

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into discrimination in the law

Melbourne — 11 July 2005

Members

Ms L. Argondizzo

Ms L. D'Ambrosio

Mr A. Brideson

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Witnesses

Mr P. Coghlan, QC; Director of Public Prosecutions; and

Mr B. Gardner; Office of Public Prosecutions.

The CHAIR — I declare open the first day of public hearings of the Scrutiny of Acts and Regulations Committee's inquiry concerning discrimination in the law. The inquiry is being held pursuant to a Governor in Council order made on 3 June 2003. That order by its terms of reference requires the committee to review provisions in Victorian legislation which may discriminate or lead to discrimination against any person as provided in section 207 of the Equal Opportunity Act 1995.

Our first witnesses are Mr Paul Coghlan, QC, and Mr Bruce Gardner. Welcome, and thank you very much for making yourselves available for this public hearing. Gentlemen, I am sure you are aware that anything you say before the committee is protected by parliamentary privilege. However, once you leave the hearing anything you say outside this room is not so protected. In due course you will receive a draft copy of the transcript, which will be an opportunity to correct anything that the Hansard reporters may not have correctly recorded; of course it is not an opportunity to add or remove evidence as such.

You will have received a copy of the letter inviting you to the public hearing and to make a submission, including some dot points summarising the issues that the committee is seeking to take evidence on. You will also have received a copy of the committee's interim report tabled in Parliament on 14 June 2005. I invite you to firstly, make a statement with respect to those dot points; then we can move on to some questions and answers and elaboration on those matters.

Mr COGHLAN — Thank you. Madam Chair, members of the committee, there are some matters of public policy involved which are not really matters that become our concern. I will simply point out where I think they arise in some of this material.

In relation to the question of re-examining sexual offences as they relate to an expanded definition of section 35(1) in the definition of 'de facto spouse' in that section, there is no reason that that would have any particular effect, adverse or otherwise, on the operation of the law, except to expand its operation as policy dictated. As far as we can gather — and this is not material about which any actual statistical material is being kept — anecdotally there do not appear to be any cases at the moment, which we know of, which have involved abuse by a same sex partner of a child. We do not know of any case.

That does not follow, of course, that there may not be unknown to us some cases. They would be caught, in any event, by the general provisions of the law usually, but many of them fall into a more serious category, so that a case of sexual penetration which would carry a maximum penalty of 10 years, if it is converted to incest carries a maximum penalty of 25 years. For the abuse of children living in those sorts of family relationships there would be no reason, it would seem to me, to not have provisions that operated in a completely equal way. So there do not seem to be any — at least unintended — consequences that would ever flow from those changes.

I come to the next dot point, which is the potential impact of extending the delineation of criminal liability of married persons in sections 337, 338 and 339 to de facto and same-sex spouses. It raises some policy considerations in this sense, that the law of coercion as it grew up historically — probably over some hundreds of years — accepted the primacy and power of a male over a female in a spousal relationship. Whether these present amendments would be intended, for instance, to open up the question of the equivalent of the defence of marital coercion to a male at the hands of a female is not actually addressed at the moment because that is outside same sex and outside de facto as it is presently defined. They are really matters of policy.

Then the question of policy is whether we accept as an excuse for the commission of a criminal offence the pressure exerted by one person over another in a spousal relationship at the end of the day being a matter of policy rather than a matter of effect of the law. But if those changes were made, there would be a much wider range of cases than the ones we are presently looking at. Marital coercion, either in its old common-law form or in its present statutory form as it is expressed in the Crimes Act, has been very unusual, but is more likely to be of effect than it has been of effect in the occasional cases that relate to being what we traditionally called 'accessory after the fact', but is now termed 'assisting the offender'.

Some of these provisions in any event will probably become subject of the present review that is going on in relation to the Crimes Act, because it is not clear that section 337, for instance — misprision; there is no such offence as misprision of a felony, so there is not much point having a defence to it, really — some of those things will need to be tidied up.

The interim recommendations, as has been pointed out to me, in any event begin at a review of sections 337, 338 and 339. Section 336, in its definitional component, would need to be addressed as well if those matters are to be taken on. It is probably a bit more complex than the other provisions, but is mostly about matters of public policy rather than matters that would have substantial effect on the law as we have understood it.

In relation to the third matter, the extension of section 400 of the Crimes Act, if we statutorily extend the definition of ‘marriage-like relationship’ or of ‘de facto relationship’, there does not seem to be any reason why it should not apply to section 400. Again, because section 400 does not confer unqualified or total rights in the matters to be reviewed by judges or magistrates in particular cases, the present restrictions seem reasonable and not affected, really, particularly by any definitional changes. I think they were the matters that we were directly asked to comment on. Bruce, is there anything you want to add to that?

Mr GARDNER — I do not think so. Just in relation to the paper, you might note that in footnote 105 that is probably a reference to section 400 not 401; then see subsections (3) and (4) for the criteria for assessing the relationship.

Mr COGHLAN — The only other provision that we thought might bear some looking at is section 177, which is in the part of the Crimes Act dealing with secret commissions — whether subsections (1) and (2) bear looking at in terms of these considerations. Subsection (1) is:

Any valuable consideration given or offered to any parent husband wife or child ...

The word ‘partner’ used in that context means partner in a commercial sense rather than a private sense. We have not been asked to argue otherwise. I think we would be pretty brave.

The CHAIR — If I may just go on to questions: of course you can certainly elaborate on other areas if you wish. You said that the law historically has been based on the primacy of the male over the female in a married relationship. Would that be reflected in the current law, as it stands?

Mr COGHLAN — That is certainly reflected in section 336 in the form that it is in. It was a specific defence that developed to excuse married women of criminal conduct committed at the suit of their husband, there having been a presumption, prior to these changes, that a married woman could not be guilty of a criminal offence committed jointly with her husband. That was changed — these things always occur a bit sooner than you think — in 1977 in the married persons liability part and some other provisions were picked up. It was retained in the sense that it allowed the defence to exist in circumstances where coercion could actually be proved, but it applied quite directly to a woman, so it is:

Where a woman is charged with an offence other than treason, murder or an offence specified in section 4, 11 or 14 of this Act, that woman shall have a complete defence to such charge if her action or inaction (as the case may be) was due to coercion by a man to whom she was then married.

So it could not be more gender specific in relation to the way that coercion developed, but it developed for strong historical reasons.

As I say, the questions of policy that arise are, for instance, would we accept — and it is a matter, really, for the Parliament — that a man might commit an offence, being coerced by a woman to whom he was married and I do not know that we have particularly looked at that; or that it might arise in a same-sex spousal relationship. Of course it might, but it is a question of policy as to whether that is the path down which we go. It is a very rare defence. There are plenty of instances, I suspect, where police officers exercise the general discretion that they might have, where you might have a case that you could put against both husband and wife; and if you are satisfied that the husband is the major offender, you proceed against the husband and so on.

Some of those decisions, though, are now being caught up with views that we are forced to take in relation to the law of confiscation. If both parties to a relationship are in a house where they are growing a few hundred marijuana plants and so on and it would be ‘forfeit’, if the wife is not charged and convicted of the offence it might protect her share. So more careful consideration has to be given these days as to who really is liable criminally for the offences. It may have a substantial effect on penalty in a lot of those cases, of course, if the wife would not in many of them suffer the same consequences, but nonetheless they might be the very situations where coercion could arise as a defence, I suppose. Nobody seems to want to run it much.

The instance where this situation arose was in the Wales-King case where, many people have noted, the accused wife in that case was charged with attempting to pervert the course of justice and not charged with assisting the offender. She was not charged with assisting the offender because she had a defence to that pursuant to section 338. So that is one recent example, but they are pretty unusual.

Mr McINTOSH — In relation to the discretion to excuse a spouse given to a judge or magistrate under section 400, is it something that is constantly before the courts or is it just a rare case where that sort of discretion has to be exercised?

Mr COGHLAN — It is pretty unusual. I think these days we are more likely to be faced with the proposition of a female spouse simply refusing to give evidence when she has taken the view that she no longer wants to go on with the case, to the extent that we get cases of women who say to us, ‘I’ll go to jail. I’m happy to be dealt with for contempt’, rather than give evidence in these cases.

It worries me a bit because we worry about ultimate consequences. You do not worry about the result of any particular individual case you are faced with but you worry about what happens to those women in the future because of what we know happens arising out of abusive relationships. That is a bit of concern, but section 400 of itself is not particularly so.

When it arises I think judges do have pretty firm regard for the proposition of how important the evidence is and how important the crime is. So if the evidence is pretty important, the possibility of people being excused is reduced, as it ought to be in relation to the way the section operates.

Mr McINTOSH — You mentioned the Wales-King case before, but are you able to give any concrete example of the operation of this exercise in a practical sense?

Mr COGHLAN — Not off the top of my head but I am happy to provide some material to the committee. We have already got in our material some rulings in relation to section 400 but we will have them put into an appropriate form and forwarded to the committee.

The CHAIR — Extending the discretion to grant exemptions to, say, de facto or same-sex couples, would that present any difficulties for the processing of the law as you would see it?

Mr COGHLAN — I think not. It is anomalous to some extent. If you look at long-term traditional de facto relationships as we have understood them, the mere fact of having gone through the rationale for saying why you should be excused from giving evidence is the damage to the relationship, and if there is an identifiable existing relationship but not one that the law has to the moment recognised, that seems odd.

The CHAIR — In terms of establishing the bona fides of a relationship though, would you see that would perhaps take more time to establish?

Mr COGHLAN — It might take a bit longer but they are usually pretty easy to establish. One of the problems that has always arisen in that area is that sometimes in de facto relationships, for reasons connected to the provisions of the Social Security Act and so on, people are a bit more reserved about speaking about their relationships than they otherwise would be.

The CHAIR — In what circumstances may a person’s de facto same-sex spouse be named as a prosecution witness? Could you envisage any?

Mr COGHLAN — Many. They have always been competent, compellable witnesses. How you ever manage the circumstances of a witness who simply says, ‘I am not going to give evidence’, or, ‘I am not going to make a statement’ and so on — you are usually just stuck with that. But we now have power — for instance, pursuant to the Magistrates’ Court Act — to compel certain witnesses to make statements. I look at every one of those. I do not think there has been one that involved a de facto partner or a married partner for that matter.

The CHAIR — If it were a case of a choice of witnesses in terms of prosecutions, would that potentially lead a prosecution to choose alternatives, say, to witnesses?

Mr COGHLAN — It just depends on how important the evidence is. Yes, it always boils down to the evidence being where we can find it. If witnesses are cooperative, then that helps. If they are not cooperative, you

do not get the evidence anyway usually. The ones where section 400 arises are where people have made a statement and now want to change their mind, or something has arisen that leads them into a different view of the matter.

The CHAIR — You talked about confiscation laws earlier. Could you just clarify whether that was just an example or did you make an observation in the light of the — —

Mr COGHLAN — I have been in practice now for 37 or 38 years, I suppose, depending on what view you take of it — it does not seem as long as that, I must say. Traditionally I think police officers would have commonly exercised a discretion to not prosecute partners for all sorts of reasons that do not have much to do with the law, I suppose. If there are children who need to be looked after et cetera, it is part of the traditions of the operation of the law. We have to be more careful in the advice we give now. That has changed a fair bit over the years. There is less latitude given. I think if police think the female involved is guilty of offending, they are more likely to be charged these days. We have to be a little bit more — I do not know if zealous is the right word — careful about it because of the effect it has on confiscation.

You have jointly owned property. If you have three or four rooms of a house in which a couple are living that have been converted over to growing big hydroponic crops and the electricity being diverted and so on, it is a pretty generous decision to make to say the spouse would not be charged with the offence. But if the spouse is not charged, it has an effect on what part of the jointly owned property will be forfeited at the end of the day. More pressures arise out of those areas of the law. But it might be that as we live in a society that takes a different view of equality of gender, the old rationale of wives not being charged with offences will change in any event.

The CHAIR — Would you envisage perhaps any notable change in the rate of spouses, in the case as we have it now, seeking exemptions or not seeking exemptions?

Mr COGHLAN — Probably not.

Mr McINTOSH — Could I just clarify one matter in relation to incest. As I understand it incest is obviously an abhorrent crime of a parent against a child. You mentioned step-parents as well. You can still be guilty of incest even if all the parties involved are adults.

Mr COGHLAN — That is true, although it is likely here that under that provision you would be dealing with it up to the age of 18. The present provision as it relates to step-relationships is section 44(2):

A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.

In discussing it this morning we thought if the changes in the provisions were made, the effect it would have would probably be the under-18 effect rather than the adult, because in this circumstance it might be regarded as a slightly odd result in relation to adults.

The CHAIR — I do not think there are any further questions. You are welcome to make any observations or closing remarks if you choose.

Mr COGHLAN — I am happy with that, thanks very much. If there is anything else the committee requires, obviously I would be available.

The CHAIR — Thank you very much.

Witnesses withdrew.

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Ms C. Randazzo, SC, senior public defender; and

Ms T. Lee, policy officer, Victoria Legal Aid.

The CHAIR — I welcome Carmen Randazzo and Tonye Lee from Victoria Legal Aid. Thank you very much for attending. I have some preliminary comments to make. Anything you say before the committee is protected by parliamentary privilege. However, once you leave the hearing anything you say outside this room is not so protected. In due course you will be provided with a draft copy of the transcript. This is an opportunity to correct anything that the Hansard reporters may not have correctly recorded. However, as you would know, it is not an opportunity to write any additional information or to remove evidence that has been provided.

You will have received a letter inviting you to make a submission which included some dot points we would like to be addressed here today in your evidence. You will have also received a copy of the committee's interim report, which was tabled in the Parliament on 14 June 2005. I now invite you to make some statements to the committee on the relevant issues or the interim recommendations that we have made, which are to seek further information on the issues we have identified as needing clarification. Following your opening statement members of the committee may choose to ask questions to elaborate further on your presentation.

Ms RANDAZZO — Thank you very much. First of all, can I just say that Victoria Legal Aid (VLA) is grateful for the opportunity to contribute to this particular inquiry. We believe that Victoria Legal Aid is in an opportune position to observe the ramifications and consequences of the various acts that have been identified as containing some unjustifiably discriminatory provisions. These acts and the relevant provisions have been identified in appendix A of Victoria Legal Aid's written submission dated 21 June 2004. However, I note that Victoria Legal Aid made reference to various acts that still contain discriminatory provisions, particularly against same-sex couples, I am really here to look at the criminal justice and criminal law perspective and address those three key areas the committee has asked us to address.

The written submission that Victoria Legal Aid provided made specific reference to sections 399 and 400 of the Crimes Act. However, we recognise that there are other sections within the Crimes Act, some of which have been brought to our attention by the committee and indeed some others which I will refer the committee to in a moment, that still contain discriminatory language insofar as terms such as 'husband and wife' do not include, for example, de facto spouses or same-sex couples. This, Victoria Legal Aid believes, is contrary to the object of the Statute Law Amendment (Relationships) Act as provided for in section 1(3) of that act. As I said, the committee has invited us specifically to address three key areas of the Crimes Act and to comment on the potential impact of amendment to those provisions, which would extend the scope and applicability of those provisions to encompass a broad class of persons.

Before I turn to those I should make it clear that the comments I am about to make on behalf of Victoria Legal Aid are from a criminal justice and criminal law perspective and only from that perspective. I have not looked at nor considered any of the other acts — civil acts and so forth — that have been addressed by the committee in its report.

As a general proposition the removal of discriminatory language from those provisions of the Crimes Act that have been and will be addressed has practical implications for the criminal justice system, none of which I may say are considered to be negative impacts. However, it is recognised that there may be wider social justice issues that would be impacted upon as well.

I turn to the first of the three areas that the committee has asked us to comment on, and that is the potential impact of replacing the definition of 'de facto spouse' in section 35(1) of the Crimes Act with a new section defining the term 'domestic partner' as defined in the Statute Law Amendment (Relationships) Act — that is, replacing the term 'de facto spouse' with 'domestic partner' in section 35(1) and in particular section 44(2), section 51 and section 52 of the Crimes Act. Currently section 35(1) provides a definition of de facto spouse which, in the view of Victoria Legal Aid, is discriminatory insofar as it excludes same-sex couples. Victoria Legal Aid supports the replacement of the definition of 'de facto spouse' with a new section defining the term 'domestic partner'.

However, we note that great care needs to be taken in defining that term — that is, the term 'domestic partner'. I have noted that in the Statute Law Amendment (Relationships) Act the term 'domestic partner' is defined differently in the various acts that it refers to so as to adequately reflect the particular requirements of particular acts. For example, the term is defined slightly differently in the Administration and Probate Act compared to the Children and Young Persons Act. For the purposes of subdivisions 8A to 8G in part 1 of the Crimes Act it must be kept in mind that those provisions provide for and create a series of sexual offences against vulnerable persons, in particular children, persons with impaired mental functioning and residents within residential facilities. What has to

be kept in mind is that that protection afforded to those persons must not be undermined in any way whatsoever. We would say that great care needs to be taken when defining the term ‘domestic partner’.

Similarly, however, the rights that are afforded to persons charged with such offences must also be the subject of legislative provision. VLA supports the defining of “domestic partner” for the purposes of subdivision 8A to 8G in part 1 of the Crimes Act in terms similar to the definition of “domestic partner” in the Children and Young Persons Act — that is, to include persons irrespective of gender and marital status living as a couple on a ‘genuine domestic basis’. However, Victoria Legal Aid is also of the view that there ought not be any time constraint or limitation on the length of that relationship. The criteria should be life as a couple on a genuine domestic basis rather than determining the genuineness of it by the length of that relationship, so persons who are in a de facto relationship or a same-sex relationship would not be considered any differently to persons who are married and have been married for only a very short time. The current provisions would enable married persons and de factos who have been together for a very short time to still be subject to the same liabilities, and it ought not be any different for same-sex couples.

Any definition of “domestic partner” ought not be limiting. We should move forward and recognise an ever-increasing trend in our community, an ever-increasing number of committed same-sex couples in genuine domestic relationships as well as the ever-increasing number of same-sex couples with children. These children ought to have available the same protections afforded to children of heterosexual couples, and partners within same-sex relationships should be subject to the same liabilities as those currently subjected to the provisions of subdivisions 8A to 8G in part 1 of the Crimes Act. Victoria Legal Aid does not see any difficulty in providing for what it would see as a broad definition of “domestic partner”, particularly where clearly the aim is to protect children and the intellectually disabled or those with impaired mental functioning. We would support a broad definition of “domestic partner” that includes same-sex couples and de facto couples with no time limitation on the length of that relationship being a criteria for consideration.

In relation to the term ‘de facto spouse’ as provided for in section 44, I heard some of the comments made by the previous witness in relation to section 44, and in particular Mr McIntosh’s question in relation to incest. Clearly section 44(2) deals with situations where the potential victim is the child or stepchild of an accused de facto spouse. I agree that practically it does only relate to children under the age of 18. My experience has shown that it is limited to children under the age of 18. Currently it only incorporates a child of a person of the opposite sex. Victoria Legal Aid is of the belief that in this day and age, where there is an ever-increasing number of children of same-sex couples, the term ‘de facto spouse’ should be replaced with a more broadly defined term such as domestic partner so as to include children of same-sex couples.

I imagine — and this is only a comment by me — that the incidence of incest with a child of a same-sex partner is rare, and it is hoped that it remains so, if that is in fact accurate. However, the practical implications for the criminal justice system would be no different, we say, from those it faces all too often under the current provisions of section 44(2). So we do not see that such a change would lead to an inability by the criminal justice system to deal with those types of cases should they arise.

I also comment that there may be other social implications that arise from such a change. Amendment in this way may well attract criticism from some groups or individuals who, understandably, may resent the inference drawn that same-sex couples are likely to engage in prohibited sexual conduct with the children of their same-sex partner. However, it is, I suppose, a case of: you want the protection; you should be subject to the same liabilities, quite frankly. But that again, as I say, is a social issue that can be dealt with and not necessarily a criminal justice one. I think the criminal justice system is more than able to deal with these types of cases should they arise.

Sections 51 and 52, in the opinion of Victoria Legal Aid (VLA), clearly discriminate against same-sex couples as they currently stand. We see no practical or policy reason for not providing same-sex couples the same protections and defences as are currently provided to heterosexual couples by these sections. We are unaware of the number of same-sex couples in these situations and again imagine it would be quite rare. Nonetheless the principle, we say, remains the same. As for practical implications for the criminal justice system, it is difficult to see what negative impact could arise from such amendment.

These are same-sex couples providing therapeutic services or care to their partner — and that is ever-increasing as well. One can imagine quite easily the situation of a committed same-sex couple where one of them acquires, for example, a brain injury, and therefore their mental functioning is impaired, and therapeutic services are being

provided by their partner. In those circumstances we can see no reason why they should not be afforded the same sorts of protections and defences that are provided for in section 51 as would be provided to a heterosexual couple in the same circumstances. Again I reiterate that VLA believes the criminal justice system would be able to cope with such amendment in much the same way as other arms of the legal system have managed to cope with it.

The second area that the committee has asked us to address is the provisions in sections 337 to 339 of the Crimes Act and in particular what, if any, impact there may be in extending the delineation of criminal liability of married persons to de facto and same-sex spouses. As a general policy statement VLA does not believe that there should be any delineation between spouses and de facto spouses and same-sex spouses. It is noted that the term 'spouse' is not in and of itself defined but that division 3 of part II of the Crimes Act relates specifically to the criminal liability of married persons, so we have no doubt that it relates only to married persons.

An interesting sidenote, however, is that an argument, I believe, can be made that 'spouse' could include a de facto spouse — that is, that they are really categories within the same class or group of persons — but as it currently stands division 3 of part II clearly only relates to married persons.

VLA sees no potential impact, apart from a positive impact, in erasing the discriminatory practices by extending the delineation of criminal liability of married persons in sections 337 to 339 to de facto spouses, and similarly sees no potential negative impact from a criminal justice system perspective in extending the delineation of criminal liability of married persons in these sections to same-sex couples. It is foreseen that these provisions would require some significant amendment if they were to be amended. The term 'married' would need to be erased from the section and the term 'spouse' would need to be replaced by the term 'domestic partner', again defined in a broad sense as including de facto and same-sex couples.

The criteria for this definition would be found in the notion that all couples, irrespective of gender or marital status, are living as a couple on a genuine domestic basis. Imposing a time limit on de facto and same-sex relationships, as I understand once used to be the case with de facto relationships for the purposes of family law, would only serve to add a further form of discrimination against non-married couples.

I note too that section 339(1) is framed in positive terms; hence removing the word 'married' and the words 'as if he or she were unmarried' from section 339(1) would appear to make it somewhat superfluous. However, the scope of section 339(2) to include offences other than treason or murder would make it necessary to include a provision not referring to 'married person' and referring to 'domestic partner' instead of 'spouse' to cover those circumstances — that is, offences other than murder or treason. So there would need to be some fairly significant amendment made to section 339 so as to make it applicable and relevant.

The committee has not asked us to specifically address section 336, which is also part of division 3 of part II of the Crimes Act. However, VLA has considered it and is prepared to make comments in relation to section 336 should the committee so wish it. In particular it is queried whether or not it was deliberately left out or deliberately not referred to for any particular reason, but if the committee is willing to hear from me, I am prepared to make some comments in relation to it.

Section 336, which is entitled 'Marital coercion', currently applies to married women as against their husbands. The provision, I should say, does abolish the presumption of marital coercion, but it does not abolish the defence of marital coercion — or duress, for that matter. VLA queries whether it would be appropriate to extend the delineation so as to include de facto spouses irrespective of gender and same-sex spouses. We believe that such a move would be in keeping with corresponding amendments in sections 337 to 339 and with section 1(3) of the Statute Law Amendment (Relationships) Act. In other words, we can see no valid reason why it ought not extend to persons who are, for example, in a same-sex relationship where there is an unequal relationship.

Clearly the rationale behind section 336 was to take account of the weaker party — or what was perceived to be the weaker party — women — and the unequal relationship between a husband and wife. That, in this day and age, we recognise as being applicable even to de facto spouses, clearly, as it is to same-sex couples. There is nothing to suggest that same-sex couples or de facto spouses because of the nature of their relationship necessarily have an equal relationship, and the protection that is afforded currently in section 336 and afforded to wives ought to be extended, we believe, to same-sex couples and de facto spouses.

We do recognise, however, that any such amendment may do nothing more than codify the existing defence of duress which of course applies to all persons irrespective of gender and marital status and irrespective of sexual

preference and irrespective of the relationship to the person allegedly coercing. However, we note the criterion to be applied in this section is that of “dependence” as is provided for in subsection (4):

Without limiting the generality of the expression ‘the circumstances in which the woman was placed’ in sub-section (3), such circumstances shall include the degree of dependence, whether economic or otherwise, of the woman on her husband.

If that is the criterion that is to be applied, then its existence is justified because it is so unique, and that criterion does not apply in the common law defence of duress. It is not a consideration for the common law defence of duress, and in that regard the committee can see the case of *R v Hurley and Murray* (1967) VR 526 on when duress arises.

It is respectfully suggested by Victoria Legal Aid that if that is the criteria and it is to be embodied in statutory provisions, such as in section 336, it ought not be expressed in discriminatory language. Hence we say that in respect of section 336 the statutory defence ought not be limited to married persons and should incorporate domestic partners as has been previously defined in the broad sense to include de facto spouses and same-sex spouses.

The third area that the committee has asked Victoria Legal Aid to comment upon is the potential impact of extending the discretion to exempt married spouses as witnesses in section 400 of the Crimes Act to include de facto and same-sex spouses. I did hear part of what was said by the previous witness in this regard. From a practical point of view I agree that there is no negative impact that can be seen from extending that exemption or the ability to apply for the exemption to same-sex couples or de facto couples. I did hear part of what was said in relation to the genuineness and length of the relationship, particularly of de facto and same-sex couples. Victoria Legal Aid is of the view that there ought to be no time limit expressed — that is, that there ought to be no criteria that relies on the length or duration of the relationship — but rather what should be looked at is whether or not it is on a genuine domestic basis.

From a criminal law perspective Victoria Legal Aid does not foresee any negative impact from extending the discretion to exempt married persons as witnesses in section 400 of the Crimes Act to include de facto and same-sex spouses as long as the court retains a discretion and the discretion is exercised in accordance with the provisions of subsections (3) and (4) of section 400. That is the critical aspect of it. Indeed the discretion to exempt wives, husbands, mothers, fathers or children of an accused was premised on the concept that such persons usually maintain such a special relationship that the circumstances of that relationship were capable of outweighing the interests of the community in their giving evidence — in other words, the exemption is premised on there being a relationship between those persons and that there is the likelihood of that relationship being damaged if the person were compelled to give evidence and/or because of that relationship it is deemed to be too harsh to compel that person to give evidence.

De facto and same-sex relationships are relationships which should be covered by the provisions of section 400. There is no logical reason for not including them as a class of persons who can claim the exemption. Victoria Legal Aid believes an abuse of the provisions is highly unlikely as long as the general discretion to exempt such persons is retained. We say that it should be left to the court to determine whether there exists a relationship which is capable of being damaged. As the section currently stands all persons, irrespective of their relationship to an accused, are competent and compellable witnesses. We are not suggesting that that ought to be done away with; it is only the discretion to exempt certain categories of persons from giving evidence which alters the fundamental principles of competence and compellability. There is no logical reason, nor can we foresee any negative impact from extending the discretion to exempt de facto and same-sex couples from giving evidence. We should allow them to make the application to be exempted and allow the court to determine whether or not there is a relationship and whether that relationship is likely to be damaged or it is too harsh for the person to give evidence.

It is interesting to note that the commonwealth Evidence Act 1995 has a similar provision to section 400. Section 18 of that act is entitled ‘Compellability of spouses and others in criminal proceedings generally’, but it provides in subsection (2) that:

A person who, when required to give evidence, is the spouse, de facto spouse, parent or child of a defendant may object to being required:

- (a) to give evidence ...

A de facto spouse of a man means a woman who is living with a man as a wife on a genuine domestic basis while not married to him and a de facto spouse of a woman means the corresponding — a man who is living with a woman as a husband on a genuine domestic basis while not married to her. Currently that commonwealth act goes one step further — and only one step further — by including de facto spouses.

There is a sequence that arises out of this particular provision — that is, in relation to the aspect of stepchildren or children of same sex-spouses. If you are going to extend the discretion to exempt de facto spouses and same-sex couples, it must follow that the children of de facto and same-sex couples should be able to apply for the exemption as well. Victoria Legal Aid is firmly of the view that the discretion should also be extended to include the children of de facto spouses — that is, stepchildren and same sex-spouses. Again it is the presiding judge or magistrate who is the best person to determine whether there is a relationship between these persons and the accused such as to give rise to a discretion being exercised in their favour.

Victoria Legal Aid can see no reason why a child of a same-sex relationship or a stepchild ought not be eligible to at least claim the exemption and be treated in exactly the same way that children of married couples or, if the legislation is amended, children of domestic partners are treated — of course where domestic partners are defined to include de facto and same-sex spouses. Even though we have not been specifically asked to address it, it must follow that if there is going to be an amendment to section 400 so as to extend the class or category of persons who can apply for the exemption, it ought also be made clear that it extends to the children of same-sex couples and stepchildren.

In conclusion can I just say that Victoria Legal Aid supports and endorses the aim of the Statute Law Amendment (Relationships) Act, particularly where its effect has been to remove the legislative provisions which discriminate against same-sex couples. However, it is Victoria Legal Aid's firm belief that there are still acts which contain discriminatory provisions against same-sex couples, and, as I said, they are set out in appendix A of Victoria Legal Aid's submission. From a criminal law perspective, the changes being proposed or being considered are considered by Victoria Legal Aid to be, firstly, progressive and positive; secondly, necessary to accommodate changing community trends and social morays; thirdly, necessary to bring into line acts containing discriminatory provisions; fourthly, capable of being implemented with very little, if any, negative impact; and, fifthly, conducive to providing consistency and uniformity of approach across our entire legal system.

The CHAIR — In the latter part of your submission you mentioned that the commonwealth act has gone that one step further in terms — —

Ms RANDAZZO — Yes, the commonwealth Evidence Act.

The CHAIR — Are you aware of any evidence from that jurisdiction which bears out any impacts, negative or otherwise?

Ms RANDAZZO — I am unaware of any negative impact. It extends only to de facto spouses, and there is no time limit attached to it. It is “on a genuine domestic basis”. I am unaware of whether or not there have been any cases that have actually involved a de facto spouse making an application under section 18 of the commonwealth Evidence Act. I must say I have not come across any personally. Clearly there is under section 400 of the Crimes Act, but I am unaware of any under the commonwealth act.

Ms LEE — I might just say that the Australian Law Reform Commission is currently looking into the commonwealth Evidence Act, so something may come out of that inquiry to shed some light on that issue.

Mr McINTOSH — Ms Randazzo, in relation to the definition of a same-sex couple living together on a genuine domestic basis, I understand that to qualify under the Property Law Act, for example, the requirement is 12 months as a de facto couple or a same-sex couple, whereas under the Administration and Probate Act it is two years, and there are a number of other acts where it is just left undefined. It seems to me that the discussion we have had in relation to the provisions of the Crimes Act involves a general problem in the way the law now stands in the sense that there have been various acts that have been cherry picked, and it is about time that we started to define all relationships — married, de facto or same sex — without any pejorative argument one way or the way. Because they have been cherry picked there is confusion as to the time. But it would seem that a married couple, for example, whether or not they were a married couple who had not lived together for a number of years, should be able to avail themselves of the section 400 exemption. It seems to me that you could clarify a lot of matters simply by defining the relationships — married, same sex, de facto or otherwise — on the basis of a genuine domestic

relationship that existed at the time of the offence, for example, or a genuine domestic relationship at the time of making an application for admin or probate or something like that.

Ms RANDAZZO — Or at the time of making an application for exemption under section 400. It seems somewhat anomalous that you can have a situation where a married couple, or a partner in a married couple, makes the application for exemption where the marriage only arises after the offence has been committed, for example. That can happen; I know it happens in the United States quite regularly. There are acts, and the Children and Young Persons Act is just one of them, where the criteria is a genuine domestic basis and only a genuine basis. There is no time limit required; there is no length of relationship required in order to qualify under that particular act.

Because the Crimes Act provides such specific liability and protections to members of the community, it ought not, I think, be necessarily regarded in the same way as, say, the Property Law Act or the Administration and Probate Act where clearly you are talking about issues that are of a quite different — I am not suggesting less important — nature to the sorts of things you are talking about when you are talking about the Crimes Act. You are obviously talking about a person's criminal liability, their liberty and so forth. There is a lot more at stake in that regard.

To differentiate between married couples who have been together for a very short time and afford those couples the same protections and subject them to the same liabilities, and a de facto couple or a same-sex couple who have also been together for a very short period of time, just does not seem to be a consistent approach and we believe it is difficult to justify. One way of getting around the possible problem that you foresee is to define genuine domestic relationship. But acts, including the Children and Young Persons Act, have refrained from doing that because it is left to common law to come up with the definition and to interpret that phrase. The relationship is looked at to determine whether it is a genuine domestic relationship. One can have regard to the length of that relationship, but clearly if it is a long relationship that, of course, stands in good stead for them as evidence of genuine domestic relationship. But simply because it is not a long relationship should not be held against that particular couple, or, in other words, should not be interpreted as meaning that it is not a genuine domestic relationship. Other factors such as whether they are living together and whether there is any degree of dependence — perhaps economic dependence — and whether the non-linear parent is engaged in the day-to-day care of children of that relationship, for example, are the sorts of factors I would envisage a court would be looking at to determine whether a relationship is a genuine domestic relationship. Those are, and should be, the factors that a court looks at, rather than looking at things such as the length of time. It is the genuineness of the relationship itself rather than the length of time.

There are practical reasons why it is necessary in acts such as the Property Law Act and the Administration and Probate Act. In fact, even in the Family Law Act we know that if you make a claim for property division, one of the factors that is looked at is the length of the relationship. If there is a dispute over property, the length of the relationship and whether the property qualifies as a marital property and so forth is something that is considered. But that is a very different consideration that does not apply to criminal law and ought not apply to criminal law.

The CHAIR — Regarding the Statute Law Amendment (Relationships) Act, do you have an opinion about why there was no application or assessment during that period of issues to do with the Crimes Act in terms of extending the coverage of the relationships act?

Ms RANDAZZO — I am unable to answer that at this point. I could find out.

The CHAIR — — Have you had any experience yourself during that period?

Ms RANDAZZO — Not personally, and I am not sure whether Victoria Legal Aid was involved in 2001 in the particular inquiry that led to those amendments or to that act being passed. We clearly endorse the passing of the act, but I was not involved and I am not sure that Victoria Legal Aid was either.

The CHAIR — Thank you very much for your time and thank you for your submission. We greatly appreciate you being able to join us in developing further our interim recommendations.

Witnesses withdrew.

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into discrimination in the law

Melbourne — 11 July 2005

Members

Ms L. Argondizzo	Mr P. J. Lockwood
Ms L. D'Ambrosio	Mr A. J. McIntosh
Mr A. Brideson	Mr J. Perera
Mr K. S. Jasper	Mr M. H. R. Thompson
Mr M. A. Leighton	

Chair: Ms L. D'Ambrosio
Deputy Chair: Mr M. H. R. Thompson

Staff

Executive Officer: Mr A. Homer
Research Officer: Ms N. Schlesinger

Witnesses

Mr P Myers, general manager, program development and evaluation; and
Ms S Maclellan, director, liquor licensing, Consumer Affairs Victoria.

The CHAIR — I welcome Ms Sue Maclellan and Mr Paul Myers from Consumer Affairs Victoria. Thank you both very much for attending our public hearings. Anything you say before the committee is protected by parliamentary privilege. However, once you leave the hearing anything you say outside this room is not so protected. During the course of the inquiry you will be provided with a draft copy of the Hansard transcript which you can peruse for any errors that may have arisen during the recording. It is not provided for deducting or adding any evidence.

You will have received a letter inviting you to make a submission, which included some dot points which we would like you to canvass in your submission. We will ask you to speak to your submission and there may then be some questions from the committee members.

Ms MACLELLAN — Thank you for the opportunity to address the committee. The liquor law in Victoria needs to be seen in context. We need to relate back to the objects of the liquor act, which are:

- (a) to contribute to minimising harm arising from the misuse and abuse of alcohol by —
 - (i) providing adequate controls over the supply and consumption ...; and
 - (ii) ensuring as far as practicable that the supply of liquor ... does not detract from, the amenity of the community life; and
 - (iii) restricting the supply of certain ... products; and
- (b) to facilitate the development of a diversity of licensed facilities ... ; and
- (c) to contribute to the responsible development of the ...

industry. That is quite a broad range of objects.

In dealing with issues related to minors — those under 18 in licensed premises — it is probably relevant to deal with four scenarios. They are: when minors under the age of 18 can drink; when minors can be on licensed premises which are regulated under the Liquor Act; when minors can be employed on premises regulated under the Liquor Act; other regulatory systems that affect minors consuming alcohol; and the nature of offences for both minors and those who supply liquor to minors. They are all separate contexts and they all have separate provisions, so we need to deal with them each separately.

Minors under the age of 18 can drink in private premises. They can only drink in licensed premises in certain circumstances, so those two situations need to be separated out. Minors can be on licensed premises in their own right in certain circumstances or in the company of other people in other circumstances, or in circumstances where the director of liquor licensing has permitted them to be there. So there is quite a diversity of opportunity there.

Minors can be employed on licensed premises with the permission of the director in certain circumstances. Minors may also be affected in relation to consuming alcohol in public places by the provisions of the Local Government Act, under local laws which may restrict the provision of alcohol in public places. There is a broad range of offences for minors consuming alcohol and a broad range of offences for those who supply alcohol to minors. I have brought copies of a pamphlet that sets out the broad provisions of the act, rather than detailing them here, for each member of the committee; that may assist in going through that.

It is also important in addressing the two questions that the committee put to me to look at liquor law in context around Australia, so I have sought to provide some information on where Victoria's system sits in relation to those in other states, and probably that will reflect the laws that are there.

In 2004 the government reviewed the situation in relation to minors being on licensed premises. At the time the law reflected longstanding law that minors could only be on licensed premises in the company of a parent, spouse or guardian. 'Parent' was narrowly defined to be a parent, 'spouse' a lawful spouse, and 'guardian' a legal guardian. They were three very limited circumstances. They failed to reflect family circumstances that currently exist in the community in that they did not reflect step-parents and other family relations such as grandparents, uncles and aunts. That was reviewed and the concept of 'responsible adult' was introduced into the legislation, in addition to step-parents and grandparents being specifically recognised by the legislation. A 'responsible adult' is defined as a person who is acting in place of a parent and who can reasonably be expected to exercise responsible supervision of the younger person. The term 'responsible person' is recognised in all states and territories except Tasmania, so Victoria was the second-last state to introduce that family circumstance into liquor law.

The effect of those changes is that it enables a broad range of circumstances where a minor can be on licensed premises when accompanied by a responsible adult; at the same time, there is an increase in penalties for minors, licensees and other persons for supplying liquor to minors in those circumstances. So whilst the opportunity for a minor to be on licensed premises broadened, equally the penalties for serving liquor to them increased significantly. There were also significant increases in penalties for those under 18 who fraudulently sought to obtain and use proof-of-age cards to be on licensed premises. So the penalties concurrently increased.

The committee asked whether changes should be made to the circumstances where a minor can consume liquor on licensed premises by broadening the definition of 'spouse' to include de facto relationships and same-sex relationships. I think it is important to put in context that minors can only drink alcohol on licensed premises when they are consuming a meal. They cannot consume alcohol at any other places. For example, they cannot have a drink with their parent at the bar; they can only drink with a meal. Once they have finished that meal, they cannot continue to drink.

As to minors drinking on licensed premises, again that needs to be considered in the context of what occurs in other states and territories. It is an offence for a minor to consume alcohol, regardless of the company they are in, in New South Wales, Tasmania, Queensland, Western Australia and the Australian Capital Territory. The Northern Territory has a law similar to Victoria's, and in South Australia a minor can only consume alcohol in the company of a parent, but not a spouse. Victoria has the most liberal of the laws in terms of drinking in licensed premises of most states and territories.

However, licensees can exercise discretion as to whether they permit the minor to be on licensed premises and equally whether they permit the parents to provide the alcohol for consumption by the minor with the meal. So they can equally refuse both the minor being there or the minor consuming alcohol with the meal.

The second question the committee asked was in relation to the practical implications of extending the definition of 'spouse'. I have to say that since the 2004 amendments came into force in December 2004 there is still continued resistance by some licensees to the concept of 'responsible adult' and working through that concept. Considerable work is going on through licensees forums and accords with licensees to work through what is 'a responsible adult' — whether it is a 19-year-old with a 16-year-old, or somebody who is actually responsible and standing in the shoes of the parents — what that means and what is reasonable to expect. So working through that concept and getting some firm and practical guidelines around that will take some considerable time.

I must say there are other licensees who have no problem dealing with the concept and certainly in other states there is no issue with that. If the definition of 'spouse' was extended to de facto relationships and same-sex relationships, I could foresee that it could create a potential problem for a licensee in determining whether they are serving the alcohol with the meal, the status of who is with the minor and the questions they would need to ask of the person accompanying the minor to determine whether they were a de facto spouse or whether they were a same-sex partner.

In the context of law it probably would be a preference to delete the reference to 'spouse' in relation to drinking and leave it in the context of a parent — to delete all references to 'spouse' and leave it with 'parent' and 'legal guardian' rather than to broaden the law to include same-sex partners or de facto partners in the definition of 'spouse'. This would be consistent with the government's policy of tightening up the requirements for under-age drinking in Victoria to deal with various issues that exist.

Nevertheless if the definition was broadened there would equally need to be a broadening of penalties to go with those that did not abide by the clear definitions of 'same-sex partners' or 'de facto partners', so a review of penalties would also be needed at the time. I think it is important to put in context the fact that the onus is on the licensee to determine who is there rather than the minor to prove, so it does create some tensions within the licensed environment to determine exactly the relationships.

Mr LEIGHTON — What would be the implications of deleting the reference to 'marriage spouses'? At the moment it seems to me that we have two conflicting goals. The way the law stands it does discriminate against same-sex relationships, and if that is an important principle in other areas like superannuation, or whatever, I cannot philosophically work out why we should not be concerned about it here; but at the same time we have the goal of not extending under-age drinking. How many minors would attend licensed premises with their married spouses? Surely there would not be many?

Ms MACLELLAN — I would envisage that there are not many. It has not been raised as an issue to be dealt with by licensees.

Mr McINTOSH — There is a potential for abuse where you have a couple arrive there, where one is an adult and the other is not, and one says, ‘I am living in a relationship with this bloke and I am entitled to be here’.

Ms MACLELLAN — And for the licensee to be satisfied that they were the circumstances, it could be quite intrusive into two people’s relationship to determine that — and it is not easily determined.

Mr McINTOSH — The way of making it non-discriminatory is to remove married couples as well as —

Ms MACLELLAN — Yes.

Ms ARGONDIZZO — What sort of evidence does one need to provide to prove that they are married?

Ms MACLELLAN — I would be interested to know what one was providing to prove that they were married, but presumably a marriage certificate.

Ms ARGONDIZZO — They would have to take their marriage certificate down to the pub when they go for a meal.

The CHAIR — You mentioned the introduction of the concept of responsible adult, which I would imagine would — correct me if I am wrong — obviate the need to look into the issue of, say, a de facto relationship. Does ‘responsible adult’, providing that there are not two minors, kick in and cover that; is that correct?

Ms MACLELLAN — Yes.

Ms ARGONDIZZO — Is a brother a responsible adult? If an older brother went drinking with — —

Ms MACLELLAN — Unless that brother can prove that he is standing in the shoes of the parent, no. So a 19-year-old brother with a 16-year-old sibling would not — —

Ms ARGONDIZZO — How would he do that?

Ms MACLELLAN — He would need to supervise during the whole time the person is in the licensed premises.

Mr LEIGHTON — Can he be a responsible adult just on that occasion, or does it have to be a situation where he more generally performs the role of a parent?

Ms MACLELLAN — He more generally would have to perform the role of a parent.

Mr LEIGHTON — Not just on that occasion?

Ms MACLELLAN — And not attend and say on that day, ‘I am the responsible person’.

Mr McINTOSH — Circumstances where it would come about would be a de facto relationship or same-sex couple where one of the adults was in the relationship and the child was regularly in the custody of that couple. The non-parent could say, ‘I am the responsible parent’, or adult, ‘in the circumstances’.

Ms MACLELLAN — In the circumstance of a person being there but not consuming a meal, a responsible adult would cover a same-sex relationship or a de facto relationship if that de facto had responsibility for the child of the relationship.

Mr McINTOSH — Or indeed a married couple.

Ms MACLELLAN — Yes, but that is only attending the licensed premises. Where the definition was not amended in 2004 was in relation to drinking — the minor drinking on the premises.

Mr McINTOSH — But you are saying that there was also a discretion in the licensee to say, ‘I don’t care; unfortunately we don’t allow’ — —

Ms MACLELLAN — ‘We don’t allow minors on these premises’, or, ‘We will not allow minors in these circumstances’. An example would be that many licensees, after 11 o’clock at night, may not permit minors in any circumstances in certain venues, such as nightclubs. Even though they may be entitled to be there lawfully with a responsible adult, that licensee will make a judgment to not allow them in.

Mr McINTOSH — If the penalties were increased, the reaction from most licensees would be, ‘We are just not prepared to debate the issue and will not allow any minors on the premises’.

Ms MACLELLAN — I would envisage that they would be concerned about the increased penalties and their liability if they, for whatever reason, did not do the right thing.

Mr LEIGHTON — Am I correct in saying that there would not be many married minors in the state of Victoria, full stop?

Ms MACLELLAN — I am unaware of where to obtain the statistics that would determine how many minors between the ages of 16 and 18 are married, if there are any. I would envisage it is not many.

The CHAIR — Would the liability for paying a penalty be attached to the responsible adult, who is not deemed to be a responsible adult in that case, or would it just be the licensee?

Ms MACLELLAN — It is the licensee, not the sole adult, yes. It is the licensee’s obligation to determine. There is a reasonableness test in there that they did try to determine — which is a defence — and so they made the appropriate checks of the circumstances.

The CHAIR — When the law was reviewed in 2004, leading up to that amendment, was the issue of the definition of ‘spouse’ looked at from your side of things?

Ms MACLELLAN — I was not involved in dealing with that issue. Perhaps Paul could answer that question better than I.

Mr MYERS — It was given some consideration and put aside on that occasion because the complex issues that attach to that could not be resolved within that process.

The CHAIR — Although there is, I suppose, a simpler approach of actually removing that reference altogether and simply having a responsible adult fill in for that?

Mr MYERS — Yes; that option was not identified at the time.

The CHAIR — It was still put aside?

Mr MYERS — Yes. It was not ruled out, but in the context of the review the issues attached to broadening it out to same-sex couples appeared substantial and would have required a fairly extensive degree of consultation with the community.

The CHAIR — So it arose out of what was the original intent of the review, which was really to, I suppose, recognise more broadly the categories beyond parents in a more modern sense?

Ms MACLELLAN — Yes.

The CHAIR — I do not know if there is anything more you wish to add; you are welcome to. If not, thank you very much for your assistance and your submission.

Witnesses withdrew.

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into discrimination in the law

Melbourne — 11 July 2005

Members

Ms L. Argondizzo
Ms L. D'Ambrosio
Mr A. Brideson
Mr K. S. Jasper
Mr M. A. Leighton

Mr P. J. Lockwood
Mr A. J. McIntosh
Mr J. Perera
Mr M. H. R. Thompson

Chair: Ms L. D'Ambrosio
Deputy Chair: Mr M. H. R. Thompson

Staff

Executive Officer: Mr A. Homer
Research Officer: Ms N. Schlesinger

Witness

Mr P. Grano, legal officer, Office of the Public Advocate.

The CHAIR — Welcome to the public hearings, Mr Grano. Thank you for appearing. I have some preliminary things we need to go through. You will know that anything you say to the committee is protected by parliamentary privilege and that once you leave the hearing, that will cease to be the case. In due course you will receive a draft transcript to correct any errors you may pick up in the report of the proceedings. Of course evidence given or omitted cannot be subtracted or added.

You have received from us a letter indicating why we have asked you to be here. If you could focus on some key points, that would certainly assist us in reaching a conclusion for recommendations in our final report. Perhaps you could make your presentation and then there will be an opportunity for members to ask questions. You will of course be able to elaborate further after that.

Mr GRANO — Thank you for the opportunity to be here. I have an outline of what I am going to talk about. Perhaps if I hand that around, it might be easier to see where I am going.

What I thought I might do to start off with is address the submission we have made and go through it briefly. I know you have asked for a particular response in relation to whether a change should be made to alleviate discrimination by amending the Guardianship and Administration Act or the Children and Young Persons Act, so I hope we will get to that.

I thought I would start with a case study which is a little illustrative of why we believe there is in the law a gap for people who are aged 17 and are in need of protection. The case study I have is of a person aged 17. She had a borderline intellectual disability. She was a person who came under the Intellectually Disabled Persons' Services Act, as she had an IQ of just under 70. But she was near the border and she was actually functioning in the community to a quite reasonable degree. Her mother had an alcohol abuse problem and she was not looking after Z. Z was moved to a community residential unit and the people there needed to find out more about her. The mother was not answering the phone and it was also thought that she was using for her own purposes the money that Z was entitled to through her disability support pension. There had been serious health issues for Z and the people at the community residential unit found it difficult to access health information without being able to get her mother's consent. This becomes an issue of how are people going to get the information needed to look after her and protect her.

She attended a special school. The principal did not have adequate information about her general daily needs — medication, permissions to administer medication and those sorts of things. There were also things relating to going on excursions. Because she was 17 you could not make an application for a protection order under the Children and Young Persons Act. If someone is 16 you can get an order for protection that can continue through to the age of 17 up to the age of 18. It would stop on the 18th birthday; once you have turned 17 you do not fit within the definition of a child in the Children and Young Persons Act.

There could not be a application for guardianship or administration, because she is not 18. You can make an application for guardianship and administration when someone is 17 but it will not come into effect until they turn 18. She was only just 17 when this happened, so there is a year's gap. There are other provisions in the Guardianship and Administration Act which come into effect only when you are 18. In the Health Records Act there are references to an authorised representative who can release information. That would be a person's parent. In this case it is the mum and she is not willing and able to do it. So there are problems there.

In the next section I have set out the definition of 'child' in the Children and Young Persons Act. It is the definition in paragraph (b) which is the one that creates the gap. The effect for the purposes of protection applications is that you cannot make an application for a person who is between 17 and 18. Then I put in section 63 because they are the protective concerns under that act and they would have applied in this particular case.

On the next page I have given you the provisions of the Guardianship and Administration Act. Again all I am really doing is drawing your attention to the age of 18 there. That is at the top of page 3. I look at section 19, which is about guardianship, and section 43, which is about administration. There is this curious thing called the 'person responsible' provision, which provides for, dare I say it, when you and I lose capacity at some stage in our lives who is going to give consent to medical and dental treatment on our behalf.

The Guardianship and Administration Act sets up this scheme called the 'person responsible' and it is always good to find out who is the person responsible for you. In this case that would not apply because the mum was the person who had the parental role, and she was not able to exercise it.

There is another statutory scheme under the Health Records Act. One of the issues is with health records access to health information. The Health Records Act sets up a scheme that can come into play where a person does not have capacity to consent to the rights that people have under the Health Records Act; that is called the 'authorised representative'. The authorised representative for a child who has a disability is the parent. Again we have the problem. You will see on page 4 that if a protection application is able to be made for the child, 'parent' would have included 'a person who has custody or daily care and control' of the child, so it could have included someone like the department who would have had those responsibilities.

Is the issue clear where this gap is and the problem?

Mr LEIGHTON — Does it just apply with intellectual disability? What about acquired brain injury?

Mr GRANO — Yes, it would certainly apply to all people who lack capacity.

Mr LEIGHTON — What about psychiatric illness?

Mr GRANO — Yes. Psychiatric illness comes into it a little differently because the Mental Health Act will apply. Under that Act there are protected provisions where people can be removed from the community and given treatment — that is, it not only applies to people who are over the age of 18; it applies to people who are younger. Perhaps in terms of the Mental Health Act there may be some other avenues for dealing with it, but strictly, yes, this gap would occur if someone had a mental illness. Most of the situations seem to be people who have an intellectual disability or the cases that have come to us. I have given you a couple of other case studies there.

I think it is discrimination in that people who are of a particular age — that is, 17 — are not in a position to be able to access these protections. It might be postulated I suppose that being protected is perhaps something that a 17 year old would not necessarily like or appreciate. In these cases we are in a situation where the state is trying to step in to protect persons for their own benefit. To have access to those protections seems to me an important thing to be able to achieve.

I think it is also disability discrimination in that the majority of people whom this gap will affect will be people who have a cognitive disability. I guess if you have a physical disability and are about to turn 18, you are probably going to be able to make decisions for yourself. Many people who have a cognitive disability will probably be able to do that too with guidance. But there will be some people for whom that will not be possible. The way I would see it is they would be largely the people who have a disability who would be affected by this gap.

This brings me to the difficult question you have asked. Why should I suggest you amend the Children and Young Persons Act so that act is the one in which protection is able to be granted rather than reducing the age in the Guardianship and Administration Act to 17? It is a very good but difficult question. I was inclined to think the strongest argument is consistency in law. The age of majority is 18 and there is an Age of Majority Act in this state, which sets it at 18.

I did a search of all Victorian legislation and I think I came up with 100 acts and regulations that have 18 years in them as a significant date because something is either going to occur or not occur — someone will be permitted to do something or not be permitted to do something at that particular age. I got a bit enthusiastic and on pages 5 and 6 started giving you a number of them. When I got to near 50 I became exhausted by the process. You will be able to see that the first home owners grant even has provisions in relation to this and private agents are prevented from being an agent until the age of 18. So this is an important age.

When I did a search of the age 17 I came up with 14 mentions of that age. Interestingly some of them are in the process of being amended to 18. For instance the Children and Young Persons Act in relation to criminal law has been changed and there are some consequential amendments in, for instance, the parole and other acts. I was interested to see that the Domestic (Feral and Nuisance) Animals Act kept the age of 17 — if someone has a child and if a pet were in the control of someone under the age of 17, it was deemed to be in the parents' control and not that of the child. And you cannot send a miner down a shaft into an underground mine if they are under the age of 17 but you can if they are 17.

Largely my submission is that 18 is the standard age at which you become an adult in this state and there should be good reason to depart from that which should be justified. Therefore it is my submission that the Children and

Young Persons Act is the Act which deals with the rights of children and that should be the act in which this change should take place. If you change the Guardianship and Administration Act, it might also bring you into conflict with the Family Law Act. The Family Law Act has children up to the age of 18 and if you had a guardian being able to be appointed when there are residential orders in place under the Family Law Act, you might end up with conflicts between the two acts.

I did notice that in New South Wales, where you can apply for a guardian and an administrator at age 16, such a conflict had arisen in relation to a sterilisation procedure. It was outlawed under the Guardianship Act of New South Wales but would have been able to be approved by the Family Court. It was found that the Family Law Act prevailed over the Guardianship Act of New South Wales to the extent of any inconsistency.

My submission is simply that I do not think we as a state should go into situations where we are not quite sure whether our laws apply or do not apply. If we know that there are these difficulties it would be preferable to accept them and give clarity as much as we can around them. These are areas of law which have a deep, personal impact. Sometimes ambiguity is useful, but sometimes it just leads to more pain and suffering when people do not know where to go and what to do. My submission is that it is better if we can be clear and precise in this matter.

Also, we could end up with a conflict with the Children and Young Persons Act in that if a person has a protection order made before they turn 17, it can continue through until the age of 18 — it is just that you cannot make one when they have turned 17. If you could also apply to have a guardian and administrator appointed, you would have possibly a conflict between the two Acts that you would need to deal with. My submission is it is better to leave it all in the one Act.

I think there is a significant difference between the roles of protection under the Children and Young Persons Act and the Guardianship and Administration Act. The Children and Young Persons Act brings with it the Department of Human Services and a panoply of services that are there under the various Acts. The Guardianship and Administration Act brings with it a person who can make decisions, who says, 'I will decide that you will live here', but will then have to work out where on earth to get the services to do that. It does not bring with it a whole service system; it is essentially the appointment of a decision-maker. I think if we are looking protectively, it would be better at that age to go with the Children and Young Persons Act, because it would seem to me to provide better ways of protecting people who are at that tender age. That takes you through my submission.

Ms ARGONDIZZO — Are you suggesting that the age in the Children and Young Persons Act be increased to 18 and then that takes care of the whole situation?

Mr GRANO — Yes, so you can bring a protective order for someone who is 17.

The CHAIR — Do you think this gap came about through some oversight? Do you have any insight into its history?

Mr GRANO — I think it comes about because when someone turns 17, why generally would you be applying for a protection order when they are going to be 18 within a year? Perhaps people who are 17 will have similar maturity to someone who is turning 18. I know there are theories that you mature significantly during those years, and that is probably true, but nonetheless 17 and 18 is not so much of a gap. I can understand the rationale. I think the rationale becomes difficult once you have people involved who have a cognitive impairment. They may not make the gains in maturity that you would expect, and they may not be open to those gains in the longer term. Maturity is perhaps the wrong word; perhaps the word is sophistication in being able to make decisions. Some people who have an intellectual disability are very mature in the way they make their decisions. Sometimes the sophistication of the decisions is perhaps more difficult for them — the more sophisticated, the more help they may require. I think we perhaps made the law in the Children and Young Persons Act for what would be the vast majority of situations. It is only this group of people who you probably would not be thinking of generally when you are drawing up legislation.

The CHAIR — I am not sure if you would have figures of, say, the young people under the age of 17 who become part of an application, but do many of those applications continue until the age of 18 or do many of them stop at, say, the age of 17? Is there a tendency that those orders are made up until 18?

Mr GRANO — I really do not know; you probably would need to ask the Department of Human Services. I am sorry, I cannot help you.

Mr McIntOSH — The Children and Young Persons Act has been amended a couple of times but was amended principally at the end of last year to raise the jurisdiction of the Children's Court from 17 to 18 and provide the ability to deal with children under the age of 18 while those orders may continue on until they are 21, for example. Essentially there was a strong public campaign to increase the age from 17 to 18. That may well be the basis of the anomaly that exists now as this committee meets, but what I do not quite understand is why that anomaly would have existed under the old regime in any event.

Mr GRANO — I would have to go back and read the reports dealing with the way the Children and Young Persons Act was originally conceived. Some years ago I did have occasion to look at it and it is quite an interesting report. I have a feeling it has something to do with youth training centres when it deals with criminal matters, but I cannot remember — —

Mr McIntOSH — Under the old regime if you committed an offence at 17 you were dealt with by an adult court. That has now been lifted from 17, so the Children's Court has jurisdiction. You have a dual-track system that operates up until the age of 18. It can be older as it is when the offence was committed — we can go to 19 and be dealt with by the Children's Court if the offence was committed earlier.

Mr GRANO — I think that is another indication of why this should perhaps be brought into line with that, and the whole act appears as one.

Mr McIntOSH — Perhaps it should have been dealt with at that time.

Mr GRANO — I think the protective sections in child protection are being reviewed at the moment by the department. I think they are probably looking at this issue now in relation to all the matters. I think they are doing quite a significant review of the Children and Young Persons Act.

Mr McIntOSH — Indeed.

The CHAIR — Just following on from the question I asked you, if someone is 16 and an order is made with respect to them under the Children and Young Persons Act, under what circumstances would an order finish at 17 or continue to 18? Are there certain examples that you can provide?

Mr GRANO — I think the orders are made for particular periods of time. I think some are one-year orders, so they have to be reviewed.

The CHAIR — Do you think that would be the norm?

Mr GRANO — I think it is largely the norm. It depends on how long the person has been in protection. Some people would have orders that go for longer than that. I really do not know enough about the Children and Young Persons Act. I can look it up — I do have it with me — but I imagine you are speaking to the Department of Human Services about this so I expect it would be able to tell you what is usual in terms of children's orders. I regret my experience is under the Guardianship and Administration Act with adults rather than with children.

The CHAIR — Thank you very much for your submission and the time you have taken to prepare it and present it to us. We appreciate that very much.

Mr GRANO — Thank you for the opportunity.

Witness withdrew.

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into discrimination in the law

Melbourne — 11 July 2005

Members

Ms L. Argondizzo	Mr P. J. Lockwood
Ms L. D'Ambrosio	Mr A. J. McIntosh
Mr A. Brideson	Mr J. Perera
Mr K. S. Jasper	Mr M. H. R. Thompson
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Chair: Ms L. D'Ambrosio
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Executive Officer: Mr A. Homer
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Witnesses

Mr J. Morkham, executive officer, ACROD Victoria; and
Ms J. Deurwaarder, general manager, north-west, Melbourne Citymission.

The CHAIR — Welcome, John Morkham and Jennifer Deurwaarder. Thank you very much for agreeing to be with us here today at our public hearings.

Mr MORKHAM — I am the executive officer of ACROD Victoria. ACROD nationally is the National Industry Association for Disability Services.

Ms DEURWAARDER — I am the general manager north-west for Melbourne Citymission.

The CHAIR — I have some preliminary comments to make about the nature of our public hearings. Anything that is said here is protected by parliamentary privilege. However, once you leave the public hearings, that ceases to be the case. You will receive a draft copy of the proceedings, prepared by Hansard, to check for any errors in reporting. It is of course not there to add or remove any evidence that is given today.

You will have received a letter from us inviting you here with some dot points on some specific areas that we would like to hear about from you today. You have got an opportunity now to present a submission and after that members may choose to ask some questions to elaborate on any points. Of course you are very welcome to add any other information that you think is appropriate.

Mr MORKHAM — I thought I would open by making a brief statement about ACROD's position in relation to this — that position was drawn from wide consultation with our members three years ago in the review of the disability services legislation in Victoria — and then try to highlight where Jen and I think that the tension between disability services legislation and the Residential Tenancies Act may illustrate the point. Then I think Jen will give you a couple of examples.

ACROD's position — and Melbourne Citymission is a member of ACROD and is not at odds with this position — is it presumes that for the time being there will be an ongoing need for supported accommodation within disability services which is offered in community residential units (CRUs). The basis of the legislative framework for the protection of residential rights of people with disabilities in shared accommodation should be in disability legislation. At a policy level there should be a model shared occupancy agreement that can be adapted for those matters that are particular to each service outlet and to its environment. Complaints that arise under the agreement should be resolved at a local level and using mechanisms that are put in place by the service provider in accordance with disability standards. Such a mechanism should involve conciliation. That is the statement of our position.

We think the tension might be best illustrated in that the current policy of the Department of Human Services is to move people out of CRUs where it is perceived that those people are over serviced — that is, over provided with a support service — and to move them into less-supported accommodation models which probably include areas in which the tenancy legislation has its effect, and to move in replacement people who are normally of much higher support needs than those who have moved out. In those two circumstances we think that the moving into less-supported accommodation and the replacement with people with higher needs could be an area that perhaps illustrates the point that we would like to make, and Jen has got a couple of experiences well beyond my experience, which is now over five years old in this area.

The CHAIR — It would be terrific to try to perhaps use some examples for us to exemplify those differences or conflicts.

Ms DEURWAARDER — We currently operate one CRU where we have four people currently living there and one current vacancy. The vacancy is a result of someone moving out to supported independent living. We have worked extensively with that person and identified that their dreams and aspirations were living in an alternative accommodation source. We hoped that they could be effectively supported within a different environment, which will necessarily mean that they will be subject to a tenancy agreement. We do not have formal tenancy agreements in our community residential services at the moment. We have a number of other avenues in place that we hope actually reflect people's rights.

Of the four people who reside in our current service, one has a dual disability which requires she not have access to knives or broken crockery et cetera. One has diabetes to such a point that he requires constant medication and support, and in times when his sugar levels are high he can present with extremely challenging behaviours. Another person in there is blind and another person has had a whole lot of issues around anger management and behaviours. So at any given time in that house, depending on how one person is feeling on the day or if anything has contributed to the way they are feeling, we can have a number of tensions happening.

If the Residential Tenancies Act was in place, then there would be extreme difficulties for us in terms of managing the quiet quality-assurance type issues. A resident could then complain about one or the other destroying their —
—

The CHAIR — Do you mean a neighbouring resident?

Ms DEURWAARDER — One of the housemates should then have the opportunity of complaining that another housemate who is experiencing significant behavioural difficulties is destroying their peace of life at the current time. We recognise that happens within that environment, and in terms of our duty of care and our ability to support individuals, we then put strategies in place. Those strategies work some of the time but are indeed a constant source of negotiation with the individual and the other housemates in the house, any of whom could be subject to that. That is one area.

We support people who are in rooming houses and other types of accommodation. We find that in supporting those people they do not have the same security of ongoing housing as the people who are currently within our community residential unit structure. The Residential Tenancies Act will allow for a lease of up to five years. It is assumed within community residential units that people will have that ongoing care. If indeed they deem, and the key significant people around them deem, that they should move, you should be able to show that they can move on with the appropriate supports in place. Ideally there would be lots and lots of choice around that, but we all know that is not the case for the majority of people.

I am giving you examples of people who have high, complex needs because that is the nature of the business that Melbourne Citymission is involved in in our community residential units. I fully recognise and support people's access to their appropriate rights, and I fully recognise that there are other people who do not have the same degree of difficulty in their daily lives due to their disabilities and who may indeed be able to manage a tenancy agreement. Areas of capacity also come to the fore. It is assumed that people have the cognitive ability to make decisions regarding their leases. If it is assumed that their families, significant others, advocates or guardians should make those decision, it should also be assumed that everybody has access to those types of supports. Many of the people we work with do not have family members in their lives. Many of the people we work with do not have advocates even though we try very hard to get independent advocates for them, but the resources are just not there. In order for them to have a guardian there are significant issues. Many of them do not have access to that sort of support to assist them in making decisions.

Community residential units are both people's homes and workplaces for us as well. We work in one house, for example, where there are a couple of young men who are subject to criminal justice issues. They have both drug and alcohol issues that they are dealing with. They will come to and go from the home environment, and there are times, due to their health and safety, the health and safety of other residents and occupational health and safety concerns for my staff, when my staff need to go into their rooms and search their bags to see whether there are any weapons, drugs or alcohol. We have an agreement with these people that while living in our environment they will work towards not using substances and that they will not bring those types of influences into the house. But on occasion that has happened and we have needed to work through that. Once again, our duty of care is such that we must have the ability to have an agreement with someone to go into their room, even if it is just in terms of turning somebody who requires turning at night-time but may have decided that they do not want us to do it at that time. It involves supporting rights with the opportunity of providing the supports that we are funded to deliver.

The CHAIR — You talked about agreements that you have. Can you describe for us what they look like. Are there standards that you look towards implementing? Are those agreements individualised, or are there standards which apply to all and then from there you build on individual needs, responsibilities or rights?

Ms DEURWAARDER — In terms of Melbourne Citymission, we have a client rights charter which is standard across our services. We are obligated within our funding to meet the disability quality standards which include the principles of disability services and what the client rights are, and we are obligated to monitor and evaluate them on a yearly basis. In terms of the individual, we do an individual program plan for each client, which will include any restrictions that we will place in any agreement. In terms of the actual agreement for the house, that is done individually with the client, and if that client is unable or does not have the capacity to do that, then it is done with a family member, advocate or guardian. In saying that, we recognise that if there are any breaches, it is up to us to negotiate generally with the client and not to go through any legal process, such as through VCAT

et cetera. Those plans are reviewed. There is a client grievance process in place within our organisation and also within the department, which is monitored through our agency liaison offices.

The CHAIR — I just want to delve a little bit more into that. Are you required as part of your service agreement to keep a record of grievances that arise, and are they reported to the department? How does this operate?

Mr MORKHAM — Not necessarily. It is not only because of the funding and service agreement; most organisations are now working towards quality assurance programs and are taking client or customer-first approaches in whatever area. The ISO and the commonwealth disability service standards work towards a grievance model which requires the organisation to go through a process which is audited annually at least. I am not sure whether mandatory reporting to the department is in existence in Victoria at the moment.

Ms DEURWAARDER — My understanding is that it is not mandatory; it is something that we do as a matter of course in our meetings with our agency liaison officer. Having a client grievance process fits the mission of Melbourne Citymission in terms of upholding people's rights, so we are more than willing to be accountable in that area. When the department becomes involved with a grievance it works its way up through the regional channels, such as in relation to somebody wanting to move from a CRU or someone wishing to remain.

Mr MORKHAM — In a prior manifestation I was the chief executive of an organisation, E. W. Tipping Foundation, which provides accommodation support for people with disabilities. That shared occupancy agreement was devised between the commonwealth and me back in the days before the commonwealth-state disability agreement. It covered each of the eight quality-of-life areas, and shelter is included as one of the elements. So from my point of view from a policy side each of the quality-of-life areas would be included in any shared agreement.

Ms DEURWAARDER — The new way of doing business at the moment is that everybody is entitled to an individualised plan that looks at what sorts of supports they require holistically, and anyone who moves into a community residential unit can now expect that if the policy and procedures are adhered to, there will be a full transition plan with all of the expectations for that person already developed in conjunction with their case manager, advocate or whatever, and then negotiated through with the service provider. From our point of view, from the time somebody commences the transition into our service they get information and support to understand the information about what is the type of service and what are the expectations in terms of their working with their housemates and what we consider is appropriate within the house. Given the issues of compatibility that exist right throughout most community residential units, that is just so important.

Mr LEIGHTON — Presumably a client could still go to court and argue about their treatment under one of the agreements?

Mr MORKHAM — Disability standards are not enforced in courts of law.

Mr LEIGHTON — Are the agreements you have been talking about formal documents entered into with the clients?

Mr MORKHAM — They are formal, but they are formal between the two parties. To argue the case in a court would probably be impractical. In my experience it has never got to the stage where it has ended in a court.

Mr LEIGHTON — Where your agency has obviously received public funding I would imagine that where a party in that agreement was unhappy about the outcome you could persuade a court to intervene?

Ms DEUWAARDER — And under the IDPS act if a client is unhappy with their individual program plan or general service plan, it can go to the review panel.

Mr MORKHAM — But only in that circumstance. The practical solution for people with a disability in supported accommodation circumstances is to look within for a solution and negotiate it because it is in nobody's interests to start picking off one person relative to the others that are being provided with support at the same time. It is fraught if you try and individualise a case. In my opinion the real solution is to negotiate an outcome.

The CHAIR — Could you just describe the array of reviewable mechanisms, if you like, that decisions at the local level can go through?

Mr MORKHAM — I am aware that it would vary from organisation to organisation and there are lots of strategies that are put in place to enable a separation of the inevitable conflicts of interests. One of the things that Jennifer was describing was the fact that her management covers a wide variety of service outlets for children, adults and people who are aged and have no disability and all the rest of it. It ends up as a constant source of a conflict of interest for organisations that are trying to advocate for people with a disability on the one hand and advocate for their own organisation and staff on the other. In my experience many organisations tend to try and source out that negotiation element to volunteers outside their organisation to sit in judgment, if you like, and perform that role of advocating either for a client or for themselves. If these organisations have to advocate for themselves, they then draw in people from the Office of the Public Advocate or others to try and advocate for clients. It is a constant source of difficulty for organisations.

The CHAIR — But ultimately the Office of the Public Advocate can potentially have some role?

Mr MORKHAM — Yes.

The CHAIR — Can you go through the sequence?

Ms DEUWAARDER — Citizen advocacy can have some role. Community visitors can have some role. If we have somebody in our residential service who is having some difficulty, we will try and get an independent case manager, whether that be from the department or another area; not a case manager from our own service. They are the areas we would have gone through. Once it goes to the department's case manager they tend to involve other areas of the department as well. If the client was experiencing some difficulty we would involve our agency liaison person from the department as well because we are trying to get that independent advocacy role in place. It then becomes the role of the case manager to look at what is happening or for the community visitor to come in and investigate and see whether the person's needs are being appropriately met. The advocate will do that as well. The disability justice unit is there as well. Villamanta can be contacted around legal issues. There are a number of different avenues we can go through. We also encourage our clients who are capable to take part in consumer participation groups where those sorts of skills are being taught, developed and supported. For those who are not capable of doing that we need to call on the advocate or a family member.

The CHAIR — With respect to the nature of grievances, do they tend to come more from a resident complaining about their own rights being breached or do they relate to the fact that another resident may present a challenge to the quality of their environment?

Ms DEUWAARDER — Luckily we do not have many grievances and we have appropriate strategies in place to give everybody their space. One of the areas where we have experienced grievances is where we have a vacancy and a person is transitioned into that vacancy who is incompatible with the other people. It is the same for all of us: if we move home and we are sharing a house and a new element is introduced to that house, that causes enormous distress if it is not managed appropriately. Unfortunately at the moment because the people who have good skills are moving out, which is fantastic, obviously the people who are moving in generally tend to have quite high needs, and this does cause some problems. Yes, there are grievances around people saying, 'I do not want to live with Joe Blow'. We then have to work our way through that.

The CHAIR — Do you think there is room for improvement in the current situation with respect of the way the rights and responsibilities of tenants are developed?

Ms DEUWAARDER — There is always room for improvement.

Mr MORKHAM — I will ask the question if I may — in practice or in policy?

The CHAIR — In policy.

Mr MORKHAM — I think there is always loads of room for improvement in practice. I am not sure because I think more cover is provided by the disability service standards than is provided by the Residential Tenancies Act.

The CHAIR — As a positive, you are saying?

Mr MORKHAM — Yes.

The CHAIR — And you think that can be improved in terms of the standards?

Mr MORKHAM — Absolutely. If the Department of Human Services was to get out of being a service provider and become a forceful enforcer of disability standards, that would have a massive impact on standards. It would then cease to have its own conflicts of interests and have a clear focus on enforcing the disability standards, one of which is around privacy and quiet enjoyment for people.

Ms DEUWAARDER — I also think if those standards were independently accredited within organisations, that would make a real difference as well.

Mr MORKHAM — In the way the commonwealth currently does through the employment of people with a disability.

Ms DEUWAARDER — At the moment there is a self assessment system in place or you can opt to look at some accredited quality assurance, but that is not mandatory.

Mr MORKHAM — In Victoria.

Ms DEUWAARDER — What I fill in on my self-assessment form is what I believe to be happening. We have put other things in place such as consumer assessments where consultants go out and do an independent assessment with the consumer or their family or advocate; but there is no proviso that we must do that.

The CHAIR — Mr Morkham, you said ‘in Victoria’. I take it from that you mean there are states where they have a different system?

Mr MORKHAM — Mandatory systems.

The CHAIR — Which states are they?

Mr MORKHAM — Queensland. Western Australia is just about to adopt and the commonwealth has across the nation.

The CHAIR — Are they backed by enforceability measures.

Mr MORKHAM — Yes, they are. The commonwealth is the most rigid. If you fail to meet the disability standards with a major non-compliance, funding ceases instantaneously.

The CHAIR — In your opinion do those standards pay adequate attention to the rights of tenants vis-a-vis each other and vis-a-vis the service provider and the individual tenant?

Mr MORKHAM — The service provider is the last in the chain, the client is the first in the chain, and, as I say, the commonwealth has no compulsion in withdrawing funding if you have failed to comply. It is not a line that the Victorian department has had for years. It has been far more accommodating in its approach. We are currently reviewing the disability standards in Victoria. ACROD strongly advocates for a very strong position to be taken by government, but equally at the moment government has a conflict of interest because it is also a service provider, and it is on the horns of a bit of a dilemma.

Mr McINTOSH — What would be the consequence in a practical sense of the exemption being removed? What would happen?

Mr MORKHAM — I think you would end up with fights and arguments over the difference between what is a tenant right and what is a support right. In other words, people are in community residential units not by their own choice; they are there because the system has designed a support arrangement around them and said, ‘The only place you are going to receive that support is if you take up that vacancy’. A person does not have to take up the vacancy — they can choose not to — but once you are in a CRU you are there because you effectively have to be there, and you just end up with conflicts between the two systems, I think.

Mr McINTOSH — What would be the immediate consequence? You mentioned before that because of occupational health and safety reasons your employees would perhaps remove drugs or weapons if they found them in someone’s bag. Will that be prevented by the removal of this exemption?

Mr MORKHAM — That is a staff one, but I would have thought the greatest preponderance of conflict would be between residents and how you would enforce that, how you would judge that, because of the intrusions of people into each other's lives.

Mr McIntOSH — How does the Residential Tenancies Act relate to conflict between tenants in a tenancy?

Mr MORKHAM — I would have thought because the landlord was failing to provide client enjoyment, and then of course you have the problem that the landlord is not necessarily the person who is providing the support or the service, or if they are the landlord as well as the provider of support, then they have another conflict.

Mr McIntOSH — You mentioned Queensland, I think Western Australia and the commonwealth in relation to their code. Are there any other states? I mean residential tenancies differ profoundly, but there are different acts around.?

Mr MORKHAM — I do not know, I am afraid.

Mr McIntOSH — Do you not know how other states operate in relation to this?

Mr MORKHAM — I do not know. I know only of the other two states in relation to disability services legislation.

The CHAIR — Just following on from that, if the exemption was removed, other than comparing the impact on rights and what possible situations may arise from that in terms of conflicts, how would you respond to how that may impact on responsibilities that would automatically flow on from the application of the Residential Tenancies Act to the tenants at community residential units, because you have got both rights and responsibilities?

Ms DEURWAARDER — Do you mean the responsibilities around not putting up fees without informing people?

The CHAIR — No, I am talking about the actual residents' responsibilities as tenants. Could you make some comments on that and how onerous that would be?

Mr MORKHAM — Do you mean, for example, for people who are cognitively — —

The CHAIR — For example, tenants in public housing. Theoretically if there are enough complaints from private residents around them about noise or the public tenant's behaviour in the street, for example, there is the punitive capacity to remove them ultimately from that tenancy. I suppose what I am asking is that along with the rights that come with residential tenancies, how do you envisage tenants in that situation being able to cope with that same level of responsibilities; are there differences in how they could deal with those as compared with other tenants?

Ms DEURWAARDER — We work now with people with a disability who are evicted from Office of Housing properties because of behaviours that they cannot control. If that were the case in the picture I gave you of the first CRU I was talking about, if one housemate was bringing to the attention the behaviours, the noise levels, the property damage et cetera, the person would be evicted and they would have nowhere else to go. They do not choose to live there. It is a place of last resort, because they can no longer live with their family, they cannot be maintained within the community and have adequate support so that they are not at risk or other people are not at risk. So they do not have the choices that you and I have in terms of going to different rental opportunities. If you breach an Office of Housing lease and you breach a number of times and you do not pay your rent — because you do not actually know how to budget appropriately or you do not have appropriate support — at the end of the day you do not get another place and there are no options.

In terms of expecting that someone will manage their behaviour because it says on a lease that they will not do property damage et cetera, that is something that is managed through the support staff who are there on most occasions. Sometimes through anger management and really rigid behavioural management programs, yes, we have some wins there, but you cannot guarantee that all of the time. People are generally in CRUs because they require that level of support.

Mr MORKHAM — And organisations are constantly advocating with their neighbours and other locals to be participatory, to be inclusive and to work a way around if a household is perceived to be upsetting the local neighbourhood. It is just another facet of providing an accommodation support service. In fact I question myself as to whether or not it is better for the service provider to be the landlord as well as the service provider because they can take responsibility for what the building looks like, what the building does and how to work with the local neighbours as a landlord, not only as a service provider. It is one of those other imponderables.

The CHAIR — Do you know whether the exemption operates to exclude types of accommodation other than CRUs?

Mr MORKHAM — We looked at the guidelines and unfortunately — or fortunately, whichever you prefer — the guidelines were written in 1999 and are somewhat dated. Therefore that gives us more opportunity for flexibility in their interpretation, both for the good and the bad, I suppose.

Ms DEURWAARDER — It is — what do you call a CRU? Is it 16 hours of support and sleep over? Is it active night? In some of our houses it might only be 10 hours of support, dependent on the individual's needs. How do I differentiate that from where we are going into a house that someone owns, where two people with a disability are living and we are providing them? We are funded to provide support for their health and wellbeing and to promote inclusion as much as we possibly can within the community. We do that regardless of whether it is in a community residential unit, a private home or a rental property. We just have degrees of difficulty.

Mr MORKHAM — In fact I suppose the legislators are the ones that create these definitional differences. From the service provider's point of view, it really makes no difference where you are working; it does not change the nature of the support that you are giving.

Ms DEURWAARDER — It definitely does not make any difference to the individual getting the support, so long as they have got that individualised support.

Mr LEIGHTON — I think you cover people with intellectual disabilities in CRUs?

Mr MORKHAM — Not in practical terms. The guidelines were written for people with an intellectual disability because that was the governing piece of legislation from the department's point of view. But since then the true effects of the commonwealth-state disability agreement have come into effect, and it now applies to any person with a disability who has reached such a criteria on the SNR — the service needs register — and is given a place in a community residential unit by definition.

Ms DEURWAARDER — Overwhelmingly, however, because it has been under the IDPS act, the majority of people have an intellectual disability, not an acquired brain injury or something. With acquired brain injury and neurological disorders it is now very, very difficult to get that level of support for those people — so apart from physical and sensory, the old established services.

Mr MORKHAM — And frequently psychiatric disabilities get a blend in as well.

Ms DEURWAARDER — If there is a dual diagnosis; overwhelmingly the services I am talking about are services for people with an intellectual disability, some of them with a dual disability.

Mr LEIGHTON — If we stop putting people with acquired brain injury into nursing homes for the elderly, then that consideration would have some implications for them as well?

Mr MORKHAM — Immediate implications.

Ms DEURWAARDER — Yes, and all those young people might have somewhere appropriate to live and reside.

The CHAIR — Thank you very much for your time and your input; it is greatly appreciated. It has been very helpful in formulating our recommendation for the final report.

Committee adjourned.