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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009

WEDNESDAY, 21 JANUARY 2009

SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 21 January 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett and Crossin

Terms of reference for the inquiry:

To inquire into and report on:

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

WITNESSES

Committee met at 10.17 am

CHAIR (Senator Crossin)—I declare open this first public hearing of the Senate Standing Committee on Legal and Constitutional Affairs on our inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. This inquiry was referred to the committee by the Senate on 4 December 2008 for report by 24 February 2009. This bill seeks to amend the Disability Discrimination Act 1992, the Age Discrimination Act 2004, the Human Rights and Equal Opportunity Commission Act 1986 and other legislation to implement the recommendations of the Productivity Commission in its 2004 review of the Disability Discrimination Act. The bill also implements recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs and makes various other amendments to the human rights legislation going to the general operation of the human rights laws in Australia. We have received 29 submissions to date for this inquiry; all but one of those submissions have been authorised for publication and are available on the committee's website.

I remind witnesses who are here that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may then request that the answer be given in camera. Such a request may of course also be made at any other time. I remind people in the room to turn off their mobile phones or switch them to silent.

[10.19 am]

HUNYOR, Mr Jonathon Neil, Director, Legal Section, Australian Human Rights Commission

INNES, Mr Graeme, Human Rights Commissioner and Disability Discrimination Commissioner, Australian Human Rights Commission

MASON, Mr David, Director, Disability Rights Unit, Australian Human Rights Commission

CHAIR—It is always a pleasure to have the company of the Australian Human Rights Commission and hear your expertise. I welcome you here today, gentlemen. You do not have any amendments to make to your submission, do you?

Mr Innes—No, we do not.

CHAIR—Okay. I invite you, Mr Innes, to make an opening statement for us, and then we will go to questions. Thank you.

Mr Innes—Thank you for the opportunity to give evidence to the committee on the important reforms contained in this bill. The commission strongly supports the aims of the bill and believes that the amendments will improve the protection of the human rights of people with disability. We are concerned, however, with the way in which the bill seeks to achieve its objectives in a number of areas. The commission's submissions, therefore, seek to ensure that the intentions behind the bill are realised. In part, we believe, this can be achieved by greater simplicity in the drafting. Regrettably, simplicity has not been a feature of Australian discrimination law, but we propose a number of amendments that we think will make the DDA easier to understand and apply.

As we have limited time today, I will address our major concerns with the bill rather than go through those aspects of the bill that we support. Our written submissions set out the aspects that we support in the introduction and throughout the submission. I reiterate, though, our strong support for these issues and the objectives of this bill. They have been a long time coming since the completion of the inquiry of the Productivity Commission in 2004.

I will, however, note the commission's strong support for the change of its legal name. The commission has been known as the Australian Human Rights Commission since 4 September 2008, when its operating name was changed from the Human Rights and Equal Opportunity Commission as part of an updating of its corporate identity. The new name is intended to ensure that Australians know that the commission is a national human rights institution with the responsibility to protect and promote human rights throughout all of Australia.

I now turn to the commission's concerns with the bill. The commission's first concern is with the proposed definition of 'direct discrimination'. The commission recommends that the definition of 'direct discrimination' be further simplified to remove the explicit requirement for a comparator. The proposed definition of 'direct discrimination' in section 5(1) includes an element of causation—the treatment must be because of disability—and a comparative element—a comparison with a person in circumstances that are not materially different. An aggrieved person must prove both elements.

The practical application of the comparator element by the courts has proven problematic. Only very rarely is there an actual comparator—a person who was in the same circumstances and against whom an aggrieved person's treatment can be compared. It is therefore necessary for courts to consider the position of a hypothetical comparator. This is an exercise fraught with complexity. These complexities led this committee, in its recent review of the Sex Discrimination Act, to recommend that the SDA definition of 'direct discrimination' be simplified to remove the explicit comparator element. In the context of the DDA, this would result in a simple test: a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because of the other person's disability. This gets to the heart of what nondiscrimination is about and avoids the artificial and sometimes tortuous search for a hypothetical comparator.

Our second major concern is with the definition of 'indirect discrimination'. The commission commends the steps the bill takes towards simplifying the test for indirect discrimination and the shift of the onus of proving reasonableness onto the respondent. However, the bill retains what is arguably the most problematic feature of the current definition—namely, the requirement that an aggrieved person show that they cannot comply with the requirement or condition.

This has been held to require that a person must show they face a substantial disadvantage in complying with a requirement or condition. The commission's written submission notes the problems that have been created by this test in a number of cases. We argue that the focus should be on the disadvantage caused by the condition or requirement, as is the case under the SDA definition of 'indirect discrimination'. A test of compliance focuses a court's inquiry on the resources and perseverance of a person with disability. It results in the court asking, in effect, what level of distress, inconvenience and embarrassment a person with a disability should have to endure before they can be said to be unable to comply with a requirement or condition. That is a long way from equality for people with disability. The starting point should be that people with disability are entitled to live without disadvantage, not that they are expected to put up with it.

Legitimate concerns of respondents are addressed through the test of reasonableness and the defence of unjustifiable hardship. The commission therefore urges the committee to recommend that the definition of 'indirect discrimination' be amended to mirror the definition in the SDA. Of course, this also has the distinct advantage of harmonising our federal unlawful discrimination laws.

Our third concern is with the duty to provide reasonable adjustments. The commission strongly supports the bill's intention to make explicit the duty to provide reasonable adjustments. However, the provisions in proposed sections 5(2) and 6(2) are unnecessarily complicated and may create uncertainty. They are not easy provisions to read and understand. The commission therefore proposes a simpler model which we believe will achieve the same result as that proposed by the bill in a way which brings greater certainty for applicants and respondents. The model works by providing a more detailed definition of 'reasonable adjustment' that requires a person to show that the adjustment will alleviate their disadvantage or promote equality of opportunity.

The commission's model then defines a failure to make reasonable adjustments as discrimination but does not replicate the more complicated language of direct and indirect discrimination, as the bill does in proposed sections 5(2) and 6(2). The duty then applies in the areas of public life in which discrimination is unlawful. A respondent has available the defence of unjustifiable hardship. This is consistent with the bill's proposed section 4(1) definition of 'reasonable adjustment', which defines a reasonable adjustment as any adjustment that does not impose an unjustifiable hardship. We believe this model clearly and expressly gives effect to the intention of the bill—to create an explicit, positive duty to make reasonable adjustments.

The commission's written submission also identifies a number of other areas in which the bill might be improved. In the time available, I will not address those. I will note, however, that the commission considers that many of the recommendations made by this committee in its recent review of the Sex Discrimination Act may well be equally relevant to disability discrimination. We submit that there would be considerable value in government considering how changes proposed by the SDA report might be implemented for the DDA.

Finally, I note that the commission expects that the proposed changes, by improving the operation of the DDA, will result in a further increase in the demand for the commission's complaint-handling services, as more people seek to use the DDA to protect their rights. Given the recent cut to our budget, we are significantly concerned about having adequate resources to meet this additional workload.

Can I make one brief, more personal comment with regard to submissions to this inquiry. As you indicated, Senator Crossin, there have been some 29 submissions made to this inquiry. About half of those submissions are available on the website in a form that I can read, and they are only available when requested. Particularly in relation to an inquiry about disability discrimination legislation, I think this is an unfortunate practice of the parliament. It is a matter that we have raised with parliament over time and a matter that I hope the government will move to quickly address. Thank you again for the opportunity to meet with you today. All three of us are very happy to answer any questions which you may have.

CHAIR—Thanks very much. Mr Innes, let me start with your last comments about submissions. Is this a problem with all submissions that get loaded onto the Parliament House website?

Mr Innes—I think that it is, because submissions are primarily loaded in PDF format, which is an inaccessible format. The problem could be easily solved by the parliament requiring that submissions be made available to them in Word format as well as PDF format and making those word files available on the website rather than people having to request those files. Effectively, the current practice meant that last night, when I wanted to look at a particular submission, I was unable to do so. Because it was outside office hours, I was not able to request the Word version of the submission, and it was only available on the site in PDF.

CHAIR—Thanks for bringing that to our attention. I notice that for a lot of documents you can click 'PDF' or 'Word', but you are saying that that is not standard practice and we should raise that.

Mr Innes—That is right, and I would assert that there is potential for complaints to be lodged under the DDA if a submission has been provided in Word format and has not been made available on the site in that format.

Mr Mason—It was particularly striking to find that our own submission was made available in the first instance only in PDF when it was provided in Word—and I know it was because I provided it. To have it converted to a format that is less useful is depressing. I am aware of some other inquiries—not of this committee, I should say—where it is clear that someone has consumed their time and all of our money in printing off useable documents, scanning them less than adequately and then re-rendering them in a format less adequate than that in which they were provided in the first instance.

Mr Innes—This is not the first time I have raised this issue. I raised it in the same-sex inquiry as well, where we had the same problem. It is an ongoing issue with the APH website.

CHAIR—I am sorry; I must have overlooked that when you raised it. Outside of our reporting on this bill, I am sure that this is something that this committee could take up separately and quite quickly by writing to both the Speaker and the President of the parliament bringing it to their attention. We could seek to do that outside of reporting.

Senator BARNETT—Through you, Chair, Mr Innes, could you advise when you have previously raised it? You mentioned you did that during the same-sex inquiry, but have you raised it officially at any other level? Have you ever written to the President of the Senate or the Speaker of the House of Representatives, for example?

Mr Innes—I think we have written to both the President and the Speaker, but we have certainly written to the President of the Senate. I would be happy to make that correspondence available to the committee.

Senator BARNETT—When roughly would that have occurred?

Mr Innes—Some time last year. I would say around the middle of last year.

Senator BARNETT—Did you receive a response and, if so, what was it?

Mr Innes—I think the effect of the response—and I would need to go back and look at the correspondence—was that to make files available in an accessible format was not something which the APH website was in a position to do at the time. The argument was that PDF files were primarily used because they were unable to be altered. But it is just as easy to alter a PDF file as it is a Word file these days, and the parliament could avoid the need to convert PDF files that it received just by asking for the submissions to be filed in Word.

Senator BARNETT—Just to get clarity on this, if a document is in Word, as far as you are concerned there are no problems with people with disabilities accessing that? Is that the simple sum result—a document being in PDF and in Word solves the problem?

Mr Innes—Yes. I can access Word files on a machine like I have here or on a desktop PC with voice or braille output and, because I have the expensive technology to do so, I can access some PDF files as well—it depends on how they are scanned and how they are formatted—but many people with the less expensive interfaces are unable to do that, whereas that is not the case with HTML or Word files.

Senator BARNETT—You have highlighted a good point. It is something we will certainly be following up on. The chair has made some comments in that regard, so you can leave that with us.

Mr Innes—Thank you.

CHAIR—Mr Innes, can I take you to some questions about your submission. On the issue about the requirement for a comparator to be removed, we heard these arguments when we were looking at the Sex Discrimination Act. Does the same thing apply—that it is very hard for a person making a complaint? Do they have to compare it with someone who would be in a similar situation without that disability?

Mr Innes—I might let my colleagues comment in a moment, but I would say that it is probably worse in terms of people with disabilities—it is at least as bad or worse—than it is in terms of gender, because disability can of itself be quite a unique situation. It is sometimes very hard or impossible to get an actual comparator. It means a need to go through this tortuous process of developing a hypothetical comparator.

Mr Hunyor—I do not have anything to add. It is a problem that has been raised by a number of commentators. We note there is a passage there from Lindsay, Rees and Rice at paragraph 23. Similarly, Dr Belinda Smith from Sydney University has written on the problems that the comparator raises. Our submission

is that to remove that provides simplicity and really gets to the heart of the issue—that is, was the action because of disability? That is really the question, which is a causal one. Using comparative methodology may be useful in determining whether or not something was done because of disability. So you are not necessarily fundamentally changing anything; you are simply simplifying it. You are asking the relevant question and not having to try to construct someone who has the same objective features—for example, someone who is blind and you have to try to fumble around figuring out who your comparator is in that sort of situation.

CHAIR—When you talk about simplifying the definition, what form of words would you be suggesting? What is the practical application of what you are proposing?

Mr Hunyor—The model that we suggest is that found in the ACT Discrimination Act 1991—this is in paragraph 24 of our submission—and is the model that this committee also adopted in the SDA enquiry. It provides simply that discrimination occurs when the discriminator treats or proposes to treat the other person unfavourably because the other person has a disability.

CHAIR—If we look at the legislation before us, is where the changes would be made page 7 of the bill, Direct disability discrimination? Is that the definition we are talking about?

Mr Hunyor—In section 5, subsection 1, yes. One possibly simple solution would be to remove the words following 'less favourably' in that proposed definition. So you have: 'For the purposes of this Act a person discriminates against another person on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the person less favourably.' We would say that that is what discrimination is all about. The words that follow there are really the ones that cause the trouble, because it requires you to consider what the circumstances are that are not materially different.

CHAIR—Thanks for that. When you talk about the duty to provide reasonable adjustments, you say in your submission that you have proposed an alternative model to ensure that effect is given to the intention of the bill. Can you take us through what your alternative model is and how that would differ from what is being proposed?

Mr Hunyor—Part of the commission's concern is that, when we read proposed sections 5(2) and 6(2) it causes us a moment of nausea as we try to figure out what it means and how it is going to work. It is just very complicated and very difficult to figure out how that is going to work. What we propose—which, as we say, hopefully achieves what is trying to be achieved here—is to introduce a definition of 'reasonable adjustment' that clearly links an adjustment to a person's disability. At paragraph 59 of our submission we propose:

'Reasonable adjustment' should be defined as a modification or adjustment that:

- alleviates a disadvantage related to an aggrieved person's disability; or
- assists an aggrieved person to have opportunities which are, as far as possible, equal to persons without the aggrieved person's disability.

We would say that that is an approach that is consistent with the convention and is consistent with what is generally meant when we talk about reasonable adjustments in the context of disability discrimination. So that is the concept of reasonable adjustment.

Then the duty, which is in paragraph 58 of our submission, becomes a much more simple duty. It could simply state:

For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if the discriminator refuses or fails to make a reasonable adjustment.

So it is quite a simple statement: if you fail to make a reasonable adjustment, that is discrimination. We define reasonable adjustment as being something that alleviates disability or assists an aggrieved person to have equal opportunities. Then, by defining that as discrimination, the areas in which the failure to make reasonable adjustment is unlawful are set out in divisions 1 and 2 of part 2 of the act—so goods and services employment. It is then clear from those sections who has the duty—the employer, the service provider, the educational institution—and in what circumstances in relation to the terms and conditions of employment, the terms and conditions on which a student is admitted and so on. It means the duty is a simple one but quite a specific one and linked neatly to a person's disability.

CHAIR—So the current sections 5(2) and 6(2) are too complex and do not really hit the mark. Would that be fair to say?

Mr Hunyor—They may well hit the mark; there is just some uncertainty about how they will operate because they seek to use the language of 'indirect' and 'direct' discrimination. So it means that the problems

we have identified—with identifying a comparator, in the context of indirect discrimination; the ability to comply; defining your requirements and conditions—are all imported into this test of reasonable adjustment. We would say that it is simpler to simply say what we mean, and that is: you have a duty to provide a reasonable adjustment; if you do not, that will be discrimination. The defence to that is the overarching defence of unjustifiable hardship.

Mr Mason—I just want to add that we certainly do not regard our proposals as imposing any additional level of regulatory burden compared to the existing proposals in the bill or indeed compared to the existing effect of the act. The bill as it stands is intended to draw out more clearly for everyone what can be parted out from mainly the existing effect of indirect discrimination if one squeezes hard enough. As Jonathon says, we think the virtue of our proposals is to state it all more simply but not to impose a higher level of duty or obligation.

CHAIR—Your recommendation 4 is 'as an alternative to the strongly preferred recommendation 3'. So you are suggesting recommendation 3, but, if that is not picked up, then it should be recommendation 4. Is that what you are saying?

Mr Hunyor—That is correct. Recommendation 3 is that the definition of 'indirect discrimination' be simplified to mirror that of the SDA. That has the advantage of harmonising the laws. The SDA is a model that has been road tested so we know how it will work. The recommendation simplifies the test of indirect discrimination to be a condition or requirement that has the effect of disadvantaging people with a disability. Again, it gets to the heart of indirect discrimination without needing to show that you cannot comply. The problem with compliance has been the level of disadvantage someone needs to show before they can prove that they cannot comply with something. If the current wording is to be retained and the compliance with the requirements or condition is insisted upon, then our alternative is that the act should clarify that a person cannot comply if to do so would have the effect of disadvantaging them. That would modify the current test, which is substantial disadvantage. We would say that the DDA should not require people with disabilities to suffer what can be a disadvantage but not necessarily a substantial one if in all the circumstances it is not reasonable and there is no unjustifiable hardship and so on.

CHAIR—Your preference is to mirror the definition that is in the SDA, which would mean an amendment to this act before us in order to do that?

Mr Hunyor—That is right

Mr Innes—Yes, it would. Can I just make it clear that that is a definition that is in the SDA and has been for some time—it is a road tested definition, as it were. We are just saying that it would be a better definition and provide consistency across discrimination legislation.

Senator MASON—It is not just a matter of desire for technical purity on our part as the administrators. The committee may have already noticed that there are a couple of submissions that pick up the importance of this set of issues for people with disabilities in various settings. I am thinking of the submissions from the Australian DeafBlind council and from Blind Citizens Australia, for example, both of whom pick up issues in this area in quite a vivid way.

CHAIR—Finally, can you take me through the findings of the Purvis case for the *Hansard*? Is that too complicated? I would like to know what connection it has with the amendments that we are dealing with. Is that a simple thing or is it very complicated?

Mr Innes—We can, but I am not sure that it is a simple thing.

CHAIR—When it is to do with law, I suppose nothing is simple!

Mr Hunyor—The amendments respond to a number of the things in the Purvis case. One of the ways that the amendments respond to the Purvis case is by clarifying that the definition of disability includes the manifestations—I think that is the wording of the proposal—of a disability. So in that sense it clarifies what we know the High Court said in Purvis. Another thing that it seeks to do is, by modifying some of the definition of direct discrimination, to clarify the operation of the law as the High Court set it out in Purvis. One of the things that the High Court made clear in Purvis was that there is not a duty of reasonable adjustment expressed in section 5 of the DDA. In that sense that is again one of the ways in which the bill responds to Purvis. Prior to Purvis, people argued that there was in effect an obligation to make reasonable adjustments and I think that was the effect, commissioner Innes, of that first instance in that decision. The High Court respectfully disagreed—

Mr Innes—Yes.

Mr Hunyor—and this bill effectively seeks to make explicit what had been thought to be part of the DDA before Purvis.

CHAIR—Okay, so that is the link between the case and what we have before us.

Mr Innes—That is right. I should say that Jonathon is being kind because it was not only the High Court but every other court on the way to the High Court that disagreed with me. One of the purposes of the Productivity Commission's recommendations is to remedy that problem.

Mr Mason—We would say that, in Purvis, the High Court found that the existing section 5(2) of the act did not do what was intended, which was to incorporate a 'reasonable adjustment' concept into the definition of 'direct discrimination' in the act. The drafting, as per 1992, did not work; it did not stand up to the analysis of the court. That is why we welcome the government's having brought into the parliament amendments intended to confirm that there is indeed a duty of reasonable adjustment in the act, without having to trawl through the thickets of indirect discrimination analysis to get there.

The other issue that was raised in Purvis, which I suppose motivates our simplifying proposal in relation to direct discrimination, was that the High Court found that whereas, in the sex discrimination area, sex based distinctions could not be 'material differences'—because that would fatally undermine the purposes of the act, as various courts have said—in the Disability Discrimination Act material differences could be disability related distinctions. But it was not explained which ones, or when, and how comparable total undermining might be avoided. So our proposal to prevent any total undermining is to get rid of the term 'material difference' in the DDA altogether, because it could mean anything at present and we do not think that is a safe state for the law to be in.

CHAIR—You recommend that section 9 of the act be amended to include reference to guide dogs, but section 9 does actually say that an assistance animal is a dog, or other animal, which is accredited by a state or territory and has been accredited by an animal training organisation. Do you need to specifically mention the term 'guide dog'? Does this recommendation not cover that sufficiently?

Mr Innes—I think it is just reinforces the role that guide dogs have played as some of the first, and perhaps still the major, assistance animals. I think the definition does cover it but, bearing that in mind, we feel that it is necessary to add that extra degree of specificity.

CHAIR—So you would amend it to say, for example, that, for the purposes of this act, an assistance animal is a dog, such as a guide dog, or other animal? Or would you want to specifically list a guide dog in that definition?

Mr Innes—I am just trying to remember whether our submission proposes a—

CHAIR—Your submission recommends including a guide dog as a specific further example of an assistance animal in section 9(2).

Mr Innes—We have not made a recommendation as to the actual drafting.

Mr Hunyor—The current act defines an assistance animal as a guide dog or other forms of assistance animal. We would suggest that a similar drafting would be appropriate so that an assistance animal is (a) a guide dog, (b) a dog or other animal accredited—and so on. You could achieve it in that sort of way.

CHAIR—We will go back and have a look at the current definition and look at the difference there.

Mr Hunyor—We do accept that a guide dog would fall within the current definition. It is just that the act currently acknowledges the status of guide dogs and it is unfortunate, in a way, to lose the recognition that is currently there.

Senator BARNETT—While we are on the topic of guide dogs and assistance animals, there is a submission from the Sydney Opera House. I am wondering whether you have read that and have some views with respect to their recommendation that assistance animals be appropriately trained and that the act require independent verification that a high standard of appropriate training has occurred based on standard criteria. They talk about health and hygiene issues and having animals that are properly trained to deal with large crowds and noisy venues. That is from the Sydney Opera House.

Mr Innes—I might let Mr Mason comment in a bit more detail. I have not looked at that submission but have no difficulty with the concept of assistance animals being appropriately trained; in fact, I think that there being such training and some form of certification supports the regime available for guide dogs and assistance

animals. I think it is valid to provide some reassurance in that regard to operators of various facilities. But I have not looked at that submission, so Mr Mason might be in a better position to comment.

Mr Mason—I think we have some sympathy with the spirit behind what the Sydney Opera House is putting forward. The commission has dealt with this issue a number of times and in different ways; it came up in a submission to government some years back and, rather more recently, in the course of making a decision on an application for temporary exemption brought by the Australasian Railways Association. In that decision we included a number of conditions as to when assistance animals ought and ought not be required to be recognised as suitable for accompanying people on public transport. I think that at present we support the balance that the government has struck in this area. The most desirable destination would be a comprehensive set of recognition regimes, established, one would expect, at state and territory levels, which federal discrimination law could then recognise. But at present there is not such a comprehensive set.

As we see it, the bill recognises that there are people out there deriving value in terms of opportunity, access and participation in society from the use of assistance animals. To require people only to use assistance animals if they have been able to get them certified, either under a state and territory regime or by using the services of an accredited organisation, would exclude a significant number of people from those benefits and that access and participation. The first line—recognition—is indeed under state and territory law. The second line would be under accreditation from an organisation recognised by the regulations. The bill has still left open a third category. If a complainant could show—and it would be up to the complainant to do—that their animal meets those tests; it is not as clean and as certain as the comprehensive regime under state and territory laws, but it allows that scope as a subsidiary position. We certainly think it is far preferable to the existing position, where there is at least some degree of invitation in the drafting of the act for people to assert that this is an assistance animal because they say it is. We think that, compared to that, the bill moves certainty for all concerned substantially forward.

Mr Hunyor—The proposal in the bill—the proposed section 54A, which provides defences in relation to assistance animals—helps get the balance right. It makes it clear that it is not unlawful for a person to request or require that the assistance animal remain under the control of a person, to request that the person produce evidence that the animal is an assistance animal and so on. The defences that are created by 54A provide an appropriate balance between the needs of organisations to ensure safety of the public, hygiene and those sorts of things.

Senator BARNETT—Yes, I know, but the point that is being made by the Sydney Opera House and, perhaps, others is that there must be an appropriate level of acceptance of evidence that the animal is an assistance animal—appropriately trained, independently qualified et cetera. How far do you go in ensuring that such an animal is independently assessed and appropriately qualified? No doubt many of these animals do the job and do it well, but whether they get the tick by some state government department begs the question. I think that is an issue that is out there for consideration.

Mr Innes—We have encouraged the development of state regimes. In fact, whilst what David says is correct—that there are not any such regimes currently existing—I think that it is also fair to say that there are a number of states where a fair amount of work has been done. In fact, I understand there is likely to be an announcement in the next week or so about recommendations in one particular state where further work has been done in that area. So I guess our position is that this bill gets the balance right at the moment because there is the need to reinforce that with these sorts of regimes. I think that, once they occur in one or two states, there will be a flow on.

Senator BARNETT—That is fine. Let's move on if we could.

Mr Innes—I am sorry.

Senator BARNETT—No, not at all—it is a relevant point. Just in regard to this act, you have already highlighted some of the differences between this act and the Sex Discrimination Act. Of course, you also have the Racial Discrimination Act and other antidiscrimination legislation around the country, both state and federal. Can you highlight to the committee any other key differences between this act once it is passed, let us say, and the other key antidiscrimination legislation.

Mr Innes—I am not sure that we are in a position to do that. One of the proposals coming out of SCAG is work towards harmonisation of discrimination legislation around the country, and I think the first step towards that is to look at the various areas of federal legislation and harmonisation of those. We have flagged that in our comment about the SDA, but I do not know that we are in a position to—

Senator BARNETT—Have you made the submission to SCAG?

Mr Innes—No, not to SCAG, but we have certainly put views to the Commonwealth Attorney. So I suppose in that sense they have been represented.

Mr Hunyor—And we are involved in a working group on harmonisation, so we are having input there.

Senator BARNETT—Okay. I draw your attention to the submission of the People with Disability Australia Incorporated. They refer to the significant number of exemptions under some pieces of legislation but not under others. They put that in their submission. I have it here somewhere. I just wondered if you have similar views to them.

Mr Innes—I have not looked at that particular section of that submission, but certainly there is some work to be done in looking at—

Senator BARNETT—Page 4 of their submission, under the executive summary states:

These acts do not contain the number of exemptions nor contain tests such as unjustifiable hardship.

They are referring to the SDA and the Racial Discrimination Act and comparing them to the DDA.

Mr Mason—I think, from the work that we have done so far, that we would say that the major areas of need for harmonisation of the DDA with the existing suite of federal law either are already picked up in this bill or would be picked up with the suggested further amendments that we are making, and that is principally in the area of the definition of discrimination. Unjustifiable hardship is clearly a distinctive feature of the DDA compared to any of the rest, but I think it is fairly clear from our submissions that we support the continued existence of that distinction. You do need a mechanism for dealing with areas where adjustments required by disability impose difficulties or costs, and if you do not have unjustifiable hardship then you end up having to come up with a multiplicity of other tests or to leave it to the courts to make up as they go along. One of the other things we would say about the Purvis case is that it is pretty clear that that is what went on. At the time, amendments to expand the operation of the unjustifiable hardship defence to all aspects of education, which is what was at issue there, had not gone through, so the court was driven to some fairly complicated conclusions about the meaning of discrimination in order to avoid what the High Court and the other courts involved saw as an unsustainable result. So we actually support—and I think we have said this in our submissions—the extension of unjustifiable hardship to apply generally as a defence under the Disability Discrimination Act rather than only in particular instances, as is presently the case.

Senator BARNETT—I have raised it in the context of the issue of harmonisation. You have raised the contrast here between this act and the SDA and your preference for including in this act some of the references in the SDA and, indeed, the Senate committee report—I assume you are referring to the majority recommendations of that report. I have a question on the definition of 'disability', which under these proposed amendments will now include medically recognised symptoms and genetic predisposition. You obviously support that. Could you give an example of where that would be relevant and how that would work.

Mr Mason—I suppose that one should start by saying that we think that this confirms what the act already means, and that was the effect of our submissions to the Australian Law Reform Commission's inquiry in the area. Indeed, I think it is fair to say that that is what the ALRC thought as well: the DDA already applies to these issues and it was a matter of making it clear that that is the case.

Senator BARNETT—So this is really clarifying the position.

Mr Mason—Yes—that someone who has survived cancer is a person with a disability for DDA purposes. Someone who has a family history of and therefore an underlying predisposition to various forms of cancer would be covered as well if they are discriminated against because of that.

Senator BARNETT—On that point specifically, is this going to have any impact on insurance companies—let us say in taking out life insurance—if they are suddenly required not to take into account some medical predisposition?

Mr Innes—I think insurance companies are currently taking those issues into account, so the short answer to your question would be no, because in our view this clarifies what is already the case in the legislation. All of our experience with insurance companies, I think, would demonstrate that they do, in fact, take that into account in their assessments.

Mr Hunyor—There is an existing exemption for insurance companies that I think will apply in the same way.

Mr Innes—Yes.

Mr Hunyor—I would not expect that this will have any effect on insurance companies.

Senator BARNETT—All right. Secondly, on the general issue of cost and the burden of regulation, this is an issue. We have talked about getting the balance right, whether in this, the Sex Discrimination Act or other antidiscrimination acts. We do not have submissions at this stage from employer groups, whether the chamber of commerce, AIG or whoever, but do you have a view as to whether the balance is right with respect to these amendments in terms of the cost to employers and the community and the burden of regulation and red tape?

Mr Innes—As we have indicated in our submissions, the recommendations that we have made are not to differentiate from the broad purpose of this legislation but rather to cause some simplification of the wording of the bill in a number of areas we have detailed. Whilst we have not done a detailed analysis, I would assert that that simplification would in a number of cases reduce costs, particularly legal costs for both applicants and respondents, because it would make the operation of the legislation clearer and simpler. We have not done a detailed analysis, but I think it is fair to say that this bill does not, in broad terms, impose any further burdens on either party and that in some ways it reduces the complexity.

Mr Mason—I think that that is one of the virtues of having had these amendments, in large part, emerging out of a fairly extensive process conducted by the Productivity Commission, which started from a reference to examine whether the act was imposing unnecessary burdens. They concluded, in broad terms, that it was not and that in a number of areas its operation would be improved without excessive business costs. That was not via a complete formal regulation impact statement process, perhaps, but it was pretty close.

Senator BARNETT—I have two other areas where I will ask a couple of questions. Firstly, on the name change—and we discussed this briefly at Senate estimates last year—I understand that occurred officially on 4 August.

Mr Innes—September.

Senator BARNETT—On 4 September last year?

Mr Innes—Yes. You say 'officially'—I should say that the commission took a decision operationally to change its name from that date but clearly it has not yet occurred legislatively.

Senator BARNETT—No, and that is what I want clarity on. We discussed this at estimates. You did not request the consent of the minister but you advised the minister prior to the operational name change—or did that occur after the name change on 4 September?

Mr Innes—My recollection is that it occurred before the name change, but you are correct that we advised the minister; we did not request permission. It was the view of the commission that as an independent statutory authority it could make that sort of operational decision. I suppose the government's move to confirm that decision in legislation recognises or supports the commission's approach.

Senator BARNETT—So you would reject the argument that you were acting as a law unto yourself in terms of the name change or in other respects?

Mr Innes—I would say that the commission had the capacity to operationally change its name and that that is what we did.

Mr Mason—Senator, by way of background, you might recall—I certainly do—that this is not novel. The commission has adopted various different forms of publicising its existence and function. For some years its letterhead read 'Human Rights Australia'. In the end that was moved away from—not because it was regarded as unauthorised but simply because it perhaps was not as clearly focused on it being a statutory authority as it might have been.

Senator BARNETT—Sure, but you operate in a different way and manner to, for example, the Australian Law Reform Commission. It acts on initiatives and recommendations given to it by the government or the Attorney-General, whereas you act based on advice from your commission and act accordingly, obviously within the law and the act.

Mr Innes—Yes. We are governed by various relevant pieces of legislation, such as the Financial Management and Audit Act, and we operate within those, but it was the commission's view that as an independent statutory authority we had the capacity to take that decision and we thought it was appropriate to advise the government prior to its implementation.

Senator BARNETT—Finally, how many Australians have a disability?

Mr Innes—The Australian Bureau of Statistics estimates that just under 20 per cent, or one in five, have some form of disability according to the ABS definition, which is perhaps slightly narrower in some respects than the definition in the Disability Discrimination Act.

Senator BARNETT—That is why I asked. Now that the definition has broadened slightly or there has been confirmation in terms of it being a predisposition, what would your view be in terms of the numbers and the difference between your view and the ABS's?

Mr Innes—That is hard to estimate, but I would suggest that it is around or slightly more than 20 per cent, or one in five, Australians, which fits the legislation. The nature of our legislation has been different to that of American disability discrimination legislation in that they have a narrower definition. I would be happy to go into details of that if you want, but the effect is that many people with what I would view as legitimate disabilities are excluded from coverage by the legislation. This legislation was always intended to have a broad definition so that people would not be excluded on the basis of their disability; however, if they cannot establish that they have been discriminated against, of course, they do not get through that second gate.

Senator BARNETT—But what is the definition that you use which is different to that of the Australian Bureau of Statistics?

Mr Innes—The difference in the definitions?

Mr Mason—If I could give one pertinent example: both senators present would have a disability under the DDA definition if you were discriminated against because you wear glasses. Now, there is no way that you would meet the ABS definition, and nor would I, on that basis. We would not, from day to day, regard ourselves as having a disability because we wear glasses. But if someone was silly enough to discriminate against us because of that—and there have been complaints on that issue, believe it or not—then we are through the gate. The act does to some extent incorporate a social or environmental model of disability which takes into account discrimination as something which is disabling. If we are not discriminated against then we are not disabled. Now, there are some people who have a level of impairment such that clearly the disability is not so context dependent. There would be other instances as well—for example, someone who has had cancer, survived, is completely symptom-free and whose prospects for life are the same as for someone who has not had cancer. Functionally, they do not have a disability. If he or she is discriminated against because of that history, then they do.

Senator BARNETT—My final question is whether unborn Australians have protection under this legislation?

Mr Innes—I would not have thought so. I cannot think how they could.

Senator BARNETT—You have referred to the UN convention on the Rights of Persons with Disabilities in your submission and your support for that convention. I stand to be corrected, but I thought that there was a reference in that convention to unborn children.

Mr Innes—I would have to go and look at the convention, but my recollection of the debates around the drafting is that that issue was fairly carefully circumscribed.

Senator BARNETT—Are you aware of any UN conventions referring to protection for babies in utero?

Mr Innes—I am sure there are some, senator, but I could not take you to them.

Senator BARNETT—Should the legislation provide protection for unborn Australians?

Mr Innes—It has been standard practice for these pieces of legislation to commence from birth. I have not thought about whether or not the legislation should operate in that regard. That raises some complexities.

Senator BARNETT—If you want to take any of those questions on notice, I would be happy for you to respond accordingly.

Mr Innes—I might because—

Senator BARNETT—You do not have to do, but if you would like to please feel free.

CHAIR—Senator Barnett, I remind you that we do not expect witnesses to comment on what might be a matter of policy, essentially. We do not ask witnesses, particularly witnesses in this instance, to provide us with advice about what could potentially be a reflection on the government's policy or lack of policy in that area.

Senator BARNETT—I think you are talking about government departments. This is the Human Rights Commission. That is about policy from witnesses in government departments; it does not apply to witnesses in

general. I have left it open for Mr Innes, on behalf of the Human Rights Commission, to take it on notice. That is an option for you, Mr Innes.

Mr Innes—I am happy to do that, and thank you for reminding me of that. We will give some thought to whether we want to make further comments. As I say, it is not an issue that I gave much thought to when preparing for this hearing. I would like to think about it a little bit more.

CHAIR—Thank you, Mr Innes and your colleagues, for your time and for the preparation of your submission to this inquiry.

Proceedings suspended from 11.19 am to 11.29 am

BANKS, Ms Robin, Chief Executive Officer, Public Interest Advocacy Centre

CHAIR—Welcome. We have a submission from you, which for our purposes we have numbered 7. It is with the committee. Do you need to make any amendments or changes to that before we start?

Ms Banks—No.

CHAIR—I invite you to make a short opening statement, and then we will go to questions.

Ms Banks—Thank you for the opportunity to attend and give evidence in this hearing into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. You will have seen from our submission that we consider the bill a very positive step, in the main, but have a few concerns about some of the fine detail. I propose really only to make a few brief comments, less about our submission and more in support of some proposals that we have now had a chance to see, particularly in the submission of the Human Rights Commission. Then I am happy, obviously, to respond to any questions and clarify any aspects of our submission that are unclear or require further elaboration.

As I said, we have had the opportunity to review some of the other submissions. I have not read them all—and just before I go any further I noted in the questions to the Human Rights Commission that you, Senator Barnett, referred to page 4 of our submission. I think the submission you were referring to was the submission of People With Disability Australia. Just for the record, I correct you there.

Senator BARNETT—Apologies for that.

Ms Banks—No, it just did not sound familiar and I thought I was not going to be able to answer questions about it. As I say, we have had the chance to review the other submissions, and I commend particularly the submission of the Human Rights Commission to the committee in relation to several of the recommendations. There is nothing in the commission's submission that we do not agree with, but in particular we think that their recommendation 1, which deals with the need to clarify, in the definition in proposed section 4, the protection of carers and assistants and other aspects that are covered in proposed sections 7 and 8. We also commend their recommendation 2, in relation to the definition of 'direct discrimination'. We think it is a significant improvement on the proposed amendment.

Recommendation 3 we would endorse. Again, we think it very much reflects what is understood by most courts and tribunals to be the requirement, but occasionally we get case law that goes in a different direction. So we would fully endorse `the clarification that the commission has recommended.

We also would endorse their recommendation 5, in relation to reasonable adjustments and a stand-alone provision that a failure to make a reasonable adjustment is discrimination. It reflects the commentary in our submission and the concerns we raised about the focus in that definition and I think provides quite a clear and neat way of dealing with those comments.

Finally, I would urge the committee to seriously consider the definition of 'reasonable adjustment'. The commission's commentary on it and ours—and that of many of the other submissions, I think—highlights the problem that the current definition fails to talk about the need to consider how effective the adjustment will be in responding to the needs of the person with the disability and ensure they have equal opportunity. Instead, it focuses on the question of unjustifiable hardship, which should be kept separate. I noticed that the submission of Kate Eastman and Ben Fogarty also noted the concern about the two concepts being conflated. Separating them out and clarifying that, for an adjustment to be reasonable, it really needs to be fit for purpose—it must address the needs of the person with the disability—is critical to the act operating effectively.

Senator BARNETT—Thanks. I am sorry I referred to your organisation rather than People With Disability Australia. It was page 4 of their submission, so apologies with that. We have clarity on that now. I have a question on your submission. Under the migration section, you state:

PIAC is disappointed that the amendments proposed in the Bill do not include repeal of section 52 in its entirety.

Your view is that it should be entirely removed. Can you talk to us about that and about how the status quo, where the legislation as it currently is has an exemption under the Migration Act, is in your view inappropriate. Can you explain that to the committee?

Ms Banks—Certainly. While the submission of PWD was not ours, I think their general point is a good one. One of our ongoing concerns about all antidiscrimination law—and the act that particularly falls within this concern is the Age Discrimination Act—is its use of blanket exemptions. We certainly do not object to exemptions that you can make out through evidence. The unjustifiable hardship defence, the inherent

requirements provisions and the insurance exemption that exists in the act all require an entity seeking to rely on them to be able to establish on evidence that they cannot do what they are intending to do without discrimination, thereby making that discrimination lawful.

The difficulty with any blanket exemption is that it does not have any nuance to it; it does not allow for circumstances where, in the case of migration, a person may in fact be able to establish quite easily that they would be a very solidly contributing member of the community, that they are going to be able to contribute to a family situation by being part of a family that comes to Australia and that the overall cost is not one that Australia as a country should be concerned about. The way the act operates now is to effectively say, 'We don't have to consider that; we can just say that a person with a disability can be excluded from entering this country as a migrant.'

We have seen the impact of that recently in Victoria with the initial decision by the immigration department about a doctor who was providing services in rural Australia. He has a child with a disability. I do not remember his name; my apologies. The family were basically excluded by the immigration department from being able to progress with any sort of citizenship status, and in that circumstance there was no recourse to discrimination law because there is this blanket exemption. We would much prefer that the immigration department, its conduct and the Migration Act be subject to the same sorts of principle based exemptions that everybody else is—that, if they can establish that there would be an unjustifiable hardship to Australia as a result of the person being admitted to the country as a citizen or permanent resident, they should be able to do that—but there should not be a blanket exemption. It is really that idea that you should do the absolute best you can in discrimination law rather than cutting away and excluding whole groups of people or whole areas of life from consideration.

Senator BARNETT—Why do you think they have not gone down that track?

Ms Banks—I think it is a matter of timing. I noted that after that incident in Victoria the minister did intervene and that there has been an indication from the government that they will consider that whole issue of the exemption of the Migration Act. I know that many advocates in the disability sector are urging the government to do that. I have not turned my mind to why the Productivity Commission did not recommend that, but I think it had been seen for a long time as a bit of an area that you could not touch, and the absence of it may well reflect that. We certainly support the amendments that are in the bill to reduce the scope of the exemption, but we would want it to go further.

Senator BARNETT—All right; that is fine. I asked the Human Rights Commission about the number of Australians with disabilities. Do you have a view on that? Can you alert the committee to that?

Ms Banks—I think I would probably answer it in the same way as Mr Mason did. If you applied the test in the DDA, I think you would find that there are very few people in Australia who do not in some way meet the definition. However, the really critical question—and I have done a lot of training in the past on the DDA—is not whether or not you have a disability; it is whether or not you have been discriminated against because of that characteristic. So it is an inclusive definition of disability but an exclusive definition of coverage under the act. You only get protection if you can establish that, because of that characteristic, you were treated in a discriminatory way.

It causes challenges to most people's thinking. I have mild asthma, so I have a disability under the definition, but I have never needed to rely on the act because I have never been excluded from an activity because of it—although probably if I tried to go scuba diving these days I would be. Then the question would be: is that exclusion a reasonable exclusion? And the answer is probably yes for somebody with asthma.

The test, I think, is right. The inclusiveness of the definition does mean that it is probably a whole lot more than 20 per cent, but from my point of view that is really not the critical question. The critical question is: does it properly give protection against prejudicial conduct, conduct that is based simply on a view that, because of that characteristic, you cannot do something as well as others?

Senator BARNETT—Do you have a view as to whether unborn Australians are protected by the legislation?

Ms Banks—I have never thought about it. When I heard that question, I thought it was a very interesting question. There is certainly a lot of concern within some parts of the disability sector about the rights of unborn children with disabilities, because there is a tendency to terminate those lives or perhaps not sustain them. I had not thought about it. I certainly think there would be some technical difficulties about who would

bring the action, who would be the complainant on behalf of them, but I have never had it raised as a question of a complaint under the DDA. But I do not see anything in the act that precludes it.

Senator BARNETT—I asked this question of the Human Rights Commission as well: with regard to the DDA and its consistency with other discrimination legislation—whether it be the Racial Discrimination Act, the Sex Discrimination Act or other state and territory discrimination laws—do you have a view as to the major differences that should be removed so that the legislation can be better harmonised, as it were? Do you have some views or thoughts on that?

Ms Banks—I would probably want to take a question of that extensive nature on notice. Certainly the acts reflect the time at which they were made—so the Racial Discrimination Act is quite different from the subsequent legislation. At that time it was passed, the DDA was definitely, from our point of view, best practice. I would say that the Age Discrimination Act did not really improve on it in terms of thinking about perhaps a new generation of legislation. So I think it is time to do that—to really think about: are we at the best practice in discrimination law in Australia? We have learnt a lot over the years. The review of the SDA was a really good opportunity to start that thinking. I certainly commend to the committee that you recommend to government that the report from the SDA review be considered in light of other discrimination law. I would not support the view that we should have another review of the DDA quite at this stage. I think these amendments need to be bedded down and the review of the disability public transport standards under the DDA—hopefully the report will be out soon—really should be the focus of any amendments in the short term.

Senator BARNETT—Do you think there are likely to be recommendations for amendments following the standards review?

Ms Banks—I certainly hope so, because there are some quite practical difficulties with the way in which the standards operate.

Senator BARNETT—Such as?

Ms Banks—Enforcement is really not a focus of the current framework, and it really needs to be. We were involved in representing an organisation seeking to challenge conduct in breach of the standards, and we were unsuccessful not on the basis that we could not establish a breach of the standards but because we could not establish sufficient standing for our client, despite the fact that they were a representative body. Those sorts of technical problems really need to be resolved. We have advocated in the past, and we continue to advocate, for an approach that would allow the Human Rights Commission to have standing in relation to breaches of the standards, because the way the standards operate is to say that, if you act in accordance with the standards, it is an absolute defence, effectively, to unlawful discrimination and, if you fail to comply with them, it is a breach. That is a pretty simple test, you would think, and we would like the law to reflect that.

Senator BARNETT—So the issue of standing is one that you would like to have addressed.

Ms Banks—I certainly think the issue of standing needs to be progressed—in the area of standards but also, I think, more generally under the discrimination law. The idea of representative proceedings really has not been able to be explored because of the way in which the act operates.

Senator BARNETT—Is this relevant in the area of public transport in particular?

Ms Banks—In particular it is relevant, yes.

Senator BARNETT—Yes, I am with you there. With regard to these action plans, which you support, you say on the last page of your submission:

PIAC strongly supports to expansion of Part 3 to include the making of action plans more broadly than only the provision of services and facilities …

Would you give us some examples as to why they should be expanded. Can you be specific about that?

Ms Banks—I think I can be specific, and partly from my own experience in the past. I did quite a lot of work with a lot of local government around action plans—talking to them about their obligations under the Disability Discrimination Act and how they could use action plans as a means to be proactive in compliance and work with their local communities. Because they were employers, many of those councils were interested in looking at it beyond the issue of their service delivery. Many employers are used to thinking about compliance with antidiscrimination law in the context of equal opportunity for women. So they effectively have thought around the idea of an action plan in the area of equal opportunity for women in the workplace but have never done it so much in the area of disability. Once they started thinking about action plans around

services they were saying, 'Can we do it in relation to employment as well?' I said, 'Yes, you can. It goes beyond the scope of the definition in the DDA of an action plan, but I certainly encourage you to do that.' Legislating that sort of opportunity will hopefully bring a new wave of organisations thinking about how, beyond just their service delivery, they can improve opportunity within their workplaces and within other aspects of their operations.

The other point is that, often if you are looking at something from a service provision perspective only, you are sort of missing the point. I recall we did some work in relation to the banking sector. There was a bank—I will not name it—that was going through a major refurbishment of all of its local branches. It was very extensive and a lot of the issues had obviously been thought through. From the point of view of service delivery—the counters in the area where you would go and talk to somebody about getting a loan and so on—access had been greatly improved. But in terms of the height of the counter from the perspective of the employee, it was too high for a person with a wheelchair who worked behind the counter. To me that does not make sense. You are not just thinking about people with disabilities as recipients of service; you should be thinking about them as potential employees. It is good for the economy; it is good for everybody. So this is, I guess, a way to encourage that to happen. It is not a mandated process, but, if organisations can show they have gone through that thinking to create a more inclusive workplace and all of those other things, it potentially gives an additional protection if the defence of unjustifiable hardship is then sought.

There are lots of examples where, for a little bit of extra work and thinking at the outset, an action plan that covered more than just service delivery would be a very easy achievement and would really, I think, take thinking about disability and inclusion the next step in this country.

Senator BARNETT—Have you looked at proposed section 61 of the bill and the descriptors referred to in that?

Ms Banks—I must be looking at the wrong page, because I have proposed section 61 as:

Omit "of a service provider".

We must be close to the right place, though.

CHAIR—I think it is page 18 of the bill.

Senator BARNETT—We can pass on that question. I will pass back to the chair and come back to that if need be. Thank you.

CHAIR—I had a few questions to ask you about section 52 of the Migration Act but I think you have pretty well covered those in your responses to Senator Barnett. I did want to ask you, though, about the burden of proof. Can you take me through your submission and the clarification you think would be better in relation to the burden of proof in section 21A. You say that what is proposed is problematic. Why is it problematic and what do you think needs to be changed?

Ms Banks—The issue with inherent requirements is about whether or not an employer seeks to rely on that as a defence—whether they seek to say that they have not employed a person because that person could not fulfil the inherent requirements of the job. That defence, on its face value, is not challenged by us. The question is whether or not without really thinking about it at the time of making the employment decision you can subsequently, as the employer, retrospectively justify that decision. There are certainly cases in Australia that say that if you can later show that the person could not meet the inherent requirements, even if you did not test it at the time, then you can have the benefit of that defence. The purpose of discrimination law is, in part, to challenge discriminatory attitudes. If you look at the person in front of you in an employment context and, without testing your presumption, presume that they cannot do the job because of a disability then that is the discriminatory attitude at work. As the employer, before you can rely on that defence you should have to show that at the time of making the decision you considered what the inherent requirements were and you tested the person's capacity against them—so your selection process was designed to properly test people's capacity to do the job and their merit. That then takes you out of just allowing prejudice to determine employment decisions. I guess the clarification that we are seeking—and we have not, I think, sought to draft anything—is to say that if a respondent is seeking to rely on that defence they have to be able to establish that at the relevant time, at the time of making the decision, they turned their mind to the inherent requirements and how the person may or may not have met them, rather than being able to sort of play catch up later on, which is what has happened in some cases.

CHAIR—So how do we rectify this in the bill that is before us?

Ms Banks—That I will take on notice, because I am not very good at drafting in this situation. But I think it is probably a matter of adding something that says that the burden of proof on the respondent is to be able to establish at the relevant time that they considered inherent requirements. I am happy to have a think about how to do that.

CHAIR—If you could do that and get back to us that would be very useful. Can I also ask you about this issue on the next page of your submission where you say that you understand the rationale for the new section 54A dealing with assistance animals. We had this discussion before with the Human Rights Commission. But you have put to us that it is difficult to implement without clear guidance on what might give rise to a reasonable suspicion that an assistance animal has an infectious disease. This is not just about accrediting that animal but ensuring its ongoing health, is that right?

Ms Banks—It is more about that the fact that if you had an animal in front of you that was clearly unwell, that was mangy or frothing at the mouth, that would be a reasonable suspicion. I guess the risk is that there are some circumstances where a person might say, 'The dog looked to me like it had weepy eyes. That was enough to say I did not have to let it in.' I am not necessarily suggesting guidance in the act but I think some sort of guidance on what should ground a reasonable suspicion that the animal is potentially infectious would be helpful in some form. I have not thought about how you might do that beyond the fact that that guidance would be helpful, but I think it is important to think about. The reasonableness of it has to be very clear. It probably also varies due to the circumstances. With an assistance animal coming into a zoo, for example, you may have a higher bar in terms of the health requirements of the animal, because those are secure areas in terms of animal hygiene and health, than you might have with a dog coming into any other workplace.

CHAIR—Have there been instances where a person has been refused access because a dog is unwell and they consider that that is unreasonable?

Ms Banks—As I understand it, there is a least one case where that question has arisen.

CHAIR—And the person with the dog is questioning?

Ms Banks—Yes. So it can turn on matters after the fact. On the issue of assistance animals, the other thing we raised was the question of giving people some time to be able to get the evidence necessary. Certainly in the area of guide dogs, I would presume that the Guide Dogs Association will very quickly be in a position to issue some sort of documentation to all of the people who have dogs provided by them. But for other people it will take longer because there are less formal mechanisms available, and it will potentially put people to quite significant cost to have them assessed or to be able to establish that. So we are not suggesting that those provisions not operate. We agree that they are a good development, but, really, some time needs to be allowed for people to meet that requirement.

CHAIR—I do not have any other questions. I think the concerns I had have been covered. Thank you very much for your time and attendance today. We appreciate the fact that you have had to slip out of your conference to come. Thank you.

Ms Banks—Thank you. I will come back to you with those other matters.

CHAIR—Thank you very much.

[11.59 am]

SHULMAN, Ms Joanna, Principal Solicitor, New South Wales Disability Discrimination Legal Centre

GIVEN, Ms Fiona, Policy Officer, New South Wales Disability Discrimination Legal Centre

CHAIR—I now welcome representatives from the New South Wales Disability Discrimination Legal Centre. We have your submission with us. It is numbered 27 for our purposes. Do you need to make any amendments or alterations to your submission?

Ms Shulman—We provided an amended submission to the committee last night. I want to confirm that that is the one you are referring to.

CHAIR—Yes, we have that. So this replaces the submission you had given us?

Ms Shulman—It does replace the submission. There are two major amendments. In quick terms, we are agreeing with the definitions of 'indirect discrimination' and 'direct discrimination' proposed by the Australian Human Rights Commission.

CHAIR—I invite you to make a short opening statement. At the end of that we will go to questions. Who is going to go first?

Ms Shulman—We will do it together. Fiona will start.

CHAIR—Okay, and please take your time. There is no rush.

Ms Given—We acknowledge the traditional owners of the land on which we meet. We would like to thank the committee for giving us the opportunity to give evidence at this Senate inquiry. We are a specialist community legal centre which provides direct legal services to people with disabilities, delivers community legal education and undertakes policy work.

From the outset we would like to emphasise that our position is ultimately that the individual complaints based model, as provided by the DDA and retained in the bill, is an ineffective mechanism for achieving substantive equality—that is, to enable full and effective participation of people with disabilities in all aspects of Australian society. We note that in this regard Australia lags far behind other countries, including Europe, India, Canada and the UK, and may be in breach of its obligations under the recently ratified Convention on the Rights of Persons with Disabilities. That being said, we support the majority of changes proposed by the bill and do not believe that it should be delayed. Ultimately though what is required is a comprehensive review of all discrimination acts, as recommended by the Senate standing committee in its review of the Sex Discrimination Act.

Turning to the bill before us, we support most of the proposed amendments. Most of our suggestions are to clarify areas where we feel the bill is not clear or is drafted in such a way that makes it inaccessible to both people with disabilities and respondents. Perhaps one of the most significant changes proposed by the bill is its inclusion of a positive duty to make 'reasonable adjustment'. This will go some way to addressing issues of substantive equality—that is, it will require different treatment in order to ensure an equal outcome.

Many cases which come to New South Wales DDLC involve situations where employers, educators and service providers will not do anything different to accommodate a person's disability. Sometimes it is through fear of what an adjustment will involve; sometimes it is laziness; but, more often than not, it is simply because they do not know that they are required to do otherwise. A perfect illustration of this occurred when I asked the organisers of today's hearing whether our organisation could have an extended time slot in order to accommodate my disability as I have to communicate via a communication device, which takes longer than natural speech.

To be afforded substantive equality, I require additional time to fully participate in today's hearing; however, the response of this committee was that it would prefer not to allocate extra time. From the outset, the committee did note that there may be some flexibility to extend our session if required on the day. We certainly hope that you will afford us this flexibility, particularly in the spirit of the bill that we are discussing here today. Ultimately, New South Wales DDLC has been denied a reasonable adjustment. A similar scenario is reflected in a large percentage of cases that come to New South Wales DDLC. Should the duty to provide reasonable adjustment be spelt out clearly and effectively? We are hopeful that for many of our clients it may mean that employers, educators and service providers would comply with discrimination law from the outset.

As currently drafted the concept of 'reasonable adjustment' buried in the definitions of direct and indirect discrimination creates complexity and uncertainty. A clearer stand-alone provision would align the term 'reasonable adjustment' with the definition of 'reasonable accommodation' and with article 2 of the Convention on the Rights of Persons with Disabilities, as was the intention of the drafters of the bill. Having said this, it is imperative that reference to unjustifiable hardship or the convention equivalent, disproportionate or undue burden, should not appear, and the definition of reasonable adjustment and unjustifiable hardship is a defence and should be referred to only in that context.

Ms Shulman—I would like to make some comments about the definitions of direct and indirect discrimination. Starting with the definition of direct discrimination, we are concerned that proposed section 5 of the bill maintains both the comparator test and the requirement that the discrimination is because of the disability. The application of these tests has proven difficult in practice. Many of our clients contact us after they are dismissed from work after absences due to a disability, in breach of the workplace standard leave policy. It is also common for us to see clients who are suspended from school for weeks on end, in accordance with the department of education standard suspension policy. This is because of a disability that manifests itself in behavioural ways. Our advice to these clients is that, unless they construe what happened as indirect discrimination—which is extremely difficult to do—disability discrimination law will not offer them protection. The comparator test means that another employee or another student without the disability who behaved the same way in the same circumstances would have been treated the same. Accordingly, there is no differential treatment and therefore no discrimination. We have seen situations where employees with depression have found them themselves left without a job after a period of illness or where students are suspended from school for two-thirds of the year and do not receive any form of education over this period. We have to tell them that discrimination law will not assist them in dealing with this situation. Removing the comparator test and replacing it with the definition of direct discrimination in the ACT Discrimination Act, as recommended by the Human Rights Commission, will go some way to addressing this issue.

Turning now to the definition of indirect discrimination, we are also concerned that the proposed amendments do not address the inherent difficulties in the operation of indirect discrimination. Currently, in order to prove indirect discrimination, a complainant must prove that they cannot comply with a requirement or a condition imposed by the discriminator. The focus on an inability to comply means that those who do comply through perseverance or through assistance, even if they experience some disadvantage in doing so, are not protected by discrimination law.

An example of this is where New South Wales DDLC recently acted for a high school student in a complaint against her school of disability discrimination. This student has a form of dyslexia which makes it difficult for her to read information on white paper or from a blackboard. The solution developed by the school to deal with this issue was that she be provided with the information on hand-outs at the start of each class. She then had to leave class to photocopy the notes onto different paper so that she could read the material. Our advice to this student was that, although she missed 10 minutes at the start of every class to reformat the material, it was likely that a court would find that she could comply with the requirement or condition that she use the class notes provided by the teachers and, accordingly, she had limited prospects of succeeding in a disability discrimination claim. Our client is still continuing to experience difficulties at school and has fallen behind in her studies. In order to overcome this hurdle we recommend that this section mirror the definition of indirect discrimination under the Sex Discrimination Act—that is, it is indirect discrimination to require that a discriminator impose or propose to impose a requirement or condition that has or is likely to have the effect of disadvantaging people with the aggrieved person's disability. Our submission also details areas which we feel have not been properly addressed in the amendment bill, and we are happy to comment on these or to answer any questions from the committee.

CHAIR—Thank you very much for your submission and for going into some detail about some of those measures. I think we are going to get caught up in an area that is long and complicated, if we start talking about whether individual complaints are an effective measure. I notice that, in your submission, you outline for us what is happening in other countries. We will take that on board, but I think it is probably a bit outside the spirit of the act. It is more about a change of policy than a change in the act. You say that the bill should be made clearer in terms of reasonable adjustment. Do you mean in terms of the definition in the bill or in terms of its application?

Ms Shulman—The short answer is: both. A starting point for every bill, and for this bill in particular, is that it should be accessible. This is a bill for people with a disability, so it needs to be in the clearest language possible. At the moment, the concept of reasonable adjustment is tied up in the definitions of direct and

indirect discrimination. This makes it extremely confusing as to how it would be applied in practice. A standalone provision will make the concept of reasonable adjustment much clearer. This is particularly important not just for our clients but also for potential respondents—employers, educators and service providers. As we noted in our opening statement, much of the discrimination we see is not intentional, it is simply through ignorance. A clear definition or a clear statement that there is a positive duty to make reasonable adjustments that is not embedded in other sections of the act will go a long way to addressing this. Secondly, we do think that the definition itself need some clarification. We are concerned that there seems to be a confusion between the concept of reasonable adjustment and the defence of unjustifiable hardship. These are two separate steps. First you make out a reasonable adjustment and then you look at the defence of unjustifiable hardship. We feel that the bill should reflect this. The definition of reasonable adjustment proposed by the Human Rights Commission is one that we would support.

CHAIR—I take it, then, that you are supportive of most, if not all, of the recommendations from the Human Rights Commission.

Ms Shulman—I am not in a position to say whether we support all of them, but we definitely support the recommendations in relation to reasonable adjustment, the definition of direct discrimination and the definition of indirect discrimination.

CHAIR—On page 6 of your submission you mention medically recognised symptoms for which the cause is unknown. Could you clarify for us what you are referring to there?

Ms Shulman—Is this in our amended submission?

CHAIR—It might not be. I think it is the original one.

Ms Shulman—Perhaps you could tell me the section it refers to.

CHAIR—It is in the area of indirect disability discrimination. Perhaps it is not an area that you want to highlighting now.

Ms Shulman—I think we have replaced that section in our amended submission.

CHAIR—Okay. Finally, I just wanted to ask you about the special measures. You make a comment that you are concerned about the phrase 'implementing a measure', that it is 'ambiguous, as it is not defined'. Are you suggesting there should be a definition or a clarification of 'implementing a measure'?

Ms Shulman—We are suggesting that, yes.

CHAIR—In the definitions or with examples, do you think?

Ms Shulman—At this stage, I would say with examples, but I would like to think about that further and take that question on notice.

CHAIR—Yes, because your submission does not actually go to how we might rectify the problem. You raise it as an issue and you talk about how it is unclear and confusing. But I am not sure, for the purposes of our report or any recommendations we might want to make, whether we include a definition of that, we include examples or we simply get the explanatory memorandum reissued to clarify what is meant.

Ms Shulman—I would like to consider that.

CHAIR—Yes, if you can have a look at the best way we might go about that. Senator Barnett, do you have a question?

Senator BARNETT—Thanks, Chair. I think the chair has asked most of the questions in which I had an interest, but I do have a couple of others just to get a little clarity around the issue of the assistance animals. I think there may be a difference between your original submission and the supplementary submission tabled today. In any event, can you just confirm that your main concern about the provision regarding assistance animals in the current bill is the fact that it is included in a section where there is a reference to carers and assistants, and you think there may be some insult to carers and assistants.

Ms Shulman—Just to clarify: there is no change on this point between our previous submission and this current submission. It is a minor point, but in the act, before it was amended, assistance animals were a stand-alone provision, and we think it makes sense to continue with that. They are very different. Carers and assistance animals and disability aids are very distinct and probably should be treated that way.

We do have another issue, though, about assistance animals particularly, and that is in relation to section 9. We applaud the amendment, as we think it provides greater certainty in defining what an assistance animal

is—and I note that many other organisations have raised this with you, including the Sydney Opera House. DDLC ran a case recently where a client who had an assistance animal to assist him with a psychological disability was not allowed to fly with the animal unless he could prove that it was accredited. Because he had trained the animal himself, no organisation for assistance animals was willing to accredit the animal. This is a case that we see commonly with assistance animals—people train them themselves. This meant that in order to get any clarity on this issue his only option was to proceed to either the Federal Court or the Federal Magistrates Court, and he decided not to do that because of the many barriers for a person with a disability in pursuing a complaint that far, including the cost risk and the psychological risk.

While the amendment bill goes a long way towards providing some certainty, it does not address issues where an assistance animal is trained by the person themselves or is not accredited by an assistance animal organisation from birth.

Senator BARNETT—So what do you suggest should occur in that instance?

Ms Shulman—Some states and territories are starting to set up schemes for accreditation, and we applaud that. Hopefully, as Commissioner Innes said, there will be a flow-on effect and others will follow. Some Commonwealth guidance on this issue might be needed.

Senator BARNETT—Guidance in terms of ensuring that if an assistance animal is personally trained or individually trained there should be some sort of accreditation available?

Ms Shulman—That is correct.

Senator BARNETT—You do not think the bill currently does that?

Ms Shulman—I will just turn to the section.

Senator BARNETT—What section are you referring to?

Ms Shulman—Section 9(2) of the bill. The bill recognises an assistance animal where it is accredited by a state and territory—as I said, only some states and territories have that accreditation scheme—or accredited by an animal training organisation. As I said, where assistance animals are not accredited by them from birth, most organisations will not accredit them later on. There is, as I think David Mason referred to, a final catch-all provision for animals which do not fit either (a) or (b), which is the situation I am talking about. Unfortunately, no-one will be able to work out whether they meet that definition until a court decides that that is the case.

Senator BARNETT—In the instance that you referred to of the person wanting to fly, which I am not familiar with, presumably they were disallowed from flying?

Ms Shulman—That is correct.

Senator BARNETT—Has he made a complaint?

Ms Shulman—That is correct. The complaint is settled, so I cannot talk about it in too much detail.

Senator BARNETT—But, if it had not settled, you are saying he would have had to take it to the Federal Court?

Ms Shulman—His only option would have been to take it to the Federal Court, to have a court decide whether the animal was trained to alleviate the effects of his disability.

Senator BARNETT—Is that case in the public domain?

Ms Shulman—No.

Senator BARNETT—You are referring to it in general terms to give us—

Ms Shulman—I am referring to it in general terms to give you an illustration. There is a case that is in the public domain, Forest v Queensland Health, which dealt with similar issues. In that situation the animals were also, I believe, trained by the applicant from birth and were not accredited by a separate organisation. The court therefore had to prove that they were trained to alleviate the effects of his disability. The bill does improve on what previously existed. It puts in a little bit of guidance in terms of meeting standards of hygiene and behaviour. But we submit that, as state governments have put in place schemes for accreditation, this is actually required either by each state and territory or, if possible, at a Commonwealth level.

Senator BARNETT—At this stage can an institution, a company, an airline or a transport operator refuse access if a person does not have adequate recognised accreditation?

Ms Shulman—Accreditation is not referred to in the act. It is now referred to in the bill. Currently, they have to show that the animal is trained to alleviate the effects of their disability. The question is: how do you do that? That is why this amendment came about. We say the legislation does not go far enough.

Senator BARNETT—Thank you. There were some good points there.

CHAIR—Do you think there should be a further dot point that says, 'Or an animal accredited under a state or territory scheme'?

Ms Shulman—That is already there. I am suggesting that perhaps there needs to be a comment from this committee—I am not quite sure to whom—stating that there needs to be some more guidance in this area either through Commonwealth leadership or through working with states and territories to develop accreditation schemes.

Senator BARNETT—To take into account instances where there is training which has not been accredited by a state or territory scheme?

Ms Shulman—In New South Wales where there is no state accreditation scheme, all that exists is individual accreditation bodies such as Assistance Animals Australia. Those bodies, for obvious reasons, are reluctant to say that this animal meets certain procedures when they have not trained that animal from birth. Without a state accreditation scheme where that animal can be assessed by an objective standard, which is not of itself open to the risk of being prosecuted if the animal misbehaves—which I understand would be the concern of these individual small organisations which do accredit animals—there is no option for a person where they have an assistance animal, which they have trained themselves, to get that animal accredited. So I am suggesting that there needs to be either at the Commonwealth level—I do not know whether that is possible—or at each state and territory level, accreditation schemes.

Senator BARNETT—You may wish to take this on notice. We are looking at this bill. We can recommend changes to the bill and we can make suggestions to the government, which has put the bill forward, to improve the bill. So if you want to take on notice and come back to the committee with suggestions on how we can improve the bill to take into account these circumstances which you are referring to, then we would be more than happy to receive those.

Ms Shulman—Okay, I will do that.

Senator BARNETT—Another issue I want to raise, and it is a very big area and you touched on it in your introductory remarks and in your submission—and I am not wishing to pursue you on it because it is referred to in attachment 2 to your submission and you refer to it in one of your opening paragraphs—is about the ineffective mechanism for addressing breaches and discrimination relating to an individual complaints based model. I just want to put on notice with you that I have perused your attachment 2 and your concerns about that and your reference to the UK model and other overseas models, and your concerns are noted. I just want to let you know that because you may be interested in light of the fact that that is quite an important issue for you, but it has not been addressed in this bill.

Ms Shulman—Thank you.

Senator BARNETT—There is a whole range of issues there that need further consideration and review in due course, if the government wished to proceed down the track. The other issue concerns the school student with dyslexia you referred to, Ms Shulman. I did not quite get the outcome as to what happened in that instance. The student had to take 10 minutes out of each class to go and photocopy the notes prepared by the teacher—is that right? And you were saying that that was discriminatory? What was the outcome in that instance?

Ms Shulman—We were simply providing her with advice about whether she would be successful or what the likely outcome would be if she went to a court. It was our opinion that based on previous cases it would be a likely outcome that a judge would find that she could comply with the condition that she uses the notes provided by the teacher even though she had to go and photocopy them and experience some disadvantage in doing so. So really, this point highlights our concerns about the definition of indirect discrimination and the fact that the bill, as it is currently drafted, maintains the requirement that a person be not able to comply with the requirement or condition, and the formulation proposed by HREOC, which we also endorse, removes that from the bill.

Senator BARNETT—So you are really highlighting the point that in your view the current bill and the current amendments do not go far enough?

Ms Shulman—That is correct.

Senator BARNETT—Thank you for that feedback.

CHAIR—I have got just one last thing I want to raise with you. Your involvement in the development on the convention on the Rights of Persons with Disabilities at the United Nations level is still ongoing, is it?

Ms Shulman—The convention has been completed and Australia ratified it last year. Our involvement is purely on working around measures to do with implementation in Australia.

CHAIR—Did you provide advice to the government before ratification of the convention?

Ms Shulman—We did. We were heavily involved in drafting submissions around what we thought the convention should look like. Our management committee, which is made up of a team of very active volunteers, were at almost every session of the United Nations ad hoc committee developing the convention. One of the members of our management committee—in fact our chair, Rosemary Kayess—was selected to be part of a government committee in some of the final ad hoc committee sessions. So she actually represented Australia at the UN.

CHAIR—Thank you very much for your submission and your attendance today. It was very helpful and is much appreciated. Thank you.

[12.35 pm]

PRICE, Mr Dean, Advocacy Project Manager, People with Disability Australia

CHAIR—Welcome. We have your submission. For our purposes, we have numbered it 21. Do you need to make any changes or amendments to that submission?

Mr Price—No.

CHAIR—I invite you to make an opening statement, and then we will proceed with questions.

Mr Price—Thank you for the opportunity to present further information with regard to our submission. I thought I would tell you a little bit about the history of People with Disability Australia, which I will refer to now as PWD. We are a national cross-disability advocacy organisation. We have had a long interest in the Disability Discrimination Act. It has been part of our work. We provide a New South Wales based individual advocacy service, and that often involves advising people around accessing the means of sorting out cases of discrimination or potential discrimination under the act. We have had a long interest in and engagement with this reform process, engaging in the Productivity Commission's review and report of 2004. In the meantime, when there were other attempts to amend the DDA, we also provided forums for the disability sector and people with disability themselves, along with other organisations such as the Australian Federation of Disability Organisations and the New South Wales Disability Discrimination Legal Centre. What we are presenting to you is based on that experience.

CHAIR—Did you want to go through some of the elements of your submission or are you happy just to take questions?

Mr Price—I am happy to take questions. I guess the main point of what we have made submissions around is about achieving substantive equality for people with disability. I am happy to take questions.

CHAIR—Let me go to the Migration Act as well. We had representation this morning from PIAC that the Migration Act exemption should now be removed. You would have a similar view to that, I see. Your recommendation is that the Migration Act now be subject to the DDA. So you would be seeking that the bill before us be amended to ensure that occurs. Is that right?

Mr Price—We definitely welcome the amendment that subjects the administrative processes of the Migration Act to the DDA. That is very much welcome and something that we have been calling for, but we would go that step further and ask that the whole of the Migration Act be subject to the DDA. Our experience and recent cases that have appeared in the media have shown that the exemption allows people with disability to be seen as a burden on society, and we do not think that is the right way of viewing cases for migration. We think that the Migration Act should be subject to the DDA so that those mechanisms around migration are freed up to a wider range of people.

CHAIR—You make some comments about the Electoral Act. It is not necessarily related to this legislation, but perhaps a spin-off of our inquiry into this legislation would be that further work be done in the area of people with disabilities and elections. Can you, for our purposes, outline where there is potential discrimination when it comes to the Electoral Act?

Mr Price—To its credit, the previous government provided a trial at the last federal election of electronic voting, which was something that was very much welcomed by some of our members and people in the wider disability community. Under the current act that is only allowed to happen as a trial. We would see that that is one area where there could be amendments of the Electoral Act which would further remove discrimination. We have also pointed out in our submission other parts of the act that we are concerned with, which we still see as discriminatory. We pointed this out because, as we said, the DDA has been in place for over 15 years and this is one of the key areas that relates to some of the government's current agendas of social inclusion that has not yet caught up with the intent of the DDA.

CHAIR—But generally, does not the ability to receive a postal ballot assist in overcoming access to polling places?

Mr Price—It does assist some people in overcoming that. What we would see as the ultimate goal would be that people with a disability would have the exact same opportunities as anybody else in society in being able to participate in elections. Maybe this is just me, but part of the excitement of polling day is actually going to a polling place—

CHAIR—There are people who do everything to avoid going to a polling place on election day.

Mr Price—Running the gauntlet and things like that. But it is an opportunity that unfortunately is not available to a large number of people.

CHAIR—Is that because some polling places are inaccessible?

Mr Price—Yes.

CHAIR—I see.

Mr Price—The AEC has done some great work in increasing that and increasing the information available about exactly how accessible different polling places are. There are, I think, accessible polling places in each electorate. But in some of the bigger electorates—say in the west of New South Wales and in the bigger states of Western Australia, Queensland and the Northern Territory—one does not necessarily help a lot of people.

CHAIR—Have you had a chance to read the submission from the Human Rights Commission?

Mr Price—In part, yes.

CHAIR—Would there be areas of their submission you would disagree with, or generally are you supportive of their recommendations?

Mr Price—Generally we are very supportive of their recommendations as well as the recommendations of the Human Rights Law Resource Centre. I could not say that we 100 per cent agree with everything. I have not gone through their submissions in that much detail, but we are generally supportive of their submissions.

CHAIR—Were there any areas that leapt out at you as being areas that you would not agree with—can you remember?

Mr Price—I have not read them in that much detail. I have more looked at the parts that we agree on.

CHAIR—I might ask you to have a look at that, then, because as a peak body that actually has people with disabilities as your consumer group it would be interesting for us to know if in fact there are areas of disagreement—particularly with the Human Rights Commission's submission to us. Generally it seems that most of the submissions support their recommendations—or think perhaps the recommendations do not go far enough. Your view about those—where you disagree, generally—would be useful.

Mr Price—Sure. I am happy to get back to the committee with some information about that.

Senator BARNETT—Thank you for your submission, Mr Price. I have a number of questions. Firstly, in regard to the Occupational Health and Safety Act 1991, on page 7 you say that you are:

> ... concerned with the regular number of reports from members and clients where OH&S legislation and policy is used as an excuse to undertake discriminatory actions.

That is a pretty strong statement. Can you assist us in backing that up? Do you have any examples and any other evidence to support that statement?

Mr Price—In previous submissions in other areas of the federal government's work we have indeed made submissions that have included case studies of things that have been reported to us—for example, the use of non-automatic ramps on transport. There have been excuses made about not using those by bus and tram drivers due to the weight, despite the fact that, clearly, in other circumstances, they are used by other people and that, when comparing the weight of those ramps to the weight of other objects that are lifted in similar sorts of workplaces, there are no bans on the use of lifting that sort of weight.

Senator BARNETT—All right. Can you, on notice, perhaps alert us to the submissions you are referring to.

Mr Price—Yes, that is fine.

Senator BARNETT—I have not read those submissions, wherever they have been directed to, but perhaps you could alert us to that, even on notice.

Mr Price—Sure. A number of those appeared through the development of the Accessible Public Transport Standard falling out of the DDA.

Senator BARNETT—I note that you have referred to finding 12.7 of the Productivity Commission, but you obviously have evidence yourself, so that would be useful. There was another issue. You said on page 4 of your submission that the Productivity Commission has made a whole range of recommendations, some of which have not been implemented, and that that is a concern for you and your organisation. Do you want to

alert us to the concerns you have more specifically with respect to the recommendations that have not been addressed in this bill?

Mr Price—Primarily, those are the recommendations that we have referred to in section 4, starting on page 8 of our submission, which outlines some of the areas that have not been addressed. Some of those relate to the bill and some of those relate to external things which would, according to the Productivity Commission, allow the Disability Discrimination Act to be more effective. That section does go through a number of those complaints.

Senator BARNETT—Chapter 4, section 4 on pages 8 and 9 of your submission covers those main areas that you are concerned about.

Mr Price—Yes.

Senator BARNETT—All right. We will have a look at that. I think this issue of allowing disability organisations to initiate complaints has been raised by a number of groups. Let's just go back to the other section on the definition of disability, on page 5 of your submission, where you refer to the DDA being expanded to include medically recognised symptoms where the cause is unknown. Do you have some examples of that that you could share with the committee?

Mr Price—We do not have any specific individual cases of people that we could provide, but it was a recommendation of the Productivity Commission. We saw value in the point that they made that having the broad definition helps get over the first step, which is defining the disability and therefore making sure that as many people as possible can benefit from this act rather than getting caught in the technicalities of what a disability is. We think that that is a reasonable definition to put in because the disability has to be medically recognised, so we would presume it has to be recognised by someone in the medical profession, but we do not think it is necessarily important where that recognition comes from. The current definition of disability in the DDA includes medical sorts of conditions, presence of disease-causing organisms and the like, and we think that this is just an extension of that, where the cause is not necessarily known but the symptoms are clearly present.

CHAIR—Just following on from that, that was a recommendation from the Productivity Commission that has not been included in this bill.

Mr Price—Yes.

CHAIR—So, effectively, if we went back to the Productivity Commission's report, they would provide examples, would they not, of medically recognised symptoms where the cause is unknown?

Mr Price—I presume so, yes.

CHAIR—We could cross-reference that.

Mr Price—Yes.

Senator BARNETT—So that is a concern for you, that the definition of disability in the DDA should be expanded to include the medically recognised symptoms where the cause is unknown which, under this draft bill, is not covered?

Mr Price—That is correct.

Senator BARNETT—Do you know why they have not covered it?

Mr Price—I am not sure.

Senator BARNETT—I can think of one disease right now—motor neurone disease—where the cause is not known but the symptoms are patently obvious to people with motor neurone disease, and no doubt there will be others as well. We can have a look at the Productivity Commission's report. Are there other groups that would perhaps support your view in that regard?

Mr Price—I presume that groups who submitted to the Productivity Commission's review and report would also have supported that at that point in time, but that was before my time.

Senator BARNETT—We can follow up on that. I think that is a question for the department when they, hopefully, appear before us as a witness. We can then ask them why that was not included. We can come back to that. That covers it for me. The chair asked about the Electoral Act, and you have made those points at page 6. Have you had feedback from the Electoral Commission with regard to your concerns? What have they said?

Mr Price—We participate on the Australian Electoral Commission's disability advisory group, along with a range of other key disability groups and peak organisations. It is an ongoing discussion that we have been having with them. Their constraint is that the legislation, in many circumstances, prevents them from implementing some of the things that they may wish to. That is my understanding of the case. When it comes to the form of ballot papers, for example, the legislation is quite prescriptive about what a ballot paper is, and in that specific example that is what stops the permanent implementation of an initiative such as electronic voting.

Senator BARNETT—Have they got back to you officially on that, or have they written to you about it? When did you write to them, expressing your view to them?

Mr Price—We have not written to them. It is part of the discussions that we have had in that advisory group. My understanding is that some of those concerns were raised by the AEC during the inquiry into the 2007 federal election and related matters. It was also subject to another Senate inquiry, and I think they did deal with many of those issues through that process.

Senator BARNETT—This issue about people with a vision impairment not being able to cast a secret ballot is not a new one. It has been hanging around for years, hasn't it?

Mr Price—Absolutely. Some of the other issues are a bit more specific to design and implementation, which we will continue to work with the AEC on. For example, one of our members uses an electric wheelchair and votes at one of the lower cardboard booths, but the placement of those was actually right next to the queue where everyone else was waiting, lining up. The height of that booth also potentially prevents a secret ballot being cast. Those are the sorts of things we discuss with the AEC, and they are very receptive to fixing those sorts of things.

Senator BARNETT—Did you put an official submission into that inquiry into the 2007 election?

Mr Price—Yes, we did.

Senator BARNETT—And would those points that you make there on page 6 have been included in that submission?

Mr Price—Indeed they would. They were.

Senator BARNETT—Have they reported on that?

Mr Price—My understanding is that they have not reported on that part. There have been reports in regard to electoral funding, which was also part of that same inquiry, but they have not yet, as far as I am aware, reported on the actual administration of the election.

Senator BARNETT—Thanks for that. I appreciate it.

CHAIR—Mr Price, thanks very much for your attendance today and for the work that you have done in putting your submissions to us. It is much appreciated.

Committee adjourned at 12.53 pm