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## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Disability Discrimination Amendment Bill 2003**

WEDNESDAY, 24 MARCH 2004

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**SENATE****LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Wednesday, 24 March 2004**

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

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

**Senators in attendance:** Senators Bolkus, Ludwig, Mason, Payne and Scullion

**Terms of reference for the inquiry:**

Disability Discrimination Amendment Bill 2003.

**Committee met at 5.49 p.m.**

**BATH, Ms Nicola, Policy Officer, Australian Injecting and Illicit Drug Users League**

**MADDEN, Ms Annie, Executive Officer, Australian Injecting and Illicit Drug Users League**

**SALEEBA, Miss Emma Louise, Policy Officer, Alcohol and Other Drugs Council of Australia**

**WILSON, Ms Cheryl, Chief Executive Officer, Alcohol and Other Drugs Council of Australia**

**CHAIR**—The Disability Discrimination Amendment Bill 2003 proposes to amend the act to remove prohibition on disability discrimination on the ground of a person's addiction to a prohibited drug. The bill would not apply to people who are receiving treatment for their drug addiction.

The committee has received 117 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and their protection of official witnesses. Further copies of those notes are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

The committee prefers all evidence to be given in public. Under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I now welcome Ms Cheryl Wilson and Miss Emma Saleeba from the Alcohol and other Drugs Council of Australia, and Ms Annie Madden and Ms Nikki Bath from the Australian Injecting and Illicit Drug Users League. Your organisations respectively have lodged a

submission, which we have numbered 5 from the Alcohol and other Drugs Council of Australia and numbered 17 from the Australian Injecting and Illicit Drug Users League. Do you need to make any amendments or alterations to those submissions?

**Ms Wilson**—No.

**CHAIR**—As I think has been explained to you, I will now ask each of your organisations separately to make a brief opening statement and, at the conclusion of that, members of the committee will ask you questions. Who would like to kick off?

**Ms Madden**—I am happy to go first. For brevity, the Australian Injecting and Illicit Drug Users League is known as AIVL and I will refer to it as AIVL from now on. We would like to thank the committee for providing us with this opportunity to speak to you today. As far as we can ascertain, AIVL is the only organisation that will be representing the direct perspectives and views of people who use illicit drugs to these committee hearings. We take this responsibility very seriously. However, being conscious of the time available and wanting to leave as much time as possible for your questions, we do not intend to reiterate all of the points made in our written submission. Rather, we would like to, very briefly, highlight and elaborate on a few key issues.

First, AIVL would like to state for the record that we do not support the proposed amendment bill. Second, while there has been a large focus on the impact that the proposed bill may have in the employment context, AIVL would like to stress that we believe the proposed bill will have implications well beyond whether someone is removed from their job or not. This bill will potentially have people being evicted from their housing, refused places in educational or vocational training and, perhaps of most concern, it could result in people being refused access to critical health or social services. Suspected drug users could potentially be refused medical services, a shopkeeper could refuse to sell food to a suspected drug user. People who have used or use illicit drugs already experience this type of discrimination routinely, but this bill says that not only will treating drug users this way be tolerated but it will be actively encouraged at law. In short, we believe this gives people permission to act on their prejudices with impunity.

Third, AIVL is very concerned about the potential impact the bill will have on the numbers of people accessing drug treatment programs. There is a great deal of internationally recognised evidence to show that forcing people into treatment, regardless of how it is done, does not work. Far from encouraging people with dependency issues to seek drug treatment—as stated by the Attorney-General—AIVL believes this bill will force people away from support, away from information and, therefore, away from programs.

People will access drug treatment if they think it is in their best interests to do so. The potential of losing your job, your housing et cetera will deter people from coming forward. This is not just a theory. We are drug users and we know what will work as an incentive and what will not. In relation to drug treatment, the point needs to be made that currently there is a huge unmet demand for treatment across the country. How can it be okay to penalise people for not accessing treatment when there are many who would like to be in treatment but cannot get access?

I would like to make some comments about the human and legal rights implications of the proposed bill. As AIVL has stated in our submission, because someone is accused of breaking the law it does not mean that the individual forfeits their basic human rights or their right to be treated through a fair legal process. We accept that even if people are convicted of breaking the law their legal and human rights should be maintained. We believe the proposed bill brings this principle into question. It says that, on the basis of suspicion and rumour, people will forfeit their right to be treated with human dignity and respect, and can be refused access to basic services, many of which can be needed for people to survive, such as housing, food, health services, employment, education et cetera.

AIVL does not believe that the Disability Discrimination Act should be used as a tool to modify people's behaviour, to promote a particular moral viewpoint about illicit drug use, or to promote media stereotypes about people who use illicit drugs. We—and I—represent the drug users in the workplace that everyone seems to fear so much. Stereotypes are universally narrow and invariably flawed. AIVL believes the media images and stereotypes presented to the community about drug users are equally narrow and flawed.

Like any group in the community, people who use illicit drugs are an extremely diverse group of people. Although drug use can be problematic for some people, this does not mean that it is that way for all people who use drugs. It also does not mean that people who use drugs cannot be productive and contributing members of our community and workplaces. Many thousands of us hold down regular jobs across all walks of life. We are often too quick to rush to the stereotype of the heroin user in the toilet stall in the workplace, causing havoc, stealing from their employer, and putting everyone at risk of disease.

I run a national drug users organisation and I can honestly say that I have never found a staff member using in the toilets at work. I have never had a staff member steal money from the organisation, and I have never had a staff member who has put other staff members at risk. In fact, quite the contrary: I have hard-working, committed staff who are honest and responsible. This is not the image that is usually used to portray employees who use illicit drugs. In my opinion, the stereotype of illicit drug users in the workplace is rushed to all too often: it is actually a very rare occurrence that people are caught using illicit drugs in the workplace. Most of the working drug users that I know desperately avoid ever having to use at work, out of respect for their employers, out of respect for the people they work with, out of respect for themselves, and because they do not want to lose their jobs. I will finish by saying that we do not want special treatment. We want to be treated the same as everyone else in the community. Thank you.

**CHAIR**—Thank you, Ms Madden. We will move to the Alcohol and other Drugs Council, unless, Ms Bath, you wish to add anything.

**Ms Bath**—No, that is fine. Thank you.

**CHAIR**—I assume, Ms Wilson, you will make a presentation?

**Ms Wilson**—Yes. Thank you very much for the opportunity to give evidence today. The Alcohol and other Drugs Council of Australia—which is ADCA for short—is the peak national non-government organisation representing the interests of the Australian alcohol and other drugs sector. ADCA's member organisations employ almost 10,000 staff Australia-wide,

of which approximately 2,500 are specifically employed within the alcohol and other drugs sector—for example, treatment and prevention workers.

As outlined in our submission, ADCA is opposed to the Disability Discrimination Amendment Bill for a number of reasons. These include the potential impact of the bill on Australians who use illicit drugs and on their families and associates; the deterrent effect that this bill will have on people accessing treatment for drug problems and the lack of availability of treatment services in the community; the potential impact of the bill on efforts to reduce the transmission of blood-borne viruses such as hepatitis C and HIV; the failure of the bill to recognise the nature of drug dependency as a chronic relapsing condition; the potential impact of the bill on people's recovery from drug dependence; and definitional problems relating to addiction and treatment.

Given the potential harm that these amendments could cause, ADCA is somewhat perplexed as to why they are even before the parliament. In their evidence to this inquiry, the Human Rights and Equal Opportunity Commission has stated that since the Disability Discrimination Act's inception 11 years ago, they have only received 14 complaints relating to addiction and it is unclear how many of the 14 complaints related to a current addiction or other prohibited substance. Similarly, in the Productivity Commission's draft report on the review of the Disability Discrimination Act written last year, there is no recommendation or finding that identifies a need to exclude illicit drug addiction as a disability.

Rather, a review of transcripts of evidence given to the commission indicates that those who raised the issue of addiction were supportive of it being included under the definition of a disability. One rationale provided for the bill is that businesses, clubs et cetera currently have no protection against discrimination claims by drug dependent people when trying to keep the work or social environment safe from risky or inappropriate behaviour.

ADCA's understanding is that the Disability Discrimination Act does not provide a person with a drug addiction with any greater rights or allowances than a person without a drug addiction. Rather, it acts to prohibit discriminatory behaviours based solely on an individual's perceived or actual drug addiction. Furthermore, it is our understanding that the act does not provide protection for intoxication or any other behaviour that may be associated with a disability such as drug dependence.

Given the above, there would appear to be no reasonable rationale for denying Australians with an illicit drug dependence the same protection under the law as applies to other Australians with a disability. These changes will only serve to legitimise the stigma and prejudice experienced by Australians who use illicit drugs, their families and the health and welfare professionals who work with them. This stigma and prejudice alienates from the community people who use drugs and reduces their opportunities for recovery. It also deters people from working in the alcohol and other drugs sector, which in turn impacts on the availability of drug treatment services.

It is also important to note that, if passed, the impact of this amendment could be widespread. Potentially, nearly one million Australians—those who use illicit drugs on at least a weekly basis—could face discrimination in their employment, accommodation, education,

club membership, housing et cetera. The bill will particularly impact on young people, as those aged 14 to 29 are the highest users of illicit drugs.

In conclusion, it is clear to ADCA that the community has little to gain by legalising discrimination against drug dependent people. In fact, the proposed amendments are likely to result in significant harm for a significant number of people, and there are many ethical and practical problems that are likely to arise from the amendments, making the position of businesses et cetera less, rather than more, clear. Furthermore, the inclusion of drug addiction under the Disability Discrimination Act since its inception 11 years ago has resulted in few problems, which only leads one to wonder why we are trying to fix something that clearly is not broken. As such, ADCA urges the Senate Legal and Constitutional Legislation Committee to recommend against the proposed amendments proceeding through the parliament. Thank you.

**CHAIR**—Thank you very much, Ms Wilson. Ms Saleeba, did you wish to add anything at this stage?

**Miss Saleeba**—No, thank you.

**CHAIR**—You have obviously had some opportunity to look at the *Hansard* of the hearings held in Sydney a short time ago. One of the questions which some senators were pursuing through those hearings was the breadth of impact on individuals being greater than employment—that is, the areas that you referred to. In some cases we are talking about very marginalised members of the Australian community. Ms Madden, you have spoken about people who are productively holding down jobs and existing in the community on a daily basis, but others who are in this broad category of addiction fall into the most marginalised category. What levels of discrimination do they experience currently, in your experience as the peak group, and how do you think this will impact on those particular people?

**Ms Madden**—Discrimination for all people who use illicit drugs, particularly those who perhaps experience some form of double or triple marginalisation, is extreme already. They are a very marginalised group in the community, largely because of the stereotypes that I have talked about that are promoted in the media to the community to encourage the community to think of these people as criminals and violent and unproductive.

Drug users are just other people in the community. They are people's sons, daughters, partners, parents and children. They are not monsters. They are people who are sometimes having a particularly rough time, and often they are facing discrimination in trying to access the very services that are there to meet their needs. In particular, I am thinking about Indigenous injecting drug users. They are a particularly marginalised group in the community, often marginalised both within the Indigenous community and within the broader Australian community.

I believe that group, in particular, will suffer greatly at the hands of this bill if it is made into law. I suppose it goes to the comment I made about people being able to act on their prejudice with impunity. Indigenous drug users, for example, could be evicted from their housing on the basis that they are drug users or drug addicts. It could be more about the fact that they are Indigenous, but that will be covered by this legislation. I think that the more

marginalised you are, the more chance there is of this legislation causing great harm for you, particularly for drug users with mental health issues.

**CHAIR**—Would you describe it as a fine line for some people, discerning between whether you are talking about someone who is affected by a drug addiction or a mental health problem?

**Ms Madden**—It can be, yes.

**CHAIR**—For some people. I do not wish to make a generalisation at all.

**Ms Madden**—Some people use illicit drugs to self-medicate for mental health problems.

**CHAIR**—Proposed section 54A sets out in parts (1)(a) and (b) the grounds that we are discussing here:

- (a) the disability is the other person's addiction to a prohibited drug; and
- (b) the other person is addicted to the drug at the time of the discrimination.

Can you tell me, from your experience—walking down the street, standing in one's office, being a newsagent or the manager of a Centrelink office—how one will know that one is safe under the Disability Discrimination Act by exercising that particular level of discrimination in deciding someone is drug addicted? How will they know?

**Ms Madden**—They will not know. That is the thing. There are a lot of problems with the proposed bill, in the sense that it does not give a definition of 'addiction'. There is a lot of conjecture within the alcohol and drugs sector about whether it is possible to find a definition of 'addiction'. In this case, I think the biggest issue will be that someone will be able to be discriminated against. They could lose their job, they could be evicted from their housing or denied services, and they would then have to prove that they are not addicted rather than someone else having to prove that they are. That is my understanding of how this will work.

What happens routinely is that people are discriminated against. You are talking about a really marginalised group that has very low self-esteem and very little access to resources. They are not going to bring a case, even if they could, under the act. This is just further deterring people from being able to protect their rights.

**CHAIR**—Ms Wilson, in the ADCA submission you make some observations in relation to the difficulties of accessing treatment generally, but then you go on to specify the increased difficulty in rural and regional locations. The bill provides that if a person is undergoing a program or receiving services to treat the addiction to the drug the provisions will not apply. What level of access do you see is currently available and what would have to be done to ensure that there was sufficient access to treatment to enable people to fall into this category?

**Ms Wilson**—I think that the estimation of people in treatment currently in Australia is about 40 to 50 per cent, so we have a long way to go. There are, I think, shortages everywhere. It is not just rural areas, but rural areas also have that tyranny of distance, where they may only have one service within a three- or four-hour drive of them. If that one service is booked out for quite a long time, there is nowhere else for them to go.

In terms of the amount of resources, realistically it would be significant. It is not just a matter of putting money in. For example, in the area of pharmacotherapies, like methadone

and buprenorphine—which are some of the most well researched and established treatments in terms of effectiveness—they cannot get enough people to prescribe it or dispense it in terms of pharmacists et cetera. Even when governments have tried to expand those programs, they have had real problems in terms of people being prepared to deliver them. Similarly, when the federal government rolled out its Non-Government Organisation Treatment Grants Program, some services were delayed up to 18 months or more, because they could not recruit staff for those services. It is a much bigger problem than just putting more money out for services. There are real problems around qualified personnel and people's willingness to do it.

**CHAIR**—Thank you very much.

**Senator BOLKUS**—I want to start with one or two questions for ADCA. You tell us that you believe many of the statements made by A-G's and ACCI are wrong. One of them that you state is wrong is the assertion that the bill is consistent with the Productivity Commission's findings. Can you explain to us why it is not?

**Ms Wilson**—We had a look at the Productivity Commission's report. We did a word find, to try and look for any references to addiction et cetera. The only references we could find in that report were to people who were saying, 'Addiction should be included.' The report concludes that, in fact, it is included under the definition of 'disability'. They were the only references we could find. The submissions were saying it should be included. I am perplexed by how it can be argued that it is consistent.

**Senator BOLKUS**—You claim that the bill may expose employers, landlords and others to greater legal risk. Can you explain that assertion?

**Ms Wilson**—It is basically adding a complexity. We have already talked about, 'How do you define addiction?' and to expect a layperson to assess whether someone is addicted, whether what they are addicted to is a prohibited substance as opposed to another condition which may present similarly, I think, is impossible. For example, as a nurse, someone would present to A and E who you thought was intoxicated; they were often in a hypoglycaemic state and it was something you had to be aware of; there are lots of presentations which mimic. It is a big ask. As a result, it is likely that they will make decisions which are wrong basically and open themselves to legal ramifications as a result.

**Senator BOLKUS**—If an employer or a person providing a service takes a stand, makes a decision and denies someone a service, and that person turns out not to be an addict, do you then see those people as being subject to the application of the discrimination act? Is that the way the act operates? There is no defence for anyone who makes a decision, no matter how honestly they believe that it is the right decision.

**Ms Wilson**—Sorry. You are saying, if they make the wrong decision? I am assuming that action could be taken, yes. If someone wanted to go to the human rights commission or take action against them, they would be able to do so, although as a non-lawyer I am not 100 per cent certain.

**Ms Madden**—Regarding legal action, with employers opening themselves up to further litigation, there is the issue that they may not know that someone is on a recognised treatment. If they are in treatment, they then are protected under the act, and the employer could act without having that knowledge.

**Ms Wilson**—The way in which a clinician would make an assessment of dependency was by talking to the client and getting information from them about their experience of their drug use. How someone could make that sort of assessment without access to that information is beyond me.

**Senator BOLKUS**—That is one of the concerns that I have—and maybe groups, such as employers, should have. How does one make a decision which is sustainable? If it is found not to be a sustainable decision, what are the repercussions? I think you have spelt that out. Thanks.

**Senator LUDWIG**—I would like to follow that up. It is not always discernible from a visual perspective, or from listening or talking to the person, that they might be an illicit drug user, is it? How would the employer, or the social club, or the person, make a decision or a determination that, in fact, they have a suspicion?

**Ms Madden**—This goes to the heart of the problem. We know that, with alcohol and gambling and issues like that in the workplace, the more the employer brings in supportive programs for employees, where people can come forward without the fear of losing their job as a first point of call—of course, this is a progressive thing, and we are not suggesting that no-one would ever lose their job for those reasons—the more likely it is for someone to come forward and talk to their employer and seek help and support. We are concerned that this bill will, in terms of illicit drug use, push people further away from coming forward to employers or anyone else who may be able to help them or assist them to get access to support.

**Senator LUDWIG**—In relation to the issue that you raised on page 5 of your submission, which indicated that there was significant research showing that forced or involuntary drug treatment is less effective than when someone enters treatment of their own volition, I take it you mean that it is difficult to tell whether a person is on a program or not, or it might in fact (1) cause people not to go on a program or (2) encourage them to go on a program, really when they are not prepared to go on one at that point in time.

**Ms Madden**—Yes. There have been trials of people being forced into compulsory treatment through various means in various countries. Often people in those circumstances will not have as good an outcome with their treatment as people who have volunteered to go into treatment for their own reasons and at a time when they are ready to address their drug use issues. Forcing people to address their drug use problems is not seen as something that is a particularly productive method of drug treatment and it often brings worse outcomes.

**Senator LUDWIG**—You think the way the legislation is drafted may cause people to enter programs—in other words, force them into programs—when they are otherwise not ready?

**Ms Madden**—Sorry. I understand what you are saying to me. Our concern when talking about ‘forced’ or ‘coercive’ treatment was with the Attorney-General making reference to, ‘If people want protection under the law, then they will have to go into treatment.’ That is not a good reason for getting them to go into treatment. It is a good way to waste valuable treatment services. People need to be going into treatment because they want to address their drug use and because it is right for them and the program is right for them, and their needs will be met. Then they have a really good chance of a successful outcome; working with people who have their best interests and needs at heart. People being forced to access treatment purely so that

they will not lose their job or be thrown out of their housing is not good for treatment services or for the people going into them.

**CHAIR**—As I should have indicated at the beginning of the hearing, the committee is constrained by the fact that we are meeting while the Senate is in session. This is unhappily for us a division—well, happily for you, in fact—not a quorum. We hope you will bear with us until we return to the committee room and resume the hearing.

**Proceedings suspended from 6.17 p.m. to 6.27 p.m.**

**CHAIR**—Again, my apologies for the interruption. We were having questions from Senator Ludwig but, in the interim, Senator Scullion.

**Senator SCULLION**—Thank you very much for your opening statement. There are a couple of observations I would like to give you some feedback on. You spoke about a couple of particularly discriminatory behaviours: one maybe from an employer to no longer employ someone; the other maybe, for example, in tenancy if you are a landlord, to sort of move them on. Are you aware of any of that sort of activity happening at the moment? I am not asking you to be specific. I have to frankly say I have done it myself: I have been on a prawn trawler and if you are a junkie on my prawn trawler you normally end up dead, not because of the drugs but because of the eight-tonne winch. The issues there have not really come to the top of my head until tonight. Where would they go anyway? How would we find out the range of people that may be discriminated against in any event?

**Ms Madden**—This is the thing. It does not come to the surface because most of the people you are talking about have really low self-esteem and are quite ashamed of themselves anyway. That is how they see things—not always, but often. They kind of see poor treatment—whether it is real discrimination, stigma or all of those things—as just life. That is just what their life is like. They do not even necessarily identify it as discrimination. Then to come forward and go through a whole Federal Court process is huge for some people.

There is a lot of discrimination and poor treatment. People do lose their jobs. There are numerous cases I know of around the country where people have lost jobs. I am talking about productive employees, not people who are slacking off or using at work or any of those things. They perhaps have lost their job because someone saw them coming out of a methadone clinic, or someone saw them at a needle and syringe program. I am not stretching the truth at all: people have lost their jobs for those reasons.

Sometimes it will be a bit more subtle than that. Someone will see them coming out of a program, then it starts in the workplace. Anything that goes missing or is wrong is blamed on them. They are slowly whittled away until they leave the job. It can be indirect—more subtle than direct—discrimination a lot of the time.

**Senator SCULLION**—That gives me a bit of an understanding. I was just checking whether you have attempted to find some statistics on that. New South Wales, I understand, in 2002 passed an amendment to the New South Wales antidiscrimination legislation which effectively excluded people who are addicted to prohibited drugs from being persons with a disability under the act. Subsequent to that now being law in New South Wales, have you been able to monitor, or can you give me a feeling of what were the consequences for people

that may have come and seen you, or you may represent in New South Wales, as a consequence of that act?

**Ms Madden**—Our organisation in New South Wales has said, at this stage, that the difficulty is that it is very hard to monitor when people are not coming forward anyway. These sorts of changes in legislation just make it that much more difficult for people to come forward. It is one of those areas where, because the behaviour is illicit, everything is very much underground anyway. It is very hard for people to come forward to anyone, even to an organisation like ours. People are scared to come forward to us and admit to using illicit drugs. It is an illegal behaviour and people have a lot of lose and there is the shame associated with it. It is very hard to get a sense of those things.

Our organisation in New South Wales certainly has a number of people they are working with who have lost their jobs due to illicit drug use or claims of that or assumptions of that. They are trying to encourage some of those people to come forward legally, but this change to the legislation has changed the potential for a number of those cases. Even before that change to the legislation, a lot of those people were not willing to do it because it meant their families would potentially be brought into it, and the public would know they were drug users as well. There are many deterrents to people coming forward anyway and this just makes it even worse.

**Senator SCULLION**—As I understand it, the New South Wales legislation applied only in the areas of employment and related specifically to a disability under the act. Over the two years—or however long it has been around; about two years—since that has been law in New South Wales, are you aware of anyone who has come to your organisation to say, ‘I have now fallen foul of this legislation or law’?

**Ms Madden**—Not directly, but we do not work in New South Wales specifically.

**Ms Wilson**—My understanding, from reading some of the other submissions, is that the federal law can override the state law as well. Someone who did that would still be breaching the federal act and probably would not take that action, so I do not think we would see the full effect of the New South Wales legislation unless this legislation was also passed.

**Senator SCULLION**—In your evidence, Ms Madden—I think it was you, but you will correct me, no doubt, if I am wrong; it may have been Ms Wilson—you indicated there was a concern that the suggested provisions would create an environment where people were reluctant, for example, to go to their employer and say, ‘I’m looking for rehabilitation,’ and those sorts of things. It is my view—and I would like you to respond to this—that in many instances it would be uncommon—in my genre anyway—that the employer would be the first port of call for that sort of counselling. One thinks you would have a mate, or family, or something. I am not being cynical about this, but could you amplify on why you think that would be an important relationship; why they would go to their employer and say, ‘Excuse me, I’ve got a bit of an addiction’?

**Ms Madden**—It depends on where you work; it depends what area you work in. Contrary to stereotypes, there are a lot of doctors and nurses who have problems with illicit drug use.

**Senator SCULLION**—Indeed, yes.

**Ms Madden**—And they have bodies within their profession which would probably be, quite frankly, a good first port of call for them, because they have programs set up specifically to deal with those issues and they can assist people to get into rehabilitation and back into the work force as soon as possible. It depends on where you work; what sorts of programs your employer has in place already; what sorts of attitudes they have expressed to illicit drug use in the time you have been there; whether you have a good relationship with them; what your level in the organisation or company might be. A lot of things like that would factor into whether you picked your employer as the person you would come forward to. But I do not think it is out of the question that someone would do that if they felt it was right.

**Ms Wilson**—Increasingly, workplaces—especially large workplaces—will have an alcohol and other drug workplace policy which, if it is following recommended guidelines, would have mechanisms so that if someone came forward they would be assisted into treatment et cetera. I know there are programs, such as the one the CFMEU runs. It has its own rehab program and does have those mechanisms for people within the construction industries et cetera. There are industries out there that do take this issue seriously and are prepared to provide assistance for workers.

**Senator SCULLION**—Clearly, the amendments to the discrimination act that we are looking at today would not have an impact on all of those people, so were you referring to others, apart from those organisations that currently have that attitude or culture?

**Ms Wilson**—Yes, except some places, you might believe, have that culture and you are also protected by the discrimination legislation, but the fear is that you might think there was a risk that if you came forward and identified yourself as an illicit drug user and went into treatment, it would not be successful. We know that the great majority of people relapse. It is a chronic condition. People usually need multiple treatment episodes in order to recover. If you know that you will go through one episode and then they are going to have their eye on you and, if you relapse—which is likely—you could lose your job, in that situation people will think twice about coming forward.

**Senator SCULLION**—You talk about stereotyping. We are running a very interesting program in the Northern Territory—in school basically—'Losers use drugs'. Wherever you go there is that sort of particular stereotyping that the government sponsors with regard to illicit drug use. I would not subscribe to any other view. I think that it is a good idea to warn people about the dangers of drugs, and that is my particular view.

I recognise you may be talking about those who are current drug users. You commented about the stigmatisation of a group: how can we deal with it as an issue? I certainly believe that we need to be very active about warning people about the dangers of drugs. That, in itself, is educative. We are teaching schoolkids about drugs and the way we do it is to say, 'They are losers.' We are saying, 'These are not good people.' We may not be doing it directly, and most of the kids nowadays probably have a higher level of tolerance to these things than in my day, but they still believe very intrinsically that, at heart, drug use is something very bad and they associate it with theft and generally bad behaviour. How do we try to change the views of those people, to protect drug users—if you agree with that or not—without actually stigmatising them?

**Ms Madden**—Can I ask you a question?

**Senator SCULLION**—Absolutely.

**Ms Madden**—Do you think I am a loser?

**Senator SCULLION**—I do not know. You do not look like a loser.

**Ms Madden**—I suppose that is the answer I wanted. You do not know. You do not know me. You do not know my life. You do not know what has happened or what I have tried to do to address my drug use or anything else. I am not trying to attack you about that.

**Senator SCULLION**—No.

**Ms Madden**—What I am trying to get across is that people who use illicit drugs are a really diverse group of people. They come from all kinds of backgrounds. It is not just working-class kids; it is kids from wealthier backgrounds; and educated and not educated. There are all sorts of reasons why people use drugs and stop using drugs and then continue and relapse. It is, unfortunately, quite a complex issue. There are no simple answers. If there were, we would have those answers and we would have put them into place.

I have no problem with young people being given good, accurate information about drugs. Yes, drug use can cause problems in people's lives; there is no doubt about it. They have caused problems in my life. But all drug use is not problematic—and I am talking about alcohol when I am talking about this as well. We know that not all alcohol use is problematic, so it follows that other drugs maybe can be used in a non-problematic way as well. It is about looking at what are the stereotypes. What are the myths we have built up around illicit drugs? Ultimately, as a bottom line, if you want to attack the drugs, attack the drugs, but why attack the people who use them? They are just other people. Maybe they have made mistakes in their choices, but should they die for those choices, from HIV-AIDS or hepatitis C? Should they be thrown in prison for the rest of their lives for making that choice?

We need to have a response to this issue that is relevant and proportional to what it is that is actually happening. I do not think we do that now. I think we should give people—young people in particular—good, accurate information and be honest about drugs with them, but do not stigmatise the people who use them, because that does not get us anywhere; it just creates more problems.

**Senator MASON**—My learned friends Senator Bolkus and Senator Ludwig have raised legal issues. I think both of you also raised evidentiary and enforcement problems that the legislation could have. I do not want to go over that again. Obviously they are issues that the Senate will have to deal with. Senator Scullion has raised the issue of workplace. The Commonwealth legislation relates to broad services, the New South Wales legislation simply workplace. In Sydney I think it was fair to say that my specific concern was with the workplace, like Senator Scullion. Of everything, that struck me as potentially the most difficult issue, because if I were an employer, to be quite frank, I would not want to encourage it and the idea of people using prohibited drugs at work would not be something I would encourage. I argued, I think, in Sydney—or at least raised the question—that there could be problems with workplace harmony et cetera.

I think it was Ms Madden who said that on the one hand you are dealing with some of the most marginalised people in the community, often with low self-esteem. That can relate obviously to workplace. Also, you said the people that work with you are, I think you said, productive and work very well. So what are they? Are they marginalised? Do they have low self-esteem, or are they people who are productive and work well? Which?

**Ms Madden**—‘Yes’ is the answer to your question. They are all of the above. An individual can be marginalised in some contexts but not others. They may be well treated within an organisation like ours that is open to the issues they bring, but not in other contexts. As I have said a number of times now, drug users are a very diverse group of people, so it depends on the opportunities they have had in life, their education, what their home life has been like, issues that have come up for them, what their race is; all of those things come into whether someone is marginalised or not and whether they can continue to use illicit drugs and still live a productive life.

It does take opportunity in your life to be able to manage that. Some of the more marginalised people who have not had much opportunity may find it very difficult to use illicit drugs and not have them have a problematic impact on their lives. What I was trying to get across is that real diversity of people. There are a lot of people in the workplace who are using illicit drugs. I do not encourage illicit drug use in our workplace, either.

**Senator MASON**—I am not suggesting that, Ms Madden.

**Ms Madden**—You were saying you would not want to see that. I would not want to see that either. It is absolutely not on.

**Senator MASON**—Can you understand, particularly in contexts of heavy machinery and so forth, that on the face of it the use of prohibited drugs would create a situation where an employer would want to discriminate and would want to say, ‘Look, you can’t work here, Jack’?

**Ms Madden**—But my understanding is that the current act allows for that. It allows an employer to say it would cause undue hardship or they cannot complete the inherent requirements of the job. Then it is okay to say, ‘We can’t employ that person.’ I am not sure what extra is needed.

**Senator MASON**—So that is your point? In other words, fair enough if there is an issue with workers on drugs that are potentially a threat to other workers; that is already catered for in existing legislation?

**Ms Madden**—Yes, and with workplace policies, I would think, as well.

**Senator MASON**—Ms Madden and Ms Wilson, thank you very much.

**CHAIR**—That was exceptionally brief for you, Senator Mason. I am very impressed! That concludes questions from members of the committee. Can I thank Ms Bath, Ms Madden, Ms Wilson and Miss Saleeba very much for assisting the committee this evening, and thank you for bearing with us during our brief adjournment for that division. If there are any questions which arise out of the rest of the committee’s deliberations, we may be in touch with your organisations.

[6.44 p.m.]

**WEBSTER, Emeritus Professor Ian William, (Private capacity)**

**CHAIR**—Welcome, Professor Webster, and thank you very much for agreeing to be a witness for the committee this evening. Do you have any comments to make on the capacity in which you appear?

**Prof. Webster**—I am appearing in a personal capacity, and I am a physician.

**CHAIR**—Thank you very much. Professor, you lodged a submission with the committee which we have numbered 2. Do you need to make any amendments or alterations to that submission?

**Prof. Webster**—No.

**CHAIR**—Thank you very much. Would you please make an opening statement, and at the conclusion of that we will go to questions from senators.

**Prof. Webster**—Thanks very much for inviting me to speak to you about this matter. When parliament makes legislation it is making very important decisions and one has to weigh up the good and the harm that may result from legislation. As I read this proposal, I kept wondering what was the rationale behind it, and it is still not clear to me by any means. My concern is that even if there is some benefit, possibly, in the legislation the harmful consequences across many other domains may be very severe indeed, so the legislation itself may produce harm rather than benefit.

The second area is that this area of disability and mental illness and dependence and the behaviour of people is very complex and it is very difficult to make judgments about that, even if you are close up to the person, seeing them medically or in a clinical situation. It is very hard to specify those differences in legislation. My basic feeling about this is that this is an area where governments should not legislate at all because it is just too difficult to apply that legislation at the interface, at the front line.

My third concern is that people with similar problems and similar situations will be being treated unequally. That is an unjust situation and I would hate to see Australian legislation do that. This legislation will make it very difficult indeed for people who are providing treatment to encourage people to get back to work, so I would see it as a potential barrier to effective management and treatment of these people in the community.

It seems to me that in employment there are provisions which already exist which allow the sorts of issues that may be the concern of employers to be addressed. After all, an employer is concerned about is how the person performs and does their work, and there are tests and judgments which can be made about that. The second thing is that an employer is concerned about safety and in particular occupations, particular situations, we do have special provision to ensure the safety of the public and people at work. Those provisions apply to this group just as they apply to alcohol-using people or any other group.

It seems to me that there is a confusion in this legislation between what is perceived as a likely risk and harm to people in the population and the people at work, and the idea of criminality. Why have we chosen, or why are we choosing, so-called prohibited drugs to

address this amendment to, and why not so many other substances that people use: the benzodiazepines, the prescribed drugs that doctors prescribe, alcohol and so on?

To sum up, I found the rationale behind this confusing. There are judgments and value judgments being made in legislation which are difficult to make, and I do not think legislation is the way to do that. It should be left to the judgment of people who are at the front line and close up to the person and who understand the person, and even then it is very difficult. I think there are adequate measures which can deal with problems of safety and performance in the workplace. And I would say that there is a duty generally of the community, amongst whom I would number the employers, to be seen as people who are providing opportunities for people with problems to get back to employment and not placing impediments in their way.

Fundamentally, the most important way of overcoming the problem of dependence and addiction is to get a job and have a place where you have some status, standing and recognition; and to earn an income.

**CHAIR**—Thank you very much, Professor Webster. If I might say, for my own part at least, that I think your submission is particularly valuable to the committee's deliberations and we are very grateful for it. You make some interesting observations which are different from those made by many other submissions. That is to say, we have had rooms full of lawyers and not a great deal of information from people in your professional position, so the observations that you make in relation to the characteristics of dependence and the question of free will and choice in substance use disablement are ones which we have not had a good chance to consider.

Would you comment on those two areas. Also, where you make reference to the challenge of disentangling what you describe as 'the multitudinous intersections between mental and substance abuse problems', could you comment on that.

**Prof. Webster**—In legislation these days, people now define impairment and disabilities and the functional consequences of those. Disability is a very important idea. It is not an idea that is handled very well in the medical care system or in our social systems. What it essentially is saying is that a person's function is affected over a long period of time. Addiction and dependence is classically a situation where a person's function in all sorts of domains is affected over a long period of time, and it can relapse.

The effect of having a disability is it affects a person's ability to work sometimes and their ability to converse and relate to people. In the physical health area we have some fairly defined parameters for that, but in the mental health and substance use area we do not have many. The consequences of having a disability very often can be that a person's social standing is affected. They lose their job, or they have to leave their house, or they cannot relate to other people. That is when the social security system and our housing systems come into play to support those people.

We seem to be prepared to address that when the problem is one about which we do not have value judgments; we just accept it. But when it is related to a person having a substance use problem, we start having moralistic and judgmental attitudes. The effect of that is it makes

the situation worse because it adds another level of social segregation to that person: discrimination.

Some of the questions I heard earlier were about discrimination. Discrimination against people whom you might judge to be using a drug is embedded through all our systems. Unfortunately, it is in medicine. It is very difficult to get doctors who are prepared to look after these people. In the emergency departments of hospitals, a person who presents with a problem of dependence is less likely to get empathic treatment than a person who presents with a broken leg. Those sorts of attitude pervade our criminal justice system, our legal systems and our social welfare systems. By adding, through legislation, another mark upon those people, it is just going to add further to that.

Another assumption that many people have—and it is a very difficult one to think through—is this: are people who are using drugs making free-will choices? The whole area of addiction 100 years ago, driven by the medical profession, was that this was a disease of the will; that somehow or other, people's wills had got diseased and all you had to do was to sort of turn that will around and operate on that. There used to be all sorts of enforced ways of dealing with it.

We do not talk about the will any more, it has sort of disappeared from our language, but essentially it is implying that people have an open choice and that there is some driving mechanism within them towards a particular purpose. The problem of dependence and addiction is not something which happens overnight to people. It is something which develops over years and years of use, generally, and it usually starts in relatively young people. Why is it that some young teenagers are vulnerable to drug use and become dependent, and others are not? There is a whole set of thinking about resilience and protective factors.

There are some who become dependent, and they become dependent over a long period of time. Does that mean that was a free-will choice of the person in the first instance? After all, lots of other young people are making those choices too. It so happens that a segment or one group, for complicated reasons of vulnerability, becomes particularly engaged in this pattern of use. It takes over their lives and they become harmed by it. This legislation seems to believe that people are making these free-will choices and that you can suddenly turn that around. I think that is a fantasy and not in accordance with the experience of anybody who has worked with, seen or had to live with a person who has had a problem of dependence.

**CHAIR**—Thank you very much for that, Professor Webster.

**Senator BOLKUS**—Was the Australian National Council on Drugs consulted in the preparation of this legislation?

**Prof. Webster**—No. I am a member of the Australian National Council on Drugs and I am not the chairman. I cannot speak officially for it, but I am a member of it. We were surprised, as a council, to see that this legislation had been put into parliament without consultation with the Australian National Council on Drugs.

**Senator BOLKUS**—In your submission you make the assertion that the existing occupational health and safety legislation and employment agreements are more than adequate to handle any particular problems in this area. Can you elaborate on that?

**Prof. Webster**—It seems to me that the fundamental responsibility of the employer should be to ensure that a person performs the tasks that they are employed for. The judgment you make about that is seeing how the person performs at work, not by making assumptions about whether or not they are using a drug. Secondly, there are high-risk occupations where provision is made for testing. Pilots and particular professions will have testing. That is something which is publicly discussed. It is generally agreed that is a high-risk situation. Where that is the case I would agree that a person could be discriminated against on the basis of their addiction, in those environments.

Certainly within medicine a drug addicted doctor is counselled, treated, commonly reported to a medical board, steps are put in place to ensure that person will get rehabilitated, but there are strictures placed on that person's practice unless that person become fully rehabilitated.

The third area is the question of safety, which is using heavy equipment, posing a risk to people at work or beyond work. In my judgment and experience of seeing the occupational health and safety legislation provisions working, there are processes in place which allow that to be controlled adequately.

**Senator BOLKUS**—The line in the second reading speech that offends me most is when the Attorney-General says about the bill:

This ensures that people who are taking responsibility for their addiction cannot be discriminated against.

Do you get a feeling amongst the people you have contact with that they actually feel aggrieved that someone is continuing to take drugs when they are making the effort to rehabilitate?

**Prof. Webster**—The assumption is that only those people who have sought treatment are the good people, and the people who are still using and not in treatment are the people who we are discriminating against. If we were in Europe, we would find that 80 per cent of people with a substantial drug problem were going to into treatment. We are in Australia and, as you have heard earlier today, it is estimated that somewhere between 40 and 50 per cent of people are getting treatment. There seems to be a whole segment of people who may even wish to get into treatment but who cannot get into treatment.

Senator Bolkus, the word 'treatment' is a very important idea too. It obscures many different sorts of treatment. It may be medical treatment from a doctor, prescribing a drug for the person or taking some medical action. Treatment might be being in a rehabilitation program over a substantial period of time. Treatment might even be coerced treatment of some kind. You probably know that New South Wales is going to pilot some coercive treatment of recidivist drug offenders in the prison system and at the drug court. The Attorney-General's dissection into what I will paraphrase as the good and the bad in that particular statement is unacceptable to me.

**Senator MASON**—Professor, to bounce off Senator Bolkus's question about treatment, again we have heard evidence in Sydney and here tonight that there are definitional problems with that, and potential legal complications. As my colleague Senator Scullion raised before, the New South Wales legislation does not go into treatment. It simply says if there is a disability relating to a person's addiction to a prohibited drug, and the person is actually

addicted to a prohibited drug, you still have those legal issues about what is a prohibited drug, but that is not so hard to define. Addiction is more difficult to define.

**Prof. Webster**—Yes.

**Senator MASON**—The New South Wales legislation, which has fewer legal frills than the Commonwealth legislation, is narrow in scope and relates only to the work force. Do you have any knowledge of how often that has been used and whether that has created any problems?

**Prof. Webster**—In New South Wales I chair the advisory committee to the government on drugs. We certainly were not consulted about the introduction of that legislation. It came at about the time of the drug summit, and most of us were totally unaware that it was going into the parliament. My knowledge of it is zero. It seems to me that it probably has not been used. I think it may well be because it is difficult to use, but I am just surmising there, without knowing.

**Senator MASON**—Yes, we are surmising. It could be because it is hard to enforce or because there are no problems with it.

**Prof. Webster**—Yes. I just do not know. It would be very important to try and get that evidence, but I do not have it.

**Senator MASON**—On the face of it, it seems to be less problematic in the legal context in the Commonwealth legislation because, firstly, it is narrower and, secondly, you do not have the issue about receiving services or treatment that I concede. All the evidence thus far has been that that is a broad term, a contentious term and it seems to have a very broad legal context.

**Prof. Webster**—If you go back to some of the points I was making about disability, there are different levels at which drugs affect a person. They can affect their brain and the neurochemistry, and you can try and treat that. There are effects on the body systems, such as the liver and other parts of the body, which can require treatment. The disability can require treatment, and that is more in the nature of rehabilitating a person. Finally, you could argue that the handicaps or the social disadvantages require treatment, where you need to provide housing and other arrangements for people. I am just reinforcing your point that the word ‘treatment’ would have to be defined very carefully in this legislation, but I defy that to be done in a workable way given the nature of responses to the sorts of problems that people have when they have substantial drug and alcohol problems.

**Senator MASON**—The advantage of the New South Wales legislation, of course, is that the two areas of definition that potentially create the most difficulty perhaps are ‘disability’ itself and also the word ‘addiction’. Again, they are contentious.

**Prof. Webster**—Yes.

**Senator MASON**—Is there legal sense to the word ‘addiction’, in your view? Is it a word capable of legal context sufficient to be enforced?

**Prof. Webster**—The word ‘addiction’ tends to be used in legal documents. For example, when I seek permission to prescribe a drug of addiction to a person in New South Wales, I have to tick a little box which says the person, in my opinion, is addicted to a substance, and it

probably defines it in some way. Those of us who work in the drug and alcohol sector and think about this area tend not to use the word ‘addiction’ any more. We use the word ‘dependence’. Addiction has that connotation of being a biological problem, whereas dependence—at least in the way it is currently used—has a much more psychological-social definition.

If you look at the definition that I put in my submission—and others have put forward in their submissions—about the nature of dependence, there are people who will argue that it is a very socially defined definition. You are making judgments about a person’s social standing and behaviour, as well as the more biological or the more medical end of things. It certainly is conjectural, and there are some key elements which we tend to draw out in our discussion of addiction or dependence.

I heard some of the questions earlier on, which were trying to divide people up into well-functioning people who are dependent and virtually derelict people who are dependent. It is not a plus or minus switch. There are degrees of dependence, just as there are degrees of harm to a person; just like—as I described before—that cascade down of impairment, disability and handicap. There are some people who are grossly handicapped and will never go back up that cascade, because of the things that have happened in their lives, and they are very evident publicly.

Most people who think about drug problems are really thinking about people who are marked by their experience. You can see it, in a sense, in the way they dress and their habits and behaviour. A lot of that is quite prejudiced. I can show you photographs, which I show medical students, and I ask the medical students, ‘What’s wrong with this person?’ One of them is of a young man, and they will say, ‘He’s got a drug addiction problem,’ or they will say, ‘That person is an alcoholic.’ I will say, ‘Well, they haven’t got either of those things, they’ve got schizophrenia. It just happens you’ve seen them in this place, and this is the behaviour which you are characterising as being behaviour of addiction, but it’s not.’ One of the photographs I have is of two men drinking out of a bottle in the streets of Kings Cross. They have no private place in which to drink. The only place they can drink is in a public. Of course they are visible and they become identified in that way.

There are two sorts of issues. One is the public perception of what we are dealing with when we talk about addiction and the other is what we think we are dealing with when we are trying to assist people who get defined as addicted and present to the various care systems. They are quite different.

**Senator SCULLION**—Let us say that we are working under the New South Wales legislation. It says:

Nothing in these provisions renders unlawful discrimination against a person on the grounds of a disability if

(a) the disability relates to the person’s addiction to a prohibited drug, and—  
most importantly—

(b) the person is actually addicted to a prohibited drug at the time of the discrimination.

Let us say Joe Blow says, 'I'm not addicted though,' and you are called as an expert witness. I am not trying to be flippant about this, but within your profession do you think you have the capacity to determine if somebody is addicted, as spelt out in the legislation, or not?

**Prof. Webster**—You cannot make a simple judgment. The only way you can make a judgment about that would be to understand the person's story over time and their pattern of use. It would require a detailed history. In my own case, I would do a physical examination and I commonly do some tests. Not all of those tests would be relevant to addiction, because you cannot test every substance.

**Senator SCULLION**—But do you think you can actually make a definitive decision one way or another? Do you believe there are processes of going back in the history et cetera?

**Prof. Webster**—Yes. The task of doctors and people who work in the health systems is to categorise things. The accuracy with which we categorise things is not good. We often have to go back and revise our opinions. Most of the diagnoses that are made in medicine are actually based on the person's story, and so a story can be quite various but you have to use that as evidence. I certainly think that I could say that this person, according to the criteria we use, fits that criteria. It may well be that another doctor seeing the patient may disagree with me and there would be some genuine disagreements about that.

The accuracy of the decisions that I, as an individual, make would not be 100 per cent. It might be of the order of 80 per cent and so 20 per cent of the time I would be wrong. I am just hypothesising there, but that is the sort of error rate there is in making these judgments. People will disagree because the whole area of mental illness is a classical situation where you get different opinions about whether a person has a particular form of mental illness compared to another, but even in physical illness the same thing happens.

**Senator MASON**—That would be a clinical judgment, Professor, rather than a workplace judgment in any case.

**Prof. Webster**—Yes, absolutely. But it would be hard to make a workplace judgment about dependence without understanding more about the clinical.

**Senator MASON**—I agree. I think that is Senator Scullion's point.

**Prof. Webster**—Yes.

**CHAIR**—Professor Webster, that has been extremely helpful to the committee. Thank you very much for your assistance this evening.

**Prof. Webster**—Thank you for the invitation.

[7.13 p.m.]

**BARKLAMB, Mr Scott Cameron, Manager, Workplace Relations, Australian Chamber of Commerce and Industry**

**CHAIR**—Our next witness, Mr Scott Barklamb, the representative of the Australian Chamber of Commerce and Industry, is appearing by teleconference. Welcome. I understand, in the context of your current obligations, that there is much happening for the chamber and I appreciate that you are making the time to appear this evening before the committee.

**Mr Barklamb**—Thank you. I represent the chamber in relation to a wide range of workplace relations matters.

**CHAIR**—Thank you very much. The committee has received a submission from the chamber which we have numbered 48. Do you wish to make any amendments or alterations to that submission?

**Mr Barklamb**—The only amendment is to paragraph 70, where we erroneously referred to there being either three or four factors which we say warrant further consideration and, on rereading that, it is perhaps more accurately described as ‘a number of’.

**CHAIR**—It would read, ‘There is, however, a number of factors.’

**Mr Barklamb**—Yes, or, ‘There are, however, a number of factors.’ That is the only slightly misleading part of it that I noted on rereading it.

**CHAIR**—Thank you very much. Mr Barklamb, would you like to make a brief opening statement to the committee and, at the conclusion of that, we will go to questions from senators.

**Mr Barklamb**—Yes. I would like to commence by thanking the committee for the opportunity to appear and for the committee’s forbearance by allowing us to appear via teleconference. I would like to commence by briefly restating the context in which ACCI makes its submission in regard to this bill. As we note in our submissions, ACCI members are the employers of many thousands of Australians with disabilities and we, as an organisation, have a long commitment to providing employment opportunities to persons with disabilities, in relation in particular to employability skills and the creation of opportunities and the like.

Most recently, we have been highly involved in the reassessment of the principal Disability Discrimination Act by the Productivity Commission and have passed a major ACCI policy on employability and skills for persons with disabilities. However, it is also part of the context of this inquiry that ACCI represents employers of persons using and with addictions to prohibited drugs. This includes employers wittingly and unwittingly providing employment pathways away from drug use and addiction and it also includes those employers forced to address any negative manifestations of drug addiction in Australian workplaces. We thereby represent, we say, one of the key interests affected by these potential amendments.

Our submission extensively addresses the intersection of work and drug use and drug addiction in Australian workplaces. We address in detail the manifestations and possible outcomes of drug use and addiction which can cause concern for business. We do that at paragraphs 1 to 53. These include matters which require of employers management, discipline and termination action. It is not necessary to repeat this material orally for the committee at

this juncture. However, we would wish in particular to note that we are not saying that all drug use or addiction is necessarily actionable by employers or requires an employer response. We do say, however, that genuine safety, quality, operational and commercial challenges can and do arise from employee drug use intersecting with work. We spent some time on these in the submissions, as I said. Interestingly, we note that our assessment of the challenge for Australian employers is directly validated by a typology produced by the International Labour Organisation showing that the challenges are very similar right around the world. As we say at paragraph 7 of our submission, the ongoing challenge is to ensure that business has effective and appropriate capacities to manage and address the interaction between drug use and drug addiction and work.

We set out at paragraphs 54 to 58, effectively, employers' bottom line in regard to the capacities we say employers require in managing the intersection of drug use and work and workplaces. It is on this basis that we strongly support the passage of the proposed amendments. They will, we say, guarantee or further—to the extent that is possible—the certainty and capacities employers require in managing the manifestations or the intersection of drug use and work, where that is an issue.

It will, in particular, address the possible consequences of the decision in Marsden. I will use that shorthand for the longer reference to that case, which I am sure you have had cited before you previously today. This was not an employment based case. It was made, we say, entirely without reference to the considerations set out in some detail in our submissions, which are those our members must manage on a day to day basis in workplaces. We also say that that decision is effectively an extension of the Disability Discrimination Act beyond the purposes set out by parliament and beyond the expectation and understanding of the community in regard to the Disability Discrimination Act.

We note that the Attorney-General says in his second reading speech that the Marsden decision is effectively an unjustified application of antidiscrimination law. That is a conclusion with which we would concur. We say it requires a response from the legislature, and it is that included in the current bill. We also note that it is perfectly legitimate for the legislature to address a judicial interpretation which is at odds either with the intention of the legislation, a more contemporary application of the original intention of the legislation, or public policy goals more generally.

There are a couple of brief issues I wish to address in closing before turning to questions. One particular perspective which we bring forward which may not have been raised by other parties is our specific identification of avenues for employee redress under the Workplace Relations Act 1996. We address this at paragraphs 155 to 167 of our submission. The key thing to note here, and the particular point we would like to highlight to the committee, is that nothing at all in these amendments would stop an employee seeking redress for an unfair dismissal.

Where the fairness of the actions of an employer are under question or where an employer has in fact acted unfairly, we can see no reduction in redress or capacity to seek to address that under the unfair dismissal system. Effectively, to adopt the vernacular that is so often used in workplace relations policy making, we say this offers a safety net for employees in the wake of the changes proposed in the amending bill. We invite the committee and the Senate as a

whole to give close consideration to this safety net, which we say will protect employees from unfair treatment, regardless of their particular drug use or status in drug addiction.

Another issue which I wish to touch on briefly in opening is those areas in which we identify some specific queries and matters requiring further elaboration or detail in the proposed bill. These matters are genuine concerns to ACCI. They are areas in which we say the amendments could be enhanced, either in finalising the wording of the amending legislation or through extra statutory clarification. However, we say they are not grounds upon which the amendments should not proceed on this occasion. Rather, they are issues which should be able to be addressed in the legislative process, including through this committee and its recommendations. Our written submission obviously addresses a range of other issues and considerations, and we commend these to the committee.

I would like to address two final matters before concluding. The first is by way of a conclusion: to recall the comments we make in paragraph 58 of our submission. ACCI is not saying that this is an easy issue, nor that the actions of any party appearing before the committee, or indeed the committee and the parliament as a whole, can ever render the management of the interaction of work and drug addiction an easy matter. It is never going to be an easy matter for employers or any of the employees involved. It is complex on an interpersonal basis, let alone a legal one.

We say in the consideration of the current amendments that parliament does have the capacity to ensure that employers can properly address challenges which do arise in Australian workplaces from time to time. Again, having reread the comments of the Attorney-General in introducing this legislation, we agree with him that these amendments are not directed to penalising people with drug problems. Rather, we agree again that they are about a proper balance and a proper application of antidiscrimination laws. We say this would not be served by maintaining the status quo and not passing the amendments.

The final matter to address before concluding and handing over to questions from the committee: we have had a chance to look over submission 22A to the inquiry from the organisation that goes by the acronym of PILCH, the Public Interest Law Clearing House, which I think may be involved in making submissions with the Homeless Persons Legal Clinic. We are very encouraged that other submitting parties have taken us up in the particular challenge we made in our initial submission, to say how, why and where they disagree with certain things we were saying. At this stage we do not seek to address these matters directly and I will address any of those that come up in questioning.

It serves only to say at this juncture that we certainly do not concede that our concerns have been invalidated or disposed of by the PILCH supplementary material. We maintain that, on a proper consideration of the response and the matters raised in all of the original submission material that were based on such an assessment, the amendment bill should pass. However, having said that, if there is a chance at the end and there are particular matters that were not taken up from the PILCH replies to us, I would welcome an opportunity to briefly address some of those. On that basis, Chair, I will conclude my opening remarks.

**CHAIR**—Thank you, Mr Barklamb. The committee is on a limited time schedule, as you are aware. I will start with a couple of questions. In paragraph 60 you refer to the Marsden

decision. Are you aware that the implementation of this bill as an amendment to the act would have had no impact on the Marsden decision because the person in question was engaged in a so-called treatment program—that is, the receipt of methadone?

**Mr Barklamb**—I was not aware. I had not reread Marsden in that particular detail. That certainly would make it something that would be addressed under the amendments. However, our understanding of the implications of Marsden is that it stands for broader authority on the scope of the definition of ‘disability’ and provides scope for an extension of that into areas, as we say in the submission, which are at odds with what we would say is an intention of parliament and community expectations.

**CHAIR**—As it happens, we are not here to talk about the implications of Marsden, but I would like to ask you about the facts. Your submission is quite clear that you believe the amendment of the act would overcome the ‘apparent effect’ of the Marsden decision. I am putting to you that in fact it would not.

**Mr Barklamb**—If it is the case that, on the unique facts of Mr Marsden’s case and in the context of someone formally on a methadone program, the act would not have directly changed that factual circumstance and outcome, that may be correct. However, one of the implications arising from the Marsden decision, as we understand it, is an extension of persons with drug addictions to make claims on the basis of disability discrimination more generally—persons who may not be participating in methadone treatment. Our reference to overcoming the Marsden decision, or the implications of the Marsden decision, are made on that basis, not necessarily on the narrow facts of Mr Marsden’s case.

**CHAIR**—It is very convenient. In relation to the point you made about balance, is it the view of the Australian Chamber of Commerce and Industry that it is balanced to allow discrimination against people addicted to a drug at work, in education, in access to premises, in access to goods, services and facilities, in accommodation, in land, in club membership, in sport and in the administration of Commonwealth laws and programs? Is that something that the Australian Chamber of Commerce and Industry describes as a ‘balance’?

**Mr Barklamb**—The use of the word ‘discrimination’ carries a very pejorative context in our general society, and rightly so. To the extent that differential treatment or treatment necessary to manage negative manifestations of drug use in work and in all those other areas that you mentioned is required, to the extent that that is necessary or required in a managerial, a tenancy or a commercial or other club management sense, it certainly is our position.

**CHAIR**—Can you assist the committee, Mr Barklamb, by pointing me to where the bill refers to ‘the negative manifestations of drug use’?

**Mr Barklamb**—Where the bill itself refers to ‘the negative manifestations of drug use’?

**CHAIR**—Yes.

**Mr Barklamb**—I am having a look at the bill—

**CHAIR**—You just said, ‘If this was necessary to manage the negative manifestations of drug use, then the chamber supported it.’ I am interested to know where you find the bill refers to ‘the negative manifestations of drug use’. I would also be interested in what you

thought they were, but we do not have time to go through your entire list, which I understand is in your submission.

**Mr Barklamb**—Yes. There certainly is that information in the first 60 or so paragraphs of the submission. The bill talks about making a relatively simple amendment to the Disability Discrimination Act. It is directly about access, as I understand it. It simply says, ‘Such and such is not a disability within the meaning of the act.’ The purposes for doing so, or the policy rationale, do not appear to me to be contained within the bill as such. The bill looks mechanical.

**CHAIR**—Does the Australian Chamber of Commerce and Industry support the application in those I think in excess of 12 areas that I listed or do you only support its application in relation to employment matters?

**Mr Barklamb**—Our submission is principally advanced in relation to employment. We have not turned to consider in detail each of the other areas you have talked about, so I will restrict my comments to employment. However, obviously our membership extends right through clubs and societies to landlords and to a range of people offering commercial services. I think there would be, although I have not gone into this, important bottom line commercial and operational imperatives for those people comparable to those in employment, which we say on a proper balanced assessment should be able to be maximised without redress through discrimination law based on drug use or drug addiction.

**CHAIR**—The question of addiction and treatment is referred to in your submission under the heading ‘Confidence for employer users’. Can you indicate to the committee how you intend to assist your members in identifying people who are addicted to a prohibited drug? Can you also assist the committee by telling us how you would assist your members in enabling them to determine whether that person is undergoing a treatment program at the time?

**Mr Barklamb**—The first part of my answer to both of those questions is that we have requested they be matters that are given further consideration in the legislative process. We have pointed out the practical difficulties for individual employers to make an assessment of addiction or of treatment and of some potential practical difficulties that may arise. As to how we would advise members, it is obviously very difficult.

The profile of persons that provide employment advice to our employers is of a legal or human resources nature, certainly not of a medical nature, and I would think that were the amendments to go through, and were the exclusions to go through in their current form—which is, as we say, something where we ask the legislature to have a bit of a further look to redress precisely the concerns you mentioned—it would be clarified by interpretation in any litigation on this matter. That would not be a particularly satisfactory outcome for us in providing advice to employers. But we would need to wait to begin to identify some parameters to make those judgments and give that advice.

**Senator BOLKUS**—Mr Barklamb, I think you quite fairly acknowledged earlier on that this is not an easy issue, and you acknowledged that it was a hard job for us to come up with responses. In that context, given that your submission seems to be one out in its support for

the legislation and given that all of the expert evidence before the committee indicates that the legislation is the wrong approach, is it feasible that maybe the ACCI has it wrong as well?

**Mr Barklamb**—I had put my mind to this, having a look at submission 22A that I talked about earlier in my introduction.

**Senator BOLKUS**—Not just that submission. Professors, doctors and people working in the field all seem to indicate that the legislation is flawed. Could it be that you have it wrong?

**Mr Barklamb**—I do not think that is the case. We have the feedback and the input, through our membership, of quite a significant range of Australians: the employer community, the people that are seeking day to day to manage the manifestations of drug use in workplaces. As I said, where and if that does occur—

**Senator BOLKUS**—Unlike the professionals, of course.

**Mr Barklamb**—Indeed, the professionals are too. We have said throughout that it is about balancing a range of interests.

**Senator BOLKUS**—I had someone very close to me who died from drug abuse, and that person was not able to fess up in the workplace. As a consequence, the drug abuse was kept private and killed her. The advice we get from just about everybody is that the direct effect of this legislation will be to produce more situations like that and possibly more deaths. Doesn't that worry you?

**Mr Barklamb**—Were that to be the manifestation in particular workplaces, of course that would concern us. To date, this is not a dimension that I have picked up, but I certainly thank you for putting it into my mind. It is perhaps an area where it could be bolstered by additional support for employers being able to pick up the—

**Senator BOLKUS**—I think you missed the point, Mr Barklamb. It is not a matter of support; it is a matter of people being able to be open with their situation. The direct effect of this legislation will be to put pressure on secrecy rather than openness.

**Mr Barklamb**—There are two ways in which I would not agree with that. The first is that were a person to have a treatment exemption—that is, in treatment for their drug use—it would be very clear that an employer would be open to an action in discrimination were they to take action. A person that declared their drug use—

**Senator BOLKUS**—Don't you think there would be stigma attached to a person undergoing a treatment program? Let us be fair about it. In the workplaces that you know and the workplaces that I know, don't you reckon there would be some sort of stigma, some sort of looking down on people who are being treated?

**Mr Barklamb**—There may be that in some cases.

**Senator BOLKUS**—You must acknowledge that there would be in just about all cases.

**Mr Barklamb**—I am not sure that the prescription put in these amendments is necessarily a recipe for widespread knowledge in a workplace of someone's drug status.

**Senator BOLKUS**—Perhaps I should take you to the legislation. I think you quite rightly raise some matters of concern—the difficulty with the definition of 'addiction' and 'lawful use' and the lack of clarity in respect of 'treatment' and 'privacy'. I think you go to the

mechanical operation of the legislation and raise some pretty fundamental problems that the committee has to face. In the light of those problems and in the light of even your—expert as you are—inability to understand how Marsden would not be affected by this legislation or how negative manifestation of drug use is not mentioned in the legislation, could it be that the legislation, as it now stands, is not going to do the job? It is flawed, isn't it?

**Mr Barklamb**—That is not our overall assessment, on balance, of the legislation.

**Senator BOLKUS**—But you tell us that 'addiction' is not defined: there is a difficulty for employers in determining when someone is addicted. That makes it hard to apply, doesn't it?

**Mr Barklamb**—We in our submissions quite rightly point to some practical difficulties we foresee, but we have confidence that the legislative process provides the capacity to begin to address those issues.

**Senator BOLKUS**—What you are saying is that the legislation needs substantial amendment.

**Mr Barklamb**—I do not know that I would agree that it is substantial, but it may be that the Senate has an opportunity to work through—

**Senator BOLKUS**—There are not many clauses in this legislation. The basic definitions of the fundamentals in the legislation, you tell us, are all wrong—'addiction', 'lawful use', 'treatment', 'privacy'. You tell us that they all need substantial amendment, and you suggest alternative approaches. Why wouldn't we come to the conclusion that you think the legislation is flawed? Aren't you standing by your submission?

**Mr Barklamb**—We certainly are standing by our submission.

**Senator BOLKUS**—You cannot have both, Mr Barklamb. You cannot stand by your submission and then tell us that the legislation is okay.

**Mr Barklamb**—We say the legislation is substantially sound.

**Senator BOLKUS**—How can it be substantially sound when the major definitions are all flawed?

**Mr Barklamb**—We say that they could do with some further examination.

**Senator BOLKUS**—Yes, but you acknowledge, in saying that, that they need amendment.

**Mr Barklamb**—They may need either clarification, as we said, in the wording of the final amendments or extra statutory clarification through additional speeches and supplementary materials.

**Senator BOLKUS**—Yes, but let us be fair. You want us to amend the legislation to make it lawful to discriminate against people who use drugs lawfully.

**Mr Barklamb**—To use drugs lawfully?

**Senator BOLKUS**—That is right. You raised the issue of an employee who is using a prohibited drug lawfully. You want us to amend the legislation to allow discrimination against a person who uses a drug lawfully. What sort of principle is that?

**Mr Barklamb**—That is potentially the material we refer to at paragraphs 82 and 83, I think.

**Senator BOLKUS**—I do not want you to tell me where it is. I know where it is. I am asking you to defend it.

**Mr Barklamb**—We certainly accept that a lawful use of drugs is a legitimate exception or exemption to the primary amendments proposed, particularly in regard to things like palliative care, which is the example cited in the explanatory memorandum. Even then, there are issues to be managed for employers, and that is really what we are saying in 82 and 83.

**Senator BOLKUS**—But even in the application of the legislation you want amendments to require an employee to disclose the treatment, you want amendments to add words to clarify whether an employer should reasonably have had knowledge of a person's drug treatment and you want amendments to take redress to the Workplace Relations Act. Do you reckon this legislation has it right?

**Mr Barklamb**—The principal amendments, we say, are sound.

**Senator BOLKUS**—But you do not say they are sound. You ask us to amend them in about 12 substantive areas. How can you say they are sound? It is not a very long bill. I would be surprised if there are 12 clauses. There aren't! You want 12 substantive amendments to a bill which has four clauses and you are telling us that it is not fundamentally flawed.

**Mr Barklamb**—We are saying that. We think its principal policy thrust through the amendments—

**Senator BOLKUS**—I think you have a credibility problem, Mr Barklamb.

**Senator MASON**—Mr Barklamb, you will be pleased to know that I do have some sympathy with the chamber's concerns, particularly with respect to employment. You raised some concerns with respect to 'addiction', 'lawful use', 'treatment' and 'privacy'. For the moment, at least, let us put that aside. We have heard evidence here today—and, indeed, the other day in Sydney—that, in any case, this legislation is not necessary because there already exist protections for employers under the Disability Discrimination Act. Let me outline what they are. First of all:

A fundamental principle of the DDA regarding employment is that the act does not require an employer to employ a person whose disability prevents them from performing the inherent requirements of the job.

We heard that evidence this evening. Secondly:

The DDA already permits employers to act to ensure the safety of other employees and customers when exposed to any risks associated with an employee's drug addiction.

In other words, if an employee is not up to the inherent requirements of a job, or their behaviour is dangerous to another employee or customer, there are already protections. Why do we need this bill if those protections already exist?

**Mr Barklamb**—The principal point we would like to make in relation to that is, again, this is not a black or white issue. The negative manifestations of drug use in the workplace can be episodic, periodic, isolated, then concentrated, then long gaps between them. They may be matters that arise as a cumulation of particular concerns for employers. We think that the inherent provisions of the act, whilst welcome for employers in relation to a number of areas,

do not provide confidence, in our view, with what we foresee as the actual manifestations of this in workplaces.

**Senator MASON**—Mr Barklamb, do you think it is too narrow?

**Mr Barklamb**—The notion of inherent requirements in the DDA?

**Senator MASON**—Yes.

**Mr Barklamb**—It is a matter which we have periodically examined and made representations to government on. We are not talking about a wider change to the DDA at this time. We do say it is too narrow to be an exemption to the principal goals of this amending legislation and that it presupposes employer involvement in litigation. The notion of inherent requirements is a heavy area of litigation and discrimination law. That presupposes that it is appropriate for employers to become involved in that litigation and defend it, which is something that we have no support for as an appropriate avenue under this legislation.

**Senator MASON**—While the DDA does have those protections for employers, it assumes a litigious course that is totally unsuited to modern commercial enterprise.

**Mr Barklamb**—Yes. Employers need the kind of confidence that is provided by the amendments.

**Senator MASON**—In your submission I think you concede, along with points that Senator Bolkus raised, that it is very difficult for employers to make judgments about someone's addiction or disability and so forth. You agree with that, don't you?

**Mr Barklamb**—Yes.

**Senator MASON**—But you are really concerned about the employees' output and performance in the workplace and how you can deal with that within the workplace without going to litigation.

**Mr Barklamb**—Yes, and those other overarching and perhaps more important things about safety for workmates, for end users, for customers, consumers and the like.

**Senator MASON**—I have one more question about this that I have asked other witnesses tonight, and I think indeed in Sydney, and that is about the recent amendments of the Carr government to the New South Wales Anti-Discrimination Act. Sir, are you aware of that amendment?

**Mr Barklamb**—I am aware they are in very similar or comparable terms in the area of employment.

**Senator MASON**—You are quite right. The federal act applies far more broadly to services and elsewhere. The New South Wales act just relates to the workplace. Also, the New South Wales act does not speak about receiving treatment. It is complex from a legal perspective. Do you think that is a potential model for the Commonwealth to take up?

**Mr Barklamb**—It certainly may be appropriate to re-examine the treatment option there. We have identified some difficulties in employers having certainty about what treatment is when an employee is in treatment, and what an employer can and must reasonably know. There is the quite laudable aim of persons in treatment having differential treatment, which is contained in the current bill. If that were determined to be of intractable difficulty, we would

come back to the matter I pointed out in our introduction: that there is an overarching capacity for an employee to claim an unfair dismissal. That would certainly be something that may go to the fairness of dismissal.

**Senator MASON**—All right. I thank you for your candid submission. Some of the points you did raise, about workplace realities and the capacities of employers to make certain decisions, shed light on our investigation because, quite frankly, all the evidence we have heard over the last couple of days would point to the fact that it is difficult for clinicians to decide issues of addiction and treatment and so forth. I suspect it would be well nigh impossible, as you concede, for employers.

**Mr Barklamb**—Thank you, Senator.

**CHAIR**—Mr Barklamb, in your submission, in paragraph 106 you invite consideration of alternative approaches. One of those includes imposing a duty on the addicted person to disclose to the employer both their drug use and any treatment they may be receiving. You then go through a number of subpoints as to the circumstances in which that might happen. One of those you point to is where an employer is acting on the manifestations of drug use, which you list. I assume it is not an exhaustive list, but you list absenteeism, poor concentration, poor productivity and so on. To your knowledge, do those factors manifest with any other addictive behaviour or employee behaviour that causes concern to employers, or is it only for drug addicts?

**Mr Barklamb**—Of course there is a wide range of things that can lead to those.

**CHAIR**—Such as?

**Mr Barklamb**—In regard to absenteeism, for example, someone may simply have other priorities or orientations outside the workplace that are leading them to not present for work. I hope I am not opening another area that could mislead us, but someone may be working second or third jobs. Someone may have other recreational activities they want to pursue that are interfering with their work. They could manifest themselves that way. Someone may have difficulties or stresses in their personal life that may lead to those things. Depression, for example, could certainly sit at the root of all of those things.

**CHAIR**—That is an interesting observation to make. If you have a look at some of the submissions that the committee has received, particularly from health professionals, including the extremely eminent Emeritus Professor Ian Webster, who appeared before the committee immediately before you this evening, you will see some concerns as to how one disentangles the engagement of issues between mental health and drug addiction. I am also interested that you did not list alcoholism as a factor and I wonder whether the chamber has any policies in relation to alcoholism and mental illness.

**Mr Barklamb**—I am not aware of policies in those areas as such, although I am not our principal practitioner in the occupational health and safety area. That said, however—and I am not exaggerating in saying this—many thousands or even tens of thousands of our members have drug and alcohol use policies that extend well beyond notions of testing and compliance and measurements into areas of employee welfare and how particular manifestations—in particular, of alcohol use—will be addressed in the workplace. It would be

entirely accurate for me to say to the committee that a very wide range of Australia's employers are addressing precisely those concerns at a workplace level with their employees.

**CHAIR**—I think it is a very good thing that your tens of thousands of members have DDA policies in place. How many of those in an average financial year period would come to the chamber with issues about how to deal with employees experiencing drug addiction? What is the volume of complaints that you receive?

**Mr Barklamb**—I am not able to answer that with an empirical measure or volume.

**CHAIR**—Could you take that on notice, please?

**Mr Barklamb**—I certainly can. I might provide this clarification at this stage. ACCI is a peak council of employer bodies. Those direct requests would come to our members in each state at an industry level. I have some doubt they measure that as a metric, but I will certainly take that on notice.

**CHAIR**—Are you aware of any?

**Mr Barklamb**—Any particular employers bringing manifested queries to their employer associations regarding those issues?

**CHAIR**—Yes, drug addiction issues specifically.

**Mr Barklamb**—I certainly could not give you particular names and times, but one of the commencing activities for any young employer representative is to take phone calls from employers. It is certainly something I did approximately 10 years ago. I certainly had queries in regard to drug use, particularly with reference to possession of drugs most often, to be honest.

**CHAIR**—Which of course is probably a criminal act, isn't it, Mr Barklamb?

**Mr Barklamb**—Yes. I certainly have memory of having those queries put to me during my year and a half or so of answering employer phone calls.

**Senator LUDWIG**—As I understand your solution to all of this, if they have a manifestation of apparent drug use or the employer forms a suspicion that there is a manifestation which hinges or attaches to drug use, is dismissal followed by their remedy, which you say then is reinstatement. Does that seem reasonable to you? You know as well as I do that the number of times a person might obtain a reinstatement in the AIRC is about four per cent. You are aware of those statistics, I am sure. The result is that dismissal follows, whether or not the person was a drug user or not.

**Mr Barklamb**—We certainly would note that there is a range—I will not use the word 'sanctions'—of responses which employers can have to these manifestations. The DDA is not restricted in its redress against dismissal solely, for example, but talks about detriment and, by implication, I would understand, to sanction and management and control and monitoring et cetera. I certainly would not want to have our submission interpreted solely in terms of dismissing employees. That said, the particular avenue which we would wish to have noted is that, where a dismissal does occur, an employee with a drug addiction or with drug use leading to that has the same avenues of redress as all other employees.

**CHAIR**—Thank you, Mr Barklamb, for your assistance to the committee and the extremely comprehensive submission of the Australian Chamber of Commerce and Industry. The committee appreciates that contribution. I did ask you to take one question on notice which I would appreciate a response on.

**Mr Barklamb**—Yes.

**CHAIR**—If, in the finalisation of the committee's inquiry this evening and the drafting of the report, there are any other issues which we need to seek information from the chamber about, we will be in touch.

**Mr Barklamb**—It would be our pleasure to provide those. Can I thank the committee once again for the opportunity to do this via teleconference. I know it is not the easiest way to elicit or provide information.

**CHAIR**—We understand it is difficult for you as well. Thank you very much, Mr Barklamb, and goodnight.

**Mr Barklamb**—Thank you very much.

[7.53 p.m.]

**O'BRIEN, Ms Paula Louise, Executive Director, Public Interest Law Clearing House (Vic) Inc.**

**CHAIR**—Ms O'Brien, thank you very much for joining the committee. Do you have any comments to make on the capacity in which you appear?

**Ms O'Brien**—Yes. The Homeless Persons Legal Clinic is a project of PILCH.

**CHAIR**—PILCH has lodged two submissions with the committee, which we have numbered 22 and 22A. Do you wish to make any amendments or alterations to those submissions?

**Ms O'Brien**—No, thank you.

**CHAIR**—May I ask you to make an opening statement—a brief opening statement, if I can encourage you in that direction—and we will then proceed to questions from members of the committee

**Ms O'Brien**—Thank you. My statement will be brief. Firstly, I would like to note our endorsement of the submissions to the committee by Clayton Utz lawyers, Vivuids and the Royal Australian College of Physicians. In short compass, the effect of the bill is to give employers and proprietors of caravans parks, managers of supermarkets, educators, operators of clubs and others in those categories that are listed in the act the imprimatur to treat people addicted to drugs worse than they would treat any other member of the community, wholly and simply because the person is addicted to drugs and not seeking treatment. This differential treatment can occur despite the fact that the person may be the perfect employee in terms of work performance, the perfect tenant in terms of being punctual with rent and fastidious about the upkeep of the property and the perfect student in terms of intellectual ability and commitment to learning.

Mr Ruddock proposes that we allow discrimination wholly and simply because a person is addicted to drugs and not seeking treatment. Mr Ruddock has explained in various documents why this approach is necessary. We are of the steadfast view that the bill will not achieve, or is not necessary to achieve, those objects or purposes and that a bill should not be enacted if it is unnecessary or will not achieve its stated ends. We go further and say that the bill will cause more problems, hardship and legal uncertainty than it will resolve. It will cause unemployment, homelessness; it will harm families and children; it will potentially increase HIV and hepatitis C transmission; and it will deter drug users from seeking treatment. The potential negative impacts of the bill are a further reason for parliament to refuse to enact the bill.

Our submission sets out in detail our position in relation to the alleged objects and purposes of the bill and our views about the potential adverse effects, so I do not want to repeat them, but I do want to make three short points to emphasise the bill's shortcomings. Firstly, the bill appears to ignore sound, well supported, persuasive, medical, scientific and public policy research—and I understand, from listening to the hearing during ACCI's submission, that you have heard excellent expert research about these issues. We are aware and our submission cites research about the causes of addiction, the nature and effect of drug addiction, conditions

which are required for effective treatment, the lack of available treatment services, waiting lists; the fact that treatment services are not addressing complex, multifaceted problems such as drug addiction and mental illness and the need for a holistic approach to the solving of drug addiction.

This research about these issues does not support the bill. Legislation should not be enacted where expert evidence suggests that it is unnecessary and will be ineffective and may, in fact, cause harm. However, I would like to note for the committee that when I met with Mr Ruddock in early December 2003 and we asked him if the bill was informed by expert research he simply answered that the policy behind the bill was informed by the government's Tough on Drugs strategy. We say this is an unacceptable basis on which to introduce a bill where there is substantial expert evidence which suggests that the bill will have a detrimental effect.

Secondly, the bill seems to ignore clear legal authority which exists and provides proper protection to employers and others who are detrimentally affected by the behaviour of drug addicted and afflicted persons. The existing provisions of the Disability Discrimination Act, as authoritatively interpreted by the High Court of Australia, are clear and rigorous, and strike a good balance between protection of the rights of persons with a disability and the commercial imperatives of society. We strongly refute the suggestion that the decision in the case of Marsden creates legal uncertainty which needs to be addressed by the bill.

In addition to being legally unnecessary, the bill will in fact produce legal uncertainty and confusion. This will create costs and complexities for the courts which run counter to the recommendations in the recently released 'Federal Civil Justice System Strategy Paper' which focuses on the efficient operation of the system. Thirdly, and finally, the bill indicates a backing away by Australia from its clear international obligations to prohibit discrimination and to address the effects of discrimination. Australia has demonstrated a sound commitment to these principles and has reaped the benefits of this commitment through the building of a society which is largely tolerant and accepting and through the avoidance of many problems associated with people being marginalised and disadvantaged.

The reasons given by the Attorney-General for the bill do not provide a sound justification for departing from the prevailing antidiscrimination law position which has, in fact, served Australia very well. That is the end of my opening statement and I am happy to take questions from the committee.

**CHAIR**—Thank you very much, Ms O'Brien. Thank you to PILCH for both their original and supplementary submissions.

**Senator BOLKUS**—You may not have heard, but you may have seen, the ACCI submission where they assert to us that there are some fundamental problems with the application of the proposed legislation. Would you agree that, in the implementation of the legislation, it will be very hard for an employer or a provider of services to actually determine whether someone was addicted?

**Ms O'Brien**—Yes, we would agree with that. Linking that to the point I made in the opening statement, we are very concerned about the uncertainty and confusion this would create both on the ground and in the courts. The bill does not define addiction, as you are

aware. I know you have heard evidence about the meaning of ‘addiction’. There are issues about the point at which addiction starts and ends. Can a person be addicted if they are not using? There are differences between addiction, dependence and usage. There is going to be significant debate about that. It sounds like it would be difficult to give employers and others on the ground useful yardsticks to use on a day to day basis. It would also require HREOC and the courts to hear from experts, probably giving rise to disputes between experts that would need to be resolved. That is obviously one area of potential confusion. There are issues about definition and program services and treatment, and issues about setting up the standard against which you would assess the drug addicted person for the purposes of discrimination law.

**Senator BOLKUS**—On the other hand, we are told that associates, spouses, family, partners and so on would be protected from the impact of the legislation. Do you have a view as to whether the proposed protection could in any sense be effective?

**Ms O’Brien**—We absolutely disagree with that. We say that, whilst on the face of it there is not permitted to be direct discrimination against associates because of their relationship with somebody who is drug addicted and not seeking treatment, the issue is that the very real and substantive effect of the bill will be an impact on associates. A child whose father is dismissed with impunity because of the provisions of the bill will suffer consequences because there will no income coming into the house, or there will not be the same income. That will obviously affect the adequacy of the living conditions of the child. It may result in ultimate flow-on effects into homelessness, poverty, lack of access to education. We think it is quite spurious to say that the bill exempts and protects associates.

**Senator BOLKUS**—In a tenancy situation where an ‘addict’ is evicted, and where that person may have been the legal tenant—as in having signed the lease—is there anything in the legislation that protects the rest of the family or the rest of the household and assures them of continued occupancy?

**Ms O’Brien**—No, there is not. There is no carve-out to protect people in that situation. If the lease contract was between the landlord and the person who was drug addicted, it would be that person who is evicted. It would have the flow-on effect that I mentioned earlier.

**Senator BOLKUS**—The assurance in the second reading speech is merely doublespeak, I suppose.

**Ms O’Brien**—Yes. We say that if you look at the real way this provision will operate it will not provide protection.

**Senator MASON**—Ms O’Brien, you say that this bill is inconsistent with the government’s Tough on Drugs strategy. How is it inconsistent: discriminating against individuals engaging in illegal activity involving drugs? Isn’t that being tough on drugs?

**Ms O’Brien**—I am sorry, I did not say that it was inconsistent with the government’s Tough on Drugs policy. I said in fact that the Attorney cited the government’s Tough on Drugs policy as the basis for this bill, despite the fact that there is extensive research suggesting that it is unsupportable.

**Senator MASON**—Unsupportable in the context that it will not have the effect that the Attorney wants?

**Ms O'Brien**—Unsupportable in the sense that there is excellent research that suggests that it will have overwhelming negative effect. The Attorney suggests that it will have the effect of encouraging people to take responsibility for their own actions. This is one example of a stated objective or purpose by the Attorney. We have several responses to that. We say, firstly, there is an issue about the fact that drug addiction is a disability which can significantly impair free choice or the capacity to take responsibility. Medical evidence supports this view of the effects of drug addiction. Secondly, the Attorney says it will encourage people to undergo treatment. We, like many others who have made submissions to you, would say that often treatment is not available, it is not accessible, the waiting lists are long and people may not be able to afford it. Where people have co-morbidity issues, there will be problems with the appropriateness of the treatment which is available. We would also say that the Attorney has said one of the objectives and purposes is to keep the work and social environments safe from other people's behaviour. We agree that that is an important purpose. But we say that this bill is unnecessary to achieve that because of the very adequate protections which currently exist in the legislation, as well as in the way they have been interpreted very recently by the High Court of Australia. I can go on.

**Senator MASON**—There is no need to. Certain consistent themes are emerging in the evidence.

**CHAIR**—Ms O'Brien, there are no further questions from the committee. Thank you very much for assisting the committee tonight by teleconference. We all appreciate it is not the best way to do business, but it does mean we can all go about our jobs. The committee also appreciates the two written submissions from PILCH.

**Ms O'Brien**—Thank you very much and thank you for allowing us to lodge a supplementary submission in response to ACCI's submissions.

[8.07 p.m.]

**MEANEY, Ms Mary, Principal Legal Officer, Civil Justice Division, Attorney-General's Department**

**MINOGUE, Mr Matt, Assistant Secretary, Civil Justice Division, Attorney-General's Division**

**CHAIR**—I believe we have not received a submission from the Attorney-General's Department, which is often the way with such hearings. If you wish to make a short opening statement, at the conclusion of that we can go to questions from the committee.

**Mr Minogue**—Thank you very much. I would like to make a short opening statement, initially by thanking senators for the opportunity to represent the department at these hearings. In introducing the Disability Discrimination Amendment Bill 2003, the government's intention was to address community concerns that disability discrimination laws should not be used in an unjustified manner and to provide clarity, to all those concerned, about the relevant issues.

At the time of the announcement of the bill, the Attorney commented that addiction to a prohibited drug is not a sufficient basis to gain the benefits of the antidiscrimination regime. However, as the Attorney-General also made clear when he introduced the bill, the bill is not about penalising people who have a drug problem. The government has made, and continues to make, a strong and continuing commitment to overcoming the lamentable reality of the modern drug problem through its Tough on Drugs strategy.

The Prime Minister launched the National Illicit Drug Strategy—Tough on Drugs—in November 1997. That strategy provides a balance and an integrated approach to reducing the supply of and demand for illicit drugs. Since its launch the Commonwealth government has committed more than \$1 billion to the strategy. This commitment is reflected in the specific protections that the bill provides.

In particular the bill does not affect existing protections under the Disability Discrimination Act, or the DDA as I will refer to it. It does not affect existing protections that people may have on other grounds. The note in the bill clearly states what would become parliament's intention if the bill were passed—that existing protections for people with hepatitis C and HIV-AIDS that may be related to an addiction are not affected.

The exemption will not apply where use of a prohibited drug is authorised by law or where the person is undergoing a program or receiving services to treat their addiction. This is intended to ensure that people who are taking responsibility for their addiction cannot be discriminated against. Nothing in the bill affects the eligibility for disability support pension and other Centrelink and Veterans Affairs payments as set out in the Social Security Act and the Veterans Entitlements Act respectively.

Again, as the Attorney-General noted in the second reading speech, the concepts of undergoing a program or receiving services are deliberately cast broadly to provide the maximum protections possible. This is a clear advantage of this bill over the New South Wales legislation—and I am aware of the discussion that there has been in comparison of the two—which only provides protections for people who are using specific treatment drugs—

methadone and buprenorphine—whereas the Commonwealth government's bill proposes a broad range of programs, treatments or services that would ensure protection.

The government is aware of concerns that the bill somehow reflects an intention or grants permission that it would encourage people to discriminate against people who are suffering from an addiction and who are often marginalised. Clearly the bill does not provide, and is not intended to provide, such an encouragement. The bill does not authorise an open slather against people who may be addicted to a prohibited drug. This is because the exemption will only apply in specific circumstances which are outlined in the bill and which must be established by evidence.

Importantly, the bill will not protect people who guess or assume that someone has an addiction to a prohibited drug, but for employers or service providers who do take action, the bill ensures that they cannot be found to have unlawfully discriminated against someone solely on the basis that the person was addicted to a prohibited drug; in other words, lawful acts will not be rendered unlawful under the DDA solely on the basis that a person is addicted to a prohibited drug and then claims their addiction as that disability. Significantly, the amendments do not change the law in relation to people with other disabilities or, indeed, other disabilities of people who may be addicted to prohibited drugs.

**Senator BOLKUS**—Sorry. Could you explain that again?

**Mr Minogue**—The bill does not affect any other protections that a person might have in relation to a disability under the DDA, whether or not that person is also addicted to a prohibited drug.

**Senator BOLKUS**—You cannot hang them twice; you can only hang them once.

**Mr Minogue**—Indeed, you cannot hang them at all, if you use that phrase—which is not a phrase I would use. If someone has a protection under the DDA that is not addiction to a prohibited drug, whether or not they are in fact addicted—

**Senator BOLKUS**—I understand what you are saying now, yes.

**Mr Minogue**—their protections continue. The only other comment I would make in conclusion of my opening comments would be to note that the amendments do not affect persons who are associates of a person with a drug addiction. The associates retain any rights they may presently have to protection from unlawful discrimination under the Disability Discrimination Act. Thank you.

**CHAIR**—Thanks very much, Mr Minogue. Ms Meaney, did you wish to add anything this evening?

**Ms Meaney**—Not at this stage.

**CHAIR**—I would like to discuss the bill itself. I think you just said, Mr Minogue, if I heard you correctly, that the bill does not authorise—and I will paraphrase here—random discrimination against people with drug addictions because of specific circumstances set out in the bill and the fact that the behaviour has to be established by evidence. Where does it say that in the bill?

**Mr Minogue**—The bill says that the exemption only applies in certain circumstances, those circumstances being that the disability is the other person's addiction to a prohibited drug; the person was addicted to the drug at the time of the discrimination and that the use of the drug was not authorised by a law of the Commonwealth, state or a territory; and that the person who was undergoing a program or receiving services is—

**CHAIR**—Let us take a bank manager who decides to prohibit access to premises based on this legislation, if it is enacted. What is the establishment by evidence that they are going to be able to use to ensure they are complying with the bill, the act?

**Mr Minogue**—That is precisely the point. If they do not have that evidence, they would be very unwise to seek to discriminate against the person on the basis of an assumption that they might be addicted to a prohibited drug.

**CHAIR**—I would suggest one would be optimistic in assuming that there was no malice in the community against people who had drug addictions. Would you agree? Do you think there might be any exercise of malice by proprietors of the sorts of places that this bill will stop people entering? Do you think a person might find some capacity under the bill—and we have certainly heard evidence about this—to use it as an excuse to prevent people from accessing their premises?

**Mr Minogue**—Unless they had the evidence to establish that the exemption applied, then they could not successfully do so, no.

**CHAIR**—Will we provide legal aid to the indigent, drug addicted person who may be the victim of that wrongful discrimination?

**Mr Minogue**—That is assuming that someone will, in fact, wrongfully discriminate. I am not saying that. I am saying that, unless someone has evidence, the provision does not cover them.

**CHAIR**—Mr Minogue, if we can assume the existence of the Disability Discrimination Act is in place to stop people wrongfully discriminating against people with disabilities, generally speaking, then the fact that we need discrimination legislation right from the word go—whether it is related to gender, disability, HIV status or any of the other things for which discrimination legislation exists—then probably they were enacted for a reason over decades and decades of legal development. Let us not pretend that there is no discrimination, wrongful and otherwise, in existence.

**Mr Minogue**—It is certainly not seeking to do that.

**CHAIR**—You tried to say then that 'if it happened', but clearly we have discrimination legislation for those reasons.

**Mr Minogue**—The Disability Discrimination Act provides a remedy of complaint that a person who is concerned or feels that they have been discriminated against can bring a complaint against the alleged discriminator. This bill does not undermine that. If someone discriminates, there is a remedy. If the sole basis for a claim of discrimination is that the person was addicted to a prohibited drug and that that addiction amounted to a disability as defined, the bill would remove that sole basis of the capacity to make a complaint.

**CHAIR**—The committee understands that.

**Mr Minogue**—That is the effect of the bill. In other respects, the bill does not affect the existing protections that a person would have under the DDA.

**CHAIR**—How will an individual know that a person is addicted to a prohibited drug?

**Mr Minogue**—I do not know how a person would know that.

**CHAIR**—How will they know if the person is addicted to the drug at the time of the discrimination?

**Mr Minogue**—I do not know that and, again, that is the reason why the bill does not authorise or give comfort to those who would discriminate on the basis of guesses or lack of information.

**CHAIR**—How will they know if a person is undergoing a program or receiving services to treat addiction to a drug?

**Mr Minogue**—Unless they know all of the elements of the exemption and they can establish those by evidence, it would be difficult for them to establish sufficient evidence to bring themselves within the scope of the exemption and, therefore, the bill would not authorise their behaviour.

**CHAIR**—How do you suggest that we educate the community to interact with this legislation, if it is enacted? How do you suggest that we provide adequate education to people so that they can know who is addicted to a prohibited drug and whether they were addicted at the time of their proposed or exercised discrimination and whether they were undergoing a treatment program?

**Mr Minogue**—With respect, in introducing the bill, the government, in the public statements I have seen, has not suggested that people should embark on such a course of inquiry.

**CHAIR**—Do you suggest, Mr Minogue, that every single example and every single issue raised by those with concerns about the legislation in the submissions to this inquiry is baseless?

**Mr Minogue**—No, I do not suggest that at all.

**CHAIR**—You seem to be saying that if randomly discrimination occurred and it was not supported by evidence, that somebody who is discriminated against wrongfully in that context would have ready access to a remedy, which in this case is to make a complaint, and that you do not believe that this is going to be a problem. To take that at face value, what do you then want me to do with the 115 submissions to the committee which say to the contrary?

**Mr Minogue**—With respect, the point I am making in response to the interaction of the community with the bill is that the bill—and the government in introducing the bill—does not seek to authorise employers, business operators, landlords to say, ‘Open slather, let’s go against people we think are drug addicts,’ because if they do, without the capacity to establish all the elements of the exemption, they will be vulnerable to a successful complaint that they have discriminated against someone on the ground of their addiction, if the person making the complaint can establish that they in fact have a disability in the terms of the act.

In relation to the concerns, people have made submissions to the committee, and I have read as many of the submissions as I can, and I have read *Hansard* from the previous hearing and, indeed, listened to the comments tonight, and I am certainly not suggesting that those concerns are baseless. It would be gratuitous of me to do so, and I am certainly not suggesting that at all. But to the extent that there is a suggestion or a concern that the bill somehow encourages open slather against people who others might think have an addiction, my response to that is that that is not the purpose or, on the government's analysis, the effect of the bill. That is not to say that the concerns that have been put to the committee are not real. My response to that is simply that the bill would not give succour to those who would, in fact, act on those concerns and attempt to act on the basis of an unknown situation. If they do not know that someone is addicted to a prohibited drug, the bill does not suggest that they should act or, indeed, that they can act.

**CHAIR**—No, it does not, Mr Minogue, on the face of it. But it leaves the individual, against whom the discrimination—wrongful, in your terms—is exercised in an invidious position, when their only response to somebody who may exercise that wrongful discrimination is to say, 'But that's not meant to be the effect of the act.' That is what the government says: 'That's not meant to be the effect of the act.'

**Mr Minogue**—I am not sure that is what I—

**CHAIR**—They have already been discriminated against, you see. It is post fact.

**Mr Minogue**—You may have been. If you have been discriminated against, the person—

**CHAIR**—No, I am fairly safe. I can stand up for myself. It is post fact, isn't it?

**Mr Minogue**—That is very much the nature of how the complaint process works. That is not a feature in—

**CHAIR**—It is a bit of a shame for the person on the receiving end who may be impacted by this. I want to go to some of the observations in the second reading speech. The second reading speech makes a reference to 'community concerns'. Can the department provide the committee with any information on those community concerns: from whom they are received; what level there is; where they have arisen?

**Mr Minogue**—My response to that is that community concerns were those brought to government. Ministers and government made assessments about those community concerns and, on the basis of those assessments, government decided to act in the way that it has.

**CHAIR**—Does the department have any information for us on that?

**Mr Minogue**—There is nothing additional to what the government, ministers or the Prime Minister have publicly stated.

**CHAIR**—The second reading speech also states:

The government believes that people operating a business or a club should not have to face discrimination claims by drug addicts when trying to keep the work or social environment safe from other people's behaviour.

Can you point me to the part of the bill that refers to 'behaviour' and 'protection from behaviour'?

**Mr Minogue**—There is no reference to ‘behaviour’ in the bill.

**CHAIR**—There is no trigger in the bill upon which an individual—an employer or a shop owner or whatever—can say, ‘I don’t want you on my premises because you’re addicted to drugs and you’re not in a treatment program.’ There is no trigger, is there?

**Mr Minogue**—With respect, the effect of the bill is that if a person takes action on the basis of behaviour or otherwise, if the sole basis of challenge to that action is on the basis that the person was addicted to a prohibited drug which amounted to a disability, the bill provides that that sole basis—if that is the sole basis of complaint—would not be sufficient to challenge the action of the person who was taking that action.

**CHAIR**—I am not sure that you have answered my question, which was quite specific. The second reading speech refers to ‘protection from drug addicts’ behaviour’. I cannot find a reference in the bill to ‘behaviour’.

**Mr Minogue**—The word ‘behaviour’ does not appear in the bill.

**CHAIR**—How will the bill protect people from drug addicts’ behaviour?

**Mr Minogue**—If a person takes action against someone—not on the basis of knowing or believing that they are addicted to a prohibited drug—and that person subsequently seeks to challenge that action on the basis of a complaint that the action amounted to discrimination against them on the basis of their addiction to a prohibited drug which amounts to a disability, the bill removes that capacity to make that complaint. In that sense, it does exactly what the Attorney said in the second reading speech. It says that people doing those things ‘should not have to face discrimination claims’. In that specific situation, the bill removes a capacity to bring a claim of discrimination; that is the effect of the bill.

**Senator MASON**—Mr Minogue, the chair’s questioning has been down the avenue that, in other words, there is no need for any manifestation of any particular behaviour at all to bring this bill into operation. That is right, isn’t it?

**Mr Minogue**—I would put it another way, if I can, and bring it back to the point that the bill does not authorise otherwise unjustifiable behaviour. If there is a substantive course of action that an employer, a facility operator, a landlord, can take, that is provided under the law that would normally permit those actions, the bill says, ‘You can’t challenge that solely on the basis of the person being addicted to a prohibited drug, and that amounting to a disability.’

**Senator MASON**—But it is the fact of the addiction to a prohibited drug and so forth, rather than any behaviour that is covered by the act. I think the chair’s point is that Mr Ruddock, the Attorney-General, has spoken about drug addict behaviour, when in fact drug addict behaviour is not relevant; it is only the fact of the addiction to a prohibited substance and not the behaviour at all, surely.

**Mr Minogue**—That is right.

**Senator MASON**—That is the point.

**CHAIR**—I understand that.

**Senator MASON**—I just thought I would get it on the record.

**CHAIR**—What, that I understand? Thank you, Senator Mason—I think. Mr Minogue, we were going to the areas in which discrimination based on drug addiction would be allowed. As I read it, there are about 12 of those set out in the explanatory memorandum. In a worst-case scenario—and we have had this discussion—you could be rendered homeless; you could be rendered jobless; you could be denied the opportunity to study; you could be medically disadvantaged by being refused access to medical premises, pharmacies, hospitals and so on; you could end up socially isolated, deprived of services which includes here the administration of Commonwealth laws and programs.

The community concern that the second reading speech refers to—and I go back to that—has been mostly, as I said, concentrated in the committee on work, on employment. We have a number of submissions which indicate to us that most of the issues, if not all of the issues, concerned with dealing with these matters in the workplace are already addressed legislatively. I am interested in the department's comment on those. I do not know if we have time to go through them all; you may wish to take it on notice. The initial submission and supplementary submission of the Public Interest Law Clearing House addresses those, as do a number of others. Has there been community concern expressed about the other 11 areas which the bill covers?

**Mr Minogue**—Can I respond, firstly, to the 12 or so areas. I need to say for the record that if a person is addicted to a prohibited drug and that addiction amounts to a disability—and that would need to be put in evidence by the person claiming discrimination—that person could only be discriminated against lawfully in respect of those areas if the person who is said to have discriminated could bring themselves within the exemption. As I have indicated earlier this evening, the circumstances within which the exemption operates are very limited and would need to be established. I just wanted to qualify that it is not ticking off the list and saying, 'Yes, you can discriminate against someone in these 12 areas.' I want to clarify that.

**CHAIR**—You might have to say that again for me. How is it not? It is. They are the 12 areas which the bill specifies—or, in fact, the explanatory memorandum specifies—because they are in part 2 of the act. Indeed, I understand that.

**Mr Minogue**—Indeed, yes.

**CHAIR**—But they are the areas where it says it is okay.

**Mr Minogue**—That is probably the area where I would take issue. The bill does not say it is okay.

**CHAIR**—The bill says it will not be discriminatory behaviour if you choose to exclude a person from accessing your premises, from providing them the use of the facilities in your bank, from going to your university, from taking up a tenancy in your apartment, from being a member of your club, from playing in your sporting team, if the person is addicted to drugs. It does say that, Mr Minogue.

**Mr Minogue**—The bill says it is not unlawful to discriminate against another person in quite specific circumstances.

**CHAIR**—Yes.

**Mr Minogue**—And those circumstances need to be established. Without those circumstances being established, a person cannot bring themselves within the exemption, so the bill, with respect, does not say it is okay to discriminate in those areas, full stop.

**CHAIR**—It says it is lawful to discriminate.

**Mr Minogue**—It says it does not render it unlawful to discriminate—

**CHAIR**—Please do not reduce this to a semantic discussion. It makes it lawful to discriminate.

**Mr Minogue**—If the bases of the exemptions are established, yes.

**CHAIR**—Yes, I understand that. The second reading speech also states:

Eligibility for the disability support pension and other Centrelink and Veterans' Affairs payments, as set out in the Social Security Act 1991 and the Veterans' Entitlements Act 1986 respectively, is not affected by these amendments.

But I cannot find a reference to that in either the EM or the bill.

**Mr Minogue**—Those provisions are currently excluded from the operation of the DDA, in any event so the bill—

**CHAIR**—So that is the protection that will be provided there.

**Mr Minogue**—There is no effect—

**CHAIR**—No, that is fine.

**Mr Minogue**—What it says is that those provisions are not affected by the bill.

**CHAIR**—Yes, but it does not say why, so one has to seek clarification. The reference to 'undergoing a program' or 'receiving services', there is no definition of what a program is or what 'receiving services' means. We also have noted previously there is no definition of 'addiction' which does not make it easy, one would have thought. In the second reading speech it says that protection—about a program or receiving services—would not extend to sham treatments. Who will define 'sham treatments'?

**Mr Minogue**—The person conciliating the complaint, which would be the Human Rights and Equal Opportunity Commission or indeed a court on appeal from that.

**CHAIR**—Have you read the transcript of the *Hansard* of the Human Rights and Equal Opportunity Commission's appearance before the committee?

**Mr Minogue**—Yes.

**CHAIR**—Did you read that part of it?

**Mr Minogue**—Yes, I have.

**CHAIR**—And you noted that the Human Rights and Equal Opportunity Commission in evidence indicated that that would not be a very easy thing for them to do.

**Mr Minogue**—Yes, that was their evidence. The basis of the treatment would have to be established by evidence. The fact that there is not a definition of what is addiction or what is a relevant program or receiving services, actually was deliberately included—particularly the receiving services, as the second reading speech says—and they were not defined to give

them a deliberately broad operation. Because they are the aspects that would exclude the operation of the exemption, to attempt to define those areas, given the large range of circumstances in which people are addicted to prohibited drugs, would in fact limit the operation of that protection for people. The fact that they are not defined is not, in fact, a limit on the protection but enhances the scope of the protection that people can bring themselves within.

**CHAIR**—In the only supportive submission that the committee has received on the legislation, may I quote from paragraph 86:

The second proposed exclusion/exemption is potentially of greater concern to employers.

That is a reference to the treatment exclusion. That does not fill me with confidence about the capacity of the bill to address the ill that apparently it is intended for; it does not fill me with confidence about the drafting circumstances in which we find ourselves when the only supporter of the legislation spends from paragraph 67 of their submission to 128 raising issues with the lack of clarity in the bill. I can go through them.

**Mr Minogue**—No, the—

**CHAIR**—You would not want me to do that.

**Mr Minogue**—I would only be repeating what I said before. The matters are not defined so as not to limit the range of programs or services that could be protected in the bill. I draw the distinction between that and the New South Wales bill, where the carve-outs, the protections, are quite limited and might be inappropriate to a number of people who could be potentially affected by the bill. In that respect the government's bill is a lot more beneficial, or indeed is beneficial. The fact that there are issues people raise with the bill, obviously the government introduced the bill in the form that it was satisfied with and will take account of whatever recommendations the committee might have as it goes through the parliamentary process.

**CHAIR**—I wish I thought that would be the case. You mentioned the fact that the bill would not apply and impact upon associates of people who are dealt with under the legislation, impacted by the legislation. I am trying to find the clause of the bill. Is it actually in the bill?

**Mr Minogue**—No, it is not in the bill. That works by operating as an exemption from what is unlawful discrimination rather than attempting to narrow down the definition of what is a disability. If the definition of what is a disability were amended, that would affect the associates of a person with a disability. In this context, the bill does not affect the definition of disability at all. It has its full meaning, so that an associate of a person who has a disability remains protected. The exemption only operates in respect to the person with the disability.

**CHAIR**—Okay. I am trying to find the part of the EM. I will put to you an example which has been given to the committee repeatedly in evidence. One of the implications of the legislation which makes it not unlawful to discriminate against somebody with a drug addiction is, provided the person knew they were addicted to a drug at the appropriate time, in a tenancy arrangement that person is removed from a tenancy based on a drug addiction. They will have had to exhibit no behaviour which led to that event; it is just the fact of the drug addition. If that person is, for example, a single parent and they are ejected from their

accommodation, there is going to be a very significant impact on their associate if it is, in this case, their children. I am wondering what protections are in place to look after a child in that environment.

**Mr Minogue**—To some extent, the example you put forward—if someone is going to be evicted from their premises—would be governed by the substantive law of landlord and tenancies in the relevant area. It is not necessarily a discrimination matter at all. If there was a lawful basis to evict, a landlord—by going through the processes that their jurisdiction allows—can execute that function.

If there was not a lawful basis to do that, the bill does not affect the remedies under the substantive law that a person—be they addicted to a prohibited drug or not—would have or, indeed, an associate would have. What it does is say that if the only basis for challenge in that situation is that the addiction constitutes discrimination then that basis is taken away, but in all the other respects of the substantive law the bill does not affect that at all.

**CHAIR**—That is why we are talking about this part of the law. We are not talking about all the other respects of the substantive law. I am talking about a person being evicted from their accommodation based solely on the fact that they are addicted to drugs. It may be that a landlord is in a better position than a bank manager to know whether the person they are engaging with is addicted to drugs or not, by virtue of evidence they may have available to them. It still does not help me understand what happens to dependants of someone in that position if it is lawful to evict them based on their drug addiction.

**Mr Minogue**—I am not trying to be trite. If it is lawful to evict them, the landlord or other person authorised to do so can take actions that are lawful. The bill will not change that. It does not lessen the protections that the person or an associate of the person would have, except in respect of removing a sole basis of challenge, as I have said, and I will not repeat that.

**CHAIR**—Thank you very much for your assistance, Mr Minogue.

**Senator LUDWIG**—The second reading speech provides a paragraph which indicates:

The government is aware of the review of the DDA that is being undertaken by the Productivity Commission. The approach taken in this bill is consistent with the commission's findings in its draft report.

Who put that provision in the second reading speech? Who wrote that?

**Mr Minogue**—The speech is the Attorney's speech. As you know, a lot of people assist in the preparation of those documents. I am not sure that I follow the question.

**Senator LUDWIG**—Do you know if the Attorney-General wrote that? Do you know whether the department wrote that? Do you know whether, for instance, the minister's office put it in?

**Mr Minogue**—No, I do not.

**Senator LUDWIG**—Could you find that out for me?

**Mr Minogue**—I could take it on notice, but the speech is the Attorney's second reading speech and I am not sure what further information can be provided.

**Senator LUDWIG**—Do you say then that the Productivity Commission’s findings in its draft report are consistent with the DDA in relation to this bill?

**Mr Minogue**—That is the position that the government has, yes.

**Senator LUDWIG**—No, I am asking you. Are you reflecting the government’s position?

**Mr Minogue**—In my capacity as a witness, yes.

**Senator LUDWIG**—Why do you say that it is? Have you seen the draft findings?

**Mr Minogue**—Yes, I have.

**Senator LUDWIG**—You say the second reading speech says it is consistent and you then say you hold a view that it is similarly consistent. You are not just reflecting the second reading speech. You have formed a view that it is consistent. You have read the Productivity Commission’s draft findings and you have come to that conclusion.

**Mr Minogue**—My response is that the second reading speech is the Attorney’s second reading speech. As a representative of the government, I am not walking away from the second reading speech. As a separate answer, I am also aware of the Productivity Commission report. I am not in possession of the detail that would enable me to give an answer to the question you are asking.

**Senator LUDWIG**—You do not know whether it is consistent with the draft report then?

**Mr Minogue**—I will have to take that on notice. The government’s position is that it is, and I will certainly bring that to the attention of—

**Senator LUDWIG**—You accept that?

**Mr Minogue**—Yes, I do.

**Senator LUDWIG**—But you do not know that.

**Mr Minogue**—I would not say I do not know. I am not trying to be evasive about it.

**Senator LUDWIG**—Obtuse?

**Mr Minogue**—It is not that I know or do not know. It is that I do not have that detail to hand.

**Senator LUDWIG**—I assume you have read the submissions that indicate that the bill is inconsistent with the draft report. Do you have any recollection of those?

**Mr Minogue**—I am aware of those submissions, but not the detail.

**Senator LUDWIG**—You did not then appraise yourself of the draft report to establish whether or not the submissions were consistent or inconsistent?

**Mr Minogue**—I did not reread the report, no.

**Senator LUDWIG**—You might want to take this on notice and come back to me with the first issue and then perhaps this issue as well. The report accepts ‘addiction’ as being included in the definition of ‘disability’ and recommends widening the definition of ‘disability’. On that basis, is the bill consistent or inconsistent with the Productivity Commission’s report?

**Mr Minogue**—The bill would be consistent, because it certainly does not narrow the definition of ‘disability’.

**Senator LUDWIG**—Why doesn’t it narrow the definition?

**Mr Minogue**—Because it does not affect the definition of ‘disability’ at all.

**Senator LUDWIG**—It does not have any impact upon the definition?

**Mr Minogue**—No, it does not.

**Senator LUDWIG**—Why doesn’t it?

**Mr Minogue**—Because the bill is not addressed to the definition of ‘disability’.

**Senator LUDWIG**—When you look at the Purvis decision, doesn’t it alleviate any concerns that employers might have?

**Mr Minogue**—The Purvis decision itself?

**Senator LUDWIG**—Yes.

**Mr Minogue**—That is an interesting one, because there have been a lot of comments made about that, both in submissions and in evidence to the committee. It comes down to a summary that what Purvis was about was differentiation based on behaviour being lawful. In fairness, that is a pretty condensed analysis of what the decision held, in the context of a decision where there was an initial HREOC decision, a Federal Court decision and then a High Court decision, which included several judgments, two of which were dissenting.

**Senator LUDWIG**—That does not weaken the High Court case.

**Mr Minogue**—It certainly does not weaken it, but what it does indicate is that the extent to which Purvis is seen as the answer—

**Senator LUDWIG**—Just because it is five to two and not seven to zip, the principle still remains, doesn’t it?

**Mr Minogue**—Of course, and that is the same point. My point is that what Purvis held—

**Senator LUDWIG**—Do you say you prefer the two rather than the five?

**Mr Minogue**—My point—and I beg your pardon for not explaining it more clearly—is that the court did not say, ‘You can differentiate on the basis of behaviour in all circumstances and that will be lawful.’ As I am sure you know, that case concerned a particular situation where a child was aggressive and physically violent towards teachers and other children.

**Senator LUDWIG**—That did go to the definition under the Disability Discrimination Act in relation to 5G, and indicated what that meant, and it considered it even in the dissenting judgments as well.

**Mr Minogue**—It did not so much go to the definition of ‘disability’, as how you apply the definition.

**Senator LUDWIG**—The comparator.

**Mr Minogue**—The comparator, indeed.

**Senator LUDWIG**—You were trying to explain how it was not relevant.

**Mr Minogue**—No, not at all. To say that it is now lawful to discriminate on the basis of behaviour, which is the condensed version of what some of the evidence was, I would submit, is an oversimplification. It is not quite that simple. What is required is a consideration of the circumstances of the person with the disability, the circumstances of the alleged discriminator—and a whole range of issues come in there—and the circumstances of a notional person without the disability who exhibits that behaviour. That is why I say bear in mind that the court there was dealing with a clear case of very extreme behaviour.

**Senator LUDWIG**—A person in similar circumstances—

**Mr Minogue**—Those circumstances will be difficult to assess in many cases. The court itself acknowledged that, in relation to some behaviour, they are not easy assessments to make. Then you have to go into the question—which the court does—of whether the differential treatment was because of the disability. I put this simply to make the point that saying you can differentiate on the basis of behaviour—and that is Purvis—is an oversimplification of what Purvis is.

**Senator LUDWIG**—I understand that, but then you are accepting as well that employers—hotel owners and landlords—will have to do exactly what Purvis does in some respects. They will have to make an assessment and make a comparison and all of those things as well. It is an oversimplification, for their decision making, to look at the Disability Discrimination Act and say, ‘Look, that provides me with an exemption. I should exercise it if am suspicious of the circumstances of the person who might be a drug dependent person not on treatment; therefore I will act.’

**Mr Minogue**—I think that is the point, Senator. The bill does not seek to encourage people to act. What it does is provide a defence, if the sole basis of a claim of discrimination is the basis of someone’s addiction to a prohibited drug. It does not seek to encourage people to take discriminatory action on the basis of a guess or an assumption.

**Senator LUDWIG**—The Productivity Commission also favoured as few exemptions as possible, as I understand it, in their draft report. Do you say this has few exemptions?

**Mr Minogue**—The bill clearly provides an exemption. If it were enacted it would add to the exemptions, that is right.

**Senator LUDWIG**—Also, they have a view on setting the terms and conditions for supported employment or superannuation and insurance purposes, and they go on to provide an approach of focusing on exemptions for actions or activities. Do you say this focuses on exemptions for actions or activities, or others?

**Mr Minogue**—There is an element of actions or activities in terms of defining the scope of the exemption in the sense that the exemption is excluded, depending on the actions or the status or the circumstances of the person who might be addicted to the prohibited drug. By that I mean a reference to undertaking a program or receiving services.

**Senator LUDWIG**—But not the others?

**Mr Minogue**—No. The initial basis on which the exemption might apply clearly is the fact that someone is addicted to a prohibited drug at the time of the discrimination.

**Senator LUDWIG**—What about the ability to obtain information? Does the employer have an ability to obtain information to establish whether or not they believe that the person is drug dependent, or a drug addict on treatment?

**Mr Minogue**—Not under the bill, Senator, no.

**Senator LUDWIG**—How would they establish it?

**Mr Minogue**—That would be a matter for an employer or a business.

**Senator LUDWIG**—It is your bill, though. You have set up the framework for it to be alleged.

**Mr Minogue**—The framework is to remove a cause of action based on disability discrimination, if that is the sole cause of action. It does not seek to encourage discrimination. What it says is if the sole basis of challenge is that a person is addicted to a prohibited drug and that is a disability, and that person is not—in the words of the minister—taking responsibility for their addiction by undertaking a program or receiving services, it takes away that cause of action, but it does not seek to encourage someone to do a discriminatory act.

**Senator LUDWIG**—I did not think I said that it encourages. What I was asking is how they discern it. Your bill sets up a framework. It sets up an ability to be able to discriminate on certain grounds. Do we agree that far?

**Mr Minogue**—It does, yes. It renders discrimination unlawful.

**Senator LUDWIG**—And the remedy for that is really a complaint to HREOC at first instance. That is the framework the Attorney-General has set up under the bill. To find out how it works after someone has caused discrimination to occur, under suspicion or under proof that they might have—the only way to find out whether or not the basis is right or wrong—is for them to take the complaint to HREOC and have it proved or disproved.

**Mr Minogue**—I am not sure I quite follow the question, Senator. The reason I say that is because the proposition assumes that a potential discriminator will make an assessment of their capacity to discriminate successfully.

**Senator LUDWIG**—They may not. They might just simply say, ‘I think you are drug dependent, not on treatment, and therefore I’ll throw you out of the tenancy,’ or, ‘I will not let you into a hotel,’ or, ‘I will not let you on to a program,’ and so on and so forth.

**Mr Minogue**—And the bill will not affect the substantive remedies that the person who is on the receiving end of that might have. If they have remedies because it was a breach of the landlord and tenant law, they would continue to have those remedies. For example, in the case of barring access to premises, physical assault is an action that someone might take. The bill does not authorise any of that. The reason I have difficulty with the proposition is that it assumes that employers or facility managers or owners of premises will undertake an inquiry or will seek to undertake an inquiry to see whom they can discriminate against. My responses to that are that the bill does not encourage or authorise that, and even if someone were to take that inquiry, unless they could establish it, they would not be able to bring themselves within the exemption and would be vulnerable to challenge.

**Senator LUDWIG**—Why would they embark on an inquiry in the first place?

**Mr Minogue**—With respect, Senator, that is my question.

**Senator LUDWIG**—They might observe behaviour that might be similar to drug dependence and then take action accordingly. They might ask the person whether they are on a program. They might be exhibiting behaviour which might be similar to a drug dependent person—or it may not; they might in fact misapprehend what a drug dependent person's behaviour might be, and they take action accordingly, believing under this section that they can. How do you combat that?

**Mr Minogue**—Again, Senator, the section does not seek to authorise people—

**Senator LUDWIG**—I am sure you have read the ACCI's submission. They circulate information to their employers, they circulate to the hotels and clubs. An employer reads that it is now lawful to discriminate on the basis of a person who is drug dependent and not on a treatment program. That, in itself, is providing a basis where they might say that you should not act unless you can observe the behaviour or manifest behaviour. That is the situation, or that is the scenario that you are creating with this bill, aren't you? Or do you say, 'We'll just hide it under the cupboard and no-one will use it'?

**Mr Minogue**—I say neither of those things, Senator. What the government would say is that if someone were to put out information saying, 'It is now lawful to discriminate against someone who is addicted to a prohibited drug,' that would be a mischaracterisation of what the provision says. I do not talk for ACCI or people who provide that information and support to the groups they represent, but—

**Senator LUDWIG**—Even if they say it does not render it unlawful for a person to discriminate against another person on the grounds of the other person's disability, if the disability is the other person's addiction to a prohibited drug, how would an ordinary person read that?

**Mr Minogue**—I cannot respond to that. How a business owner would respond to that depends on whether that information will be put to them in that way.

**Senator LUDWIG**—Say it is put to them in that way—little flyers go out; they take your provision and they put it out and say, 'Look, this is how you should read it. This is the black-letter print.'

**Mr Minogue**—If it is inaccurate information—

**Senator LUDWIG**—That is accurate. They have just put out the black-letter print.

**Mr Minogue**—If someone finds the provision before them, however it gets before them, and seeks to rely on it without being able to establish the specific requirements for bringing themselves within the exemption, they will not be able to avail themselves of the exemption, however they came about that information.

I also want to address your comment that the provision would be hidden in the cupboard and not used or shown to anyone. That is not the purpose of the provision. If enacted, it would be a part of the Disability Discrimination Act along with all the other provisions and would have effect, but the circumstances within which it would have effect or within which the government envisages it would be effective would be where the sole basis of the challenge were discrimination on the basis of a disability in the circumstances. I have discussed

previously. It does not attempt to authorise, as I said, open slather against people with a disability or, indeed, people who might be assumed to have a disability.

**Senator LUDWIG**—So the person or ACCI—perhaps they could use another body instead—put out the second reading speech that says:

The bill provides that it is not unlawful to discriminate against a person who is addicted to or dependent on illicit drugs.

... ..

The bill is prompted by community concerns about the implication of the decision of the Federal Court in Marsden ...

I am sure you have already heard the ACCI do not understand Marsden and its full implication, and that decision, you say, suggests—or in the second reading it suggests—that it may be unlawful under the Disability Discrimination Act to discriminate against a person solely on the ground that a person has an addiction to or is dependent on a prohibited drug. You say that the black-letter print will save them, but if people act on the basis of second reading speeches, which are supposed to provide the ability to be able to understand the legislation, wouldn't that give the employers the general impression that they can discriminate against a person who is addicted to or dependent on illicit drugs?

I understand what you say the black-letter law reads, but let us get into the real world for a second. Just walk out here and put yourself in the real world. That is the second reading speech and that is what it says. That is how employers are going to read it and that is how they are going to enact it. What is the Attorney-General going to do if that starts to be the case?

**Mr Minogue**—I cannot respond to that scenario, Senator.

**Senator LUDWIG**—Do you want to take it on notice and see what the Attorney-General says?

**Mr Minogue**—I am happy to take it on notice but I am not sure there is a great deal further information.

**Senator LUDWIG**—Other than your same phrase that you keep repeating over and over.

**Mr Minogue**—Which is the description of how the bill works?

**Senator LUDWIG**—How you say it works.

**Mr Minogue**—Yes, indeed.

**Senator LUDWIG**—But you do not know how it will work in the real world.

**Mr Minogue**—I would not agree with that, Senator.

**Senator LUDWIG**—The consequential amendments to the Workplace Relations Act are included as part of this bill. Can you clarify to the committee how they will operate?

**Mr Minogue**—The way that would work is that the consequential amendments to the Workplace Relations Act provide that it will not be unlawful to terminate someone under the act on the basis that they have a disability that is covered by the bill. That is, it will not be unlawful to dismiss an employee who is addicted to a prohibited drug when use of the drug is not authorised by law and when the employee is not receiving services, so it breaks that nexus

between the Workplace Relations Act that provide it is unlawful to terminate someone's employment on the basis of a disability, amongst a number of other things.

Having said that, even if an employer has a ground to terminate an employment, they still have a continuing duty to ensure that that termination is not harsh, unjust or unreasonable. The processes by which they undertake whatever disciplinary or other action they might take would still need to accord with the requirements of the Workplace Relations Act, even if the fact of addiction and non-receipt of treatment services were established.

**Senator LUDWIG**—Can I just put a concrete example: the case where there is a drug screening in the workplace and the employer detects an illegal or prohibited drug in the blood or urine analysis and then asks the employee, 'Are you on a treatment?' He might consider that he is drug dependent on a continuum because there is no definition. He assumes that if you have an analysis which provides for a certain level, that might be an indicator of an addiction and a reasonable assumption he might make, and he asks the employee whether or not the employee is on a treatment program. The employee then says, 'I'm not required to answer that.' Where do you go from there, if the employer then says, 'A non-responsive answer is as good as a negative'?

**Mr Minogue**—The first thing the employer would have to establish is that the employee is in fact addicted to a prohibited drug. Evidence of use is not necessarily evidence of addiction. While there has been some discussion of the lack of definition of 'addiction', again I would say that the fact that there is no attempt at prescription of what addiction means is in fact a benefit of the bill. As the committee knows from its own experience as well as the evidence that has been presented to it, 'What is addiction?' is a very complex and difficult assessment to make. An employer who is able to administer drug tests—and there are circumstances where that is possible—and found evidence of drug use would have to be cognisant of the fact that use does not of itself indicate addiction, so the question of whether someone is on a treatment program or otherwise does not necessarily arise.

**Senator LUDWIG**—You say they have to then at least consider all of those issues and ask the employee, 'Are you a drug addict?'

**Mr Minogue**—If it were relevant.

**Senator LUDWIG**—The employee says, 'I'm not going to answer that either.' If a negative is as good as a positive, he might then consider that he is if he fails to answer.

**Mr Minogue**—It comes back to the statement that, unless the person alleged to have discriminated can bring themselves within the exemption and can establish that, they will not be able to rely on the exemption.

**Senator LUDWIG**—The memorandum at the end of the second reading speech explains that it will not affect certain entitlements and it lists Centrelink benefits and veterans' entitlements. What about other Commonwealth program benefits?

**Mr Minogue**—The bill itself will not affect entitlements to other statutory programs or other Commonwealth programs.

**Senator LUDWIG**—Then why are only a couple listed? That is what I am trying to clarify.

**Mr Minogue**—I mentioned in response to a question from Senator Payne, benefits under those acts are listed. Those pieces of legislation are currently, under section 51, exempt from—

**Senator LUDWIG**—That is the reason you have put those in?

**Mr Minogue**—Yes. The bill does not affect those.

**Senator LUDWIG**—It then goes on to say:

The amendment is not confined to one area of disability discrimination that is prohibited under the DDA, such as employment. It applies as an exemption to all areas of disability discrimination that are prohibited under Part 2, including work, education—

and it continues—

Commonwealth laws and programs.

What falls under the definition of ‘Commonwealth laws and programs’?

**Mr Minogue**—It is difficult to give an answer to that.

**Senator LUDWIG**—Perhaps a couple that you are familiar with.

**Mr Minogue**—‘Commonwealth laws and programs’ is an existing definition within the Disability Discrimination Act. It would refer to legislation administered by Commonwealth or programs funded by Commonwealth appropriations, and there can be many of those.

**Senator LUDWIG**—Do you know one, just by way of an example?

**Mr Minogue**—I can, Senator. Again, I am not trying to be difficult.

**Senator LUDWIG**—I know you are not trying to be difficult.

**Mr Minogue**—If you have a program in mind, I am happy to talk about it, but I do not think I can helpfully suggest a particular program.

**Senator LUDWIG**—I was just trying to establish what ‘Commonwealth laws and programs’ were. I thought you were the people to ask.

**CHAIR**—What about Work for the Dole? You could be prevented access to Work for the Dole. If you were addicted to a drug and if the service provider knew you were addicted at the time of the decision to restrict access to the program, you could be restricted from access to Work for the Dole, in this context of Commonwealth administered programs.

**Mr Minogue**—The bill has the effect that it renders not unlawful all the areas of the DDA. That includes Commonwealth laws and programs. But the application of the exemption, as I have said previously, is in quite specific circumstances, so it would not be a statement that I could agree with to say that the bill has the effect that people can be discriminated against. The bill would operate in quite specific circumstances, if those circumstances were established. I think it is a fair question, how would anyone administering those Commonwealth laws or programs know that you were addicted to a prohibited drug? I would question whether it is a realistic scenario.

**Senator LUDWIG**—It is a broad definition.

**Mr Minogue**—No, with respect, Senator.

**Senator LUDWIG**—I thought you said it was a broad definition.

**CHAIR**—Mr Minogue, with enormous respect, it is not specific. That is the whole problem. Even the Australian Chamber of Commerce and Industry's submission clearly says that by definition and clause by clause it is very difficult for them to work out how this is going to operate. They have 60 paragraphs of concerns about that.

**Mr Minogue**—In evidence earlier this evening—and I cannot recall precisely which witness it was—the comment was made that the best evidence, or how a clinician would determine whether someone was addicted or not, would be by a relationship and a discussion with the person who may or may not be addicted. It is a difficult thing to assess and define. Someone administering a Commonwealth law or program, I think it is fair to say, would not necessarily be in a position to assess whether someone was addicted and, therefore, the suggestion that they would feel empowered to discriminate on the basis of the amendment is not a realistic scenario.

**Senator MASON**—Because it is difficult to determine is not an advantage in the legislation. You cannot say because it is difficult to prove, somehow that is an advantage in the bill.

**Mr Minogue**—The bill is an exemption from the protections of the DDA. Unless someone can establish that they can bring themselves within the exemption, the substantive operation of the DDA would continue. The bill would only make a difference in the circumstances where someone was able to establish that a person was addicted to a prohibited drug. The likelihood is that the person claiming discrimination would be in the best position to put that in evidence, not the person who is the discriminator. I return to the proposition that it is not open slather for—

**Senator MASON**—But you are not sure who the class of discriminators are. Does it include the Newstart allowance program as well? That is the point.

**Mr Minogue**—My response is that the administrators of Commonwealth laws and programs are unlikely to be discriminators in respect of the concerns that have been made.

**Senator MASON**—Why—because we are not sure of the breadth of the bill?

**Mr Minogue**—With respect, no, because the bill does not authorise discrimination.

**Senator MASON**—We have been down that track before, Mr Minogue. I do not want to verbal you, but I thought when you gave your opening statement that you said this bill will provide clarity. You have just heard from Senator Ludwig and you have heard from Senator Payne and I gather you have looked at the ACCI's evidence. Have you read that submission? You have read the transcript from Sydney and you have heard the evidence tonight. Do you still believe that?

**Mr Minogue**—The bill does not seek to provide a cause of action for someone to discriminate against another. If someone was looking for a ground to discriminate against someone else, the bill does not give them much comfort, because the matters they would have to establish are difficult to establish. That is not a weakness of the bill; it is a strength. What the bill does and what the bill was proposed to do, as introduced, was to provide that if the only cause of action against an otherwise lawful action is a complaint of discrimination, on

the basis that it was a discrimination against a person who is addicted to a prohibited drug at the time of the discrimination, the bill removes that cause of action.

**Senator MASON**—The cause of action may be difficult. I accept that. We all accept that. But we are not certain of the class of persons and the Commonwealth programs Senator Ludwig was talking about before, and so forth; we are not sure of the class of persons which the bill covers. It makes it extremely difficult. Let me ask the question again: do you think this act provides clarity? I am sure that is what you said in your opening statement.

**Mr Minogue**—Yes.

**Senator MASON**—Do you really believe that?

**Mr Minogue**—The government introduced the bill to provide clarity. The bill does not provide clarity for those who wish to discriminate. It does not seek to give people comfort so they can go off and discriminate at all. It provides clarity but not for those who seek to discriminate.

**Senator LUDWIG**—The bill provides that it is not unlawful to discriminate against a person who is addicted to or dependent on illicit drugs. It is not about the dependent drug user; it is about the person who is going to discriminate.

**Mr Minogue**—Yes. The purpose of the bill is to provide that it is not unlawful to discriminate solely on the ground of addiction. If that were the sole ground, it removes that ground. If there were other grounds of complaint, they will continue unaffected by the bill.

**CHAIR**—According to the second reading speech it is about keeping the ‘work or social environment safe from other people’s behaviour’ and it is about protecting the general community ‘from the harms and risks posed by another person’s illicit drug addiction’. It is about all of those things which we have been talking about.

**Senator LUDWIG**—And ensuring that drug users attend a program, apparently.

**Mr Minogue**—Certainly the ministers and Prime Minister have been very clear on it.

**Senator LUDWIG**—How does it do that?

**Mr Minogue**—It excludes from the operation—

**Senator LUDWIG**—No. Show me in the bill where it does that; where it actually does that.

**Mr Minogue**—The bill excludes—

**Senator LUDWIG**—The black-letter law that says it is going to encourage people to enter a program.

**Mr Minogue**—By excluding from the operation of the exemption, circumstances where people are undergoing a program or receiving services, it heightens the protection for those people. Therefore, the government’s position is that would be further encouragement—which the government has done through many sources; through the Tough on Drugs strategy—to undertake treatment.

**Senator MASON**—There is debate about the degree at which that will happen. Can I just change the context for a second, Mr Minogue. We heard from Professor Webster. How broad was the consultation in the drafting of this bill?

**Mr Minogue**—Within government the consultation involved relevant departments administered by the Minister for Health and Ageing, Family and Community Services, Prime Minister and Cabinet, Employment and Workplace Relations. Outside the agency level, ministers made their own assessments of representations that had been made to them. I am not privy to those.

**Senator MASON**—You are not privy to them?

**Mr Minogue**—No.

**CHAIR**—What information can you provide to the committee on the consultation? Is there any documentary information you can provide?

**Mr Minogue**—Probably not. That would be within government. The circumstances I have outlined is the information I can give.

**Senator MASON**—I think Professor Webster is a member of the Australian National Council on Drugs. Correct me if I am wrong, Chair, but I think his evidence was that they were not consulted in the drafting of this legislation.

**CHAIR**—As far as he was aware.

**Senator MASON**—Is that right?

**CHAIR**—He said as far as he was aware.

**Senator MASON**—Are you aware if the Australian National Council on Drugs was consulted?

**Mr Minogue**—I am not. It is not within the Attorney's portfolio. How the agencies appraise themselves of their own interests, I cannot answer.

**CHAIR**—Mr Minogue, this is a bill that the Commonwealth Department of the Attorney-General is bringing to the committee. We are perfectly entitled to ask the extent of consultation with other agencies and parts of government and government representative bodies. Can you get that information for us on notice?

**Mr Minogue**—I can, indeed.

**CHAIR**—Good.

**Senator MASON**—The chair asked questions of the Australian Chamber of Commerce and Industry about their submission and I think the chamber's concession was that there were potential ambiguities in the bill with respect to treatment and addiction and so forth. Leaving that for a moment, with respect to the need for the bill, the ACCI said there was a need for it. You heard that evidence. Do you still believe that is correct? You have heard evidence in Sydney and also here tonight that existing legislation protects people—what are the words?—inherent requirements for the job and also occupational health and safety legislation protects potentially employees and customers. Do you accept that?

**Mr Minogue**—My response is that the government made an assessment that there was a need for the bill. The Prime Minister and government made that assessment.

**CHAIR**—Can you then take on notice for us, Mr Minogue, what the identified gaps are in that legislation in the DDA and in the occupational health and safety legislation that this legislation addresses. Thank you.

**Mr Minogue**—Yes.

**Senator MASON**—You mentioned that, for example, the Commonwealth legislation had an advantage over the New South Wales legislation because the New South Wales legislation limited the definition of prohibited drug, but did not include methadone or buprenorphine. I understand what you say and I take on board your argument. But, you see, the problem again gets back to whether things like, for example, treatment are ambiguous. The New South Wales legislation simply classifies what is in order and what is out of order. There is no problem having to look at what is treatment, what is appropriate treatment, what is sham treatment—which the chair alluded to before. In other words, I think that the New South Wales legislation, even though it has been much maligned by the Commonwealth, has the benefit of simplicity; it does not seem to have the vagaries that the Commonwealth legislation has. Can you comment on that?

**Mr Minogue**—The comment I could make is that the Commonwealth legislation provides a much greater scope for protections for people who are undergoing a program or seeking treatment. That is not limited to the two substances that have been omitted.

**Senator MASON**—But then you fall back on the problems with the definition of ‘treatment’ that we have already discussed and whether, on balance, that is an appropriate legislative and policy response.

**Senator LUDWIG**—Greater scope for application in New South Wales. That is only limited to New South Wales, to the employment sphere.

**Senator MASON**—Thank you very much, Mr Minogue.

**CHAIR**—Mr Minogue, can you advise the committee whether the Privacy Commissioner was consulted?

**Mr Minogue**—I can take that on notice.

**CHAIR**—That is actually in your department’s purview. Do you know the answer now? Do you know the answer tonight?

**Mr Minogue**—No, I do not.

**CHAIR**—Can you comment at all on those submissions from professionals who work in the alcohol and drug sector—both clinicians and service providers—who say that they are concerned that the effect of the legislation might be to make those who are addicted or drug dependent reluctant to access health services like the needle and syringe programs, methadone programs, for fear of being identified and then being subject to discrimination because they are identified, with the evidence that you said was so important, as a drug addicted person. What is the public health impact of the legislation in those terms? Does the department have a comment on that?

**Mr Minogue**—My response to that is that the bill does not give any greater authority for someone to inquire whether someone is undergoing treatment or not, so that the concern that people might have about being outed is not a necessary effect of the bill and it is certainly not the intention of the bill.

**CHAIR**—You do not have to out yourself to attend a needle and syringe exchange program. It is just a case of walking in a door.

**Mr Minogue**—In which case, how would anyone know?

**CHAIR**—Let me give you an example: if you are undertaking the methadone treatment in a regional part of Australia and you live in a town which has maybe one pharmacy, it is not going to take Einstein to determine if you are accessing methadone treatment. I do not know if you have ever been in a pharmacy when someone is receiving a methadone treatment and seen that happen in front of you. You do not have to be in a good, bad or indifferent part of town; you just need to be in a pharmacy and see that happen. We are talking about a country regional area where everybody knows everybody and it is very simple to know everybody else's business. If someone is known to be on a methadone program and then determined to be, therefore, a drug addict, even though I know we have a caveat about treatment programs, they are identified and they can be discriminated against. How is that helping our public health approach which ensures that people are supposed to be able to participate at a much different level in the methadone program or needle and syringe program?

**Mr Minogue**—The bill would not render discrimination against them lawful. That was the very point about your comment to ACCI in their assumption about Marsden.

**CHAIR**—Yes. It was interesting, wasn't it? I understand that. Nevertheless, the identification issue is still important in terms of the employer: how they treat that person and what happens in the process. There is a concern in the committee—you can hear it, I am sure—and a concern in a number of the 115 submissions that do not support the bill, that this will have some public health impacts.

**Mr Minogue**—I accept that is a view that has been put very strongly to the committee. I cannot comment on it, except to repeat that the intention and the government's understanding of the effect of the bill is that it would not create a different set of circumstances where it would be open slather or, indeed, encourage people to act or to discriminate. It is certainly not the intention. To the extent that evidence of concern has been put to the committee, I cannot critique that.

**Senator LUDWIG**—It says in the second reading speech:

However, this bill is not about penalising people with drug problems. Rather, it is directed to ensuring that our disability discrimination laws are not used in an unjustified manner.

What does that mean—'unjustified manner'?

**Mr Minogue**—That is a reference to the fact that, as I said earlier, if the sole basis for challenge for an otherwise lawful decision was on the basis that someone was addicted to a prohibited drug and that constituted a disability, that is seen as being unjustified in the government's assessment, and the bill would remove that sole ground of action. If there were

other grounds of action—comorbidity or other disabilities—they would continue to be unaffected by the bill.

**Senator LUDWIG**—Except if they were on a program. A drug addict on a program is the exception.

**Mr Minogue**—The bill provides that it is not lawful to discriminate against a drug addict on a program.

**Senator LUDWIG**—Yes. If they are a drug addict not on a program, then it is.

**Mr Minogue**—If that is the sole cause.

**Senator LUDWIG**—That is the unjustified manner—that they have failed to get a program. If they are in a regional centre and there is none available—

**Mr Minogue**—The government—sorry, Senator.

**Senator LUDWIG**—I am happy to let you finish. I think you get the gist of what I am saying.

**Mr Minogue**—Yes. There have been public statements by the government, which I can provide to the committee on notice, where the government has said something along the lines of, ‘The fact that someone claims an addiction to a prohibited drug as a disability should not be the sole basis of bringing a discrimination claim.’ There are comments to that effect. That is the basis of the government’s actions.

**Senator LUDWIG**—That is all it means? That is the sole basis of what it means: nothing else?

**Mr Minogue**—That is my reading of it. People might react to it differently.

**Senator LUDWIG**—I was interested in what the Attorney-General thought. You are representing the Attorney-General or the department, I would have thought, and I presume it is a fair question. Is that the sole reason?

**Mr Minogue**—I have given my answer. I cannot speak for the Attorney’s mind. Although, I could, if I may, Senator, perhaps by way of example of my previous comment I made about public statements, read from a press release of 3 December:

Mr Ruddock said the government wanted to send a strong signal that addiction to a prohibited drug is not a sufficient basis to gain the benefits of the anti-discrimination regime.

That is the consistency with that statement.

**Senator LUDWIG**—The exception there is, of course, if they are on a program or a treatment.

**Mr Minogue**—Yes.

**Senator LUDWIG**—Does it say that in there?

**Mr Minogue**—In the Attorney’s press release?

**Senator LUDWIG**—Yes.

**Mr Minogue**—Yes. The Attorney continues:

This measure is consistent with the Government's 'Tough on Drugs' strategy and requires people to take responsibility for their own actions, Mr Ruddock said.

People undergoing treatment and receiving services to treat an addiction will continue to be protected from unlawful discrimination.

**Senator LUDWIG**—If they cannot get treatment because they are in a rural area and there is a shortage of spaces, a range of other prohibiting factors, is there an exception for that?

**Mr Minogue**—That is why the definition of what is a relevant treatment or service is not prescribed: to provide the widest range of circumstances where people can demonstrate that they are seeking to take responsibility for their addiction, which is the phrase the government uses.

**Senator LUDWIG**—They can just simply assert that: that they are taking responsibility for their addiction.

**Mr Minogue**—No.

**Senator LUDWIG**—It is two-way, is it?

**Mr Minogue**—It becomes a matter of evidence.

**Senator LUDWIG**—This is your bill, this is how it is going to apply, and I am curious as to how it will apply in truth.

**Mr Minogue**—If someone were to make a complaint that they had been unlawfully discriminated against, the person making the complaint—as, indeed, is the case now—has to put into evidence sufficient matters to demonstrate that that person has a disability. How they go about that is up to them.

**Senator LUDWIG**—That is a public record, where they are doing that.

**Mr Minogue**—Hearings before the Human Rights and Equal Opportunity Commission—the decisions are made there.

**Senator LUDWIG**—All of the matters are drawn out. Do you think they would make a complaint, where all those matters are going to be drawn out and put before them? In fact, it might heighten discrimination down the track, mightn't it? Other employers like ACCI might circulate the decision with the person's name on it.

**Mr Minogue**—That is the complaint—

**Senator LUDWIG**—You do not care about that?

**Mr Minogue**—I do not think that is fair, Senator. That is a feature of the Disability Discrimination Act as it works.

**Senator LUDWIG**—How your bill will work.

**Mr Minogue**—Whether someone chooses to make a complaint or not will be governed by the substantive provisions of the Disability Discrimination Act and, indeed, as they currently operate.

**CHAIR**—Can we just go back a step. I do not have the benefit of the press release that you are quoting from. Can you quote to me again the part about the benefits of the antidiscrimination regime.

**Mr Minogue**—I will read it. This is Attorney's press release of 3 December:

Mr Ruddock said the government wanted to send a strong signal that addiction to a prohibited drug is not a sufficient basis to gain the benefits of the anti-discrimination regime.

**CHAIR**—Yes, that is great, thank you. That is the part I wanted you to reread for me. Correct me if I am wrong, but isn't the purpose of an antidiscrimination regime not to grant special rights or additional rights to people—which are not available to the rest of the community—but rather to provide equal rights to provide balance? That is why the Disability Discrimination Act says that it is about providing the same fundamental rights as the rest of the community? Is that what discrimination law is about?

**Mr Minogue**—I would accept that characterisation.

**CHAIR**—Thank you very much. I think that concludes this evening's hearing, Mr Minogue. May I say that over the last hour and a half you have most certainly earned whatever they are paying you in the Attorney-General's Department. Thank you very much for assisting the committee. We do appreciate it. We know it is not an easy process, nor is it for us. The committee has asked you to take a number of questions on notice and we will provide those to you, alert you to those. There may be a couple of others which we would like followed up. We will now turn to our deliberations on the report. I thank all the witnesses who have appeared this evening, particularly those who appeared by teleconference—that is not easy either. I declare this meeting of the Senate Legal and Constitutional Legislation Committee closed.

**Committee adjourned at 9.32 p.m.**