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# TRANSCRIPT OF PROCEEDINGS

**PRODUCTIVITY COMMISSION**

**INQUIRY INTO THE DISABILITY DISCRIMINATION ACT**

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

**TRANSCRIPT OF PROCEEDINGS**

**AT HOBART ON WEDNESDAY, 4 JUNE 2003, AT 11.35 AM**

**Continued from 30/5/03 in Brisbane**

**MRS OWENS:** Good morning, and welcome to the Hobart public hearings for the Productivity Commission's inquiry into the Disability Discrimination Act 1992, which we will refer to as the DDA. My name is Helen Owens and I'm the presiding commissioner on the inquiry. My associate commissioner is Cate McKenzie. We will be having two breaks today, a lunch break at around 12.30, for an hour, and an afternoon tea break at about 3 o'clock. We don't have to talk about auslan signing at the moment. We will be sticking fairly closely to the timetable for today and you are welcome to take a break and re-enter at any time. Our commission staff will assist you if you need anything during the course of the day and they are sitting there.

On 5 February this year the government asked the commission to review the DDA and the Disability Discrimination Regulations 1996. The terms of reference for the inquiry ask us to examine the social impacts of the DDA on people with disabilities, and on the community as a whole. Among other things, the commission is required to assess the costs and benefits of the DDA and its effectiveness in achieving its objectives. We have already talked informally to a range of organisations and individuals with an interest in these issues and submissions have been coming into the inquiry, following the release of the issues paper in March.

The purpose of this hearing today is to provide an opportunity for interested parties to discuss their submissions and their views on the public record. We have already held hearings in Darwin and Brisbane, last week. Following the hearings in Hobart today and tomorrow there will be hearings in all other Australian capital cities. We will then prepare a draft report for public comment, which we will release in October this year, and there will be another round of hearings after interested parties have had time to look at the draft report.

We like to conduct all of the hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason, and to assist people using the hearing loop, comments from the floor cannot be taken because they won't be heard by the microphones. If anyone in the audience does want to speak, I will be allowing some time at the end of the proceedings for you to do so. If you think you would like to take up this opportunity please identify yourself to the staff.

Participants are not required to take an oath but are required, under the Productivity Commission Act, to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be available on the commission's site, in Word format, following the hearings. I now invite Anita Smith to please give your name, your position and the capacity in which you are appearing today.

**MS SMITH:** Anita Smith. I have written my submission in my capacity as a former practitioner, practising in disability discrimination, between 1994 and 1999.

**MRS OWENS:** Thanks very much for coming and thank you for your submission, which was very comprehensive. And I think I can speak for Cate as well; I enjoyed reading it very much, as we mentioned before the hearing started. You have raised some very important points, so we look forward to discussing it. But I understand you have some opening remarks you would like to make to us.

**MS SMITH:** Just some belief statements. One of the issues that has guided my response to the act itself, and to your inquiry into the act, came from a really moving discussion paper I heard once by a Dr Helen Meekosher, who said, "Society disables me far more than my disability ever did." It's a common sentiment but it's one that she expressed particularly well, and I hope that she might have some opportunity to contribute to discussion around this act.

But really, with the Disability Discrimination Act it gives people the tools to overcome the discrimination that disables them further. Our physical limitations are beset by this attitudinal difficulty; when someone thinks you can't do something because of your disability it means that they then don't give you the opportunity to do it, which is obviously best described by that poster that the Human Rights Commission put out early on. It said, "Don't judge what I can do by what you think I can't." But Helen Meekosher's statement about that, which I heard in probably about 1995, saying "Society disables me far more than my disability ever did", was really powerful in looking at the fact that we judge our physical environment because that's the way it has always been. We never, up until the Disability Discrimination Act, looked at our physical environment as a factor in limiting other people and causing them to be limited in their participation in society.

The other belief statement comes from the fact that when you practise law well, then it should be inclusive of people with disabilities, as a matter of course. So law and the practise of law and the systems of law are exclusive for lots of people. A lot of people have difficulty in using and accessing legal systems, so when those systems become accessible to accommodate people with disabilities they actually get better at accommodating everyone and creating more access across the field.

Recently I have changed from practising in disability discrimination and I had a period in bureaucracy, but just recently I have taken up an appointment as the president of the Guardianship and Administration Board. It's interesting that the people who are appearing before me now, in the context of disability interacting with the law, are people who have far more severe disabilities than the people whom I was accessing when I was practising disability discrimination law.

The former commissioner, the late Elizabeth Hastings, often used to opine that the Disability Discrimination Act was being used by people who didn't have the real

disabilities; that was the way that she put it colloquially. But I think that this has become far more apparent in this last six months of practice that I've had in the Guardianship Board, in that people who really are living in conditions that still are institutionalised, whose disabilities have a far more severe impact on them, perhaps have not been assisted as much by the Disability Discrimination Act as people who have lesser disabilities, who still have the ability to speak and to read and to access information. There's probably room there for people, for instance, with severe dementia, people who have lived most of their adult lives in institutions and then after the process called deinstitutionalisation are now still living in highly restricted and highly secure environments, to be better serviced by the Disability Discrimination Act.

**MS McKENZIE:** But in many ways, a power in HREOC to initiate complaints or if the HREOC Act or the DDA were amended to permit other bodies to complain on their behalf might help those people because otherwise, effectively, they have no voice.

**MS SMITH:** I think that's where the former commissioner was coming from in her statement, because at that stage we were investigating very serious issues of abuse of people in institutions.

**MS McKENZIE:** Yes.

**MS SMITH:** And there was a very comprehensive report put out from the University of Newcastle, collating all of the various pieces of institutional abuse - financial, sexual, physical, emotional abuse - that was occurring, and she was looking for a response to that under the Disability Discrimination Act. But equally I have an aversion to calling those things discrimination because I think they are actually crimes, and you euphemise it to call it discrimination. In terms of freedom of movement and freedom of decision-making, I think the people who appeared before the Guardianship Administration Board, by definition, are far more restricted, but also society isn't responding to allow those restrictions at this stage.

**MS McKENZIE:** This is really a question that hasn't entirely got to do with the DDA, but it's interesting nevertheless. How do you see the interaction between the DDA and guardianship legislation?

**MS SMITH:** From our point of view we work on the fundamental principle of the least restrictive alternative for a person. The wishes of a person and their best interests are paramount and are enshrined in our legislation. The difficulty is where the best interests override both their wishes and the least restrictive alternative, so if a person's wishes and the least restrictive alternative would put them in a place of physical threat then the best interests tend to override those two earlier principles and

we make restrictive decisions as a result. So I think that the only impact for disability discrimination into guardianship is to acknowledge the principles of disability discrimination and to try and eliminate it within our jurisdiction.

**MS McKENZIE:** With administrators, they seem to take the view, in your jurisdiction, that if legal proceedings are in question you are looking at an administrator rather than a guardian, although you might be looking at both, because certain life decisions might need to be made in connection with those proceedings, so perhaps you need both. What are your thoughts about administrators who find that the person they represent has, they believe, been discriminated against? Would you see a possibility of the administrator then accessing the complaints process under the DDA, assuming the discrimination is on the ground of disability?

**MS SMITH:** Administrators having the power for litigation appears, from my reading of the legislation, to be more financially based. I think if it were a discrimination action I would contemplate either a guardian or an administrator to do that. Our difficulty here is not whether we would see that as an appropriate action for one of those roles. Our difficulty is more that people are unwilling to take up that role of litigation guardian because people are very concerned about the possibility of adverse costs. So it's more the fact that we can't get someone to fill that role than a legislative difficulty.

An issue that wasn't addressed in my paper, that really concerned a lot of the time that I practised between 1994 and 1999, was the issue of standards development in the Human Rights Commission. Interestingly, the most successful standards development process to date has still been the transport standards, which really was very cleverly hijacked by a local Hobart man, Angus Downie, who wrote a book and published it in great detail, with great specificity, that really set the direction for people, and HREOC and the transport ministers and other people really were working to catch up to that. As a result those standards were passed and that has been a very successful operation for the standards. But it was interesting that in employment and education standards they have often got bogged.

**MS McKENZIE:** Well, he will have to write another book.

**MS SMITH:** I'm sure he'd be very flattered, but Angus is still a very busy man. But employment standards were interesting in that when the standards were being developed in the last round, which would have been about 1997, I think, there was a draft standard publicised, and I notice that Human Rights Commission is still interested in proceeding with those draft standards. But at that time my colleague Robin Banks and I wrote a paper called Dirty Deeds Done Dirt Cheap, which was a fairly provocative paper but did have a lot of effect within the disability community, of saying, "Well, these draft standards are just about explaining how the law

operates," and we think that in explaining it it has diminished the role of that. It's better to leave the law vague and allow complainants to try and fit their cases to the action than it is to prescribe it by these descriptions that the employment standards had.

**MS McKENZIE:** How do you think, then, standards should work? What exactly do you think they should do?

**MS SMITH:** There are a couple of hints in my paper. I guess people included standards in their legislation in the first place because they were so impressed by how standards had worked in the United States, with the Americans With Disabilities Act, and they saw that sort of policing role as very important. But because this was brought in as a civil litigation, a chose in action, that wasn't going to be possible, so I think that initially the transport standards model was seen as the way to go. But in employment it became such a difficult concept and so difficult to determine.

**MRS OWENS:** Is your paper readily accessible, this paper that you've written?

**MS SMITH:** It would be. It was published at the time and it was part of the public submissions at the time. It was written through the New South Wales Disability Discrimination Legal Centre.

**MRS OWENS:** We might ask you later for the details and see if we can track it down; it sounds very useful.

**MS SMITH:** It was highly critical of the processes of consultation and of the fact that the standards initially were promoted by the Human Rights Commission as being a way of having more certainty around what was appropriate. The beauty of transport standards was that you could say, "An aisle has to be so many metres wide," whereas in employment it became much more vague. And so it had a criticism of that, the fact that the explanations made it more vague, because it limited it as well.

**MS McKENZIE:** There has also been a query in the submission made to us in Queensland, by the Queensland anti-discrimination commissioner, where concerns are expressed in a similar vein, saying that they don't want standards in this area to become so inflexible that they actually miss real questions of discrimination and stop you from accessing the more flexible and more general prohibitions in the act, and in fact finish up then making a lower standard than the act would make.

**MS SMITH:** That was our belief in the New South Wales Disability Discrimination Centre, and that was at that stage the reason why the DDA standards project really halted on employment standards at that stage. I noticed in the 10-year

anniversary documentation there was a move towards going back to that, and I thought, "Well, if they're starting from the same foundation as they finished on before, that would be a very poor place to start."

**MRS OWENS:** You'll have to write another paper. One of the other participants has said, I think probably consistent with what your paper might be arguing, that it's very hard to write standards in this area but there are some aspects of employment where you could do something quite tangible and that's in relation to the processes of interviewing people for jobs and so on, that you could have something that is not vague there in terms of requiring employers to interview people with disabilities and not knock them off before they even get an interview and so on.

**MS SMITH:** Yes.

**MRS OWENS:** So there might be aspects of employment where you could consider standards.

**MS SMITH:** I have a bit of a rusty memory but the way that the discrimination employment provision works in the DDA, there's not actually an available defence of unjustifiable hardship for your interview processes and your selection processes. That only applies with the reasonable adjustments once you're in work. So that in fact would mean that it already is very prescriptive if they were to proceed with specific standards. It's just a matter of not meeting the lowest common denominator but putting a benchmark in that is acceptable to people with disabilities.

**MS McKENZIE:** So to just revert to my question about how standards should work, would you then say that it's fine for standards to set some kind of benchmark but that they oughtn't to exclude or limit the more general operation of the prohibitions in the act?

**MS SMITH:** One of the main concerns that came through education sessions that we did through the legal centres, when we did them for potential respondent groups like large corporations, was that they were so frustrated by and concerned about the uncertainty: "How do we ever know when we've done enough?" That reflects back on litigants too because then when they take an action it comes back to, "Well, how much do these people want?" It comes back to that. The uncertainty leads to a feeling of people asking for more than they're entitled to.

So if you were able as an applicant for a position to point to a document and say - just like you can point to a building standard - "I was entitled to this, this and this in my interview process. I was entitled to the selection process to conform to these procedures," then there's some certainty and both potential employees and employers are able to say, "Well, that was done correctly," and then it only comes

down to the factual situation, whereas when there are not standards, it still comes down to a dispute about the law.

So I don't like the way that the process went around trying to develop employment standards before because it was really about putting in a few examples and fluffing out the words a little bit and trying to make it more understandable without prescribing. I think people in the disability community were looking for a level of prescription that was going to create the certain, whereas the people who were developing the standards didn't want to go down that path. They saw that as interminably long. Like you've mentioned, Helen, if they broke it down into small bits and took different parts and developed them over time, then that might be a better way to go.

**MRS OWENS:** It could be more prescriptive in some areas; and some areas, you just don't touch them if you can't be prescriptive, I suppose.

**MS SMITH:** Yes.

**MS McKENZIE:** If you make a fully prescriptive standard, should you be able to say, "Well, I've complied with the standards, so I've complied with the act"? In other words, there's no more operation for claiming discrimination if there's been compliance of the standard in that particular respect.

**MS SMITH:** I think that's how people would want it to be. There's no point going through standards unless it has some certainty and if you can say, "I have now complied with the act," it really only comes down to the factual situation of was that complied with in that time and did they follow those procedures; much like an unfair dismissal where you can say, "Well, there were three warnings," or, "There weren't three warnings" - that sort of a process.

Also there was an issue coming through a number of different parts of the paper in relation to the fact that, say, within the built environment, the local government has really taken up a mantle of checking applications and looking to try and pre-empt whether there's going to be any lack of access in a building. They can't get it right every single time, but it was the role of having an authority that can assess and make an administrative decision about something that has made that probably one of the more successful parts of the operation of the act.

In standards I think the difficulty has always been that it's still left up to the parties to litigate. It's still left up to some litigant to really put themselves out, to have a go at an organisation for an act of discrimination and not know whether they're going to have any certainty of getting an outcome, and they usually suffer quite a lot of stress along the way. I guess the prescription element would also need

some sort of authoritative body who could make an administrative decision or some quick decision, or a quicker process to enable that certainty but also to take it out of that legal realm.

The issue with action plans that I've raised and the issue with temporary exemptions and also the issue with the role of local government is always that perhaps if there's another authority that can take an overview of these things it takes the pressure off individual litigants to take actions against large corporations, which can be stressful.

**MS McKENZIE:** Who should the authority be? Have you got any thoughts about that or should there be different authorities?

**MS SMITH:** There are state authorities who govern areas of employment like Workplace Standards and Industrial Relations Commissions and those kinds of people. There are authorities who can have overview over those things. I'm getting to the stage now where I'm starting to draft standards on the run in order to get into that position. The discussions that were held the last time draft employment standards were put out were around the fact that there needs to be pressure taken off individual litigants to make it, and whether that's having an administrative organisation who can tick or not tick boxes and say, "This was done and that wasn't done and therefore that's not an appropriate process," that would be beneficial. It would take that pressure off.

It's interesting that taking a discrimination action, even when you're taking it simply about whether there are ramps or steps involved in the physical premises, even when the evidence is right there in an object in front of you, it still becomes a very personal issue, and once you've used the magic "D" word, as we used to call it, you suddenly become seen as vexatious, as asking for too much and being a little bit greedy, when in fact all these people are doing is asserting their rights. I often would say to people that a litigant involved in any kind of litigation experiences a lot of distress. They're worried about whether they've remembered something accurately and they're worried about the fact that other people put contrary statements that just aren't true.

There's a lot of stress for any litigant being involved, but it was always amazing to see. When you have to start that litigation by saying, "I have an attribute about me that this person chose to single me out for," or, "This person left me out because of this attribute," it's a very personal thing and it must be very very damaging and difficult to take through an action on that basis.

**MRS OWENS:** Yes, it probably makes it - just the very circumstances - very hard for people to just keep going. We keep hearing other stories about the barriers to - if

there's a complaint process - going through that process, because people get very stressed by it and very upset and it just can keep it going for a long, long time.

**MS SMITH:** Can I give you a couple of case studies about that?

**MRS OWENS:** Yes.

**MS SMITH:** But that takes us away from standards.

**MRS OWENS:** Why don't we come back to that because I was going to ask you if you have given any thought to education standards.

**MS SMITH:** Do you want to stay with standards for the moment then?

**MRS OWENS:** Yes. You're talking about standards, so we may as well, and then we can go back to your other issues.

**MS McKENZIE:** Then go to your case studies.

**MS SMITH:** In my paper I've mentioned the fact that I cooperated in a network of disability and discrimination local centres around the country and it was interesting that, having stalled the employment standards processes, there was talk then of developing education standards, and it was generally felt amongst my colleagues and I at the time that education standards could probably be more effective if they were broken down into certain parts of education, certain types of education.

There's more uniformity amongst education and various sectors of education than there is in types of employment, and we did see that there was some scope for that, and it was interesting that the process in education standards was commenced. Last time I saw it, it was operating more through the education bodies themselves than through the Human Rights Commission. It was them saying, "We want the certainty. We want to take that track." I really haven't seen what's happened to education standards. The Finney decision was certainly very useful in setting some targets around education as well.

As a network, I think at that stage we thought that education standards did have some hope, especially because most education is administered through state authorities anyway. There's that impetus to comply with the law, and plenty of the funding for the non-government schooling comes from the Commonwealth government as well. It's because of where the money is coming from that there was a bit more use for standards and a bit more possibility for compliance, whereas, in employment, it's a much wider respondent.

**MRS OWENS:** With bodies who are not funded privately.

**MS SMITH:** That's right. There's no tie. There's no ability to restrict funding or to put conditions on funding in those kinds of issues.

**MRS OWENS:** That's an interesting perspective. Have you thought about other areas like accommodation? That might be closer to where you are working now in terms of accommodation standards.

**MS SMITH:** Nationally, as well, that would be an excellent issue, to have some minimum standards for accommodation. I think in that sense it would be great if it was acknowledged that aged care accommodation does involve disability accommodation as well, for people with dementia, living in those highly institutionalised and highly restrictive environments, and some of those horror stories about people being bathed in - what was it - acid or something disgusting?

**MRS OWENS:** Yes.

**MS McKENZIE:** Methylated spirits, wasn't it?

**MRS OWENS:** I guess that ignores the fact that there are already standards governing a lot of that. There are already laws against a lot of that sort of abusive behaviour and yet those behaviours continue. It's more about the issue of having a regulatory authority who is active and intervening and is able to go in on-site and see this is happening, because when you leave it to the people with dementia to make complaints, obviously they can't, and that's why the abuse occurs in the first place.

**MRS OWENS:** And often they don't have a family member or another interested person to look after their interests. I shouldn't personalise these things, but my late mother, who died last month, lived in a nursing home where there were a lot of what I call abandoned people with dementia. There was nobody who ever came to see them. A lot of those people had been there a long time and there's really nobody taking up their interests.

**MS SMITH:** No, and those are the people who are appearing before us now, which highlights that difference in disability discrimination. The complainants who come to you with a lawyer are people who have an advocate, who know their rights, or someone who knows them knows their rights, and knows their rights are being breached. In guardianship you're dealing with applications from paid staff, who are the only people who have an interest in this person's life, and it can be incredibly distressing to see that there are categories of people who are abandoned, and I guess the two are elderly single people with dementia and people who grew up in institutions such as Willow Court or Royal Derwent here in Tasmania and who are

then, in name, deinstitutionalised into smaller group homes, and they still have no contact or they lost contact with their family years and years and years ago.

**MRS OWENS:** But even the staff bringing something to your attention - I don't know what happens in Tasmania, but I come from Victoria where a lot of the staff in nursing homes are really just contract people who come in and out, sometimes just for a day or two. They're not really bonding with the patients or the residents. You do have some staff there on an ongoing basis but then they have got a dual interest; one is to protect their own jobs or their connections with the employing body, as well as the patients, their clients.

**MS SMITH:** What a big ask it is for somebody to be complaining to Disability Discrimination, but for someone to be a whistleblower is probably even more terrifying. That's where the community visitor schemes and those sorts of independent assessors become really important, and I guess the problem with breaches of other standards in relation to accommodation has been that there has probably been not enough resourcing in that on-the-spot random checking from an independent body.

**MRS OWENS:** And it has to be random and without any warning because they can tidy up - - -

**MS SMITH:** Yes, situations can be changed artificially.

**MRS OWENS:** That was useful. Thank you.

**MS McKENZIE:** You were going to give us case studies, before we forget.

**MS SMITH:** It's just about the effect of litigation on people. I had two cases that were so similar I will simply condense them into one, but it in fact occurred twice, which is why it's significant. They were women who had been in employment. One person was seeking a position and the other person had been in a position and was unfairly dismissed. Both women had bipolar affective disorder and both women had excellent grounds for taking a case of being dismissed on the basis of their disability. Sorry, one person was dismissed on the basis of her disability. The other person was not selected because of her disability. She in fact had been given the job and the job was in a health facility who had records, and when they looked up those records and found out she had that disability, they then changed their mind about whether they would appoint her.

In the other case the woman had a letter of termination that said she was terminated because of her disability and the impact it was having in her workplace. So both women had excellent cases and they should have either got excellent

settlements or excellent judgments as a result of them. But in both cases the process, firstly, of setting their experiences down on paper to make the complaint, was distressing, but they worked through it and, in the end, it became an empowering experience because it was then in black and white for them to see and they could read it, and they were happy that it expressed their own views.

The investigation process was slightly challenging in that then you receive a respondent's letter that says, "These things simply didn't happen. This is simply not true" with the inference, "Well, she's mad, what would she know?" That starts to make them question themselves and, by the time you get to a conciliation session, they really are in a very anxious state and they probably behave not with great decorum perhaps in the conciliation setting because they're angry and they're upset, and this is the first time they've had to confront this person since the act of discrimination occurred.

Nothing occurs in conciliation because the respondents, no doubt, had legal advice, "Well, you know, we can discredit this witness because she has a mental illness." So then you start preparing for a hearing and in both cases the women went into very very severe episodes, became far too unwell, and really one of the factors in making them better was to withdraw the complaint. It was just distressing; people had excellent evidence, they had documentary proof, they had excellent support from their families in all circumstances. But none of that was enough to cope with the distress of taking the complaint and pursuing it in the face of being called a liar; in the face of having your former workmates - in one of the situations - say things that you knew were not true.

It has that destructive element of people, who you formerly thought were your friends, now being divided; a bit like a divorce situation, I guess. You know, some people stay with the employers and some people sided with you, but most people in an employment situation, would have to choose to keep their livelihoods.

**MS McKENZIE:** Would that situation have been helped if HREOC had been able to initiate or pursue that complaint on behalf of those people, because they would still have been faced with the same denials, the same untruths?

**MS SMITH:** They would still have had to have given evidence though, that's the difficulty.

**MS McKENZIE:** Yes, indeed.

**MS SMITH:** I just highlighted something, I think, that's a bit tragic; I don't see any particular solutions for it. I just thought that it really hampered people's abilities to receive redress in that situation. Interestingly, by contrast, when I worked at the

Human Rights and Equal Opportunity Commission I was employed to undertake a project in relation to the Federal Government's then recent decision to restrict Medicare payments to about one in every two days. You couldn't claim more than, you know, 250 or so Medicare claims for a psychiatrist in a year; once you did then it reduced after that time and, for people with personality disorders, that was particularly distressing.

We interviewed them when we conducted sessions with them, and it was really interesting in that we were able to take their evidence, we were able to interview them and people who need daily assistance from a psychiatrist were still able to come and conduct themselves in the hearing to give really good evidence and to participate in that inquiry, and to come to a conclusion within the Human Rights Commission in a way that still caused them some distress, and they still had to do a lot of personal preparation to be able to come and confront the reasons for their disability. A lot of that is to do with the fact that a lot of these people had experienced very severe trauma in their childhoods, so that involves some disclosure around that for them. But they were still able to do that in that sort of setting because it was a one-off: you come in, you give your evidence and you go and you don't have to conduct the case yourself; you don't have to pursue the whole issue yourself.

**MRS OWENS:** So it's a one-off, and it's probably not quite so personal - I mean, nobody is attacking that person.

**MS SMITH:** No, they did see it as very very personal because if you're in that situation where you are reliant on psychiatric advice every day, then the idea that it's going to be taken away for half the year, you know, is actually a physical threat because you might have to kill yourself, and that was basically where they were coming from.

**MRS OWENS:** It's different from the other two cases you gave us of the employment situations where those cases are going to be about them, particularly, and their missing out on the job or losing the job, whereas this is a sort of more generic issue which is going to have an impact on them.

**MS SMITH:** That's right.

**MRS OWENS:** But it's not a direct attack on them as an individual, it's an attack on everybody who wants to use psychiatric services for more than X number of days a year.

**MS SMITH:** Yes.

**MRS OWENS:** So it is one step removed.

**MS SMITH:** It is one step removed, and I suspect that was probably the only way that those people could have participated in any kind of process. It was unlikely that was ever going to be the subject of an individual complaint, and it got incredibility bogged into the issue of psychotherapy versus other psychiatric treatments, and that was also seen as challenging. But I guess if anyone was going to call anyone a liar it was a dispute between two sections of the psychiatry profession, rather than a dispute between the clients and other people. It was an interesting use of the commissioner's function to inquire, and an interesting process that could perhaps be a model and which could be used in other events.

**MRS OWENS:** And that was successful that process, wasn't it, if I recall it correctly?

**MS SMITH:** It did force an amendment. I mean, some of those people believe it could have been a better amendment, but it did resolve the issue.

**MS McKENZIE:** So one possibility then - of at least dealing with systemic issues - might be the inquiry model, but can you see any application for what you said might have to the complaints process?

**MS SMITH:** I think that perhaps there could have been a more inventive use of conciliation in those situations. There could have been a bit more compassion about just what a devastating effect it was going to have upon those people in sitting in a room with the people who were calling them liars, discussing whether settlement is possible or not. There's so little control over a conciliation session once it's - I mean, I'm not saying people fail to exercise control, I just mean that you don't know what someone is going to say, whereas conciliation could be conducted in separate rooms or the old-fashioned way that lawyers did - I mean, writing letters and exchanging views and exchanging offers - and there might be other ways to conciliate those matters.

A lot of times the interesting thing about discrimination complaints, as opposed to any other area of law, is that so often it comes down to an apology. So often a person simply wants to hear someone say, "Look, I am really, really sorry. We really messed this up and that had a terrible effect on you." It's incredible how many times that can be the pivotal point. Respondents have so much legal advice to say, "Don't ever apologise. Never, ever apologise" whereas, in fact, they would save themselves and everybody else a great deal of hassle and money if they simply apologised early up and said, "We're really sorry". It comes down to a best-practice issue, I think, a lot of the time.

**MRS OWENS:** Is there room to actually do something before you even get into

this process, where you could elicit an apology - just have an informal discussion with the respondent - before they become the respondent, and have just an informal investigation and it doesn't become part of a complaints process?

**MS SMITH:** Well, that was a really good role for the disability discrimination centres, in that a lot of times we would compose our complaints and have all the factual information there and ready to go, but we wouldn't actually issue the complaint. Now, there was a really good reason for that and that was because once you issue the complaint, it might be another year before you heard back from HREOC, and we didn't want the respondents to necessarily know that. We would say, "Here is a complaint and we are going to lodge it, but we invite you to meet with us first and discuss whether this matter can be resolved." By that process we did manage to get a number of really good alternative dispute resolutions for issues without ever involving the commission.

Really we did that because we knew that, once it got into the commission, the respondent was going to be able to drag it out for a very very long period of time, and that was going to be counterproductive for our clients who needed that access to whatever that service or facility was at that stage.

**MS McKENZIE:** That idea of sort of pre-complaint conciliation discussions - should HREOC have any part in that, do you think?

**MS SMITH:** I think that would almost be the sort of antithesis of the idea. I guess I would like to see the continuation of disability discrimination services in doing that. I think they have a preventative role in undertaking negotiations to get resolutions before it gets to that stage because a lot of respondents really aren't unreasonable people, they're just people to whom the problem hasn't been pointed out and they've never had cause to consider it. If they haven't had a disability themselves - you know, the classic of saying, "Well, we don't get people in wheelchairs in here so why would we need to remove the step?" You know, that classic, wilful blindness that they have in relation to those issues.

So a lot of respondents, once an issue has been pointed out, will say, "Goodness me, we don't want to go that extreme, let's have a discussion and see if we can sort this out." I think really that would be better staying with independent advocacy services and legal services and being sorted out at that level because then your client can be assured that they've gone about it in a reasonable way as well.

**MRS OWENS:** You've mentioned in passing - you passed over this very quickly - it might take a year for HREOC to get around to hearing this. Do you want to say more about delays?

**MS SMITH:** Look, I guess it's irrelevant now because the complaints process changed in HREOC, but at this stage, which was pre-amendments, it took it to the Federal Court. Once you lodged a complaint, it would actually take some time to get a response from the commission simply acknowledging the complaint. There was then a difficulty that, having lodged the complaint, very often the Human Rights Commission would make its own administrative assessment of the complaint - which it was entitled to do under the legislation - and tended to dismiss a large percentage of complaints.

Sometimes they did so on the basis that there was a potential defence of unjustifiable hardship. Now, I didn't think that ever formed the grounds that the Human Rights Commission should be taking into account at that administrative stage. That's something that the respondent should be put to proof on, or at least be in a position to argue, but they were dismissing it before even hearing from the respondent saying, "There's a potential unjustifiable hardship defence." Now, there's always a potential defence to any action. Then we would seek reviews of those decisions, which were probably 97 per cent unsuccessful, because the then president took the view that it was better to let a case rest and to not re-invigorate it, because to give someone false hope that their action was going to be successful was worse than denying them the action in the first place.

That was very very frustrating for a number of reasons: firstly, it was incredibly paternalistic; surely someone can make their own decision about whether they want to pursue the case in the face of a potential defence. Now, where a case is completely vexatious and trivial and is out of jurisdiction, fine, get rid of it but, where you're dismissing it simply because there's a potential defence, it was incredibly frustrating to not even be able to put your case, to not even ask the respondent to respond, and then to reject the dismissal on the basis of, "It's fairer to let you go now than to take you a bit further down the track and then let you go."

The other reason that was incredibly frustrating was that the review process was done entirely on the papers, there was no opportunity to address and, at times, we would ask for the opportunity to address and we were refused. So there was a denial of natural justice in that process which is incredibly frustrating. In one situation there was a case which was, in fact, against the Human Rights Commission itself for employment. The case was referred out for an independent barrister to address the issues, standing in for the commission so that it was independent of the commission. That barrister then became involved in a royal commission and was unavailable, which occurred at the time of the then president, Sir Ronald Wilson, vacating office and the new president, Dr Alice Tay, taking up the role.

So Sir Ronald Wilson, then having been made independent of the commission, supposedly, took up that administrative role on behalf of the commission, to which

we said there was bias because the complaint was against the commission at the time that he was president of the commission, and it was just so inimical to the whole process that that person should then be reviewing whether the complaint was valid or not. I rang and discussed it with legal officers at the Human Rights Commission, who were always of a really excellent quality and high-standard lawyers - but I was really surprised, to say, "Look, I'm going to take a review of this on the basis of perceived bias" and he said, "No, actually I think it's actual bias." But we didn't even get to address on that review application. We didn't even get to go and say, "Look, we think you should vacate the chair" and we put very strong submissions, but you really couldn't tell what was the opposing argument; there was a real denial of natural justice about the whole process.

**MRS OWENS:** So you didn't see if there was any other material that came in from any other person?

**MS SMITH:** No.

**MRS OWENS:** Are you aware of whether these processes have improved since then?

**MS SMITH:** No. As I said, it's an out-of-date view and I haven't followed it to see - - -

**MRS OWENS:** But we can ask other people about that?

**MS SMITH:** Yes. I guess another important development has been, from our point of view, that we have new state legislation here in Tasmania, which is seen as very comprehensive, and the complaints process was developed by people who had awareness of the pitfalls of the HREOC system. So in the main, Tasmanian complainants have now preferred to take the state legislation rather than the federal.

**MRS OWENS:** Because it's seen as faster and simpler and - - -

**MS SMITH:** I'm not really sure.

**MRS OWENS:** - - - a better process, by the sound of it.

**MS SMITH:** Also, since the Brandy decision, and their legislative amendments there, the Human Rights Commission has become more remote. There used to be a Human Rights Commission office here and people could have access to it. So I guess there are a lot of reasons for that change in the environment.

**MRS OWENS:** We are looking at this interaction between Commonwealth and

state legislation right around the country, and also asking the question "Why is one jurisdiction used over the other? What are the advantages of one versus the other?" And there are some other bigger issues like "What happens with costs?" Under the DDA there's the potential that costs can be awarded against you, and so on, so that becomes a deterrent to following things right through. I think it's just the geographic distance from other states in Sydney, where HREOC is located, and the proximity of the local office, and just the knowledge that that's there. Would that be your general impression?

**MS SMITH:** We were so spoilt in Hobart and in Tasmania, before the Hobart was office was merged. I'm only talking about the period when I was in practice, so I really haven't been specifically in practice in the state jurisdiction since then. But really, the small office that was here, with Robert Henderson and Santi Mariso, was an office where the community knew those people, they identified with the human rights issues. And from my point of view as an advocate, Robert and I would meet and we would run through - almost like a practice list - about 20 or 30 cases and say, "Where's this at?" and keep it on the move and keep it on the boil.

Really, the process for the Human Rights Commission in Tasmania was faster at that stage than it was anywhere else in the country. So whereas I was putting in a complaint and having acknowledgment within a month, and often getting into conciliation within six months, people around the rest of the country were finding, when in submitting a complaint from Darwin to Sydney, it was taking over 12 months to even get an acknowledgment; to get it moving. So there were real delays elsewhere. But we were spoilt quite rotten here because of that personal response and because of that immediate contact.

Also, I think we had, proportionally, a very high number of complaints. It was just that ability to keep everything moving and the ability to have that personal contact one-to-one, which was excellent. And it wasn't, when you look at it, two or sometimes three or four staff in that office to service a community of 4 or 500,000 people. They did a really good job at doing that.

**MRS OWENS:** So the answer is, does HREOC set up offices in each state again and duplicate the state offices, or does it - - -

**MS SMITH:** I don't think that would be necessary now, given that the Anti-Discrimination Commission is here now, and that takes up a lot of that. There are broader grounds now and you can have multiple grounds, whereas, if you take a federal action now that would have to be limited to one or the other of those grounds that are provided for in federal legislation. So there is more flexibility with the state act and people are going to choose to take that option because it is immediate, and the network - interestingly Santi Mariso is now with the Anti-Discrimination

Commission as well, so part of that network and part of that personal contact and identification has gone with her to that as well. I don't think that you would want to go back to that model of the regional offices; I just think that they were particularly successful when they were operating but the state legislation changed that environment.

**MS McKENZIE:** Would it be better for people though, who did want to complain to the DDA, if, for example, there was funding - some kind of Commonwealth funding - for the state commissions to at least deal, to a certain point, with complaints lodged at the DDA?

**MS SMITH:** I think that did occur in some states, from recollection.

**MS McKENZIE:** It did. Do you think that would be a sensible move?

**MS SMITH:** If they had defined functions and if people were very clear about the different kinds of operations, because not everything is the same; not all interpretations are the same in the law. When I was practising in New South Wales we did have to make that assessment, whether we would go with New South Wales jurisdiction or Human Rights jurisdiction. Very often one of the reasons why we would choose the Human Rights jurisdiction over the state jurisdiction was, in employment, New South Wales had a very strict rule about not accepting any complaints where you had any action on foot in any other jurisdiction or forum, and that could have a really difficult effect of limiting - if you had a discrimination action, an unfair dismissal action and a workers compensation action, that could really hamper your ability to pursue all issues, even if all three issues were live and available on the facts.

So we would choose the federal option because that was going to be more accessible, even though it would take longer than the state option, on many occasions. But it comes down to an individual assessment on each case-by-case basis, as to what the issues are that you are trying to prove and whether you want to get a result that's going to have national effect or a state effect, and those sorts of issues would come into play.

**MS McKENZIE:** Would you favour continuing the DDA as a separate act? You have talked about the benefits of having - if you like - an omnibus act in Tasmania. Would you favour having the DDA as a separate act or merging it, for example, with the Sex and Racist Relation Act?

**MS SMITH:** From an entirely sentimental point of view I would. So many people feel so much identification with the Disability Discrimination Act. I said, informally, before the hearing, that it's amazing how many people you will meet who will tell

you that they were lobbyists who were involved in the passing of the Disability Discrimination Act. It was a really important social development that the act was passed, and it's really important that people feel ownership of it. It still outranks all other areas of discrimination for numbers of complaints, and I think that is probably a good reason for it to still be separately identified.

**MRS OWENS:** And keep it as a broad act. The other model would be to have it as a complementary act, where it's covering the broader national issues like the Commonwealth government department issues and so on.

**MS SMITH:** Restrict it just to Commonwealth jurisdiction issues?

**MRS OWENS:** Yes.

**MS SMITH:** I think that would be disappointing. I think people would see that as an eroding of their rights rather than enhancement.

**MRS OWENS:** Even if you don't use that act most of the time, say in Tasmania, for most issues you would still argue it's good to have that there as a backstop?

**MS SMITH:** If you look at the broader step of the United Nations movement, and if you wanted to take a case to the United Nations you've got to have exhausted all your domestic options. I think it is good to leave a domestic option that takes you to the federal level just because you can make that decision stick right across the nation as well.

**MRS OWENS:** Do I understand that if somebody takes an action under the Tasmanian Anti-Discrimination Act 1998, or commences an action, then HREOC won't necessarily pick it up? If it's found not to be appropriate to this jurisdiction HREOC would say, "Well, it has already been started in that jurisdiction so we can't look at it"? I thought that was the way it operated.

**MS SMITH:** Yes. And in both pieces of legislation there's a provision to say that if you have taken substantially the same complaint on the same facts to another forum then you can be dismissed on that basis. I think that's appropriate because you've still got to look at the issue of double jeopardy for the respondent.

**MRS OWENS:** Yes. You don't want jurisdiction shopping, but I think the problem you might have is that some things might fall through the cracks because you could start a case here in Tasmania under the Tasmanian act and then find midway through, or at the beginning somewhere, that it's not necessarily a state issue and it was really, after all, a Commonwealth issue. My understanding is then that could flick to HREOC and they would say, "Well, you have already started it so we are not going

to look at it." I am going to ask Jocelynne Scutt but - - -

**MS SMITH:** Yes. I think that's a good idea because I'm not sure what would happen in that event.

**MRS OWENS:** I think it's an interesting issue because there potentially is a gap.

**MS SMITH:** In New South Wales there was some discussion of transferring a matter at one stage, from the Anti-Discrimination Tribunal through to HREOC, because it involved airlines and because of the decision in McLean v Airlines of Tasmania. They said that that proved it was a federal issue, therefore it had to be dealt with federally.

**MRS OWENS:** And did HREOC pick it up?

**MS SMITH:** In the end I think it settled. A lot of these questions become live questions but never into the gazette. But generally people assume they will stay with the forum that they start with, and you hope that they have a reasonable adviser at that stage to tell them which is the appropriate forum. Like I said, often that came down more to process issues than to legal issues, for us.

**MS McKENZIE:** There are two ways one might think of dealing with that matter. One is of course to have a transfer mechanism, which would have to be replicated in both the Commonwealth and the legislation of the various states and territories, and presumably there would have to be some provision - because the state can't bind what HREOC does - that HREOC would have to consent to receive the matter that is being transferred. The other is to look at something similar to what's in the Workplace Relations Act about proceedings where there are some provisions that deal with state proceedings, and say that you can proceed under the federal legislation even if you start it in a state under some - - -

**MS SMITH:** And I think there's some sharing of registries or tribunals.

**MS McKENZIE:** - - - other (indistinct) or if there has been found to be some want of jurisdiction.

**MS SMITH:** Yes. The underlying thing is to protect the actions from being found to be in the wrong jurisdiction and being dismissed on that basis when the factual basis is being looked at.

**MRS OWENS:** You were running through a list of points on your bit of paper there. Did you cover all those, because I have a couple of other issues I wanted to raise with you on your submission?

**MS SMITH:** Yes. I have covered all of these, yes.

**MRS OWENS:** One of the issues you raised in your submission is about the distinction between direct and indirect discrimination, and you raise quite a few concerns about that. What would you do about it? Would you have just something called discrimination? Would you get rid of it, or would you explain it more clearly, if possible?

**MS SMITH:** I think you would just collapse direct/indirect discrimination into one definition of discrimination. Now, that's probably going to be a draftsperson's nightmare, but I do have great faith in - - -

**MRS OWENS:** I thought we could hand that over to Cate.

**MS McKENZIE:** They are very different. I was a drafter in a previous life.

**MS SMITH:** It's a very different approach they take, but it just seems to me that the way the cases have developed you still are able to look at a situation - a lot of it depends on who you are and how you are looking at it, because I will always look at a physical access issue as being indirect discrimination, and the requirement being that you are requiring a person to overcome that inaccessibility in the same manner as you require everybody else to, and they can't, by reason of their disability, and that's unreasonable. But if you are the person who is restricted in access you are saying, "No, I don't care. I'm being treated differently. I'm being treated less favourably." And therefore it's direct discrimination.

**MS McKENZIE:** Yes. But the difficulty about that, technically, is that the treatment may not be on the ground of disability. It may simply be a state of affairs; that's why you are quite right, I think, to say that indirect discrimination is a more appropriate concept. But it does make me wonder how to collapse the two into the same concept, and I think there are difficulties.

**MS SMITH:** I think for the person involved, when you have experienced that discrimination, it really doesn't matter whether someone meant to do that or didn't mean to do that, or whether it was you being singled out or you being left out; it has that effect of making you feel just as irrelevant to society or irrelevant to whatever services or facilities are being offered and it still has that same impact upon you. I think, from the point of view of making it an accessible concept so that people would comply with it more readily, I think if there was a clearer definition, or one that didn't involve straining the language so badly, that people would have more understanding of it. And that issue I raised before about complainants being seen as somehow vexatious or somehow greedy - - -

**MS McKENZIE:** Technical trip-ups as well, because the wrong concept is chosen.

**MS SMITH:** Yes. I think most tribunals though would end up making a decision on what they think has been established rather than what was written down in the original complaint; I think generally that's dealt with the same way. It was amazing how many times we would take complaints, and specify one or the other, and find that the tribunal had made the opposite, and different tribunals would find different findings out of it.

**MRS OWENS:** Another definitional issue was your idea that "addiction" be included in the definition of disability. I presume it's not now. It wouldn't be inferred from the definition that we've got now.

**MS SMITH:** I was responding to other papers that I saw on the web and had seen that a lot of disability-based groups were saying that addiction should be included. I guess I had that rider in it saying, "Well, this will always come down to what sort of medical evidence is available." I really think that for a lot of addictions you might be able to find a physician or some sort of specialist who is going to say, "Well, this is in fact a disability because it's based in this kind of a dysfunction or disorder," and put it within the terms of the context of the definition anyway. Whether it has to be specifically mentioned or not, I think is a different matter. I guess I put that in to say it's a fine idea if you are worried that it's not included but I think that perhaps it already would be, depending on what sort of medical specialist report you could obtain.

**MS McKENZIE:** The other definitional question is the question of reasonableness which in turn raises questions of burden of proof and, again, looking at the question of unjustifiable hardship, what way around all this maze do you see?

**MS SMITH:** To me it was just the issue with reasonableness and I think you really do need that issue of reasonableness in discrimination because it always has to come down to: what's a sensible person going to make of this and what would be the sensible resolution to this issue? Once you are establishing a case of indirect discrimination it pops up all the way through. So when you're trying to establish your case and establish that this was unreasonable in the circumstances, to know what sort of evidence you are going to put down to show that this was unreasonable in the circumstances, is the evidence like in a Scott decision, to simply just say it's unreasonable to expect a deaf person to operate a T300 handset or is it in fact saying it wouldn't have been reasonable in the circumstances because it involved expense on behalf of somebody else and that was an unreasonable expense.

That interpretation question really seemed to change from tribunal to tribunal

as to whether that reasonableness set in the indirect discrimination definition centred upon the complainant or whether it centred upon the external factors to the complainant. Obviously, as complainant's advocates we always said, "No, no, no. It's only about the complainant. It's only unreasonable for the complainant to expect them to comply with that condition," but different tribunals would interpret that differently. Then when it crops up again in unjustifiable hardship, I think in that situation it's quite realistic to say it only has effect for the respondent. But then to talk about the effect of the disability seems to bring in some of the same questions as what was unreasonable in the circumstances. So that 11A, I think it is, about what is the effect of the disability concerned is almost a mirror image of what the complainant has tried to establish of what's unreasonable in the circumstances.

**MS McKENZIE:** What if the concept was turned around and reasonableness was simply made a defence?

**MS SMITH:** I think that could be some sort of response. I think reasonableness is probably a weaker concept than unjustifiable hardship because as I've put in my paper, I always thought unjustifiable hardship was a pretty high threshold for a respondent to jump over, and reasonableness would be a lower threshold, I would have thought, depending on how the act is prescribed around that concept of what's reasonable and what's unreasonable. When people talk about reasonableness they tend to get lost into duty of care issues and issues to do with prevention of personal injuries and those kinds of discussions.

In the McLean case there's a very unusual definition about what was reasonable in the circumstances and it was said in that case that it was reasonable to expect that persons on a plane, if the plane was doing to ditch into the sea, would assist to help a person with a disability to get out the emergency exit and therefore put their own lives at risk. That was such an enormous leap and it was all taken on entirely judicial notice, which seemed bizarre really, and that - I will speak about that case because I was counsel in that case and we did appeal it, but the appeal fell through because the respondent became insolvent. But that seemed a bizarre thing to take into unreasonableness and it was entirely done really on prevention of personal injury or a personal injuries test rather than on a discrimination test. So I think there are differences. I would invite discussion around that idea of reasonableness being a defence so long as there were some limits or some reference back to the objects of the act in terms of that reasonableness.

**MS McKENZIE:** Unless you had another definitional matter to raise I was going to ask - - -

**MRS OWENS:** No, I didn't.

**MS McKENZIE:** I was going to ask just a couple of questions about HREOC's education role and do you have any comments to make about how best that might be performed?

**MS SMITH:** After the act was first proclaimed, I think one of the most powerful things about HREOC's educational role was the fact that you had a role model in Elizabeth Hastings who was a woman with a disability who had lived with her disability since early childhood, who had experienced exclusion on that basis, and for her to tour the country and have this very important role and to be proclaiming this very important new piece of legislation was an enormously powerful thing, and the fact that she was able to break it down into experiences that everyone in the audience could identify with was enormously powerful.

I have enormous respect for Commissioner Ozdowski as well but I do think it's disappointing that the federal government has chosen not to appoint a person who identifies as a person with a disability in that role, and has reappointed that person. I equally felt the same way when they reappointed a long time ago Zita Antonias as the Aboriginal and Torres Strait Islander commissioner, social justice commissioner, for the same reasons, that you need someone who you identify with in that important role to provide role modelling and to provide a positive face for that. I think that in the early days that was certainly an incredibly powerful part of HREOC's role and they also did a lot of education through the consultations in development of standards.

There was a lot of travelling and coming down part of the time and talking to communities and a lot of that has the effect, not only the formal education, but the informal education, of the disability communities getting together and meeting at those events and discussing the issues and putting forward some of their issues and those sorts of things. So that was important. I also think the other important role was the role of the community legal centres in disability discrimination and education, because I think without that, all of the posters and all of the pamphlets that you produce wouldn't have had the effect of then being able to put it into a practical format so that if someone then has a complaint of discrimination they have got someone they can go and talk to who will not only put the complaint down in writing but support them through all of those other stressful events I talked about before like the investigation, conciliation and preparation for hearing.

Firstly, that spearhead role and the role model role that HREOC provide at the time in the Disability Discrimination Commissioner together with the practical application of the law by people in all centres really meant that the act had really hit the ground running, I think. It really had a life very very early on.

**MRS OWENS:** In terms of what HREOC is doing now, you talked about them

earlier on going around and consulting on standards and so on. Does HREOC get down to Tasmania very much? I presume that HREOC came here for the tenth anniversary.

**MS SMITH:** Yes, and I think Commissioner Ozdowski came. I met with him in my previous role as head of office for the attorney, so he - that was in the last four or five years. He was down for that as well. Of course he has a number of different roles as commissioner, so I can't remember if that was in relation to disability discrimination or not. But at the same time, since 1999 the limelight in Tasmania has been on our state commission and the state commissioner and that new act and promoting that, and also I guess because the Human Rights Office closed here - it had been the last regional office - it made less opportunity for HREOC to be down here and discussing these things.

**MRS OWENS:** So maybe you don't need so much involvement in education within the states to the extent that the other offices also perform that sort of function.

**MS SMITH:** In terms of social attitude development and people becoming aware of the issues, potentially not. I guess you have to assess what each state commission or tribunal is doing and whether they need to develop that role; whether there's a role or a gap being left in those services.

**MRS OWENS:** Some people have just raised with us the problems HREOC has in terms of performing its role just because of resource restraints and funding constraints.

**MS SMITH:** When I worked at the commission in 1997, it was the same year that they brought out the Bringing Them Home report and it was ironically the same year they received a 43 per cent funding cut, and I don't think they have ever had an increase back. So when you talk about resources, that was a one-off decision that had the effect of really removing most of the bulk of the policy development areas and it skimmed HREOC right back to just its legal complaints handling role. So there was an active sex discrimination policy unit, ACIF race discrimination policy unit, the social justice commissioner and there was an active policy unit in each of those which got pared down essentially to one or two advisers and the commissioner, and it probably changed the roles of commissioners in that effect too. Whereas, earlier the commissioners had the ability to say, "I want to conduct this inquiry," and they would have available staff and they would have available resources, after that 43 per cent funding cut, none of that is there. So it's really no surprise that the inquiry's power has not been utilised to a greater degree.

**MS McKENZIE:** But then arguably, and this is a matter really to discuss with HREOC as there might be now some change for complaint handling because of

Brandy and full complaint handling now go to a Federal Magistrates Service or a Federal Court.

**MS SMITH:** In fact looking back, on reflection, you wonder whether the funding cut was just a pre-emption of the fact that the complaints-handling focus was going to be lost.

**MRS OWENS:** Yes.

**MS SMITH:** But at the immediate stage it had the effect of paring down the policy units.

**MRS OWENS:** There was one other question I was going to ask you and that concerned any improvements as far as dealing with or eliminating disability discrimination is concerned. You talk a bit about that in your submission and you say that any improvements might be due in part to the DDA but also to societal change. Is there any way of disentangling the two, do you think?

**MS SMITH:** I also touch on it in a way in the paper where I used the example of the built environment and talked about the role of local governments, and saying that before a person with a disability who wanted to object to a new development would (a) have to be aware that there was a development application on foot and (b) know the procedures to object to that and (c) make representations at council and all that sort of stuff, and now because councils have become concerned about their potential liability in these situations, they pre-empt that situation and actually give applications an assessment according to their idea of what makes disability discrimination eliminated in a new development and what doesn't. So while that process might not be perfect it does take a lot of that burden of an individual having to be there to pre-empt all of those decisions, and that occurred because the act was there. The council would never have taken on that role if there wasn't federal legislation requiring them to do so.

**MRS OWENS:** That could be said to be a direct response to the DDA.

**MS SMITH:** I think it's absolutely a direct response and that in the early stages of 94-95, around that stage, in Tasmania, particularly the Glenorchy Council, but later the Hobart and Launceston Councils, were proactive in developing access committees and involving consultation from people with disabilities and really looking very closely at how they were going to manage this, and at that stage there wasn't a liability. There hadn't been that decision that imposed some liability on councils for approving applications, but then once that decision did come through, which was a direct result of the Disability Discrimination Act, I think they have really taken up that role, and it's an interesting model for the rest of the act because it

has involved that second level authority who does make an assessment without there being a complaints process.

Someone said to me really early on when I was explaining back in 1995 what my job was, "Really. I just thought we put in ramps because we were being nice and touchy-feely," and when you say, "Well, no, actually. Now it's required under law," it put it in a whole different concept and it meant that people didn't have to go in and say, "Would you please make access for me because you seem to be a nice person and it's a terribly Christian gesture," or something like that. Now you can go in and say, "I'm sorry but it's actually something I require," and I think that's something that would never have come about with the Disability Discrimination Act. Litigation involves a lot of personal resources but begging for change just because you're there and you want someone to do something nice for you is probably even more resource intensive.

**MRS OWENS:** I had one more question, and I know we've taken much more of your time than we probably told you we were going to do. Have you got time to stay?

**MS SMITH:** Yes.

**MRS OWENS:** It was the issue about temporary exemptions, and you said in your submission that temporary exemptions they had little practical effect and you said you wondered why any organisation would apply for one because it advertises the fact that they're discriminating. Do you think you need temporary exemptions in the act?

**MS SMITH:** I've said in my submission that I really think that it was a way of getting their bill through the house at the time it was passed, because I just don't see how an exemption application can anticipate every possible type of discrimination that an organisation might be undertaking. It's not going to give them protection if they are trying to seek an exemption because they can't afford to make certain adjustments within their organisation; they don't know that those adjustments are the kinds of adjustments that someone might come along and require. It is just such a hit-and-miss kind of an application, and really the kinds of organisations who have sought application exemptions have always seemed to me to be the kinds of organisations who would have had a defence under special measures anyway.

So it seems to me that the people who provide a specific disability service to a specific disability group are the kinds of people who have been seeking exemptions so that they can exclude other disability groups when they didn't really even need to do that. They would have had a defence because they provided a special measure. Other people have made applications saying, "We can't afford to do this but we are

going to do it over time." Wily kind of complainants out there just say, "Okay, they failed on that exemption. So that is obviously a clear ground of discrimination. I think I will have a go at them on that basis."

I think they are anomalous and I guess I have always been a complainant's solicitor, so I have never been in the position of advising a respondent, but I have always thought if a respondent came to me saying, "How do we protect ourselves - - -"

**MRS OWENS:** You wouldn't say, "Go that track."

**MS SMITH:** why wouldn't you just say, "You had better make a budget allocation and start saving moneys towards those adjustment and have a plan set out, preferably in an action plan that you register, that tells you how you are going to address that discrimination, because the only other thing you can do is sit back and wait and see if anyone happens to take a complaint." I just think that they are anomalous and the process for judging them isn't really set out very clearly in the act.

It was done as an administrative decision which presumably has an administrative review facility, but really you put an ad in the paper, you don't know what the motivations of people who are going to respond to it are, and there is no limit to how they might respond or what they might say and then you end up with some conditions imposed upon you that might be worse than what you had before. I find them completely anomalous and in a sense, coming from having been a complainant solicitor, it wasn't really many times I felt sorry for respondents, but it seemed to me it was a pity for respondents to go through that process.

**MRS OWENS:** Yes.

**MS McKENZIE:** The only thing I would say about that is that if I were in a respondent's position and I simply could not put certain measures in place immediately but would have to over time, I would feel happier to be able to apply to the commission and have those measures put in place by way of exemption and with conditions, than to wait and take the risk. One can understand that. I would have thought that a respondent might feel that it is preferable to have the matter regularised than take the risk. There may well be a question that they would lose simply because if the tribunal looked at the situation as it was at that point of time, without the necessary measures in place, reasonableness may not be an element because they are not looking to the future.

**MS SMITH:** I see that argument. In an administrative sense I don't know that anyone ever checks up whether someone has complied with the conditions in an exemption.

**MS McKENZIE:** There are lots of things that you are saying about the process which I understand completely but for the minute, looking at the concept, I can't entirely see why a respondent might not be able to have that facility. But obviously it has got to be done differently, given what you have just said to us.

**MS SMITH:** Once the conditions are imposed, I don't know that there is any process of someone going along and policing whether those conditions have been met, and presumably if the conditions aren't met then the exemption lapses, which still puts you in a position of not being culpable in any discrimination sense, and you might just make those conditions later. I guess that would make it confusing if someone then takes a complaint and the question comes down to whether you complied with the conditions of the exemption or not, but also, like an action plan, often people do that early stage of negotiation around discrimination complaints that we talked about before and they meet with the respondent and say, "We are concerned that you are discriminating in this area," and if they say, "We have got an exemption for that," it might actually be seen as a cover-all and it is not. There might be some other issue of discrimination that had cropped up in it that they haven't covered in the exemption and haven't covered in their action plan.

**MS McKENZIE:** Indeed. The other thing you say which I completely agree with is that blanket exemptions that seem to cover all kinds of general stuff are anomalous. It's very difficult, one would have thought, to have blanket exemptions that are going to cover all kinds of things that the applicant even hasn't considered that might occur in the future.

**MS SMITH:** I doubt that there has ever been a blanket exemption given. I think they end up being so specific that really if you are looking at an unjustifiable hardship argument against a complaint, you would probably establish a defence on that basis anyway. A person who has taken steps to redress discrimination in their workplace, someone who is aware that there is discrimination there and conscious about it and wants to seek some legal redress to it, to the extent of making an exemption application, is probably the kind of person who is going to fix up that problem anyway.

It's the people who never thought about whether it is discrimination or not and who would never go near making exemption applications who are the ones who are concerned. It's a bit like the old adage with continuing legal education: it's the people who don't turn up that need the education, and probably the same thing with the exemptions.

**MRS OWENS:** Thank you, Anita. I don't know if there are any other comments you wanted to make before we break. Is there anything else you would like to tell

us?

**MS SMITH:** No, I think I have exhausted myself. Thank you.

**MRS OWENS:** Sorry to keep you so long, but it was terrific.

**MS McKENZIE:** Very, very enlightening. Thank you very much.

**MS SMITH:** Thank you.

**MRS OWENS:** We will now break and resume at 1.30.

(Luncheon adjournment)

**MRS OWENS:** The next participant this afternoon is the Anti-Discrimination Commission, Tasmania. Welcome. Long time no see! Could you please give your names and your positions with the commission for the transcript.

**DR SCUTT:** I'm the anti-discrimination commissioner, Dr Jocelynne Scutt.

**MS FERGUSON:** I'm the training consultant for the commissioner, Di Ferguson.

**MRS OWENS:** Thank you both for coming today. I'd also like to express our appreciation for the submission and for the earlier visit we made to March. You didn't come with me, Cate - - -

**MS McKENZIE:** No, I didn't.

**MRS OWENS:** - - - but my colleagues did. She wasn't appointed then. I understand you would like to make a few opening comments and then we'll open it up for some discussion, thank you.

**DR SCUTT:** Thank you, too, for the opportunity of making a submission. I must say thank you also for coming to Tasmania. What one notices, coming to Tasmania, is that too often federal bodies that are engaging in research or community consultation overlook the existence of the state of Tasmania. Somehow Bass Strait creates a barrier for some federal bodies. It's most important that the Productivity Commission has recognised the value of coming to Tasmania and also the right of Tasmanians to be consulted in this important inquiry into the Disability Discrimination Act.

We'd like to make just a few opening comments and then we're happy for questions and also for interruptions and so on. Something I would like to emphasise is that it's most important to have discrimination or anti-discrimination legislation, and the Disability Discrimination Act in that regard is a most important addition to a very valuable area of the law and of community employment and education and provision of services interaction.

At the same time, it is valueless to introduce legislation without recognising that everybody needs to be educated in what the legislation is about, what its impact will be and what the intention is. I say this most particularly in relation to, for example, lawyers and the judiciary. There is no point in introducing anti-discrimination or disability discrimination legislation, et cetera, and then leaving the field open, because what we know is that of all the members of the judiciary, say, existing in Australia at the moment, there would be handful - if that - who have ever studied discrimination law.

If one thinks that the first discrimination law in Australia was the Racial Discrimination Act federally and the South Australian Sex Discrimination Act in 75-76 and then New South Wales and Victoria in 77, that means that the legislation has been in existence in one form or another for about 30 years and the Disability Discrimination Act for 10 years. If you have lawyers or members of judiciary who have never studied the law, who have never studied the concepts, who have never had to exercise their intellectual capacity until they're sitting on the bench, you're not going to have the legislation interpreted, as was the intention of parliament, as was the intention of the community, through giving its imprimatur to parliament to pass the legislation.

That's the first point I'd really like to strongly make. Secondary to that is that we now live in a country where at long last judges have acknowledged and recognised - some of them at least - that they require education. In the past they said that they didn't need education - it would interfere with their independence - so, of course, they continued in their own independent/unindependent way as, in a sense, captured by their own socialisation, their own understanding and their own education. What they have - some of them - now come to recognise is that education is essential for the judiciary, as was long recognised in the United States and the United Kingdom, for example. This idea of bringing in legislation with a concerted educational program for everybody who will be involved in it is a key issue and it's one that I'd like to emphasise right up-front now.

**MRS OWENS:** Can I just interrupt there. Is it a short-term issue, in that is this sort of law being taught in universities now? Is the younger generation going to pick it up or is it still going to be an issue in the future?

**DR SCUTT:** It's always an issue, because the legislation is about discrimination. The people who are in positions of power haven't had to think about it, because most of them haven't been in situations where they've been discriminated against in the way that discrimination legislation is supposed to deal with. As the chief justice of the West Australian Supreme Court, David Malcolm, says - and he's talking about himself - it is our comfortable image of impartiality and neutrality that interferes with our ability to see discrimination when it exists. These are the people who were making the decisions.

Some law schools do have discrimination courses, but some don't. If they do, they're optional, not central. That's a real problem, too, because everybody needs education in this area, not just if they're going to be lawyers practising in the area, but if they're going to be lawyers and judges full stop, because they have to recognise in their courts, in their tribunals and so forth that they don't have to be dealing with a case that's got discrimination labelled all over it to have to be cognisant of what these issues are about. Other points that we'd just like to briefly touch on - - -

**MS McKENZIE:** Just before you do, take it one step backwards. You talked about judicial education, if you like, and briefly about what's available at universities, but what about schools?

**DR SCUTT:** Absolutely. That's a really important issue. In Tasmania, for example, we have an extremely important organisation called Tasdec. Tasdec, under the guardianship and guidance of Yabbo Thompson, who's the head of Tasdec or plays the coordinating role, has introduced a most important program into schools in Tasmania to ensure that students have access to human rights education. Unfortunately, that organisation has recently been defunded by the federal government.

That's an issue, of course, that has to be looked at in the context of this Productivity Commission inquiry, because if there are bodies who set themselves up specifically to ensure that school students and teachers have access to resources and knowledge about human rights and anti-discrimination then what we need to be doing is ensuring that they are able to continue in their role, which they won't be able to do if they're defunded.

Another thing that's really important within schools - and it's very big in Victoria, from where Cate McKenzie comes, and also Commissioner Owen - is legal studies for students. That has played a very important role in school students getting access, but again there's a need to ensure that this is obtainable in states throughout Australia. Some schools are more ready and some states are more ready to have that as a topic. The more that can be done for education for teachers as well, because that will help in their role of educating the students, but it also assists them in their role of appreciating and understanding the situation of colleagues who may have a disability, of students who may have a disability and also for those teachers and students who do have a disability to recognise that they do have rights and that it's taken into account in terms of the education system and the importance of community education.

I'd like to draw to your attention that at the Anti-Discrimination Commission in Tasmania we don't deal with the Disability Discrimination Act as such, because we operate only under the Tasmanian Anti-Discrimination Act. There is a provision in that act - as in all state bodies - that, if operative, would enable us to operate with the federal legislation as well. I think the experience of the cooperation between the state bodies and the federal body sometimes has been a little fraught. We haven't been involved in that, but what we do notice is that there's a really big issue in terms of which act people should access.

My understanding is that there have been some court cases which have been

interpreted as saying that, if an individual approaches the state body and they put in a claim to us or a complaint in other state bodies, the very doing of that act cuts them out from access to the Human Rights Commission. That really cannot be the way that the law is supposed to be interpreted. Certainly, the federal acts have provision for the state legislation to run alongside the federal legislation and there is an approach that, if the state body has taken up the matter, the federal body won't intervene or act at the same time. That's quite sensible. You don't want two bodies investigating the same matter, claim or complaint.

At the same time, I'll give you an example. We had a situation where somebody made a claim to us that involved federal funding, a state government department and then an independent entity that was funded by the state government. This is a disability discrimination case. In order to even be assessed by the Anti-Discrimination Commission, the person has to put a claim in. They've got to fill out a claim form, otherwise we aren't going to be able to assess where they stand in terms of, "Does it come under our legislation? Is it better for it to be dealt with by the Human Rights and Equal Opportunity Commission?" and so on.

The claim was split into two and we dealt with the body that was the independent body that was being funded by the state department, but because the other part involved federal government funding, although it was coming through the state department, and because we'd had experience in the past with a similar claim that the tribunal had considered not to have coverage by the state act, I sent it to the Human Rights Commission. In order to do that, because the claim had come in, I had to reject it, but I deliberately did not look at the substantive issues. I looked solely at the question whether it should be state or federal, as narrowly as I could.

That claim has now been rejected by the federal body on the basis that it would be better dealt with by the state body, but I've already rejected it. The person has come back and what I am going to do is deal with the substantive issues, but it could be challenged because I've already rejected it. That's not a sensible way for the law to be working, and we have to do something positive and concrete about ensuring that state bodies aren't cut out of their sphere of operation, but the federal body also takes on claims or complaints where the state body has said that it's better dealt with by the federal body. I'm not suggesting the federal body then has to go ahead and accept it willy-nilly. They've got to address their mind to it, but their mind should be addressed in terms of what their law is, not that it should be dealt with by the state body, because the person is then cut out of the remedy.

**MS McKENZIE:** Also you've got a falling through the cracks problem.

**DR SCUTT:** Yes.

**MS McKENZIE:** Because if your tribunal has said, "We can't do this because it's a federal matter," you send it, correctly, to HREOC who then says, "It should be a state matter," you've got a huge problem. Your tribunal says you can't do it. It's impossible, and it's impossible for a complainant to understand, let alone cope with.

**MRS OWENS:** So what's the solution? Do we change the legislation at both ends?

**DR SCUTT:** I suppose my solution - and it may seem odd for a state body to be saying this - is that ultimately human rights should be dealt with totally federally, in the sense that it shouldn't be the case that we sit in Tasmania with the pre-eminent discrimination legislation, with the widest scope, the widest coverage, the best legislation there is in this country and we're okay - or should be, I should say - but where people in South Australia are very poorly off because their state legislation is very narrowly defined and conceived. They're currently looking at it, but then their recourse to federal law is very narrow because the federal laws are not particularly broad in their scope.

The disability discrimination legislation is a very good act - and we would all agree - and the Racial Discrimination Act and the Sex Discrimination Act. Always legislation can be improved, as our act can, but that's basically what there is at federal level, so that my view is that human rights are a federal matter, an Australian government matter, an Australian parliament matter, and that's where they should be dealt with, properly and comprehensively and with broad scope. Other people would argue against that and say, "Well, what we have to do is fight for really good legislation in the states," and if one state gets good legislation up, it has a flow-on effect to other states.

**MRS OWENS:** Are you trying to do yourself out of a job?

**MS McKENZIE:** To follow it through, to make the Commonwealth power clear to make laws in this area, it probably would be sensible for the states then to refer to the Commonwealth any residual power that - - -

**DR SCUTT:** Just to ensure, that is right.

**MS McKENZIE:** Yes, particularly in relation to binding state governments.

**DR SCUTT:** That's right, because arguably the federal parliament has the power, anyway, through the foreign affairs power, because of all the treaties that we've entered into, and we've entered into many many treaties that the federal parliament has never turned into domestic law, but, yes, to ensure that there is again no slipping through the cracks. But to look at the current time, it seems to me that there does have to be greater clarity at both sides, in the state legislation and the federal

legislation, to make sure that the falling through the cracks doesn't happen. Whether it has to be cooperation administratively, but there may be a cause for looking at the legislation.

On the other hand, of course, one doesn't want to be in a situation where the state bodies can't deal with anything that has a federal complexion to it. In Tasmania we've found that there are many "federal bodies" that are very cooperative with us and our process, and we've had many conciliations with federal bodies that have come to a positive outcome, a positive conclusion, and many people in Tasmania, in fact the vast bulk, want to come to the Anti-Discrimination Commission because it's a state body, it's located in this state; we travel out to the other parts of the state and they feel that they can communicate directly with people here rather than writing a letter or ringing up a body that's in Sydney.

**MS McKENZIE:** How quickly do you deal with complaints? One of the other matters that's been raised in submissions is the time it takes to go through all the processes of a complaint under DDA. How quickly does the Tasmanian commission deal with complaints that come to it?

**DR SCUTT:** I'll have to get statistics out of the annual report to deliver to you. We have very good, clear time lines in our act. You've got to decide within 42 days if you're going to accept a claim for investigation or reject it, and that is adhered to by us 99.9 per cent of the time. The only time that we would ever go over that 42-day limit is if there's a need to seek further information from the claimant, because my own view is that it's better to go slightly over the limit and get the full information from the claimant and make a properly based decision than say to reject it because there's not sufficient information there. Then the person goes to the tribunal and they produce their additional information or material there, and it comes back to us for investigation. That's just not sensible. I've suggested in our annual report that that can be amended by giving some latitude only focusing on instances like that.

What we've done in the commission is set out own internal time line of 30 days so that the recommendation comes to me at 30 days so that we have a 12-day leeway in which to get additional information anyway. You have to notify people within 10 days if the claim has been accepted. We always do that. The next time line is six months from that date that the investigation has to be finalised or the claim is referred to the tribunal unless the claimant gives an extension of time.

We've had difficulties sometimes with that because of resourcing. We're not well resourced in terms of the workload and the work that's done, though we do appreciate the fact that the government has increased by giving us some administrative support, and I want to make that very clear. But the other problem is that sometimes lawyers become involved and are very very positive in the way that

they're involved. Sometimes they're not. They don't understand the legislation and seem to think that the proper approach to take is an adversary one, rather than a cooperative one which we do our best to promulgate. Other instances happen where people disappear and it's very difficult to locate them, so that can create time problems and so on.

But to come back to the point of delay, what I think also has to be recognised in this area is of course every legal issue or being involved in anything that can be classified as litigation is stressful. Everybody recognises that, and I think on those levels of stress it's one of the highest next to moving home and having a family member die. But this area is particularly difficult and particularly with disability discrimination legislation, the disability area, and therefore one can only say there should be resources so that time lines can be truncated, but at the same time I would add that people often don't realise that you have to have a process that's going to take some time, in that they might come in the door and think that because they say they're being discriminated against, well, then, you're going to say, "Yes, that's true," and rush off and do something about it, and when you explain, "Well, if you had a claim made against you, would you be happy if you weren't even consulted or your point of view wasn't even gained?" and then they understand that you've got to go through a process.

But often it's that people don't understand the process, and then we come back to what we said earlier about the state-federal issue. It's hard to ensure that people do understand those sorts of issues, but I have every sympathy with people who say that it's taking a length of time for their claims to be dealt with, and again, under the Disability Discrimination Act, that goes back to resourcing of the Human Rights Commission, and it goes back to what value our society places on human rights and the right of people to access services, to access education, to access employment, and so on, and not to be bullied or harangued or harassed or brutalised, simply because they possess an identity or attribute that brings about bias and prejudice.

Perhaps Di Ferguson, who is with me, I should allow to make some comments in relation to training because in the area of training - she's newly with us, of course, but there are issues that come up in training that I'm sure she could comment on that might be of value to the Productivity Commission.

**MS McKENZIE:** Certainly.

**MS FERGUSON:** While Jocelynne was talking about how necessary it is to educate judiciary and people involved in the law area around the act, I think what we're ultimately trying to do by putting in this legislation is to actually change our community culture and behaviours, and for that to happen there has got to be the education at the other end, and that means that as many people as possible - not only

in Tasmania but right throughout Australia - need to be educated about what the content of the act is for Tasmania, what those attributes are, what the areas of activity are, and even further, bring it back down to what that looks like in their workplace or in their particular culture, in their working environment or when they access training or what it should be like for them and what's okay and what's not okay.

So for me, where my passion is is that getting across the message to as many people as possible; that while this might have been okay or considered okay in the past and even now is still considered so, it's actually not, and we now have legislation to say that those sorts of behaviours aren't acceptable, and as many people as possible need to become aware of that so that gradually that behaviour will change and will bring about a cultural change in our nation.

**DR SCUTT:** And perhaps I could continue from what Di has said, just linking it back to the delay factor, too: sometimes people don't realise that the process is a very big part of what one is endeavouring to do under this legislation. You see, if you have toing and froing - we do a correspondence exchange at the beginning under our act, where the claim goes out, and we say, "Would you please give a response," and we get the response back, hopefully - we do mostly - and then we send that out to the claimant to let them know what the respondent is saying, and then they can put their comments in, which go back to the respondent.

Now, people say, "Why is there all this paper going backwards and forwards?" But, you see, if you do that, you've got a chance of actually getting people to understand what the nature of the problem is. Rather than us going and writing down some questions and saying, "This is what the problem is," and imposing our take on what the issue is, it's between the parties.

Now, at the end of that we ask for witnesses and we ask for documents and so on and a report is drawn up. We've had claims where people have said to us, "If only we could have got together right at the outset, without even us having to give a response, then everything would have been fixed up." Well, I would suggest it's very possible that that is not what would have happened because it's the process itself that's led people to the point where they've been educated, as Di said, into at least acknowledging and recognising there is an issue here and somebody is not just whining and whingeing and moaning for the sake of it.

We have introduced in the commission an early conciliation process, but we would never ever do any conciliation without having a response from the respondent in writing, because my view is that the claimant has to put something in writing, and we will always assist, or we can get mentors and so forth to assist if people are unable to write themselves and so on, but they've committed themselves to writing, the respondent must do that, so we know where they stand.

And also they have to know where they stand, too, because you often have people who are respondents saying, "But I didn't do anything," and then you say, "Just go and walk round the block, and when you come back, sit down in a quiet room and go methodically through each item in this, and then you will put in your response and send it in to us," and what you find is that when people actually do do that and go through the process, they do have a possibility of beginning to think differently about what the issue is and this isn't some recalcitrant or somebody just trying to make trouble or somebody being a whining, whingeing, moaning problem.

**MS McKENZIE:** And how does the early conciliation process work?

**DR SCUTT:** That has worked really well, and here I must actually commend the Department of Education in Tasmania because they suggested this to us, and it's not a power under the act, but under the act we can only direct a conciliation if the investigation is complete, and it's a gap in the act, but what I've done is said, "We will write to both parties." If we think that an early conciliation might work, we'll write to both parties and say, "This is a possibility. Will you agree?" and if they agree, then we do it.

But to the Education Department one: there was a claim that involved a child with a disability in a school, and there had been a couple of these before that had not, in my opinion, been handled very effectively. The Education Department, I think recognising that, or clearly recognising that, came to us and said, "Could we have an early conciliation?" We got their response and we approached the claimant and said would they like to come to an early conciliation, and we did.

Now, this is one where, if you looked at our statistics, you'd say, "Heavens, there's been a long delay in that claim," but it's not an inappropriate delay because we'd had the claim perhaps several months. We had the conciliation - say for the sake of the argument the conciliation was ended up scheduled say at the six-month point. Then an agreement was drawn up to be adhered to, and there were ideas about - "We'll come back in another six months to see how that's worked," which we did.

So we had another conciliation meeting at that stage, and then there was another agreement written up with other principles and points that were going to be met on both sides, and then we said, "We'll have another conciliation meeting six months down the track." So that was 28 months that that took, but at the end of that, everybody signed off that what had been done so far was acceptable, it was a good response to the situation, and so on.

Another one I can give you that's another disability one was a community service provider that had all its offices upstairs. In Tasmania there's an issue in that

there are a lot of heritage buildings, and this service provider had set itself upstairs. A lot of its clients were persons with a disability who would not be able to walk up stairs, and the person who put in the claim - we ended up going to a conciliation on that one, though actually I think it might have been a final conciliation, and the agreement was that the service provider would search for alternative premises within a 12-month period - because they had a lease that they had to extricate themselves from - and that they would come back to us with the proposal about what the alternative accommodation was going to be, and the claimant was satisfied with that, because they were reasonable, too, and could see that this service provider just couldn't move out of the building instantaneously. There are commitments that you have and also you have to search for an alternative premise.

But those sorts of experiences are really positive because it's an issue of people coming together in conciliation, although I have to add a caveat, and very often conciliation can be a cover-up mechanism that means that the political will is not going to exist out in the community in the sense that there's not a recognition that matters have been solved that way, and there's not going to be a flow-on effect necessarily.

**MS McKENZIE:** That's exactly what I was going to raise with you. There are a number of submissions that express exactly that concern and also the concern that because normally in conciliations the results are confidential. No-one in the committee ever finds out that certain combinations have been made, at least for one person or for a small group.

**DR SCUTT:** Sarah Charlesworth has written a really good paper on this, looking at industrial law and looking at discrimination law, and the irony is that in the industrial arena they often call conciliations where they all get together around a table and argue it all out, but there's no notion that that conciliation process will be confidential, and when they go back into their mediation mode - or whatever the term is that is given to it, or the hearing mode - what has been discussed in the conciliation can be actually used. That's completely foreign to this area, because in this area nothing in a conciliation can be used in future proceedings. It's confidential and the commissions have to keep it confidential, and the parties very often put a confidentiality clause.

When I was at the bar I always worked hard not to have confidentiality clauses in any settlements because I don't believe that you should actually bind people in that way. One of the points that I think could be considered here - and although there might be disagreement with it at the outset, when people think it through it could have some validity - is, I think the idea in discrimination law has been that you won't get people to agree to anything if they think it's going to be public. But if you said, "Come to a conciliation and, if you reach an agreement, it will be public, but you've

had the opportunity to reach it in a confidential setting," and then if you do agree, that agreement, as I say, will be public. People would still come - surely they wouldn't be foolish enough to say, "Well, I'm not coming to a conciliation if the end result can be public", because they've got control over whether they agree, and if they don't agree there's not going to be anything that would be public.

If you drew up the agreement - both sides: "We agree that this person is not saying they did do any discrimination, but what they've agreed for the sake of settlement, they will agree to X" - I can't see ultimately how that would have any negative impact on the parties and it would have positive educative effects.

**MS McKENZIE:** So that the process would be private but the agreement public?

**DR SCUTT:** Yes. They don't have to agree to that. If they don't agree to that, well, then off they are to the tribunal.

**MS McKENZIE:** Yes, which is then entirely public.

**DR SCUTT:** Exactly. That's right.

**MS McKENZIE:** That's a very interesting suggestion.

**DR SCUTT:** I've got another one, too. I must just get this one in.

**MS McKENZIE:** Any more you want to tell us, this is the time.

**DR SCUTT:** I was reflecting the other day that sometimes people get really quite upset and it's understandable. If they get a letter saying there's possible discrimination, they of course think somebody is saying they've done something wrong, whereas what we're saying is, "There is possible discrimination here. Could we please find out what your point of view is, and let's investigate." This comes to the time factor as well. The reason I think a lot of claimants do become upset is because it's all hanging on them and their stress levels are rising; they've got to go home every day from the workplace where they might have their claim or they feel they can't go into the bank any more because they've got a claim - I mean, obviously they can but people might feel this way, though we would emphasise they don't have to, but they do.

If you had a system where somebody makes a claim and they say, "I have been bullied and harassed in my workplace because I have a disability," or, "In my workplace there aren't proper accommodations for disability," and so on, and we looked at the claim and on that basis said, "Okay, we will accept this claim for investigation." But then we would go to the workplace and say, "We're not coming

here to investigate a particular issue. We're coming here to look at your policies, your grievance procedure, your practices, your accommodations, how the workplace is configured and that sort of thing, but we're not doing it in relation to any particular individual or person or against any individual," so that we're not going to do it because - we don't say, "It's Mr X or Ms Y who's been named in the claim, and that's what it's all about." We don't mention that. We say that, "We're coming here to do an overall assistance" - we wouldn't call it an investigation; we'd call it assistance - - -

**MS McKENZIE:** So workplace assistance or something like that.

**DR SCUTT:** Yes, workplace assistance. That's right, yes. That, of course, would take resources, too. It's not lacking in resources. We have done this ourselves actually, where people have approached us. We had an aged care facility - as they call them - that approached us because they had what was being seen by other staff members as a bullying problem, and they saw it that the person who was the alleged bully was a person who had come from another background and that was what the issue was. It was a personality issue, and even might have elements of discrimination against the member that was being seen as the bully.

The training officer prior to Diane Ferguson went into the workplace and talked about bullying - what it meant, and how the act worked, and what the issues were, and so on - and came away. We heard a positive outcome, and then perhaps three months later the person rang up again and said, "Well, that was very good as the beginning, but we need something more." We had another training officer who went up to the workplace - and we call this now a pre-claim conciliation - and talked individually with everybody in the workplace that was a part of this group where there was the issue, and then came back with this report.

We discussed it and what we decided that we would do is go back into the workplace and set up various permutations of conciliations, and that training officer was a female training officer and we got a male conciliator from outside, so that they both went and conciliated with different groupings, and then came up also with other aspects in the workplace that needed to be remedied arising out of the initial discussions and then these conciliation forums, or conciliation sessions. We did a grievance procedure, we did an equal opportunity procedure, and other suggestions for workplace change, and gave a report to all the people who had been involved.

We got some really good feedback and we haven't had any more calls from them about problems in the workplace, which I wouldn't be so bold or foolish to say means that there are no more workplace problems in this particular facility, or institution or whatever it is that one wants to term it as, but clearly there has been some effect of that process which has been positive. Maybe Di could add to that one,

too: something about the way that you see in your training approach that this sort of mechanism can work.

**MS FERGUSON:** We talk about conciliations at the commission. I think it's about putting practices and things in place in the workplace where things can be solved when they're happening, so that something doesn't escalate to the level where it actually gets to the commission. But it has to be meaningful; it has to be a policy that's supported by the whole management of an area; it has to be a policy that is well known and understood, and training done to everybody in the area. Then there have to be the appropriate people within that workplace to deal with issues as they come up, and also once again they need the appropriate training to do it.

That way things are contained, they're settled at a really early stage and, instead of people getting frustrated or feel that they're not being listened to or feel that they're not being taken seriously and that action is not happening, you are getting resolution at an even earlier stage. From there, we increase training. I believe that you could even go to a preventative sort of area where you're getting in and you're getting to people before those situations start occurring. You're bringing your conciliation back to a lower level and eventually, if you're doing the right sort and the right amount of training in the workplace, you're actually getting to more of a preventative stage.

**MS McKENZIE:** You find out about a workplace that needs this kind of assistance by someone in fact contacting the commission, either from the workplace itself, from the management or one of the staff, for example. Is that how you become aware that there might be a workplace that needs this kind of assistance?

**DR SCUTT:** That's right, because in this one it was the head of the facility who rang and said, "We've got this problem and really we want to do something about it." We've had a lot of calls particularly from the nursing aged care industry and I began to think this is terrible because it's a female-dominated area and, "Why is this happening?" We're not getting calls from male-dominated areas about the dreadful bullying that's going on in there. Then I have to confess that I came to another conclusion which is that at least they're getting in touch with us; at least they're perceiving that there's an issue here that has to be dealt with, rather than saying being gung-ho and saying, "Bullying's the mode and emotional intelligence is irrelevant. We'll just get on with how we've done it from the year dot."

I think part of it is actually recognising you have a problem and, to come back to Chief Justice David Malcolm, that's what he's saying. He's saying that you don't actually see a problem if this issue has never been anything that you've had to experience or that you've actually had happen within your vicinity so that you can see it. People have things happening within the vicinity all the time and are completely unable to recognise that it's there. Even things like language: I have to

confess to Deputy President McKenzie - I'm sorry, what's your title?

**MS McKENZIE:** Not today. Try Cate.

**DR SCUTT:** I said hello to Cate, "It's really good to see you," and Cate responded by saying, "It's actually good to see you."

**MS McKENZIE:** And I meant it.

**DR SCUTT:** I know - I, too. I was actually taken back to a case I did - Katie Ellis or Katie Ball who uses a wheelchair for mobility. Katie always used to talk about walking to the station and some of her colleagues who also use wheelchairs were saying, "Oh, Katie, don't say that." But she'd say, "I am. I'm walking to the station. I use 'walking' in this mode of - I mean I'm getting to the station, and that's the word that I use."

**MRS OWENS:** It's reflecting her mobility.

**DR SCUTT:** That's right. We might use "walk" in terms of our own perception of what walking is, but she's perfectly entitled to use "walk" in terms of what it means for her. People would say we're now having a discussion that's moving into the realms of this dreaded political correctness, and of course what I always say is if people respond by saying, "You're being politically correct," it's an indication that they don't have an argument of substance to put forward, because if they did they would articulate it instead of resorting to this political correctness notion. If it's being politically correct to think about issues like this, then I would prefer to be in that camp than in the camp of the unknowing that don't ever think that these are issues to be reflected upon or even acknowledged or recognised.

There are a lot of things, too, I think, that happen say, for example, in planning. To come back to Katie Ball or Ellis, her case was about access to the heavy rail which doesn't exist in Tasmania because the heavy rail is used solely for transporting goods rather than individuals. There the issue was about access and it seemed to me that one of the problems there was that you had a situation where people hadn't actually thought ahead of time about what taking the heavy rail away would mean. That was because they didn't realise, as Katie explained it to me, if you use a wheelchair for mobility, you buy your house near the heavy railway because that's where you get access to mobility. You go to university, not at La Trobe or Monash - this is in Victoria - but you go to RMIT or to Swinburne because you can get there by rail. If you get a job you get it located to the railway station. We don't all have cars. So many people don't think about it from that point of view.

That's a part of what Di was saying about education - that you've got to go right

back. One of the things we've found is that, although everybody is talking about - well, not everybody, but some people talk about contact officers and about policies and so on, some people don't have those things in place or, if they do - and I'm not telling you all anything new - they're beautiful pamphlets, but they're actually not really implemented or used. You have your policy and that's the answer.

**MRS OWENS:** Can I just come back to what you were both talking about before - the aged care facility, going in there and providing advice and training and so on. Coming back one step to HREOC and its role - which is a nationwide role - how realistic is it to use that sort of model when you're talking about HREOC with its responsibilities across all states?

**DR SCUTT:** I think it could do it, though, in terms of larger organisations, because you see if you look at organisations in Australia there are some who, under a different regime, I expect, that came from the United States, where there was some quite forward-looking thinking about workplace organisation, and so companies that had their headquarters in the United States or were subsidiaries quite often were much more attuned to the fact that they had to get their act together. So that if you had big organisations that the Human Rights Commission could go into that had a large entity somewhere in Australia and had smaller branches elsewhere, if it got the head entity at least doing something in the right way and its procedures, then there would be a flow down from that. So arguably they could do it with larger organisations.

**MS McKENZIE:** So national organisations - similarly, national industry associations perhaps as well.

**DR SCUTT:** That's right.

**MRS OWENS:** The other approach which they already do is encourage organisations of all sizes to put in action plans, and some have argued that organisations should be required - they should be mandatory action plans and that they should be monitored and HREOC should have a role in monitoring those - policing those action plans. That's a different sort of model.

**DR SCUTT:** That's right, because then you're putting the proactive perspective on the organisation itself for a start to make its plan. I was in the United States at university and I very well remember when they were going to lose their funding under affirmative action. This is the University of Michigan. It's a while ago, and they took it really seriously. They actually were rushing about, getting all the statistics out, looking at what they could do and so on. They weren't saying, "This is really nonsense and we don't have to pay attention to it and we're not going to do anything." They were absolutely proactive in saying, "We have to do something

because" - they were saying, "We have fallen down on our targets or quotas," or whatever, and it was impressive to see that.

That was Prof Virginia Nordby who was the head of their affirmative action program at the time. It was so professional. It was so serious. It was, "There is an issue here that we have to deal with and it's got to be dealt with professionally," not turn your nose up in the air, "This is a load of old nonsense," and, "They've got no power so we'll just say that we're not going to do anything." Unfortunately, until there is a really strong high-level acknowledgment that these areas count, there will still be some people who say, "Well, we're not going to do it." But with a plan too, one has to make sure, I think - it's like the standards. What's the point of having a lowest common denominator?

There's another side of this, and people say, "Well, if we get the lowest common denominator at least we've got everybody with something." But it seems to me to have the lowest common denominator is worse than having nothing at all, because then everybody says, "Right. We'll meet the lowest common denominator," and the people who might have been drawn into having a higher standard or a higher level don't actually do it. So I think you have to, if you're going to have that sort of approach - "Draw up your own standard and then we'll monitor it" - you've got to be sure at the beginning that the standard has got some value and some high level, and how are you going to do that unless you go and look at the workplace and see what their standard is, I think?

**MS McKENZIE:** The other problem is you've talked about anti-discrimination policies that organisations sometimes have but don't observe, and don't always look at either. It may well be that the disability action plans might be something similar. Assuming that monitoring could only be random monitoring; that if action plans were mandatory, and there would be many, that monitoring might be random monitoring. If that's the case, then you may well simply have companies that treat them just as they treat anti-discrimination policies, which are not implemented.

**DR SCUTT:** That's right. You see, I'm really interested in building and in transport and building is a very interesting area because building surveyors generally, I have found, are relatively on the ball, at least in this state. Some architects are really excellent. They will come to us and say, "Look, what are we going to do in a particular situation?" But you would need to get into the universities and make sure - or TAFE - when people are actually learning to become building surveyors and architects that they actually learn about these issues, and that in standard building plans there are doors in every single house - new house that's built - that are of the appropriate dimension to access the larger sort of wheelchair. Then people will say, "Why bother to do that?" or "Why bother to have a walk-in shower? You just walk in on the floor and there's the shower?"

If we don't die young, every one of us is going to get old sooner or later and be on our walking frame. So even if you want to think totally selfishly, well, think from that perspective, you might say, "Well, I'm not going to stay in that house forever." That's true too, but anything can happen. One can become a paraplegic. A child can be born with a disability that means that it needs special access and so on, and if all houses are built in that standard way, it's certainly not going to cost any more to build houses with wider doors and have the people who make doors make doors that that size is the standard size.

Where the cost comes in is the retro-fitting, because it costs a lot of money to reconfigure a house. What one I think would find in every state is that housing departments have real problems with providing housing for persons with a disability, and that's not because they want to not assist persons with a disability, it's because of the money factor and it's because houses generally are built that aren't accessible and therefore the housing department has to put a lot of money into retro-fitting. But if that was dealt with way back at square one, and architects and plans were operating and built in accordance with plans of accessibility, then you cut down the expense at the other end. With all these plans - I mean, having a standard plan in your business and so forth, if there was planning before that - in terms of we come back to the education factor - then if you do have plans they might be a bit more appropriate and they might then be accessed rather than just left there on the shelf so that when a problem happens you just wave your plan and say, "Well, we did this plan."

**MS FERGUSON:** If I can just say something there. I think another tack that we can take when we're talking about how to get organisations to actually take on policies and procedures and implement them, if we can focus on the bottom line for them and help them to show how it not only makes their workplaces better places to be for their workers, but it actually increases productivity for them, and this is looking at leveraging diversity in all areas, including disability. Why limit yourself to the number of people that are going to apply for that job? Are you going to get the best workforce that you're going to need for your particular area? Are you actually tapping into the expertise that's there? Because all that comes back to reflect on the bottom line and how well they're going to do, whether it's at a state level, at a national level or internationally.

So by once again promoting the fact that a bottom line is affected by being inclusive and having a diverse workforce in all of the areas that we look at as far as attributes under the act, I think you're once again giving yet another imperative and another reason why people would look more openly at putting those sort of policies in place.

**MRS OWENS:** I think one of the challenges for us is to get that balance of

thinking between the costs and the benefits and, as in many other areas, it's quite easy sometimes to measure the costs. It's much harder when you're talking about those broader benefits, but we're going to do our best and at least acknowledge those broader factors. It is in our terms of reference to look at this issue, but you made a good point, yes.

**MS McKENZIE:** But the terms of reference are somewhat wider than that. They deal with the effectiveness of the DDA against its objectives, and in that sense look at the objectives as values in themselves; if you like, values to be pursued.

**DR SCUTT:** I think that's right. Perhaps just one final point - two final short - I have to make them short points - I would like to make is that I happened to be out at Claremont High School the other day in my usual inspection mode. I was out there for a mentioning program - I don't mean inspection mode - but went into their most glorious large disability access toilet. It's absolutely splendid. It's a very large space and there's a shower in there and there's a toilet and so on, and from the wall it has an arm that comes down. So the arm goes back and comes down, so if a person with a disability is using that toilet - that lavatory - they can actually access that arm so that they can lean on it. It's not a fixed rail. However, it just struck me, "Well, clearly you can put an arm on the other side because we have this issue with persons with a disability." Some people are right-handed.

All people with a disability are not right-handed, not wanting a right-handed rail, and so this sort of thing can be accommodated, and it's very easy, because it's not going to cost more realistically to have two such arms than just to have one, and if you're putting one in, you may as well put the second one in. So that's one issue. Another one - because I found this interesting - is about competing claims, because we had an application for an exemption under our act for an - it's an entertainment facility for older people, and in the building they had, say, three lavatories - toilets - for women and two for men, and if they were going to put in a disability access toilet, they would have had to get rid of two of the toilets to make the disability access toilet.

What they have said is that first it's a non-profit organisation and so the money really wasn't there, but secondly, if they did that, they had a lot of incontinent members, so that you need the three toilets for the incontinent members and they didn't have any member at the moment that was using a wheelchair for mobility. So in the end I looked at disadvantage and equal opportunities and so on and said, "In this case, we have to privilege the incontinent members who are there so that they can actually" - and I mean it would be very embarrassing.

**MS McKENZIE:** Which is probably a disability anyway.

**DR SCUTT:** Of course. That's right. It's an age and a disability thing, and yet that would mean that somebody who used a wheelchair for mobility would not be able to get access to a toilet at that particular entertainment place. But you have to weigh up these things, and that's what a lot of people, when they're talking about disability, I think don't recognise. They tend to see disability as something that's visible; whereas there's invisible disability. There are all sorts of ones, and to come back to the toilet idea, just because you've put your arm that way doesn't mean, "Well, now we've done our disability toilet and that's the end of it." You've got to think that there are all sorts of disability that might need access and they might need something other than a right-handed rail or arm.

**MS McKENZIE:** I've got two more questions I would like to ask you. The first is about temporary exemptions. I want to raise with you one of the earlier submissions that we got which said basically that the temporary exemption provision should be repealed out of the Disability Discrimination Act on the basis that there shouldn't be a capacity to give temporary exemptions from the act for a few reasons: first, if you're applying for a temporary exemption, you're probably going to be the kind of conscientious organisation or individual that will want to deal without discrimination and will only be applying because, for example, it might take time to make certain facilities accessible and so on. And in any event, if in fact you were doing it within a time that was reasonable for you in your circumstances, the unjustifiable hardship defences would apply to you, so that you wouldn't be put at risk in any case. That basically was the argument: that there was no need for temporary exemptions. You could simply rely on the defences.

**DR SCUTT:** That's an interesting argument. I guess that we have very rarely given temporary exemptions, and in a handful of cases - it would be about three times, I think - there was one where there was a need. They had been given a grant for a particular position and if they didn't advertise immediately, they would lose the grant or the grant wouldn't be able to be operative for six months or whatever it was. That was a case relating to a job that was targeted for somebody of a particular race, a refugee or something like that, and I thought in that case, you can see quite clearly that there could be an issue because people could be annoyed if this job is being advertised.

The other thing you've got to worry about are the newspapers too, because they are very conscientious and they don't want to put an advertisement in that could be in breach of the act because they could be liable too. It wouldn't just be the organisation, it would be the newspaper as well. I think that if newspapers, for example, are being very conscientious about making sure that they're not putting in advertisements that are in breach of the act, then I think you've got to encourage that, and that was one reason why we gave them the temporary exemption, so they could put the advertisement in for this job, but it's very rare that we would give a temporary

exemption.

The other point I think is what I think about exemptions in themselves, and I would possibly have to reflect more on what you've said about the temporary, but it has arisen so very infrequently under our legislation that we don't give exemptions unless they can come within an exception in our act. We don't look at the public interest because my view is that the public interest is reflected in the legislation through what the parliament said, and what the parliament said is that we should not have discrimination and, if we do, it can only be legitimated by reference to the exceptions, and therefore that's the public interest I think that's being expressed through the parliament in the legislation itself, rather than me saying, "I'm going to impose my vision of public interest on this legislation."

The reason that I have also thought that it's actually useful to look at the exemption provisions and to grant exemptions if they come within an exception is because it's good to put people to the proof. That is, they then have to think about, "Do we really want to classify this job in this way?" or "Can't we find another building that we can have for our service?" and so on. You actually make them think about their reasons up-front. We've had situations where people have approached us, saying they want an exemption, and then we've said, "Well, give us your reasons why." They've then gone through their reasons and they've then thought, "No, we actually don't really need an exemption; we can do something else that can accommodate the requirements of the legislation."

**MS McKENZIE:** So they're thinking proactively at an early stage about that?

**DR SCUTT:** That's right, yes. We always say to people, "You can sit there and wait for a claim to come in, if that's what you choose to do. The claim will come in and we will accept it for investigation and then you can respond then," so you're responding. But if you think about it ahead of time - and this is not disability, but we've had a number of applications in relation to services for women only and I don't think it hurts to have to address that issue sometimes, rather than just saying, "Well, it's accepted wisdom; we have services for women only," and that's somehow set in concrete. In each case of that the arguments that have been put have been substantive and the exemption has been granted, but I don't think it's a bad thing to have to be put through your paces.

**MS McKENZIE:** The second question I wanted to ask related to the definitions of "indirect" and "direct" discrimination. The difficulties with those are mentioned in your submission, and perhaps the distinction should be removed or clarified. Have you got any suggestions you'd make about how that might occur?

**DR SCUTT:** Well, you go back to the original Racial Discrimination Act. Now,

that's been fiddled around with and they put in what, they say, is an indirect discrimination provision. I don't think they needed it because when you look at what the Racial Discrimination Act originally talked about - distinction, exclusion, et cetera - it really imports the notion of neutral-seeming rules that impact differentially against people. I think the whole thing is there and what really interests me about the legislation is that we've gone off into this less-favourable-treatment notion, which I think is also problematic, whereas the United Nations treaties and conventions and covenants have actually been built up over time, with people arguing vociferously from this side, that side and so forth. Now, if they came to the conclusion that that's a really good way to describe it, it's not that you bow down and you say, "Well, they must be right," but I would have thought that there surely has to be some credence given to the conclusions that they came to.

With less favourable treatment - I know I'm now on a different thing from the indirect and direct but I would like just to address this briefly too. You see, when you're talking about less favourable treatment what are you talking about? Are you saying that if this woman were a man, she would be treated in a different way, or are you saying, "In this circumstance a man would be treated differently"? They're both quite different - they're really different - but to get anybody out there sometimes to see it might be a difficult. But if you think about it, they're really very different things that you're talking about. "If Mary-Jane were a man, would she have been treated in this way?" is a very different thing from, "Would John Smith, in that circumstance, be treated differently?" I think.

When you come to direct and indirect discrimination - I've been in cases where, honestly, the courts - everybody at the bar table and everybody at the bench says, "Is it direct or indirect?" They're wasting all their time on that when they actually really should be focusing on what the actual issue is: how has this person been dealt with and what is the problem that they're articulating? I also think that, over time, what you will find is that things that were conceptualised as indirect discrimination in the past would be very likely to be conceptualised as direct now, just because people have become much more aware of what discrimination is about and what breaches of human rights are. Look at the Garity case. It was really interesting in that case because - just to prove that it could be done, I expect - I actually argued one aspect of it as indirect discrimination. They were holding a whole lot of fire brigade tests and the alarm would go off and she wouldn't know whether it was a real fire, an exercise or whether it was just that the alarm had gone off by mistake.

Now, you can argue that as indirect discrimination because she was being required to abide by the same rules as everybody else who was a telephonist, which was to sit in her chair and wait until somebody came and tossed her over their shoulder and carried her out. You can also argue it as direct discrimination because she was a person with a disability who was actually being treated differently from

every other worker in the place because they were all going on the fire drills, whereas she was sitting at her post. Her post was the switchboard operator and at that post you had to sit in your spot, but she was also a person with a sight disability and therefore she was not able to see if there was a real fire or not. When the decision came down, Commissioner Nettlefold actually said that it was direct discrimination, that there wasn't any need to look at it as indirect discrimination.

I think the most problematic area in relation to direct and indirect is disability discrimination. For example, if you say, "I'm going to have stairs in front of my town hall" - fortunately, at the town hall here they have a really beautiful ramp that's on the side that really is aesthetically pleasing, but say if we have a town hall where you've got to get up the steps, you can say that's indirect discrimination because all persons are being treated in the same way; whether you use a wheelchair for mobility, you have a walking-stick or whatever, you're all going to get into the town hall in the same way. Clearly, it impacts differentially against persons with particular sorts of disabilities, but you could argue it as direct discrimination because you could say that is less favourable treatment of persons with a disability because they are being expected to get up the stairs, and they can't get up the stairs, therefore there is a direct nexus with the disability and stairs.

Although the people haven't put the stairs there deliberately to say, "We're not going to let anybody in who is using a wheelchair for mobility," the practical effect is that that's what they've done. How would you see that? Would you see that as direct or indirect? As I say, you can argue it both ways, and that's why I don't think they're useful concepts; in fact, I think that they're more trouble than they're worth. Of course the only value in them is if you can get it into "indirect", then you've got an argument that the person who is saying they've been discriminated against has to say it's unreasonable and the onus falls on them, whereas if it's direct there's no argument that can be made. But what valid argument can you really make that somebody is not going to get access to somewhere or other? How can that be reasonable in any circumstance, just because they're using a wheelchair for mobility? It's unreasonable whatever the circumstance. But anyway I actually don't think they're useful concepts.

**MS McKENZIE:** Because of those difficulties.

**MRS OWENS:** Have you got those concepts in your act?

**DR SCUTT:** Yes, that's unfortunate that we do. Yes, that would be a negative and it's in every act.

**MRS OWENS:** It's a negative for every act if it's in there.

**DR SCUTT:** Yes, and all that "less favourable treatment", but there are really concepts in our act that aren't elsewhere. Just really briefly on that - and I won't wax lyrical on it - - -

**MS McKENZIE:** I was going to ask you about your act, because you said earlier, "We have one of the best acts in Australia" - simpler and so on - and I want to know in what sense it's better and maybe what lessons we can learn from your act in terms of the Disability Discrimination Act.

**DR SCUTT:** Well, I should say it's come in for some pretty rough treatment but it's a very good act. You know how in every other act in Australia, they will have a heading, Employment, and then have a whole lot of sections about, that you're going to be directly or indirectly discriminated against in employment if you apply for a job, or if you're in a job and promotion and this, that and the other thing. Then they have another heading, Education, and then they reiterate all the same provisions but they just change Employment to Education. Then they have another heading, Provisions of Goods and Services, and then they have all the same sections but all they've done is change Employment and Education into Provision of Goods and Services. Now, amongst other things, it is not a good use of trees.

**MRS OWENS:** Maybe parliamentary draftspeople get paid by the word?

**DR SCUTT:** But our act has the definitions of discrimination, which are direct and indirect, but then it has, as other acts do, the whole list of attributes or identities and then it just has the areas of activity in which discrimination is unlawful, so that it just says Employment, Education and Training. Unfortunately it says Provision of Goods and Services which legislation elsewhere says, but it shouldn't. It should just say Goods and Services, there's no need for "provision of".

**MRS OWENS:** You put that point into your submission. What is wrong with those words? Is it just that they're untidy or have they got meanings in law that I don't understand?

**DR SCUTT:** It's not consistent for one thing, but if you've got Provision of Facilities, Goods and Services, why don't you have Provision of Employment? You don't; you have Employment. Why don't you have Provision of Education and Training? You have Education and Training. It's meaning within the whole scope of employment - whether it's an advertisement for a job, whether it's a promotion, whether it's a dismissal or whatever - that whole area of employment is covered. Now, with provision of facilities, goods and services, there was a big argument about this in IW v City of Perth; a case about putting up a drop-in centre for people who had been diagnosed HIV-AIDS positive. The argument in that is really convoluted and most unsatisfactory, and a lot of it comes back to the fact that, instead of just

saying Facilities, Goods and Services they had Provision in there, because they said that the council doesn't provide facilities, goods or services when it gives out planning permits and so on.

**MS McKENZIE:** It wouldn't have helped to take out the word "provision" though because what IW did was look at it and say, "Irrespective, it's not provision of a service and it's not a service," for numbers of technical reasons which both of us know there's no point dealing with at this point

**DR SCUTT:** I do understand that, but I also think that there was some comment in there which also indicated that taking out "provision of" would be helpful too. For example, under the Victorian act in employment, instead of just employment, there is this business about getting a job, applying for a job, being promoted and so on. I did a case there - Atkinson v Department of Health and Human Services, where Aboriginal Affairs is, and Yarragah - and in that it was very hard to argue that a consultant came within the way that the employment sections were drafted.

**MS McKENZIE:** Have they tried to make the same arguments in Tasmania? For example, have they tried to say that employment doesn't include pre-employment?

**DR SCUTT:** Not yet, but of course that possibility arises, because one of the problems we've got here is that there are cases that were decided under quite different legislation and there are implications that all that will be imported here, which will really undercut the importance of this act. The other thing that happens too - because this comes back to education - there are cases that are being decided in other jurisdictions when it didn't say that the attribute or identity did not have to be the sole or dominant reason. There is one case - Justice Vincent, I think, in the Victorian Supreme Court - which went under the Victorian legislation, that it did have to be a dominant or something else reason. Well, of course, it's no good looking at that case now because that's not what the law is any more. It's not what the law is in Victoria; what's the point? But lawyers are always being dragged back into the past, always, and it's a real problem. It actually impedes their thinking and it inhibits intellectual thought and imagination: off they go, back into the past.

**MS McKENZIE:** The only good thing about doing that, Jocelyn, is it would make me younger.

**DR SCUTT:** Yes. Well, that's true for all of us, isn't it! But that's one thing. Another thing which is most important to disability is inciting hatred; it includes disability as well and that is not in other legislation. What they've concentrated on is sexual orientation and race, and Victoria of course has got religion now, but this one has got disability and this is really important. I mean, there was an instance where people were having a meeting about shop furniture - and this is a huge issue. We all

like to go and sit out on the street and have a coffee and so forth and we'd all like to walk down the street. If you have a wheelchair for mobility or you're on your crutches or you have your walking-stick and so on, street furniture, as we all recognise, is a hazard. Anyway, there was a meeting about this, and unfortunately, in the course of the meeting - and I wasn't at the meeting so I'm repeating what was alleged to have been said at the meeting - it was said to a couple of people who use wheelchairs for mobility, "Well, the whole problem is that if you people would just go back into your institutions, then we wouldn't have the problem with street furniture any more."

This had a horrible impact on everybody apart from, I suppose, those who - and perhaps those who said it actually thought twice afterwards, too, but it was a terrible thing to have said and really got at the hearts and the souls of the people against whom it was said. Now, really, we do need something that says that if you by a public act bring into serious contempt or severe ridicule or incite hatred against somebody with a disability, I think that's a really important item to have, because that does happen.

I mean, we know there are instances where people are walking down the streets and really soul-wrenching statements are made, statements that are soul-wrenching to them are made, and it can be about race, it can be about sexual orientation, it can be about religion or ethno-religion, and it can be about disability, so that's an important aspect that's there. We've also got a provision about bullying that's not in legislation elsewhere. It's unfortunately limited to sex gender, marital status and so on. It doesn't cover the whole area.

> A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Now, that's limited, as I say, because it comes out of the Sex Discrimination Act, and it's limited to sex gender, marital status, pregnancy, breast-feeding, parental status and family responsibilities, but it should be able to be used in terms of race and disability, the other attributes or identities, I think.

**MRS OWENS:** We may have to call it time soon. I think if we can come back to at some stage some of these advantages, you've probably got a million more that you could tell us about.

**DR SCUTT:** Yes.

**MRS OWENS:** But, as you can see, we are really keen to learn what's in this act - how we can improve the Disability Discrimination Act, if there are parts of this act that work particularly well, and you've given us some very good examples. I don't want to cut you off if there was some other major point, but we're running a little bit behind time. I think you said you'd like about 45 minutes and I think we've been going for quite a lot longer than that. I'm sorry to do that to you.

**DR SCUTT:** No, that's fine. Just one last thing, and I will be short. Victimisation: I think this area has to be looked at really carefully, and that's part of the reason why I think maybe going over to the idea of not dealing with individual claims or having a category for individual claims, but having a category where something triggers you off to go in and do an investigation and look at issues and so on. The problem with disability in that circumstances is that the person with the disability would, I guess, be identified by people as the person who is the reason for your coming in, but victimisation is a really big issue and people are - even if you have good victimisation provisions, people are still intimidated by that possibility into not wanting to bring claims, and maybe there needs to be something looked at in terms of the way the victimisation provisions work or how they're structured or whether there's some other protection that can be introduced for people who do being claims, at the same time as recognising that sometimes claims are brought that are spurious and that don't have validity, but mostly claims and claimants do have a real issue there, even if it's not an issue under the discrimination legislation.

**MRS OWENS:** Thank you both very much. I think we could have probably gone all afternoon, actually, but you've probably got another job to do just down the street. Thank you very much for coming. We will just break for a couple of minutes.

**DR SCUTT:** Thank you very much.

**MRS OWENS:** The next participant this afternoon is David Norton. Welcome.

**MR NORTON:** Thank you.

**MRS OWENS:** I'm very pleased that you could be here and sorry to hold you up.

**MR NORTON:** That's okay.

**MRS OWENS:** Could you please give your name and the capacity in which you are attending this afternoon, for the transcript.

**MR NORTON:** Yes. My name is David Norton, and I'm a personal representative here; I don't represent anybody.

**MRS OWENS:** Thank you. And thank you very much for putting some of your concerns down into a submission for us. Cate and I have both read it, and I think you have raised some very important issues in relation to employment practices and the behaviour of employment agencies that are government-funded. And I was wondering, would you like to run through some of your concerns, and then we can talk to you about it.

**MR NORTON:** Yes, I certainly would. If I may, there are four government bodies who received money; grants to help people who have disabilities. Now, there are three of them who have come straight out and said to me, straight up, when I've gone in to put my name down at each for a job, "Sorry, we can't have you because you are handicapped; you have got a disability." Now, by the looks of me you say, "He is not handicapped." I've got a hidden disability. Whereas, like I'm just here talking now, I just keel over. It has been going on for 22 years, and I've had to put up with all this for 22 years, of getting discriminated against getting work. I'm only 52, I'm a baker by trade and these people, I think they should be looked into before they get re-funds.

The last one is, I've got an investigation going on where there are two acts of the Discrimination Act which have been - I shouldn't say "have been broken" - could have been broken by one group. I don't know whether I should name them or not but I don't think I will say.

**MRS OWENS:** You don't have to.

**MS McKENZIE:** No, you don't need to.

**MR NORTON:** Okay.

**MS McKENZIE:** We are interested in the principles and what has happened, rather than the group.

**MR NORTON:** In November - quite recently - I was doing a numeracy and literacy course with this employment agency that got the grant from the government to help people. I was doing the course, and I was also doing it at home and at the employment agency's office. I went into hospital and I had my gall bladder out - it had gallstones in it and I had to have it out - and I completed at least three-quarters of the course. When I came out of hospital I produced a medical certificate and they told me, "Sorry, David, we've scrubbed you off the course because of your sickness; your disability."

I was getting lessons sent home through the post, while I was sick. I produced a medical certificate. Also, I probably just walked up because I was only a block away from their office and picked it up so, therefore, I was still doing the course. But they had to go and rub me off because of my disability; I had to go into hospital. Now, that was just plain unfair.

A couple more items. These three others - one is a private firm. I went looking for a job - he wanted a baker by trade, a casual baker. I went in and my hair was down at shoulder length and I had a beard, a little bit longer than this. He said to me, "Cut your beard, shave your hair" - I had it how I've got it all now, nice and neat - "and the job is yours." He said, "Come back to me." So I went back the next day and showed him what I've done. He said, "Sorry, I've given the job away." He did this because he knew that I had a disability and also because of my hair and that. It wasn't scruffy or anything, because I don't like scruffy people. But these are the sorts of things that I've had to put up with and I don't think it's right. And for these people to get money off the government to help people, well, that's what they should do if they want money to work.

I don't know what else; it's just that I'm scared to even ride a bike and all that but I know where my limits are. Sometimes I get a warning that something is going to happen. So I have to go and sit down somewhere and get out of the way from any danger. But I always say to people, "I've got a disability, a hidden one" and that's it. It's just not right what we have got to go through. It's unbelievable. Did you want to say something?

**MRS OWENS:** I was going to ask you, with the baker, whom you went to and he asked you to get your hair cut and all the rest of it, did you tell him you had a disability or did he just - how did he know?

**MR NORTON:** I told him, because I think it's the best policy to tell people that you've got a disability and that way it doesn't come back on you if you injure

someone or you injure yourself. You are covered and they are covered, and they know. But that shouldn't be any grounds for being discriminated against.

**MS McKENZIE:** Did you make any complaints about these problems to, for example, the Human Rights Commission or maybe even the Tasmanian Commission?

**MR NORTON:** No. I just swept it away. I said, "Oh, well, it was just one of those things." It has been happening to me for years and years. It has just come down to the last straw last November.

**MS McKENZIE:** With that course?

**MR NORTON:** With the course that I was doing. I can get a job in an office in a bakehouse, using computers and all that.

**MRS OWENS:** So you had gone and started the course, gone off to the hospital and had your operation, and then the employment agency that was putting you through the course used that as an excuse to drop you from the course?

**MR NORTON:** Correct.

**MRS OWENS:** It sounds like you've got a good case to pursue.

**MS McKENZIE:** Maybe you might like to think to go to one - if you wanted to, but only if you wanted to; you might want to seek - - -

**MR NORTON:** Sorry, I should have mentioned it. That one - I don't know whether I said earlier, there is an investigation going on at the moment.

**MS McKENZIE:** Good.

**MR NORTON:** By the Hobart office.

**MS McKENZIE:** By the Hobart one?

**MRS OWENS:** Right.

**MR NORTON:** The discrimination board, and they are the ones who have told me there is a possibility of a case, that they have broken two of the Anti-Discrimination Act - I've just got it here. I must have lost a page somewhere. I did have the name of the act.

**MS McKENZIE:** It's Anti-Discrimination Act, I think that one is called.

**MR NORTON:** Yes. 16K I think it was, or 16B.

**MRS OWENS:** Yes. You refer to that, yes.

**MR NORTON:** And 104 of the act. Yes, I've got it here. If I just might read it out to the people:

> I cannot name the agency or anyone connected with this last employment agency as there are very strong indications that I've been discriminated against by them under section 16K, using both the direct and indirect discrimination provisions, as well as section 104 of the act.

That's what is going on at the moment. I'm still waiting to hear more.

**MRS OWENS:** David, how did you find out about the Tasmanian office where you have taken this complaint? Did you get information from somewhere?

**MR NORTON:** I used to be the executive secretary of a place out here in Hobart that deals with people with handicaps, and that's where I got my training from, because I had to do a lot of speaking in that forum and going to hearings in that forum. That's how come I knew what I could do.

**MS McKENZIE:** That's how you knew where to go to, to talk about the problem.

**MR NORTON:** Well, I sat down at home, myself, and I said to myself, I said - well, actually to my son; I've got a 13-year-old son, and I was telling him. I said, "I'm going to do something about it this time, son." I said, "I know where to go to" - I said, "and that's where I'm going." I sat down and wrote a letter out to the commission, the Anti-Discrimination Commission, and asked them what I should do. I got a letter back stating what I should do. I had to fill out a claim form and that, and give it to them. So I filled out a claim form; I sent that away. I got a letter back, and they wanted some more details. So I did this and this is what's going on at the moment. It hasn't finished; it is still going.

**MS McKENZIE:** It's good that you've gone to them. That's a good organisation for that.

**MR NORTON:** It's not only for myself; it's for everyone. And for these people to get money off the government, well, they should be there looking after people with disabilities, not discriminating against them and saying, "Oh, just because you've got a disability, no, we can't put you on the books and let someone employ you." That's

wrong.

**MRS OWENS:** In making your complaint are you comfortable with the process? Do you find it an easy process or do you find it a bit hard? Does it feel stressful or intimidating?

**MR NORTON:** No. I don't say that. The only thing I've got against it is it's too slow. It's too slow. 42 days is too long to go from A to B.

**MS McKENZIE:** You'd like it to be finished sooner?

**MR NORTON:** Yes.

**MRS OWENS:** We were talking to the anti-discrimination commissioner before and she was explaining that you need to have some time to collect all the evidence and get the facts in place, so that they can work through it.

**MR NORTON:** Yes. I think she was sitting on my case.

**MRS OWENS:** Was she?

**MR NORTON:** Yes. I was listening up there very closely. I was pretty sure it was my case she was talking about. Yes, I could quite understand that, but to go from me to the commission, back to me, and back to the commission, and then to the respondent - the people - and then back to them and wherever it goes, I don't know.

**MRS OWENS:** There's a fair bit of paperwork as I understand it.

**MR NORTON:** Yes.

**MRS OWENS:** Have you got any legal assistance with your case?

**MR NORTON:** No.

**MRS OWENS:** Have you gone to any advocacy group? You are just running it yourself.

**MR NORTON:** Yes, I did.

**MRS OWENS:** You did?

**MR NORTON:** Yes, I did. There's a place down Sandy Bay, and they told me there are other groups as well, they have been discriminated against as well, and

looking for work because of it. That's why I needed to do something about it this time, because last time I just let it go. I said, "Why waste my time? Where's it going to get me? It's not going to get me anywhere." But who knows, unless you have a go?

**MRS OWENS:** And it might mean that you are going through this process now, which might help other people in the future, because I think they would have to think twice, next time, about how they handle that sort of situation; your sort of situation.

**MR NORTON:** Yes.

**MRS OWENS:** So it's very important and I'm glad to see you are doing it.

**MS McKENZIE:** It's good that you've done it.

**MR NORTON:** Thank you. As I said, it's not only for me; it's for everyone else.

**MS McKENZIE:** Yes.

**MR NORTON:** It's about time I stood up because, as I said, I've had this problem for 22 years. I've had two spine operations, and that has hinders my work as well. But I can still do work. I've got chronic pain in the back and I'm on a controlled drug for it, which I'm good; I can do anything. I've got it in my spine and my left leg. I'm still able to do anything.

**MRS OWENS:** I think the idea of doing that sort of retraining, and doing the literacy and numeracy sounded like a very positive thing to be doing.

**MR NORTON:** I want to get back into the workforce, and the only way I can - being a baker by trade, well, they are not going to run out. We are going to need a baker all the time and you are going to have to have people working the computers, so I said, "Why not go up and work in the office?" There was one instance there where I did have a job, and I had half an hour to go on my night shift; I was a manager. The boss came in to me - I was in having a shower - this was after I came back from the hospital because I'd collapsed at work. He said, "David, if this happens again I'll have to send you down the road." Just like that. I said, "Oh, well, he's not worth working for." So I just resigned.

It's not worth it, people working like this, so I just hope that me coming here today - I hope that, as you said, people would look at different ways of dealing with people such as myself and others. It doesn't matter what sort of disability you've got - everyone should be given equal opportunity to do - if someone - what they feel they're capable of doing and that's it. If you tell the truth - that you've got a handicap

- you shouldn't be discriminated against, so you know it's just unreal.

**MRS OWENS:** The act that we're reviewing - its objective is to reduce discrimination and to ensure that people are treated properly and we're trying to assess how well that act is operating at the moment and - - -

**MS McKENZIE:** And do things that might make it work even better.

**MRS OWENS:** Yes.

**MR NORTON:** They should be educated more, I think.

**MRS OWENS:** Yes.

**MS McKENZIE:** Yes.

**MR NORTON:** I think it was brought up here a bit earlier - that they should be educated, you know. They should be made - before they put - going on at these employment agencies and all that - not only employment agencies. It goes on in shops and all, you know, so - just open their eyes a bit more and, as I said, treat us a bit more fairly.

**MRS OWENS:** Has it improved for you over the years or you don't see any improvement? It seems like you have had these experiences over quite a long time and it doesn't seem to be getting better.

**MR NORTON:** 23 years.

**MRS OWENS:** Yes.

**MR NORTON:** No, and the funny part about it is that the doctors have got no clue as to what it is and I've had one in front of a High Court judge in his courtroom - I was giving evidence - and I've had him in front of the surgeon, who's been looking after me all this time, and he couldn't work it out, and I've been watched - cameras - 24 hours a day, I've been put into hospital for seven days solid. Chained up. Wasn't allowed to go anywhere or nothing, and they had that going for 24 hours seven days, and they still don't know, so just (indistinct) I'm going to have it for the rest of my life, but still I should be allowed to work.

**MS McKENZIE:** Yes, that's right.

**MRS OWENS:** We'll follow this with interest because this case will be going on while our inquiry is going on - - -

**MR NORTON:** Yes.

**MRS OWENS:** - - - so maybe by the time we come back to Tasmania - - -

**MS McKENZIE:** By the time it finishes we might know the result.

**MR NORTON:** I hope so. Surely.

**MRS OWENS:** And then you can come back and see us.

**MS McKENZIE:** Yes, I hope so, too, because we'll come back again. After we put out the draft report we'll come back to each state to find out what people think or how they might suggest we improve the report.

**MR NORTON:** That's good. I'll be looking forward to that and I'll let you know what's going on.

**MRS OWENS:** Good. Thank you very much and thank you for coming today.

**MR NORTON:** No worries.

**MS McKENZIE:** Thank you very much for your submission and thank you for coming in and talking to us also.

**MR NORTON:** I'd just like to thank you for having the opportunity to come here and put my case for myself - not only for myself but for others, as well. Thanks very much.

**MRS OWENS:** Thank you very much.

**MRS OWENS:** The last participant for this afternoon - officially on our schedule anyway - is Advocacy Tasmania. For the transcript could you please give your name and your position with the organisation?

**MS THOMPSON:** Yes. My name is Rebecca Thompson and I am statewide disability advocate with Advocacy Tasmania Inc, which is a statewide service.

**MRS OWENS:** Thanks, Rebecca, for coming and for the submission. I would like to take this opportunity to thank you for the meeting we had a couple of months ago - I think it was a couple of months ago. I understand you want to make a few opening comments to us.

**MS THOMPSON:** Yes. I suppose I would like to put this into some context in that this submission is informed by the individual advocacy case work and systemic advocacy case work of three disability advocates, two home and community care advocates and one mental health and one aged care advocate, working statewide in our agency, and that they have all contributed. I am just the front person.

**MRS OWENS:** I am sure you will do justice to it all.

**MS THOMPSON:** Thank you. Would you like me to identify or highlight a few areas that I would like to in the submission?

**MRS OWENS:** Yes. The points would be terrific.

**MS THOMPSON:** Thank you. I suppose in the first instance I would like to make one point: that it is very strongly felt by our organisation that the DDA should be amended to allow HREOC and/or other appropriate bodies to initiate complaints. We feel that this may allow or encourage important test cases to be mounted by organisations which have the capacity to research and put a case where individuals are unable or unwilling to because, in our experience, we find that a lot of our clients with disability outline a few areas as to why they find it hard to make a complaint or a referral through HREOC themselves.

The first one is that a lot of people with profound disabilities, battling for service - or other issues - find addressing the issue itself is often hard enough and they find that accepting any offered alternative to what they want - in other words, coming to a mediated outcome - is easier for them than fighting the issue and fighting the system. For advocates that's often quite disappointing, but we have to respect this because that's the limitation of their disability, therefore making a complaint needs to be easier and more accessible and seen to bring about improvements before they can be encouraged to, so that's why we feel that submissions such as these that highlight systemic issues by more than one person

might be a useful source for the DDA or other organisations to actually bring test cases.

**MRS OWENS:** Can I ask you - it's a process issue really. How does HREOC decide what complaints it is going to initiate? How does it prioritise? How does it get the information in the first place to decide in which direction to go and what to do?

**MS THOMPSON:** From my experience - I will be honest, I have only assisted a few people to go to a direct submission to HREOC because we're in the fortunate situation in this state to have a DDA advocate as well, and so Judith Blades, who is based at the Launceston Community Legal Service - and her being a specialist in both the Commonwealth and the state acts and being a lawyer - more often than not, if there is a discrimination case that has come to myself I will refer it on to her for support.

**MRS OWENS:** Yes.

**MS THOMPSON:** And my understanding is that the issue is put and often clients do need support to put their submission in - they really find it quite testing - and there is some initial consideration of the application and then the applicant is told whether or not - and I believe in writing - they feel their complaint complies with the act and comes under the act and then whether or not they will investigate it and what action they will take. It's a bit of a long process.

**MRS OWENS:** So that's the process now with the individual complaint, but if HREOC is going to initiate complaints or take on more systemic issues, I guess it has got to decide - - -

**MS THOMPSON:** How?

**MRS OWENS:** - - - which systemic issues to take on because, having been doing this inquiry for just a short time, there seem to be a myriad of issues that I would love to see addressed, but it's only really a remote chance that somebody is going to bring them because some of them are quite difficult.

**MS THOMPSON:** I suppose that I would, off the top of my head, see two ways they could do that: that if people who put submissions to this hearing - if their submissions were available, and of course that would have to be determined, referring to all the privacy principles - that they might form a good basis, but also on more than one occasion HREOC actually goes around all the states and holds open forums. There was one recently on their 10-year anniversary and people made some mini submissions verbally about the issues around the three main issues they

identified, and I would have thought that the information they gained there - and especially if they extended that process by saying to people, "If you want to come and give your name and contact details and sort of be a participant" - that they could interview them, but then instead of the individual having to drive the process - - -

**MRS OWENS:** The consumer - - -

**MS THOMPSON:** Yes, the consumer. If HREOC could interview them, and if you interview a number of people in each state that has the same issue - in relation to, let's say, transport - that it would be very weighty. It would be a very weighty way to address the systemic issues.

**MS McKENZIE:** But there will be other ways, too, presumably, that information can come to the commission. It might come perhaps through advocates like you or like the other advocates in Tasmania speaking to the commission wherever a systemic issue has been raised, and the commission would then have to determine whether it took the matter further.

**MS THOMPSON:** Yes.

**MS McKENZIE:** Also the commission does education. I mean, that also might be raised in the course of doing that.

**MS THOMPSON:** Yes. I think that that is two other ways. For instance, our agency and others quite often, if we see an issue, being a large systemic issue, we will write a short discussion paper on it, and so we could possibly feed into HREOC that way, but also, yes, they often do come to the state and do education sessions which are an ideal forum from a particular interest group to discuss a particular subject, be it employment, education or transport, and I think that that would be useful possibly if it was done in that way.

If you have a particular focus for a particular forum, it is a good way to draw the issues out, but certainly I think that via the DDA advocate - we often feed into the DDA advocate, especially in relation to access to buildings, and she usually takes a three-step approach and, that is, we usually approach the agency where people can't get access to a building and we endeavour to negotiate with them and ask if they have an action plan. If they don't, we talk to them about whether they would like to prepare an action plan. Then if that's not possible I would refer on to the DDA advocate and, if the organisation concerned seems reluctant to deal in any way reasonably, it would then be put through to HREOC, but I think that feeding in of groups - and there are many groups in the sector - peak bodies - that are well aware of particular systemic issues, because they have a number of cases or clients of theirs that experience the same issue.

**MS McKENZIE:** As far as the commission choosing which, out of the various matters that have been raised with it, it should actually initiate a complaint about, I would have thought they would have looked at matters like how serious each of the matters is, how many people are affected by the matters - - -

**MS THOMPSON:** How many people it impacts, yes.

**MS McKENZIE:** - - - what location, how big an area does it cover, for example, how urgent is it and they would have to also look at a resourcing issue, I suppose, because I would assume they're not going to have resources to pick up every single systemic matter that's raised with it. Maybe whether there could be an individual complaint - - -

**MS THOMPSON:** I suppose it's always a matter of waiting. It's the same for our organisation. Our primary work is individual advocacy. We act on systemic issues throughout the year and we have a process during the year on two or three occasions of identifying all the systemic issues that have come before us and then looking at them in relation to again, as you say, how serious an act is breached or a standard is breached, how serious the issue is - you know, so far as its impact upon people - and then, of course, if it's impacting on a great many people. Yes, unfortunately, there always has to be those choices made; that balancing and that prioritisation.

**MS McKENZIE:** Are there other issues you wanted to talk about with us before we - - -

**MS THOMPSON:** There were just a couple that I'd like to raise.

**MS McKENZIE:** Sure.

**MS THOMPSON:** Maybe I'll just touch on three other points - and this is reflected from our clients - of why people sometimes do not make a complaint themselves. One of them is in the area of disability. If people have a mental health disability which is active at the time of their complaint, they often find the stress of making a complaint to the commission too stressful on top of managing their mental health problems. Naturally, they put their health to the fore - regaining their health.

Alternatively, they may be fearful that taking up a complaint, even if they are well at the time, will put so much stress on them that they may then become unwell. People with mental health disabilities who understand their disability very well know the stress level to which they can go. People also talk about the inconvenience and the cost. The cost doesn't have to be very large, when you are on a disability pension, to find it really inaccessible.

The other issue that was raised by one of the other presenters - the length of time before cases come to hearing and are resolved is often mentioned by clients as - the perception at least. People are so often looking for an outcome then to their problem, and one can understand why.

**MRS OWENS:** Often, as the time goes out, the preferred outcome is no longer possible.

**MS THOMPSON:** And no longer viable; no longer has any relevance. They've moved on, they're in a new situation and it's quite difficult. I think another important area that others have mentioned which I really would like to support is the HREOC education and public policy. I think, particularly in the area of new public buildings, it's thought that it would be a very cost effective exercise for more education, with local councils, builders' associations, architects, et cetera, regarding the standards requirements for disability in buildings.

I don't think people intentionally flout the standards. I don't think they are aware enough. I think there's a difference between building codes and the actual standards. There have been quite a number of examples of very large additional costs and time delays to buildings here in Tasmania having to be tolerated for new buildings due to substantial changes having to be done after completion, because they didn't meet the standards.

**MS McKENZIE:** Are those changes being made?

**MS THOMPSON:** Yes, but it meant that there were quite additional costs and quite additional time delays. It's because certain things - when they thought a building was complete - were then drawn to their attention, and that's really very unproductive. It's not a very cost effective way, so I think it would be really useful to promote to builders and architects to possibly routinely consult with access auditors as part of the planning process. So few do, and it's really hard.

I was visiting somewhere with the auditor at a local library a few months ago in relation to consultation regarding our new prison that's being built and making sure that the access in that for disability was fine. The person who was the access auditor, who also has a disability, came out and we both went to go to the lavatory and we both found that the disabled toilets, that were labelled disabled, in a public library - all the doors were so heavily marked from people in wheelchairs by themselves having to apply so much force with their wheelchair just to get the door open. It was like a fire door, it was so heavy. There were about five points where a toilet in a public library, labelled disabled toilet, did not meet the standards.

**MRS OWENS:** These access auditors - who are these people? Are these people that are funded by the Tasmanian government?

**MS THOMPSON:** No, they are people who have been independently trained in the application of the national access standards and are happy to - either for profit, in some instances, but in other instances where there is no profit being made - do an inspection and assist whoever is concerned how to make premises accessible.

**MRS OWENS:** Do they act really on a consultancy basis?

**MS THOMPSON:** Yes. There are only about three in this state. They do work as consultants, but they also do a lot of community voluntary work. For instance, this gentleman appears at all the consultancy meetings consulting about the prison. We're building a new Risdon Prison here. It's going to be huge. It's going to take three years to build. There are three architectural firms from interstate who build prisons all the time, and we went to the first consultation and saw the drawings for the disabled-accessible cells. They didn't meet the standards. That's really unacceptable.

**MS McKENZIE:** That's very basic.

**MRS OWENS:** Especially if they've already been building prisons in other states. They've probably done a few in Victoria, which probably means that those buildings aren't meeting the standards.

**MS THOMPSON:** That's right, so it was a very interesting process. We have an access auditor in the state who's actually disabled and in a wheelchair, so he's quite passionate. If there's an agency that's a community agency that doesn't have any profit margin, he's happy to have a look at it, tell them what the problem is, give them some assistance and go on. However, it's surprising that large hotels or whatever open - we find it really surprising that public buildings - people who should know really don't have any concept of what accessibility is.

Anybody who's got friends who have a disability, who have rung up and spoken to a restaurant and asked, "Is it disabled accessible?" "Yes." So you arrive at the restaurant and find a client in a wheelchair. "Sure, it will get through the front doors, no problem," but there's no accessible toilet at all. They actually think that having disabled access means you can actually get into the premises. They don't think about if they're a restaurant and you're there for two or three hours that you might need to go to the lavatory. You even have people say, "Yes, it is accessible, there's only one small step."

**MRS OWENS:** One too many.

**MS THOMPSON:** Yes. They make assumptions that disability is about people being in wheelchairs only. They make assumptions that people in wheelchairs are in manual wheelchairs that are light for someone to manhandle up a step. They make assumptions that people with disabilities always have a carer with them to assist them. People go to stay in hotels that also claim they have disabled-accessible facilities. They think because a client can easily get into the hotel, register, go to the restaurant and there's a disabled toilet - and think nothing of the fact that there's a shower over the bath. They say, "But the carer will be able to shower" - and the person is ringing and saying, "I don't have a carer." They don't understand that if it's one small step and the person is in a motorised wheelchair and actually drives themselves to wherever they go, there's no way they can get up one small step. The term "accessible" is very very worrying.

**MRS OWENS:** I was going to say we choose all our hearing venues on the basis of accessibility. I thought last night I would just come in and check this room, which I did, and then I said to the man who was setting it up, "Well, where's the disabled toilet?" and he said, "I don't know, I think it's up on the first floor." I said, "Well, that's nice, but I was under the impression it would be on the ground floor with any other toilets and any other facilities and near the restaurant."

**MS THOMPSON:** The reason that they say that here is that the ladies' toilets here supposedly have a disabled toilet, but the last time I came here with disabled people it was found that, for a person who didn't have a carer with them, again, it was not accessible. It's got a very wide door - it's got lots of things - but it was not accessible, so the client actually had to be taken to the first floor to, I believe, a suite.

**MRS OWENS:** So they've got to go and unlock the suite for us?

**MS THOMPSON:** They unlock the suite, yes.

**MRS OWENS:** What happens if somebody else is staying in the suite?

**MS THOMPSON:** That's right. It's very difficult. It was very difficult for the staff as well, because the staff here were not trained. It's not a lack of willingness, it's a lack of education, and I think that there really is a grave need for education.

**MRS OWENS:** I understand what you're saying.

**MS McKENZIE:** What about accessibility to the courts? You mentioned a couple of instances, one for the Supreme Court and one for the Magistrates Court. That's not only a question of general premises access, but it's also a question of access, in effect, to the law.

**MS THOMPSON:** Yes. It's come as a surprise to me that there were a number of public buildings opened in Tasmania recently which have been found not to be accessible under the standards, and some of them are very interesting. One of the new public buildings - and it is a new building - is the Magistrates Court in Liverpool Street opposite the Royal Hobart Hospital. It's new, it's beautiful, it's shiny, it's marble and granite. It's fully accessible to the public from the front and within the courts.

Whoever did the work certainly must not have thought very much about it, because it is not accessible for someone with a disability who is actually on remand to come through from the remand centre up through the back section and come into the dock, which is of course what is preferred by the magistrates. They don't want clients being brought through the front section of the court, for a number of reasons. The docks are not accessible if a client is in a wheelchair, because the chairs that defendants sit in in the dock are bolted down, because they are possibly quite a dangerous weapon if there's an outburst.

It's understandable, all this, but I had an experience not very long ago where I went to see a client of mine in Risdon Prison who actually was sent into remand to appear in the Magistrates Court. The magistrate knew that they were going to hand down a custodial sentence, so it was very important to the magistrate that the defendant actually came to court and came in - not so much came in the back way, but was able to be what they call taken down back to remand the back way after they'd been found guilty and given a custodial sense, rather than the embarrassment of having to be traipsed out through the court.

A custodial staff person, who was not trained in lifting, had to manhandle the defendant in and out of their wheelchair and up and down steps in order for them to appear in the court. The risk to the defendant and to the worker of injury is horrifying, not to mention the embarrassment for both concerned. It's also obvious that the Magistrates Court doesn't have an action plan of how to manage defendants with a disability, because if they did the matter would have been heard via video-link. There's no need for the client to actually be there. What happened is the magistrate actually adjourned the issue at 10 o'clock in the morning to 2 o'clock so they could be in a different court, which he knew was more accessible, but at 2 o'clock that court wasn't available. That's what happened.

The Supreme Court of Tasmania in Hobart - by looking at its design, not being a local Hobartian for more than 10 years, I would say was built sometime after 1960 - does not have disabled access for the public or defendants at all. There are multiple steps to go into the courtyard, let alone to get in. Now, I do believe there is a disabled access round the back and through the back alleys, but when you go to

appear in the main Supreme Court for a case, it's actually built like a theatre. It steps down and it's really staged. It's impossible for anybody with any sort of disability, even with a walking-stick, to get in and out.

**MRS OWENS:** It would be interesting to look at the courts in some of the other states. What happens in Victoria?

**MS McKENZIE:** I don't have experience of all of them. Perhaps I should confess I don't have experience of any of them, at least direct experience.

**MRS OWENS:** I only asked you, Cate, because - - -

**MS McKENZIE:** But certainly the Supreme Court is a very old building. These are buildings that were built in the mid-1800s, and there are many steps. The new County Court building I would have thought would be much more accessible, but there are still, I think, some steps, but certainly they did employ disability auditors at the time of designing that building. Some of the Magistrates Courts I would have thought would be accessible and perhaps some not, because buildings vary greatly in age.

**MS THOMPSON:** The fact that surprised me was that a person known to be in a wheelchair would be transferred from the prison to the remand centre and go through all this rigmarole without anybody going ding - might just ring the sergeant and say, "We're sending the prisoner in. They're in a wheelchair, you know." Nothing happened.

**MRS OWENS:** Have you brought this to their attention?

**MS THOMPSON:** Oh, yes!

**MRS OWENS:** And what are they doing to do about it?

**MS THOMPSON:** We're actually having some meetings with them at the moment to discuss their action plan, and if they don't get an action plan pretty promptly, I suspect the DDA advocate will be putting a submission through under the act. I actually think the point that you make is very important. It's not just access to the court; it's access to the law - - -

**MRS OWENS:** Exactly.

**MS THOMPSON:** - - - which is horrendous. There are enough limitations to access to the law for people with disabilities without that as well.

**MRS OWENS:** We can use it as a nice case study in our report, if you like.

**MS THOMPSON:** Well, I'd be pleased if you did. When somebody said to me, "Oh, it's not accessible," I said, "It's new. It must be accessible," and so I went down to have a look because, being an advocate, you never ever make a claim unless you're sure it's so. So I satisfied myself, then I rang the key person, the registrar at the court, and said I'm who I am. "I'm really sorry but I just want to talk to you about the lack of accessibility for defendants in the Magistrates Court."

He said, "Oh, no, you're talking about the Supreme Court. The Supreme Court is totally inaccessible, but our court is totally accessible," and I said, "No, it's not," and he said, "Yes, look your public" - I said, "I'm not talking about the public. I'm talking about a defendant." He said, "But there aren't any defendants in wheelchairs, are there?" I said, "Well, you know, people with disabilities can get up to the same sort of things as the rest of the population," and I pointed out this case. He said, "Can you give me some time and I'll ring you back." Well, he rang me back within an hour, because he had been down to see the sergeant in charge of remand, and said, "I've just had a woman on the phone who's told me this" - he told me later - "who told me this nonsense that the court is not accessible to defendants and you had to manhandle a person in a wheelchair." "Oh, yes, I'm really pleased to talk to you about this," he said. So he did the little route through the courts and was horrified, rang me back to say, "I'm most dreadfully sorry why I said, but it's a disaster, isn't it?"

He was the registrar of the court and it never entered his - he said, "It's because we haven't had anybody in here in a wheelchair." I said, "Well, you'll have the same problem with somebody who's on walking-sticks if you cannot move the chair in the dock in order for them to sit down."

**MRS OWENS:** Somebody on crutches.

**MS THOMPSON:** Yes, many sorts of disabilities.

**MS McKENZIE:** You talk a little in your submission about medical and social models of disability.

**MS THOMPSON:** Yes.

**MS McKENZIE:** Can you talk a little more about that?

**MS THOMPSON:** I hope that you didn't mind me taking that up in the paper because I know it was the introduction of the paper and the assumption, quite rightly so, was that there really has been a moving on in many areas from the medical model

to the social model of disability, but unfortunately in Tasmania the medical model is alive and well in some state-run and non-government organisation facilities. You know, despite the closure of state institutions, despite the state standards and so forth, the establishing of social models of disability has been greatly delayed

It has been proposed that one of the reasons that this delay has happened is that a lot of people who continue to be employed in the area are trained nurses who are employed as support workers and to manage services, and that there has been little or no training or emphasis put on social models in relation to their staff.

**MS McKENZIE:** So they look at primarily conditions rather than - - -

**MS THOMPSON:** That's right. They have been trained as nurses, they did their first work in hospitals. They moved then to work in the state institutions, mental health or intellectual institutions, and now they are employed in group settings and that's the way they see things. They're not bad or wicked people, but their employers and the state has not put enough emphasis on the fact that, yes, there are advantages to having you employed because you are a nurse and you have skills that the clients may need, but they don't need your medical model.

**MRS OWENS:** And they're our clients, not patients.

**MS THOMPSON:** That's right, but they still call houses wards in inadvertent moments, and I actually believe their employers and the state are the ones who have the responsibility to help them bring about that change. It is very hard when we've been trained and work in an area for many years to see things differently. There's no doubt that the state disability service standards stress the social model, but it's written down.

**MS McKENZIE:** Do you think there should be any change made in the DDA to sort of reflect that or do you think it's not necessary because that's really what it's on about anyway.

**MS THOMPSON:** Well, it is its main point, and I suppose I would take the point that Jocelynne Scutt so adequately put, that writing it down is not the issue, whether it's in the act or anywhere else. It's actually getting the key people to educate about it and bring it into living action.

**MRS OWENS:** In the standards setting you do discuss the nature of independent monitoring of standards.

**MS THOMPSON:** Yes.

**MRS OWENS:** You're not talking about HREOC, or are you?

**MS THOMPSON:** No, I'm really talking in a very very general sense. The successful implementation of disability standards of any type - and it could be either in HREOC, the DDA, the state - disability standards as advocates we find are problematic. Standards are supposed to be monitored in one way or another annually in nearly all jurisdictions but because the systemic regular monitoring is not by independent authorities and that recognised sanctions are not implemented if people don't meet the standards, then nothing happens.

State and Commonwealth disability standards are broken regularly with impunity in this state, and I'm sure Tasmania is not by itself, and it results in clients being completely ignored their rights in certain areas, choice, consultation and access and sometimes poorly addressed in the issue of abuse, and it's felt that if there's no implementation of sanctions, this practice will continue. If there are not sanctions, then there have to be incentives. I know that it goes against the grain that people should actually have a commitment to doing right, but we know that in reality you either have to have the carrot or the stick to ensure that something is done, and I suppose I favour a bit of both. But if you don't do that and people don't meet the standards and nothing is done about it, then they certainly don't take them very seriously.

**MRS OWENS:** Do you have different approaches say for standards? I'm thinking again at the national level, the transport standards that are already in place, versus, say, future education or employment standards. Would different groups monitor those and apply the sanctions or would it all be done centrally? How would you do it?

**MS THOMPSON:** No, I don't think I'd favour something centralised. As advocacy services, we find the bigger an agency, the more unwieldy, but I think that there is an ability to have independent monitoring done in a number of ways and it can be done in a very small-scale way, that the actual service provider itself can choose from a number of qualified bodies that would do their monitoring and then send a certification as such, not dissimilar to the way that your auditor does every year for your money.

**MRS OWENS:** Yes.

**MS THOMPSON:** But it has to be real, it has to involve speaking to the clients to find out if standards really are being followed, rather than the self-assessment and tick the box model.

**MRS OWENS:** Yes.

**MS THOMPSON:** And then when your funding body - if you tick the box, which I have done in the past, saying, "We're unable to meet this standard for a particular reason," and the state body or Commonwealth body that is funding you saying, "I think you're being a bit hard on yourself. We think you do meet the standard." We say, "No, no, we don't, we don't meet the standard." They don't want you to say you don't meet the standard. It's too hard.

**MRS OWENS:** So if you were going to have sanctions, what would they be? Are they financial sanctions?

**MS THOMPSON:** Unfortunately, sadly, in this day and age, money is what talks. I must say that when it comes to - let's speak of something that I know a bit about, employment or accommodation services for people with disabilities. There are two sorts of monetary sanctions. One is that if you do it wrongly, you get fined. I think that a more effective sanction is that if you can't provide the service of the standard, then we won't fund you to provide the service. We will put it out to tender and somebody else who can do a better job we will take on to provide the service.

**MS McKENZIE:** What about a private service provider?

**MS THOMPSON:** Well, the difficulty is, when you are going to have monitoring it's usually the people who provide funding that provide monitoring. I would say that the DDA is the other standard, that if it's in the public sector they are sort of like the public standard, and you will need to go then to an independent commission and say, "Well, the standard isn't being met." And that's harder. It's harder in that if I have a client who is receiving a service that's not meeting the standards, and that service provider is funded by the state or Commonwealth government to provide it, that is a lot easier to monitor than, as you say, a private organisation.

**MS McKENZIE:** A private organisation.

**MS THOMPSON:** I mean, the one way that private organisations, if they don't meet the standards, if you are paying for your service, is that people vote with their feet; they take their service elsewhere.

**MRS OWENS:** You've got a lot of private service providers - they put bus services now with accessible buses.

**MS THOMPSON:** Yes.

**MRS OWENS:** Somebody needs to be, I presume, monitoring what they are doing.

**MS THOMPSON:** Yes. I must say that I find the transport issue a difficult one. It's not one that I feel that I have a lot of expertise in, and I do think that monitoring it is quite difficult.

**MS McKENZIE:** What about the licensing body, for example? I was wondering, is there some general body that has oversight of that?

**MS THOMPSON:** That's right.

**MS McKENZIE:** Maybe that's what you look for.

**MS THOMPSON:** But it has to be somebody who is independent, that actually doesn't take a tick on a page but actually sees a situation and says, "You are abiding by the standard," or, "You are not." I think transport is a very very fraught issue and I know that my clients believe that what is happening in transport, even with the implementation of the standards, is not going to bring about the changes that they want, especially in regional and remote areas.

**MRS OWENS:** What do you think about the standards for accommodation, moving on and developing those standards?

**MS THOMPSON:** I think, again, it's very similar. If you've got a really regulated area, such as nursing homes or state accommodation services, it's only a matter of doing it. But when it comes, as you say, to - - -

**MS McKENZIE:** Holiday accommodation.

**MS THOMPSON:** Yes, to private - - -

**MS McKENZIE:** - - - to apply to many submissions.

**MS THOMPSON:** And I actually think that is the biggest area of concern, as I said. Maybe you need some sort of accreditation standard, that people are not actually able to say that their facility is accessible unless it has been audited independently by someone who says it is. Bodies, such as councils and so forth, put out accessibility maps and label publicly accessible toilets in certain places, and then when you go there they are not really.

**MS McKENZIE:** But then the bodies who put out those maps should be the ones then perhaps who have to do the auditing.

**MS THOMPSON:** That's right.

**MS McKENZIE:** And perhaps there should be some way of bringing the matter to their notice as well.

**MS THOMPSON:** I think that fortunately, here in Tasmania, the councils are learning a great deal in that they are having their access audit; the work that they are doing. We have a very forward council here in Glenorchy City Council, in the area of disability, who really have excelled and they do so by including people with disability and access auditors in their consultation process. In other words, they ask the people who know. Other councils have been a little slower to come on board, but I think they have learnt that lesson too.

**MS McKENZIE:** Can I raise what you said about unjustifiable hardship, that you thought that sometimes - at least the perception was that it was used as an out by employers who didn't want to make the accommodations that they should be making.

**MS THOMPSON:** Yes. It is a perception, and I suppose I can't reflect upon the reality. But it's a perception not only in the sector but also by people with disabilities, that employers can quote unjustifiable hardship and not have to make accommodations because of the financial viability issues, when in fact it would not be terribly hard or terribly financially burdensome to really make the accommodation - because I am funded by the federal government, and my primary focus is employment disability, the employment issue in relation to discrimination is a pet concern of mine, and I really wouldn't mind just making a few points on that.

**MRS OWENS:** Please do.

**MS McKENZIE:** Please do.

**MS THOMPSON:** The first one is that Business Services, who were once known as Sheltered Workshops for those who are the uninitiated, that are funded by FACS: there is a primary focus on clients with intellectual and sensory disability, and clients with physical difficulty have great difficulty in getting placements at all. So there is quite a discrimination there to begin with. But in open employment one of the major areas of discrimination that our service has encountered, in relation to its clients, is clients with mental health disability. The discriminatory attitude of the broader community maybe has moved along in relation to other disability, but in mental health disability it just has not.

Workers often choose not to disclose their mental health disability because they are aware they don't have to. But in a small community the information about their diagnosis - and this is a small community - leaks to the employer and because of the negative attitudes towards mental illness some employers then harass workers to leave work, or workmates - it may not be employers - quite often - until that time

workers have been quite well, but the stress that is brought about often then means they have to have sick leave or workers comp. So it really snowballs into a huge issue. Employers sometimes then try to deter them from returning to work, and often the worker's primary goal is to recover. So they feel they cannot endure the additional stress of making a DDA claim, so they leave work, and then either end up on Newstart or the disability support pension.

**MS McKENZIE:** And these are the issues that have been raised with you?

**MS THOMPSON:** Yes. As an employment advocate it's surprising that so many of them come - referrals come - from psychiatrists. That the client has come to them and said, "You know, this person has a mental illness but their problem is not their mental illness at the moment. Somebody at their work has found out they have a mental illness and they are applying so much stress that they are actually on stress leave." But when they put in for workers comp for stress leave they say, "No, you've got a pre-existing condition."

So the whole area becomes very nastily muddied. But the biggest muddying is that a person who may have a mental illness, who has been on medication and stable and well for a long time, the stress of all this means that ultimately, within six to 12 months, they will be very unwell again and possibly out of a job and may not work again, but certainly won't work for that agency. Or will say to me, "Yes, I know I can do this and I can do that and I can do that, but I'm just going to leave there. I don't want to work for these people. I'm going to leave this job, get well and then find a job somewhere else." And for those of us who care about rights we feel that that is a real injustice. But on the other side, being on the client's side, I can understand that their primary focus is being well.

**MS McKENZIE:** So the problem then is left for another person.

**MS THOMPSON:** Exactly. It is.

**MS McKENZIE:** To experience.

**MS THOMPSON:** Yes. That's right.

**MRS OWENS:** Well, again coming back to this view you expressed earlier about HREOC being able to initiate complaints, and we were talking about the criteria of how they prioritise, maybe this is one of the areas that needs to be addressed as a priority, because this is a whole group of people that are probably not getting the same access to these processes as other groups in the community.

**MS THOMPSON:** Yes. I certainly had some discussion about them when they

were down for their 10-year anniversary about this, and they were aware that their statistics indicated that that group of people with disability are not as well represented.

**MRS OWENS:** So you've covered the points you wanted to make on employment.

**MS THOMPSON:** There was one other point I wanted to make on employment, and that is the education side of it; that many employers seem very unaware that workers do not have to declare their disability when they are seeking employment.

**MRS OWENS:** You mentioned that in your submission.

**MS THOMPSON:** It surprises me, in this day and age, with the amount of promotion I would have thought had been done - that I knew - that employers are not aware of this. Employers actually produce employment forms, which ask people "Do you have a disability?" They are not aware that they are actually not allowed to ask that, or they say they are not aware.

**MRS OWENS:** So again that comes back to education, doesn't it?

**MS THOMPSON:** It does. It is an education issue, and it's a very big education issue. I think that employers are very genuine. They say, "Well if you've got a disability you should tell us and we will make allowances." And they don't understand that a person with a disability, if they are not asking for an allowance, so far as a physical allowance - that they need a different sort of computer or they need a ramp or so forth - they don't want to tell the whole world they've got a disability.

**MRS OWENS:** It's not relevant to the requirements of the job, in which case it's fair to ask.

**MS THOMPSON:** They don't need to know, because they can do the core job, and it's private; it's their own personal business. When the employers find out there is a disability they are somewhat miffed and say, "Well, you should have told us." And do you know what I say to them, "Look, they don't have an obligation to tell you." They seem quite shocked.

**MRS OWENS:** So who should do the education? Is this HREOC?

**MS THOMPSON:** I think so.

**MRS OWENS:** It is HREOC?

**MS THOMPSON:** I would have thought - - -

**MRS OWENS:** Or should it be Jocelynne Scutt?

**MS THOMPSON:** Maybe it's a combination of the two. I would have thought there was enough promotion done when the DDA came in 10 years ago, and then with the celebrations after 10 years. There are a lot of informed people within the sector of disability, but in the broader community, with people who are ordinary employers who don't know and don't even think about employing people with a disability and don't know they are employing people with a disability, do not know their rights and obligations under any of the industrial laws, let alone the DDA; they are totally unaware of it.

**MRS OWENS:** But given what you said about the request for disability you might be wanting to look for amendments to the DDA, because at the moment the provisions concerning a request for information only relate to requests for information, in effect, about disability which might be used as a basis for discrimination. Now, really, what you are telling me about employers is that a lot of them are not asking because they are thinking particularly to discriminate against that person because of whatever disability they mentioned but, really, just because they don't even think that that might be irrelevant information.

**MS THOMPSON:** That's right. Yes. I think that in the broader area, those of us who work in the disability sector get very surprised every now and then at the wider community, who don't come in contact with disability directly, how uninformed they are. I do think access to education and to information, as you say, is very important.

**MRS OWENS:** I think we've talked about funding issues; maybe we didn't with you, but there is an issue of funding advocacy groups and you said you are funded by the Commonwealth government.

**MS THOMPSON:** My position is funded by the Commonwealth government. We have a rather unique organisation, Advocacy Tasmania, in the nation, in that most advocacy services provide advocacy to one particular client group, and we provide them to people who are aged and people with disability. So it covers employment disability, state disability, then home and community care services, residential aid, aged care and mental health. And we are funded from various different services, but all of them state and Commonwealth funding. We would prefer our funding did not come from the agencies from which we may have to advocate against; a real bringing away from power. However, it has never presented a problem.

For instance, I'm funded by FACS - the Department of Family and Community Services - who fund Business Services and Supported Employment Services. If I have to advocate against them - I've never had any problem. We have never, in all

our years of operation - which is more than 10 years of operation - ever had it implied that if we advocated too strongly in a particular area against the people who were actually funding us, that our funding might be in jeopardy. We have never ever had that occur. But we've always philosophically said that advocacy services should be funded from justice, or somewhere like that that's even more removed.

**MRS OWENS:** One step further removed.

**MS THOMPSON:** Ideally that's what we would like to see. We have disability advocates that are funded by State Disability Services and we advocate very strongly against State Disability Services on a very very regular basis, and they don't see any problem with it. They must actually believe that there is an advantage in us being involved.

**MRS OWENS:** Yes. What about the adequacy of the money you get? People always say, "We can do with more," but is this an issue in terms of what you can cover?

**MS THOMPSON:** There certainly is in this state because people - interstate services - usually cover small regions and we're statewide, and when you've got a small population spread over a geographically diverse area it's difficult. We have concerns that it is sometimes proposed that services should be funded on a per capita basis - what your population is without looking to your demographics - and our concern is that if that was the case, funding in Tasmania would be reduced.

We, as an agency - and our sister agencies, who also do advocacy work - know how often we are so busy that we are at risk of closing our books, not being able to take on any more clients, and yet there are people wanting service, and I suppose that with the scantness of resources in health and human services in states at the moment, our services are being called upon more and more, because there are waiting lists; there are great inequities. People who are eligible for disability services and HACC services in the state - there are not enough resources to go around and so some people get service and some don't and, naturally, those people who don't get services, who depend upon a service provider in order to maybe get out of bed in the morning and be able to be part of the community, are struggling. We've got clients sitting in hospitals. Our agency has got a client who has been waiting in hospital for three years to be discharged - ready to be discharged - because there isn't enough support in the community to support them. It's very worrying.

**MRS OWENS:** In this inquiry that we're doing we have to think of how we can improve the Disability Discrimination Act and one of the things we're doing is looking at the acts that are in place in the different states and seeing what we can learn from them, and when we spoke to Jocelynne Scutt before - I think you were

here at the time - - -

**MS THOMPSON:** Yes.

**MRS OWENS:** She said that the act in Tasmania is one of the best acts. It's clear, it's well-drafted and its coverage is good and so on. Is that your general impression of the Tasmanian act? I don't know how much you know about the act that we're reviewing - the Disability Discrimination Act. You're not a lawyer either, are you?

**MS THOMPSON:** No.

**MRS OWENS:** I'm not either.

**MS McKENZIE:** Are you able to comment about any benefits or particular advantages that you see in the Tasmanian one or in the DDA - - -

**MS THOMPSON:** I'm certainly not a lawyer and I certainly can't comment on legislation. I do find the state act more straightforward and easier to read for myself, so therefore that must be the case for people with disabilities. For ordinary members of the community like me, the more complex the written legislation the harder it is for people to understand it and then be able to make application. It certainly appears to be very accessible. If I go to national conferences elsewhere other disability agencies speak very glowingly of our state act and have wishes that their act was similar. It certainly makes a very big difference for clients who may have considered making an application under the Commonwealth DDA, but if their complaint comes under the state act they can make a submission in the state and, although the 40-odd days seems a long time to some, it is a pretty quick resolution compared to cases that sometimes have taken quite a bit longer under the federal DDA, so the perceptions within the sector and by clients is that the state DDA serves them well.

**MRS OWENS:** Is cost a factor in that? I mean, would you recommend a client stay away from the DDA advocate in Launceston because, if they get into that system, it could end up costing them more money?

**MS THOMPSON:** I wouldn't make that recommendation because we like to say, as advocates, that we don't advise people. We explore options with them. We usually don't have to tell them. As soon as they know that the body they have to submit to is not in this state, they know themselves that it will cost them more. But I think a lot of people actually find the time cost very high; they really do want an outcome in a timely fashion. But, yes, having to submit somewhere - and also dealing with people at long distance. This is a small population state. People are used to doing business face-to-face. Clients of mine who ring in - that I may never meet - talk to me. They say they have a discrimination issue. I tell them about the

state DDA and they say, "Where are they located? I might go in and see them." This is what they like to do - to be able to go in and see them.

**MS McKENZIE:** So face-to-face is really important.

**MS THOMPSON:** Yes, it is.

**MS McKENZIE:** And to be on their doorstep virtually.

**MS THOMPSON:** That's right. It also means that Jocelynne's office here really assists people. If they want to verbalise what their situation is, it will advise them about the advisability or not of making an application and will assist them in doing that in whatever medium they need, and that's an important one. The DDA advocate does the same and I find that she is excellent in that she lets the client make the decision and she will assist them either to make a HREOC submission or to make a state submission.

**MRS OWENS:** Yes, so it works both ways really.

**MS THOMPSON:** Yes, but then we've got a DDA advocate for the entire state, and of course submission work is a big job and, again, you can only run so many.

**MRS OWENS:** I think I have covered everything. Sorry to have kept you so long.

**MS THOMPSON:** Not at all.

**MS McKENZIE:** It was a tremendous submission and we had lots of questions to ask, which you have helped us greatly in answering.

**MS THOMPSON:** I am sure that the work you are doing will bring about some changes for people with disabilities and, after all, that is our aim. Thank you very much.

**MRS OWENS:** Thank you. We will now adjourn until tomorrow morning. I usually ask at the end of each day whether anybody would like to come forward, so maybe one of the staff would like to come forward. Everybody has left!

**MS THOMPSON:** I also want to thank you for accommodating me in changing the time today because I did have an urgent issue that came up. I appreciate that.

**MRS OWENS:** That's a pleasure.

**MS McKENZIE:** Not a problem.

**MRS OWENS:** We are resuming tomorrow at 9 am. Thank you.

AT 4.42 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 5 JUNE 2003

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