SPARK AND CANNON

Telephone:

Adelaide	**(08) 8212 3699**
Hobart	**(03) 6224 2499**
Melbourne	**(03) 9670 6989**
Perth	**(08) 9325 4577**
Sydney	**(02) 9211 4077**

SUBMISSION TO THE PRODUCTIVITY COMMISSION

DISABILITY DISCRIMINATION ACT INQUIRY

JANET HOPE
MARGARET KILCULLEN

MS HOPE: This is our submission to the inquiry on the Disability Discrimination Act that the Productivity Commission is conducting. My name is Janet Hope and I'm interested in disability discrimination issues from two perspectives. One is that I myself have had a disability for nearly six years, and the other is that I have in the past - although I no longer do this - worked as a lawyer and provided some advice on the Disability Discrimination Act. In addition, I've also taught some students at university who have disabilities. The other speaker on this tape is Margaret Kilcullen.

MS KILCULLEN: I'm Margaret Kilcullen. I also have a disability, and have had one for 11 years - 91. I'm interested in the act from various different perspectives, like Janet. I also worked in local government on Meals on Wheels and other disability services, so I have an interest from that perspective. I was on the working party for developing the disability action plan for a university, so that involved a lot of negotiations and talking about how the act affected the education. I suppose also from a personal perspective, when it comes to employment, I've had some experience with regard to the discrimination act with that, and my experience with the university also involved applying the policies of the university.

MS HOPE: So I guess our combined experience is both personal and also on the more official side, in the areas of education and employment.

MS KILCULLEN: Yes, and in some wider areas just because of personal experience.

MS HOPE: Just because of life experience. What we'd like to do is just go through the questions in the issues paper. We have various comments to make about those. At the end of our conversation we just have made a few other notes and we'll go through and just check whether there's anything further we want to mention. But we'll try to adhere reasonably closely to the questions in the issues paper.

MS KILCULLEN: Yes, although there may be some more general views to bring in as we discuss those that aren't covered by the specific questions.

MS HOPE: Right, yes, and from reading the issues paper it seems that that's encouraged - to bring different perspectives - because it says it's just to stimulate discussion.

MS KILCULLEN: So yes, we'll allow the questions to stimulate our discussion.

MS HOPE: So this is the discussion that has been stimulated.

MS KILCULLEN: Yes.

MS HOPE: Okay. Let's just refer to - actually, what I've done is I've highlighted elements of the whole issues paper, not just the questions. So shall we keep on the same page as each other and see if we have any comments relating to that page?

MS KILCULLEN: Yes, okay, and why don't you start by saying your comments, then I'll see whether I have things to add.

MS HOPE: Yes, okay, and often you will have a lot to add.

MS KILCULLEN: Yes.

MS HOPE: All right.

MS KILCULLEN: I think you've made more comments on the way through possibly than I have, so we'll start with yours.

MS HOPE: I just want to start with the terms of reference. I'm not deeply familiar with the competition policy review program, but I have had occasion to look at it in relation to review of different legislation, other legislation, many years ago. So the reason that I actually wanted to make a submission here is that I was sort of gripped with this fear that the review was going to basically seek to - or that one possible outcome would be the trashing of the DDA holus-bolus, and that basically it was up to people with disabilities to come to the inquiry and sort of justify its existence by saying, "Well, the benefits to me have outweighed the cost to society." If that were true, that would be a great concern. It would be an entirely inappropriate way to go about reviewing the legislation.

I also have noted, by looking at the Internet - submissions that had already been made at that point - that a lot of people were complaining that the Disability Discrimination Act had been ineffective in helping them out in their case. So I was concerned that people were sort of innocently believing that the aim of the review was to improve the legislation and therefore complaining about it, whereas it maybe as a higher priority to explain how it is that the legislation is in fact really helpful - because there was a threat to its existence.

Now, having had a closer look at what the Productivity Commission is doing and what the issues paper says, I feel more confident that that's not the approach. But there are a couple of places through the paper where there is this suggestion that the onus socially is on people who want to protect the human rights aspect of the legislation, to come up with an economic justification for it. I just want to note at the outset that that should not be the way that we analyse this legislation. A bit later you have asked specifically in the issues paper about economic issues, and at that point I have some comments to make about how I think a shift of perspective could be helpful there, within that framework.

MS KILCULLEN: Yes, because Janet and I actually discussed this. After her fear reaction, she was talking to me about it. My perspective on that - my experience with the competition policy - actually comes from a slightly different direction. When I was working with local government, a review was being made of the Disability Discrimination Act. So I saw, through that review, that the questions about competition were actually quite a good thing in relation to disability services, because they were aimed at creating better services and that kind of approach, which seems to fit the human rights aspects which Janet has been talking about as well.

So that encouraged me to think that there were more positive possibilities with looking at the competition thing. I think our previous discussion also brought up how useful a competitive view can be, of the legislation, as long as you apply it broadly, which I am pleased to see in the issues paper you seem to be doing, in terms of productivity for society as a whole, rather than necessarily just looking at competition on a one-to-one basis. You might need to clarify me a bit then.

MS HOPE: I guess the focus with the terms of reference and in the competition policy review program generally is there is a specific focus on reducing clients' costs and paperwork for non-small business, and that is something that I would have comment to make about in connection - later in the paper, with the competition and economic aspects of things. But for this purpose, we'll move on.

MS KILCULLEN: Yes. I guess the point that I was trying to make is if you're looking at principles of good design, the same applies for participant discrimination in general as applies to services and things of that kind. What works for people with a disability is good design practices generally, and therefore has productivity results and competition results that are pleasing and compatible, rather than starting off with the view that it's likely to be a negative process in competition with the human rights thing. I think it's worth noting that actually human rights and competition and productivity outcomes here are all headed in the same direction, not opposing one another.

MS HOPE: Yes. Any assumption that they're not, can be a discriminatory based assumption. So we'll talk about the specifics of that in relation to the economics paper.

MS KILCULLEN: About the terms of reference, the point that I was going to make that I don't think I've got notes on anywhere else is about identifying relevant alternatives to the legislation, including non-legislative approaches, which is pretty dead, I think.

MS HOPE: Of the terms of reference?

MS KILCULLEN: Yes, in the terms of reference. I just wanted to make sure that that means alternatives to sections of the legislation, rather than the whole legislation, because my view of it is that there are quite a lot of things that you might do better outside legislation, but that you also need legislative frameworks and enforceable laws, about what's legal and what isn't, to go with that. I don't think that a completely sort of self-regulatory approach or other mechanisms would be as effective as having the Disability Discrimination Act. Even if you change the act quite a lot, there needs to be one.

MS HOPE: There needs to be one, yes.

MS KILCULLEN: Yes, there needs to be one.

MS HOPE: Okay, I agree with that.

MS KILCULLEN: I just wanted to make that clear.

MS HOPE: Yes, I agree with that.

MS KILCULLEN: Don't chuck the whole legislation, even if you decide to change bits.

MS HOPE: So that's all the comments we have to make on the terms of reference. I don't have anything further to say until we get to the first actual general issues for this inquiry, which is chapter 2, until we start to get to the bullet pointed questions. Do you have comments to make in that - - -

MS KILCULLEN: Yes, the thought that I had really - what is not included in this inquiry. The bit that says:

> Although we are not reviewing the provision of disability services, we are interested in the attraction between disability services and the DDA.

MS HOPE: Could you just tell us a page number for that?

MS KILCULLEN: Yes, page 9.

> For example, a lack of support services, such as funding for a particular therapy or device such as a wheelchair, may prevent access to employment or education, effectively discriminating against a person

with a disability.

The reason I thought I should make some kind of comment upon that is that when I was working on the university disability action plan, that was actually the major cause of discrimination that was in fact going on; was to do with funding arrangements, much more than it was to do with, I don't know, just attitudes or - - -

MS HOPE: The way that the university has arranged things.

MS KILCULLEN: Yes, and it was kind of inherent in the funding arrangements that was a problem. For instance, the biggest area of complaints that were sort of specifically lawful was - you know, that things were unlawful - were in relation to students with high support needs. That was a big problem for the university to get around, because of the unpredictable nature of large amounts of changes in funding involved there. When they were talking about sort of structural issues or things like that, there was much more that they could do about it. However, if you don't know until you let a student in or until just before you've let them in, because they're doing exams and stuff, whether you're going to have to, you also don't know how much money you're going to have to spend on very high cost things.

One area with that is sign language interpreters, another area was personal carers for people who have quadriplegia, and stuff like that. The university has to provide those services, and if they only find out about them a few months beforehand that's a very big fluctuation in their budgets, which isn't covered by her arrangement with the Commonwealth or anything else. So that can cause practical problems, even when the attitude is right. With enough notice, which is unfortunately not possible, it would be covered.

Similarly, with situations about wheelchairs and things like that, that actually affected me personally in my access to education and employment because I needed a wheelchair to get around when I was at university and the disability services, the Commonwealth Rehab Service for instance, wouldn't help me with - the university couldn't give me funding for it, because it was a personal device. The Commonwealth Rehab Service wouldn't give me funding for it because they regarded the education I was doing was not sufficiently vocational and actually told me that if I had been going to TAFE it would have been a different matter, which was a strange definition of vocational as far as I was concerned.

MS HOPE: The education you were doing was a combined undergraduate degree in science and in arts.

MS KILCULLEN: Yes, preliminary to a planned dip ed, to do teaching.

MS HOPE: Right. So you did have a vocational plan. It wasn't a way-out, unusual degree to be doing.

MS KILCULLEN: No.

MS HOPE: But their issue was that - - -

MS KILCULLEN: It wasn't directly vocational enough to fit their funding.

MS HOPE: Where had you been an apprentice hairdresser and you had been doing a hairdressing course at TAFE, that would have been okay.

MS KILCULLEN: Yes, that's actually what they said to me too, quite specifically.

MS HOPE: Right.

MS KILCULLEN: The person that I was talking to about it said, you know, "If you were at TAFE doing a vocational course that was classed as a vocational course, then we could help you with this, but we can't because you're not." So the funding arrangements - the point I'm trying to get to here is that I think that funding attached to people, as opposed to attached to institutions, actually does have a big effect on discrimination, because the same applies in workplace situations. If you are bringing equipment with you, rather than the employer suddenly having to fund it, then you're much more likely to get a job as well, than you are if they're going to have to worry about questions of unjustifiable hardship and all the things that come up later. So yes, I just wanted to make the point that there needs to be - a third party in funding is just as important a discrimination as the actual - - -

MS HOPE: Protagonists.

MS KILCULLEN: That's right, yes, and the specific - - -

MS HOPE: And the structure point you're making is that funding that is attached to individual people with disabilities has far more flexibility and gets over a lot of problems that are associated with having funding, instead, being associated with institutions.

MS KILCULLEN: Yes, exactly; that you can take it with you and that overcomes - - -

MS HOPE: It doesn't need to be the problem of the institution.

MS KILCULLEN: Yes, and so it overcomes things that are otherwise unavoidably discriminative, because the university or another institution doesn't have that flexibility built into the system.

MS HOPE: Right.

MS KILCULLEN: The same with an employer. They don't necessarily have those flexibilities in their workplace arrangements that would allow them to cover that. So it would be an unjustifiable hardship when applied to them, but when you're talking about the actual cost or whatever applied to an individual person it's not very much. It's clearly in everybody's benefit. Another example of that was also at university with the speech recognition program that I used later in my degree. Initially when I started my degree I had scribes provided by the university, writing the essays and things to my dictation.

MS HOPE: You were in fact the first student at the university to use speech recognition software.

MS KILCULLEN: Yes, that's correct. That was a similar kind of - there was a similar funding problem to overcome there, which was that providing me with software and a computer that I could dictate to was, particularly during the course of my degree, immensely cheaper for the university. I think it was a $3000 cost to buy the computer to start with, and that would have been covering the whole - you know, with small updates, maybe $200 or something every two or three years or something - as opposed to every single year they were spending $10,000 or something like that on employing a scribe to take my dictation.

The problem there was that they could employ a scribe much more easily than they could give me money for personal equipment, because it was going to be only used by me and only - it was sort of classified as personal equipment, and I would be taking it with me when I left the university or I would have to give it back to them. It was a long-term budgeting problem because it was attached to me, as opposed to an institutional provision of a service that they could do much better, although a great deal less efficiently.

So we got around that in the end, got through a loophole that nobody else was afterwards able to follow, unfortunately. I ended up getting a grant from a community options group in Canberra, who was willing to provide money for equipment - which they also usually didn't do - to allow me to continue, but to have something attached to me personally that allowed me to overcome that potential discrimination barrier at the university. In terms of general overall societal efficiency and productivity, I think that the way funding is arranged - and particularly arranging it to attach to individual people so that flexibility is brought into the system - actually leads to a great deal of efficiency.

MS HOPE: My personal experience is along the same lines. I was working - I didn't have a disability when I started the job, and then six or 12 months into the job I found that I couldn't type any longer. I was at the job for many months, battling with the IT people to give me software equivalent to the software that Margaret has just been mentioning, The difficulty was that I was wanting software that was not familiar to the institution, and the staff there were overworked and were unhappy about the idea of supporting the software. That was an issue because it was going to be owned by the institution. If it had been my personal software - - -

MS KILCULLEN: Whereas if you could just buy it and - - -

MS HOPE: That's right.

MS KILCULLEN: - - - you teach yourself how to use it, there wouldn't be a problem.

MS HOPE: There wouldn't have been a problem. In fact when I resigned from that job and went off - I in fact worked in New Zealand - it took me less than two weeks, armed with $2500 from my own bank account, you know, just from my own savings, to look up the Yellow Pages in a new country, identify someone who could provide me with a computer and set myself up at home in a perfectly ergonomic environment; something that had been impossible for an entire Commonwealth department to achieve in the course of 18 months. That was just simply because I was acting with the flexibility of an individual, instead of within a system that had so much inflexibility built in. So I agree with that.

MS KILCULLEN: Also with the information of an individual - I mean, that's the other thing that needs to be taken into account. People with disabilities usually themselves have thought of the problems and know exactly the problems they're going to encounter in employment, education, transport, many other things, and if they're given the resources to get round them themselves, do so quite quickly and easily.

MS HOPE: Right, because you're the one who's best placed to make the decisions and make the compromises about what's going to work and what you can afford and so forth.

MS KILCULLEN: That's right, and you know what's wrong and you know what will fix it; whereas somebody who doesn't have a disability has to work through all the different options of what might be the problem and what they might be able to do.

MS HOPE: So it's an abstract theoretical problem that has so many more possible dimensions than the actual problem does when it correlates to an individual situation.

MS KILCULLEN: Exactly, and also it's a matter of experience as well. Like, we're talking about kind of things in terms of competition and productivity. A person with a disability has usually - by the time they're looking for a job anyway - - -

MS HOPE: Not always, but - - -

MS KILCULLEN: Not always, but you know very often, and very quickly - even if it's not years and years - - -

MS HOPE: There's a lot of in-built learning that it's very inefficient to try to transfer through the system.

MS KILCULLEN: That's right. They have a great deal of experience in how to deal with the problems that they're meeting, and also very - like, in terms of efficiency of time spent, somebody with a disability, even if they've only just acquired it, is having to spend all their time dealing with it anyway at that stage, as opposed to taking somebody off some other job and making them deal with it all and learn all the things that they have to learn.

MS HOPE: So there's a huge learning resource there - - -

MS KILCULLEN: Yes, there is, and it can't be ignored.

MS HOPE: - - - that can't be tapped into. It sometimes is ignored just through a lack of imagination, or sometimes through the assumption that the person with the disability, because they can't do the thing that is relevant to their disability, is also incompetent in every other area.

MS KILCULLEN: More often in my experience what has caused that to be ignored has been the larger systematic situation that has prevented people, who can see it right in front of their noses and are quite happy to acknowledge it, from actually being able to adjust their systems to take that into account. So as with your workplace situation and with the situations I was talking about at the university and also in employment, they could have been adjusted and everybody wanted to adjust them, except that the funding arrangements and bureaucratic arrangements were such that nobody actually had the freedom to adjust them.

MS HOPE: Yes. But actually I do want to say something in relation to the issue of why often you are ignored, in terms of - suppose there's a reasonable adjustment to be made in the workplace and there are several options and you have a particular view as to - sorry about that, I just had to pause the tape there.

So I think there is an issue, perhaps not so much with assuming that people with disabilities don't have information, but out of a prejudice sort of issue. But there is also built into this whole system third party funding type scenario, the issue that there's a great - in order to safeguard the integrity of the system, there's a great reluctance to just directly give someone money, because of the accountability issue. Certainly I was treated with some suspicion, not necessarily personally directed but suspicion that this would not be a good way to run an organisation, to be giving people money and giving them the discretion to spend it on whatever they needed in a particular job. So I reckon that is definitely part of the reason why people don't have this flexibility built in. I'm not sure how you would address that.

MS KILCULLEN: I think as well people are worried about - especially in employment - worried about setting precedents. They don't want to be later held accountable for some flexibility that they were able to do at that stage, in comparison to a different situation.

MS HOPE: After the loophole closes, they don't want to have to be - - -

MS KILCULLEN: Yes, like, if they find a way of doing something now, they don't want to always have to find a way of doing it and have that compared to how they're doing it now, when situations change, which I think is particularly a problem for businesses and stuff, because they don't want to be trying to predict their situation in, say, 10 years' time, when somebody might make a complaint that they haven't been dealt with in the same way, and yet the whole business structure has moved on or whatever has changed.

MS HOPE: So there's a difficulty in building in flexibility for the person with the disability and at the same time flexibility for the organisation they're dealing with.

MS KILCULLEN: Yes.

MS HOPE: We were talking about how you could build in flexibility both for the person with the disability and the organisation - or to put it more broadly, both for the individual and the organisation.

MS KILCULLEN: Yes, because I think some of these things - I mean, this is why I was talking about funding attached to a particular person. I think some of these things are not very dealable with in a large system, just because it is a large system. Similarly, like for small businesses and stuff like that, if they're talking about employing somebody with a disability, that's a competitive problem for them possibly, because they might have to spend a lot more money that a larger organisation might more easily have or things like that. If you're looking at it from the employer's point of view, from the point of view of the institution rather than from the point of view of the person with the disability, in terms of how you fund reasonable adjustments or whether the organisation has to fund them, that creates a lot of inequalities and competitive problems that you don't have if you direct the funding to the person that it's going with.

MS HOPE: So there is in fact no tension. The tension I just described is a false one, between flexibility for the institution and flexibility for the person, because you're saying that if you grant the person flexibility, it no longer needs to be a problem at all for the institution, in many cases.

MS KILCULLEN: Yes, that's right.

MS HOPE: So they can have their flexibility because they're not being asked to do something that might bind them as a precedent later on and so forth.

MS KILCULLEN: Yes, exactly, because it's no longer about what they have to do. It's part of what you bring with you to the job.

MS HOPE: Right.

MS KILCULLEN: Now, some of those things you have to deal with when you get there, because you don't know the nature of the job sufficiently until you're doing it at all, because you might have acquired the disability while you were doing the job or questions of that kind.

MS HOPE: Also, it's important to note in that context that disability does involve a lot of uncertainty that isn't necessary part of a life without disability, but you're constantly needing to deal with changes in the nature of your disability and severity of it and so forth.

MS KILCULLEN: Yes, there's a lot of unpredictability built in already. So even the person with the disability may not be able to predict things well at all. But I think when you're dealing with just one person in the unpredictability stakes, you're not magnifying that original unpredictability through a whole set of systems and other workplace arrangements and things like that.

MS HOPE: Yes.

MS KILCULLEN: So yes, I think one major effect on discrimination in the workplace that would be good - which is not really a legislative issue but is perhaps in the capacity of alternatives to legislation I suppose - is better funding for individuals, particularly in the area of equipment, but attached to individuals rather than to workplaces. You imagine how different it would have been with your computer issue if you and your employer could have just gone, "Right, what we need to do is apply for funding together to this other body," or whatever, and then it's your money to spend on what you need to get over the hump of employment there. It would make things a lot easier.

MS HOPE: Let's just talk about this concept of getting over the hump, because in our previous discussions about these issues it just kept coming up and up that so often the problem that - the reason for discrimination is a perception that there is going to be a whole lot of difficulty associated with employing or educating or in some other way catering for a person with a disability, which would in fact not be a long-term problem. It may be that the person doing the discriminating or potentially discriminating sees it as a long-term problem, or it may be that they realise that it's only a short-term problem but for whatever reason there's a difficulty getting over that hump, and if only that could be got over, so much less discrimination would actually occur. Do you want to comment on that?

MS KILCULLEN: I think one reason why a lot less discrimination would occur, just to deal with the pattern before we deal with some of the specifics - and this is part of the educating role I suppose - is that if more people with disabilities were in employment and education and able to use shops and all these other things, it would be much more apparent that there weren't - you know, all of the imagined problems would be clearly seen to be imagined.

MS HOPE: Yes.

MS KILCULLEN: There are problems obviously that aren't imagined, but they're not really the subject of discrimination. They're just part of treating - I mean, everybody has different problems that affect how well they work or whatever. I think there's a line - where is that bit that you underlined, Janet, in your - when we were talking about this before and I told you to make a note?

MS HOPE: I don't know, we may come across it. We'll come across it again, because it was on this document that I had.

MS KILCULLEN: Yes, about the issues of humps.

MS HOPE: Yes. Anyway, that's like a motif in our discussion of this; is this idea of, okay, so how do you in fact most effectively get over some of those humps, because if you could then in many cases there would be no further problems, or the further problems would be clearly manageable by everyone.

MS KILCULLEN: Also, they would be clearly not discriminatory problems. I think this is something that's worth pointing out; that when you're dealing with trying to get rid of discrimination you're not trying to make all outcomes completely equal necessarily, like you're not really focusing on the outcomes even. What you're talking about is equal opportunities to do what everybody else can do and just the equal chance to do that. So we're talking about artificial barriers to start with. If the barriers aren't artificial then it's not discrimination to take them into account; it's just ordinary behaviour. I think people often confuse that.

MS HOPE: Yes, and perhaps another way to say that is that one of the most common manifestations that either of us has come across of being discriminated against or of seeing other people being discriminated against is where there is genuinely a kernel of difficulty associated with the situation but that in some way this difficulty is magnified in the mind of the person who has to deal with it, to the extent that they just can't cope. Then they just go, "I just don't want to deal with the problem, and you are now rejected from your application to university," or, "You can't come to the job," or whatever it might be, whereas if they had perceived it correctly, as a difficulty but a small one, then they wouldn't enter into this fear, panic reaction that is such a common feature of life as a person with a disability, dealing with other people in institutions and so on. You need to learn to manage and deal with the fact that other people are going to panic and freak when you come to them with what in fact is a fairly simple request and all you need is the answer, yes or no. But all kinds of psychological stuff kicks in.

So some of it is just pure reaction to disability, psychological reaction to disability, which includes things like - people are just afraid, when they see people with disabilities or know that you have a disability. It reminds them that they could have a disability at some point, and that's scary and no-one wants to think about it. So that comes in, and a whole lot of other - - -

MS KILCULLEN: People are desperately worried about getting it wrong as well.

MS HOPE: That's right. They're so afraid - - -

MS KILCULLEN: Which is actually kind of the worst fear because, you know, it's really simple. There's no getting it right. I'm not a weird, different kind of person. I'm just a person like you. It's, you know, "What would you do if you were in this situation?" It's a lot simpler than people think it is.

MS HOPE: That's right, so people think it's so difficult. The thing is, sometimes there are extra difficulties that could be smoothed over by the existence of extra funding or reasonable adjustments of one kind or another, and sometimes it's a purely psychological reaction to being presented with someone with a disability, whether or not it’s labelled that way. So the hump is kind of combined real stuff and weird psychological stuff, prejudice. Actually, I have nowhere to go with that, but do you remember where I was going with it?

MS KILCULLEN: Well, I’m just trying to - something you said a minute ago. Yes, what I was saying about real issues as opposed to discriminatory issues - - -

MS HOPE: Yes, that’s where I was going.

MS KILCULLEN: - - - really applies to this hump issue all the time, because there are possibly real issues but those ones are not ones that we need to try and deal with, with legislation. When you start confusing the real issues and the discriminatory ones, people think that these things that they’re imagining - all the fear we’ve just been talking about - they think that that is the actual issue. So they say, "Damn, I’m going to have to do all of this, you know, adjusting and all the rest of it, and then I’m still going to have this problem of a person with a disability who’s not going to be as good as the people who don’t have a disability. It’s like I have to make some special allowance, I have to make some special arrangement in my mind because - - -"

MS HOPE: It’s a perception that the effort won’t be worth it.

MS KILCULLEN: Also, it’s a perception that something special needs to be done to be kind. So it’s kind of, you know, "We have to be kind, we have to make more allowance, we have to be generous to somebody with a disability," as opposed to, "If we make these arrangements, it’s going to be good for us."

MS HOPE: Yes.

MS KILCULLEN: The shift in perspective when people realise that it is going to be good for them, when it’s not about them being nice, it’s just about them - - -

MS HOPE: Following their own enlightened self-interest.

MS KILCULLEN: Yes, that’s right, and also removing artificial barriers - that’s where the hump comes in, you see, because it might not be their enlightened self-interest to deal with those hump issues.

MS HOPE: Yes.

MS KILCULLEN: But particularly for instance in terms of employment, if it’s not ultimately in their interest to employ you, then not employing you is just exactly what they do to anybody else without a disability.

MS HOPE: That’s right.

MS KILCULLEN: It’s not a disability discrimination issue; it’s a sheer, sensible employment decision. Where it becomes a disability discrimination issue is when there is this hump to get over before you were being as good or better than another employee. But I think that people get freaked out about it, because the hump is all their problem, which is where we get back to the individual funding kind of concept. I think it would be good if there were some kind of third party arrangement for people, especially in employment, where the cost did not fall just on the employer.

What has happened now, in shifting to a rights view of disability, is that you’ve taken the onus off the person with the disability to come up with solutions and funding and all that kind of thing, but you’ve instead dumped it on "society" - in quotation marks - but society consists of all these individuals. They have no particular - like, it’s no more fair to dump it on an employer or a small business or whatever, than it is to dump it on the person with the disability. It’s not their fault that something has happened to this other person, any more than it’s the fault of the person with the disability, which is why I think society needs to be kind of re-adjusted to be a third party view, government or another independent organisation or something - - -

MS HOPE: So there needs to be some way of screening the costs around, away from individual organisations, as well as away from individual organisations, as well as away from individual people with disabilities.

MS KILCULLEN: That’s correct, and I think that’s a fairness issue; that a lot of people in employment and in education and in other areas feel acutely and rightly - you know, I think it creates a lot of resentment for them. They go, "Oh, no, now I have to deal with all these problems," because they perceive it as dealing with it for some vague social benefit that is not going to be any good to them. Often they’re actually right about that, because they could just employ somebody else who didn’t have this hump to get over. Ultimately they will be very happy with the solution, once the hump is fixed.

MS HOPE: Yes.

MS KILCULLEN: So I think the hump should be an overall social responsibility, not an individual responsibility or an employer’s.

MS HOPE: Yes.

MS KILCULLEN: From a competitive point of view, from competition policy view, I think that’s sort of central to the issue.

MS HOPE: I think this focus of the competition policy review of small business is interesting in that regard, because small business is probably, of all the segments of society, one of the least able to pay. It’s a marginal sort of area of activity. Small businesses are always very short of cash, and they’re often very short of people power and so forth. So asking them, asking a small business to deal with anything hump-like, any kind of barrier, is indeed a big ask. So therefore, why are we asking them to deal with it? Why isn’t it that we can spread the whole burden around, of dealing with genuine hump issue?

MS KILCULLEN: I think the answer to the "why" is that from a whole of society point of view it is a very much more economic, competitive, generally good approach, to have people with a disability able to participate. It creates a lot of economic activity that wouldn’t be there otherwise. It reduces pressure on pensions. It does all sorts of things that are good for society as a whole and there’s an obvious benefit there. The problem is that the cost is currently not distributed in the same way as the benefit is. The benefit goes to everybody and the cost goes to one small business or - and it doesn’t go to their competitors, or it goes to one big business and it doesn’t go to their competitors, or it goes to some person with a disability and not somebody else. You know, it’s not an evenly distributed cost, even though it is an overall economic benefit to society to get over these things.

MS HOPE: That point is actually made in the issues paper; that there’s benefit to society in general of, you know, making sure that people with disabilities are able to participate. But I was actually struck by how conservatively that was expressed. It was sort of a cautious, you know, "Maybe we might want to" - I can’t actually see the quotation so I won’t sort of go on about that. But I think now might be a good point to talk about how a shift in perspective might help. The point I’m trying to make is, cost-benefit analysis I think is a dodgy way to look at legislation that has a much broader than merely economic aim. But even if you take the Disability Discrimination Act purely within a competitive economic framework, it still can be seen as a pro-competitive piece of legislation.

I would really like to see that analysis followed through and elaborated by people with economics training and so on, to really follow through all the implications of that, because I’m sure that the way I’ve just expressed it there, it’s flawed from an economic perspective.

MS KILCULLEN: Although, I mean, there are questions in the submission paper here that we don’t have the resources to follow up, in terms of research, but which could be followed up and which you seem to intend to follow up, about productivity benefits of the employment of people with disabilities and things of that kind.

MS HOPE: Perhaps when we have it actually in front of us - - -

MS KILCULLEN: Yes, I think maybe we should move on now, through the actual thing, and get to specific issues I suppose.

MS HOPE: Yes, okay. If we go to chapter 2, we've got general issues for this inquiry. The first set of questions is about the definition of disability in the DDA. The question that they ask is:

> What have been the effects of the DDA's broad definition of disability, and are any elements of the DDA's definition of disability too narrow or too broad?

So do you have comments that you would like to make about that?

MS KILCULLEN: I seem to have written things down the bottom here - I'm not quite sure how they relate to the questions - about how that interacts with the complaints or the nature of the act. I guess it's part of the sort of defensiveness, fear sort of element we were talking about earlier perhaps.

MS HOPE: Can I then - are you going to flow on with this or shall I make my comments? I think they'll help you to - - -

MS KILCULLEN: Yes, you make yours and I'll add what points I have. Well, perhaps just as a sort of brief experience point that we might then develop more logically, if you know what I mean. When I was on the working party for the disability action plan at the university, that broad definition of disability at the beginning of the act caused immediate fear and trembling in the souls of almost everybody we were negotiating with and tended to provoke sort of resentment as well, because people were still thinking in terms - as we've just been saying - of making some special allowance, some special move, rather than removing barriers. Rather than thinking in terms of good design of the whole system, they were thinking, "What will I have to do to specially help these individual people?" So the broad definition really worried them, because - - -

MS HOPE: It's like, "Oh, I have to deal with this stuff and look at all the people I have to deal with, all of the - - -"

MS KILCULLEN: Yes, "and also all of the people who might have some really minor problem that I now have to go out of my way to do stuff for." It's like, you know, if you're going to have this broad a definition of disability, where even having a disability in the family or having a missing top finger that has no effect on what you can do and what you can't or whatever, becomes "my problem" - was their perspective - an instant barrier to the educative aims of the Disability Discrimination Act, because it made people panic and put up walls to the kind of attitudes that I think the Disability Discrimination Act is meant to encourage.

MS HOPE: That's actually really interesting, because my comment or my reaction when I read that was also in relation to the educative role of the act, but it was the exact opposite experience that I've had.

MS KILCULLEN: Really?

MS HOPE: The experience that I've had hasn't been in a situation where I've been speaking as a person with a disability, asking for something, so I haven't been dealing with someone who's thinking, "Oh, this is my problem, and look how big a problem it is," which is - the broader the definition, the bigger the problem, in that perspective. Instead, I've been actually just trying to - it was in seminar that I was giving in my professional role.

MS KILCULLEN: As a lawyer or teaching at the university?

MS HOPE: I don't remember. This is many years ago.

MS KILCULLEN: Right.

MS HOPE: But my disability isn't visible, so in no way was I being seen there as a representative of disabilities. But it was interesting because there is this perception, which does come up and - - -

(tape changeover)

MS HOPE: - - - tape unexpectedly, but we're just talking about the broad definition of "disability", and Margie was saying that she found it triggered resentment and fear and panic on the part of people who were being asked to do something in order to cater for a person with a disability, and she was talking about the educative role of the act in that context, and I was saying that I've actually found that that broad definition is very useful in an educative context in the context of seminars that I've given, and I just was referring to part of this issues paper.

MS KILCULLEN: Give the example, because I think that that actually - - -

MS HOPE: Yes, I will. In box 1 of the - on page 7 of the issues paper, just quoting the act, "Objects of the Disability Discrimination Act," and one of them is:

> To promote recognition and acceptance within the community of the principle that people with disabilities have the same fundamental rights as the rest of the community.

Okay. My reaction to that is people with disabilities don't just have the same fundamental rights as the rest of the community. People with disabilities are the community.

MS KILCULLEN: Yes.

MS HOPE: Statistically I think you've quoted an ABS statistic that one in five Australians have a disability, and that that's on a much narrower definition of "disability" that in the DDA. If you go with the DDA definition, it must be some - you know, certainly I would say a majority, especially if you go in terms of past disabilities, future disabilities, perceptions et cetera, especially if we all do live to a good old age that the statistic becomes something like 85 per cent of people.

So disability is part of everybody's life, directly or indirectly; more severely at different times, you know, whether by association with a close family member or themselves, basically everyone has to deal with that, and I think that the broad definition can help to make people realise that there is no category for people with disabilities that is a separate category from the rest of the community, and that the costs associated with it, if they fall on individuals, it will fall on all of us as individuals at some point.

MS KILCULLEN: Yes.

MS HOPE: It's better if we set things up so that it can be dealt with by the resources of society as a whole, so that it isn't at the very point of your life when you are most unable to cope with extra demands, as in when you suddenly acquire a disability or someone you know does or you have a baby born with a disability or whatever. It's not at that point that you have to contribute because you have to contribute at some point anyway.

MS KILCULLEN: Yes.

MS HOPE: Let's contribute when we're able to and be supported when we're not able to. So the specific example that was a good illustration of that was I was speaking to a group of professional people, many of whom were wearing glasses, and people with glasses, you know - people who need glasses in order to be able to conduct their daily life are within the definition of "disability" in the act, and most people with glasses don't think of themselves as something with a disability, and it's quite confronting and educational to them to realise that they are just as much at the mercy of whoever provides them with their glasses as a person who needs a wheelchair is at the mercy of someone who makes a wheelchair or funds the purchase of a wheelchair.

It’s only because glasses are cheap and easy and widespread and so many people have that particular disability that it doesn’t impact on their lives in the same way as needing voice recognition or a carer in the home or any of those sorts of things. I found that a really useful way, and people really did - you could see them click in their mind - wait on, "These people are not" - "these people", that’s a phrase that’s often - - -

MS KILCULLEN: Yes.

MS HOPE: "You know, these people are different from us." These people are not different from us. We are these people. So I think there’s a broad definition there. I have reservations about the idea of legislation as an aspirational sort of educative mechanism. I have reservations about it because of my own experience where feeling that I was being unlawfully discriminated against made me feel a lot worse about the situation than if I’d just felt that I was in a bad situation and that nobody had been doing anything unlawful or unfair.

MS KILCULLEN: Yes.

MS HOPE: And that then nothing was in fact, you know - I’ll tell more of my story later on, but I never made any kind of complaint. There was never anything but my own feeling that I had been discriminated against. It may be that legally I wouldn’t have succeeded in establishing a complaint, but in any case the fact that the legislation was there made me feel more wrong than I would have felt, and yet there was no way of overcoming that wrong through the legislation. I think it’s bad, but to the extent that - - -

MS KILCULLEN: Yes, that’s an interesting point.

MS HOPE: To the extent that there is a valid role for legislation in education, the broad definition obviously from my experience and from Margaret’s experience can really cut both ways, and I imagine a narrow one could cut both ways as well.

MS KILCULLEN: Yes, I find what you just said incredibly interesting because I agree absolutely with every word that’s just come out of your mouth. Despite the experience that I was talking about, my overwhelming experience in relation to discrimination personally and also in the various jobs I’ve been doing helping other people with disabilities or whatever has been just that; that people tend to think of people with a disability as a different class, a different category, a different type of person from themselves, and not as part of the general community. Whereas in fact, as Janet was saying, they are, we are part of the general community, just ordinary people.

MS HOPE: We're not just part of the general, we are the general community.

MS KILCULLEN: Yes.

MS HOPE: The general community has a disability.

MS KILCULLEN: Yes.

MS HOPE: The only question is how is how much it gets in their way, and there are some people - and it's arbitrary that there are some people for whom it gets in the way a lot more. It's arbitrary because that - - -

MS KILCULLEN: You put that much better than I have.

MS HOPE: That technology just happens not to have progressed to the level that, you know, eyewear technology has, you know. But it's completely arbitrary that some people are so much more - that the hump is so much bigger.

MS KILCULLEN: Yes.

MS HOPE: It's an accident of history, you know, and - - -

MS KILCULLEN: Yes. Well, that's something that I've specially seen in employment situations that it's - the hump is a rampant thing, and I guess that relates to inherent requirements of the job that we were talking about before and perhaps we'll need to talk about more specifically when we get there.

MS HOPE: Yes.

MS KILCULLEN: But, yes, with inherent requirements of the job, part of the problem with that concept is that there are not inherent requirements of many jobs. There is not clearly a person who is the best person for the job in many cases. There are different ways of doing it. There are different things that people will be good at and not be good at, and many of those have nothing to do with somebody's disability. If you have a disability, then you have another set of those to go on top. So it's hard to tell on what basis - like, I guess to get back to the point that the community has a disability, everybody in the community has things they can do well and things they can't do well, and things that they need help with and things that they don't, and extra training they might need, and extra training that they don't et cetera. It's not an unusual setting apart kind of thing.

MS HOPE: Yes. I think, like, that a broad definition does assist with helping people to understand that, if it’s pointed out to them in that way.

MS KILCULLEN: Yes.

MS HOPE: And the fact that something is written in legislation, "You have a disability, you know, you’re short sighted. That means you have a disability. Look, it’s in the law" carries a lot more weight than, "Oh look, by my personal definition of disability, you with your glasses have a disability."

MS KILCULLEN: Yes.

MS HOPE: You know, that has no impact saying, "Look, the Commonwealth government in its law has recognised that" - that has an educative impact that wouldn’t otherwise be there, and it seems to me that, you know, by having these contrasting experiences with the broad definition, it seems like we’ve set up attention. I’ve said, you know, "It cuts both ways," but in fact Margie’s experience that people feel resentful with the broad definition and afraid and panicky with the broad definition all comes again back down to the system that is set up that it’s their problem; you know, that it’s the problem of individual businesses or institutions.

MS KILCULLEN: That’s right; that it’s not a community problem.

MS HOPE: That’s right.

MS KILCULLEN: It’s their problem.

MS HOPE: And if you can eliminate that side of things, if you can make it a community problem rather than the problem of individual small businesses or whatever, then you don’t have a sort of tension between should we have a broad or should we have a narrow definition, because the educative role will still be fulfilled, but the trigger of resentment and fear and so forth, that won’t be triggered because there is no sudden heavy responsibility that needs to be - - -

MS KILCULLEN: And also the fear that people have because they think they need to make some special allowance. I found particularly in all the negotiations to do with the action plan, what really really helped and shifted people’s views was when they realised that what we were dealing with was good systems and good design, and not with special arrangements that would give someone an unfair advantage or would - you know, they weren’t special arrangements for a particular person; they were just an easy, open flexible way of doing things. The same applies to a lot about employment. Flexible employment practices would eliminate much of the discrimination that goes on in employment; not all of it, but a good swathe could be dealt with just by making systems more accessible.

MS HOPE: More flexible.

MS KILCULLEN: More flexible, more accessible throughout society; same with transport, same with shops, same with many of these things. There are people without disabilities even under the broad definition of the act who would be assisted by increased flexibility.

MS HOPE: Yes.

MS KILCULLEN: And that's something that really - once people realise that what they're doing is trying to design a good system that works better for everybody, they cease to be defensive and panicky and start to be interested in - - -

MS HOPE: They become creative and - - -

MS KILCULLEN: - - - fixing the problem.

MS HOPE: - - - enthusiastic.

MS KILCULLEN: Exactly, yes.

MS HOPE: And you tap into the best side of human nature instead of the worst side - - -

MS KILCULLEN: Yes.

MS HOPE: - - - just by that shift in perspective from making it - like people aren't coming from behind the eight ball - - -

MS KILCULLEN: Yes, exactly.

MS HOPE: - - - and making us feel negative about the situation.

MS KILCULLEN: Yes, and just to use a bit of a contrast, this kind of gets back to what I was saying a little earlier about focusing on outcomes rather than on the process at the moment, not being such a good thing as focusing on the process and making systems open and accessible and flexible. That's because of what we were saying about people with disabilities being in the community and everybody having different abilities and the rest of it.

One of the funniest pieces of discrimination I came across, which wasn’t personally directed at the time, but amused me considerably when I was working on the action plan - I don't know if I've told you about this, Janet, but we were talking about the provision of scribes for examination, and as I said earlier I used scribes for some time, one of the people that we were talking to was using as a measurement indicator that most of the students who had scribes for exams had done better in their exams. This therefore meant that they were being given an unfair advantage by having more time and all the rest of it, which amused me because it completely failed to take into account that most tertiary students with disabilities have got there because they have unusual abilities to get through schooling and the rest of it to start with. There are more - - -

MS HOPE: If they weren't academically inclined, they would never find themselves in uni because it's not something you accidentally find yourself doing.

MS KILCULLEN: That's right.

MS HOPE: You have to jump the hurdles and you only do that if you - - -

MS KILCULLEN: You really have to work hard to get there and you only do that if you're more motivated than the average student, and also more academically capable usually and, yes, it amused me partly because I was given a national undergraduate scholarship to go to the university, and I only achieved that when I - that was before I had a disability, and a requirement of having that scholarship was to keep up a certain honours level standard, but according to this person, to do that meant that I was being given an unfair advantage because my marks were not the average mark.

MS HOPE: Yes.

MS KILCULLEN: Yes, which is part of what I was talking about about outcome. You're not trying to create a system that produces the average mark. What you're trying to do is create a system that produces - - -

MS HOPE: Removes artificial barriers - - -

MS KILCULLEN: Yes.

MS HOPE: - - - to getting what mark you can.

MS KILCULLEN: That's right, and some people are going to be stupider or cleverer or better at work or worse at work or whatever, but the aim of the Disability

Discrimination Act is to remove those barriers and those things that sort of shade people's real ability rather than to create a specific outcome.

MS HOPE: That's right. So just like any pro-competitive action, the aim of the DDA seen in this light is to remove artificial barriers.

MS KILCULLEN: That's correct, yes, and I think that works both ways. It works in removing artificial barriers for the people with a disability, but also it removes restricted access for people who are doing the employing or the educating or whatever. They can get the employees and the students and whatever who are the best. They have a proper - like a fair tendering process. They've got the proper pool to choose from as opposed to one that's been artificially narrowed and therefore not as productive or competitive as - - -

MS HOPE: As it could have been, yes.

MS KILCULLEN: Yes.

MS HOPE: Okay. So I guess those are our comments on the breadth of the DDA, and I guess - - -

MS KILCULLEN: Yes, and many other things.

MS HOPE: - - - the upshot of what you're saying is that we are in favour of the broad definition and that the negative aspects of the broad definition we think could be removed by changing the tenor of the legislation in other ways to make it less of - to make the actual costs of employing or educating, whatever, a person with a disability come down less heavily on individual institutions and - - -

MS KILCULLEN: Yes, and I think that comes into what we will discuss presumably shortly about the definitions of "unjustifiable hardship" and inherent requirement of reasonable adjustment, and also to - what was the other thing I was going to say?

MS HOPE: We'll come back to that.

MS KILCULLEN: Yes, anyway.

MS HOPE: Yes, just one more comment - this is on page 12. There's a question:

> "Have there been any unintended affects of using different definitions of "disability" for different purposes, and if so, how should they be addressed?

I haven't personally encountered effects of using different definitions except that there's a lot of confusion when you're trying to work out what the legal position is because, you know, as is pointed out in the issues paper, even though the Disability Discrimination Act is a separate piece of legislation, the actual facts that give rise to its application nearly always bring in a whole raft of other legislation, workers comp, disability services, social services, social security, whatever, and it's very confusing if there are different definitions. I'm not sure - - -

MS KILCULLEN: Yes. However - - -

MS HOPE: You might have a comment. One way to deal with that would be to include - you know, one of the first pieces of legislation to include notes that aren't part of the legislation, they don't have legal force, but they illustrate and explain the notes, is the Evidence Act in 1995, and I think that's now quite common to include those sorts of notes. I think you could do a lot of good in terms of dealing with legal issues that are confusing to laypeople and even to lawyers, but then need to be resolved by a bit of legal research. Those things can be incorporated into the notes in the legislation so that they're accessible as soon as someone wants to know what the law is. Maybe that would help with the different definitions from it.

MS KILCULLEN: Yes. I was just going to say that it does cause problems to have different definitions. That was one of the sources of the same reaction that I was just talking about, about the broad definition, and people were going, you know, "Those people are disabled in this case and not in that case. Where is reality here?" if you know what I mean.

MS HOPE: Yes.

MS KILCULLEN: But I also think that they do in fact need to be different definitions, particularly in terms of legislation governing financial support, like community service legislation and pensions and stuff like that - couldn't have as broad a definition as - for economic reasons as the Disability Discrimination Act does, but the Disability Discrimination Act needs to be that broad, too, to cover all the types of discrimination that is happening. So I think that the assessment there, the different definitions, like, the reason that there are different definitions is a good reason and still applies, even though there are some problems.

MS HOPE: So some way of helping to eliminate the confusion that results would be useful.

MS KILCULLEN: Yes.

MS HOPE: So that on the face of any given piece of legislation there is - even if it's in note form - reference to other legislation so that you can get a complete picture without having to do a huge amount of extra research.

MS KILCULLEN: Yes.

MS HOPE: That would probably be helpful.

MS KILCULLEN: And possibly - I mean, I don't know if within these notes or guidelines or something of that kind, there might be some explanation of why the different definitions are necessary. I think that would help a lot, too, when people say, "Oh well, obviously you might be discriminated against for disability where it's more financial minor than you wanting to pay somebody a pension for a - - -"

MS HOPE: Yes. I think in relation to the breadth of the definition as well, our earlier discussion about how the department's discrimination and a person's perception that there'll be difficulty is the artificial barrier that we're trying to remove with this type of legislation. I think - you know, it says here in the paper that:

> The broad definition is intended to ensure that the DDA covered all potential sources of discrimination based on disability.

It's focus is on whether discrimination has occurred rather than the nature of the disability itself, and I think that's important because it's discrimination itself which is the artificial barrier to people participating.

MS KILCULLEN: Yes. That's right.

MS HOPE: It's not the disability that should be the focus there, if you're trying to remove artificial barriers and you're trying to remove the discrimination and not the disability itself.

MS KILCULLEN: Because in the act I understand it says about definitions here - I'll just find it - yes, what disability discrimination is, and it says -

> if, because of an aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than in the circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

When you take away the artificial elements there, that makes things much clearer. For instance if you don't get a job or somebody can't do a job, you - - -

MS HOPE: There are circumstances that are material.

MS KILCULLEN: There are circumstances that are exactly the same as somebody without a defined disability. You can't do the job. There is no difference there. So you don't really need to worry about that in terms of discrimination. What you're worrying about are the artificial things that aren't really there, but there are differences between people on all sorts of grounds. But it's only when you're unfavourably dealing with somebody - - -

MS HOPE: On the basis of - - -

MS KILCULLEN: - - - on the basis of the disability.

MS HOPE: I don't think we're being terribly clear about that issue, but perhaps next time around when we have - - -

MS KILCULLEN: You might be able to disentangle what we're saying.

MS HOPE: Yes, but we'll have a few more bashes at it, I have no doubt, as we go through. Okay. So that was all the comments we had on the definition of "disability" I think at this stage.

MS KILCULLEN: Yes.

MS HOPE: It then talks about what areas of activity are covered. Did you have any comments in relation to the questions at the top of page 13?

MS KILCULLEN: No.

MS HOPE: On the top question on page 13 it says, "For example should any areas or exemptions be added or removed?" and I guess I just wanted to say in relation to that that exemptions - the terms of reference of this inquiry ask you to look at any restrictions on competition and analyse them in a cost-benefit analysis, and only if the benefit outweighs the costs can they be justified. I think if you look at the DDA as I've suggested you could, as a pro-competitive piece of legislation designed to remove artificial barriers to participation in the economy and by people with disabilities, then you should actually focus on those exemptions and do a cost benefit analysis of them as restrictions on competition. They themselves are restrictive because they are ways of allowing people to impose artificial barriers because there are exemptions. You're saying, "Yes, this is discrimination, but it's not unlawful." That should be justified.

If you're going to apply this cost benefit analysis thing to the rest of the act, then in fact you should look at those exemptions and if the benefit doesn't outweigh the cost there, then that exemption shouldn't get off the ground. Do you agree?

MS KILCULLEN: Yes, I do. That's very clear, and I agree that the exemptions I think need to be justified.

MS HOPE: Yes. I think it's interesting actually just from a psychological perspective, often you see in discussion of exemptions this "need to be fair to providers", and there's always this emphasis on fairness to providers of services or institutions that are employing or educating people. This notion of fairness is an interesting one, and in some ways as a lawyer I don't really want to touch it with a barge pole because it's just so complex, but it's just interesting that fairness is something people often bring up when they propose to treat you differently and so on without a disability as a justification for the way that they're treating you.

So for example in the education environment, you'll often get situations - and I've had discussions with colleagues about how we should approach teaching people with disabilities, who come to us asking for extensions on deadlines or scribes or any other kind of adjustment in this situation, and often their concern is, "But we need to be fair to the other students." In that case that doesn't carry any weight because you can give two students an A. It's not like there's a scarce resource of good marks. It's not that students are in fact in that kind of competition with each other, but it always strikes me, where does fairness come in when I get hit by a car and become quadriplegic and you don't, but then suddenly fairness is relevant where I'm asking for some kind of assistance, you know.

I think that people invoke fairness when they're about to basically continue the unfairness that the university dealt out to someone with a disability by giving them a disability in the first place because they really don't want to feel about themselves that they are being discriminatory and, you know, there is that defensive reaction, and by saying, "Look, what you're asking me to do is unfair to all the others," you are putting yourself on the moral high ground.

MS KILCULLEN: I'm a bit too - I mean - - -

MS HOPE: And that relates to the exemption thing. I mean, there's this big emphasis on fairness to providers but, you know, where does fairness come in when someone gets a disability in the first place?

MS KILCULLEN: I think as well that's part of the shift that we were speaking of earlier. I think it exists independently of it, but it's also part of it, that from putting the onus on people with a disability to putting the onus on other individuals or small groups within society rather than society as a whole because in a sense it's true, that it is not fair to do that as well. It's not fair for the person with the disability, nor is it fair to make it only the responsibility of the person that they happen to meet. It makes it a - it also makes for much more tense interpersonal relationships, but there'd need to be, because it's either my problem or it's your problem when in fact it is a shared - - -

MS HOPE: A shared community problem.

MS KILCULLEN: - - - community problem, but it has just happened to land on these two people.

MS HOPE: Another thing I'd just like to say about that is that this shared community problem, like, there is no legislation that's going to make it go away and there is no lack of legislation that's going to go away. So when you talk about the costs of compliance with the DDA and the cost to society of having the DDA, you've also got to take into account if you're going to, you know, talk about costs the fact that those costs will exist somewhere, no matter what you do. Somebody is going to have to deal with the fact that there are people in society who can't, you know, do all the things that some others can do.

MS KILCULLEN: And this is where that rearrangement I was talking about earlier comes in as well because if somebody is going to have to deal with it, then very often it's way more efficient and less costly and all the rest of it to remove these items which are barriers that we're talking about, and that needs to happen.

MS HOPE: Exactly. Having the DDA - - -

MS KILCULLEN: It's the same about it being pro-competitive. If there are barriers that - - -

MS HOPE: There's a cheaper ways to deal with the problem.

MS KILCULLEN: That's right.

MS HOPE: The problem exists.

MS KILCULLEN: If you can have employment and participate fully and all the rest of it, it will cost a lot less than dealing with the problem that's going exist anyway if you don't remove the barriers.

MS HOPE: Yes, because as soon as you move on in exposing the infants on the hillside, you've got a problem that has to be dealt with, and I reckon this is a cheaper way of dealing with it than having a lot of people sitting at home with their spare capacity unused. That's talking about employment situation and the same sort of argument would apply in the activity area. Should we move on there?

MS KILCULLEN: Temporary - bottom of page 13?

MS HOPE: Yes, but above that, there's a reference to:

> Discrimination is permitted only in limited circumstances; for example if a person cannot perform the inherent requirement of the job -

and you just made a comment to me when we were reading it through that that language creates - that language which is in the act as well, creates a confusion with attitude because we're saying if someone can perform the inherent requirements of a job, then it's an artificial barrier to discriminate against them, but if they can't perform the inherent requirements, then what you're doing is not discrimination.

MS KILCULLEN: Yes. That's right.

MS HOPE: Would you like to have another bat at that?

MS KILCULLEN: Yes, I think I've probably made the point already, but just to check - yes, my problem with the way that is put is that if a person can't perform the inherent requirements of a job, it's not discrimination not to employ them. It's exactly how you treat somebody without a disability as well, which is what I was talking about when I read out that section earlier from the Disability Discrimination Act about the definition of "discrimination". It's not discrimination if you treat them, not less favourably, but just exactly the same under those circumstances as you would - - -

MS HOPE: So many - - -

MS KILCULLEN: And not employing them is treating them exactly the same as you would a person without a disability.

MS HOPE: Who could not perform the inherent requirement of the job.

MS KILCULLEN: Yes. That's right, and that does create confusion because it makes people think that they're going to have to employ somebody who can't perform the inherent requirements of the job, just because they had a disability which creates all that resentment and the hump issues that we were talking about earlier. They think they're not going to get anything out of it; it's always going to be a drag on their resources to employ this person, whereas in fact what we're saying is once you get over that initial barrier, if there is one, then there is no disadvantage to the person doing the employing, because if there was, they wouldn't have to employ you.

MS HOPE: Yes.

MS KILCULLEN: They only have to employ you if you're going to be just as good or better than - - -

MS HOPE: Yes, because it wouldn't fall within the definition of discrimination.

MS KILCULLEN: That's right. It wouldn't be discrimination. It would be just normal business practice, and I think it's important people realise that they are not being asked to change what is normal business practice. They're not being asked to make special exemptions or, you know, to place a burden upon themselves - an ongoing burden upon themselves. It's not what they're being asked to do. What they're being asked to do is get over those initial barriers which are not relevant to them in the long term.

MS HOPE: In the long term.

MS KILCULLEN: Yes, and so that's where the question of a third party to help them get over the barriers comes in because even if they're talking about a short-term problem. That is a real - that is still a cost to an employer to get over that barrier, and it's a real cost and one that they should be allowed to fairly say if - - -

MS HOPE: Should be shared by the rest of society.

MS KILCULLEN: Yes, that's right, and as it is now, employers tend to see that cost and to see no way of ever recouping it. Even if it is a short-term issue, they might be thinking, right, that's six months for instance which somebody's productivity is not going to be the same level as somebody else, and given what I was saying earlier about there often not being a best person for the job, they will just employ the person that doesn't have that hump.

MS HOPE: Yes.

MS KILCULLEN: And you'll never know. Like, there's no way of ever proving that that's what's being done.

MS HOPE: Yes, and that relates - - -

MS KILCULLEN: You know, you can't.

MS HOPE: - - - to the complaint system as well. You can't prove that discrimination is being - - -

MS KILCULLEN: And even if you could, the way things are sort of set up, why should they have to overcome that barrier? Why should, say, a small business have to take a six-month decrease in productivity for the sake of general societal benefit of having more people who are able to participate when it's not going to bring them any actual overall benefit. It's just not going to bring them any overall costs apart from the - - -

MS HOPE: The hump.

MS KILCULLEN: - - - hump, yes. So that's where the inherent requirements bit comes in. I think that language should be clarified by now.

MS HOPE: Okay. So now we're at temporary exemption.

MS KILCULLEN: Yes, I had - did you have anything to say about that?

MS HOPE: Just a very minor point but, yes, you go ahead.

MS KILCULLEN: Yes. Well, I just had a very quick point under "Under what circumstances should temporary exemptions be granted?" I think it's important that they should be limited in time and that that should be enforceable because I see that sometimes they are used to delay things that really should not be delayed. They sort of allow people to put things at a lower priority because they're not as urgent as they would be if they didn't have an exemption.

MS HOPE: Is that something you've seen in the context of negotiations?

MS KILCULLEN: Yes, in the context - particularly at building issues. I didn't actually see this happen I hasten to add. It was just a sort of issue that we were considering, but, yes, like, to say, "We have all this building to do and we're going to do it in five years' time," also allows various things to slip down a list of stuff that had to be done. It preserves an exemption and so it would be all right to do it in five years' time.

MS HOPE: So are you saying that the fact that there's an exemption there means that it's very difficult to be specific enough with the exemption to only apply it to something that really deserves an exemption, but other things sneak under the umbrella of the exemption or - - -

MS KILCULLEN: Yes, partly that, and partly that it's really important that it should be a limited time; that somebody at the end of those five years or whatever should say, "So happy now. Done the thing." Rather than going, you know, "You don't have to do it for now," that should always be followed up with, "Have you now done it?"

MS HOPE: Yes. So they should be specific enough that they don't end up becoming a cover-all for everything that people don't want to do until five years have passed.

MS KILCULLEN: Yes.

MS HOPE: And there should also be a check at the end of the five years.

MS KILCULLEN: Yes. There should be some legal requirement that it be done and an exemption is going to be given in the intervening period.

MS HOPE: Five years, that's actually - I mean, if you're thinking about a person's lifetime, it's actually a long enough time - it's longer than most people would take to get an undergraduate degree for example. It's as long as many people would spend in any given job before moving on anyway. So it's a child growing from babyhood to going to school. So is five years actually - what I'm seeing here is obviously if somebody - if I want to access education and someone says, "You need to wait for five years," that basically is the same as telling you, "Don't bother getting it at all." So is there a reason why five years is a reasonable length of time to be allowing people?

MS KILCULLEN: I'm just looking for where I got the five years from.

MS HOPE: No, five years is actually in here.

MS KILCULLEN: Is it.

MS HOPE: They may not be more than five years.

MS KILCULLEN: Right. Yes.

MS HOPE: I wonder, you know, if that's a fairly arbitrary number or if that reflects some kind of business reality or funding turnover reality or anything like that, or again looking at it as you would need to justify it on competition principles - you know, "Why five years?"

MS KILCULLEN: I guess a lot of organisations now have a five-year rolling budget which may have something to do with that. I know at least the university had a five-year plan for funding which was how they funded all their capital works and that sort of thing, but I think that wasn’t an unusual period. That was kind of like a financial year - - -

MS HOPE: Forward planning.

MS KILCULLEN: Yes, that people had their sort of five-year plan, their 10-year plan, whatever. So it was kind of a point which, yes, people talked about. But I mean in terms of the effects that you're talking about, I have actually seen that happen with a basic, "We can't afford to do this, buy this," as a result of which the person involved did not get a university education. She gave up because it was too hard, and waiting around five years was - - -

MS HOPE: Not feasible.

MS KILCULLEN: It didn't make any sort of material difference to her immediate plans. Like, not getting an education for five years was the same as not getting an education for as far ahead as she could plan anyway.

MS HOPE: Yes. Because people make five-year plans as well.

MS KILCULLEN: Exactly, and she just never ended up being able to do that because by then her family had moved somewhere else and all sorts of other things.

MS HOPE: The opportunity occurred in her life at 18 or whatever it is to go on to university.

MS KILCULLEN: That's right. They were lost for that, and I think - I mean, I'm talking - my own experience is only really with tertiary education and with the sort of effects of schooling on the people who managed to make it to tertiary education, rather than with, you know, primary school education and stuff like that, but if we're talking five-year exemptions for, say, a primary school, you're talking about a very very significant developmental cost to a child, to delay them for five years from what they wanted to do. But I'm assuming that these exemptions are attuned to that kind of thing.

MS HOPE: Yes. That's HREOC's job. It's not really related to the matter. The only point I was going to make in relation to the temporary exemption thing there is that HREOC produces guidelines and conducts public inquiries, and just the word "public inquiry", the issue of using public inquiries as a way to obtain important information about how a disability policy should be developed cropped up a few times as I was reading the paper, and also cropped up in terms of whether or not to make a submission to this inquiry that we're now submitting to.

If you're making public inquiries in the area of disability, then almost by definition you are dealing with the people who have the expertise - ie the people with the disabilities - on all the things that you need to know about, people who by definition find it difficult to do some aspect of their life that most people find easy. So even if they are well paid or in other ways are well resourced, it is more difficult for them to contribute because everything just is that much harder because they've got something extra to deal with. I don't know what the percentage response is to public inquiries in general, but it can't be very high, but similar to questionnaires and surveys and so on. You don't expect more than, you know, 30 per cent or something often if you send out a survey.

So I imagine that you'd get a very very low percentage response. So I don't know that it's necessarily the greatest way to obtain information about these sorts of things. It might be better to go out deliberately using the structure of umbrella organisations and pulling them down. I don't know how you'd actually access that information.

MS KILCULLEN: Actually that was something that came up a lot when I was doing the work with Meals On Wheels and in association with the local government that the largest proportion of people that I consulted with were actually service providers rather than service receivers, and I didn't like that. I wanted to do what I could about that to get a higher proportion of the sort of end users of the system, and the people who were managing the system, but it was very hard to do for that kind of reason. You ended up talking to organisations representing people more than you ended up talking to the people themselves. It's just the kind of reasons that we're talking about.

I think like what we seem to be getting into now - perhaps it's premature, I don't know - is the area of how you measure some of these things. We were talking earlier about how this complaints-based system and also public inquiries - you know, a similar thing, we were talking about the possibility of audits perhaps and monitoring systems. I don't know where - - -

MS HOPE: Let's talk about that a bit later but, yes, public inquiries in general, there is that caveat that in a way they're again relying on the very people who are going to find it hardest to give you the information, to come forward voluntarily on top of their other, you know, views and obligations and desires, and get out information. I mean, this particular inquiry that we're making a submission to, the fact that we can do it by tape is the only reason that we're doing it. So they've done a really good job to try and make it accessible, but even so it's a big deal to set aside this time when everything else in life takes a bit longer than it does for a lot of people. So just, you know, a caveat about relying too heavily on public inquiries is - - -

MS KILCULLEN: Perhaps you can pass it on to the people who set them up, that they should give you guys at the research end heaps of time to deal with wading through all of our long tape submissions rather than - yes - assuming that all - - -

MS HOPE: Time is actually often one of the biggest issues with that type of thing. Often public inquiries - you know, you've got, like 30 days to submit and, you know, it can't be done if you can't write, you know what I mean?

MS KILCULLEN: Yes.

MS HOPE: Unless there is some special arrangement. So anyway - go ahead - even less if you had difficulty speaking, which I know you are - are you finding it a bit difficult?

MS KILCULLEN: Yes.

MS HOPE: Would you like to take a break?

(tape stops)

MS HOPE: We've just had a little break, and now we're up to page 14 of the issues paper, and the heading that we're discussing here is Reasonable Adjustment and Unjustifiable Hardship. Margie, would you like to make your points in relation to that?

MS KILCULLEN: I've only got a few notes here which seem a bit confused, but we were talking about it quite a lot the other day. So perhaps if I come to remember what we were saying.

MS HOPE: Okay.

MS KILCULLEN: We were talking about the distinction between justifiable and unjustifiable hardship. It says here it's crucial, and I think that is true, but it's a key area of confusion because for a start, who has to do the justifying, and then to whom are they doing the justifying. So if you're talking about legal issues, you can probably kind of elaborate on this better than I can. For instance the justifying has to be done to a court after you've made a complaint, by the person with the difficulty, and that's not really very helpful. I'm not quite sure where that's going.

MS HOPE: Yes. I think that's right. I mean, what you're highlighting there is this whole issue that's built into that phrase is this whole issue of onus of, you know, "justifiable" means justifiable by someone to someone, and it's not clear from the phrase itself exactly where that burden will lie and to whom it means you justify.

MS KILCULLEN: Also it immediately sets up a system in which you have to be justifying things. It sets people against each other right from the beginning because employers or educators or whoever are thinking, "No, this is a hardship that isn't an unjustifiable one." So they're thinking about their rights, and the person from the other end was thinking, "Can this hardship that I'm asking them to do be justified?" If it can, you've instantly got the kind of argument implied in having to justify - - -

MS HOPE: The adversarial sort of - - -

MS KILCULLEN: Yes, that's the word I'm looking for. It instantly sets up an adversarial situation to set out an exemption which can be justified or unjustified, depending on what side of the fence you're sitting on.

MS HOPE: Yes, and I think what I'm about to say might be qualified if you look at the act, and it might have to be qualified if you look at the way "unjustifiable hardship" fits into the rest of the act, but just the words itself, I think not only does it set up this sort of adversarial situation, but it does definitely put the burden onto, if not the person with the disability, then someone arguing on their behalf, and to illustrate that point, just think how different the whole problem would look of what unjustifiable hardship is or what the content of the concept should be if instead you talked about justifiable discrimination. If you had to justify the discrimination, how different would that look from justifying the hardship? Do you know what I mean?

MS KILCULLEN: Yes, absolutely, and I think, too, the use of hardship there to make another comparison, reasonable adjustment, as it's pointed out in the issues paper is not actually in the act. But there's a world of difference in the implication between a reasonable adjustment and an unjustifiable hardship where - - -

MS HOPE: Or a justifiable hardship.

MS KILCULLEN: Or a justifiable hardship, yes, when they in fact could be talking about just the same thing, because you've instantly got a hardship there; somebody is thinking, "This is going to be a problem that I have to deal with. Either it's right that it's been thrust upon me or it's not, but whatever it is, it's a problem that's been thrust upon me."

MS HOPE: Reasonable adjustment is a lot less catastrophised a term.

MS KILCULLEN: Yes, that's right, and also I've got here two other notes. One is why accept any hardship which I think is coming back to that community question again. Even it's a small hardship, even if it's just that they have to rethink their view of a job - - -

MS HOPE: It’s by no means a small issue in practice.

MS KILCULLEN: That’s right. It’s not a financial issue which is also part of the definition of a "justifiable hardship" in the act. It seems to be very much financially focused, and that’s the measurable element of it, but there is a big element of hardship which is not measurable like that which applies to the overall economic system that a business is working in in their sort of overall productivity as opposed to something specific that they can put their finger on now and go, "This will be a cost of putting in a ramp," or whatever.

MS HOPE: Yes.

MS KILCULLEN: There are costs like that that are hard to quantify, but there’s also - to get back to inherent requirements again just briefly, I think part of the problem with the concept of inherent requirements is that it poses - having a concept of what the inherent requirements of a job are already imposes a hardship upon employees because it’s not in fact standard practice for them to know what the inherent requirements of a job are before the interview. I’ve seen this from both directions - both as an applicant and talking to various people I know who were conducting interviews about how to conduct them and how they were choosing people, and we talked about the inherent requirements in fact when talking about that.

The problem with then was what can be shifted to another position or what can be done in another way, all of these things are questions that are not necessarily thought about before you employ someone. I realise that even people who are on selection committees did not know exactly what they were looking for a lot of the time.

MS HOPE: Or exactly what the job was that they were - - -

MS KILCULLEN: Yes, exactly.

MS HOPE: They knew that they needed extra help around the business and they were going to organise exactly what the job was.

MS KILCULLEN: Yes, but there are always sort of flexibilities and grey areas falling there. They were going, "Well, this person might be good because we can fit them into this slot. That person might be good because we can fit them into a slightly different one." It wasn’t a situation where it would be very easy to compare and say, "These are the clear inherent requirements of the job. This person matches them, but they weren't given the job because of their disability." There is not a clear issue of that kind because nobody had worked out the inherent requirements.

The problem with then a situation where people were faced with an employee with a disability was that they had to come up with the inherent requirements of the job when they were already presented with the problem which was the - - -

(tape changeover)

MS HOPE: Okay, so you were saying - - -

MS KILCULLEN: Yes, that they had not defined the inherent requirements of the job until they were put into a position, because of a disability - - -

MS HOPE: Of having to justify a decision that they had made.

MS KILCULLEN: Exactly - when they then had to define what the inherent requirements were. Now, to require people always to know what the inherent requirements of a job are, before they do any interviews, is putting a big burden upon a business, which would ultimately probably be a productive one - for people to know how their systems work efficiently and what could be changed.

MS HOPE: A bit more clarity and certainty.

MS KILCULLEN: Yes, like a bit more clarity in a business is not necessarily a bad thing, but it's something that takes time and effort and is not a financially quantifiable thing to require someone to do. So getting back to the hardship question I was going to say, again, why should those sorts of things be the problem of any individual business or person who's employing, educating, rather than the whole community? I think that feeds in a little later into some of the questions about industry self-regulation and voluntary plans and stuff like that.

MS HOPE: Yes, which you had some interesting thoughts on.

MS KILCULLEN: Yes, because that's the mechanism by which people can set aside the space to work out things like inherent requirements on a broader pattern that's not going to cost an individual so much time.

MS HOPE: Yes.

MS KILCULLEN: But my other point about unjustifiable hardship is that it instantly becomes a question of legal risk as well, which was part of what I was saying about adversarial things. To put it that way means that people are thinking, "How likely is it that I'm going to be complained against, and when I am, how will I be able to justify it," rather than thinking in terms of best practice or more positive, reducing the barriers kind of concepts. It instantly lowers it to the lowest denominator of, "What can I get away with," rather than, "What's the right thing to do?"

MS HOPE: Yes, and not the morally right thing to do but the best practice, best design thing to do.

MS KILCULLEN: Yes, that's right, and also from a human rights point of view the right thing to do, which is - - -

MS HOPE: But not only that.

MS KILCULLEN: Yes, but not only that.

MS HOPE: For the purpose of this discussion, although we do share that, that belief that it is - - -

MS KILCULLEN: Yes, and think that it is equally important in the legislation.

MS HOPE: Nevertheless, we think that the arguments we're making are justifiable on economics grounds as well.

MS KILCULLEN: Yes, on both, basically. They're justify on both.

MS HOPE: Yes.

MS KILCULLEN: Yes, and it instantly lowers it to the question of immediate economic risk to a business - of being sued and stuff - rather than long-term best practice.

MS HOPE: So do you have more comments on this area?

MS KILCULLEN: No. Go right ahead.

MS HOPE: Okay. I guess my first comment - this is in relation to one of the introductory paragraphs about the reasonable adjustment, unjustifiable hardship stuff on page 14. You've said:

> If the level of unjustifiable hardship is set too high, compliance with the DDA could be unduly costly for those affected and for society generally.

Then:

> If the level is too low, too much discrimination might be tolerated.

That's one of those just pieces of phraseology in the issues paper that I think reflects a broader assumption - not always made in this issues paper but occasionally sort of popping up its head - that the costs are only those costs associated with a requirement of the DDA and that, you know, against the cost is discrimination. That's said against the cost. We need to avoid that type of thing. But once again - - -

MS KILCULLEN: To me, it's set against a broader cost.

MS HOPE: To me, yes, it's the cost of complying with the DDA versus the cost of not complying with it, in the same terms of, you know, how do you pay people to pay for their groceries and so forth if they can't get a job. I think that is acknowledged elsewhere in the paper. But to me, it's something that really needs to be emphasised. The reason I feel so strongly about this is actually also in connection with the reasonable adjustment issue, which is where I have the most difficulty and have experienced the most frustration in relation to my disability. Would you like to make a comment?

MS KILCULLEN: Can I just briefly interrupt you there - - -

MS HOPE: Yes, absolutely.

MS KILCULLEN: - - - to talk about how that connects with what I was saying about unjustifiable hardship. The question of level assumes that you're talking about the level that you impose on an individual, and setting that too high or too low will encourage or not encourage individuals to act in a certain way.

MS HOPE: Yes.

MS KILCULLEN: I think that feeds into my question of why should any one individual have to accept any hardship whatsoever. They'll avoid it whenever they can, and why shouldn't they.

MS HOPE: Yes.

MS KILCULLEN: We should have a system that doesn't require those costs to fall on individuals where it is possible to make that not happen.

MS HOPE: Yes.

MS KILCULLEN: We've set it up so that - the intention of the act is so that it doesn't settle on people with disabilities, but there's no real improvement if it settles on the other party to the - - -

MS HOPE: Well, there is an improvement - - -

MS KILCULLEN: There's some improvement.

MS HOPE: - - - in that the other party is - you know, whereas - - -

MS KILCULLEN: Doesn't have a disability as well.

MS HOPE: Yes, I mean, they may, they often may as a matter of fact. But I think we should also avoid the trap of thinking in terms always of small business here - - -

MS KILCULLEN: Yes.

MS HOPE: - - - because that is the terms of reference emphasis, but in fact that's one of the reasons why the competition policy review was politically controversial, because it seems to be setting things up so that all of what we value in society that is beyond the mere economic cost benefit sort of rationale is now going to be justified according to whether small business can afford it, and in fact small business is the least able to afford it of any sector.

MS KILCULLEN: Yes.

MS HOPE: So again relevant to the issue of whether these principles should apply in relation to Commonwealth laws and programs and the Commonwealth itself - I mean, suppose we did this whole cost-benefit analysis with the big emphasis on whether the Commonwealth could afford it, we would be getting different answers.

I think the point that I was making before about DDA being costly for society generally, depending on the justifiable or unjustifiable hardship level - I think you were making a slightly different point from the one I was trying to make. Yes, I agree, as we've said before, that society generally should be bearing the burden in an evenly distributed way, but my point is that the DDA itself doesn't increase the burden. If it works properly, it should determine the burden because it should remove unnecessary aspects of the burden of dealing with disability in society, which is going to exist no matter what we do.

MS KILCULLEN: Yes, absolutely.

MS HOPE: So the point that I'm making is when we talk about compliance with the DDA becoming too costly for society generally, that suggests a lack of understanding of the fact that the costs are out there no matter what and that the DDA is a way of bringing them down, rather than putting them up.

MS KILCULLEN: Yes, you're so right.

MS HOPE: Okay, so that was the point I was making there. In relation to the reasonable adjustment issue, yes, that's the area in which I've had the most difficulty myself. In fact the difficulty that I had was in relation to delay in providing reasonable adjustment. I think that what you were saying before about time frames, Margie, is like so crucial in the context of reasonable adjustment in the workplace, because in my case I was told, "Yes, you can have this adjustment, there's no problem, we're going to provide it for you," and then it just simply was not provided. It just continued to never be provided and I continued to have to ask for it and it just never - but at every point I was told, "Yes, absolutely, sorry we haven't done it so far, we'll do it for you as soon as we can."

That really sweeps the ground from under you, in terms of complaint, because you've been assured that the problem will be dealt with. There's no overt resistance to the problem but it's kind of passive resistance. I think again that comes down to - I don't actually - - -

MS KILCULLEN: It also creates a huge - when we were talking about the psychological effects and sort of hump issues before, it creates an impression of a large cost and a lessened capacity for doing something, which isn't real. Like, in your case, didn't you find that people were starting to sort of treat you as though you were an unproductive worker and all of that kind of stuff, whereas in fact if you had immediately been given the adjustment that they said they would give you there would have been no unproductivity involved?

MS HOPE: Right, and actually the point I did start to make a little earlier was that my strong feeling about the fact that there doesn't need to be any tension between economic efficiency and complying with the DDA is due to this experience that I had in which the value of my work was probably several thousand dollars a fortnight in terms of what I was bringing in for the organisation or what I would have been if I had been able to be fully productive. The cost of the adjustments I required, in the end when I eventually did buy them, were about half of a fortnightly wage and yet for 18 months I didn't have this and was being paid a wage to do nothing, to effectively do nothing, which made me extremely frustrated. But in that case the economic interests of myself and my employers were totally coincidental, like they coincided with each other, and yet through this process of catastrophising about the size of the adjustment that needed to be made and then this process of passive resistance, not actually making the adjustment, huge amounts of - - -

MS KILCULLEN: It became a big cost.

MS HOPE: It became a big cost, and huge amounts of money was wasted that was entirely unnecessary. It was just borne in upon me, through that whole experience, that people assume that there will be a net cost in doing what's required by the legislation or in doing the morally right thing. But in fact it may be, given that the disability has occurred and that the person is there, you know, needing to be employed in some way, then the cheapest thing to do is what the Disability Discrimination Act says you ought to do. Sorry, would you like to - - -

MS KILCULLEN: I was just going to say, it may be a very small cost that is the hump that people are getting over there, but they think that it's bigger than that, partly because it has become their cost and it wasn't otherwise their cost.

MS HOPE: Right.

MS KILCULLEN: So it is costing them something and they think it's going to cost them a great deal, whereas in societal terms to pay you a small amount to get over that hump costs no-one very much and is much more efficient.

MS HOPE: Yes, but I think we're mixing up two points there. There's the issue of evening distributing the cost. There's also the issue of absolute costs, and how the absolute cost is smaller if you deal with things quickly.

MS KILCULLEN: Yes, because the absolute cost to them was smaller too, wasn't it.

MS HOPE: Yes, that's my point.

MS KILCULLEN: Sorry, catching up now.

MS HOPE: Even in this non-distributed situation, in which the burden was imposed on them as a single organisation to deal with, it was totally in their financial best interests - in their purely financial best interests - to go ahead and spent the money on getting me over this hump, and I would have gone on to be a productive employee, as I later have done. Even though I still have the same disability, you know, I'm as productive as anybody else and it's because I have this technology. So I think there's often this really imaginary intention between economics and human rights in this context, which is often entirely artificial, and the cheapest thing to do and the most efficient thing to do is also the human rights thing to do. I just wanted to make that point.

MS KILCULLEN: Would it send things off in the wrong direction if I extend that to sort of a broader social picture of some of the things that happened to me at uni?

MS HOPE: Tell us - - -

MS KILCULLEN: What I was saying earlier about the voice recognition issue and how funding went with individuals and how the university was going to spend a lot more money getting me through with the scribe than they would with that piece of equipment, that applied - if you look at the whole stage thing. If I had to stop university at that point because I hadn't been provided with that, I would ultimately - and when I was talking about Commonwealth Rehab Service as well - I would ultimately have fed a lot less money into the tax system than I would otherwise. I would have had to be supported to a greater extent - in fact immediately - by the social security net, rather than by the scholarship that I already have, and I would have generally cost a great deal both to the university, who was sort of the direct person there, and to society as a whole.

It would have cost them an immense amount more, immediately and also over time, to not overcome that small initial barrier, than it did to just buy the equipment, which allowed me to live off my own money and also to get a better paying job that then fed into the tax system too.

MS HOPE: Yes. So what we're actually doing here is making two related points. One is that it isn't an overall net cost for society generally, a lot of the time, to actually comply with the DDA. Net, if you're taking all the actual real costs into account, into the picture, it can be cheaper for society to do it. The second point we're making is that it is often also cheaper for the individual organisation, who shouldn't, according to our philosophy, be dumped with this responsibility but who currently is. It still is in their best interests, financially, to comply, and often they will do what isn't in their financial best interests, out of basically pigheadedness based on prejudice.

MS KILCULLEN: Yes.

MS HOPE: Or - and now this is the second point I was coming to - so I wouldn't presume to guess what the motivations were of the people who I was dealing with. I suspect that there was some of that pigheadedness and prejudice going on but I can't say that for sure. But on the other side of it, there was this systematic issue and this whole institutional issue.

MS KILCULLEN: There's a lot of plain confusion as well.

MS HOPE: Plain simple confusion, and it's about being in a big organisation, and everyone who has ever worked in one recognises that there doesn't have to be any ill will going on for terrible things to happen to people in an organisation.

MS KILCULLEN: Which kind of feeds in to what I was saying too, about unjustifiable hardship also meaning systems adjustments.

MS HOPE: That's right.

MS KILCULLEN: Getting over the confusion is also a hardship.

MS HOPE: Yes. Putting a task off and off because it's a lot of - the point I was trying to make here is, it's better for everybody if - okay, to take the concrete example of the information technology system within a large organisation. One reason why it may be that my software was not dealt with quickly was because it required somebody to become familiar with the software and they may not have needed it. So it was a slightly harder problem than the average problem that came in on a daily basis to the help desk. Now, if you have a help desk system which runs on the basis of deal with the easiest thing and let anything that's a little bit hard slip to the bottom, which I think is actually quite common because help desks seem to be overworked and - - -

MS KILCULLEN: Deal with the urgent stuff they can deal with, yes.

MS HOPE: That's right, deal with the urgent stuff, and in addition you deal with the stuff that's easy.

MS KILCULLEN: Yes.

MS HOPE: That seems like a reasonable philosophy, you know, on a daily basis, but in fact from the overall efficiency perspective you can't run an organisation on the basis that all the hard jobs fall to the bottom, even if, as in this case, they were quite urgent, so that IT people were going to help somebody out who was having a minor problem with their word processing program versus getting a fully qualified, fully paid lawyer up and running to do any work at all. So the problem that I was having was technically more urgent but because there was that little extra barrier, that little extra hump to do it, it was falling to the bottom of the pile, even with no ill will or prejudice involved. I think that obviously for an organisation it is better to have a system, it's universally better design to have a system that can deal with the slightly more difficult problems as they come in; for example, to have a queue system where whichever problem came in first is the one that gets solved first.

MS KILCULLEN: Yes.

MS HOPE: Or whatever. I'm not saying what is going to be the best system. But the point is - - -

MS KILCULLEN: It's universally better design.

MS HOPE: Yes, universal design should often be the principle, and it shouldn't come down to a question of the person with the disability having to challenge the inefficiencies of the whole system, but that is often what happens. To assume that it's efficient for the system to be doing what it's doing is a very false assumption.

MS KILCULLEN: And universal design, when it comes to matters of disability too, I think feeds in very strongly into the competition principle we were talking about of encouraging innovation and - I can't find the point now - but you know, encouraging innovation and productivity. The things that do that are also the same things that make it easier for people with a disability - flexibility, good understanding of what you're trying to do - all of those kinds of things are the same things as the competition policy is designed to encourage.

MS HOPE: Actually, that's related to another point that I think is made in the issues paper a bit later, when it's talking about the economic situation. Once again it refers to even if the price might be higher or the quality of the service lower, for society generally, as a result of complying with the DDA, it still might be justifiable. But in fact it seems to me much more likely that the product will be a better product.

MS KILCULLEN: Yes, that's right, the service is likely to be better, rather than poorer.

MS HOPE: That's right, and the price may be higher than the price for that service would be, but the overall cost to society is not necessarily higher at all. Here's an example, just a very simple example: my telephone. Because it's difficult for me to hold on to my telephone handset, because it requires me to use my hands, I obtained just - I had to look pretty hard for it. It's pretty hard to find one of these phones. I obtained a phone that has a headset and is a cordless phone. It's a cordless phone with a little belt clip and you can wear it without having to hold on to anything, so you can walk around the house. The reason I got that is because I needed - at one stage my disability was bad enough that I needed to move around and shift around. I couldn't just sit in one spot, next to the phone, very comfortably.

So what I've now got is a phone that everybody who has a baby to look after or wants to cook or clean while they're talking on the phone or somebody or who wants to sit there and write or type while they're talking on the phone - you know, it's a perfect home phone. Nobody understands, when they see my phone, why they aren't widespread and everyone doesn't have them, you know what I mean.

MS KILCULLEN: In fact the same happens to me, even though I only have a headset attached to a stationary phone. They think, "Oh, it's brilliant, I wish I had one of those."

MS HOPE: That's right. So the reason that we went out and found these products which were difficult to find because there isn't this demand for them out there - but there is a demand when people realise that they're there. So if these disability friendly phones were mandatory industry standard, everybody would have a better product - a much better product. So that's just one of many, many examples of better products.

MS KILCULLEN: We were talking about with regard to workplace stuff too, a while ago, workplace flexibility. I mean, one of the biggest problems that I've had in looking for work is looking for part-time work, which is a tricky one because, you know, how inherent is it that a job be full-time if you can share it with somebody else, et cetera. So that causes all sorts of complications of its own but looking at that and the current debates about child care and work life things and all the rest of it, greater flexibility, greater ability for people to have part-time work, less deterrent to that in things like payroll tax and other issues of that sort, would be good for everybody and reduce stress levels, increase economic activity, reduce child care costs. All kinds of things would happen with something that is just generally better design for all concerned.

MS HOPE: I think you were making the point in our previous conversation about how there's a limit to the amount of productive work that most people can do in a day and that being able to do it at a time when you're at your peak is ideal in terms of efficiency.

MS KILCULLEN: Yes, it means that your employer is not paying you for all the down time that everybody has anyway.

MS HOPE: Yes. So if you're on a part-time job because you have a disability and that's because you have chronic fatigue syndrome or any other similar sort of disability that means you have a lower energy quota from hour to hour than the other person might have, if the workplace can allow you to work when your energy is up you are going to be at least as productive and not at the cost of the employer.

MS KILCULLEN: Yes. In fact it seemed to be - I mean, one of my previous employers actually sort of said to me that I was doing as much work, if not more work, in sort of half the time as some of the full-time people, because when I was at work that was all I was doing, I was really focused on that. All of the kind of mental down time that people always have was on my own time. I wasn't being paid for that.

MS HOPE: That’s kind of famous in the case of mothers who work part-time; that while they’re at work, the workplace gets a huge amount of benefit out of them. There are obviously other downsides from the workplace perspective, of having part-time employees, but again those are the things that perhaps could be - - -

MS KILCULLEN: Yes, the benefits that are more widely applicable, anyway, to making things more flexible or more accessible.

MS HOPE: We talked about the French 35-hour week and how it did seem to - - -

MS KILCULLEN: Yes, and how it seemed to have actually been good for the company.

MS HOPE: Yes.

MS KILCULLEN: Yes, there are many things like that that would help with part-time work, but anyway, we won’t go into them here.

MS HOPE: Okay. I think we’ve actually addressed some of those issues about reasonable adjustment in terms of what’s the impact on competition and who should bear the costs of reasonable adjustments. I just wanted to make - besides my point about the issue of delay in providing reasonable adjustment, I actually think that there should be time frames built into the requirement to provide a reasonable adjustment. I know it’s not part of the act, the term "reasonable adjustment", but time frames should be part of all of that - because honestly, it was just the most frustrating thing on the planet, 18 months doing nothing at all for no good reason.

MS KILCULLEN: Yes, and that should be fixed somehow.

MS HOPE: It’s just a pointless waste of human life.

MS KILCULLEN: That is discriminatory, even if it’s not currently defined as such.

MS HOPE: Yes, that’s right. The other thing about it is that when reasonable adjustments are being made - back to the point about who has the best information about what reasonable adjustments should be made, definitely it should be a matter of including, in the decision that the employer makes, consulting the person with the disability about what is the best way to adjust the situation. So often that isn’t done, for all kinds of reasons.

MS KILCULLEN: It's just insane, if I might put it.

MS HOPE: Yes. It's just a stupid way to run things, to not be consulting the person who has the most interest in the thing working and the most expertise on how it's going to work. That also is part of my own - - -

MS KILCULLEN: And who knows whether it is working, more to the point.

MS HOPE: That's right. That was also part of my own situation; that there was a choice of software and I knew which one was going to work and there was a very big difference in quality between the two, which is well recognised within the community of people who actually use the software, within the voice recognition user community on the Internet and around the world. So there was this very clear difference between the two pieces of software and my employer didn't know about the clear difference and chose the one that didn't work so well. At that point the money had been spent and it was now very difficult for me to persuade anyone to buy the one that actually worked. So the person with the disability needs to be consulted about the adjustments on a systematic basis. Margaret just commented that that really should go without saying, but of course it doesn't, so we're saying it. We're now up to the section on harassment, which is on page 14.

MS KILCULLEN: Are we just following on now from what we were saying before?

MS HOPE: Okay, but before we move on to the harassment issue, just on the reasonable adjustment and unjustifiable hardship point, Margie, you had some clarifications.

MS KILCULLEN: Yes, I just wanted to make the point that what I was saying before about why should anybody accept any hardship - I do believe that people should be generous and also should have a spirit of social responsibility. As I was saying quite a while ago now, society is made up of individuals. It's not right either to expect the government should do everything. In the case of non-financial hardship, obviously there's not a lot that government can do. It has to be up to employers to rearrange how they do things and stuff like that. But I think it needs to be recognised that there are both real costs and imagined costs that come into this.

One of the reasons why people are confused about the Disability Discrimination Act is because they have to do a kind of double-think, where they're told that employing somebody with a disability or giving services or whatever is going to be good for them, and yet they do actually often have real costs to deal with as well. So it's kind of confusing for people to be told that those aren't real costs. It makes them think that there's some kind of strange thing that they have to take into account; that people with disabilities aren't just other people like them and things like that, because they're being told to ignore those costs.

So I think you need both the legislative backup for the imagined costs, which is what we'll probably be talking about a lot more when we move on to the harassment section, and also a better system of helping employers and educational institutions and stuff like that with what are actual costs to them as well, sort of thing, and just go, "I'll get some help with these," rather than freaking out about them. I don't know if that's very clear.

MS HOPE: I thought in relation to the stuff that you were saying before about not expecting any two organisations to deal with the whole costs of the fact that they - basically the way I took it was you were saying the burden of dealing with the full cost of a disability shouldn't fall on the person with the disability, but neither should it fall on the people that that person happens to randomly meet as they go through life.

MS KILCULLEN: Yes, that you encounter.

MS HOPE: Right. That was for two reasons: one is because it's unfair that it should just be those people randomly have to bear the burden and not the whole of society, but also because - - -

(tape stops)

MS HOPE: Okay, so two reasons why you don't want the burden to fall completely on the people that randomly meet that person as they go through life: one is it's unfair on them, but the other one is that then of course their response will be to do their best and not be the person that gets met, so to not be the primary school that takes you on or to not be the employer that employs you or whatever. So it doesn't work for either the person with the disability or the person who they're randomly meeting. But what I took from what you were saying before was that it's not - you weren't arguing that it should be the government that steps in and meets all those costs.

MS KILCULLEN: No.

MS HOPE: What you were arguing was that somehow, whenever it's possible, the funds or whatever support should attach to the person themselves.

MS KILCULLEN: Yes.

MS HOPE: Depending on - in different contexts you might have different mechanisms for that happening in mind, so that the flexibility of the person's own discretion as to how to deal with their disability is built into the whole system and you're not putting a burden on the other people that they're meeting at all, because the burden has been met somehow at an earlier date, where you've settled on that person enough money or enough resources of whatever kind to deal with their own issues. Can you clarify that?

MS KILCULLEN: Yes, although I was also thinking that there are circumstances in which there will be costs to the person that the person with the disability meets, that it's not possible to attach to them or whatever, like deciding what the inherent requirements of a job are and working that sort of stuff out, which might be a time - - -

MS HOPE: Yes, but wasn't your point that those things would not in fact crop up; that there would be no need to decide on the inherent requirements of a job if you were then dealing with somebody who was able to do the job because they had the resources to do the job, even if it wasn't in the normal way or whatever?

MS KILCULLEN: No, I wasn't making that point, because I do think that you're still going to have necessary rearrangements that might need to be made by the people who you're meeting.

MS HOPE: Yes.

MS KILCULLEN: Partly because - I mean, it can't be assumed that somebody applying for a job knows what that job is, any more than somebody doing the interviewing for it - in fact less so.

MS HOPE: Yes.

MS KILCULLEN: So you can't always prepare these things in advance. You can't set up all your systems and equipment and all the things that you might have to set up to make a job work before you've got the job. In fact, because of the nature of rearrangement that often happens, you would be trying to cover 50 different jobs at the same time and it's just not possible to do that. That would be inefficient as well. But I think part of the point that I was making, just to go back to what you were saying about reasons why it shouldn't just fall on the other party, because of that it can only happen at that moment kind of aspect of the problem, that means that it distorts the system immediately as well, to have to - you know, if you have never had to think about it before and now you have to think about it in the context of having to make different arrangements and all the rest of it, it's hard for people to see that in a sort of objective way, rather than going, "Oh, all this work coming my way."

MS HOPE: Yes, "coming my way because of that person".

MS KILCULLEN: Yes, exactly, because of that person, as opposed to, "I can just employ somebody else who might do just as good a job, without these things to overcome."

MS HOPE: Yes, hump issues.

MS KILCULLEN: There was something else in what you just said that I - - -

MS HOPE: Well, I was asking you to think about different instances where - different examples of mechanisms where you might attach the resources to the individual with the disability.

MS KILCULLEN: Yes. The point that I was going to make with regard to these sorts of adjustments is, first of all you can make things much more flexible by attaching resources to the person rather than to the institution or whatever. Secondly, if you take into account that there are these costs that are going to need to be met and that they can only be met by the employer or the person with the disability is meeting, then you can also look at things like compensation for those costs and incentives and that kind of idea, rather than saying that if they don't make that step they will be breaking the law.

MS HOPE: Yes.

MS KILCULLEN: Because as I was saying before about social responsibility and generosity and the rest of it, I think that is the way people should automatically deal with other people, whoever they are, regardless of the question of disability. But I also think that you can't really legally oblige people to be kind and sensible, of social patterns and all that kind of thing. On the other hand, if you give them incentives - - -

MS HOPE: If you make it worth their while.

MS KILCULLEN: Yes, if you make it worth their while to do that, it becomes a lot easier for people to go that extra step. If you acknowledge that it is an extra step, you stop them from kind of thinking, "Well, I'm being told that this person is just the same as any other person, but actually they're going to cause me an extra few months' work," or whatever.

MS HOPE: Yes.

MS KILCULLEN: Yes, which then makes them think there's a whole different system operating here, rather than just - - -

MS HOPE: Realising that people with disabilities are the same as everyone else, except that they have a disability.

MS KILCULLEN: Yes, exactly.

MS HOPE: So it's like trying to deny the disability itself is actually a way of making it seem like people with disabilities are more different than they actually are.

MS KILCULLEN: Yes, exactly, because people then think that, "I'm looking at this thing and yet I'm being told it's not here."

MS HOPE: Yes.

MS KILCULLEN: "I don't understand now, there must be some weird thing going on." But in talking about incentives - I mean, there are various things that you could do that might help. For instance - well, I'm wondering where to start here. One of the things that I have seen, though, is with the Commonwealth Rehabilitation Service. I had a friend who applied for a job, with their support. She was able to say to the employers, "Yes, I am going to need just a bit of extra training and a bit of time to get running. On the other hand, part of my salary is being paid by these people while that happens, so it won't be costing you more money to employ me. It will just be a bit of start-up time." They were very happy with that.

I think they realised they were going to have to train somebody into the job anyway and that this was a way of doing that, not entirely to their own cost. So it was something that they thought was good. Also, it gave them a little bit of leeway with the areas that they didn't know about. It was kind of a trial period that they could say, "Okay, well, if it really doesn't work out, then we won't have committed a lot of our own resources and time." It gave both sides a chance to show how the job worked and how this person would fit into the job and things like that, which I think was important.

I think you could expand that, not just through Commonwealth Rehabilitation Service because there were also drawbacks to that, largely in terms of bureaucracy trying to micro-manage things that they really can do, like the emphasis in that situation was on CRS coming up with a good plan of employing this friend of mine and she had all her plans of employment thoroughly well worked out. She could apply for jobs, she knew how to. She was getting interviews, all the rest of it. All she needed was that financial incentive and support. So there was a lot of time wasted in filling in paperwork and them sending her off to other courses and things, and both parties just saying, "Look, really what you ought to be doing is just exactly what you're doing. You just need our support with this." So she kind of got sucked in to a system that was not good for either the system or for her, which can happen.

But one area, a sort of easy provision of a government support - easy and flexible - would be if you looked at it through the tax system, because there's already issues of tax deductibility that people have to provide documentation for. You could for instance say any equipment was fully deductible, any documentable costs was a fully deductible taxation thing. If you wanted to take it even further, you could say this person's salary for the year is going to be half deductible or - you know, you could fiddle with things that way, which would not be a major legislative change, because there are always being changes made to what can be deducted and what can't with the tax. But it's also I think something that would work as an incentive, without suggesting that people with a disability - all of them - are always going to be a problem and need to be specially looked after, because it's related only to the extra costs that we might actually encounter.

Something like that I think would help quite a lot, because then people could turn up to a job and if there were doubts in the interviewer or in the minds of the people who might be employing them, that they were going to cost a lot and it was going to have to be a big arrangement for them, they could just go, "Well, if that does happen, we can recoup the cost," and so taking away some of the insecurity that people have - because I think in relation to what we were saying about imagined costs and real costs too, people often think that it's going to be harder than it really is. The only way to show them that that is not the case is to let people try it.

MS HOPE: To find out how costly it actually is and - - -

MS KILCULLEN: Yes, that's right.

MS HOPE: - - - to let them face their fear.

MS KILCULLEN: Exactly. If you can deal with it in retrospect, through something like the taxation system or some thing that a person brings to the job themselves or whatever, then you reduce that level of - - -

MS HOPE: What would you say to the argument that introducing more complications into the tax system is going to be a major drama for small business and that they can't necessarily have the up-front resources to deal with it retrospectively?

MS KILCULLEN: I don't think - I mean, the up-front resources question is a fair one. I think that there should be potentially other mechanisms, like we were talking about earlier, about more government funding for individual equipment and things like that. There could be other sort of assistance measures that might get over that for small business, so that there were some up-front funds, even if there weren't up-front funds for absolutely everybody, if you know what I mean. But also, in regard to the complications of the tax system, small businesses are dealing with tax deductibility issues constantly.

If you said to them, "This is now tax deductible, all you need is a receipt and possibly a medical certificate," or something like that, I don't think that would actually greatly complicate things. People are already doing that kind of paperwork all the time. An extra few receipts is not - when you deal with systems costs, that does complicate things a little more than equipment costs, like the amount of time somebody spent. You know, it's harder to assess that sort of thing. But in that case you could perhaps use either a combination of incentives or what we were talking about before about funding and - you know, perhaps good publicity for people who do that, or auditing and monitoring, as we were talking about earlier, or indeed later on in the issues paper there's talk about industry self-regulation and stuff.

It's possible that some of these industry bodies could sort of have trust funds or (indistinct) That was actually how the university managed to deal with the high cost support needs problems that we were talking about earlier. They had an endowment fund and they managed to sort of set it up so that it was possible to draw out of that endowment, but it took a few years to kind of kick in, unfortunately, while the money built up. But the idea was that would be a resource for some unexpected large amounts of money, that they could then draw on. So the concept of trust funds and stuff might be - but there are all sorts of possible mechanisms there. Somebody who knows more about economics would be better able to do that than - - -

MS HOPE: So just because a particular incentive system wouldn't work, doesn't mean that the whole idea of doing it by incentive instead of by making it unlawful to not do something - - -

MS KILCULLEN: Yes, well, I think "instead of" is a wrong choice of words there, because I think you need both, partly because of what I was saying already about those imagined costs. If people think that they're going to have to - like, you can reduce their fear of those by having a safety net.

MS HOPE: Making them more afraid of being unlawful and also making them less afraid of the actual cost.

MS KILCULLEN: Yes, exactly. If you have a safety net and you say to them, "If you encounter these costs then you will be able to pay for them," but you also have a system that forces them to try and encounter the costs, because of what we were saying before about just not wanting to meet those challenges and a natural reluctance to kind of do something that - - -

MS HOPE: Deal with any different or new - - -

MS KILCULLEN: Yes, to deal with that aspect of change. I think you need both, and I think that there are also circumstances in which people will not be able to be convinced of the sort of worth of employing somebody who might be different, for any reason, unless they're forced to employ people like that. It's kind of like the anti sex discrimination laws, you know; you need to actually have women employed to stop people from going, "They can't do as good a job." You need something to force people to do that, as well as things that reduce their actual costs.

MS HOPE: Yes. So is that all that you wanted to say on the issue of reasonable adjustment and unjustifiable hardship?

MS KILCULLEN: Yes, I think so. I was just wanting to clarify that I wasn't suggesting that there shouldn't be any change in - - -

MS HOPE: Any obligation at all.

MS KILCULLEN: Yes, any obligation or any change in attitude, and also because of what you were saying earlier about not encountering costs at the most difficult time of your life.

MS HOPE: Yes.

MS KILCULLEN: I think that if it has to be one of the two parties to an arrangement then it should be the employer or the educator or - you know, that it if it has to be one on the other, it shouldn't be the person with the disability.

MS HOPE: Yes.

MS KILCULLEN: I just think that it also shouldn't be the other person, if it's possible to avoid it through incentives or other - - -

MS HOPE: Other incentives, right.

MS KILCULLEN: Yes.

MS HOPE: Can I carry on from there then, into the heading of Harassment, which I actually - you may have different experiences on the harassment issue, and you also may have different sort of experiences in terms of other people's experiences that you've witnessed or heard of. My experience has been that - well, I suppose my disability is not visible, so it's very easy for me to go into the world without - I don't encounter the kind of overt harassment issues that you might if you looked very different or sounded very different from other people.

But I've experienced something that is as troubling to me as harassment and I think, as a result of the fact that the system as it currently stands places the person with the disability in the position of constantly having to ask other people and other systems to adjust themselves around the disability, which is part of this whole thing that we're talking about whereby, in order to take the burden from the person with the disability, you put it then on the person that they meet as they go through their life. What that means is that all the fear and stress and anger at unfairness, and everything else that the other person is experiencing, then becomes the problem of the person with the disability.

MS KILCULLEN: Yes, it's immediate backwash to you to have to deal with.

MS HOPE: That's right. That is every bit as damaging as harassment, I imagine. I haven't experienced a lot of harassment in my life, but I certainly found that to be the cause of great suffering. If you follow it through, it sort of does become harassment, because what it means is that because the person is looking for ways out of providing you with whatever it is that you require and because you've come to them cap in hand and they're seeking ways to avoid that responsibility - naturally seeking it - they will look for reasons in you - - -

(tape changeover)

MS HOPE: - - - so they look for reasons about the person with the disability or characteristics of the person with the disability as an excuse for avoiding any responsibility that's placed on them by the system and by the act, and that means regarding you with suspicion, doubting your integrity as to whether you really have a disability, if it's something that they can doubt, you know if it's not visible obviously. But they then can look at you as being unreasonable in your demands and then they go back to questioning you and placing you in the position where you need to justify why it is that you need all of what you asked for or - and this means that having a disability, to the extent that it does involve asking other people for assistance or for adjustments in the way that they do things or even for simple flexibility in many cases means constantly justifying every aspect of the choices that you've made to somebody who has power over you.

I mean, in a way that is harassment. I mean, the person who is in receipt of some kind of disability pension or home help who has to constantly be going through tiring or emotionally upsetting health interviews in order to ensure that they're not ripping off the system, I mean, that's a form of harassment that that has to happen so frequently, and this whole idea of accountability which is built appropriately into all government systems that provide handouts becomes in effect, although not in intention, a form of harassment for people with disabilities and with health problems who are calling on the help of that system.

MS KILCULLEN: Because it can be very damaging psychologically to have to constantly justify to other people and justify to yourself all the choices that you're making about how to run your life. I mean - - -

MS HOPE: Right. Nobody - - -

MS KILCULLEN: - - - people without a disability don't have to explain why they've decided to eat this meal or clean their house as often or - - -

MS HOPE: "Why do you need to eat at 6.00 instead of 5.30?" So many examples of tiny little things that become other people's business, and I think that's actually also part of it, not just that you have to justify it, but that your life becomes somebody else's business. So for me at work, how much pain I was in, which most people regard it as a fairly personal matter. If you go to work with a headache, you'd like to be able to just comfortably tell people that you're fine even if you're not fine, you know. That's part of the privacy that most people take for granted, and that kind of privacy is constantly breached when you need to justify your request for assistance to either a large system or to an individual.

So although I haven't personally experienced harassment as a result of disability, the psychological trauma of having a disability, even when people haven't been malicious about it, but have simply been trying to even subconsciously dodge that responsibility that's placed on them by the act, that is to me a very very psychologically damaging thing, and Margie's point that people question their own decisions and start to question their own thinking and choices, to a degree that's not called on when you are having to justify those things to other people as part of a request for assistance.

I imagine that that - I mean, for me and for many people I know who have had this same disability that I have, it leads to a level of depression and mental illness - borderline mental illness that, you know, could well be the cause of a lot of suicidal tendencies among younger people with disabilities and so forth. Their choices aren't their own, and in our individualistic society, that's crucial to saving.

MS KILCULLEN: I think, too, it's important to take into account - I mean, just bear it in mind - the different types of disabilities that people might have. If you already have a mental illness and psychological disability of some kind, which is, you know, hard enough to deal with in terms of harassment and stigma and things of that kind, to be put under this sort of extra burden must be extremely hard to cope with.

MS HOPE: Yes.

MS KILCULLEN: I think it’s hard for everybody, but even more so somebody for whom that is their disability to start with, that they have a psychiatric problem.

MS HOPE: I mean, that’s all I really have to say about harassment. I mean, in addition to just people simply trying to dodge responsibility, out of no malice at all, but just simply trying to prioritise their daily duties or whatever it might be, there are also nasty comments and plenty of assumption about what you can do and can’t do which is not based on any evidence. All that sort of thing is extremely common, just as it’s very common for new mothers to feel judged by society or for anybody else. There’s a lot of judgment flying around and we certainly cop it. So that is nastier not to be changed, and in fact one of the submissions that was made on the web site pointed out that one of the values of helping people with disabilities to participate more in the wider life of society is to help to demonstrate to everybody in society that it’s not necessary to be perfect and that you don’t have to judge one another on the basis of assumptions.

There’s a lot of good social lessons that would make us all happier and psychologically better adjusted to learn from people with disabilities. They have a lot to offer simply because of the challenges that they’ve overcome and the lessons they’ve learnt from doing that. So there’s certainly a lot of work to be done in that field, but I think also a lot of the problems I personally have encountered have come from that juxtaposition between - that placing of the burden onto the individuals that the person with the disability meets in everyday life. So, Margie, would you like to add to that?

MS KILCULLEN: Yes. I think that’s a valid sort of criticism of the current system, you know, that it does, in the way it’s set up, encourage harassment of that kind. I think it’s also true that there is a lot of more overt harassment for people who have more overt disabilities because - - -

MS HOPE: Because you have used a wheelchair, and that’s a very obvious thing. So that might have informed it. But you’ve also dealt with people - - -

MS KILCULLEN: Yes.

MS HOPE: - - - in a professional capacity.

MS KILCULLEN: I’m thinking a little more of my experiences, especially when I was working with the disability unit at the ANU that people had - people with psychiatric disabilities in particular had major issues with harassment, partly because of what we were saying about having to justify it, and that also being a disability that is not necessarily - you know, it seemed subjective to a lot of people; you know, harder to prove, and people don't tend to understand that somebody who's depressed or anxious or whatever - clinically depressed - is not just feeling bad like they might be feeling bad. It brings up all sorts of other issues, yes, surrounding that. Anyway - - -

MS HOPE: I think you had something to say about student-student harassment versus university-student harassment.

MS KILCULLEN: Yes. One of the things about the Disability Discrimination Act as it is now is that it does prohibit staff at universities from harassing students, but it doesn't in fact prohibit students from harassing other students, although the effects of that are something that the university itself might find itself liable for. So it's a little bit of an uncontrolled - - -

MS HOPE: It's an anomaly.

MS KILCULLEN: Yes, it's an anomaly. It's a problem, although, yes, again this is, you know, in terms of personal experience. I didn't really encounter a lot of student-to-student harassment because universities are much more sort of individually set up anyway, if you get extensions or whatever as - - -

MS HOPE: You're not depriving somebody else of anything.

MS KILCULLEN: Yes, and also it's usually a matter between you and the lecturer rather than, you know, everybody - there's more flexibility built into that system, whereas I think that schools in particular - high schools - have a much bigger issue to deal with there in the educational setting. It is less flexible to start with usually.

MS HOPE: And interactions between students and teachers are more public.

MS KILCULLEN: Yes, and I know various people who have a lot of trouble at high school with that sort of student-to-student harassment kind of issue and ended up, you know, needing alternative schooling partly to just be able to get on with their schooling rather than constantly deal with remarks about how they looked or, you know, wheelchair use or whatever. So there are harassment issues out there that aren't dealt with because of that student-to-student element of it I suppose.

MS HOPE: I'd just like to say finally in relation to the harassment issue that one of the most common forms of harassment which doesn't seem intended that way is to call on the idea of fairness and being - you know, that you're seen as exploiting a system if you use the system, and so on. So perhaps in looking for instances of harassment and in trying to eliminate instances of harassment, you don't necessarily only look for the more obvious kinds of harassment - abuse, name-calling, that kind of thing - but you also need to look at harassment which disguises itself as advice for the person's own good or whatever.

MS KILCULLEN: As delay or as fairness issues. Yes, actually, maybe I should mention some of my experiences in regard to that. I'm not sure quite how relevant they are, but - - -

MS HOPE: I don't think we need to go into a lot of detail there because I think that in some ways - like, we can address those issues - wait on, I'll just turn this off.

(tape stops)

MS HOPE: So you just had something to say.

MS KILCULLEN: Yes. I was just going to say another sort of type of harassment related to that question of fairness and the rest of it is that when certain assumptions are built into a system but they're not explicit for anybody else, they can sometimes become explicit for a person with a disability. For instance when I was going into third year biochemistry, my lecturer said to me, "I'm not sure we can let you go into the third-year biochemistry," and I said, "I've passed all the prerequisite courses. Why not?" and he said, "Well, you know, do you really think there's any point? You're not going to be a research scientist because you can't do these experiments on your own." I said, "Well, we're doing them in groups in the class. So this requirement is not stopping anybody else from doing it."

Also my point there was nobody else in the course had to commit to a life-time of research science in order to finish the court. But there was a sort of assumption built into that course about people who were doing it would then go on vocationally to do that kind of work because it was a vocational course in that sense, but the new requirement that was being put there was to make that explicit for one person and not for everybody. So that's another kind of systematic harassment I suppose.

MS HOPE: I guess although in some ways what we're talking about now is not so much harassment as discrimination.

MS KILCULLEN: Yes.

MS HOPE: That is clearly unlawful under the act. So perhaps we should move on.

MS KILCULLEN: Yes. I think we might be getting a bit confused in this.

MS HOPE: Okay. So requests for information is the next - - -

MS KILCULLEN: No, we were just going to say about harassment though, that the major problem that I think there is with the way harassment is dealt with by the act or the fact that it is dealt with by an act is that it's a complaint-based system. So there's no actual remedy really. If you're being harassed and then you take it to conciliation and all the rest of it, it in no way reduces our harassment burden. In fact I think it increases some hostility in situations and just makes it really unworkable there. So the only remedy that we might be able to get is somebody to say that they're sorry or whatever, but whatever you were trying to do, you probably still can't do because the relationship has been - - -

MS HOPE: Has broken down.

MS KILCULLEN: Yes, has been destroyed.

MS HOPE: That's a good point. We'll come up against that again when it asks why people don't use the complaint process.

MS KILCULLEN: Yes.

MS HOPE: Requests for information, I just simply wanted to say about that, there's an example there:

> It's unlawful to ask job applicants about any history of mental illness if it's not relevant to the job being sought -

and that issue of whether or not requests for information are relevant to any given situation just creates huge amounts of confusion and uncertainty I think. It's so easy to stretch or contract the concept of what's relevant within the bounds of what would appear reasonable from the outside that basically you can ask anything that you want and make it seem relevant to the job, and also people don't ask questions that they don't feel are relevant. If they want to ask it, it's because they think it's relevant in some way.

Usually - I mean, maybe in some cases people are just responding to a blind prejudice against the way somebody looks or something like that, but usually in an employment situation somebody will feel the question is relevant, and then if you ask them, "Well, is it relevant?" then they'll find reasons - you know, justifications for why it is relevant even if objectively it's not.

MS KILCULLEN: That is just what happened with that case that - the psychiatric disability in the university where somebody had applied for the job and their psychiatric disability became known, and I think they hadn't told the interview panel that they had a psychiatric disability, but then the question became, was it relevant to a university teaching position, and who could determine that? It was impossible for either side to - because obviously the people who wanted to discriminate against this person did believe it was relevant and everybody else didn't.

MS HOPE: The other thing is that in that situation as I recall, the person being - you know, it made them look bad even to some people who thought that they shouldn't have been asked about that information, that they hadn't volunteered it themselves. So a person applying for a job has to make this decision about when or whether to disclose that they have a disability, you know, if it's one that isn't obvious from the outset.

MS KILCULLEN: Because disclosing it often makes it look relevant as well. Like, that was something that I had difficult choices to make with them, and in various different interviews tried various different approaches there, because I was, you know, completely willing to be open about my disability and knew that I'd have to be in order to make the job work and the rest of it. So I wasn't trying to hide it in any way. But do you tell people in your application letter or is that too early or do you tell them when you're actually having the interview or is that too late? I actually had exactly that same problem with an offer of a graduate administrative assistant position in the Commonwealth public service because it was way too early to tell them about it in the application forms. There were thousands and thousands of people applying, and it really didn't - - -

MS HOPE: And you had a reasonable fear that it would be the basis of discrimination if you were to say it at that point.

MS KILCULLEN: Also I believe that I couldn't actually give them any useful information at that point. The forms were so general that there was no - like, I really needed to just talk to somebody about how you might adjust it, and there was no way to talk to anybody at that point because you know how the public service exams are so big, I couldn't, whilst filling out forms for those, say, "Can I talk to the people from all these departments? I'd like to work out and try and" - you know, they just wouldn't have wanted to talk to me until they'd assessed whether they were likely to give me the job. That was how I felt about it. I might have been wrong.

But, yes, then when I did actually get to the point of the interview, I made it quite clear what my situation was at which point they said, "Oh, if we'd known earlier, we might have been able to do something. But unfortunately it's now too late because we can't arrange all these" - I needed to work fewer hours. "We won't be able to arrange placements of fewer hours in the department. We might have if we'd known a year ahead of time," or whatever, but they couldn't actually have known a year ahead of time because I needed to do those exams and all the rest of it in order to be considered. So, yes, there are some really difficult timing issues when it comes to requests for information, and it's, yes, very hard to know - - -

MS HOPE: Damned if you do, damned if you don't.

MS KILCULLEN: Yes, exactly. If you haven't told people then - - -

MS HOPE: It looks bad.

MS KILCULLEN: - - - that looks bad, and also, you know, it causes them stress at exactly the moment they're making the choice. They go, "We just won't deal with the stress," but on the other hand if you do tell them very early - well, I think I'm not alone in feeling a fear of discrimination at that early stage, although I think now I probably would say it as early as possible in order to avoid any waste of time.

MS HOPE: In order to not waste your own time.

MS KILCULLEN: That's right, but I think also saying it early does sometimes make people think that it is more relevant - - -

MS HOPE: A bigger problem than it is.

MS KILCULLEN: More relevant a bigger problem than it actually is, and then you've got that to deal with that you wouldn't otherwise have - for instance, to use an example of the same kind of situation, but not the - yes, actually it is kind of hard - I'm just thinking of another example there, but one of the people who wrote me a reference wanted to put in that reference that I had a disability, and despite that I'd done very well, and I asked him to remove that because I didn't want it to - you know, it actually sort of suggested because of the way it was written that it was a problem; that it was a sort of in spite of - yes, it made me not look good, even though his intent was in fact to make it look good when I talked to him about the reference, and that was just because he had brought it up there. It made it look like an issue whereas in fact - - -

MS HOPE: His point had been that it wasn't.

MS KILCULLEN: - - - his point had been that it wasn't an issue, and that they didn't need to worry about it because it wasn't an issue. But it really did read wrong, and it emerged in talking to him about that that he was worried that I wasn't going to tell them, and that would be an issue.

MS HOPE: Yes. That's the other thing, that people would take on responsibility for you of disclosing that information on the basis that they think, you know, it's something that ought to be done and something that is owed to - something which is owed to the employer or the prospective educator or whatever that the disclosure be made. So people are constantly making that decision on your behalf.

MS KILCULLEN: To use a different example, not from employment, because we've been talking quite a lot about employment, but the act now also covers accommodation and various other things. The same thing happened when I applied for a housing reference from the head of our college.

MS HOPE: Residential college?

MS KILCULLEN: Yes, our residential college. She felt it necessary to put into the reference that I had kept my room clean and tidy and that there had been no, you know, problem with maintenance or anything of that kind which - - -

MS HOPE: As a result of your disability.

MS KILCULLEN: Yes, as a result of my disability which she wouldn't have written in anybody else's - if you said that about a student who didn't have a disability, you would have been raising all kinds of fears that they were a complete grub and, you know, that there'd been some sort of problem there, and in fact it turned out when I spoke to her about that and whether she would be willing to remove it, she did think there was going to be a problem. She was not willing to leave it out because she thought she should warn people that that was an issue they might encounter, even though she had never encountered it in any way.

When I said to her, "I'm moving out with several other people and we clearly have an arrangement to keep the house clean and the housework done and all the rest of it because they don't want to live in a pigsty either," she was, yes, kind of unwilling to accept that that was not - that her giving that information made it look as though - - -

MS HOPE: Right.

MS KILCULLEN: Anyway - - -

MS HOPE: So what we've been talking about in relation to requests for information, two points: it's difficult to argue one way or another whether the request for information is relevant, and the second point is we've been talking a lot about disclosure of information by the person with disability and how that person is basically in a dilemma as to when and whether to disclose information of that kind.

MS KILCULLEN: I think as one further point, I have also always been completely unsure as to how you'd actually deal with an illegal request for information, because if you don't give the information you're giving the information anyway if you know what I mean.

MS HOPE: Yes.

MS KILCULLEN: I asked the careers advisers at the university that question, and they couldn't help me with it either, because they mentioned an illegal request for information and I said, "So what do you do if somebody asks you, 'Are you married?" or whatever. I don't know. It must come up in other - - -

MS HOPE: It does. I'm sure it totally comes up - - -

MS KILCULLEN: A bit more information about that might be helpful in some way. Anyway.

MS HOPE: Cool. Okay, let's move on. We're up to problems that the DDA seek to address.

> We invite you to comment generally on the nature of the problems the DDA should address. Do the objects of the DDA adequately describe the social, environmental and economic problems that the legislation can address, and have these problems changed since the DDA was introduced.

So we're now at page 16. So I think this might be one area we can discuss the whole DDA as a pro-competitive piece of legislation. Do you have other comments that you'd like to make about that?

MS KILCULLEN: No. My initial feeling is that the objects described in the DDA are pretty good, and I don't really see that the problems have changed a great deal since the DDA was introduced either. I suppose my only comment in this sort of area would be what we were saying earlier about using incentives and things like that - you know, other means that together with the DDA would actually be a more effective way of achieving those objects. But I don't have any problem with the objects themselves, no.

MS HOPE: I would just allude there to what we were saying earlier in the tape about the possible shift of perspective that might help in analysing the effectiveness of the DDA if you see the DDA as an appropriate piece of legislation, then ask how it can be made to work better rather than seeing it as a piece of legislation that restricts competition, and then seeing whether those restrictions can be justified. So that's all I want to say about that

> Effectiveness in achieving objectives - and we welcome suggestions on how to measure the effects of the DDA.

So you have comments on measurement I think.

MS KILCULLEN: Yes. It's true that it's difficult to work out what are just social factors and, you know, other issues of access for discrimination issues.

(tape stops)

MS HOPE: We're now talking about effectiveness in achieving objectives, which is page 16, heading 2.3, and, Margie, you had a comment to make.

MS KILCULLEN: Yes. The comment I was going to make was in terms of measuring it by complaints to HREOC, that is not an adequate measure. The doubts that are expressed in the issues paper about that are spot on.

MS HOPE: Spot on. right.

MS KILCULLEN: Yes, because the type of effort involved in making a complaint to HREOC is tremendous and beyond the scope of most people we encounter, especially things like harassment. What most people do under those circumstances is just, you know, go off and do something different or have little psychological clubs of their own, and the last thing that they need is, you know, be trying to deal with it all through legal channels, especially since what they're actually going to achieve by doing that is, you know, not usually what they're trying to achieve, as we said earlier. They might get an apology or whatever, but they're not actually going to retrieve the situation - - -

MS HOPE: Right.

MS KILCULLEN: So don't try and do that, and I know of many cases of people who have - well, not many but, you know, enough cases that people have had genuine complaints which I think were fairly clearly illegal according to the legislation which they may well have won if they, you know - they were certainly good enough to take to HREOC even if they hadn't actually - - -

MS HOPE: Been substantiated.

MS KILCULLEN: Yes, but they chose not to do that overwhelmingly, and the people who did choose to do it usually chose to make a complaint only because they felt that it needed to be publicly made for the safeguard of people, not because they thought it, but essentially they were retrieving for them. So I think that's quite a small number.

MS HOPE: I think what we're dealing with here is actually very just common situation with discrimination legislation in general, and there's a book called The Little Promise which - by I think Margaret Davies of Macquarie University - I think it was Macquarie University, and it was early 90s - just about the broken promises of discrimination legislation in Australia generally. All the points that are made in there are relevant to this. So shall we move on from that subject?

MS KILCULLEN: Yes, I think so. You're right, that is not an adequate measure.

MS HOPE: One question they ask us is what evidence can you provide of programs in eliminating discrimination in different areas of different types of disabilities.

MS KILCULLEN: Whoa, hold on.

MS HOPE: That's on page 18.

MS KILCULLEN: Ah.

MS HOPE: It's the middle bold point.

MS KILCULLEN: I just had a few - - -

MS HOPE: I've skipped you?

MS KILCULLEN: Yes.

MS HOPE: Okay. Sorry, go back.

MS KILCULLEN: I think I might have already said it.

MS HOPE: I'll just pause the tape.

(tape stops)

MS KILCULLEN: Yes, in terms of measuring outcomes - that was what I was going to say - that also is not necessarily a fair enough result because of what I was saying earlier about the point that the legislation is not to create an equal outcome, it's to create an equal opportunity. It's very hard to tell from the outcomes whether that's been done. You can see, I mean, from what particularly in the divide between social factors and discriminatory factors that are covered by the act, that's going to be very difficult to tackle, and that's something that is pointed out in the issues paper, too. That is a relevant concern.

MS HOPE: Have you got anything further before page 18?

MS KILCULLEN: No.

MS HOPE: "What evidence can you provide of progress?" I just wanted to note that that was a question that just scared me relating back to my initial fear that people with disabilities or people who were in favour of the legislation existing at all being called on to justify the existence of the legislation by providing evidence of progress, and it's important that these difficulties in measuring progress, not that the uncertainty there not be used as an excuse to reduce the effect or, you know, reduce the impact of the legislation. Basically what you've got is an uncertain situation. Do you, you know, go with the - it's analogous for the problems associated with the uncertainty in environmental decision-making and the precautionary principle approach I think should be applied in favour of keeping protections, even if it can't be substantiated that they've made a difference.

MS KILCULLEN: And I think that fits in too with what we were saying before about the DDA being essentially a pro-competitive piece of legislation.

MS HOPE: That's right, because what I've just said would, if you didn't assume that, go directly against the mandate of the competition principles review. There you're called on to justify it by saying that the benefits have outweighed the costs, and otherwise it's very explicit that otherwise restrictive - consciously restrictive legislation should be removed, but in fact I think you should see the DDA as pro-competitive, and that uncertainty should therefore not be weighed in favour of removing the legislation's protection.

MS KILCULLEN: Yes. We have actually just skipped over the first question there on page 18.

MS HOPE: Yes, "How should the effectiveness in eliminating discrimination be measured?"

MS KILCULLEN: Yes, and I was going to make the point actually two points. One was more of a comment on the issues paper, the introduction to that section about a non-English-speaking background being a problem in measuring disability discrimination. I found that to be very much a problem in Sydney particularly, dealing with Meals On Wheels research. It was quite difficult to get - I mean, it was already very difficult to get information from people with disabilities for the reasons we talked about earlier, that when you factor in that people don't have English as their first language, yes, I'm sure that there's a lot of under-reporting in that area.

MS HOPE: There's under-reporting for so many reasons; the same kinds of reasons that you get in any other situation.

MS KILCULLEN: Yes.

MS HOPE: There's under-reporting social - - -

MS KILCULLEN: Yes, that's right.

(tape stops)

MS KILCULLEN: On the question of how should the effectiveness of the DDA in eliminating discrimination be measured, I think that actually the best - rather than by complaints, I think there needs to be some kind of auditing system I think; auditing of processes is in fact a better and more - it's a more general way of applying the concepts that we've been trying to apply to all organisations rather than having them just fall in the lines that people with a disability meet for a start which I think is a good thing because it will make more of society automatically accessible and give people a chance to work out their plans and their arrangements and their flexibilities before they actually encounter the situation where they need to deal with them and maybe it would be a good thing.

MS HOPE: It also could overcome some of the objections from a competition perspective to individual organisations being asked to do something their competitors aren't being asked to do. If it's a complaint-based process, that's likely to in effect be the case, even though for policy reasons we can't accept that argument when you're dealing with the legislation, but if you had an original process through the whole industry, it would be not specific to the organisation and - - -

MS KILCULLEN: I'm not sure how that could be arranged because clearly auditing would be a more expensive way of dealing with them or at least it sounds like it would be, although I think that rather than having a system just of complaints, there should be a better system of actually checking processes. That deals with what I was saying just before about not being able to measure outcomes necessarily because of the variation in human beings that goes into it, and that the focus should be on the actual arrangements themselves more than it is on the outcomes. So then the auditing puts that kind of focus on - - -

MS HOPE: Yes. Your comment about auditing being more expensive, I think one answer to that is that it depends really whether we're serious about trying to eliminate discrimination on the basis that it is an economic cost to society that doesn't have to be there. It's an unnecessary cost.

MS KILCULLEN: Yes.

MS HOPE: If you are serious about getting rid of the problem of discrimination, then clearly the cheapest way to deal with it is the most effective way.

MS KILCULLEN: Yes.

MS HOPE: If you think that compliance is purely a cost rather than a financial, economic and other kind of benefit to society, then you'll be very upset about the costs of an auditing-type process, but if you actually think that the discrimination itself is a very large cost and you take the full cost of that into account including people unemployed for years who could have been employed but for a small, you know, contribution at a particular point, then the costs of an auditing type process would be in perspective, and I think it's very important to see it in the perspective of the whole situation.

MS KILCULLEN: Yes, and I think, you know, as part of that incentives for people to say how they have met standards and the rest of it are another good way of measuring effectiveness. Only the people who have been meeting standards will come forward. So it's not a measure of the amount of discrimination going on necessarily, but that and audits and complaints, you know, covers more field and more effectively than just complaints.

One of the reasons I'm thinking of the auditing kind of system than sort of closing into the next statement about what evidence can you provide of progress in eliminating discrimination in different areas of the different types of different auditing, the area in which I've seen the most progress is actually in transport and in new buildings, and I think that that's the result very largely of disability standards. When everybody has to meet design standards, everybody thinks about it, everybody starts doing it, and then it seems to become much more second nature and also much more part of good design as we were talking about earlier, rather than sort of individual special modifications in people's minds, and that makes it easier for everybody.

The cost is better distributed, the information is better distributed. It actually becomes easier for people to do all this stuff. It becomes clearer to them what they need to be doing, and it also means that people with a disability, it's easier for them as well because they don't have to change situations that they come into contact with constantly. There is an overall movement of change going on that they can take advantage of, and that is just beautiful as somebody who, you know, doesn't have to change things in the world. It's really nice for there to be now accessible - - -

MS HOPE: To not have to make a constant adjustment.

MS KILCULLEN: Yes, to not have to specially go and ask somebody to let you in some weird little door around the back because you're using a wheelchair because the design standards are that there should always be an accessible front. Do you know what I mean?

MS HOPE: Yes.

MS KILCULLEN: If it's just like that for everybody - - -

MS HOPE: Transaction costs are way lower.

MS KILCULLEN: And also it allows you just to be an ordinary human being because you're just like everybody else when it's kind of the design standard. That is - - -

MS HOPE: You don't need to turn your own mind to your disability and deal with what is generally not the cheeriest aspect of your life.

MS KILCULLEN: Yes, that's right. You can just get on and do whatever. It actually makes society much more accessible, and I think that having standards has obviously been something that is easier to do in some areas than others because of them being, you know, sort of my objective and also generally the same problem in all of these different places, but I think that they - that really has helped, and part of what has really helped again is the certainty involved.

People can clearly see whether they're meeting the standards or not, and it's not a matter of confusion as to - they don't have all of the effort that you have to go to in other areas to work out what is unjustifiable, what are the inherent requirements, what are all these other systems-related issues. It's clearer to them what is legal and what isn't, so they can get on and do that, because I think actually the confusion aspect is one of the largest costs that people encounter when dealing with disability, and once that's eliminated, people who generally do have goodwill just get on and do whatever is required of them. They just want to be told what is required of them.

MS HOPE: That's right.

MS KILCULLEN: So transport, there has been a lot of progress in that, and there could still be more obviously, especially when it comes to things like trains and accessibility to them; you know, it being a general road, a special accessibility achieved by calling somebody on the phone or whatever, like we were talking about just before. When that is done - and that is being done - - -

MS HOPE: Did you want to say something at this point or somewhere else about this idea of paths of access because it just seems to me that it's often not taken into account that you need a full path.

MS KILCULLEN: Yes. I think we might talk about that when we get to the transport.

MS HOPE: Okay. But it's not just a transport issue though. Like, I think that's the thing.

MS KILCULLEN: No. that's true.

MS HOPE: That analogy of the paths in transport which we can talk about at that point just flows through to so many other situations that it's worth making a global sort of issue.

MS KILCULLEN: Yes, but I think we might do it there rather than here.

MS HOPE: Yes.

MS KILCULLEN: Anyway that's the evidence that we can provide of progress. There has been progress in general accessibility.

MS HOPE: I just want to say, like, in my own particular area of occupational overuse syndrome, the political atmosphere is such that people with occupational overuse syndrome are treated with a level of suspicion and sometimes abuse and harassment, that people wouldn't - the same, you know, abusers would not dream of using towards somebody in a wheelchair, and that the whole workers compensation situation and, you know, the fact, just the simple fact that OOS is so widespread and does affect productivity so severely has just made it particularly nasty to be a person with OOS, and I don't know that that situation has improved over time. I think it fluctuates. It goes up and down, but since the act was introduced in 92, I don't know how much improvement has taken place, and if it has improved significantly, then by God it was bad before.

MS KILCULLEN: Yes, I actually think it has improved, and it was really bad before, and a lot more improvement needs to be done, but a large part of the improvement there I think has been the continuation of better medical evidence.

Same with people with chronic fatigue and situations of that nature, and also psychiatric disabilities. The more people medically know about it, the less that kind of - - -

MS HOPE: The whole subjective thing.

MS KILCULLEN: Yes. I guess the next question then maybe is perhaps where we should talk about (indistinct) I suppose. What other influence (indistinct) disability discrimination could be taken into account? How should they be measured.

MS HOPE: I'm not sure exactly how to put whatever I've got to say there. So in that case shall we just flag it and move on or - - -

MS KILCULLEN: I'm just thinking about - one of the reasons why it's very difficult to measure the effect of the Disability Discrimination Act is that the overall outcome you're looking at is influenced by a whole lot of different areas of somebody's life, and if there's a blockage at one point, you may never get to hear about it at the other point. So for instance, if they're talking about outcomes in, say, education, if you look at outcomes in tertiary students, then you also have to take into account the situation in primary schools. You know, there's a whole pathway there, and if you only look at one end and go, "Great, we're getting more people at this front door" or wherever you may well be missing a blockage at some other point in the system.

The same applies with things like work and transport issues, for instance. I know that's covered a bit later on and we might talk about in more detail, but if you haven't got access to transport, you may well not have access to employment either.

MS HOPE: No matter how accessible the employment itself may be.

MS KILCULLEN: Exactly. People's lives consist of all of these things joined together, and if you are trying to measure it, you have to take into account that there are all of these areas of discrimination and areas of life that you're - yes.

MS HOPE: When it says - - -

MS KILCULLEN: The influence I suppose on eliminating discrimination needs to be across the whole pathway.

MS HOPE: When it says, "How should they be measured?" I don't know whether this can be used in this particular inquiry, but it seems to me that a lot of the difficulties surrounding dealing with disability discrimination involved not having thought through this pathway aspect because it's a time-consuming thing to do and it's something that's just a little bit - it requires a bit of imagination unless you're drawing directly on the experience of a person with the particular disability involved, and really some methodology that actually allowed you - and I'm sure that there are qualitative methodologies out there in the social sciences that allow you to do this - they actually allow you to follow through in an experiential sort of fashion, yet systematically, the various branching choices that a person makes in the course of a day or a year or a high school career or whatever it may be, with a particular disability would be so illuminating and really worth doing in terms of discovering what the problems are.

Given the difficulties of quantitative measurement that have been highlighted in the issues paper that we just talked about here, probably one of the most effective ways that people without disabilities can learn about what it's like to have a disability is to simply go through that exercise, whether or not they have the input of someone who actually has a disability, and deliberately try to imagine what the situation would be like.

A famous story of that sort of research is where people, you know, blindfold themselves and then move about learning how to, you know, move as if they were blind, and in that way you discover all the problems with a particular piece of road in terms of where the kerbs are and all that sort of stuff. It would be so difficult to discover in any other way. So in terms of measurement, if you are prepared to look at qualitative measurement, then those kinds of experiential sort of tree dendritic type of things might actually be worth - - -

MS KILCULLEN: I think too that issue of choices might be an interesting way of looking into it. I know that the graduate employment survey for instance asks you what choices you'd make at graduation, and they use those figures - I'm not exactly sure how they use them, but I gather they use them to decide on, you know, employment-related - how useful it is to have a degree or that kind of thing. If you look at the choices that somebody with a disability makes along those pathways, you may in fact find out more information about directors' meeting and barriers being basically - they tell you themselves because you don't necessarily know sometimes why you've made choices until you go back and think about it and go, "Yeah, it would have been much more difficult to do that other thing for this reason."

But if you ask people in surveys for instance, "Have you chosen to do this or that?" - alternatives, then you might get some evidence of where there might be difference between people who don't have a disability and people who do. It might in fact give you some useful information about where areas of discrimination lie.

MS HOPE: Cool.

MS KILCULLEN: Or barriers lie anyway - find out where the discrimination lies.

MS HOPE: Moving on, promoting recognition and acceptance is the next heading. Have you got anything before that?

MS KILCULLEN: I have a little note, although I don't know if you do want to go over the ensuring quality before the law bit?

MS HOPE: I have nothing to say about that.

MS KILCULLEN: No?

MS HOPE: I think people with better experience will say something.

MS KILCULLEN: I was thinking that you might want to say something about that.

MS HOPE: Promoting recognition and acceptance, I have a couple of comments. Have you got comments to make there?

MS KILCULLEN: Did you want to say yours first?

MS HOPE: I just want to say that I'm really dubious about using legislation as an educative tool. I think that there's a down side to it that's often not recognised by people who are probing the legislation which is that it raises the hopes of the people whose rights are sought to be protected by the legislation without necessarily giving them any avenue for protecting and promoting those rights, and you think legislation, you know, it's the law, it's not the law. Parliament either means it or it doesn't mean it, and I think my own personal experience with the DDA was much more frustrating and saddening than it might have been had I seen the whole situation as a force of nature rather than unlawful discrimination that there was nothing I could do anything about. That's really the only comment I wish to make on that subject.

MS KILCULLEN: The point I was going to make kind of feeds in with that one. I think that if you actually succeed in overcoming discrimination through the act, you don't need to worry about the educative result because anything that you can do about it will have been done by allowing people to show that they can perhaps do what people have doubts about them being able to do.

MS HOPE: That's right. It's far more educative to actually get people out there participating in society in whatever ways they choose to do than it is to make platitudes about it that we don't believe.

MS KILCULLEN: Yes, and if you manage to eliminate discrimination, then that’s the whole power of promoting recognition and acceptance that you really need to have, and I think the way the Disability Act is at the moment - the Disability Discrimination Act is at the moment, there are still problems directly created by it in promoting recognition and acceptance. One of them is what Janet has just been talking about I suppose, but also the fact that it’s complaint based and the fact that it’s a question of unjustifiable hardship, both of those cause a big problem by instantly - - -

(tape changeover)

MS KILCULLEN: Yes, that’s true, and that’s what we were saying about pro-competitive.

MS HOPE: Pro-competitive, yes.

MS KILCULLEN: That the DDA was actually (indistinct)

MS HOPE: Yes.

MS KILCULLEN: Yes, which is that my experience with the effect of the discrimination act has been more positive educationally and all that. I think the legislation has helped, particularly in the areas of things like transport and stuff that I was talking about; that it has encouraged people to do stuff that they otherwise would not have done or have thought of, because it’s part of standards and because it’s a legal issue. I think making it a legal issue does make people have to think about it being there, otherwise (indistinct)

MS HOPE: Okay, yes, fair enough.

MS KILCULLEN: So there are benefits there.

MS HOPE: I guess your experience with the standards and action plans is relevant there. I think the complaints based mechanism has probably been fairly useless.

MS KILCULLEN: Yes.

MS HOPE: At least in my personal experience it has been completely useless. But I suspect it has been far less useful than the standards and action plans.

MS KILCULLEN: Yes, and I think, as I was saying, that and the unjustifiable hardship provisions are in fact counterproductive, rather than useful.

MS HOPE: Right.

MS KILCULLEN: But some of the other aspects of the act do in fact encourage people to think about it.

MS HOPE: Right. I had just one thing to say on page 19:

> How should the effectiveness of the DDA in providing repositioning acceptance of the rights of people with disabilities be measured?

I just want to refer you there to two possible sources of methodology. One has been developed. It's an auditing technique used in research on discrimination and other aspects of AIDS, by Dr Helen Watchirs at the research school of social sciences at the Australian National University. She's a human rights expert who has worked with the Disability Discrimination Act and other similar legislation overseas, in an auditing process, and has developed an instrument that can be used for that measurement purpose.

Also, in terms of measuring the effects of and compliance with legislation, I just draw your attention to work within the regulatory institutions network also at the research school of social sciences at the ANU. The contact person there might be John Braithwaite. Now we're up to 2.4, Competition and Economic Effects.

MS KILCULLEN: Yes.

MS HOPE: We've already made several statements to the effect that we think that the DDA can be seen as a pro-competitive piece of legislation. Obviously there are other ways of looking at it. Margie, do you have any comments on that?

MS KILCULLEN: Yes, there are a few points on the way through but I'm not entirely sure how much of this we've already said so I'll try and be brief. In the first paragraph here, where you pointed out that the DDA might affect competition and impose costs on some businesses and not others and that the end result can be a reduction in the overall efficiency of the economy, I don't think that's actually the case. I think that it might be the case with the legislation, I'm not sure, but the actual effect of (indistinct) discrimination should be greater efficiency in the economy and more activity, you know, for the reasons that we've already talked about.

I think that's important, to make that point, rather than to see it purely as a negative effect or to think that it's more likely to be a negative effect than not. I'd be surprised if, when measured, it wasn't in fact a positive effect on the economy to have more classifications.

MS HOPE: The imposition of costs on some businesses and not others probably sounds more unfairness to individuals who are running businesses than it sounds in the economic at this stage.

MS KILCULLEN: Yes, and this point too: that policies that promote competition are generally worthwhile because they encourage innovation and the production of more or better goods or services. I think that the inherent requirements of flexibility and innovation that go with creating an accessible society do have exactly that effect on production of more and better goods and services and that that is part of the Disability Discrimination Act - if you can involve people in a better and more flexible way, you know, it will produce benefits for everybody, people without disabilities and people with disabilities, just in running the system better.

MS HOPE: So these guys have recognised that within the fourth paragraph, at a still broader level, where when anti-discrimination decreases the need for government-funded pension disability services, public money is freed up by the users. I suspect that's also a very big deal economically.

MS KILCULLEN: Yes.

MS HOPE: There's a huge amount of wasted spare capacity there, on the part of people with disabilities.

MS KILCULLEN: Yes, there is. I think too, not just on the part of people with disabilities - which is perhaps the main point that I was trying to make here. If you make a system more flexible and more innovative - which is the point of the Disability Discrimination Act, to allow and encourage that kind of flexibility and adaptability so that people's best abilities are being used - that applies to everybody, not just people with disabilities, people with kids, people older, younger, people with all kinds of different abilities as well, all of that. If you can make a system more flexible and more adaptable and more innovative then you're using all of those people much more efficiently than you are if you don't.

So yes, I don't think it should be seen - again, it's a good design issue, rather than a special issue for people with disabilities - that the more access people with disabilities have to society, the more access everybody generally has to using their abilities to the best.

MS HOPE: Yes. I would like to just comment on the last sentence of the fifth paragraph:

> If other members of the community may bear indirect costs of

> compliance with the DDA, it results in higher prices or poorer services.

So I guess the point we're making there is that compliance would often result in lower prices and better services.

MS KILCULLEN: Yes.

MS HOPE: I don't have anything further to say on any of these issues, beyond what we've already said - which in fact have been some of the main points I wanted to make on our whole submission.

MS KILCULLEN: Yes, that's right.

> What are the potential economic and competition effects of the DDA and how should - - -

(tape stops)

MS KILCULLEN: Okay. So this question:

> Put another way, what are the direct and indirect costs and benefits of the DDA? Can they be quantified, and if so how?

We've already talked about that quite a bit, but I think that measures of unemployment amongst people with a disability are not a bad guide, because you talk about people who are in the workforce, looking for work again, so presumably they believe they are actually able to do work and that it's discrimination or whatever that's stopping them, that there's a greater chance (indistinct)

People on pensions who wouldn't be on pensions, like if the system was better, are perfectly capable of telling you what would get them off a pension and what would (indistinct) or issues of that kind, so you can just ask them.

MS HOPE: Although asking someone on a pension what would get them off a pension - - -

MS KILCULLEN: Yes, it's pretty scary in that way.

MS HOPE: - - - can seem very threatening, because it's part of that pattern of government - - -

MS KILCULLEN: The sort of harassment we were talking about earlier.

MS HOPE: Yes, although I think harassment is perhaps - - -

MS KILCULLEN: Too strong a word in this case.

MS HOPE: Yes - unintended harassment.

MS KILCULLEN: Yes, that's what we were talking about before. Businesses can report costs to them, so the community costs factor could be a result of the Disability Discrimination Act. They should be encouraged to report, I think, because that can also be part of what we were talking about earlier about incentive systems and those type of things. See, normally with benefits there, I understand that quite a number of businesses have found that it has been better for their productivity and has produced measurable economic benefits to them, to have employed somebody with a disability. So they may well want to say that if they're given a chance to do so.

I think that with an audit system or with a grant system of the kind that we've been talking about that incentives, that sort of thing, would become clearer again. You would see them appropriately (indistinct) and that would include indirect costs too. On the third question there -

> What alternative ways to meet the objectives of the DDA would have less impact on competition or increase benefits or reduce costs, compared with the current approach -

I guess, just to summarise some of the things we've been talking about, one would be to have individual funding attached to the people with disabilities more than businesses.

MS HOPE: Yes, not supplied to the business or the educator or whatever directly but to the person.

MS KILCULLEN: That's right, for it to be able to be more flexible there. I think that would both affect competition and also increase the benefits and reduce the costs of - just administration there as well. I think incentives of the kind that we were talking about, passed through the tax system - and audits as well as complaints - that perhaps a greater focus on auditing than complaining would be a more efficient way of meeting the objectives of the DDA and also measuring whether they have been met or not and seeing what the benefits and costs were.

I think better guidelines on the inherent requirements and unjustifiable hardship sections of the act, and perhaps also education programs about that, would have a big impact because as we were saying before (indistinct) confusion and people having to determine all these things for themselves, which takes a lot of time and it's difficult to do. If there was more generally available information about what is a reasonable confirmation of what is an inherent requirement of different types of jobs, if it was possible to work those things out much more globally that would reduce the costs to individual and therefore have a positive effect on the competition issues that we were talking about (indistinct)

Also, another couple of things. The general implementation of a more flexible workforce sort of concept - things like greater availability of part-time work, more flexible hours, all of that kind of thing - I think if that's developed across society as a whole, we'll achieve many of the aims of the Disability Discrimination Act in a more efficient and as competitively restricted way, because everybody will be thinking about those issues. A lot of those issues again, as we were saying about good design, I think will help everybody and not just people with disabilities. That will help them in a more effective way. But I think you still need the legislation, but all of these are things that should be looked at, to deal with the problems in the legislation. They're alternatives (indistinct)

MS HOPE: Okay. Shall we move on to DDA and other legislation?

MS KILCULLEN: Yes.

MS HOPE: Have you got any comments?

MS KILCULLEN: Yes, I suppose just to note that I have seen in universities that there is a problem in education between the difference between the state and territories. I think all of that federal laws - and particularly in that if somebody complains about the state or territory law, they can't then complain at HREOC, because it's a difficult situation for people to chose where they're more likely to succeed and it's not always clear. It also gives two lines of defence to somebody who's allegedly doing the discriminating and also creates confusion.

So I think it's good if possible to make the Commonwealth and state legislation the same, also because that is a pro-competitive thing to do. If you don't do that, you end up with the benefits and/or costs going just to one area, rather than others, because people have moved to take advantage of that, especially in areas like higher education, and employment too presumably and in many other things that - these all tie in with one another. Yes, people will just move to where they can achieve better outcomes in that case (indistinct)

However, I also note that in some areas (indistinct) I'm not too sure about the details of this but my impression is that the states' and territories' Disability Discrimination Acts can actually have a wider scope than some of the Commonwealth acts can, because of constitutional issues. So yes, it shouldn't be brought down to the lowest common denominator there. If it is the case that there has to be a difference or the state and territory protection should be weakened then we should keep it as is.

MS HOPE: Any further comments on that?

MS KILCULLEN: No, I don't think so.

MS HOPE: I have a comment on that. My experience was with the interaction between workplace compensation and discrimination legislation and also with the employment legislation. I was working in a government job and the employment was governed by a Commonwealth act. One of the aspects that I felt was discriminatory - although that has never been declared to be the case by HREOC or anyone else - was that I was kept on probation. The ordinary probation period for a public servant is six months, and my probation was prolonged explicitly on the basis that it wasn't clear I was healthy enough to do the job. It was very difficult to tell whether the employment legislation or the Disability Discrimination Act prevailed there and what the exact situation was between them.

Also, with the Workers Compensation Act it wasn't clear - sorry, it wasn't the Workers Compensation Act but the workers compensation legislation - the interaction there was unclear. That did end up meaning that I didn't make a complaint because it would have been very difficult to tell if my complaint would be successful, because there would have been a lot of legal analysis required. As it happened I was capable - inherently capable - of doing that analysis, but the fact that my resources were so strained by having the disability and attempting to do my work meant that I was unable to determine what the actual preferable view of the law was there. Obviously most people wouldn't be in a position to do that in any case, which means in that case it translates to legal costs for somebody who doesn't have those legal skills, and those costs are just fully prohibitive.

So if there's any way of bringing the legal costs down of getting advice on how that works, whether it might be HREOC - but they don't only do this - issuing guidelines about how they going to interpret the interactions between legislation, by getting some proper opinions done by well respected barristers or whatever that have written opinions and then are up on the web site that's associated with the act. Something that basically means you don't have to reinvent the wheel about how those pieces of legislation interact would be good. If there are areas where it's actually simple, where one just simply prevails over the other, then that should be noted in the notes that I was talking about, that are actually part of the published legislation.

MS KILCULLEN: Yes. Just to move - I don't know if you were addressing the last point there before 2.6:

> What would be the costs and benefits of the government adopting (indistinct) legislation?

MS HOPE: No, I wasn't addressing that point, but you can go ahead.

MS KILCULLEN: Yes, it kind of feeds into it I guess. I think a benefit there of mainstreaming of these ideas - I think that concept of mainstreaming as well is a good concept; that as much as possible these are not the issues of interest groups, they are issues of the community and they should be dealt with as issues of the community and not a special group where that's possible to do so. But I'm also aware that it might produce the cost of having a very complex legislation, although from what Janet has just been saying it sounds like the interactions between different acts are sufficiently complex already and it may well be clarifying to combine them. I don't know, that's a - - -

MS HOPE: I'm not sure about that.

MS KILCULLEN: Yes, it's hard to say. But anyway, you might end up with a more complex legislation, so that would not be a good thing. But also, it might make it harder to measure the effectiveness of the legislation and also reduce that educative value that we're in kind of two minds about, but I think it does have some impact on how well publicised and how much (indistinct) and the fact that there is an act specifically about disability discrimination means that that issue is not kind of lost amongst the others as well. So those are the costs and benefits I suppose, clearly outlined. I'm not sure whether they'll apply.

MS HOPE: I guess one sort of difference between disability and sex or race or age, to the extent that it isn't associated with disability - the situations are different in that being women or being a person of a non-majority race is not in itself a - it's only by virtue of discrimination that it's - - -

MS KILCULLEN: A barrier, yes.

MS HOPE: - - - in fact a barrier or a disadvantage, and that's not the case with disability. There is, as we've always been talking about, an imagined barrier and a real barrier. The real barrier may or may not be relevant in a particular situation but it will be relevant to the resources that the person can bring to bear in order to enforce their rights. So that's a fundamental difference between disability discrimination and other forms of discrimination that may be important in that.

MS KILCULLEN: That real barrier may or may not exist of course. It's important to remember that some people - given the broad definition of disability in the act as well.

MS HOPE: Right. There may be an assumption of a barrier.

MS KILCULLEN: There is an assumption sometimes that there is a barrier that isn't actually there, but there is also sometimes a barrier there. I think you're right that that is a difference between that and the other areas of discrimination.

MS HOPE: Yes.

MS KILCULLEN: That's an area where the harassment section of the legislation has more overlap than the rest of it does, because you're dealing there with attitudes rather than actual issues. I think the confusion, though, that's in the act is a bit of a problem (indistinct)

MS HOPE: Okay. Now, I don't have anything to say about 2.6, Regulations, Standards and other Instruments. You might have something to say about standards. You've already said that you think they're very worthwhile.

MS KILCULLEN: Yes.

MS HOPE: Do you have anything to add to that?

MS KILCULLEN: Well, yes, I have quite a few things to say about this. I mean, the first thing that I've written as a comment - Part 3 of the DDA provides for the making of voluntary action plans. I've never quite understood what the "provides" really means there. When we were working on the disability action plan at the ANU there's seems to be no legal force to these plans (indistinct) and there are descriptions of what a voluntary action plan should contain and what it needs to involve to be called one of those, yet there doesn't seem to be any actual force or mechanism given to them. So I'm a bit puzzled about that.

However, if the force given to them is that they can be taken into account in unjustifiable hardship determinations, which I gather is part of it, then I think we need to be aware of the possibility of excuses creeping in there, where they really shouldn't be allowed to be. There are things that you can put in a plan that you can also do immediately, and sometimes it's better to be forced to do them immediately than to be allowed to say, "Oh, well, we'll do them, they're in our plan." So that's a comment there.

When we get to the prescribing of those various acts, I don't really have anything to say about that. Disability standards, though - yes, I think it's true that they do make it easier to resolve complaints and reduce the need to resort to courts. I also think that it's true that they are helpful to people designing systems and creating a good environment themselves. I've already said that.

It is possible that prescriptive disability standards will cut off alternative ways of complying with the DDA, but frankly I don't think that's really the problem at the moment. I think the much bigger problem is that people don't know what to do. If you can just achieve that basic level of people meeting reasonable standards, then you can deal with the question of people being clever and innovative above that. But I think at present what you have is people being most confused and a lot of that standard is misconceived. So yes, if they have a greater benefit there then that will be likely to be a problem.

> Disability standards have proven to be time-consuming and costly to formulate.

I can say from experience there too that that is totally true. The writing of voluntary action plans that the university did, and that I was part of, took a lot of time, negotiation, thought. Considerable - soul-searching is not quite the right word, because it wasn't as emotional as that, but you know, problem solving on the part of all of the different departments through the university. It was a very big process and took quite a lot of time.

On the other hand, I think that now that plan has been formulated, it saves a great deal of time and cost to individuals. I think the more that these voluntary plans are developed, the easier it will be for people forever after that. So there's a kind of investment cost, I suppose is the way it - - -

MS HOPE: And there's a huge educational benefit. Everyone involved in that process will come out of it with a much better understanding of the difference between disability discrimination and non-discrimination. I mean, a whole lot of people turning their minds to the issue is definitely a major social benefit.

MS KILCULLEN: Absolutely. So when we're talking about standards here - I think I've wandered a little into voluntary plans as well - but when we're talking about formulating disability standards, I'm sure that they are time-consuming and costly to formulate, but I also think that they're worth doing at a political level because they're equally time-consuming and costly to formulate at that individual level and it saves everybody a lot of trouble and also spreads out those competition issues that we were talking about before, to have general standards.

MS HOPE: And to have none at all is even more costly still than to have it done on the individual - - -

MS KILCULLEN: Absolutely.

MS HOPE: Have you got suggestions for how the process can be improved?

MS KILCULLEN: Well, yes, this line about - this might discourage government and business enterprises from introducing better practices.

MS HOPE: Page 23?

MS KILCULLEN: Yes, as a concern about introducing standards. This might not be a problem if standards included incentives to exceed minimum performance requirements. I think that’s a good idea, the idea of incentives, as we’ve already talked about in other places. But I also think that there’s already a tendency there for people to - turn it off for a minute.

(tape stops)

MS KILCULLEN: Yes, I was going to say if the desire to move to better practices is not there (indistinct) yes, this might discourage government and business enterprises from introducing better practice. Well, I think that usually the better practice will already be there. People have a tendency, a will, to take it there. Having the standards is not going to stop them from doing that. People will improve upon them if they can and they would already be doing that, regardless. The classes exist - people who want to do best practice and people who don’t - and they’ll exist whether or not you have standards, I think. So I don’t think we need to be too concerned about limiting people’s innovation over and above those standards. That can still happen.

MS HOPE: Yes.

MS KILCULLEN: Advantages and disadvantages, okay. Process for development - - -

MS HOPE: Should they be mandatory?

MS KILCULLEN: Should they be mandatory? I don’t think there’s a - well, there’s some point in having them even if they’re not mandatory, but I think that they’re even better than they are. If it’s possible to develop them to - like, as we were saying, they’re time-consuming and costly to formulate. However, if you do that properly and get the kind of inputs that you need to make them sensible standards, then I think having them mandatory makes it much easier for everybody again, for the reasons that we were talking about, about certainty of they can go, "Right, I just have to do it, that's how it is."

When they are mandatory, the knowledge of them is quickly spread and then it becomes a lot less of an issue for people too. They don't need to really find out about them. When they're compulsory, everybody does them and it goes into building codes (indistinct)

MS HOPE: They're research costs.

MS KILCULLEN: Yes, exactly. People don't have to be trying to find out about them all the time. I think that if they're good standards, they should be mandatory as well. What reason is there that people should not do them (indistinct) I mean, if they are good. So:

> Should the DDA be amended to allow disability standards to include independent monitoring and enforcement arrangements?

I think yes, and I think that that should be funded as well. I don't think there's much point in allowing independent monitoring and enforcement unless you actually provide the funds to do it.

MS HOPE: Yes, which is - you know, obviously it goes without saying through the whole of this area.

MS KILCULLEN: That again needs to be said, all the same.

MS HOPE: That's right. The problem with the act - you know, we can talk all day about the problems and the advantages of the act - but one of the biggest problems is just that as a society we are not fully committed to actually paying for this stuff, and therefore we pay for it out of the other pocket even more.

MS KILCULLEN: And people are much more willing to have plans than they are to actually do - and it's very important. It just naturally happens in all areas of life, but it's very important I think that there should be independent monitoring and enforcement to encourage people to actually follow through on their good ideas.

MS HOPE: Okay. Anything further on that page?

MS KILCULLEN: No. I see you've got some things on the next page:

> What are the disadvantages and advantages of being able to formulate disability standards in some areas of discrimination and not in others?

I think that it should be possible in all areas. I'm not sure whether it should be compulsory in all areas, because of the argument that you already pointed out in the issues paper about some area standards to make direct standard decisions on, when you're dealing with concrete things like buildings, than it is when you're dealing with things that need necessarily to be more flexible, like inherent requirements and stuff.

However, I don't think that means that there can be no standards in areas like inherent requirements and stuff like that. For example, I think the Public Service Merit Commission for instance - I don't know if that's what they're still called - that they influence requirements on who can sit on interviews for things like sex discrimination, equity issues there. I don't see any reason why there can't be similar bodies enforcing that, particularly discrimination throughout the public service and beyond, into private enterprises. There should be monitoring systems possible there just as much. If there are standards of any kind possible in areas like that, then there are disability standards possible as well.

MS HOPE: Yes.

MS KILCULLEN: So they should be looked into and allowed in all areas. The same applies to things like accommodation and stuff. I'm not actually sure - I can't remember where you can and can't have these standards - but looking through the list earlier on, on the areas that the act covers, I don't see any reason why it's not possible to come up with standards (indistinct) or even if they're sort of suitable, flexible and maybe monitored by an independent person or organisation that can make up their minds as they get there, whatever. But the standards, yes - should be possible.

MS HOPE: Next heading, HREOC Guidelines and Advice.

MS KILCULLEN: Yes:

> What are the advantages and disadvantages of guidelines or advisory notes, compared to disability standards?

I think the fact that they're not enforcement means that people don't pay much attention to them. That means that they're not as well-known and therefore there is a lot more research and effort to be put in if people do want to find out what to do and how to do it. That tends to create a hump for people.

(tape changeover)

MS KILCULLEN: There are some benefits in having guidelines rather than standards, and that benefit is that people do have to think about it, but that's obviously (indistinct)

MS HOPE: Yes. Are there sufficient incentives under the Disability Discrimination Act that meet voluntary action plans?

MS KILCULLEN: No. As far as I can see there aren't any real - not strong ones anyway, especially - - -

MS HOPE: Basically those benefits are only - the incentives are only triggered if somebody makes a complaint and you want to bring up unjustifiable hardship.

MS KILCULLEN: Yes, that's right, and in that case I think those problems about making it an excuse, as I mentioned briefly earlier, become more of an issue.

MS HOPE: It's only going to come up in a tiny, tiny proportion of cases where a complaint is actually made.

MS KILCULLEN: Yes, that's right. I don't think that there are sufficient incentives. The only incentive is not having a complaint made against you and that kind of goes for everything you do anyway.

MS HOPE: I mean, 228 action plan in 10 years is just absolutely pathetic.

MS KILCULLEN: Yes, and I think, you know, there's good reason for that, and the reason is that there is no incentive and that there is a big cost, as I was saying. It's very time consuming and a lot of effort, and unless there's some kind of, you know, financial incentives on education program (indistinct) to encourage people to do it, there's no reason why they will. So it's not surprising that they - - -

MS HOPE: If I owned a business, I certainly wouldn't do it.

MS KILCULLEN: Yes, totally. So should there be a formal link between action plans and extensions? I think that it should be enforced. I think that any exemptions, there should be an action plan and that it should be enforced.

MS HOPE: You've done it or you haven't.

MS KILCULLEN: Yes, correct.

MS HOPE: Industry self-regulation.

MS KILCULLEN: Right. Certifying voluntary industry standards, thus complying with the DDA. Yes. I think that would be a good idea, and I think that it would be an even better idea if there was some method in enforcement there. You have, say, voluntary agreements, it would be good if people could volunteer to have that independently monitored as well.

MS HOPE: Yes.

MS KILCULLEN: I suppose that's what I'm thinking there.

MS HOPE: Then that would be an advantage for businesses if they could say, like any other independently monitored standard, they could say we are living up to this, and that would be a competitive advantage.

MS KILCULLEN: Exactly. It would be like, you know, having regular audits done for financial things. You'd be able to say, "Independently we have been certified to meet these things," but, yes, brought upon ourselves but, you know, it would be good if it was possible to do that. It would make it a lot easier for everybody, especially since we're talking about (indistinct) objective issues here to - potentially it would be easier (indistinct) but if you want correct judgments to be made and we know that we're not the party to make them, that would be a good thing to be possible.

MS HOPE: Yes.

MS KILCULLEN: Could industry self-regulation play a greater role in managing disability discrimination? Yes, I think that it could in the sense that developing these action plans and developing overall industry plans for dealing with discrimination would I think be a very good thing and would reduce the competitive costs that we've been talking about because it will allow much of the confusion to be cleared up in a nice global - not immediately in relation to a complaint - way, and I think that would be a very good thing. I know that doing the action plan at the university, you have a very useful effect on people by sustaining the issues and just general changed attitudes which is actually one of the strongest and best ways to deal with discrimination.

(tape stops)

MS KILCULLEN: One other point with industry self regulation, I think it's good, it's important and it's not enough. There also needs to be some kind of regulatory oversight involved as there is now with the Disability Discrimination Act. But, yes, you still need that independent (indistinct) where completely voluntary self-regulation (indistinct)

MS HOPE: Yes.

MS KILCULLEN: It should be encouraged.

MS HOPE: It says, "Should the DDA be amended to facilitate industry self-regulation?" That's the question you're answering there. My response also would be, yes, it should . It might well work - I agree that it should be used in isolation, but given that currently the regulations effectively imposed by people with disabilities who are unable to effectively impose the regulation, industry self-regulation is certainly a lot better than that on its own.

MS KILCULLEN: Yes, and much preferable to the kind of complaints-focused system, too, as we were saying before about audits and other monitoring and enforcing the act.

MS HOPE: The onus in enforcing the act should absolutely not be on the people with disabilities, the way it currently is.

MS KILCULLEN: As it currently is. So that does need to be amended. It should be industry regulations.

MS HOPE: Okay. So now we get to 2.7, complaints. What would you like to say about that?

MS KILCULLEN: The fact that the outcomes are not binding and that there are choices between going to court or dropping the case really means that in most cases there's not a lot of point in making a complaint. You won't fix the situation. You might make a point, you might get an apology, but you're not actually gaining what you are setting out to get - like a job or access to a building or whatever. So I think that what affects the willingness or ability of people with disabilities to make complaints to HREOC and to proceed with it to the Federal Court, one is that because the outcomes aren't binding, there's not much benefit to be gained, and the other is that the costs financially and also in terms of energy and just coping with your life is immense.

Anybody that I know who has been through the HREOC process, even when dealt with kindly by people and, you know, not harassed in any extra way has found it extremely painful, distressing, time consuming, psychologically wearing to have to go through all of these issues in a court-type situation.

MS HOPE: Yes. Once again everything that's in (indistinct) about this is totally relevant, and I would add that complaints can only currently be made by or on behalf of the person aggrieved and not by any interested party. There may be legal reasons for that in terms of standing, there may be restrictions on how far the legislation can go there, but I just think it should go as far as it possibly can go without running into those kind of legal problems. If it’s currently narrower than it could be, it should be brought in because as Margaret says, it’s extremely difficult for a person with a disability to make a complaint for all kinds of reasons, and if there’s any way of allowing somebody else to make that complaint, then that should be exploited.

MS KILCULLEN: I think as a part of that too, what we were saying before about auditing systems and that kind of thing, there should be a general shift towards - rather than it being complaints initiated by a person with a disability, it should be possible for industry bodies and others to actually, you know, come up with standards and make it enforceable and, you know, deal with the issues that come up in complaints before they’re in that kind of situation, in an enforceable and independent way.

MS HOPE: Yes. I’d like to just say about my situation. I was fairly certain that I had been discriminated against but didn’t make a complaint. My reasons were that although I was pretty sure, I wasn’t one hundred per cent sure what the outcome would be because of the confusion over the various pieces of technology in the act and the interaction with other acts. So there was legal uncertainty there that put me off. I was also put off by the fact that there was going to be no binding outcomes that would actually put me in a better situation.

Also any legal costs, if you say that complainants could usually expect to have to pay only their own costs eve if they lose, "usually expect" is simply not good enough. As an individual with a disability, your own statistics in the paper illustrate that the likelihood that you’ll be in a low income bracket is higher than people without disabilities. Your other resources may well be reduced compared with other people. Everybody knows that most ordinary Australians can’t afford to go to court anyway.

MS KILCULLEN: And the prospect of having to pay even your own costs, it’s a large question immediately for almost everybody.

MS HOPE: It’s unacceptable, yes. I was employed as reasonably well paid public service lawyer at the time, and it was just beyond my ability, and I was otherwise healthy et cetera.

MS KILCULLEN: It’s understandable from a legal point of view, but that might be how things need to be set up I suppose.

MS HOPE: Yes, there are reasons, but I’d like to say that - these were my reasons for not going through with it. The other issue that Margie may or may not have touched on was the adversarial aspect of things. If there’s any chance at all that you can redeem the situation you’re in, which in an employment situation you’re certainly hoping for because your livelihood is at stake, then introducing further adversarial sort of elements into the situation for any sense of - even invoking the Disability Discrimination Act, saying the word "discrimination" immediately makes the whole situation much, much worse.

You can't mention it without people getting very defensive and upset. Nobody wants to think of themselves as acting in a discriminatory way, even if they are doing exactly that. It just is, you know - - -

MS KILCULLEN: And the prospect that they might end up in court instantly makes people legally defending themselves as opposed to trying to solve the problem.

MS HOPE: Trying to solve the problem, yes. All these problems are well-known, you know, with the legal system in general and I think they apply here. There was another reason too. Just the emotional costs, yes, which you've mentioned.

MS KILCULLEN: Yes.

MS HOPE: I just couldn't have handled it; could not handle it.

MS KILCULLEN: Yes, I think that's a problem.

MS HOPE: I pretty much couldn't handle not doing it either, and in that connection, yes, the other thing I wanted to say was that even though we've said that it's important that there be binding decisions made, nevertheless an apology isn't just an apology. My experience with the whole disability discrimination situation really opened my eyes to why it is that an apology is so important in the context of racial reconciliation in this country, but an apology is a very important, very big thing. It's not cheap for people to give. They may be willing to pay out large sums of money rather than apologise, and it's also not negligible for someone to receive. So apologies are important, but they're frequently not enough.

MS KILCULLEN: Yes, and I think that - - -

MS HOPE: They become less and less likely to be freely and genuinely given the more the adversarial the process.

MS KILCULLEN: But I think this question, too, "Should the DDA be amended to allow HREOC and/or other appropriate bodies to initiate complaints?" our general view there is obviously as much of it as possible about it (indistinct)

MS HOPE: Yes, there's a legal issue.

MS KILCULLEN: Yes, the legal issue outlined in the issues paper is, you know - we understand that, but we also think that wherever possible, it should be made so that other bodies can do the initiating and follow through.

MS HOPE: Right, and if they're given that kind of role, that they really be given enough money, and once again it's a matter of do we really need this or not, and one way to mean it is to realise how much it costs not to do it.

MS KILCULLEN: Okay. Is there sufficient publicity for complaints and outcomes? I don't think there is. I think that there should be more, partly because - I've lost it. I'll just go back - partly because when solutions are found, more people need to know what those solutions are as well more easily, and also because the prospect of negative publicity is actually something that affects people a lot more than many other things - businesses, organisations.

MS HOPE: Shaming is very much an important regulatory tool.

MS KILCULLEN: Yes, I think it is. However, yes, the more publicity there is, perhaps the more differences there will be as well, and that's not necessarily a good thing, but it is - - -

MS HOPE: I think the whole set of the act does seem to sort of reflect ambivalence on the part of the legislature about - it's not just a lack of commitment to the objects of the act, although I suspect that may have been part of it back when the act was passed, but it's also this recognition that by giving the act teeth, you make it a lot more adversarial and bring in a whole lot of disadvantages for people with disabilities. I think however the act currently is wishy-washy about that aspect of things. It raises hopes. It looks like it's going to do something, then it doesn't, and that's worse than - - -

MS KILCULLEN: I think actually the best way of dealing with that is to make the act have teeth, but also to do properly all of the things we've been talking about, about incentives and other issues that stop people from getting to the point where they have to be making a complaint.

MS HOPE: Yes.

MS KILCULLEN: You should be in a position where complaints do have force and do have, you know, proper effect, but are very uncommon because there are all sorts of other means of dealing with the problem readily available to people.

MS HOPE: One other thing I wanted to say about complaints is even though I was not willing to make a complaint, nevertheless I might have been willing to lodge an anonymous - well, anonymous in terms of being publication of it, not anonymous as far as HREOC is concerned - statement of what had been a problem which could be, you know, a sort of lower level way of getting people to come up and report the problem without having to go through the complaint process.

MS KILCULLEN: Yes. I too would have been - - -

MS HOPE: So options along those lines could be useful for gathering information and for allowing people to have their say.

MS KILCULLEN: I too - and also various - like a lot of the people that I've met professionally in relation to these matters would have been much more likely to do that. They would have been much more willing to report a problem than they were to undergo an adversarial court situation for an outcome that wasn't going to do them much good because, as I said before, all the people that I know who did go through what they were actually aiming to do was perhaps increase the information available and to change general systems and attitudes much more than they were looking for a benefit for themselves because of all the costs we've discussed. So, yes, increasing the opportunities for people to report at a lower level their problems, just for information and further investigation on an industry-wide level or whatever.

MS HOPE: Yes, and I think what we're saying here is just evidenced by a lot of the submissions that we've read on the web site from the Productivity Commission's inquiry, the current inquiry. They're basically reports of discrimination that's taken place. People feel the need for some outlet of that kind that will allow their experiences to then learn from, and that does seem to not be there right now.

MS KILCULLEN: Yes. Discrimination in specific areas of activity, are you ready to jump to that?

MS HOPE: I hadn't gone to that. I just sort of skipped it basically.

MS KILCULLEN: Did you have any more on 2.8?

MS HOPE: Yes. How effective has HREOC been in educating? Well, apart from the fact that I actually had to study human rights as part of a law degree, I've never seen anything put out by HREOC. I've been to the web site a couple of times and seen that stuff there, but I've actually in the ordinary course of life never seen a poster or seen an ad on television. When I went to the United States recently, there was huge amounts of stuff of that kind everywhere, in the trains, in subways and buses.

The contrast was quite striking, and I suspect that the issue there is a funding issue because when I did go to the web site recently to check this out, I saw that the campaigns had been very cleverly designed. They were good slogans and so on, but they just aren't there where I spend my time, and I think it's again a case of not giving HREOC enough money.

MS KILCULLEN: Yes. Similarly I've seen a small amount of HREOC's publications and things of that kind purely in a professional role, working in disability services and advocacy and around the university, and I thought they were always good and that they could be - yes - much more widely known about, but I feel that it's fairly obvious that the reason there is HREOC is not well resourced at all. There are too few commissioners and too little money and too little (indistinct) to do the job properly. That should be dealt with because they could do a lot more if they had the resources.

MS HOPE: Obviously the reason that hasn't happened is there's no political will there. I think perhaps one advantage of having this very economic and potential policy focus review would be that it might well turn up evidence that there is - you know that even the economic rationalists mind that there are reasons to make disability discrimination - to eliminate disability discrimination.

I have one more thing to say about 2.8. It talks about the scope for using inquiries to achieve systemic change. To the extent that an inquiry is one of these broader, non person who's been discriminated against initiated things to try and eliminate discrimination, that's great, but I just wanted to point out that an inquiry is itself potentially indirectly discriminatory in that it gives everybody a public voice on topics that people differ about, but in effect it's much more difficult for people with disabilities to take advantage of having that voice. So it could be one more means by which other interests can achieve a higher profile than the views of people with disabilities.

So very careful use of inquiries which really make a big effort to positively allow and encourage and facilitate contributions from people with disabilities, they are important, but it really has to be a careful thing.

MS KILCULLEN: Yes, okay. Looking to the future, 2.9? I have nothing.

MS HOPE: I just had something to say about that. Yes. "What changes are likely to affect people with disabilities in the role of the DDA in the future?" It doesn't seem to me - I mean in 92 there was no such thing as the Internet. Now the Internet is a very big part of most people's lives, and certainly it promises much in terms of accessibility that currently - it doesn't deliver because of problems in general with standards in the IT industry and web design and so forth, and it may be that the DDA can do something there.

For example I use voice-activated software. It's very difficult to navigate web pages because there's no standard design for interacting - for the software to interact with web pages. So - - -

MS KILCULLEN: But I think in terms of the overall construction of the act, I don't see any great sort of future or technology issues, but in terms of the standards sections, I think that . I think that that - yes, a lot can be done through standards of technology that will probably have to change. I think that's what this is saying.

MS HOPE: Yes. I haven't gone through the rest of it.

(tape stops)

MS KILCULLEN: On the issue of employment - we're looking now at discrimination. This is the area we're up to:

> Is there any evidence of any counter-productive effect of the DDA on employment for persons with a disability at (indistinct) sexual or economy-wide level?

Yes, there is, as we've already discussed because the responsibility has been put on to the employer to deal with those hump issues and cost issues that we were talking about. So that is counter-productive because people don't want to employ people with disabilities (indistinct)

> How have the eligibility criteria for the disability support pension and employment support services affected incentives for people with disabilities to stay in the labour force?

That's a question that makes me a little tense because it assumes that a lot of the incentives are needed and that people need to be persuaded to go to look for work, whereas in fact I've usually seen that people on disability support pensions who can work will work if given the opportunity to do so, and that in fact a lot of them do work. The disability support pension allows you to work a certain number of hours, and many people who are on that pension are on it in order to cope with the hours that they're not working rather than as an alternative to working at all. So it's an safety net provision for them rather than an incentives question.

However I think that there is some impact I suppose in terms of costs of working that need to be taken into account; the costs you pay to work as well, and that because of the reductions in the disability support pension due to whatever income you warn, it can be a very small financial incentive to work even if you have a strong willingness to work in other respects, and effectively working for, you know, about half as much as you would be working for if you didn't have a disability. So, yes, and I suppose other influences on labour force participation of people with disabilities I think the question of training is a big one there. It sometimes creates a bottleneck that is then easily overcome later in the working life. For instance an employer who normally has a fair amount of part-time and flexible working hours for their employees generally may have very specific requirements for training years, such as the graduate administrative system that I was talking about before that prevent people from even making it through that bottleneck to the next level of flexibility.

MS HOPE: That's one more application , and that considers the pathways.

MS KILCULLEN: Yes, questions of training as part of work and training opportunities as part of employment opportunities, that's another labour force participation issue.

> What influences are access to public transport likely to have on people with disabilities entering the workforce?

Some, and I think that all of the issues - more flexibility, more (indistinct) time, your training bottlenecks, all of that kind of thing, again in that continuous pathways concept, all of them will have some effect on people with disabilities entering the workforce. However, I think with both these questions, it's important to take into account that there are many people with disabilities who just cannot work at all or full-time because of their disability, and that won't be changed by these effects, and it should not be considered as a measurement of how successful these things are, you know, how many people would get a pension or whatever, because there are a lot of people who just aren't going to be able to.

Also as I was saying before about the combination of the pension and other workplace issues, I think getting people off the pension is perhaps not as worthy as making it easier for people on the pension to work and therefore reduce the amount of pension they're being paid whilst still being paid some, because there are many benefits that go with the pension that affect extra costs like transport and things of that kind that go with working as well, and if you don't have the pension, you have to - - -

MS HOPE: The costs of working.

MS KILCULLEN: Yes, that's right. You already have higher costs. So I think that that should be - things should be looked at more in those terms.

MS HOPE: Once again, measurement methods that allow you to go through experiential viewpoints could be (indistinct)

MS KILCULLEN: Yes. I think also there’s the generalised standard that people with a disability will work usually if they can and when they can, and that there shouldn’t be this kind of level of suspicion and accountability brought into it because that changes, because a lot of people with disabilities have a pretty fluctuating working (indistinct) and in fact often one of the limiting factors for their workforce participation is that they can't reliably say that they will be able to work full-time or whatever for the long periods that employee usually want them to be able to say that, even if there are times at which they can go.

MS HOPE: That's another aspect of the categorisation issue that we talked about in relation to the broad definition when I made the point that people with disabilities are the community, that it is (indistinct) or able or unable, disabled or non-disabled, there are degrees, and people often change categories, and that is no indication that when you're in the same category, they're lying or malingering or - - -

MS KILCULLEN: Yes, and that also means that other changes that you make are not likely to be able to complete or reduce that category because it is a general category (indistinct) can't work. So facilitating movements between work and pension is really the go there, and that more than talking about shifting people from one system to another. Yes.

> How have the terms "inherent requirements", "unjustifiable hardship" and "reasonable adjustment" been interpreted in employment?

I think we've already talked about that quite a lot, but the key thing I'd like to say there is that they haven't really been, especially not in - well, just regarding education as well, but in both sectors. People don’t know what they mean and the confusion is part of the problem. If they knew what they meant, they could just get on with it and comply, which is what they want to do usually with the act, but because of their doubts about it and the costs - - -

MS HOPE: There are huge transaction costs and application fees.

MS KILCULLEN: Yes, and finding out what the inherent requirements are and all that sort of - - -

MS HOPE: That's what I mean by "transaction costs".

MS KILCULLEN: It should not be assumed that these things are really clear and known by employers. They're not. So:

> What are the costs of reasonable adjustments in employment and who currently bears these costs? Who should bear them and why? What impact, if any, do they have on competition?

I think we've probably already covered that fairly extensively, that there are imagined and real costs, and that the real costs at the moment are met by employers and probably should be spread around much more than that.

> What are the advantages and disadvantages of developing disability standards for employment?

Simple answer to that, I think there are huge advantages, as we've already discussed - huge.

> What are the costs of reasonable adjustments in education? Who currently bears these costs? Who should bear them and why?

I think this is a big problem in education as we've spoken about already, but funding is actually the most significant cause of discrimination really, in universities anyway, and those costs are currently borne by the university or the person with the disability, and I think that there needs to be more general methods of dealing particularly with fluctuations of costs.

> What are the advantages and disadvantages of developing disability standards in education?

I say the same as in all the other areas, but perhaps there might be more technical and curriculum issues to deal with. Therefore it might take a little longer to come up with these standards, but coming up with good standards is a good aim and should be attempted.

> Has the accessibility of public transport improved since the DDA was introduced? What more remains to be done?

Yes, I think it has improved. I think there could be more information out there about which things are accessible and how. Information is actually sort of one of the largest blocks at the moment to using public transport because you're not sure whether there will be paths at the end or whatever. Similarly another thing that could be done is assistance should be as automatically accessible as possible without you having to ask for special assistance or for somebody to bring a ramp to the train or whatever. As an example, the bus system here in Canberra has an automatic ramp situation and that's much better than having to ask a guard or stuff like that.

> How has the term "unjustifiable hardship" been interpreted in the provision of public transport?

I think with design standards they've helped a great deal with that, and, yes, should be encouraged in other areas as well for that reason so it makes it much clearer what is hardship and how unjustifiable it will be. Also they've encouraged people to come up with systems that overcome these problems much more quickly.

> What impacts do you expect standards for accessible public transport to have on discrimination in this area?

I am pretty sure - in fact very confident - that it will hold (indistinct) and in fact I've seen that happen when new legislation - I can't remember exactly which it was now - came in in 2000 I think about accessible standards for public transport. There was instantly a change to bus fleets and various other things, signage, all of that. It became quite apparent very quickly just how much could be done. So I think the disability standards will have a big impact on discrimination there:

> Access to public premises - has the DDA improved access to public premises so far?

Yes. I think that's true of new buildings in particular, but there's still a lot of problems when you deal with shops which I understand are covered by the Disability Discrimination Act, principally because of what is already mentioned in the issues paper about internal (indistinct) but also about the area of - - -

(tape stops)

SHOPS

- DDA has improved access to new buildings, still problems with older buildings especially access being possible but extremely complicated or reliant on personal assistance.

- Problems with shops because of internal fit outs (which would be a cost to change) and areas around buildings (many shops that would be internally accessible have a small step preventing access in the areas around the building.)

- Unjustifiable hardship difficult to assess in terms of access because it depends how many people will then access; eg, a shop. I think this had allowed lower standards than might be allowed in other areas.

- I think standards will have a positive impact and that only the stick (and possibly cost recovery through tax etcetera) approach is likely to have an effect because encounters are too random in public access for people to either complain or be successful even though public access in general does have a big effect on the ability of people with disabilities to participate. Economic participation here would have obvious benefits to the economy (and ultimately also individual businesses after initial cost).

- Same arguments apply to goods and services, clubs etcetera. Individual encounters are not worth complaining about though the whole thing does have a significant effect. Incentives may help here.

- Yes, there should be disability standards in accommodation and people should be made more aware of the benefits of accessible and adaptable design since, as we said, disabilities can occur in many stages of life, aging et cetera and adaptable accommodation is a good design issue that may save overall costs to people and society later on. Again, general access is better than particular access, incentives might also be useful.

COMMONWEALTH GOVT PROGRAMS

I don't know anything about the Commonwealth Disability Strategy but I hope it also covers outsourced government programs, like employment, about which there is some legal confusion over who is responsible for ensuring compliance with the DDA.

I think that, given what we have said about that community costs of discrimination and the government’s role as a potential third party in removing costs to individuals, the government should not be allowed to use exemptions or claims of unjustifiable hardship. This is also significant when we are talking about access to services paid for by the whole community through taxes - they should be accessible by the whole community.

Elections - democracy issue - no unjustifiable hardship or reasonableness test available. If the community as a whole can’t pay, then when can an individual or smaller organisation be expected to pay?