioner, but only for three days a week and without the full status of a commissioner.

The Australian government is of the view that specialist commissioners should not head the Human Rights and Equal Opportunity Commission. However, whilst these legislative roles remain, the appointment of a permanent commissioner in the area of disability is well overdue. Such an appointment would send a positive message to the community regarding people with disability and resource the disability area of the commission to continue the effective work it has done over the past few years. A dedicated commissioner role is essential to the overall effectiveness of the DDA. PWD calls upon the Productivity Commission to so find and recommend retention within the DDA of the appointment and functions provisions of a Disability Discrimination Commissioner.

The second issue arising since we last appeared before you, commissioners, is the promulgation of the Disability Discrimination Amendment Bill 2003. The Senate Legal and Constitutional Committee are currently holding an inquiry into the provisions of that bill. If enacted, the bill will amend the Disability Discrimination Act to limit its applicability to people with disability living with addictions.

PWD has made submissions to the inquiry and we oppose the bill on these grounds: firstly, because it's unnecessary to achieve its stated purpose; secondly, because it will result in an increase in unlawful discrimination, harassment and vilification on the ground of disability for people who are living with addiction and their associates, irrespective of their participation in accepted treatment programs and services; thirdly, it will undermine effective public health and social policy that promotes treatment and the social and economic participation of people living with addiction, by removing the human rights protections that buttress this policy; fourthly, it undermines the broad and inclusive definition of disability that underpins the protection of the human rights of people with disability in Australia; fifthly, it has the effect and possibly the intention of creating a moral distinction between impairments that are acquired as a result of perceived voluntary acts and those that are involuntarily present or acquired; and lastly, it is contrary to Australia's international obligations to enact and maintain laws that protect people with disability from discrimination.

Commissioners, one of the DDA's strengths is its broad and inclusive definition of disability. The fact that this definition has objective accepted social and medical frameworks underlying it - and I use that phrase "medical" for want of a better term - and I'm thinking now expressly of the judgments of Justices McHugh and Kirby in the Purvis case, when they refer to the World Health Organisation's ICF and ICD. PWD says it is an extremely dangerous precedent to select out, from all such accepted disabilities, one for particular adverse treatment.

The Productivity Commission is in a strong position to find that subject to the amendments already referred to regarding the definition of "disability", the coverage

of the DDA to all people with disability equally is of fundamental importance to maintaining the integrity of the DDA and, in particular, so far as it's objective, that people with disability be entitled to equality before the law. We say that equality before the law extends towards the DDA itself.

MRS OWENS: Before we move on from those two points you've made about issues that have arisen since last July, we are not really in a position to address either of those bills directly but, having said that, in the context of the second bill you've just mentioned I think what we will be doing in our final report is reiterating what we have said before in the draft report, which is that we believe the definition should remain as broad as possible. The bill is not actually affecting that broad definition. We are also going to emphasise that exemptions under the bill should be as limited as possible and be focused in the right way, and that there is a need to ensure that you have an act that is as clear as possible to minimise the potential for legal conflict.

With the particular bill that you're talking about, there are potential problems in defining which people they are talking about in terms of drugs and addiction. There are problems of determining - there are a number of other problems of interpretation which could occur in the courts, in terms of what is appropriate - what is considered to be treatment. There are, I think, privacy issues.

MS McKENZIE: Our terms of reference - it's quite clear that the bill is directly relevant to the DDA; if it passes it the DDA will be amended in the terms of the bill. HREOC is a much more difficult question because that one is relevant to the structure of the commission which affects all the acts that the commission has powers under, and that is actually way beyond our terms of reference which, as you'll understand, are limited to this one piece of legislation. That's a much more difficult situation as far as we're concerned. But the terms of reference - our terms of reference really ask us to look at the act as it is; its current effectiveness; whether it currently meets its objectives; the costs and benefits involved; whether it's meeting access and equity considerations and so on.

What we have done, and we can certainly do in our final report - we have tried to, when doing things like looking at the definitions and when looking at the exemptions, speak broadly in policy terms about how we think the definitions and so on should be framed. We are really saying that the definition should be as broad as possible, that the exemptions should be appropriate and should only deal with those matters that are necessary to be dealt with. In other words, blanket exemptions which don't have an appropriate purpose are not appropriate and certainly we would hope that our comments could, if you like, inform the way in which either this or other bills to amend the DDA would be looked at.

MR KEELEY: Thank you.

MRS OWENS: I also take your point about not making a moral distinction between how disabilities or impairments are acquired. I think that is a really important point.

MS McKENZIE: Yes, it's an important point.

MRS OWENS: I mean, we are not here to judge how people get their disability or who those people are. I think anything that undermines that general principle - this bill is about how people are treated, regardless of how they have come by the problems they are facing. I think for many people their problems are great enough without being discriminated against. That applies equally to those people who have addictions to illegal drugs.

MS McKENZIE: The other matter is that if, in fact, the real problem is a safety problem, then quite simply we would have applied what we have said in relation to the other exemptions. The broad thrust of our suggestions would be that if there is a particular problem that can be identified, then an exemption relating to that problem only should be devised.

MR KEELEY: Commissioners, we take a great deal of comfort from those comments and appreciate that it is a difficult situation, in particular discussing bills that are currently before other committees and that to tackle these matters directly is indeed problematic. We would reiterate, though, in looking at the act as it is - its effectiveness, the objectives of the act - that these matters are able to be commented upon, particularly so far as they do involve effectiveness in the case of the commissioner.

MRS OWENS: Yes.

MR KEELEY: And in the case of the amendment bill, the notion of clarity of interpretation.

MRS OWENS: Yes.

MR KEELEY: The problems in defining addiction and treatment and the problems they give rise to - and I'll hearken back to an earlier conversation that we had - are, in our submission, not so different to the problems that as a lawyer I face on a daily basis in applying the comparator test - ie, to identify what are the same or similar material circumstances. If, indeed, we have - as an overarching objective - the effectiveness of this act, its clarity, its ability to be understood not only by complainants seeking to exercise their rights, but respondents seeking to defend theirs, then we need to tackle this issue of the comparator head on, in much the same

way as we can say that this bill is problematic because it gives rise to complex arguments that we need attack.

I'm just looking at our time and I note that earlier we embarked upon a discussion of the Purvis case that it might be fruitful to return to in some measure. The issues that I have on our outline are a further discussion of that case; a discussion of discrimination in the areas of school education generally and some discussion of various international human rights legal instruments. Because People with Disability Australia Incorporated on an annual basis assists thousands of people with disability in their advocacy initiatives, many of which involve discrimination of one form or another, I thought it might be appropriate, given our earlier discussion of Purvis, instead of sticking to a structured discussion to maybe throw open the floor.

If there were issues in particular in our outline, commissioners, that you wished to discuss or are of particular interest - - -

MRS OWENS: I suppose for Cate's benefit we should maybe just run through each point in the outline. The first point, Cate, was relating to formal equality, not substantive equality. I think you've already covered that matter.

MS McKENZIE: And the next one?

MRS OWENS: Gleeson.

MR KEELEY: The next item is headed The Broader Statutory Framework, as identified by the chief justice in the Purvis case, reconciliation with occupational health and safety legislation - an illustrative, perhaps in this area - some recent events that might prove instructive. The events we're talking about are reportage in recent times of the use of a cage, in a case in Western Australia, within an educational environment as an apparently justifiable means of treatment for a student with a disability.

MS FORREST: It was a knee-jerk reaction to OH and S workplace requirements to address challenging behaviours for kids in schools. They talk about as a strategy for challenging behaviour to isolate problems, and children with challenging behaviour are seen as problems, so rather than address the issues that lead to these problems, they're isolating them in cages. There's been a few cases that have been reported in the media lately and I've even witnessed it in one of the schools.

It's an issue that's dear to my heart because I've had a lot of involvement in the education system. I've got a little boy with a developmental disability and recently this week he's been a bit feral because of circumstances, like the heat and tiredness and all that kind of thing. The new principal at the school hasn't explored resources

that are available to address issues that come up with the children, but sent me a letter home threatening me with OH and S if I didn't reinforce appropriate behaviour.

My concern is that this legislation is taking precedence over the needs of the children, yet the departments have a policy on inclusive education, and is that going to be at risk because of this legislation? Is there a clause in the DDA that can fix it? I'm really scared that a lot of kids are going to be adversely affected but it's not just a problem that's going to come up within the education system. It could be in employment, it could be in all sorts of areas when they've got to address issues of challenge, in my view. Rather than deal with the person and the individual needs of that person, they're taking the option of isolation.

MS McKENZIE: I don't know what we say about that. I think it's just a really difficult issue.

MS FORREST: It's shocking and, surprisingly enough, there was concerns raised that the boy in the cage didn't calm down. His aggravation exacerbated.

MS McKENZIE: I would have thought that might make the behaviours worse, rather than improve them.

MS FORREST: Exactly.

MRS OWENS: It seems like something - I was going to say from the last century, but probably the century before the last century.

MS FORREST: So we're revisiting it.

MRS OWENS: Yes.

MS McKENZIE: If the behaviour is particularly difficult, some withdrawal from the class might be understandable. Having done that for a period, I can't see why even OHS could justify a cage.

MS FORREST: No, but even if it's a cry out for resources or skills or if it's a call out for help for under-resourced skills, because resources are going into areas but not the proper areas and they're not catering to the kids. They're catering to their needs.

MS McKENZIE: We might have to look a little more deeply - I think you're right - at - - -

MS FORREST: The resource.

MS McKENZIE: Well, at the relationship between the two pieces of legislation. It makes it very difficult for children, for teachers and for principals - just even knowing what to do.

MRS OWENS: Do you know if there are any guidelines in these sorts of situations?

MS FORREST: In the Department of Education they have behaviour modification supports and all these kind of things in place but they haven't explored these avenues and I seem to be concerned that it's a growing problem and the cage is a knee-jerk reaction but if there are these modifications, or if there are these resources in place, maybe they're not adequate and maybe there's not enough of them. I live in a rural area and there is one resource person for lots and lots of schools in the Hunter Valley. So maybe that's a mechanism, or whatever you call it, that should be - there should be more availability to resources. It shouldn't mean exclusion of the child or the person. It should just mean that they've got to fix it so that they can accommodate them better.

MRS OWENS: There needs to be a protocol for the schools to follow and for the individual teachers to follow so everybody is certain about what they're meant to be doing. And as you say, if they had adequate resources for those kids - whatever the problem is, whatever causes - they need somebody to help them and maybe take them out of the class for a short while if that's what's needed, so they don't disrupt the other kids - but not put them in a cage like an animal.

MS FORREST: There are so many positive benefits to inclusive education, they far outweigh anything else. It's just so sad to think that it could be jeopardised in any way because of a link between these two pieces of legislation. There's a gap and, rather than see it as a problem, they should address it because it's cheaper in the long run.

MRS OWENS: We need to look at that.

MS McKENZIE: I quite agree with you, we need to look at that.

MRS OWENS: The next thing on the list was the comparator and we've already covered that. Do you think, Matthew, that you've adequately covered that?

MR KEELEY: Yes, I do.

MRS OWENS: The next one is no obligation to accommodate, a failure to mandate positive measures.

MS McKENZIE: We've dealt with that.

MR KEELEY: May I just comment briefly about that in the context of the previous discussion. Having assisted a number of parents of people with disability over the course of more than a decade - so many that I couldn't count - I believe that it is this single issue that is at the heart of so many of the problems, including the problem discussed involving cages and occupational health and safety and so forth. Particularly post-Purvis and around Purvis, advocates are perceiving a hardening of attitudes within Education Departments. That a cage might seem like something from two centuries ago is unfortunately correct. These cages have been employed - and even in the 1980s in Queensland, the Basil Stafford Centre inquiry involved the same and similar stories. Two centuries ago these things were happening and they are still happening.

The point I'm seeking to make is that they are allowed to happen because they are an end point of lack of resources, of a lack of a reasonable attempt to meet an individual's needs, rather than permissible by virtue of a policy or procedure. It's unlikely we will find any policy or procedure within any Education Department in this state permitting the use of a cage but, as an end point of lack of resources, that's where these extreme examples arise.

So I would firstly like to say that the Productivity Commission's recommendation that failure to provide adjustments be in and of itself direct discrimination will be of great assistance in this regard. Addressing the problems involved in Purvis head on, in the way that we discussed earlier, will be of great assistance in this regard. We also would suggest that OH and S legislation and the DDA do not necessarily come into conflict; that as with the issue of financial resources, or any other issue that might be raised within an unjustifiable hardship defence, we would suggest that obligations under occupational health and safety legislation require that all reasonable efforts be made to minimise occupational health and safety risk, or risk in the workplace.

These measures are often consistent with the very requirements of a person with a disability in a particular environment, be it the workplace or an educational environment, and we would suggest that it was only where those obligations imposed an unjustifiable hardship on, for example, service provider and educator and employer, that one comes to a point of inconsistency between the requirements of the DDA and the requirements of occupational health and safety legislation. At that point, presumably, one has identified that notwithstanding adjustments and measures taken to reduce risk under occupational health and safety law, an unreasonable element of risk remains, and what actions flow from that would thereby be permissible under the DDA because the whole full range of requirements and obligations have imposed an unjustifiable hardship from that point forward.

MS McKENZIE: I still think there is a real possibility of inconsistency, and perhaps I think the best we can say at this point is just that we'll look at the matter carefully.

MR KEELEY: Thanks, commissioner.

MRS OWENS: Because you don't want to get that point of unjustifiable hardship and then you've got cages again. I mean, where does it lead you once you get to that point? That's where you need some sort of guarantee there's going to be adequate resources from somewhere.

MR KEELEY: Where it left us, interestingly, in the Purvis scenario - notwithstanding that unjustifiable hardship wasn't available there - but that given that it was a broad justification for exclusion of Daniel from the school, interestingly the High Court found that Daniel was - and incorrectly, we say - a very violent young man, and found that his exclusion from school was permissible under the DDA. The Education Department in that case had offered Daniel a place in a special education environment. It was intriguing that the same apparent concerns for the safety and welfare of students and teachers were not expressed in the context of a special education environment. That's unfortunately where one goes when one is excluded from the mainstream.

MS McKENZIE: Okay, there's a need for clarity and simplicity in DDA compliance. We've discussed that. The Purvis case, a new barrier facing students with disability - and discussed that, so we're up to the school education, some general points about school education. Would you like to run us through those?

MRS OWENS: Or these matters we've raised.

MR KEELEY: Just one point, commissioner, and that is that as indicated earlier in the key points, PWD does not accept necessarily that access to education has improved more than employment opportunities, or any other area for that matter. The point we would seek to make there is that acknowledging the excellent research that the commission has presented, and the figures which would suggest that there are more students with disability in mainstream settings, that there are some qualitative and some quantitative points that are yet to be made.

Qualitatively it is reported within the sector that in many instances identification of students with disability within the mainstream environment is occurring within the range of students who would always have been, if you like, in the mainstream environment and that new funding programs are a catalyst for identifying greater numbers of students already within the mainstream environment.

MRS OWENS: So these are not necessarily new students coming in as a result of reductions in discrimination as a result of the act, but these are students that are now just being identified and they're always there.

MS McKENZIE: Because there are new funding programs that are picking them up.

MR KEELEY: Exactly, certainly very many of those, and in fact your own statistics indicate that the numbers within special schools in the same period have grown as well, so there wouldn't appear to be a corresponding decline in the population of students in what we would suggest are totally segregated environments. Another point to make is that by being listed within a mainstream environment does not an inclusion make.

MS FORREST: Yes.

MR KEELEY: And that the extent as to - - -

MS FORREST: No, keep going. That is so important.

MR KEELEY: That the extent supports provided within that environment are probably the key measure of whether or not discrimination exists in that environment, so that one might easily count a large number of students with disability within the mainstream school environment, but unless one is also asking them or their parents whether they are receiving adequate support, are included full-time within the mainstream class, have any remaining needs unmet, one is unlikely to be able to form any real opinion that there is successful inclusion going on in large numbers.

MS FORREST: Yes. And their concern is that successful inclusion won't happen if resource supports for students are isolated and there's segregated equity in it. Supports need to be done within the mainstream, just not separately, because if there's a separate equity unit within places of learning, then other people within that mainstream environment will probably be off to that equity unit rather than addressing issues within the mainstream. So really things aren't happening because they allocate resources to that unit, but that unit runs out and then you've got nothing.

MRS OWENS: And it's not really real inclusion, is it?

MS FORREST: No. It's not. It's segregated mainstream.

MS McKENZIE: Yes. It's segregated mainstream. That's right.

MR KEELEY: An example of that scenario that I was only recently made aware of in the last two weeks involved a child who, in kindergarten, was included within the kindergarten class. Along with two other children with disability, they had the support of a teacher's aide, and I understand that that teacher's aide was also very useful in sharing her resources amongst the broader membership of the class. As a result of a funding change, these students arrived at school expecting to go into the next year with their peers, only to find that there was no teacher's aide in the class, and the decision had unilaterally been made that all three students were to instead be attendees at the special unit. They were then in grade 1 and the special unit was, in fact, a large room with a composite class of three groups which spanned the full age spectrum of the school, and which included one class which was specifically for students identified with behavioural issues, and the parents contacted the organisation to discuss their concerns with this placement. Last year, in the figures, that little girl would have been an example of successful inclusion. This year she can't even remain within an age-appropriate class setting.

MRS OWENS: And that's because the assistance - the aide that was provided in kindergarten - was no longer available, wasn't resourced to grade 1.

MR KEELEY: Precisely. The last issue on our items of discussion involves the range of international conventions that underpin human rights law and discrimination law in Australia and, indeed, internationally. I note that my time is possibly impinging upon someone else's.

MRS OWENS: It is now, yes.

MR KEELEY: So I believe that the Disability Discrimination Legal Centre may have something to say about those issues, and in particular may wish to comment upon those documents and the obligations within them, as a possible framework, or indeed indicators for not only compliance with international law but discrimination law as working within that context.

MS McKENZIE: We'll ask them, but can I ask you one question perhaps before we finish, unless you've got other questions to ask, Helen.

MRS OWENS: No.

MS McKENZIE: And that relates to discrimination in employment. I said I was going to ask you about that at the beginning.

MR KEELEY: Yes.

MS McKENZIE: It's hard to find figures. That's the first thing to say, and certainly some of the employer groups have suggested to us that they don't see that discrimination in employment is a problem, and they've said that there are very small numbers of complaints relative to the workforce, or the workforce of people with disabilities, and generally they're concerned that there is a real lack of evidence of a problem here. Are you able to make any comment about discrimination in employment against people with disability?

MR KEELEY: The first comment I would make, because I do talk to a lot of people about employment issues and discrimination law, and within the DDA context employment is still the largest sector of complaints - so if employers are to maintain that position, then it might not say much for the importance to be given to the other areas of complaint under the DDA. So I don't necessarily believe that it's as insignificant as the employer groups might suggest. There are 20 per cent of Australians who identify as having a disability, and the DDA potentially covers an even greater proportion than that, taking into account associates of people with disability and the very broad definition within the DDA.

I'm aware that employment issues within the Disability Discrimination Legal Advocacy Service's network, for example, make up still the largest number of intakes for those services, which are so important to supporting the structures of the DDA. The areas in which discrimination frequently occurs are at the point of application and concerns about medical tests, concerns about disclosure. There is a particular issue which occurs that relates very much to the case of Cosma v Qantas that occurs for people who have acquired an injury as a result of a workplace accident and who return to the workplace and who receive sometimes insufficient supports to return to their previous duties, and then either lose or are threatened with losing their job because of their failure to perform the inherent requirements of the job.

MS McKENZIE: And also that's obviously something we should probably ask the DDLC about.

MR KEELEY: I would think that would be a fine question to ask the DDLC. But yes, it's still the largest number of complaints, but I can't say whether that is - clearly I believe it's significant, but if the employer groups are suggesting that it's not significant vis-a-vis the number of persons employed, I would only say to that that oftentimes advice is sought by people confidentially. People are also, more often than not, advised by any reasonable advocacy service provider to try and deal with their issues directly. A complaint of discrimination is not made lightly, and a respondent normally identified in a complaint as a discriminator generally takes umbrage to being so identified, so one doesn't advise a person to bring a complaint lightly. So oftentimes these issues may well be being addressed locally - - -

MS McKENZIE: Rather than through the complaint mechanism.

MR KEELEY: - - - rather than through the complaint mechanism, and handled not as a complaint of discrimination per se, but as a requirement for special consideration or adjustment or what have you. A case in point is - again, frequent cases involve people who may have a medical condition that may require length of sick leave greater than is provided for in an award, and so might need to front their employer and ask for more time off, and that's a fairly frequent occurrence as well. But in that situation, if that's going along well or not, it can still be dealt with between the employer and the employee, even though at heart it may amount to a discrimination matter eventually.

MS McKENZIE: That's all my questions.

MRS OWENS: I think that was very, very useful for us, particularly to talk through some of the definitional issues and talk about Purvis, so I'd like to thank you both very much. Is there anything else you wanted to tell us? Heidi?

MS FORREST: No. Just one thing - there are major concerns for me for people that live in more isolated areas, and people that are more vulnerable have severe issues with accessing support under DD. A lot of people don't even know it exists, and a lot of people in the areas haven't got information about how to use it, or don't know the processes. They can go through access, that kind of thing, so some of the client intervention mechanisms would be extremely useful for other people in isolated areas and people that are more vulnerable.

MRS OWENS: That's a good point to make. Thank you very much.

MS McKENZIE: Thank you both very much.

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

MRS OWENS: The next participants this afternoon are Roman, Lamphud and Dolores Marchlewski. Thank you for coming to our hearing. Could you each just give your name for the transcript? If you could just say your name into the microphone.

MS D. MARCHLEWSKI: Dolores Marchlewski.

MR MARCHLEWSKI: My name is Roman Marchlewski.

MS L. MARCHLEWSKI: My name is Lamphud Marchlewski.

MRS OWENS: Thank you. You're all appearing as individuals and as a family.

MR MARCHLEWSKI: Yes.

MRS OWENS: Roman, would you like to introduce us to the concerns that you have raised in your submission? Would you like to start us off and we could ask you some questions as we go?

MR MARCHLEWSKI: The whole evidence or documents what we sent is related to everything what happened. We have actually relatively short time to prepare everything and that's what I mentioned in some letter. There's only 50 per cent, at least, what we have right to say. What I mean right to say, that is the right to what is discriminated about my family for many years. If I go back in my life and I, myself, is at least discriminated since I come into Australia. That's been 22 years. Nothing happen whatsoever. When I become a refugee from Communist Poland in 1981 I was previously the officer of Polish Army and on the promise federal government in Australian Embassy in Vienna which I can find in this country peace.

MRS OWENS: Would you like to stop for a little break?

MR MARCHLEWSKI: No. With respect for human rights and I be treated like every other Australian. That has never happened. That has never happened at all. For me, what I passed, I see the system is far worse than Communist system. It is far dangerous, like fascist system, because even Hitler in Second War he have respect for their own citizens. We don't. We are Australian citizens but we see here by the system, even in this value, the garbage bin that council take away from my home every week, we have not any right.

Everybody ignoring us and everywhere is the biggest discrimination in government departments and the legal system. Nobody ever have respect for any truth what we say. It is only, all the time, systematic abuse by members of the federal government when we ask for help. It is absolutely disregarded by state

government. I was physically abused by state police and accused, when we bring case to court in relation to the death of my child through negligence of the state government; and double negligence in relation to legal system where post-mortem examination was done unlawfully against 1980 Coroners Act; against any consent whatever was made from my family.

I was accused, when I asked the state government for the truth, there were sent police to searching my house for machine-guns and accusing me of try to killing doctors that was involved in the medical negligence. To make that short, my child's body was dying through negligence, and untrained doctors by the state government which, in my view, from evidence what we have, their staff was not trained three years back. I don't know how many parents is suffering in the same way as what we, and don't know the truth.

There is all cover-up. The one reason here is because we develop problem with post-traumatic stress disorder. There was put protective commission in our family medical negligence case which he fabricated and covered up all the statements of claim and everything what we tried to ask the Supreme Court to answer the question of what actually happened. We're still fighting up to now for the truth. The Australian legal system give me, in compensation, three operations when my wife have (indistinct) to the whole problem and all the suffering what we got from the system - and Australian democracy was supposed to be friendly to us, but is enemy - I don't know for what reason. Because probably the problem is here we're speaking truth and the system doesn't like the truth. The system is not designed to deliver justice. The system is designed to crush people that ask for the truth with huge costs.

We receive $1,160,000 compensation which you find out now - one and a half years ago roughly - but all the money was missing in corrupt legal fees. We receive only parts of them which has even not covered the whole cost and my workers compensation for my injury which I was thrown out from company like a piece of shit after working 200 hours a week and the Supreme Court painted me I'm just lazy to work in Australia.

MRS OWENS: What sort of injury did you have, Roman?

MR MARCHLEWSKI: I accidentally twist my leg and damage my kneecap.

MRS OWENS: What sort of job was it?

MR MARCHLEWSKI: I have quite a good education from Europe but I accept as a labourer in Australia. That's what I say, you remember, I said I'd take anything to help me settle.

MS McKENZIE: Yes, of course. You have to try to look after your family.

MR MARCHLEWSKI: Yes. My work was only $4.50 per hour what I receive when I start in 1981 in BHP. I was able to make $33,000 a year so you can imagine how many hours you have to - - -

MS McKENZIE: Yes.

MR MARCHLEWSKI: I never have day off. I don't know what is public holiday and all are organised from government insurance, when we go and claim the compensation for the child, say in front of people even sitting behind and watching, I'm just lazy to work in Australia. I don't know what I can do more. I have only two hands. Maybe the system has to get it (indistinct) that's most likely to probably fill up - then it, what we have to do, my own education what I have from Europe was not recognised here. Even they promised me I would be continuing my education, everything. There was no chance to do it because I working too hard.

MS McKENZIE: Yes, that's right. You would have no time to do that.

MR MARCHLEWSKI: Excuse me, I take any possible overtime because of money. I lost in Poland everything. I own - all went back - and after all I lost my first family here because this problem. They can't get what we lost because huge discrimination never - I was seen in BHP like garbage, and I have to doing everything. The boss raising on me like on dog. Even I have to pay for them sandwich there - all the things. This is all the time. That's what I get. Now, hundreds of letters is what I fax to the commission because once the dispute the deputy commissioner said to me he not believe his words, so I say, "Okay. What I can doing, I be doing, I show you," and I show it in that way that all letters what is faxed to the commission was faxed to the people abusing me, so they can - very easy to find out. Handwritten, thousands of letters, copied; telephones. My bill for telephones, since I started with the negligence about my child, is probably roughly about 90,000. All of my workers compensation, what I receive for it, is missing. All go for costs. Worker simply nothing.

Up to now the legal firm was filed corruptly, stealing from us, more than half million dollar, but is not correct. I pay $7200 to do cost assessment. Supposed to have taken three months; it takes three years and he is still not finished. We have a big fight today in Supreme Court and we ask the legal firm - still appealing because the judge what give the compensation, he is the very close friend of their solicitor and he is president of Australian Juries Association. How you can deal with people like that in high offices? Where you can go? Who can listen you? They stop you and stuck you everywhere. Whatever is it? I don't have the money for fighting with

the legal field. The legal field, at the same time, hundred similar cases in 95. I don't know how much is today.

If he was able to stealing from my family, that what we see, $850,000 for the costs? Come on, here's a question. How many people is behind? Maybe even more like we're thinking, but their solicitor still is today in the court with another family and what's argument, why he's still there? He was found six months ago to - because we also have the post-traumatic stress disorder and they're abusing everybody here whilst in - - -

MRS OWENS: Can I just clarify, Roman, you've got post-traumatic stress disorder?

MR MARCHLEWSKI: Yes.

MRS OWENS: Have you still got your injury from - - -

MR MARCHLEWSKI: From BHP. That's a separate issue.

MRS OWENS: So you've got the two - - -

MS McKENZIE: You've got your injury and the post-traumatic stress?

MR MARCHLEWSKI: Yes, that's right.

MRS OWENS: And your daughter, Dolores, has been helping write the - - -

MR MARCHLEWSKI: She get a post-traumatic stress disorder because when she was small child and my wife had complication to losing the previous child, we spent three or four days a week to see doctors. So we have not much time to look after the baby. She always was with us, with sandwich in pocket because there was, you know, I was on disability pension. We can't afford anything in this country to spend extra. It's a little bit different problem today because we know how to manage, but before, on the promise the legal system to tell us they not take everything very long. That is 11 years now. It still is not finished.

MS McKENZIE: It's the delay, the long time, and also it's - - -

MR MARCHLEWSKI: No, this is delay and abuse people, like my family, because they know we have some disability and we believe it is the strong will and we're here coming, not talking about myself. I believe there is thousands behind us, maybe even worse. This system, it doesn't work. How you can trust Human Rights Commission? When we make a complaint, Human Rights Commission send to me

letter and say, "Sorry, we can't make an investigation, but the police are knowing about this," because if we call them, they might not remember their evidence, but they must call two years later after this letter to court and they remember everything.

MS McKENZIE: They remember everything.

MR MARCHLEWSKI: And what they say in the court, openly before the judge they say, "They're wrong." My specialist who representing there, contradict everything he say - they say they're using wrong method - recitation for the child; to finish everything because I am there and I correct them. Of course I correct, because I'm Australian; that's from Polish Army. Nobody tell me really what I have to do. I'm volunteering to a war in Vietnam; I was in war in Czechoslovakia. I know war experience from my life. I finding I'm sick in Poland. That's why I'm here, otherwise I never here. I hate the West but there was nowhere to go. What the Communist government tell me - 24 hours' passport or 10 years in gaol, and what are you choosing? You can go wherever you want.

MS McKENZIE: I think you choose to come here.

MR MARCHLEWSKI: That's right. I choose, because under the promise, Australian government granted me safety. Thank you very much. We leave after they abuse the police and state government, I was (indistinct) to pay. We pay in parts all the time. Three and a half year under private security guard. We were scared to go to shopping, and this you want to call democracy? Who is the commission here? Can you tell me? Who is the commission here?

MRS OWENS: I'm on the Productivity Commission full-time, and Cate - - -

MR MARCHLEWSKI: Can you tell me now or can you find me recent complaint against Australian democracy?

MRS OWENS: We're actually - - -

MR MARCHLEWSKI: This is very short-cut what I say now. It's far more - we have maybe hundred witnesses to what happen. I no want to call them here. I no want to make propaganda, but I want to say the truth: that is a system what doesn't have any respect for anything and anybody. What I reading in newspaper or advertising, the deputy commission is some job - I say, "Oh my God, 180,000 a year." I don't know how much the commission have from government to make this inquiry or any report. I think a few millions. This is money wrongly spent. This doesn't work here. You may be doing hard job to do it but this government no listen. There's no-one in the government would listen us, and we have strongly to believe there's a thousand behind us, what is on the same boat. Is boat full of holes and the

boat - nobody - no-one sink. As the boat is sinking - I'm only human. How I can fight against any system, that's impossible to believe, but I try to do it. I try to save - I give something. I'm supposed to bring my citizenship and give you today, as I said, but I forget accidentally.

MS McKENZIE: No, no, you've - - -

MR MARCHLEWSKI: No. I no voting here since 1992 and no (indistinct) called to court, but nobody checking. I don't know why - probably don't want to see or listen to more truth. That would probably be the case.

MS McKENZIE: What we have to do - we only have a very small job. We can't do - - -

MR MARCHLEWSKI: No, this is serious job because I'm involved in human rights for years, and everything is based on level where Australian government same to international law - it doesn't matter; discrimination; human rights or legal system. Even in Attorney-General Department, what have to be corrected with international law where Australia have responsibility. It's a serious responsibility, what I say. It's absolutely nothing. When I ring and call to civil department - civil department - attorney-general, they don't know what to do. They don't know what to answer. First letter what I done, I sent to - I want to check the system, how it's working. I sent to foreign minister. Foreign minister sending me letter - the responsibilities of human rights (indistinct) this is the biggest pig against refugee which should be long time ago in the International Court of Justice for crime against refugee and war victim, what Australian and America or England created themselves.

They keep the people in detention. I was like this in Austria under Austrian government. I was free to go everywhere. I was free to work; no-one abusing me; no-one saying anything wrong. Here, on TV - read paper, but the main question is, they were accusing them who come in unlawfully - they come in here unlawfully themselves. When I spoke with Senator Ridgeway and asked him, "Please explain to me the Aborigine story," no-one from Anglo-Saxon have more right in this country, whoever is it, like anybody else. I, for example, not claim anything from this country because I have no right. I'm just happy to be here, but they aren't most fair condition or the system is creating - this is 15th Century Roman Imperialist system that collapsed like that, and after the dirty British Imperialist collapsed later on, and what is the point of digging back in the whole history and all the mass injustice? It's still practised against my family here.

MS McKENZIE: What do you think can be done in a general way to make things better?

MR MARCHLEWSKI: In a general way - is only very simply way: change the constitution. Give rights to the citizens; no right for the government. At this moment the government have rights. Nobody else. I never seen anything in New South Wales government - anybody have rights anywhere. I don't have any rights whatsoever here. I even no have rights under the Australian constitution to be born. This is a joke. When I was with Amnesty International and we make a campaign about euthanasia, they send me part of the constitution - "The Australian constitution don't interpret openly right to life." Come on. If you don't have right to life, you have no right, and all of you, including me, are the slaves here. Slaves don't have rights to anything; don't have right even to any law. They was outsiders of the law in Roman Imperialist system or British colonial system - no difference.

MRS OWENS: We've always found in Australia when there have been attempts to change the constitution, they tend to get blocked.

MR MARCHLEWSKI: No. Your prime minister says no, but what you said - you should doing. If you're not doing what I done in my country, throwing out the mess from the high chairs, you'll be have like this meeting year by year and we go 10 years, 20 years and Aborigine be fighting another 200 years and nothing will be changed whatsoever. It is nothing changed at all. For me, I was shocked when I receive the thick book with the commission in 92, and last night I was very tired about half past 12 in the morning, I still picked just a few pages from - - -

MRS OWENS: You're looking at this report.

MR MARCHLEWSKI: I say to my wife in the morning, "Nothing go through because - absolutely nothing." They think it's for the government. You know what? Like daily printed newspaper: read today, forget tomorrow. End of story.

MS McKENZIE: We hope they don't do that with this report.

MR MARCHLEWSKI: No, they're doing, because I send to you all my letters. When I gone - and this government make the inquiry and they should have the respect first. Then they're accusing the state. "No, there's no difference." This is all the same level: arrogance, intolerance - look how things corrupt - morally corrupt garbage, what's stay in the political system, what they're doing what they like. They spend millions on war for America defending whatever they want. That's only imagination. I was in Europe myself. I know the Iraq story. I know everything there. I working in 12 countries before. This is not my first job. Everywhere they recognise my qualification but not in Australia.

MS McKENZIE: That is a problem, I think, for many people, because there are - - -

MR MARCHLEWSKI: That is a big problem. You know what the problem is? Since Australia was independent, I think somebody signed the old document with British - I'm sorry what I can say - in sunglasses or even in welding glasses, which is hard to see anything. This is nothing about what is here whatsoever. It's not any little sane democracy at all. How can in democratic country government take a decision by - doesn't matter what critic is, spend millions every way and stealing from the poor pensioners, $10, $20. Look, Social Security block a disability pension in relation to the payments what we never had.

For two years we live on credit card and borrow money from friends and take me another solicitor $5000 costs to get my pension back, but they not give me all. They give me half because they're thinking next year we still achieve half million. That half million not come after that. We're just waiting - I already go in court. All is cover up there again - is not true, and we ask the Social Security to pay me the whole pension plus under welfare rights we have the right to be compensate for negligence in relation to Centrelink. I don't know how to call it negligence, but bureaucratic negligence to say the truth.

MS McKENZIE: Yes.

MR MARCHLEWSKI: You know what? I don't bring my telephone bills but it's like that - it is thousand calls and faxes. I broken already three fax machines in that time and the last one is broken again, and there's no answer for any simple question: where is my money; my disability pension what the system hurt me and I am sick, why the money still not come to my family? They even stop pay - allowance for the children. The Social Security man - social worker fabricated against her doctor documents and explained to other, "With this child no need any more disability allowance." This is not true. Her doctor very upset because he never say that but they say - they ring to the doctor. The doctor says, "No, she's all right. She don't need any doctor." No, it's not true.

She is even depressed today. We're happy she is in high school. We have a lot of problem with the girl to understand many things, because we know when her childhood was before, she was damaged by the system, because we were damaged, but that is (indistinct) when I ask government to help me with her post-traumatic disorder, the government office send me letter, which I don't have, but I can show you anytime, "We can't do anything to help the child because you ask for report and you have a court case."

MRS OWENS: How are you managing to live at the moment financially if you're only on a part - - -

MR MARCHLEWSKI: Well, I borrow again $30,000 on the value of my house, because these incredible costs, we can't manage. The children is in Catholic schools because I want them to be educated before I take them to Europe, which is happen when she have her high school finish. The kids have already Polish passports anyway. I don't want them growing in the system. I don't want them suffering and all their children like we're - the system is not designed to have respect for family whatsoever.

MRS OWENS: And your son, is it, Dominic?

MR MARCHLEWSKI: Yes, Dominic.

MRS OWENS: Is he managing well at school?

MR MARCHLEWSKI: He's on better situation, because when he was born there was not the huge tension with everything like this child.

MRS OWENS: All the trouble; so much trouble.

MR MARCHLEWSKI: But my wife have post-natal depression - no help. No-one help her - anything. She get many things - she get three operation and if we stick to the government hospital - - -

MS D. MARCHLEWSKI: We die already.

MR MARCHLEWSKI: - - - she be dead. She be no live. If we no find private doctor. She have all her organs in the wrong place - four years' infection and the government doctor from the hospital when all this mess happened say, "There's nothing wrong with you. You're eating too much fruit."

MS McKENZIE: I don't think so.

MRS OWENS: It's a terrible story that you have to tell us.

MR MARCHLEWSKI: That's only half it. If we want full story, I have tapes, interview everywhere. Already all the documents were transferred into Human Rights Commission in Europe. With their help I be suing the Australian democracy for 23 years my immigration and damaged all my life because is nothing happened what they tell me. We're suffering far more here than in any oppressed dictatorial system, and this Prime Minister, this is the garbage what is hard to find anywhere or anything. He is far more dangerous than any Saddam Hussein. When I work in Iraq in 1979, Saddam Hussein shaking with my hand but this arrogant - I call him political pig - he never no reply me on one letter, which his secretary promised many

times.

MRS OWENS: We don't in this commission like to get into the politics, because we're a research body.

MR MARCHLEWSKI: No. That is the way where we ask - to understand, ask - and ask responsible people to tell us at least where we have to go and get something. There's nothing happened.

MRS OWENS: Well, at the moment we're reviewing this Disability Discrimination Act, which is an act that's dealing with discrimination against people with disabilities.

MR MARCHLEWSKI: We have come across discrimination every point.

MRS OWENS: What we're trying to do is develop policies so that that act will work better, and so that organisations like the Human Rights - - -

MR MARCHLEWSKI: If don't be those support with strong law, it simply doesn't work.

MS McKENZIE: So you think there needs to be stronger law.

MR MARCHLEWSKI: Have to be stronger law, support with the strong democratic view and this is not everything. Have to be law what have - if you don't find way to force the system or the government to respect internationally United Nations charter for human rights, whatever you want to do, Australian law is too weak, too short, has no jurisdiction, and after all, the legal system here is covered roughly - I don't fully understand the history - but no more like hundred years the High Court is - that's not enough to cover any need of people living here even one hundred and one years. It's impossible to believe that jurisdiction can cover anything like this when, in today's civilisation, is no link - any system or government - to international law. You never have everything what you be asking government. It just won't happen, never.

This is impossible, because if you no force the government listen internationally, you'll never force him to listen you here. That's never happened. That's what they're doing. That's why the whole public service is sick here, because they're not doing anything more than the government letting to do, because they're scared to hell if they're doing something different, they sack, or is transferred. Not many people would win on such workers, they say they're sick. They say, "No. They're not sick." They is transferred because they know too much problems - what's going on. We have such a worker, too, and she tell me is many story like we

but she's not allowed to talk, and I know that from many people - there is.

MRS OWENS: Roman, can I just ask your daughter a question?

MR MARCHLEWSKI: Yes.

MRS OWENS: I don't know, Dolores, if you would mind answering a question?

MS D. MARCHLEWSKI: No. I don't mind.

MRS OWENS: Your father said that you've had post-traumatic stress in the past. Have you had help for that at school? Have your teachers been helpful and looked after you?

MS D. MARCHLEWSKI: Yes. This teacher was just concerned about me and got this counsellor person to talk to me and to work problems out and stuff.

MRS OWENS: Did that help or not?

MS D. MARCHLEWSKI: I only just did it yesterday. It was the first day.

MS McKENZIE: Okay. So, you've got to wait and see.

MRS OWENS: Yes. But at least they are aware and they'll help you. You'll be able to go to school next week and say you came in and did this today.

MS D. MARCHLEWSKI: Yes.

MRS OWENS: I think that's very brave to get up in front of us.

MR MARCHLEWSKI: See, when we claim compensation for the child, something will happen. I don't mind. They can drop the money when she grow up or give it to her, but she is allowed to have it for damage in her childhood. We have evidence in reports from the school where she was before - what actually happened. We have a lot of reports from private clinic, and on one occasion we take her with us to court and she was very happy because she go with us. She's jumping outside the court and the arrogant judge, which is member of the Liberal Party and president of the International Jury Association, say in his finding the child is not allowed for compensation because she jumping, very happy, outside the court.

But he not see anything outside the court when the GIO solicitors who were representing the defendant and the state government instructing the witnesses what they have to say in the witness box - but they block me to talk with my solicitor

because it's not allowed to (indistinct) but the judge see everything through the open door. That was all right, but was not all right to us. And after all, 50 (indistinct) or more, even this - all statement of claim is completely fabricated by protective commission, and the legal freedom - there was no my family claim before the court whatsoever. We have today ask the question because they are stealing the child's body. We never the received the child's body back. They cover up everything. They're stealing body parts. They lie everything in the courts but we find out now. We have here the evidence, see I carry it with me, because I worry they break my house and they're stealing the important documents what is handy for that.

But the whole question is, the whole copy we have is in Polish Consulate in Sydney and European Government in Europe, and whatever they be doing, they be doing anything against themselves, because I know from many people when I was in inquiry, they practise to sort of meddle through police, Federal Police. Now is very good excuse because of terrorism. Now they in government, they are intent on terrorists. They abusing here everything, and simply doing like a Mickey Mouse story to put everything in some way, to get people cut off access to rights. It is the case. It's not anything different.

MS McKENZIE: Now, Roman, it's getting close to the time when we need to hear other people who have come to - - -

MR MARCHLEWSKI: I'm sorry if I'm upset.

MS McKENZIE: No. That's not a problem.

MR MARCHLEWSKI: Fighting 11 years and defending your family rights, I think no-one would be able to control himself. I not control myself for some time because when I start looking at their papers, they make me already headache before I even writing anything. But all the time rubbish coming from the court here, all is not true, even today. They're lying. I take the people out from register and they still keep lying from court register.

MRS OWENS: We don't want to aggravate your situation.

MR MARCHLEWSKI: No, but this is the case. If you no have right to talking before the law, or the law no accept you're right, who you are? You're nothing. Sorry.

MS McKENZIE: I want to thank you for writing the submissions for us. You've done a lot of work. And also thank all of your family for coming to make submission to us today as well.

MR MARCHLEWSKI: Thank you very much anyway.

MS McKENZIE: Thank you to Dolores too.

MR MARCHLEWSKI: It's getting some truth. It's very important for us if you let it be known more, like for example the government let you know, because they not let you know anything. That's what I think.

MRS OWENS: Thank you very much. We'll now break and resume at quarter to 4.

MRS OWENS: The next participant this afternoon is the Disability Discrimination Legal Centre of New South Wales. Welcome to our hearing and I will ask you each to give your name and your position at the legal centre for the transcript.

MS KAYES: My name is Rosemary Kayes and I am the chairperson of the Disability Discrimination Legal Centre.

MR FITTLER: My name is Darren Fittler. I am the vice or deputy chairperson of the Disability Discrimination Legal Centre.

MRS OWENS: Thank you. Before today we received an outline of what you might like to cover and then today you have provided us with a more fleshed-out version, I think, which I haven't had the opportunity to read. What I will do is I will hand over to both of you to run us through some of the definitional issues that you've covered in the outline.

MR FITTLER: Sure. I will just firstly start by expressing that the Disability Discrimination Legal Centre is a specialty community legal centre that is based in New South Wales. We deal with a lot of individual, as well as systemic, disability discrimination related issues. With that background we feel that on a practical level as well as on an academic level our centre is well-placed to be able to give submissions and we're happy and thankful that you have given us the opportunity to be here today to give some oral submissions also.

MRS OWENS: Good, thank you.

MR FITTLER: The plan of attack really is for me, firstly, to talk through the first, I guess, five pages of what you have there, looking at the definition of disability; going through some things around the genetic issue, behaviour and finishing up with some talk around drug addiction; leaving the rest of the paper for Rosemary to discuss, looking at the comparator test and other aspects, particularly in light of the recent Purvis case. We're both happy to be interrupted at any time, if you would like clarification, and of course more than happy to answer questions at the end.

For the most part, we submit that the definition as it currently is is good and broad and concentrates, to a degree, on the social idea or the social model of disability and, as such, should stay the way it is without amendment. The idea behind the definition is to embody the relationship between an impairment and society and the way that people are treated as a result of their impairment; and to try and give the definition of disability a bit of grounding in practicality, it almost has to and does concentrate on individual function. So on a quick look it might seem as if there's a bit of medical model stuff going on underneath, and to a degree there is, but that's really more of a practical nature.

Just to add emphasis to the fact that the DDA intends on having such a social model, is the whole idea that there is provision for imputed disability; that by putting upon someone the fact that they might have a disability, even if they don't, is still seen as discrimination on the grounds of disability. A person who is an associate of a person with a disability, even if they don't have a disability themselves, and they're subject to discrimination on the grounds of someone else's disability, then they too have right of recourse under the DDA to make complaints. We use those two examples - and there are more, of course - to sort of try and illustrate the fact that this is a very wide-reaching definition.

We run the risk, if we start being too prescriptive, of getting very medical; that there has to be a diagnosis. It is almost tick the box, "Does this happen or this happen? How do you operate? How much can you move your arm?" We run a very severe risk of running into the same problems that the United States and the United Kingdom have had where much of the disability case law has been focussed upon, firstly, trying to work out whether or not that person even has a disability or not according to the definition that they have got. We find that we don't really have that difficulty. It's a very flexible definition and, as such, should stay.

We would also submit that with our world of changing technology, changing bioscience and other such - that who are we to know what sorts of disabilities may come up in the future. We want an act that is flexible and that can move with the times without too much amendment over the years and we feel that this particular definition, if it stays the way it is, will be able to bring in and bring on board and encompass pretty well whatever comes along.

We will move then to our very brief submission on genetics. It is our submission that the definition should not change. In our submission you have got before you, actually we suggest it should change because the word "not" is missing. We will provide an electronic version of this with that "not" put in there.

MS McKENZIE: That will be really helpful for me as well too; not just the "not" but the electronic version.

MR FITTLER: Yes. I am a person who is blind myself and appreciate absolutely the need and the usefulness of such. So whatever you have to do, shred these, do something with them, yes. We feel that the idea or the definition that concentrates on and looks at disorder, malfunction and disease is more than sufficient to cover genetics or the genetic link. We really don't want to extend the definition too much and too greatly and make it even more complicated and longer and convoluted.

MS McKENZIE: The only part that I think might be deficient is where you have -

and I don't quite know how you express this, whether it's - we said "genetic abnormality" but the Australian Law Reform Commission says that all genes are different from each other although, having said that, I notice that various other papers refer to genetic abnormalities. But anyway, some genetic difference which may potentially result in disability in the future, I just worry that the link that may not be - if you get discriminated against because of that, I just worry a little bit that the link may not be quite enough yet. The literature talks about future disability but I don't know whether that's quite - - -

MR FITTLER: Yes. That's imputed as well.

MS KAYES: That's an imputed disability. There's two elements to this in the terms that, one, if you start including genetic as a finite definition, you then have to make a genetic link. That, in terms of science, is again a contested area.

MR FITTLER: I guess it's our submission that there's two aspects. As you know, it is unlawful to discriminate against someone because of a disability they currently have, have had in the past or may have in the future.

MS McKENZIE: Yes.

MR FITTLER: To discriminate against someone on the grounds that they may in the future have a disability, and including one caused by a genetic abnormality or whatever the phraseology chosen is, we would submit is covered by that notion. Having said that, of course, if genetic stuff needs to go in there, then we're not going to make the whole world fall down because of it. I mean, the DDA should not stand or fall on this issue but it is our primary submission that the way it is will cover it.

MRS OWENS: You heard earlier in the afternoon about the discussion or behaviour - and you have got some material here on behaviour as well - but there have been areas where people have said that it wasn't that clear, even with Purvis and behaviour, and there are other areas. We had another clause in about having specifically included in the definition medically-recognised symptoms where a clause has not been medically identified or diagnosed and that is to cover areas like multiple chemical sensitivity.

There are groups that say that they're not clear whether they would be covered or not covered by even this very broad definition and so our view was that maybe there was a need to spell it out. You may not need to spell it out for a lawyer but you might need to spell it out for the layman who might want to know what their rights are under the act, but we've got an open mind.

MR FITTLER: Yes. Maybe there needs to be some kind of explanatory note to go

along with it or maybe there needs to be an upgrading of the various user guides and other material that is distributed to explain to the layperson whether or not it's needed within the act and whether or not it will provide clarity or further confusion by having it in is hard to say.

We would submit though that under the current definition, if it is argued by people who have and doctors who are knowledgeable in multiple chemical sensitivity that there are absolute and physical, x-ray-able proof to various things that are going on within the brain - that with that in mind we could probably bring it down to some kind of abnormality of synapses or brain cells, or whatever it might be that they're linking now to the cause of it and that cause would definitely, I would see, come down into the definition of malfunction or part-use of or those sorts of things.

MS McKENZIE: If you're saying a cause has now been assigned to this, then you're right. But if it's not quite as certain as that, then you mightn't be right.

MR FITTLER: Yes, absolutely. Quickly, my part on behaviour is very small; simply to say that Purvis has clarified for us that they're happy to see behaviour as being part of the definition of disability. What complicates the matter is that they go on and make a ruling on the comparator tests which my colleague, Rosemary, will embark further on as part of her submissions. Finally then, turning to drug addiction - - -

MRS OWENS: Just before we get on to drug addiction, I think it's that point where I've got in my notes that have come to me from you - that's where the "not" has been added in rather than - - -

MR FITTLER: Yes, in the genetic bit, yes.

MRS OWENS: I think Genetic Disabilities reads perfectly, as far as I can see it, but I think that was where the "not" was meant to be. Anyway, we will get an electronic version and we will all be perfect.

MR FITTLER: Well, it will be slightly more perfect. I can't guarantee 100 per cent perfection.

MRS OWENS: Nor can we.

MS KAYES: It's amazing how many times you can proofread something and still miss it.

MRS OWENS: And those "nots" can be the ones that go missing. Boy, does that change a sentence!

MS McKENZIE: I used to be a drafter of legislation in a former life and there used to be a lovely saying, in drafting of legislation, which said that if it wasn't familiar - if you keep reading legislation, as you know, when you draft it again and again - and the saying was not that familiarity breeds contempt but familiarity breeds satisfaction. It's true. You don't see it any more. You think, "Yeah, that's fine."

MR FITTLER: I can't remember the example but I use scanning software, of course, and H's can sometimes be put in instead of N's; so you get "hot" instead of "not". A sentence can make perfect sense with "hot" but have a totally different meaning, so I found myself caught out a couple of times by simple little errors like that.

Anyway, we would submit, in terms of drug addiction, that the Disability Discrimination Act Amendment Bill 2003 is contrary to the aims of disability discrimination itself, turning in particular to the right of a person with a disability to have equality before the law, such as other members of the community. It's written there in front of you and I can't quote it verbatim but the crux of the matter is that for some person - either an employer or a shopkeeper - to be able to stand up and being crude, I guess, say, "You have a drug addiction. Get out" or "You have a drug addiction. We're not going to employ you," is not right. It does not permit that person with the drug addiction or the drug dependency to have full equality before the law.

We know that there are grounds for - exemptions from the Disability Discrimination Act, usually on the grounds of unjustifiable hardship. So a person with drug dependency going for a job will be able to be discriminated against - if we just take the regular DDA, that is, without the amendments - will only be able to be discriminated against if they are shown to not be able to meet the inherent requirements of the job and if giving them assistance to meet the requirements will cause unjustifiable hardship.

It is also given that being able to meet with occupational health and safety regulations and policies can be definitely considered as an inherent requirement of the job. We find it difficult to accept the fact that without any real justification and often based simply on prejudice with no true basis in reality, a person can be discriminated against by the fact that they're addicted or dependent on drugs. We would submit then finally on that matter that the amendments ought not go through. The Commonwealth Attorney-General in his second reading speech said, "We're going to bring these amendments in because we need to bring certainty to the matter." Currently, if we take the DDA as it stands at the moment, the only uncertainty there at the moment is that: is the risk or the difficulty that arises one that warrants the invocation of the exemptions, that being of unjustifiable hardship

and reasonableness?

If these amendments come in, however, we've got all sorts of other uncertainties that come in. They're listed under uncertainty there. I don't remember them in order, but the four new uncertainties, as we see them, is: is the person dependent on a prohibited drug? We don't know really. What was the first one, Rosey?

MS KAYES: Determining whether an addiction exists; determining whether the addiction is to a prohibited drug within the meaning of regulation 5 of Customs Regulations Act 1956; determining whether the addiction is present at the time of the proposed discrimination and, if an addiction is present, determining whether the individual is undergoing a program or receiving services to treat the addiction.

MR FITTLER: We would submit that it is unlikely that a person, a shopkeeper, an employer, a landlord, is going to have to hand this information to be able to make a true judgment on whether or not this person fits in and can have these questions or uncertainties answered.

MS McKENZIE: Particularly because landlords I wouldn't think would normally carry in their pockets regulation 5 of the Customs Act.

MR FITTLER: Yes, that's right.

MRS OWENS: Don't you?

MS McKENZIE: No.

MRS OWENS: We're all going to start doing it.

MS McKENZIE: I can quite honestly say I have no idea what regulation 5 of the Customs Regulation Act is. Obviously it would be possible to look but if a tenant comes to you and you're a landlord - - -

MR FITTLER: We would further submit that even if some of this information was voluntarily given by the person, we would - - -

MS McKENZIE: Who had of course read regulation 5 of the Customs Regulation Act.

MR FITTLER: Also at the risk of vilification and other such things, maybe they go out on a limb and figure, "I'll do the right thing and give some information." The person that is having information given to them is still not going to necessarily have

all the information that these amendments prescribe one needs to know in order to make decisions on this. It just seems silly that if a person comes into a restaurant and is exhibiting violent behaviour, then if there's a true and genuine risk to the patrons or the employees, then you're able to ask that person to leave or to remove them from the premises. But if someone comes in and you just merely suspect that they have a disability, that you will, if the amendments go through, be able to say, "Get out. You've got a drug addiction."

MS McKENZIE: You've got to be pretty sure. That's the one thing, because all those matters have to be satisfied before the exemption will actually apply to you, so it is really uncertain.

MR FITTLER: Yes.

MS McKENZIE: You've just pointed out about five respects of which it's really uncertain, and it is.

MR FITTLER: The trouble is it puts the onus on the person who is being discriminated against to, I guess, bring the matter to the attention of the Human Rights Commission or whoever it might be. We talk about laypeople. Once the layperson gets it into their head that they're allowed to discriminate against someone because they have a drug addiction, then how many people, we wonder, will be discriminated against in employment, in education, in general provision of goods and services based on the layperson's idea that they don't have to worry about drug addiction? There's no coverage of that with discrimination with respect to disability any more.

I think it has probably been said a million, million times before: we're in no way condoning drug addiction and no way condoning the decriminalisation of all prohibited drugs. What we're talking about is not about that. This is more about discriminating against a person because of the fact that they're addicted or that they're dependent.

MS McKENZIE: What we've said in relation to comments on this bill is that our terms of reference ask us to look at the DDA as it is, not as it might be if this bill passes, and they tell us to look at its effectiveness and costs and benefits and to look at competition effects and access and equity issues and so on but, having said that, we have made some general comments about how exemptions should be framed; questions of certainty of legislation. As far as exemptions are concerned, we have said in general terms that they should be only as broad as is appropriate; that blanket exemptions shouldn't be just made for no appropriate reason, and there should be necessary exemptions. Also we've talked about aspects, particularly the direct discrimination aspect, where at the time we wrote the draft report we thought that the

act was unclear and we've advocated certainty. So a number of those comments might well, by extrapolation, apply to the bill.

MR FITTLER: I guess by way of trying to then keep our submissions within the current inquiry's scope, we would submit that the way the DDA currently stands with respect to the way that it may affect a person with a drug addiction is good and is fine, and should stay the way it is.

MS KAYES: There is the argument that drug addiction is a genetic abnormality. There are still questions about the genetic link and what gene it is and all the rest of it, so it's a bit of the thin edge of the wedge politics of what disabilities you isolate from what.

MR FITTLER: Yes, which brings me to my very final point before I turn to Rosemary, which is, in a nutshell, to say that we don't really want to split disability between deserving and non-deserving, between voluntary and involuntary. You've probably heard examples before where a person ending up with a disability: blindness, deafness, quadriplegia, whatever it might be - say as a result of a failed suicide attempt - which you might see as being brought upon by one's own actions. Similar to that perhaps is drug addiction brought about by one's own actions. Should people in those circumstances be treated any different to a person who may have been born with their disability or have had a car accident or another incident that was no fault of their own? Our submission is that no, there should not be such a distinction.

MS McKENZIE: As I said, I haven't read regulation 5 of the customs regs, but I assume alcohol is not one of the prohibited drugs.

MR FITTLER: No.

MS McKENZIE: Because the definition of disability hasn't changed, so it still includes addiction. So then that would mean that addiction to alcohol still remains a disability and you still have the protections.

MS KAYES: And tobacco.

MS McKENZIE: And tobacco.

MR FITTLER: Yes, whilst addiction to another drug - prohibited - - -

MS McKENZIE: Prescription drugs.

MS KAYES: Alcohol addiction is a significant precursor to brain injury; very

damaging.

MR FITTLER: And other drugs as well. We just would be very concerned to see - again, to try and put it within the scope that the inquiry is already, we would submit that the DDA as it stands currently appears to us, and we submit does not distinguish between people who have acquired a disability by their own means and those that haven't, and we would submit that the absence of such a distinction stay, and that concludes my submissions, commissioners.

MS McKENZIE: Thank you very much. Can I just say we're happy to call you by your names if you're happy about that.

MR FITTLER: Of course, whatever you like. Just don't call me late for dinner. Is that what they say?

MS KAYES: Darren has been very good at doing the first part of it. I'm going to read this a little bit, and I hope you don't mind that, because I've worked on this Purvis decision for about four days solid and I just want to make sure that I've got my analysis correct, because it's a bit of a tricky one.

MS McKENZIE: Go ahead.

MR FITTLER: That's enough of your escape clause.

MS KAYES: Direct discrimination, I will look at both parts: the direct discrimination and how that breaks down to the comparator test to even circumstances that are not materially different, and then I will also look at reasonable accommodation and the failure to include and the failure to provide reasonable accommodation. Section 5(1) of the DDA establishes that direct discrimination is when a person, on the basis of a person's disability, treats or proposes to treat the aggrieved person less favourably in circumstances that are the same or not materially different - the discriminator treats or would treat a person without the disability. This is commonly referred to as the comparator test. The recent High Court decision in Purvis has added a layer of complexity to the already complicated comparator test.

This case involved a young man, Daniel, with an acquired brain injury who was excluded from high school as a result of his disturbed behaviour. Alex Purvis, on behalf of his foster son, Daniel Hoggan, claimed discrimination on the grounds of Daniel's disability. The court found behaviour to be part of the definition of disability, but found the school had not treated Daniel less favourably than it would have treated a student without Daniel's disability in circumstances that are the same or not materially different. The court concluded that in establishing a comparator for the purposes of section 5(1) the circumstances that surround the treatment must be

applied to the comparator.

In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, section 5(1) requires that the circumstances attending the treatment given or to be given to the disabled person must be identified. What must then be examined is what would have been done in those circumstances if the person concerned was not disabled. That's taken from the judgment of the majority of Gummow and Heydon who were supported by Callinan and Gleeson. I nearly forgot the chief justice's name.

In the Purvis case the court considered what was to be included in the circumstances and what was to be excluded from the comparator as part of the disability. They found that Daniel's behaviour should be considered one of the circumstances to be included in the hypothetical comparator, not a part of the disability, despite also finding that Daniel's behaviour was encompassed within the definition of disability. This meant that the question was: did the school treat Daniel less favourably than it would have treated a student without Daniel's disability who exhibited the same behaviour as Daniel?

The court states that to construe the operation of 5(1) in the way described does not frustrate the proper operation of the act. This may be so in the view of the court, but the finding is frustrating to understand in wider application. The court suggested it would be artificial to exclude behaviour from consideration, even where it is identified as being connected with that person's disability. In our view, it is artificial to leave some of the circumstances and remove the disability when the circumstances and the disability are inextricably linked. It is artificial because the behaviour is the disability and we can see, as the court conceded, to identify Daniel's disability by reference only to the physiological changes which his illness brought about in his brain would describe his disability incompletely.

To focus on the cause of behaviour to the exclusion of the resulting behaviour will confine the operation of the act by excluding from consideration that attribute of the disabled person - here disturbed behaviour - which makes that person different in the eyes of others. An important element of the Purvis decision was the court's often-stated concerns about the violent nature of the behaviour in question. In the absence of violent behaviour, the inadequacies of the court's finding become clear. What would be the comparator in a case involving a customer service operator who has Tourette syndrome and is sacked for outbursts of inappropriate shouting involving swearing in front of customers.

The Purvis decision has not provided clarification of what circumstances that are not materially different means, for purposes of comparison. It is unclear if fundamental elements of a person's disability, which are the basis of the

circumstances that attend the treatment, are always to be ascribed to the comparator. This section of the act is definitely in need of clarification as the High Court has failed to provide it.

I then want to pick up another element, another stream of the thought processes of the majority in the Purvis decision, and that's the element of the intersection with criminal law. The High Court justified its construction of section 5 by concluding that it allows the proper intersection between the operation of the act and the operation of state and federal criminal law. The court focuses on the alleged criminality of Daniel's behaviour. This is not appropriate in the discrimination context. It is not the place of discrimination law to punish criminal behaviour. This is the role for the criminal law. Criminal law is only relevant to discrimination where either of the following occur: The respondent is implicated in or otherwise made liable for the behaviour of the complainant. An example would be a case of fraud by an employee, or the criminal behaviour contravenes occupational health and safety laws, as was alluded to in the Purvis case.

In either case, the criminality of behaviour is only relevant where there is no other option available to the respondent but to prevent or manage that behaviour by a discriminatory action. In other words, the alleged criminality of the complainant's behaviour is not on its own a justification for discrimination. In Purvis, the comparator test was discussed in the context of behaviour that was said to be criminal and violent. In that context it was described that it would be nonsensical to use a comparator which prevented a school from protecting teachers and others from violent behaviour. Implicit in this argument is the school's obligation to meet OH and S standards in the school environment.

However, the decision of the court failed to consider that the school's obligation under OH and S law extends to Daniel as well as to teachers and others and you can refer that back to both occupational health and safety acts, the New South Wales act and the federal act, which both require obligations on to third parties. If the school wishes to argue that its response to a child's behaviour is consistent with and driven by its OH and S obligations, the school must demonstrate that it has met its obligations to manage that behaviour in an appropriate manner in accordance with OH and S law. Schools, government departments, employers and other entities are required under OH and S law to take positive steps to ensure the safety of employees, clients, students and members of the public.

It is not a sufficient defence under OH and S law to simply exclude an individual who poses a threat to the safety of others. Where possible, the threat to self and others must be managed in a responsible manner. There is existing case law, that if looked at gives those findings, that exclusion is not the option. There is one distinguishable case but that's a juvenile justice case and that was somebody who

was on remand for murder and the principal was that they should have been excluded, since they were on remand for killing somebody with a kitchen knife and they should have been excluded from a cooking class where knives were, and they stabbed and killed somebody. But that is quite distinguishable from the cases and in all the other cases exclusion is not an option. It's the management of the risk.

It is our view that the school that wishes to excuse discriminatory behaviour by making reference to a child's allegedly criminal or violent behaviour must demonstrate that they have met the occupational health and safety standard of behaviour management. There is no consideration of this standard in the Purvis decision. I move on to the last point of the majority's decision, which is different treatment. The court argues that its construction of 5(1) still has very important work to do by preventing the different treatment of persons with disability. By this, the court recognises that its construction invokes a narrow focus of formal equality into the provisions of the act.

Formal equality, also described as the equal or same treatment approach, suggests that social processes are inherently impartial. It is based on norms that assume everyone is equal or alike and therefore must be treated in the same manner. Different treatment is understood as unequal, unfair treatment. The act is not premised on equal treatment. It is premised on equal rights as a basis for equal opportunity. I take that straight from General Comment on 5 of the International Convention on Economic, Social and Cultural Rights, which is the driving normative apparatus for application of the ICESCR for people with disabilities.

A quality of opportunity recognises the experiences and barriers faced by people with disabilities when they try to engage with social systems, as well as historical disadvantages in access to education, employment and resources. The inclusion of the unjustifiable hardship defence is an example of this approach, suggesting that people with disabilities may require adjustments to be made to enable them to assert their rights to access and participation. The construction of section 5 recognises that people with disabilities may need to be treated differently in order to obtain the same advantage as someone without a disability. Section 5 provides that treatment is unlawful when it is less favourable, not when it is different. The Collins dictionary defines favourable as "advantageous, encouraging or promising."

For treatment to be no less advantageous it must ensure full and equal access. Hence treatment is unlawful when it provides less opportunity to access the services or goods provided. The High Court's formal of quality construction is inconsistent with the structure and underlying philosophy of the act. I'd like to now focus on different accommodation and services. I will slip into reasonable accommodation, which is a variation on the term. The failure of the act to clearly provide the non-provision of different accommodation or services, or failure to accommodate, is

less favourable treatment is problematic, especially given the current High Court decision on the comparator test. In Purvis, the court concluded that there was no textual or other basis for section 5 for saying that a failure to provide such accommodation or services would constitute less favourable treatment of the disabled person for the purposes of section 5.

The logic then becomes flawed once courts then apply a comparator that has been ascribed to the circumstances attending the treatment, for example, an ability to perform a workplace duty or meet a standard of behaviour in a school, and those circumstances only appear because the respondent failed to accommodate that inability. In Purvis, Daniel's behaviour was triggered by a continuing failure to implement effective accommodation for Daniel. Commissioner Innes at first instance found several elements of Daniel's program had not been implemented or effectively implemented. Expert assistance was refused or ignored. Teacher training was poor or negligible. The combination of these elements was found to give rise to Daniel's behaviour. Without an effective accommodation program, Daniel was vulnerable to episodes of disturbed behaviour and that disturbed behaviour, whilst part of his disability, becomes the circumstances that attend the treatment to be ascribed in comparison.

In other words, the failure to accommodate Daniel's disability gave rise to the behaviour which triggered the act of discrimination. The court's finding was that the school had no obligation to accommodate the disability but could rely on the behaviour caused by the failure to accommodate as an effective defence to the discrimination. We believe this is an unworkable situation that fails to recognise the phenomenon of disability. It fails to adequately recognise the interaction of the medical or health condition with the environment and the limitation in participating because of the nature of the environment as the disability with the failure to accommodate being the discrimination.

Consider an instance where a deaf employee, who fails to do as directed because directions are predominantly communicated by voice, is subsequently terminated for performance reasons related to this failure. Some attempts had been engaged in reducing the number of audible instructions. The other employees take on bits of these instructions but think if they speak louder, that's okay and offers to establish email and intranet communications were ignored by management. In this situation, the Purvis comparator would presumably allow the treatment of the person who is deaf to be compared to the treatment of another employee who consistently fails to do as they are directed for reasons other than deafness.

The provision of different accommodation is a fundamental principle of discrimination law. It's an accepted principle in international law. The equality clause of General Comment number 5 of the ICESCR clearly establishes failure to

reasonably accommodate as a central element of disability discrimination. Clause 15 provides that:

> For the purposes of the covenant, disability based discrimination may be defined as including any distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.

The application of this principle has been considered in the drafting of text for a comprehensive and integral international convention to protect and promote the rights and dignity of people with disabilities. The working group of the general assembly ad hoc committee considered there was a need for a concept such as reasonable accommodation in the convention in order to secure a compliance with the principle of non-discrimination. Members of the working group supported the proposition that a failure to reasonably accommodate should in itself constitute discrimination and highlighted General Comment number 5 of the committee on economic, social and cultural rights as supporting this view. Dr Gerard Quinn, the rehabilitation international delegate, stated:

> It was important that the treaty draw out a much clearer link between discrimination and the obligation to reasonably accommodate. This is what adds value and provides the most valuable tailoring to the discrimination idea in the disability field.

The failure to provide different accommodation is also an accepted principle in overseas law. The European Union recognises failure to provide reasonable accommodation as an unlawful act. In the Australian context, the duty to provide reasonable accommodation is a central tenet of the act. It is the principle behind the disability standards. The premise of the standards is that once they are codified and assented, failure to provide those standards is unlawful discrimination. The objective of incorporating the access, physical information and communication requirements of people with disabilities into mainstream service provision is an overarching goal of the legislation. Brian Howe outlined this goal in his second reading speech where he clearly set out the objectives of the act as being structural reform and attitudinal change.

The act, based on this premise, creates a framework to promote reform through the provision of adjustments. On current construction, without a mechanism to provide failure to accommodate as less favourable treatment, legitimate claims of direct discrimination may fail to be substantiated. Hence without clarification or amendment, it is unclear how the existing direct discrimination provision can meet the objectives of the act. Thank you. Any questions?

MS McKENZIE: Thank you. I understand. I think there might be some areas where you may have perhaps simplified a little bit what Purvis has said, but I think your conclusion is correct, and the conclusion is basically that it leaves direct discrimination with far less work to do than was initially thought, and I think that you've made a pretty reasonable case for including a reasonable adjustment - or however it's termed - provision in the act. The only question then is whether it should relate only to direct discrimination, or whether it should be an across-the-board, stand-alone duty.

MS KAYES: We would see it as a fundamental principle. I mean, we see it as the inherent element of the recognition of difference, and if you're recognising disability discrimination as that intersection between the impairment and the nature of the environment, then reasonable accommodation is the fundamental prop that holds it all up.

MRS OWENS: And it would apply to both direct and indirect discrimination.

MS McKENZIE: Well, it would be a general duty which would apply to each of the areas that the act covers.

MS KAYES: In the European Union directive 2000/78, it's a stand-alone provision. Now, people have tried to argue that it's only a provision within direct discrimination, but if you read the provision, if you read the directive, it's a stand-alone provision. It's a separate article. It doesn't relate back to just the direct discrimination provision, so the interpretation is that it is a stand-alone provision.

MS McKENZIE: Part of that could be clarified by placement and by appropriate words.

MS KAYES: And it was clearly supported with a majority of delegates in the drafting of the text for the convention in January, that the provision of the failure of reasonable accommodation should be a stand-alone provision.

MRS OWENS: Is there anything else you'd like to tell us about your experiences - you were involved in the drafting of the convention. Is there anything we could learn from that?

MS KAYES: Apart from the fact of how cold it was in New York? I had the great joy of being there whilst they had their coldest snap on record, I think. Yes. It wasn't too pleasant. I had been at the cricket in 35 degrees, and then ended up in New York at minus five. It was beautiful. The interesting thing was the focus to keep it clearly aligned, the notion that we weren't to develop any new rights, and that

it should be an articulation of the existing rights within the existing human rights instruments. They're talking about the core human rights instruments; in other words the ones that have treaty bodies and have committee systems attached. There's debate about whether that's six or seven, whether the convention on torture is included in that, and so you've got the ICCPR, the UDAHR, the ICESCR, CEDAW, the Race Discrimination Act - - -

MRS OWENS: I have absolutely no idea what some of the acronyms mean.

MS KAYES: The International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, CROC is the Convention on the Rights of the Child, CEDAW is the Convention on the Elimination of Discrimination Against Women, and there's the one on - what's the race discrimination one?

MR FITTLER: CERD.

MS KAYES: Convention on the Elimination of Race Discrimination.

MRS OWENS: Thank you for that.

MS KAYES: And the Convention Against Torture, CAT. But it was very interesting that a lot of it can be articulated as recognising a lot of the rights that the disability sector was looking to achieve. It's a notion of definition and what things like access mean, what we mean when we talk about universal design or universal access, the centrality of issues such as failure to accommodate, and that that is such a central pin. Like I said, it is the prop that holds up the notion of that dynamic interaction between the medical condition and the social environment.

MR FITTLER: Right from the start, in the initial stages, the debate was, "Well, do we need another international treaty or not?" Those against were suggesting that what already exists within all the other international treaties is enough. Obviously, the world view and the United Nations view and by far the majority was to go ahead and to write a treaty with disability as the focus, because disability has always been - and we hope to change this of course - always forgotten. The amount of times I've attended lectures on human rights, lectures on this, lectures on that, and people are talking about discrimination. We always hear race, we always hear women, we always hear indigenous. We always hear all these things and not one person has really ever said "disability".

Even right at the beginning, at the end of World War I when some of the first treaties were being invoked to stop the use of gas warfare and other sorts of things - because of course gas warfare caused people tremendous injury and disability - even

then, the word "disability" wasn't used. The notion of protecting people from disability even then wasn't used, even though that was really the primary focus of some of those very first international treaties.

We're at a point now where the international community is rallying together. It has been decided that a convention should happen and the text is being written, and so there's an overwhelming support for pulling out of all the pre-existing treaties and notes, putting it all together into a comprehensive device or instrument that can be drawn upon, and used for everything.

MS KAYES: You'll be amused to know that one of the most contentious issues is the area of definition, and also for legal capacity, the right to equality before the law. We will have a full submission. This is just one area of our submission. You will receive a full submission from us by 5 March. We look at the issue of full legal capacity and some of the issues around that, including legal safeguards and the recognition of capacity as not an either/or thing but a continuum, and the different modalities of how somebody communicates consent or is able to demonstrate capacity or participate is not necessarily cut and dried because of disability, and that it should be looked at as a continuum.

That picks up on principles from the universal access and also from the standard rules. The contentious issue around definition with the development of the convention text was around the issue about whether there should be a definition or not, and whether the issue rested on the definition of discrimination.

Theoretically and as an academic I would support that there is no need for a definition in something that you want to be a living document, but I think that leaves the way open for people to be excluded. It leaves for domestic environments to then discriminate against certain areas of disability, and to leave people out of the protective device that has been created. The protective instrument has been created. We included the definition that was proposed from the Bangkok draft in our discussion around the social model of disability and that's one of the definitions that has gone forward with the draft text, and I'll just quickly read it for Cate if that's okay.

MRS OWENS: Yes.

MS KAYES: "Disability is the dynamic interaction between the medical or health condition of a person and the social, economic and physical environment. It involves the limitation of the person's opportunities to participate in one or more life activities, which results from or is aggravated by the interaction between the environment and the person's physical, sensory, psychological, developmental, learning, neurological or other impairment, including the presence in the body of an organism or agent

causing malfunction or disease."

Now, the reason that I included that particular definition is because I see it has a broad scope, but it also focuses on the phenomenon of disability as opposed to the taxonomy of disability. It focuses on the phenomenon, most probably more so of discrimination and its intersection with disability, than just the taxonomy of disability. It doesn't set down a framework that in 20 years you could look at and go, "What the hell were they thinking?" So it has got longevity, but it also gives some functional highlights where you can argue about inclusion of certain groups. It was interesting that this was debated in Bangkok, because the Asian governments are mostly some of the most conservative governments, and it was in that forum that it needed to be debated because they would be the governments that would be quite happy to exclude intellectual disability and psychiatric disability, if it was left to the domestic arena to define disability.

So we believe that if an international instrument is going to have any strength, it should at least give parameters that help to stop governments from excluding certain sections of the disability community from the protections of such instruments. I was just highly amused that when I got home from New York, I had a few things put on my desk, and they all seemed to come back to the definition of , disability, failure to reasonably accommodate and, "No. It's following me round the world."

MR FITTLER: Here we go again.

MRS OWENS: And here you are today.

MS KAYES: The other contentious issue for the drafting working group was the aspect of international cooperation and that's going to be a contentious issue between the Europeans and the developing countries come May and August, so it will be interesting to see how that pans out. But there are strong precedents within the Convention on the Rights of the Child, and also within the Montreal protocol relating to environment law that really does tease out international cooperation as a process that should be adopted.

MRS OWENS: What's the timing of the convention?

MS KAYES: What's the timing of the convention? They are trying to push it through. Mexico is currently the chair of the Economic and Social Council and that chair swaps over in September or October. Mexico has been a strong sponsor of this convention and they want to get the convention through before the chair swaps over, and I don't know who the next chair is. I think it's Poland, but I'm not certain. They're not confident that the convention would get through under a different chair, so they want to push it through.

They've got two ad hoc committee meetings this year: one in May and one in August. I have problems with that. I think everybody is rushing, and I'm quite concerned with the document that came out of New York. I think it is very, very short on consideration of a lot of the definitional issues, and that speed and haste are jeopardising the quality of the document.

MS McKENZIE: That may ultimately sink the document.

MS KAYES: Yes. You end up with an instrument that's basically unworkable.

MS McKENZIE: And it's not going to be picked up because it's unworkable.

MS KAYES: You end up with a white elephant or a lame duck or whatever you want to call it, whichever analogy you want to pick up - most probably "white elephant". We won't pick on the poor lame duck. The lame duck might get me for indirect discrimination.

MRS OWENS: That's right. You'd better be careful.

MS KAYES: I'd better be careful.

MS McKENZIE: And the other one might be racist.

MS KAYES: Yes.

MR FITTLER: Well, with many things there's the whole politics thing. The argument from Mexico will be: it's better to have a slightly rushed-through treaty than none at all. Obviously they don't have faith in Nepal or the Polish chair to be able to run and push it through.

MS KAYES: I don't know how happy I am to have that "Polish chair" in the translation. Don't quote me on it, please. I'm not certain.

MR FITTLER: Sure. Well, whatever it might be. But, yes, as with all things, there's a lot of international politics running through it and sometimes it's hard to cut through that and to get to the chase.

MS McKENZIE: But whoever is the new chair, you would expect with a new chair that there would be probably a slowing-down for a while at least.

MR FITTLER: Yes, that's right.

MS KAYES: That would be good.

MR FITTLER: While they're getting head around it.

MS KAYES: I think it needs to be slowed down. Darren highlighted an incredibly important point. Disability hasn't been an agenda item within the academic sphere for a very long time. It's still not dealt with in tertiary education as an area of disadvantage. You go to any sociology class and they're going to talk about women, they're going to talk about remoteness, they're going to talk about race, they're going to talk about indigenous populations, but they don't cover disability. Town planning, architecture, all public administration courses, don't understand the concepts of disability. So you've got a limited education in your public administration, you've got limited representation of people with disabilities within the decision-making structures of government and other decision-making structures, and the informing elite of societies.

We've got a discussion happening at an international level, where people are still carrying very uneducated, unsophisticated assumptions about disability, and you're putting that into an environment of negotiation and political lobbying, and NGOs are not excluded from the process, but they're not full participants in the process, so it's hard to make it an educative process. I just think we're about five years short, maybe 10 years short, of being able to negotiate a really strong instrument. I see this process as a once-in-a-lifetime thing, and the fear is that if it goes down now, it goes down; it will never get back up again.

MS McKENZIE: Or at least not for a very long time.

MS KAYES: Not for a very long time.

MRS OWENS: So it might be better to have something, albeit imperfect, than go for the perfect.

MS KAYES: Yes.

MS McKENZIE: How imperfect? "Too imperfect" means unworkable, and that's not going to help anyone.

MS KAYES: Yes, so there needs to be a lot of consideration. There's been a pulling back of domestic governments from the recognition of their obligations under international law. You will notice with our submission that international law is a bit of a thing of mine, and seeing as I'm the author of this document, you will find it replete with reflections back to our international obligations and placing our obligations within an international normative context. There is also that happening.

Our government was actually quite anti the treaty. They have shifted on that position. They alluded to the fact that it could be just a protocol or an annex, but what that did was left us with problematic international law that doesn't move us away from the medical model, so we really needed to start with a clean slate in articulating the rights of people with disabilities as they relate to the existing instruments.

They don't want to be accountable to the international arena. Now, that's Australia, and unfortunately it's reflected across a lot of the Western countries at the moment, which is a bit of a worry, and so whether the instrument will have any bite, who knows? But the one thing it does provide is a framework and a policy tool for the disability sector to use within the national arena, to be able to advocate for what types of rights and hence what framework of rights people with disabilities should have access to within the domestic arena.

MRS OWENS: Thank you for that. Have you got any questions?

MS McKENZIE: No, I think I've asked all the questions that I need to along the way.

MRS OWENS: Darren, is there anything else you wanted to add to what Rosemary has said at this point?

MR FITTLER: I'll just say briefly that it's a very difficult and frustrating position for non-government disability-specific organisations to be in, within the international arena in particular. When it comes to the true debating time and when the committees sit, NGOs really are last on the list to speak on anything, and if the time runs out we don't get to talk at all.

MRS OWENS: Well, I'm sorry you're the last today.

MR FITTLER: Yes. Well, that's all right. The other thing is, we're in Australia and all this is happening in New York or Geneva or Madrid or wherever it might be - Bangkok - and to get people there from a community organisation with limited funding, and with support staff and accommodation and air fares and all those sorts of things, is enormously expensive as well. But it's so important to the ongoing area of disability discrimination and disability in general for Australia that it's something we feel we need to do.

It follows on that with the limited, though increasing, number of people with disability in the public administration sector, it's amazing to see how much the country delegations sitting in these committees don't know, how ignorant they are of disability issues, and they're the ones with the power, they're the ones debating and

making the decisions, and we, NGOs, are sitting in the galleries just going, "What?", with some voice but not much.

Also, of course, countries might have expertise in the area. We would love to see some of the countries saying, "Okay, let's write the best treaty that we could ever write, that does all that it needs to do for disability. Then we'll decide if we actually want to sign it or not." But, no, we can't separate them; they're intertwined. So it's, "Well, we don't want to sign this, so we're not going to help you do it," or, "We want this to be a political instrument, so we'll do it the way we want to so it fits in with our system the best" - not so it's a great treaty but "so it does what we want it to do".

MS McKENZIE: I have a feeling that all treaties might get negotiated like that.

MR FITTLER: They do, but as I say, as an NGO you can't even get in as a country delegate to be part of the wranglings and the carrying on. You sit on the sidelines and watch it all happen before you. It's frustrating.

MS KAYES: Europe was an interesting case in point. Europe has taken 12 months to negotiate their draft text and what has come out is a minimalist non-discrimination model. Ireland has just taken over the presidency of the European Union, and the guy from Ireland - who sounded suspiciously like he came from London. My Irish colleague who was sitting beside me, Joe Quinn, turned around and he goes, "We call them the Western Brits." But they basically said, "We've spent 12 months negotiating this. We're not going to give up anything." So they have had their negotiations. They've had their negotiations up to their eyeballs, negotiating it between their 25 member countries. They don't want to negotiate any more and they were quite obstinate about it.

MS McKENZIE: To be honest, you can understand why.

MR FITTLER: Absolutely.

MS KAYES: You can understand why, but a non-discrimination model does not get us any further advanced. It doesn't give you the articulation of economic, social and cultural rights. There's a recognition that non-discrimination will get you so far, but there are issues around disability and the ongoing support of personal care, the ongoing support in employment for people with intellectual disabilities, and community based care for people. The law as it stands at the moment in terms of discrimination law is not going to move you any further forward in ensuring that those programs of social access happen, so there is an argument that the non-discrimination model can be limiting to people with disabilities in ensuring full access and participation in community life.

MS McKENZIE: Can I ask one question, and that's about discrimination in employment.

MR FITTLER: Don't get me started.

MS McKENZIE: Well, I actually would like to get you started, but we have to eventually get a plane. The reason why I am asking this is because we have a submission from some of the employer groups which says that, firstly, there are relatively few complaints in employment, given the numbers in the workforce of people with disabilities.

MR FITTLER: How do you prove it?

MS McKENZIE: Hang on. It is, as far as they can see, not a real problem.

MR FITTLER: Who's "they"? Just people?

MS KAYES: Employer groups.

MS McKENZIE: The Australian Chamber of Commerce and Industry.

MR FITTLER: All right. Well, I'll start, and tell me when to stop. It's arguable, but it's probably easier to prove discrimination on the grounds of disability in employment once you're in employment - "I didn't get the promotion because of" - and even that's hard to show. "You weren't employed in the particular job that you went for because there was a better applicant. That's why." They never come out and say, "We didn't give you the job because you're blind" or "because you have a disability". They say, "We didn't employ you because there was a better applicant on the day."

MS McKENZIE: I want to ask you how many people come to you; but if people come to you and say that, and say, "Should I make a complaint?" you tell them it's impossible to prove it?

MR FITTLER: No.

MS McKENZIE: Or you tell them it's very difficult?

MR FITTLER: It depends on the circumstances of the case and what evidence you can bring to bear.

MS KAYES: Employment is our highest statistic.

MS McKENZIE: But really it's tip of the iceberg stuff.

MS KAYES: It's very much tip of the iceberg stuff. There are so many constraints, being a person with a disability and going for employment. I spent a fortune on buying a house in Sydney close to a university because I worked at a university. Otherwise, if I bought somewhere I could actually afford, I would lose my wages in travelling to and from my employment. We get a 50 per cent transport subsidy, but taxis are five times more expensive than public transport, so I'm really only 10 to 15 per cent better off because of the 50 per cent transport subsidy. There are so many other factors that are involved in the cost of disability, unless you're extremely well educated. People that have been through segregated education or people that haven't had full access to education are not going to get into the streams of being a grade B lecturer at the University of New South Wales.

MR FITTLER: It goes even beyond that. If a person studying at university or at school is not given the kind of reasonable accommodation in terms of exam and assessment tasks that allows them to do well or to compete equally with their peers and to then have marks which are competitive enough to give them a fair chance of getting employment when they go for jobs, then they're not going to get the jobs anyway. When law firms are looking for a 75, 80 per cent average and they're doing their first cull on marks because they've got so many applicants, and you've turned up with an average of 70 because you haven't necessarily had the opportunity to show your true knowledge because of the way exams have been organised, you're disadvantaged in terms of employment there.

So whilst we might see very few complaints around discrimination on disability in employment, both in getting a job and within employment, there's so much history and so many other factors behind that, that lead into it, that perhaps have nothing to do with employment at all. Or, secondly, if they are directly related to employment, such as, "This person is blind. We've never had a blind employee before. We don't know what to do. We have no idea how they are going to be able to complete the tasks" - yes, they look good on paper; yes, they are equal to this other person, and perhaps even better on paper, interview well and answer all the questions. But it's not usually malice. It's ignorance and uncertainty.

MS KAYES: And the subjectiveness of the process.

MR FITTLER: They put you in the too hard basket and suggest, "Well, we will rather employ someone that we're comfortable with, who we know will fit in and use our systems well."

MS KAYES: There are so many filters that can operate as well. I mean, you look at the role of HR structures within firms these days where they are processing CVs,

and this was a classic example of Darren when he was completing law. CVs are a visual world. They operate and they are evaluated by their structure, their presentation and their style.

MR FITTLER: The font, that kind of stuff, you know.

MS KAYES: The font. That fact that it turns up in your size 7 font, which Darren and his reader doesn't know but the person who gets it goes, "I can't read that," and shoves it in the other pile - - -

MS McKENZIE: You haven't got kids who paint colours and pictures.

MS KAYES: Yes, so there's those sorts of filters. I mean, I remember when I was at university and - well, my first degree they had no idea of what to do with me for exams, and my law degree they thought that it was reasonable to do a three-hour exam over six hours. Now, I don't know if you've done a three-hour exam, you're sort of brain dead by about two hours, maybe two and a half. To stretch it out for another four is just peachy keen.

MR FITTLER: They think they're doing the right thing.

MS KAYES: They think they're doing the right thing. So you deal with a distinction average or a credit average, or a pass average which is not necessarily reflective of your capabilities. So there are so many filters, and really the structure of discrimination law works best when you're in employment. The subjective nature of the employment process, the recruitment process, just allows it to be so obscure, the reasons why a person didn't get the job.

MR FITTLER: Yes, do you disclose your disability and run the risk of being thrown in the too hard basket before you're even given a chance, or do you turn up - - -

MS KAYES: Or do you not disclose, go to the interview and get thrown in the too hard basket - - -

MR FITTLER: Turn up with your cane, your dog or your wheelchair on the day, firstly get thrown into the too hard basket anyway or you're being dishonest, "You didn't disclose in your application. How can we employ someone who is going to be throwing tricks like this at us every day?"

MS KAYES: You can't win on that.

MR FITTLER: That's right. Don't listen to these folk that try to tell you that

disability discrimination within employment is non-existent. It just can't be seen, because we don't have the ability - they're too cleaver. It's too subjective, as Rosemary says. They never, ever - look, as soon as we get a case through DDLC where someone has said, "You can't come in here and have a job, because you've lied," you'll hear all about it. But it just won't happen. Employees won't do that.

MS KAYES: The subtleties of it are just - yes, too great, just way too great. Disclosure is a really difficult point. Do you disclose and they interpret that you're playing your disability, or do you not disclose and get the reaction that Darren was just talking about?

MR FITTLER: Because you end up working as a person - because you have a disability, when there's jobs that say having knowledge of disability is a bonus you disclose, and you get a job. So you get people with disability working in disability based areas.

MS KAYES: Some people don't want to live, eat and breathe disability. I mean, I purposely try not to work within the disability sector on a full-time basis. I mean, my academic role within the university, when I was teaching, was general social science and policy. So every now and then I would do policy case studies that might relate to disability, but I would do them in areas on children's adoption and stuff like that. But you don't necessarily want to have to live, eat and breathe disability 24 hours a day, seven days a week, depending on leap years, 365 days of the year. So that reduces our options of employment within the - you know, and it's not helping society if a whole bunch of people with disabilities are just working in the disability sector.

MR FITTLER: With other people with disabilities.

MS KAYES: There's no cross-fertilisation of disability issues into mainstream employment structures.

MS McKENZIE: And awareness. Awareness is really helped by experience. It's as simple as that.

MS KAYES: Yes.

MRS OWENS: It becomes another form of segregation.

MS KAYES: Yes.

MRS OWENS: I think we're probably finished at this point. Is there anything else - - -

MS KAYES: Yes, sorry, we did warn - - -

MR FITTLER: You can ask about the division of goods and services, you can ask about employment, you can ask about education, you can ask about government - don't get me started on government programs.

MS KAYES: You will have our complete submission by 5 March.

MRS OWENS: I'd like to thank you for the one you just gave us before, because I can see a lot of work has gone into it.

MS KAYES: Thank you.

MRS OWENS: You know, with all the footnoting and just the thought that has gone into the presentation you've both made, I think it was incredible.

MS McKENZIE: Yes, thank you both very much.

MS KAYES: Thank you very much.

MR FITTLER: Thank you for your time, your attention and concentration at this late hour on a Friday as well. It's great.

MRS OWENS: Thanks a lot. I'll just close the proceedings now.

MR PETROSIAN: May I just say something - - -

MS McKENZIE: Yes, I was sure - - -

MRS OWENS: I was going to say if you would like to say anything you could come up.

MS McKENZIE: Come up.

MRS OWENS: I was just going to invite you up.

MR PETROSIAN: I'll just stay here and do it if it's all right.

MRS OWENS: But you haven't got the microphone.

MS McKENZIE: We can't record you.

MRS OWENS: This is Dennis Petrosian. I'm just doing this for the transcript, Dennis.

MR PETROSIAN: Thanks. I just wanted to say that I've been disappointed in the fact that for the time I've been here nobody has come out and said how terrific the idea of the positive duty is. It seems to me extraordinary, for example, that employers would say, "Well, we don't have a problem," as you were saying a moment ago - - -

MRS OWENS: Yes, that's right.

MR PETROSIAN: When they don't seem to - because there's an absence of an issue they say, "We don't have a problem," but the concept of the positive duty is very important and I know people are going to jump up and down and say, "This is affirmative action. This terrible. We can't have this," but I think the concept of the positive duty is really important, because what it says is that in the employment arena - I think that is probably a very large part of what your inquiry is about - I think that's extremely important, because what it is saying is that initially in the taking up on employment, as well as once in employment, there's a positive duty on the part of organisations, public and private, the employers, to allow the involvement of people with disabilities and from a positive point of view.

In other words, they should take pride in the fact that they have people with disabilities at different levels within the organisation, and operating and fulfilling the different activities, not just the bottom rung of menial tasks or whatever. I've been really surprised that - I don't want to criticise the presentations or anything, not only the Disability Legal Centre, but others as well that I've heard today - - -

MRS OWENS: Although we have on other days discussed it.

MR PETROSIAN: I'm sure, yes, but I mean as a part-one-day spectator I've been sitting here waiting for somebody to say how important this concept is, because what it means is that it's shifting responsibility. One of the problems with the DDA is that the burden of proof is so much on the complainant, and that makes people with disabilities look like troublemakers. Unless you're prepared to take up that role when you make a complaint, for example to the Human Rights Commission, you're not going to be able to achieve anything. That's a very difficult role for a lot of people to take up, to be an agitator, to be a troublemaker, because you immediately get a reputation and you stigmatise yourself as a person who is disrupting things.

But I think this idea of a positive duty is something that is severely lacking at the economic level in our society and unless that is altered I don't see how people with disabilities can take up economic roles in different kinds of employment. I'm

working with Centrelink and I experience this sort of problem all the time. Our organisation is concerned with encouraging the participation of people with disabilities into the workforce, and I see your inquiry as dealing with the other end of that, the end of: how can the employment sector provide opportunities for the people who are the customers or clients of Centrelink with disability? I think there are a lot of issues here that need to be dealt with.

Not only does there need to be a positive duty to provide this employment, but the implications of that need to be taken into account because sometimes disabilities change over time, especially with ageing. I've had a personal experience of this. A person can have a degree of disability in their younger years, when they can go into the workforce, and then they can place themselves economically outside of the kind of income support that the social security system is supposed to provide. People have got to be very, very careful with that. All the implications of people with disabilities coming into the workforce, I think that has to be thought through as well. Not only does the opportunity have to be provided, but the implications, once people are in the workforce, both economic, medical, social have to be considered.

MR FITTLER: I guess, as the DDLC, we would encourage caution in promoting, you know, to a too high a level. Without getting too philosophical we know that just because the law tells you to do something doesn't necessarily mean that you're going to do it. Just because the law says it is unlawful to discriminate against someone in and of itself does not stop people from treating people unfavourably.

So we really need society in itself to be accepting of and to be educated to know about things. If we start saying, "Employ people with disability as a positive duty," and with less emphasis on merit, you will find society becoming resentful of the fact that a person with a disability, who perhaps doesn't quite have the ability to do the job, is being given the job over and above others who do have the qualifications. Then we are breeding resentment against people with disability. We promote equality, in terms of equality of opportunity. If our merits are equal, and we are able to do the job as a person with a disability, and what we then need to assist us to do it is a bit of reasonable accommodation, then that's what we want. We want to be able to do that.

In other instances there is a lack of government support; I mean, in the sense of it might cost 10 grand to put in a ramp, it might cost 5 grand to provide speech recognition software or screen-written software, things like that, which the individual going for the job can't afford and the business who is employing firstly may not be able to afford it. Secondly, if they can, they may not desire to have to spend that cash. So we need then, if there is going to be a positive duty - there seems to be the need for I guess other government support in that area to assist with that business to employ the person. If it's a big multinational company and they have lots and lots of

cash, then the argument of course would be that perhaps they should foot that. But, I mean, I take your point and I would encourage you to read our entire submission, not just chapter 9 which we chose to focus on today, when that is given in.

MRS OWENS: Darren, have you covered this issue in your full submission?

MR FITTLER: I guess not, not in that true sense. I mean, it's there - - -

MS KAYES: We don't cover a positive requirement per se, but the notion that unjustifiable hardship, reasonableness and failure to reasonably accommodate, and the importance - and I mean the integral importance - of education and getting children into mainstream for long-term transition of disability throughout society is most probably going to place us in a better position than a positive duty now, because the experience with affirmative action programs in the women's movement and especially in the States has led to a severe backlash now where there are people concentrated in jobs where they cannot, because they're tagged as the quota person. There is no movement, no career advancement and people get tagged as the quota person.

That is not necessarily changing attitudes, it sometimes becomes appointment by resentment. Whilst a positive duty can be a very good thing it needs to be done in the right way. I think we need to look at the experience of the affirmative action programs in the States with African-Americans and with women and try and learn from that experience, but I think we need to use it in combination with the long-term transitional stuff about focusing on non-segregated education and skilling people with disabilities up. So it is just a case of merit and then - - -

MR PETROSIAN: Can I say something?

MRS OWENS: Yes, Dennis, do you want to finish what you were saying?

MR PETROSIAN: I fundamentally disagree with that, basically because positive duty is not a (indistinct) it is going to be classed as that by the opponents of the principle of positive duty, which I see as a social obligation. We live in a very individualistic age, but we cannot deny the social framework in which we live. We live in a Thatcherite age where there is no such thing as society, there are only men and women, to quote the woman herself. There are not even children. So much for her analysis of family life, but that's the Thatcherite age. But the reality is that we live in a social environment and people have social obligations.

Infrastructure, environmental controls, are all provided so that corporations, businesses, can operate. The whole idea of an orderly society, in order to facilitate business, commerce and whatever else goes on in society, means that there must be a

relationship between those who are taking advantage of those things and the things themselves that are being provided. What is being provided is a social order, and social order imposes obligations. You will often hear conservative people talk about mutual obligation - we have it in Centrelink - legal obligations on parents. The leader of the opposition talks about parental obligations. They talk about all these sorts of obligations, but people operating in society have obligations too.

One of those obligations, I believe, is exactly what is in your draft report, which is the idea of a positive duty. That is to allow for the employment of people with disabilities, and in the same way as corporations that didn't provide adequate opportunities for women were named, were criticised. The same thing ought to apply. A lot of corporations - when the ADA was being very effective in the United States, partly because of the punitive structure and partly because of the way the corporations had to defend themselves, corporations set up programs to present their commitment to people with disabilities as a feature of the corporate image, the corporate structure.

I think that is what positive duty should be encouraging. Not affirmative action, but the idea that a corporation says, or a business says, "We employ people with disabilities at these sort of levels," and they know two things can happen: if they don't do that they can have action taken against them under anti-discrimination, but also they can have commercial boycotts of people who don't want to deal with them because they don't provide that sort of service. I think positive duty is a very important concept, not necessarily a legislative thing that has to be imposed; it's not affirmative action, but it's a concept that ought to be presented so that those providing employment, providing opportunities in the economy, have a sense of, "Where is our positive duty? Where are we showing the positive duty to people with disabilities?" It's their social obligation to provide it. That's going to be very difficult in our age to promote, but I think there are very solid economic reasons, let alone social and moral ones, why it ought to apply.

MRS OWENS: Thank you for that. We have to stop now, we have to get out of this room. The commission will resume hearings at 9.30 am on Wednesday, 25 February at the Productivity Commission's hearing room in Melbourne. More details about the hearing in Melbourne and other locations are available on our web site. So I would now like to close the hearings today.

AT 5.20 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 25 FEBRUARY 2004

INDEX