COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Age Discrimination Bill 2003

TUESDAY, 9 SEPTEMBER 2003

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

WITNESSES

ANDERSON, Mr Peter Christian, Director, Workplace Policy, Australian Chamber of Commerce and Industry 9

ATWELL, Ms Julie-Anne Maree, Acting Principal Legal Officer, Attorney-General's Department 25

BROOK, Mr John Howard, Member, National Policy Council, and Co-Chair, ACT Policy Council, COTA National Seniors Partnership 1

CLIFFORD, Ms Rocky, Director, Complaint Handling Section, Human Rights and Equal Opportunity Commission 17

FAULKNER, Mr James, Assistant Secretary, Attorney-General's Department 25

LEWIS, Ms Erica Ruth Estelle, National Policy and Research Officer, YWCA of Australia 1

LOH, Miss Evelyn Chih-Ping, Member, National Executive Committee, YWCA of Australia 1

RIZVI, Mr Abul Khair, First Assistant Secretary, Migration and Temporary Entry Division, Department of Immigration and Multicultural and Indigenous Affairs 25

von DOUSSA, The Hon. John, QC, President, Human Rights and Equal Opportunity Commission 17

WALKER, Mr Douglas James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs 25

WENTWORTH, Ms Ann, Member, National Policy Council, and Co-Chair, ACT Policy Council, COTA National Seniors Partnership 1

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Tuesday, 9 September 2003

Members: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Kirk, Knowles, Lees, Lightfoot, McGauran, McLucas, Murphy, Nettle, Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Kirk, Ludwig, Mason and Scullion

Terms of reference for the inquiry:

Age Discrimination Bill 2003.

Committee met at 6.34 p.m.

BROOK, Mr John Howard, Member, National Policy Council, and Co-Chair, ACT Policy Council, COTA National Seniors Partnership

WENTWORTH, Ms Ann, Member, National Policy Council, and Co-Chair, ACT Policy Council, COTA National Seniors Partnership

LEWIS, Ms Erica Ruth Estelle, National Policy and Research Officer, YWCA of Australia

LOH, Miss Evelyn Chih-Ping, Member, National Executive Committee, YWCA of Australia

CHAIR—This is the first hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Age Discrimination Bill 2003. The inquiry was referred to the committee by the Senate on 12 August 2003 for report by 18 September 2003. The bill proposes to prohibit age discrimination in various areas, provide for certain exemptions to that prohibition and confer certain functions on the Human Rights and Equal Opportunity Commission. The committee has received nine submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of those documents are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I now welcome the witnesses from the YWCA of Australia and the COTA National Seniors Partnership. Thank you very much for appearing before us today, and thank you very much for agreeing to appear together. It does assist the committee with our deliberations. I note for the record that, given the committee is sitting while the Senate is in session, we are subject to the vagaries of the chamber. If the Senate chooses to divide or to call a quorum, senators are required to attend. We hope that there is minimal interruption to this evening's proceedings, but the Senate is not always that cooperative. Ms Lewis and Miss Loh, you have lodged a submission with the committee which we have numbered 5. Ms Wentworth and Mr Brook have lodged a submission which we have numbered 6. Do either of your groups wish to many any amendments or alterations to those submissions?

Ms Wentworth—No.

Ms Lewis—No.

CHAIR—I now invite each of the organisations to make a brief opening statement. At the conclusion of that, I am sure members of the committee will have questions for you. Would COTA National Seniors Partnership like to go first.

Ms Wentworth—I would first like to apologise for the absence of David Deans, Director of Government Relations, who is overseas, and Patricia Reeve, Director, Policy Secretariat, who is unavailable. That is why you have two Canberra people here. We are both members of the national policy council that has responsibility for determining policy on seniors issues for COTA National Seniors Partnership. We are also co-chairs of the ACT policy council. COTA National Seniors Partnership is the largest seniors organisation in Australia, with more than 270,000 individual members aged over 50 years and 1,500 seniors organisations. We advocate on behalf of all Australia's older people, not just members, on the basis of four policy principles. These are maximising social and economic participation; promoting sustainable, fair and responsible policies; protecting and extending programs and services; and focusing on protecting against and redressing disadvantage.

Seniors experience the negative impacts of age stereotyping on their lives on a day-to-day basis. Across the community, judgments about physical and mental abilities, interests and personality traits are commonly made on a basis of age or age group, as if all members of a particular age cohort are homogenous. Our commonsense understanding that old age is accompanied by irreversible progressive decline that affects the capacity for normal activities of daily life must be challenged. In the absence of injury or disease, most older people can and do lead full, active lives, contributing to their families and communities until they reach a very advanced age. Low expectations based on negative stereotypes affect self-esteem and expectations of seniors and the opportunities available to them.

The COTA National Seniors Partnership regards legislation in all jurisdictions as one vital element necessary to redress age discrimination in our community. In addition, community awareness and understanding of the diversity of interests, capacities and needs of seniors needs to be increased. As set out in our submission, we support many of the provisions of the current bill but have three major areas of concern with the extent of the general exemptions.

Firstly, we believe that there are too many broad exemptions, which will result in many acts of discrimination remaining unquestioned and unexamined. We are concerned that

matters covered by these exemptions will continue to be regarded as normal and serve to reinforce negative stereotypes. We would like to see wider application of the provision for two-year exemptions to allow time for review, consideration and specific exemption where required. This is of critical importance in the area of superannuation and finance, including credit.

Secondly, we are concerned that the bill itself reinforces ageist assumptions by recognising inherent requirements of position based on age. By allowing judgments made on other than relevant factors, the bill leaves the way open for decisions based on negative stereotypes. Thirdly, we believe that age discrimination in voluntary work should be specifically prohibited in the act. We welcome this opportunity to discuss these issues with the committee.

CHAIR—Thank you. Mr Brook, did you wish to add anything at this stage?

Mr Brook—No.

CHAIR—And on behalf of the YWCA, I invite Miss Loh to make a statement.

Miss Loh—This will be a shared presentation. For the information of senators, the YWCA of Australia is a national women's organisation. We are definitely an organisation that supports the leadership and empowerment of women—particularly young women—in attaining a common vision of peace, justice, freedom and dignity for all people. The YWCA is a member of a global network which exists in more than 122 countries. We keep a very close eye on what is happening in all of those countries around the world.

CHAIR—I will ask you to pause there because we are required to attend the chamber for a division. We will return as soon as possible. I apologise for the interruption.

Proceedings suspended from 6.42 p.m. to 6.51 p.m.

CHAIR—Miss Loh, perhaps you could resume.

Miss Loh—For the information of senators present, the YWCA of Australia has a nationwide network called WomenSpeak. WomenSpeak is currently made up of 28 women's organisations, most of them national. The priority of this network is to work on getting more youth participation and youth perspectives into public debate. We have 16 local associations here in Australia and they have all been involved in the consultations for this particular submission.

Ms Lewis—We also wanted to say how we have participated in the consultation process in the lead up to the development of this legislation in a number of forums—through our membership of the Australian Forum of Youth Organisations, which is convened by Minister Anthony, and through our membership of the Australian Youth Affairs Coalition. As I have now written a number of times, we greatly appreciate the efforts that the Attorney-General's Department has made to run an open and inclusive consultation process around the development of this legislation.

As with COTA, we have some concerns about the number of reservations that there are in the legislation. We would particularly like to highlight a number that will continue to be a serious detriment to young people. To begin with, we would like to note the blanket exclusion of social security legislation from the proposed age discrimination legislation. We understand that it was never the intention for this legislation to apply to the Social Security Act, but we

think it is clear that there are a number of conspicuous instances of age discrimination within the social security provisions—for example, the fact that a student on youth allowance receives rent assistance whereas a student on Austudy does not, with the only difference being that the student on Austudy began their tertiary studies after age 25. There are also a number of quirks about the age of independence. Age is used as a blunt and indiscriminate marker throughout the Social Security Act.

Miss Loh—We also have some concerns about the fact that the proposed bill does not actually look at the issue of youth wages. We see youth wages as a fundamental injustice; it perpetuates stereotypes of young people being unskilled and inexperienced. For example, at an ASO1 level in the Australian Public Service, if you are under the youth wages scale you will earn up to 60 per cent less than someone who is under the normal pay scale. We are disappointed that the bill provides specific exemptions for youth wages. Similarly, we are disappointed that it does not look at the issue of company directors under the Corporations Act. A youth organisation such as the YWCA of Australia does want to include a number of young people in our governance facilities and in our decision-making processes but the Corporations Act currently denies people under the age of 18 that right. We know there are possibly some legal complications, but we are disappointed that we cannot even enter into the debate around directors of companies.

Ms Lewis—We were pleased to note that the legislation proposes to limit the exemption for access to health or medical services on a basis of clinical benefits only. We are concerned that there is a perpetuation of age stereotypes around access to health services and that that has a detrimental impact on young people. I note it is an issue that COTA has also addressed with regard to older people. Again, the legislation that governs the provision of Medicare is one of those on the blanket exemptions list as not to be reviewed. That will maintain the position where children under 15 require parental or guardian approval to be issued their own Medicare cards, which is a significant barrier to some young people accessing health care services, especially when they are young people at risk, who may have poor relationships with those people.

As has been said by many people involved in this debate, we support the granting of powers to HREOC to deal with complaints made under this legislation and hope that that will be supported by appropriate budget allocation increases to HREOC. We are disappointed that this will not trigger the creation of a children's and young people's commissioner within HREOC, as we believe there is a significant need for a specific commissioner within the human rights institutions of Australia to deal with matters of age discrimination.

Senator LUDWIG—I want to start with a couple of broader issues. In respect of the youth wages issue, is there a model that you would prefer, as opposed to an exemption that has been set out? Have you done any work on or had a look at that issue in itself, or do you accept the way the exemption is currently provided for in the bill?

Ms Lewis—It would be better if all exemptions were applied for on a case-by-case basis. The Australian Industrial Relations Commission conducted an extensive inquiry into youth wages in 1999 and did not find a replacement but did note that there was not overwhelming proof that youth wages helped young people into ongoing full-time employment. It is a case of blatantly deciding that a young person does not need to be paid the same amount as the

older worker who is standing next to them doing the same job. We note that you do not pay youth rent, youth food bills or youth utility bills; it is premised on the fact that a young person is not trying to run a household and does not have to meet the same costs, but a number of them do.

Senator LUDWIG—Is it the same case in respect of the social security issue, or do you say that blanket exemptions should not apply and it should be dealt with on a case-by-case basis?

Ms Lewis—Yes. A number of organisations would like to see exemptions applied for on a case-by-case basis so that people would have to justify it and legislation would be tested to see that it was a case of positive discrimination. There is the example of rent assistance being available to students who start their tertiary studies at the age of 24 years and nine months as opposed to somebody who starts after their 25th birthday—it is completely arbitrary. Work has been done on the common youth allowance, and work is being done on a single working age payment. Age is just a random marker, and the costs are not fully considered.

Senator LUDWIG—Ms Wentworth, on the issue of having, on the one hand, the blanket exemptions and, on the other hand, a case-by-case approach, in the area that you look after would a case-by-case approach actually be workable? It stretches across so many broad areas, like superannuation.

Ms Wentworth—It would. In our submission, we also said that in some cases maybe there should be a two-year exemption, which would allow time to look at the legislation that it was affecting and then perhaps work through the problems that seem to be wrapped up in saying, 'If it looks difficult we will just put a blanket exemption there.' We do prefer case-by-case exemptions, and we are really quite worried that in superannuation and other areas such as health this is not happening.

Senator LUDWIG—You talk about the two-year exemption. In the short time you have had available have you been able to turn your mind to identifying the areas you would prefer that to be in, or is it a broader thing?

Ms Wentworth—It is a broad thing to cover the lot of the exemptions that are listed here for all sorts of government legislation. The idea was that if you put a two-year exemption on you would have time to go through the legislation, sort out the problems and then decide what you were going to do. Otherwise, we want case-by-case exemptions.

Senator SCULLION—Perhaps Ms Lewis can answer my questions. I have some inquiries about trying to find the balance. As you say, the clear intent of the youth wage is to encourage employers to move against the paradigm of youth being inexperienced and unskilled. I think it is in the experience stakes, just in a chronological sense, that they would see a reasonable position in that. Clearly, the intent of the youth wage is to encourage young people into the work force. Have you got some suggestions on how to find a better balance? You talk about specific exemptions. How do you think they would work? For example, you hinted at the circumstances of someone who is not at home, who is not being subsidised by family and who is paying their own rent. Clearly, that makes it difficult.

Ms Lewis—Surely the test should be on the job that they do and the rate that is paid for the work to be undertaken. It should be on skills and knowledge, rather than on age. There is a

proposed blanket exemption for acts done in compliance with industrial awards. We note that HREOC, in *Age matters: a report on age discrimination*, suggested that the AIRC needed to consider those provisions on a case-by-case basis. No-one is proposing to test anybody else on whether they pay rent or how much rent they pay. If you are doing the same job as the person standing next to you, you should be paid the same wage. It is a fundamental principle—equal pay for work of equal value—which is dear to the women's movement, as well as youth advocates. I think it should be about the skills that you have.

Senator SCULLION—I want to make it clear that I do not disagree with the premise. I am just looking for some practical suggestions, because at the end of the day they are what we have to make. Perhaps I can give you another example. Take two people alongside each other who are both carpenters, except one is in his first week and one is in his 15th year. They are both carpenters, in that they have nails and do stuff with timber. In an apprenticeship system we recognise that, and you get a tiered level of pay, from when you start to when you are actually a tradesman, which is based on competency. Usually, we only have those mechanisms within certain trades. There are other jobs, particularly, as you say, in the Public Service, where either you are or you are not at a certain level. There is no way to reflect the level of competence within that task to make an appropriate remuneration. How would you try to deal with that issue?

Miss Loh—In that context, we would say that if a young person or a person of any age was not actually competent to undertake a position they probably should not have been employed into that position by their employer. When you take someone on, you do not necessarily take them on because they are a young person or an older person; you take them on because they can fulfil that job description and provide for that workplace adequately. It is an assumption to say that if you are under the age of 21 or under the age of 18 you do not have responsibilities to fulfil. If you go to a job and are told, 'If you are 18 you only have to work at this level, but if you are 35 you have to work at this level,' then that is not the same job and therefore not the same pay. We would accept that. But if the employees are doing the same thing it is not fair that young people are paid less.

Ms Lewis—Most workplaces have a series of categories for jobs and ways to assess skills. Criteria are set down either in the award or an enterprise agreement, and there are ways of assessing the skills of workers across a whole range of industries. Pay them by the skill they have or the job they do—and there are many provisions to do that. But age is a blunt marker.

Senator SCULLION—You mentioned that would you like to see someone specific like a children and youth commissioner specifically in terms of discrimination. I was speaking to Pru Goward the other day. She is a delightful individual and seems to have some very strong views on a whole range of discrimination types because of her background. Do you think she, or someone like her with those sort of skills, would be a good children and youth commissioner?

Ms Lewis—We work with Ms Goward in a range of circumstances, most notably as the Sex Discrimination Commissioner, and have worked extensively with HREOC through the paid maternity leave debate and discussion, and I would not want to pass comment on Ms Goward's appropriateness to be any other kind of commissioner. The Y has opposed the current proposals to remove the specialist commissioners from HREOC. There is a need to

maintain their focus and ability. In the same way that Ms Goward has run the paid maternity leave debate and HREOC has done an amazing amount of work in developing options around that and raising the profile of the public debate, we would hope that one day a children and youth commissioner would raise the same debate about youth wages.

Senator SCULLION—Regarding discrimination, we talk about the value of gender diversity on boards and in the workplace. Having seen the background of the existing commissioners, I would love to have seen in certain circumstances something different—'Wouldn't it be really good if you could just come and give some advice on this particular issue?' Discrimination is discrimination. Why do you think that someone like Pru Goward, for example, acting as a discrimination commissioner, would not be able to put their mind on one day to the set of circumstances that may be facing aged employment—the issues we were discussing—and on another day perhaps put their mind to something in the sex or age discrimination range? Why do you think that they would only be capable of putting their mind to one particular area, rather than using all that experience on a wider range of views, so we could benefit from those experiences over a wider suite of issues?

Miss Loh—The answer is: why do you not ask a carpenter to come and do your plumbing? There are specialists. They do research in particular areas, they advocate in particular areas, they keep up with domestic debate and domestic issues—and these domestic issues and domestic debates are different in different areas. There is nothing wrong with a bit of 'tearoom chatting' about giving some advice, but that is very different from hearing cases of discrimination in very particular areas. For example, we would not necessarily want a man looking at issues of sex discrimination against women, because they would not necessarily understand the perspective that the parties come to and the different issues that are being looked at. The issue of children and young people is a form of discrimination, but I would say that types of discrimination are different, types of speciality are different.

Senator BOLKUS—I have questions for COTA. You raise two matters. One is the question of credit, and you assert that capacity to pay should be the test rather than chronological age. The other matter of concern you raise is discrimination on the basis of the age of a person's partner or relative. Can you elaborate for the committee what your concerns are in respect of both?

Ms Wentworth—On the second one, we are concerned that, if a person's partner is older, when it comes to employing that person they will think, 'We can't employ this person, because they'll just take time off to look after their partner.' It reminds me of the debate that used to go on about whether women could be employed, because we may or may not get pregnant.

Senator BOLKUS—Is that a real, live problem? Is that something you have come across?

Ms Wentworth—We are worried about it in the context of the employment of older people. It is quite clear that there is now a movement to employ people who are much older. If you are in your 70s and your partner is in his or her 70s, it could be that that person does have a health problem and that your employment will be jeopardised or you will not be employed simply because it will be seen by a potential employer that you will have problems. We do not want that sort of discrimination.

Senator BOLKUS—Do you have current problems with the way credit lenders operate, or is this a fear of how this legislation will operate?

Ms Wentworth—We find that credit is often not offered to older people on the grounds that they will not be able to repay it. People who are offering credit look at the actuarial tables and, instead of seeing people as individuals, see people as a group or a whole that they have put into a box somewhere. A person's ability to repay should be seen in an individual context, not in the context of age.

Senator KIRK—Ms Wentworth, in relation to discrimination in voluntary or unpaid work, the final paragraph on page 6 of your submission says:

The Bill "should apply equally to unpaid/volunteer work, but this should not necessarily be by extension of the definition of employment.

How might the bill be able to then capture unpaid work without tinkering with that definition of employment? Have you had any thoughts about that?

Ms Wentworth—Many volunteers in organisations which I now mix with are in their 70s, their 80s or older. We do not believe that a person should be told that they cannot do voluntary work and that that organisation will have problems getting public liability insurance because of the age of the volunteers. This is happening now. It is really a question of how fit and appropriate for the volunteer job that person is. It does not depend on chronological age at all. It depends upon an individual's ability to do the job as a volunteer. So this is how we want it to be.

Senator KIRK—I fully understand where you are coming from. Do you have any thoughts about how you ensure that the act does capture unpaid or volunteer work without—

Ms Wentworth—We do not want any exemptions so that some agencies can somehow shed their volunteers because they have hit some chronological age barrier.

Senator KIRK—Does that apply to young people as well?

Ms Wentworth—It certainly does.

Ms Lewis—Ms Wentworth raises an important point about extending the protections to voluntary work. Insurers are reticent to insure volunteers over a certain age, and that might also need to be considered if you extend it, but I cannot help you on the drafting point; I am sorry.

CHAIR—I have a brief question for COTA on the matter of consultation, which the YWCA referred to in their opening remarks. Was COTA involved in the consultation process leading to the drafting of the legislation, and were you happy with that involvement?

Ms Wentworth—Yes, I believe so.

CHAIR—Thank you very much. I thank all of our witnesses for attending this evening. We are very grateful. We know this is a very compacted process of examination, and we appreciate your assistance in both making submissions and coming tonight.

[7.14 p.m.]

ANDERSON, Mr Peter Christian, Director, Workplace Policy, Australian Chamber of Commerce and Industry

CHAIR—I welcome Mr Peter Anderson from the Australian Chamber of Commerce and Industry. The Australian Chamber of Commerce and Industry has lodged a submission with the committee which we have numbered 4. Do you have any amendments or alterations that you wish to make to the submission?

Mr Anderson—I have one amendment to paragraph 15. In that paragraph we refer to the element of the bill dealing with inherent requirements of the job and we say, 'The bill meets this objective.' It should read 'The bill meets this objective in part.' For reasons I can explain, we have a qualification to that on closer examination of the bill.

CHAIR—Thank you. Would you like to make an opening statement before we move to questions from members of the committee?

Mr Anderson—Yes, I would like to make an opening statement. The Australian Chamber of Commerce and Industry very much appreciates the opportunity to appear before the committee on this bill. The bill is a very significant proposed piece of national legislation. As employers, we do not come before this committee seeking to in any way defend or excuse conduct in the form of age discrimination in the workplace. As employers, when we look at this bill we are sitting between two competing policy principles: on the one hand there is the principle of wishing to promote youth and mature age employment in a non-discriminatory employment environment, and on the other hand there is concern at additional regulation of the employment relationship, particularly if it has the potential to have counterproductive effects. We recognise that the federal government has a policy to introduce general anti age discrimination legislation and that states have anti age discrimination legislation already. We also recognise that there has been a significant process of consultation in the development of this bill, a process that we have been actively involved in throughout the past 12 to 15 months. It is a process that has been extremely genuine and we have certainly felt as though views we have expressed have been given full consideration. When we look at the bill in its current form we can see that in some cases our views have been acted on and in some cases not.

The bill goes a considerable way to addressing a number of industry concerns, but in the areas that we particularly identified in our submission the bill still contains a number of deficiencies and should be improved by way of amendment. In an overall sense the bill is seeking to deal with laudable objectives, the objectives of promoting the full participation of disadvantaged groups in the labour market, particularly youth and mature age employees, and that is fully supported by the Australian Chamber of Commerce and Industry. The real question that we ask ourselves when we examine the bill is whether the passage of legislation of this type will make employment prospects stronger or weaker, or make no change to those employment prospects. In that sense, we do see the bill as somewhat of a risk. Particularly in the areas of youth employment and mature age employment, the labour market is extremely sensitive. When one looks at the specific practical implications in the workplace of this bill, one sees a number of areas where it may not actually assist the attitudinal change that is

necessary, particularly if we are to see more mature age employees employed in our labour market. Care must be taken to ensure that a regulatory approach does not send the wrong signals to employers.

When we examined the bill we asked ourselves two questions: what is the problem with a national age discrimination law when we as employers have already dealt with state age discrimination laws, and are there issues which we are identifying which we are overemphasising? When we ask ourselves that we have come to the conclusion that there are some real issues. A national wage discrimination law has more extensive impact on industry than state age based discrimination laws in an employment context. That is largely as a consequence of the fact that federal industrial law currently overrides specific operation of state age discrimination laws for those workplaces that operate under the federal system.

We have raised in our submission specific concerns on a number of areas that the committee should be addressing in its report to the Senate. Particularly matters relating to the meaning of 'direct' and 'indirect' discrimination in clauses 14 and 15 of the bill. Including concepts of indirect discrimination in this bill raises a number of practical issues for employers. When one reads the regulatory impact statement and the explanatory memorandum, one can see how this bill may work in practice. In one sense it is a bill in which the parliament is saying to employers, 'You need to remove some negative stereotypes in respect of employment of mature age workers' yet the bill, in its actual terms, would introduce grounds for mature age workers, for example, to sue or lodge complaints against employers for breach of conduct.

When one looks at clause 14 of the bill dealing with direct discrimination, and clause 15, one sees a number of practical dilemmas. The meaning of direct discrimination as described in the explanatory memorandum would extend to discrimination which covers acts done because of characteristics that generally appertain to a person of that age. An example given in the explanatory memorandum is to claim 'a characteristic that is generally imputed to an older person, could be lack of computer skills'. If this is a correct assertion, does that mean that an employer advertising a job simply along the lines of 'Wanted: person with computer skills' is unwittingly committing an act of discrimination, if it can be said that a characteristic which can be generally imputed to an older age cohort in the labour market is a lack of computer skills?

Another example—one not mentioned in the explanatory memorandum but in a similar vein—is that, as we know from analysis, mature age workers tend to have fewer post compulsory educational qualifications. If an employer advertises for a person "Wanted: persons with compulsory post educational qualifications or tertiary qualifications', could it be said that that is discrimination against the older age cohort, if it can be shown that the older age cohort generally does not carry that characteristic?

If one then moves to clause 15 of the bill, the indirect discrimination, the practical problems for employers could become even greater. In the explanatory memorandum the bill identifies the fact that productivity and performance standards which currently exist in industry would be capable of challenge by employees on the basis of age discrimination, if it could be said that that productivity or performance standard is unreasonable when one age grouping may be able to more readily comply with that standard than another. This is a

practical issue that the committee should consider. It is particularly important for employers that it is considered, because clause 15 of the bill carries with it a reverse onus of proof—in other words, the employer is required to prove that a productivity or performance standard is not discriminatory and, if they are unable to make that case before a tribunal on the basis of the complaint having been lodged, the employer has committed an offence. That reverse onus of proof is in itself a problem from our perspective. But the fact that performance and productivity standards can be so readily open to challenge upon the passage of this legislation raises the issue as to how far this bill can go.

There are other matters in the bill that we also draw to the committee's attention. The provisions relating to youth wages are necessary and justified. We support fully the exemption that the bill provides for youth wages and the government's policy in that regard. The Australian Industrial Relations Commission conducted a full inquiry on that issue at the request of the parliament in 1998-99 and concluded that, in a general sense, there was no substitute readily available for the existing system of age based youth wages. I might say, though, that there are a number of workplaces that, individually, have developed their own workplace alternatives. That is quite proper and quite commendable in those workplaces, and we see no difficulty with that. That is the way in which the industrial system ought to deal with that issue.

The final point I raise in my opening statement is to draw the committee's attention to two specific provisions of the bill which we suggest ought to be subject to analysis and amendment. Subclause 18(4) of the bill deals with the exemption for inherent requirements of the job. It is an important exemption, although the concept of inherent requirements is very narrow. The particular problem I raise—and this is the point that was not specifically mentioned in our submission but that has been identified on closer analysis—is that subclause 18(4) of the bill seeks to create the exemption only for certain parts of the general offence of direct discrimination. There is no reason given as to why other elements of discrimination in employment should not be included in the inherent requirements exemption. It applies to certain aspects of an employer's conduct but not others.

Finally, clause 39 of the bill deals with the general exemption in respect of workplace relations laws and practice. That provision is supported, except for the fact that it seems to contain an anomaly and an omission. It would exempt from the operation of the bill compliance with orders or awards of courts or tribunals—and that would include both federal and state tribunals. It then exempts provisions in certified agreements and Australian workplace agreements, both of which are industrial instruments under federal industrial law, but makes no reference to exemptions for compliance under state employment agreements. That is an omission; there is no rational basis for exempting provisions under state awards but not state agreements. I conclude my opening statement with those remarks.

CHAIR—Thank you for those comprehensive remarks.

Senator LUDWIG—I am curious: you were consulted about this particular bill, weren't you?

Mr Anderson—Yes, we were members of the Attorney-General's core consultative group.

Senator LUDWIG—And you expressed those views there, save for the last one that you identified more recently upon closer analysis? Or did you express that then but did not include it in the submission?

Mr Anderson—Throughout that process we expressed the view that we were not convinced that there should be a national age discrimination law but we were prepared to put that issue of basic principle to one side and look at the specific terms of the bill. The issues that I have raised here today are issues that were raised in that process. The inherent requirements issue that I raised today—the need for an inherent requirements exemption—we generally did raise in the consultation. Until the closer analysis of the bill, which we conducted over the last week or so, we were not aware that that was qualified in the way that I have expressed.

Senator LUDWIG—The bill contains a provision about discrimination on the basis of age using a dominant reason test—the bill refers to a 'dominant reason'. Were you consulted about that?

Mr Anderson—I cannot recall if, in the core consultative group, there was specific analysis of the type of test that would be used. We certainly discussed the practicalities of assessing whether or not decisions were made for one reason or another, and we are satisfied that the provision dealing with the dominant reason test is a reasonable way of trying to address that issue.

Senator LUDWIG—How do you come to that view?

Mr Anderson—Because what we are doing here is creating a law which is entering a field where you need to balance a range of policy objectives. A number of reasons can be behind decisions that are made in the workplace. It would not be reasonable for a decision which has a perfectly lawful basis—an entirely genuine and commercial basis for an employer's conduct—to be subject to not just legal challenge but adverse legal findings because it could be said that some minor or incidental component of it was discriminatory.

Senator LUDWIG—You agree that the state regulation should remain. Should federal legislation such as this override it, be consistent with it or allow the state regulation to operate? There are different tests used, as you would be well aware. This bill uses a dominant test and the state legislation uses a substantial reason test. How would you then deal with that?

Mr Anderson—What we say in paragraph 7 of our submission is that one of the reasons why we are not convinced of the need for a national age discrimination law is that it is being proposed as an additional layer of employment regulation; it is not a substitute for the five or six regulatory structures that are already in place in the states. We would much rather see a national law which was a substitute for state age discrimination laws or, if you could not achieve that, a situation where state age discrimination laws and the federal law were complementary and did not include—to touch on the very point you made—differential tests or differential exemptions or differential levels of coverage or differential definitions. This is one of the dilemmas we have with entering this field of regulation at a national level where there is already regulation on the same topic in the states.

Senator LUDWIG—I am just trying to work out which test you would prefer at the end of the day, because a lot turns on the test utilised in any event. The dominant reason test, as I understand it, was part of the relevant legislation in the Sex Discrimination Act—but I am happy to stand corrected on that—and it was changed. Every state has picked up the substantial reason test. That seems to indicate a move forward to a more consistent or perhaps more accurate test—I am not sure of the legislative purpose behind it. I am just trying to understand what you are saying. Do you prefer the dominant reason test and, if so, for what reason?

Mr Anderson—Yes, we prefer the dominant reason test for the reason I just mentioned—that is, that it would at least provide a basis for employers to be able to successfully defend complaints where they could establish that the overwhelming purpose for their conduct was to impose certain requirements or to undertake certain activities where those were justified and justifiable on commercial grounds.

Senator LUDWIG—So it is only in relation to that narrow issue of employment?

Mr Anderson—That is the context in which we have looked at the operation of the dominant test.

Senator LUDWIG—So you have not looked at it in the wider context of age discrimination in respect of the broader issues of health, credit or superannuation?

Mr Anderson—No. We have not looked at it in the context of credit or health, or in terms of the accommodation provisions of the bill.

Senator LUDWIG—You said in your press release:

That Bill is well intended, but remains flawed.

Do you reject the bill then? Would you prefer that it not be passed?

Mr Anderson—We would prefer not to have national age discrimination laws where, as is the case currently, you have all of the existing state laws still operating. We recognise that this bill has gone a long way towards addressing concerns but without further amendment it would not be acceptable.

Senator MASON—Would you rather have a national scheme than all the different state schemes?

Mr Anderson—Yes, we would, but the reality is that we have state legislation in place at the moment and this is an additional layer of employment regulation, and we as employers have to try and comply with both when we are operating in that jurisdiction.

Senator LUDWIG—When you say 'unless amended', do you mean amended in terms of the issues that you have raised in your paper?

Mr Anderson—Yes, particularly the issues we have raised about the application of indirect discrimination to productivity and performance standards, the issue of the reverse onus of proof, the need to extend the inherent requirements definition to apply to all of the elements of the proposed discriminatory conduct in respect of employment and the need to include state employment agreements in the general exemption for compliance with industrial laws.

Senator LUDWIG—So you would extend the dominant reason test to all of the other areas on the basis that you would prefer it in your area?

Mr Anderson—It is certainly rational in our area for the reasons I have mentioned, and I see no reason why it would not be a reasonable test to apply generally in discrimination law.

Senator LUDWIG—Notwithstanding the fact that no other states have picked it up?

Senator BOLKUS—There is another test that applies in respect of RDA, sex discrimination and disability discrimination law—that is, the one or more reasons test. Have you had any problems with that? Why wouldn't that be the test to apply consistently in respect of this law?

Mr Anderson—It is a broader test—

Senator BOLKUS—That is right.

Mr Anderson—It would provide the basis for not just alleging but also having a finding of unlawful conduct if—

Senator BOLKUS—But it already does in respect of RDA, SDA and DDA, and the world has not collapsed, has it?

Mr Anderson—No, but we are dealing here with a proposed law that is intended to do something which is very beneficial and it is doing it in a very sensitive—

Senator BOLKUS—You do not think the sex discrimination law does that?

Mr Anderson—Yes. The sex discrimination law has been in operation for 20 or 30 years. We are talking here about the emergence of an attitude in the community, including in the employer community, that we need to do more to reduce some negative stereotypes, particularly in respect of mature age employment. The message from the community—from the body politic—to industry is: 'We want you to start changing some of your attitudes; we want you to look more positively at employing mature age workers.' At the very same time, the parliament with this bill is saying: 'We don't want you to discriminate against mature age workers and we're going to give them some additional rights to take action against you if you employ them and they think you are interfering with their rights.'

Senator BOLKUS—How is that different to the history on sex discrimination or race discrimination or disability discrimination?

Mr Anderson—The history, I think, is a bit different because we are right at the starting point of trying to move attitudes now and—

Senator BOLKUS—They had a starting point too, didn't they? There was a starting point in respect of that legislation as well.

Mr Anderson—Yes. That legislation tended to be introduced five to 10 years after there was the move to change community attitudes towards, for example, equal pay for women and the employment of women in the work force. We saw sex discrimination laws come into operation largely in the mid to late part of the 1970s—five to 10 years after that movement started. Here we see an attempt to change culture and at that very point we are also introducing a regulatory approach. I think we need to be very careful that we do not, unwittingly even, produce some counterproductive effects. That is why it is quite right for the

test of unlawfulness to be directed at something which is clearly outside the boundaries of what is regarded as acceptable.

Senator BOLKUS—I do not necessarily accept your argument, but let us presume it holds water. Why wouldn't you define what the playing ground is before you have people participating in it? Why wouldn't you set down the rules of the game now rather than later? In five years time, were we to do this, you would come back to us and say, 'Industry has established a culture, people have established a culture; this legislation will just unravel it.'

Mr Anderson—I do not think we are talking about industry putting in place an unacceptable culture; we are wanting industry to put in place an acceptable culture. This legislation is imposing a regulatory solution. It is saying, 'We are going to create a law which creates a cause of action and that cause of action is that, if you want a job or you are in a job and you think you are being discriminated against on the grounds of your age, you can complain against and sue your employer. The types of things you can sue your employer for even go down to issues such as the performance rules, the productivity rules and the work practices in the business. We have to ask ourselves: what message does that send to businesses? How will businesses react? Are they likely to react to say, 'There is more risk associated with the employment of a mature age person,' or are they likely to say, 'This legislation is going to make me more confident of employing somebody not currently in the labour market in a disadvantaged group'? That is really the judgment that has to be made here.

The government has made a judgment that it wants to introduce legislation. We have said, 'Having made that judgment, we want to try and make sure that the legislation deal as far as it possibly can with some of these practical issues to make sure that there aren't some of those counterproductive effects in the culture that employers will take with them once the bill is passed.'

Senator MASON—In your opening oral presentation you spoke about indirect discrimination under section 15 and you gave some examples of where indirect discrimination may lie and the difficulties that may cause for business. I understand that argument and I am with you, but—as I think Senator Bolkus alluded to—indirect discrimination has a history in this country already under the Sex Discrimination Act, and business has worked with that. Why can't it work with indirect discrimination in relation to age?

Mr Anderson—That is a very fair question. We asked ourselves that question when we looked at this bill. I think the answer to that is that, when you seek to do something of advantage to one age group, by definition it disadvantages another age group. If I have a program to employ people who are over the age of 50, it means that I have, effectively, some form of affirmative action for people over the age of 50 which makes it more difficult for people who are 45 to 49. In looking at how indirect discrimination occurs in the employment context and in the age context, you have to recognise that this is a law that is not just about discrimination on the grounds of age in respect of mature age or young people; it is about age generally. Therefore, things done to advantage one particular age group will have the reverse effect of giving some succour to those who want to raise questions about their being disadvantaged in the labour market.

Senator MASON—I follow that, but, couldn't you argue that—to use your words—positive discrimination in the context of the Sex Discrimination Act in relation to, let us say, women, therefore operates against men in the same way that age might? What is the difference?

Mr Anderson—That is a fair point. We would accept that indirect discrimination has a role and has established itself as a concept in the sex discrimination area and in some of the other discrimination areas. We have learned to deal with those issues as employers. The question here is whether or not the practical issues that arise with indirect discrimination in the age context are matters that we should just learn to deal with. I do not think that they are if you actually look at the types of examples that are given in the explanatory memorandum.

An existing performance criterion may be as simple as saying, 'This particular clerical officer is required to key at a certain rate per minute.' It could be said, on the basis of some medical evidence, that as you get older there may be a slowing down in your capacity to do that job. If the medical evidence says that an age cohort over a particular age is going to generally find it difficult to meet that standard then that standard will be discriminatory against that age cohort and the employer will be acting unlawfully in having that standard. This is the dilemma when we try to apply the age discrimination proposals in the employment context. We do not see quite that same level of difficulty in the sex discrimination area.

Senator MASON—I am sympathetic ideologically to your general thesis but when you mention, in the context of age, that someone as they get older, it may be said, cannot key as quickly, again you could draw an analogy in the cases of sex discrimination that, if there is a criterion that relates to, let us say, strength, you can use that as indirect discrimination against women because women do not generally have the same strength—they may, but generally they do not. I am trying to grapple with the analogy between sex discrimination and age discrimination. Business has come to terms with indirect discrimination in the context of sex discrimination, yet you opened your oral salvo this evening by saying, 'No, we can't cope with it.' I have not really heard a good reason as to why you cannot.

Mr Anderson—The good reason is this: we want to be removing, as far as we possibly can as employers, the disadvantage that disadvantaged age groups have in industry. The question we have to ask ourselves is: what message does the passage of new laws on this topic send to employers? If the message is that they may say, such as many have with the unfair dismissal laws, 'There is a cause of action. I could be sued if I take a bit of a risk, if I put that person on. I could be sued if it doesn't go quite right.'

Senator MASON—I am on your side there.

Mr Anderson—Some employers respond by saying, 'It is a bit of a risk, I might not tread that path.' That is exactly what we do not want to happen here. We are, at the end of the day, enacting a regulatory approach, which creates causes of action.

CHAIR—Thank you, Mr Anderson, on behalf of the committee. We thank the Australian Chamber of Commerce and Industry for their submission and for your contribution this evening. We are glad we have had the opportunity to hear you.

[7.50 p.m.]

CLIFFORD, Ms Rocky, Director, Complaint Handling Section, Human Rights and Equal Opportunity Commission

von DOUSSA, The Hon. John, QC, President, Human Rights and Equal Opportunity Commission

CHAIR—I would like to begin by welcoming you, Mr President, to your first appearance before this committee in your new capacity. We hope that we enjoy a very productive relationship with you as President of HREOC. At least we are starting with this process, and not the estimates process, which is not always the most enjoyable on either side of the table. I also welcome Ms Clifford. HREOC has lodged with the committee a submission, which we have numbered 9. Do you have any need to make any amendments or alterations to that submission?

Mr von Doussa—No, we do not wish to make any amendments or alterations to it, thank you.

CHAIR—I invite you to make a brief opening statement. At the conclusion of that, I am sure my colleagues will have questions.

Mr von Doussa—We appreciate the opportunity to be here to answer questions. We have put in a submission. I think it will be apparent that HREOC welcomes the introduction of this bill. For some years, the organisation has been advocating antidiscrimination legislation which is directed specifically to age. The bill that is presently under consideration builds on the limited age discrimination provisions which are now in the HREOC Act through the ILO 111 convention, but this bill has the advantage of at last introducing remedies that are enforceable at law and will be easier to understand and that will be more certain in its recognition by the community.

The HREOC organisation supports the structure of the present bill, which follows the structure of the other discrimination acts. However, whilst we support it strenuously, there are one or two minor matters that we raise in our submission which we think perhaps require some further consideration. I will just briefly run through those, though I know you have the submission and are able to read what is in it.

The first matter we raise is this dominant reason test. You will appreciate that I was not the President of HREOC at the time that many of these consultations took place, so some of my information is hearsay and second hand, but I understand that this was not a topic that was discussed at any length in the committee stages before the drafting of the bill. HREOC is of the opinion that it would be better to adhere to the same test applied in the other discrimination acts, for the advantage of uniformity and the advantage of understanding.

We are also concerned that the dominant reason test is very much like the dominant purpose test which gained strength in the evidence field and proved to be one that is difficult to establish as a matter of evidence. One has to concentrate on the actual mind process of the particular people who are responsible for the conduct. It adds a dimension which will make complaint handling difficult. We are also concerned that it may present a barrier to people

seeking to call in aid the beneficial effects of this legislation. As the last witness observed, it certainly would make the defensive claims for age discrimination easier to make out.

The explanatory memorandum, on page 43, puts forward as an explanation for this clause that the solution of most aspects of age discrimination is based on education and attitudinal change. It is thought that it is important not to have barriers to a positive development of that kind. As we understand that, it appears to be a reason that is advanced in the context of difficulties that might arise on the employment of people who are not in the work force. But the other side of that coin is that this legislation is also intended to protect people who are in the work force who might otherwise be targeted for early redundancy or the like on account of age. In that area, if it is easy for employers, for example, to call in aid this dominant reason test to avoid a finding of discrimination, it goes a long way to defeating the purpose of the act. We would support the view that the same test should be applied in this act as in the other discrimination acts.

The next point we raise is in relation to clause 33 of the bill, which is the provisions regarding positive age discrimination. The only point we want to make there is that the structure of the positive provisions in the bill are somewhat different from the other discrimination acts and have the risk of actually positively discriminating against certain classes of people. We offer the suggestion that, if there was a further proviso added to the effect that the particular measure must be reasonably required to address the need or disadvantage, that would go a long way to removing that risk.

We question whether clause 6 is necessary. But, in fairness, we are unable to put forward any very convincing argument that to leave it in is going to cause any great harm. We have a little bit of difficulty with it and are just concerned that a casual reading of that section by people who may wish to rely on the act would cause them to think that the act would not come to their benefit.

The next point that we raise concerns clause 39(1), which is the exemption from direct compliance with federal law. We are generally supportive of the whole of clause 39, but the one point that we raise is in relation to the Defence Force. The Defence Force, it seems to us, is unlike the service providers who provide pensions, social security and the like. The Defence Force is in fact a major employer, and the age discrimination issues arise as part of the terms of employment of a very large number of people. Rather than simply excluding in a blanket way all Defence Force personnel because of provisions in defence acts, we offer the view that it is time that there is some substitutive test to make the age discrimination depend upon the suitability of the applicant for a particular job. So one looks at the merits of the person in relation to a position on a case-by-case basis to see whether there is in fact age discrimination.

There are four lesser points that we raise, and I mention them briefly. One is the concept of age discrimination for relatives, which was discussed by earlier witnesses tonight. Could we perhaps just offer one or two examples, one of which is supportive of what was already said? We see that there is a similarity here to family responsibilities in the Sex Discrimination Act. There is a risk that, as older people remain in the work force, or are re-employed in the work force, someone may not be employed or may not be kept on because of an employer concern that they have an elderly relative that is going to be a demand on their time for care.

Also in the relative situation, you could postulate the example of a single mother seeking to lease premises and who is discriminated against because she has a child. There is age discrimination of a relative there. Or you may find someone seeking to lease premises being discriminated against because they have elderly parents with them who are not perceived to be desirable in a particular establishment. So there are areas in which discrimination for a relative could be relevant.

We raise an issue about direct and indirect discrimination definitions, which again have been discussed. We simply offer the view that, to maintain consistency with the other acts, a provision somewhat like section 7B(2) of the Sex Discrimination Act, which is set out in footnote 42 of our submission, would be desirable.

Could I just add, in respect of submissions that have been made to you by the previous witness, Mr Anderson, that, as we understand the bill, the sorts of concerns that he was raising about the definition of indirect discrimination do not pay sufficient regard to the inherent requirements provisions which are built into clause 18 and follow in the employment situation. As we understand those inherent requirement provisions in this bill, they would override, as it were, both limbs of the definition of discrimination—that is, direct discrimination and indirect discrimination. So, if an inherent requirement of a job is that you can keystroke at a particular rate, you could advertise that. Because it is an inherent requirement of the job, it would not be caught as discriminatory conduct by either of the definitions.

We raise youth wages, dealt with in clause 25, merely to make the comment that this is a very complex area. Rather than have written into the act a section which gives a permanent exemption for youth wages, it would be better to have a provision that protected youth wages by reference to awards, industrial agreements or other specific Commonwealth legislation which is directed to that particular issue.

The final point we raise is in relation to the migration exemption. The reasons for that exemption given on page 14 of the explanatory memorandum are readily understandable, but the actual clause goes further than merely protecting the statutory requirement for particular visa classes and the like. In its width, it picks up and protects the exercises of discretion so that, if in the course of considering an application a decision maker took into account age and used it as a discriminatory factor in making a discretionary decision, that would be protected. As clause 43 stands, it goes beyond protecting direct compliance with legislation, and we would respectfully suggest that it should be restricted to direct compliance.

CHAIR—Ms Clifford, do you wish to add anything at this point?

Ms Clifford—No, thank you.

CHAIR—In previous submissions, particularly the one from the Australian Chamber of Commerce and Industry, a strong view was put that really there is no need to approach this on a federal basis, given the coverage currently applicable at the state level. I am sure age matters come to HREOC, notwithstanding the fact that the jurisdiction is perhaps not currently there. What is HREOC's experience in that regard and your view of that assertion?

Mr von Doussa—We get complaints made to us under the ILO 111 provisions of the HREOC Act which concern acts and practices of the Commonwealth. They are not presently

covered by state legislation, so there is an area of Commonwealth employment which is not caught by state legislation. Also, the state acts are not consistent with one another, so there are different coverages in the different states. The HREOC view is that it would be preferable to have a national act that applies a uniform standard across the whole of the country and also picks up the Commonwealth employment situations that are otherwise not subject to state legislation.

CHAIR—I am sure that, in compliance terms, that would be welcomed by business.

Mr von Doussa—I cannot speak for them.

CHAIR—That is the message I got, I must say.

Senator LUDWIG—I understand you were consulted in respect of this bill. Is that right?

Mr von Doussa—Yes. I was not the president of the commission at that time, but the commission was one of the members of a core consultative group.

Senator LUDWIG—Were you consulted about the dominant reason test, if I can call it that?

Mr von Doussa—My understanding is that we were not and that it was not a matter discussed by the core consultative group.

Senator LUDWIG—The view reflected in your submission—these are my words—is that you would prefer the test reflected across the various states for reasons of consistency.

Mr von Doussa—That test is slightly different in its expression to the test that is in the Racial Discrimination Act, the Sex Discrimination Act and the Disability Discrimination Act. We would prefer the two or more reasons test which Senator Bolkus referred to. In substance, I think it is the same as the test that is applied in the states. A substantial reason, as I understand it, has been construed to mean something that is not trivial or minor—a significant reason but not a dominant one—which is, in effect, the same as the test in the Commonwealth discriminatory legislation.

Senator LUDWIG—Is it that the test that is reflected in this bill—if I can use the phrase—is a lesser test or is it an easier test, in your view? Or is it more stringent in its application?

Mr von Doussa—It would be a much easier test for employers to avoid a finding of age discrimination.

Senator LUDWIG—Do you recall that it was an issue that was reflected in the legislation, although I cannot quite find the position now? I think it was in the Sex Discrimination Act—I am happy to be corrected about that.

Mr von Doussa—The Racial Discrimination Act prior to 1990, I think, had that division in it.

Senator LUDWIG—Were there a couple of cases that changed that—I am trying to recollect what the driver for the change was—or was it a view that the area needed—

Mr von Doussa—My understanding is that difficulties were encountered in the application of the test, but I will defer to more expert knowledge.

Senator LUDWIG—They might have been. Were those difficulties highlighted in particular cases? If they were, and if you can recollect, perhaps you could point me to those particular cases.

Mr von Doussa—They are in paragraphs 2.5 and 2.6 of the submission, I understand.

Ms Clifford—The main issue was the difficulty of any cases being able to be substantiated. We do not have any specific case but the amendments by the Law and Justice Legislation Amendment Act 1990 changed the focus of that. Ardeshirian and Robe River Iron Associates was an example of a case in which concerns were expressed about the dominant purpose test. I presume it was not just in one case that that amendment was made but, rather, the individual circumstances of people being unable to achieve that at the early stages of the commission.

Senator LUDWIG—In respect of the provision that deals with the functions of the commission, which is part 6, section 53, are they consistent with your current functions?

Mr von Doussa—They are virtually a mirror of the functions which are in the HREOC Act.

Senator LUDWIG—There is also a HREOC bill. Are they not consistent with that bill?

Mr von Doussa—That bill seeks to reorder some of the paragraphs. There is another supplementary legislative bill—

Ms Clifford—The consequential amendment acts deal with any anticipated change to the human rights legislation as it currently stands, but the provisions under section 53 are as the HREOC bill currently stands.

Mr von Doussa—And would be reordered in accordance with the other bill if it were passed.

Senator GREIG—Does HREOC have a view or has HREOC given consideration to international comparisons of the proposal for age discrimination in Australia? As I understand it, there are very few countries which have addressed age discrimination. Perhaps on that basis alone, that means Australia is in a position of advancement, but where there might be international comparison, how do you feel that we stack up with the proposal?

Ms Clifford—I do not think we have actually examined that. We have relied on the current domestic laws, which are the state laws, and the federal antidiscrimination law. There was no real examination or comparison of like international laws.

Senator GREIG—Is the exemption applying to religious organisations, charity groups and volunteer agencies a kind of universal exemption that applies to other grounds of status within HREOC or has it been singled out for this brief on age?

Ms Clifford—No, it is similar to the other acts. Charitable organisations and voluntary organisations have various exemptions under the sex and disability discrimination acts. During the core consultative committee meetings a number of the other participants brought up the issue, particularly as volunteer work relates to people in their older years. The commission, although wanting things to be consistent, were not opposed to any particular area being made out for voluntary work but did not want that confused with the area of

employment. We understand the issues of those very concrete understandings of the employer-employee relationship, but I thought there was some merit in having another area that specifically relates to volunteerism in particular circumstances.

Senator GREIG—Is it HREOC's experience that you receive complaints—complaints which you cannot investigate or prosecute—from people who feel unjustly discriminated against within volunteer religious organisations or the charity environment?

Ms Clifford—I could not give you an exact number but, as the director of complaint handling, I recollect that we do get some inquiries about that. Again, because we are limited to employment in terms of age discrimination, we would be advising those inquirers that we have no authority to deal with those matters. Yes, we have had complaints, but I could not give you a specific number. My recollection is that we do get some inquiries about that through an informal telephone inquiry or sometimes in writing.

Senator MASON—We are all assuming it is prevalent but is there much evidence of age discrimination in the community?

Ms Clifford—When we were working with the core consultative group, I provided the Attorney-General's Department with a number of statistics from the annual reports of the state antidiscrimination agencies. From my recollection of that, age discrimination complaints made up around 10 to 15 per cent of the complaints they received. In relation to the commission's work, it is much lower than that because of the limitations of the current arrangements to solely employment. From my recollection, in New South Wales and Victoria around 10 per cent of the complaints that they received related to age discrimination.

Senator MASON—We have had a suite of antidiscrimination legislation in this country since 1975—race, sex, disabilities and so forth. Has there ever been any analysis of whether that has made a difference? Has the Race Discrimination Act led to racial minorities having better access to employment, for example?

Ms Clifford—The commission has not done anything per se, but there would obviously be specific issues. I am sure that a number of other organisations would suggest that it has made a difference. At the moment I do not have the names of any of the projects that have been done. I think women in particular would say that they are now a major component of the work force and that may well be reflective of the Sex Discrimination Act.

Senator MASON—That might not be because of the Sex Discrimination Act; that might be for demographic and other reasons of course.

Ms Clifford—It could be that as well.

CHAIR—It could be all the help that Senator Mason gives them in the work force, of course!

Senator SCULLION—I was very interested in the submission from COTA where they made the statement that there are circumstances where volunteers—as an example—come and give their time. In the case of an older volunteer, a company may discriminate against them because it may be in breach of some issue about insurance in voluntary work. Clearly, the employer is simply saying: 'These are the statutory provisions in an economic environment—for voluntary work to do whatever practice it is. I can no longer employ these people because

I cannot survive economically. They have just said to me, "This is the environment."' Clearly it is not the worker or the employer who doing anything there; it is just circumstances to do with an insurer, who may not say that they are discriminating a particular age group; they simply may say, 'There is a premium attached to the employment of that age group.' Do you think that the fact that somebody is attaching a premium as a type of risk to an age group is discrimination? Clearly it has a shower effect.

Mr von Doussa—In the abstract I think it is. The act deals with the insurance situation specifically. Insurers have to justify their position by statistics and data. If they cannot, they are guilty of unlawful discrimination. If they can, the act recognises, in relation to the insurers, that it is not conduct that should be caught by the act. I think the example that is put forward really raises that issue. At the end of the day the question should be: is the insurer discriminating on legitimate grounds, namely statistics and data, or is it discriminating for an unjustifiable age reason? It is discrimination on account of age; it is a question of whether it is omitted under the act and therefore not unlawful.

Senator SCULLION—So if the insurer was found to be compliant with the age discrimination provisions, would an employer working under those provisions in terms of risk factors be able, under those circumstances, to say: 'The risk issues are these. That is my parameter in terms of whatever financial issue—it is not an issue. I have to cut my cloth according to my income, as provided by someone else.' Is he in non-compliance if he follows the rules of the insurance company?

Mr von Doussa—I think we have got to look at it in two parts. We have got to remember at the moment that voluntary organisations are not caught, so the question does not arise under the act as drafted. If you go back to an employer situation, my analysis of that—and I stand to be corrected—would be that it is an indirect discrimination question. Conditions are imposed on the employment. The question would then be whether that condition was reasonable, having regard to the circumstances; and one of those circumstances would be the position taken by the insurer. If the insurer's position is justified, it would follow that the employer's position is justified.

Senator SCULLION—Thank you.

CHAIR—To conclude this session, I call Senator Ludwig.

Senator LUDWIG—I note that you indicated that the workload may, in comparison with other jurisdictions, be anything up to 10 per cent; they use that as the high-water mark. Would you agree with that?

Mr von Doussa—My understanding of the answer was that, on a national basis, about 10 per cent of the complaints that are received by a conglomerate of organisations are age complaints. In HREOC it is much less, because we have got only a very limited jurisdiction to deal with age at the moment—under ILO 111. We would assume, I think, that the complaint ratio would go up considerably if we had the coverage that we have not now got but would get under the bill. Whether it would be 10 per cent or whether it would be some other percentage in that region is anyone's guess.

Senator LUDWIG—Thank you. I was using that as a high-water mark. I was just trying to gauge whether or not you had been in consultation with the Attorney-General about additional

resources to deal with the expected increased workload that may result should this bill pass. Separately, I ask how you would address the collegial system that will be adopted in respect of this bill, where you will not have a separate commissioner. I know there are two parts to that question, but it is a resourcing issue at the end of the day as well.

Mr von Doussa—We would see one of the functions that we have to do if this act were passed to be the educative function, which is unrelated to actual complaints. I suppose we are trying to stop the complaints at the outset. There would be a major educative function. The educative function generally is supervised and administered through the public affairs department of HREOC, which is not specific to any one of the existing commissioners; it is a unit that operates across the whole field. So that educative function would be picked up as part of that unit, and it is very much a collegiate exercise within HREOC.

The complaints function is not peculiar, under the other acts, to the designated commissioners. In fact, they have had their complaints function taken away from them. The complaints function is vested in the president and dealt with by a complaints department under the management of Ms Clifford. So, again, it would come in as another aspect of the complaints work going into an existing function. It would have to be expanded—there would have to be additional complaints officers and so on—but the fact that there was not an age commissioner would make no difference to the way in which a matter would be administered.

Senator LUDWIG—In respect of the first part, you have indicated that there is likely to be additional officers required to deal with the matter. Have you been in consultation with the Attorney-General about those additional resources?

Mr von Doussa—Yes, we have.

Senator LUDWIG—What is their view?

Mr von Doussa—We have not have a response to that, but, when the bill came up, as part of our approach to it we worked out what we would understand the position to be if the bill were passed and wrote to the Attorney-General's Department saying that we would need additional staff and additional money to run a concentrated education program, we thought, for two years and then a lesser but continuing education program thereafter.

Senator LUDWIG—The committee might be interested in that response, if you do actually get one. Thank you.

CHAIR—On behalf of the committee, can I thank the Hon. John von Doussa and Ms Clifford very much for assisting the committee this evening. Again, Mr von Doussa, we look forward to having a productive relationship with you.

Mr von Doussa—Thank you very much.

[8.21 p.m.]

ATWELL, Ms Julie-Anne Maree, Acting Principal Legal Officer, Attorney-General's Department

FAULKNER, Mr James, Assistant Secretary, Attorney-General's Department

RIZVI, Mr Abul Khair, First Assistant Secretary, Migration and Temporary Entry Division, Department of Immigration and Multicultural and Indigenous Affairs

WALKER, Mr Douglas James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs

CHAIR—Welcome. I understand that we have a veritable galaxy of stars available to the committee this evening, led by Mr Faulkner and representatives of the Attorney-General's Department. I think there is some arrangement whereby Mr Faulkner and his colleagues are going to come to the table and then we are going to seek the support of our stars to assist as necessary during the process. I am pleased to see that Mr Walker has come back tonight—that is very good—after his sojourn here last night. I apologise that we are running over time, but I do hope that we can deal with his part of the hearing expeditiously and not delay you too much longer this evening.

Before we commence, I would remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. Mr Faulkner, did you wish to make an opening statement?

Mr Faulkner—I might make one short comment about the process here that you were alluding to a moment ago.

CHAIR—Certainly.

Mr Faulkner—I should begin by thanking the committee for the opportunity to answer questions on the bill. I would like to mention that, while the bill was prepared on the basis of instructions provided by the Attorney-General's Department, it touches on, clearly, many areas of Commonwealth responsibility and it has involved a significant degree of coordination between Commonwealth agencies. Hence, the attendance tonight of officers, in addition to those of us from A-G's, from the Department of Health and Ageing, the Department of Family and Community Services, the Treasury and the Department of Immigration and Multicultural and Indigenous Affairs. We have in mind that these officers are here to lend assistance if required in relation to aspects of the bill which touch on their respective areas of responsibility. I should also, if you do not mind, pass on the apologies of Amanda Davies, who was hoping to be here tonight but has been detained, I am afraid. Thank you.

CHAIR—Thank you very much, Mr Faulkner. I do appreciate the attendance of the officers from a range of departments here this evening. I imagine that in many ways it is a reflection of the consultative process that this bill has undergone in coming to the parliament, which has been commented on by all of the witnesses that have appeared before us this meeting, even those who are supporting the bill in part and some in a lesser part. In terms of particular questions, I will begin by asking about application of a national scheme while there are still extant state schemes which may have different criteria, different requirements and so

on. Is it the Commonwealth's aim that this will ultimately become a scheme of national coverage with those state schemes, hopefully by cooperation, being replaced?

Mr Faulkner—I do not think I could say that that is the hope or the intention, if I have understood the proposition correctly. The aim here of the government is to introduce a comprehensive scheme that overcomes some of the lack of uniformity and gaps in the existing state schemes, but there is clearly no intention under the bill to do away with, or to somehow put aside, the state and territory legislation. Indeed, the bill contains provisions which deal explicitly with concurrent operation of state and territory legislation.

CHAIR—In what way were the states and territories involved in any consultation?

Mr Faulkner—Principally through state and territory attorneys-general. I am not aware—

CHAIR—Through SCAG itself, or in a separate construction?

Mr Faulkner—Principally SCAG, as I understand it. Would it help at all to provide a brief indication as to why the Commonwealth sees this as a good idea? That may go some way towards addressing the issue that you have raised, which is the fact that state and territory laws are there.

CHAIR—I would be happy for you to place those remarks on the record, and then we will move on.

Mr Faulkner—I will not go on at any length here. The bill, as you know, does implement the government's 2001 election commitment to develop legislation to prohibit discrimination on the basis of age. It was, as we have noted, developed following very wide consultation. It is intended to strike a balance between the elimination of age discrimination and recognition of legitimate age requirements. In that sense, it is not so different from the state and territory arrangements.

A fundamental principle underlying the government's policy in this area is that the best way to protect the human rights in the particular area which we are dealing with is to educate business and the community about their rights and their obligations. There has been discussion throughout the consultation process, which I think is readily available on the public record, about the kinds of reports and the considerations that have been given to the question of ageing in the Australian society, and the changing demographics and requirements that arise from that. It was seen that giving a unifying, comprehensive role to HREOC under a scheme of laws which gave a more comprehensive application in relation to Commonwealth laws would be a significant step forward in dealing with an important area of discrimination.

Despite state and territory age discrimination legislation, the matter of age discrimination is still a significant issue which the Commonwealth believes is worthy of significant further effort. The government is very aware of the negative consequences of age discrimination for society generally. The bill is in particular—and I am to some extent shorthanding the issues here—a response to an international commitment to eliminate age discrimination, set out in the declaration adopted by the Second World Assembly on Ageing in Madrid.

I believe Australia is the first country—and this was a matter that I think you alluded to before—to propose stand-alone age discrimination legislation to cover, among other things,

access to goods, services, education and employment in the federal sphere. I thought it was worth just touching on those things to try and draw it together.

CHAIR—I appreciate that. Mr Faulkner, are you the person we ask about support for HREOC's expanded responsibilities in this area in terms of matters budgetary and a response from the Attorney on that matter?

Senator LUDWIG—Given your comment that the best way is to educate.

Mr Faulkner—I would not resile for a moment from what I said a moment ago. It is certainly the case that a key objective of the legislation is to promote attitudinal change across society so that people are judged on their actual capacity and not unfairly excluded from access to the full range of goods and activities that are available to Australians generally. It is undoubtedly true to say that the Human Rights and Equal Opportunity Commission will play an important role in relation to public awareness and education about the issue of age discrimination as well as conducting inquiries into conciliation of complaints and policy on legislative development.

Senator LUDWIG—I have a feeling you are beating around the bush.

CHAIR—I was going to wait for Mr Faulkner to finish his remarks to my question, Senator Ludwig, and then you can take over from there.

Mr Faulkner—I was just coming to the point about resources, which I take it is of particular interest to the committee.

CHAIR—Always.

Mr Faulkner—Yes, quite.

CHAIR—And to HREOC I think.

Mr Faulkner—Yes, I am sure. All I can say on that front is that generally speaking the government's policy is that agencies are not provided with new resources for changes in functions that can and should be absorbed by the normal processes of adjusting priorities and workload as circumstances change. In the case of HREOC, it receives a total budget, in the government's view, to deal with the entire spread of its responsibilities and it does not have separate budgets for particular areas of discrimination. The government is confident that the commission can manage responsibility for age discrimination legislation within its existing budget.

CHAIR—Would you call that a response to the commission's letter—that they have not apparently received?

Mr Faulkner—I am afraid I have not sighted that letter but that is not to suggest it has not been received by the Attorney. I am not in a position to comment on that.

CHAIR—I ask you to take it on notice.

Mr Faulkner—Certainly. I want to make one more point, which is to say that age discrimination does fall under the commission's broader education and inquiry functions and the commission does have capacity to reprioritise funding within the organisation to deal with complaint and education functions under the age discrimination legislation.

Senator LUDWIG—As I understand it, another bill that is currently before parliament, and I will not go to it in detail, also directs HREOC to reprioritise its work to a more educative function. If that is the case, how are they going to do all that, including this bill?

Mr Faulkner—Did I understand you to say that there is another bill before the parliament which is asking HREOC to reprioritise its work?

Senator LUDWIG—Yes, to direct it to a more educative function.

Mr Faulkner—I am not trying to be evasive, but I am not—

Senator LUDWIG—I am happy for you to take it on notice if you are not clear, but the crux of the question is that you say it is within HREOC's ability to reprioritise their work but it is also within your ability to direct them, it appears, to reprioritise their work. Given that the Attorney-General intends to reprioritise their work, wouldn't it also be likewise helpful to ensure that they had the budgetary means to do so, given it is your direction? I am happy for you to take that on notice.

Mr Faulkner—I think I should, as I will need to consider it. My only point at this stage would be that it might be a little misleading to suggest that HREOC is being directed, in the sense normally understood by that term, to do anything in particular. It is the government's position that it is within the scope of HREOC's capacity to organise its budget as it sees fit to carry out its statutory functions. That is really more the point that is being made here.

Senator LUDWIG—Perhaps you could also try to find a response to the letter HREOC have indicated they have forwarded to the Attorney-General.

Mr Faulkner—I would be happy to do so.

Senator LUDWIG—I understand that the dominant reason test is at odds with those in the states. Was there a process of consultation in arriving at that particular test rather than another test?

Mr Faulkner—Not that I am aware of.

Senator LUDWIG—When you had the first round of consultative processes, was any test suggested at that point? Was a particular framework used?

Mr Faulkner—Broadly, the any reason test of the kind that was discussed with other witnesses this evening was talked about.

Senator LUDWIG—Could you indicate at what point you changed your mind and used the dominant reason test? What was the motivating factor in that change?

Mr Faulkner—In view of the broad range of positions that were adopted during the consultation process, the government took the view that what we are describing as the dominant reason test was appropriate. Section 16 provides that age must be the dominant reason for an act if that act is to substantiate a complaint of age discrimination. As you say, that is different from tests in other Commonwealth antidiscrimination legislation. Generally in other cases the act is taken to have been done for the relevant reason if that reason is one of a number of reasons. It is the government's view, however, that in the area of age discrimination action should be unlawful only where age is the dominant consideration.

It is the government's view that this test will be most appropriate to promote attitudinal change and to strike the balance that it wants to achieve. The government sees education and attitudinal change as crucial, as I have indicated, to the elimination of age discrimination. The bill is designed to send a very clear message that age stereotyping is unacceptable, without suggesting that age can never be a relevant consideration. Clearly there are a range of views as to where the balance should be struck. I think Mr Anderson from the ACCI earlier outlined a range of views. Other views have been presented. The government decided that the balance that has been struck for the dominant purpose test is the appropriate balance to achieve the kind of clear message that it wants to send.

Senator LUDWIG—How will you achieve the educative aim when the test is inconsistent and viewed as a lesser test than that used in the states—that is, if lawful discrimination can be broader than it is in the states—and this bill also has a significant range of blanket exemptions? If you take those two together, which effectively widens the area of lawful discrimination in respect of age, how will you achieve your educative purpose?

Mr Faulkner—I think I see the point you are making. All I can say in response, and I think this is a relevant point, is that each of the acts the Commonwealth has enacted to deal with discrimination strikes a particular balance given the range of considerations—and some of them are different in different areas—that bear on the question. In this case the bill unequivocally indicates that age stereotyping is generally unacceptable. However, in the view of the government it is necessary to make sure that the balance that is struck in terms of what exemptions are present and what the nature of the initial prohibition is will not be counterproductive—will not have an inimical effect. The balance this bill adopts is the one the government thinks is appropriate in the area of age discrimination. It is not the same balance that is struck in other areas which are different and in relation to which different considerations apply.

Senator LUDWIG—I do not know whether we have time to deal with what differences might exist. It is principally discrimination that we are talking about, isn't it? That test was removed from the Racial Discrimination Act and replaced.

Mr Faulkner—That is right.

Senator LUDWIG—Is that seen to require more? I am trying to understand why you would move to that here. As an adjunct to that, perhaps you could also explain what consultation went on in respect of the test that you now have.

Mr Faulkner—On the Age Discrimination Bill?

Senator LUDWIG—No, on the dominant reason test.

Mr Faulkner—As I understand it, there was no outside consultation in relation to the dominant reason test in this bill.

Senator LUDWIG—How does this bill differ from the Racial Discrimination Act, in which you moved away from that test?

Mr Faulkner—The point I was making before was that a different area of discrimination—that is, discrimination on the basis of differentiation as to age—can be seen to throw up different considerations, even different philosophical considerations, from those

which are thrown up by questions of differentiation on the basis of sex, race or disability. For example, to take a very obvious point of difference, everyone has an age but not everyone has a disability. In some ways age discrimination might be more analogous to sex discrimination—closer than it is to disability discrimination or racial discrimination in some respects. That is the simple point I was trying to make. I am not suggesting that that should necessarily convince you but it was the only point I was concerned to make.

Senator LUDWIG—Does the definition of employment exclude casuals? It talks about part-time.

Mr Faulkner—I think the short answer is that it does not exclude them as such. Generally speaking the act, when it speaks of employment, speaks in terms of paid employment—and casual employees can obviously be paid employees.

Senator LUDWIG—So your view is that the term 'employment' encompasses what the layman understands by part-time, casual and full-time employment?

Mr Faulkner—That is my working understanding.

Senator LUDWIG—Would you take that on notice and perhaps provide an amendment which clarifies it, because it is unclear to me that it would include casuals.

Mr Faulkner—In my view it does cover casuals, and there is sufficient case law available to support that proposition. I certainly could not give an undertaking that there would be an amendment. If on further investigation—

Senator LUDWIG—I am happy to have the case law instead if you say it is sufficient.

Mr Faulkner—That is my understanding. If I am wrong about that, clearly we would need to consider it; but that is my understanding at the moment.

Senator LUDWIG—Perhaps you could take that on notice and have a look at it for me.

Mr Faulkner—I do not see that as an area of doubt as things stand.

Senator LUDWIG—There are effectively three types of general exemptions. There is exemption for two years, there are general exemptions for whole areas such as immigration and superannuation, and there is the ability of the commission to make exemptions.

Mr Faulkner—That is broadly right.

Senator LUDWIG—Are there any others, or have I got the three basic areas?

Mr Faulkner—I do not think you have missed any. That sounds right to me.

Senator LUDWIG—When you add all of those together, it seems to detract from the operation of age discrimination law generally. If we take one area and use it as an example, a store person working in a defence establishment is, for all intents and purposes, no different from a store person working in Coles or Woolworths. The way yours may operate is that, notwithstanding state legislation, it may apply to the retail worker, but it would not apply to the same person doing a similar task in the defence establishment.

Mr Faulkner—I think one may need to be very careful here. I know this may sound evasive, but it would be necessary to deal with any kinds of examples on a case-by-case basis. I know that that is something of a stock reply in cases like this, but I think it is nevertheless

true. The act is relatively complex in some areas in striking a balance. But I think it is worth making the point that it is central to the government's undertaking here to ensure that the legislation does strike a balance between eliminating discrimination and accommodating legitimate age requirements. I am afraid I could not offer a view on the particular example you have cited; I do not know whether that is in fact possible.

I think the government's position certainly is that some age distinctions are legitimate. Broadly, that is where there is beneficial treatment intended for genuine age related needs for younger or older people to overcome disadvantages. In some cases age differentiated treatments have clearly very broad social support. Age based movie classifications is an example of that kind of thing. In other cases the government and sometimes the parliament has indicated that age differentiated treatment is justifiable for policy reasons other than those that I have just alluded to. In order to respond with any substance I am afraid I would need to look on a case-by-case basis at whether or not particular situations are examples of unlawful discrimination. I do accept that the broad kinds of statements I have just made are not a direct answer to the point you have made, but it is about as good as I can do at the moment.

Senator LUDWIG—Wouldn't that then in itself be a reason why you would not have broad exemptions but would allow case by case? We have heard from submitters tonight that they prefer a case-by-case examination because of the issues that you have just raised. It is difficult to make those broad comparisons without knowing the particularity of the circumstance. A number of submitters—Immigration, COTA, ACOSS, ALHR and HREOC—have raised concerns over the breadth of the exemption in clause 43. They say that it is anything done by a person in relation to the administration of the migration or immigration acts and their regulations. It is not limited to covering conduct in direct compliance with those laws, rather also anything done in relation to their administration. It is not only the three areas in terms of the exemption and the commission; you then have to look at how broad that exemption is. The blanket one in respect of one area covers not only migration acts but also the administration of those migration acts. I suspect it also includes—perhaps you could help me—those officers that administer it. I have digressed a little but the issue that I have raised still remains.

Mr Faulkner—Just reverting to that basic issue for a moment, I think there is a relevant distinction to be drawn here. The particular exemptions, whether they be general exemptions for a subject area or acts included in schedule 1, have been very carefully considered. There is no doubt that those exemptions are very carefully targeted and have involved a great deal of consideration as to what the basis is for the particular exemption in that case. That kind of consideration, analysis, is I think to be distinguished from the other kind of issue which I was alluding to a moment ago; that is, any particular example which might be thrown up of a person in a particular situation needs to be considered very particularly in light of the provisions of the act in order to decide quite what the situation is. So to take the example you were raising a moment ago, I simply do not know—it may indeed not be possible to say in the abstract—whether a person in a shop is being treated differently to a person in the Defence Force running a store. That particular thing is too general, too abstracted, for me to say anything sensible about.

Senator LUDWIG—I will not take up the committee's time in trying to pursue where you think the difference is. If they are all moving blankets in the same room or separated by a fence, I am not sure I can agree with you, but why so broad in respect of the migration area? What is the motivation in respect of that broad exemption? I might understand your argument in respect of Defence, although I will not take up the committee's time by trying to tease out that, but can you tell me why in respect of migration?

Mr Faulkner—I can certainly have a go and then I might call on reinforcements if that is necessary.

CHAIR—Nobody is moving from the back of the room, Mr Faulkner. Mr Rizvi and Mr Walker appear riveted to their chairs.

Mr Faulkner—Yes, quite.

CHAIR—But with a little gentle encouragement from the chair, look what happens.

Mr Faulkner—I think the starting point really ought to be that, generally speaking, migration laws have a number of provisions that differentiate on the basis of age—that is a given. Immigration policies of successive governments have sought to balance social, economic, humanitarian and environmental factors in order to achieve migration outcomes of benefit to the community as a whole. The effective management of the government's migration program means that various factors, including age, need to be used to ensure that in the government's view the overall program covers persons who will make a positive contribution to Australia.

An integral component of setting programs such as these is to balance the cost of the migration program as a whole against contributions that migrants can make, and age group is one factor among many which is taken into account to make that kind of analysis. Many visa classes have age requirements. In other areas, age requirements are imposed on the basis of the legal capacity of young persons and their ability to make certain kinds of informed decisions. As I am sure you would be aware, that program is under constant review, and it is because of the plethora of such, in the government's view, legitimate age based considerations across the spectrum of a complex system like migration that it is necessary to make sure that a sufficiently broad exemption is carved out.

Senator LUDWIG—Perhaps I am missing something. Part of the reason to bring in age discrimination is to prevent discrimination based on age.

Mr Faulkner—That is one objective.

Senator LUDWIG—Can we agree that it would be the primary objective?

Mr Faulkner—I am not trying to be difficult here, but I think it has been central to—

Senator LUDWIG—The principal objective then?

Mr Faulkner—It is certainly a very important aspect. It is the government's intention to strike the correct balance, because it should not be forgotten—and I know I sound a little like a broken record on this—that there is some age based differentiation which is legitimate and that that is one of the fundamental premises on which the bill is founded. So it is one of the pillars.

Senator LUDWIG—Wouldn't it be easier to separate those out in respect of the migration area rather than provide a broad blanket? As you have just indicated, some of the criteria based on obtaining visas and what have you under those acts do require and do have age considerations, but they are age considerations which may not go to the test of whether the person can provide income to support themselves and contribute—all of those issues that would then remove it as a barrier. That is what this bill is designed to do: to ensure that people can continue on in employment and not be discriminated against on the basis of age when they can still contribute equally to society. I imagine those are also found in the migration area. Why wouldn't you want to remove those as well? Not all of them, granted; some of them might be legitimate. But we could deal with those on a case-by-case basis or by two years perhaps or, alternatively, with a blanket with fewer exemptions.

Mr Faulkner—There are many points that could be made about that. It seems to me that the most relevant one to touch on is that we are constrained by considerations of practicability to some extent. We need an act which can work. Particularly in a very complex area of national administration such as migration and particularly in an area which is the subject of such close and detailed parliamentary scrutiny as that area is subject to there are very powerful arguments, I think, for identifying it as one area which is legitimately covered by the kind of relatively broad exemptions that we have here in clause 43. In theory, all things are possible I suppose in terms of teasing out every single practical aspect of a scheme administered by the Commonwealth. In practice that would be very difficult and perhaps unworkable in some areas. In this case, very careful consideration was given to this area and it was decided that it was appropriate to adopt the kind of balance that has been adopted here in 43. That is the argument. There is probably not a lot I can add to that.

CHAIR—Thank you. Mr Rizvi and Mr Walker, do you wish to add anything on these provisions?

Mr Rizvi—I think what Mr Faulkner is saying does go to the heart of the matter. Fundamentally, if this parliament were to decide that all aspects of immigration law where age is taken into account or may potentially be taken into account in a legitimate way could be included in regulations disallowable by the parliament, then I suppose conceptually that is feasible and that would enable you to define the exemption more narrowly, as I think Senator Ludwig is suggesting as an option to be considered. Two questions arise in my mind from that. What would be the practical implications of trying to achieve that through the regulations? To what degree would it make an already very cumbersome act and regulations even more cumbersome? My suspicion is that it would make it very, very significantly more cumbersome.

The second point that arises in my mind is whether such incorporation of all areas where decision making reflects an element in relation to age could practically be incorporated into regulations. I will just go through a couple of examples where some difficulties might arise but where age is used as one indicator—perhaps not always the dominant indicator; that is often a very difficult thing to assess—in order to make a decision within the act.

Let us look at the business visitor visa class. A person who applies and who is, say, 15 years of age may alert a decision maker to the question: is this person a genuine business visitor? That may be a factor the decision makers may take into account and which may

trigger further investigations. On balance the decision maker may come to a view that a person of 15 years of age, with the background and other factors taken into account, is not a genuine business visitor. The question that arises is: could you incorporate age factors into business visitor visas decisions such as that? I do not know. What is the appropriate age in those sorts of areas? I do not know.

Senator LUDWIG—Do you have an age cut-off in the business visitor area?

Mr Rizvi—No, we do not. The key test is a subjective test relating to the genuineness of the intention to undertake a short-term business visit. Within that test, a decision maker may well take into account a range of factors, including age. Another example might be a spouse application where the age differential between the applicant and the sponsor in Australia is very significant. That may well be a very genuine relationship, but the very large age differential may be an appropriate trigger for the decision maker to ask further questions about the genuineness of the relationship. If such migration decisions were not exempt from age discrimination legislation, would it mean that the decision maker could not use that factor as a trigger to ask further questions about the genuineness of the relationship? I do not know the answer to that. I certainly would find it very difficult to understand how you could incorporate those sorts of factors into detailed legislation.

Senator LUDWIG—What does the Attorney-General's Department think of that? Would any of those be reliant grounds? I would be really interested in a response.

Mr Faulkner—I am not sure I can offer a view on that at the moment.

Senator LUDWIG—I am happy for you to take it on notice.

Mr Faulkner—I am not sure that I was conscious of a number of discrete propositions being put there. There was a general discussion about the sorts of considerations that are dealt with.

Senator LUDWIG—It will certainly be on the *Hansard* record. What they were effectively doing, as I understood it, was proposing difficulties which might trigger the operation of the bill. I am not sure I agree with them, but I would defer to the experience of the Attorney-General's Department, which sponsored this bill, as to whether the scenarios that have been presented by Mr Rizvi would be of concern to you at all and whether you have even consulted Immigration about the issues they are concerned about. Is this the first time you have heard their concerns?

Mr Faulkner—No, it is certainly not the first time the department has discussed with Immigration the need for a clause like clause 43.

Senator LUDWIG—But what about the grounds, the broad reasons? You have asked them to justify their request for a blanket exemption.

Mr Faulkner—That may not be quite the way I would come at it, in the sense that I do not necessarily see it as the Attorney-General's Department's job to decide whether the policy rationale for a particular arrangement in the area of immigration is appropriate. In terms of government policy, it is a matter for the other agency and the government to collectively decide whether a particular kind of exemption is appropriate. In terms of the operation of the bill, I think it is fair to say that in this area, as in others covered by specific subject

exemptions, it is far from clear that the complexity of the arrangement would support an argument that you necessarily have something like positive discrimination—which would be exempted more generally under the act—and so therefore it is appropriate to make sure that the schemes are protected more specifically. That kind of equation—as to whether a thing is worth a specific exemption—is not something which begins with an analysis by the Attorney-General's Department of whether it would fall foul of the bill or some aspect of the bill. The question is: are these things, in the government's terms, a legitimate basis of age discrimination? If they are, we must make sure that the bill operates so that they are not rendered unlawful. That is a relatively simple proposition, but I think it is the direction of the analysis that is significant there.

Senator LUDWIG—I am a little unclear about this but I am sure you will take the original question on notice and get back to me on that.

CHAIR—With the benefit of the *Hansard*.

Mr Faulkner—I am not sure I appreciate that but I will certainly look at the *Hansard* and see what we can do.

Senator LUDWIG—The proposition that you are putting to me then is that, if the immigration department say they require an exemption based on the act and the administration of the act, the Attorney-General's answer to that is, 'Okay,' without any critical analysis.

Mr Faulkner—I am certainly not suggesting that.

Senator LUDWIG—What are you suggesting?

Mr Faulkner—This may sound a little nebulous but I am really suggesting that questions on whether particular areas of Commonwealth law and administration may involve legitimate cases of age differentiation are a matter for the government to make a decision about. In many cases, the fact that it is on the statute book would seem to me to be a fairly clear indicator that not only the government but also the parliament consider this to be a legitimate area of age differentiation. All I am really saying in relation to that point is that the question as to what the act does and does not cover is not simply reducible to an analysis conducted by the Attorney-General's Department as to how the act works. It involves broad questions of policy as to whether particular areas of law are appropriately exempted from the operation of the bill, which might otherwise make them unlawful. As I have said, some areas of differentiation, for a number of reasons, are appropriately exempted. That is not a straight legal policy question that the Attorney-General's Department necessarily has sole responsibility for.

Senator LUDWIG—So migration agents and the like, those who work closely with the immigration department and employers in that field would not be exempt. That is a policy decision that the government has made. But the immigration department would be exempt?

Mr Faulkner—I am not sure that I follow your point.

Senator LUDWIG—I am trying to grapple with the decision to exempt one area or part of an area, because it is not the whole area, and leave, as a policy decision, the remaining requirement to deal with that legislation. What you are saying is that they do not have to deal with the legislation—they do not have to consider it in that sense because it does not apply to

them. But you are then happy for it to apply to the other integral parts of that industry—if we call it an industry as such.

Mr Faulkner—Broadly, in all the areas where exemptions have been provided, with the departments which have the expertise as to how the programs in question operate, consideration has been given to whether there is a reason to be concerned about these areas in that they may involve matters of age differentiation—yes or no. If there are, the fact that they are on the statute book at the moment is an indication that it may well be something that ought to be exempted. But the process of coming to the final form of the bill is one necessarily of toing-and-froing between all the affected policy agencies to decide what cases can be made for exemptions. In each case where an exemption is provided under this bill, the government decided, at the end of the day, that a decent case had been made out. That may not provide a great deal of detail on precisely how a particular scheme works but it seems to me it is the basic idea underlying decisions about particular exemptions.

Senator LUDWIG—Why would you exempt occupational health and safety as a broad area?

Mr Faulkner—Do you have a particular exemption in mind when you say that?

Senator LUDWIG—Sorry, I just have my handwritten notes about it.

Mr Faulkner—My briefing folder is failing me at this point, I am afraid. I would appreciate a little guidance, if you can give me any.

CHAIR—Would you be assisted by another staff member from the firmament, Mr Faulkner? Is there someone here who can help you?

Mr Faulkner—I am not entirely sure that there is.

Senator LUDWIG—If you look at the various laws, you see that they include the Safety, Rehabilitation and Compensation Act.

Mr Faulkner—You are referring there to the exemption in schedule 1, in effect, to the Safety, Rehabilitation and Compensation Act. The general point does not change, I am afraid, in that the reason the particular instrument is referred to in schedule 1 is that it results from an analysis undertaken by the government that that scheme—

Senator LUDWIG—I do not mean to short-change you in this sense. Unless you have something additional to add, the reasons you have already enunciated for immigration would likewise hold for occupational health and safety, for health and for taxation laws?

Mr Faulkner—That is right—the broad proposition.

Senator LUDWIG—Unless you can add anything that might differ with regard to defence, I guess you are going to give the same answer if I go through those individually? I do not mean to be trite about that.

Mr Faulkner—No, I take your point entirely and I appreciate that. There probably is one point I can make in relation to defence that might be new, as it were. I suppose it may be a relatively minor point in the scheme of things, but the defence situation broadly is one where much of the legislation and the instruments made under the legislation dealing with this area are concerned with matters relating to the ADF maintaining a fit fighting force. Some very

specific considerations that will often turn on age differentiation arise there. As when you look into other areas, there are very many age based considerations that are generally regarded, without much exception, as being reasonable. In this case the defence situation is particularly concerned with establishing and maintaining a fit and, inevitably, youthful fighting force. In that case there are, as I understand it, particular arrangements such that particular kinds of age based differentiations are subject to review internally, and there is a fairly extensive process for considering and reviewing decisions which are based on age differentiation in operation there. I am afraid I cannot add too much more than that, except to say that under some of the instruments service chiefs are empowered to grant limited exemptions to a member's arrangements on a case-by-case basis to meet service requirements. These kinds of decisions will often involve age differentiation, and the complexity that a system like this throws up is one of the reasons that tend to support the inclusion of defence instruments in schedule 1. They are possibly a particularly good point, though. I might just mention that Defence have indicated that some research is currently being undertaken—and this was at the back of my mind a moment ago.

Senator LUDWIG—Are they here tonight?

Mr Faulkner—No, they are not.

CHAIR—I do not think they have joined us; no.

Mr Faulkner—They are making efforts to look into what kinds of information can be obtained, what kinds of analysis can be made, to determine what sorts of physical requirements are necessary for particular kinds of activities. They have something called the physical employment standards project, which apparently measures the physical employment standards required for service in the combat arms of the Army and airfield defence guards in the RAAF.

While these kinds of projects are being undertaken to try to bring some kind of science to bear on the question of precisely what is required for an effective fighting force, it nevertheless remains the case that some of the decisions that are made do involve age differentiation. In the case of the Defence Force in particular, there is a fairly clear imperative to maintain a youthful fighting force. I do not know to what extent it goes towards addressing your question, but it seems to me that it is a relevant extra consideration which, in the case of Defence as it happens, is worth making. It is an example of the particular kind of consideration that can arise in relation to legitimate age based differentiation, which needs to be taken into account in all of these areas and which makes it very difficult to generalise about the exemptions, other than through the kinds of statements that I have been making this evening.

CHAIR—I am conscious of the time. The committee has had other issues raised with it through submissions and in evidence this evening in relation to things like superannuation—particularly issues raised by COTA and ACOSS in that regard. The ALHR—the Australian Lawyers for Human Rights—raised some concerns about insurance and whether it would be preferable to limit the exemption relating to insurance and the setting of premiums rather than the provision of insurance. Again, COTA and ACOSS have raised concerns in relation to the provision of credit, and that was discussed with the witnesses from COTA this evening.

COTA's very comprehensive submission also sought some advice in relation to the exemption for medical goods and services—mostly process related but certainly relevant questions to the committee.

We have discussed migration and immigration, and there are some issues around religious and voluntary bodies and charities and what application that has when those organisations are providing a benefit, facility or service on behalf of the Commonwealth. Mr Faulkner, rather than going through each of those individually this evening, I would be grateful if we could put some questions on notice about those to you and to relevant departments for response. They will not be complex questions, but we would appreciate some advice on those issues raised with the committee.

Mr Faulkner—We would be happy to do whatever we can to assist.

CHAIR—Thank you, Mr Faulkner. It has been a lengthy and strenuous process for you and Ms Atwell, and the committee appreciates your assistance with that. Mr Rizvi and Mr Walker, I appreciate your presence here tonight. I also want to again acknowledge the effort that departments made to be represented here this evening. Legal and Con usually just drags A-G's before it—and Immigration occasionally—and sends them away. So we are very grateful to see new faces. Thank you very much for attending to assist the committee.

Committee adjourned at 9.18 p.m.