STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

EQUALITY RIGHTS STATUTE AMENDMENT ACT

WEDNESDAY, FEBRUARY 19, 1986

Morning Sitting

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

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Sargent, E. C. (Grey-Bruce L)
Villeneuve, N. (Stormont, Dundas and Glengarry PC)
Warner, D. W. (Scarborough-Ellesmere NDP)

Substitution:
Mancini, R. (Essex South L) for Mr. D. R. Cooke

Also taking part:
South, L. (Frontenac-Addington L)

Clerk: Mellor, L.

Witnesses:

From the Down Syndrome Association of Metropolitan Toronto:
Bailey, L.
Langdon, L.

From the Women's Legal Education and Action Fund:
Brodsky, G., Litigation Director
Day, S., President

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, February 19, 1986

The committee met at 10:19 a.m. in committee room 1.

EQUALITY RIGHTS STATUTE LAW AMENDMENT ACT
(continued)

Resuming consideration of Bill 7, An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms.

Mr. Chairman: Good morning, members of the committee. I should like to welcome Louise Bailey to our hearings this morning. Mrs. Bailey is representing the Down Syndrome Association of Metropolitan Toronto. I believe she has some visitors who are with us as well today.

We should like to welcome you to our committee. I apologize for the late start, and we shall get under way right away. You can proceed if you would like.

DOWN SYNDROME ASSOCIATION OF METROPOLITAN TORONTO

Mrs. Bailey: Thank you very much.

I just want to draw your attention to the written brief. While I am going to talk about education today primarily, at the back of the brief you will see a whole page of concerns the Down Syndrome Association has about a lot of other legislative acts that affect our children. I am just pointing out that we feel equally concerned about those, but education is our prime concern at this point.

10:20 a.m.

I also want to draw your attention to the group of children--and parents and grandparents--we have here, because these are the little people whose lives are being directly affected by the Education Act and the--

J-1020 follows

(Mrs. Bailey)

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~~I also want to draw your attention to the group of~~ ~~children and parents and grandparents we have here, because~~ ~~these are the little people whose lives are being directly~~ ~~affected by the Education Act and the~~ acts you will see in the back of the brief. We wanted you to see them as real people, not just focusing on the stereotypes we had before we had kids with Down's syndrome. Thus, I hope you will tolerate the occasional noise, and we will move them out when they get rambunctious.

Mr. Chairman: I hope you too will tolerate the odd noise from us. It works both ways.

Interjections.

Mrs. Bailey: Is that right? Okay. That happens sometimes.

Mr. Warner: The noise is not a problem.

Mrs. Bailey: All right. I also want you to take a look at the fact that the kids here are very young. The youngest here is two years old. We did have a 13-month-old who was going to come, but probably the mother was too overwhelmed. The reason I am pointing that out is that parents of childen with Down's syndrome are clued in very quickly after birth that they must begin to advocate within the system for their children in terms of getting access to integrated educational opportunities, recreational opportunities, job opportunities, because if we do not do it now, they are going to be lost by the time they are 10 or 20 years old.

Now I shall get to this brief. The Down Syndrome Association Of Metropolitan Toronto and the ??York Region Down Syndrome Association represents approximately 300 families, and we assume responsiblity to speak to the interests of all persons with Down's syndrome, including the many childrean and young adults who are wards of the province and usually living in foster homes, group homes, small and large institutions.

Our organization was founded in 1985 by a concerned group of parents who were already spending a lot of time working on behalf of their children in conjunction with other groups, but who felt it was imperative to focus on the needs of persons with Down's syndrome, because they are a highly visible and easily identifiable group of people within our society who need extra supports in the community.

Therefore, it is in no way by whim or accident that the Down's syndrome associations are very interested in the benefits and protections available now to our people under the Charter of Rights and Freedoms. People with Down's syndrome have been singled out as a distinct target of active discrinimation in the areas of medical care, access to recreational activities, protection from abuse, and education.

Persons with Down's syndrome have a genetic disorder resulting from an additional 21st chromosome. There are many characteristics of Down's syndrome, all of which are found in the general population. However, children with Down's syndrome have a cluster of these characteristics, but people with Down's syndrome are highly individualized, and no one has all 50 characteristics.

Persons with Down's syndrome have been overly and negatively stereotyped, and this generally accounts for their low regard within our society and the extent to which medical research has devoted itself to prenatal diagnosis and abortion.

In the past, persons with Down's syndrome were institutionalized on medical advice and left to develop as they might within a system which was at best neglectful and uncaring and at worst actively abusive. Children, who therefore were essentially untreated and uncared for, and therefore remained at very ppor levels of functioning and suffered from poor health and early death, wre then held up to the public as the model of the disease, Down's syndrome. Children with Down's syndrome do have some common physical features which persuade people that they all look alike. However, if you take a look, you will see that they all look more like their family members than they do like each other.

They generally need help with fine and gross motor movement, but it is rare for a child with Down's syndrome to be physically disabled. Most children with Down's syndrome need help with their learning. Most are moderately or mildly retarded. There are a small number of children with severe difficulties, and a number who function with a normal range of intelligence. There is occasionally a child with Down's syndrome who is gifted.

In increasing numbers, despite great obstacles, it is evident that persons with Down's syndrome are capable of getting academic and vocational educations, participating in community activities such as scouts, getting jobs, and living independently of their families, whether it be in a group home, a supervised apartment, on their own, or in marriage. Their potential is in the main only restricted by their limited access to integrated education, recreation, job opportunities and quality medical care without prejudice.

Unfortunately, there are still medical practitioners today who insist on holding on to this old model, rather than looking at the contemporrary population of persons with Down's syndrome who are raised at home by their families, who are passionately devoted to them and consider them to be inherently the equal of any human being and equal under the law to any Canadian citizen.

We are here today to express our concerns about the Education Act of Ontario and how it negatively impacts upon our children and denies them fundamental justice as persons entitled to equal benefits of education under the law.

As you listen to this presentation, we want you to listen not only as--

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~~to express our concerns about the Education Act of Ontario and how it negatively impacts upon our children and denies them fundamental justice as persons entitled to equal benefit of education under the law.~~

~~As you listen to this presentation, I want you to listen~~ not only as legislators who have to do what is just for us, but also as parents who would be concerned for your own children's lives, as grandparents, aunts, uncles, people who can turn to the children they know and think what would be best for that child, "What would I want for my own child?"

Parents of children with Down's syndrome want integrated education for their children. This means we want them to walk with their brothers and sisters and friends to their neighbourhood school as a matter of right, attend regular classes with their age-appropriate peers, and have individualized programming geared to their strengths and needs.

Bill 82, the Education Amendment Act, was sold to parents as an integration bill. That is what we though we were getting. However, all it did was to let some of our children in the building. It forced parents who have been moving away from the damaging process of labelling their children to have to deal with a system based on broad stereotypical classifications.

It left individual boards and schools confused about the real intentions of the act and to some degree caught between the parameters of the legislation and parents' demand for integration. It also left many other other boards and individual schools the freedom to infringe on parents' and students' rights to integration by capricious use of the identification and placement review committee system and by actively blocking students' entry into the neigbhourhood school. It also left individual teachers the freedom to discriminate actively in the classroom against pupils with special needs who were integrated into the regular class.

Integration in education is not a matter of ability, as many mistakenly believe. It is a matter of choosing to support and transmit respectful human values rather than dehumanizing survival-of-the-fittest values, and it is most assuredly a matter of entitlement to equal benefit of the law. It is a civil rights issue; it is not an education issue.

There have been many instances in the past in North American society when certain prejudicial practices were considered acceptable. It was these practices, and the systems that grew up around them, which forced various disadvantaged groups to create places for themselves as best they could. Therefore, there was a segregated educational system in the United States for black people. There are many Jewish hospitals across the US and Canada--one right here in Toronto--that were established because Jewish doctors could not get privileges at general hospitals. Universities quietly had quotas on Jewish students. Women have for a long time laboured for unequal pay in the marketplace. We have

to look at Women's College Hospital as another example of disenfranchised people creating their own spaces.

Today, in more enlightened times, we recognize that these things are wrong. The issue is not different in segregated education. We parents are in the process of dismantling a segregated educational system for mentally retarded children. However, looking into its origins, we see that they system was built by a previous generation of loving parents whose children were absolutely locked out of the public education system. There are twenty-year-olds with Down's syndrome living in Toronto today who did not get the opportunity to go to school until they were nine years old. You can imagine that at that point, before there were stimulation programs for young children, they just sat at home, and parents had to find whatever they could for them.

However, as times goes on and our awareness of, and research on, human and civil rights and what is also educationally sound for children with Down's syndrome grows, we must turn away from the segregated system and move our children into the mainstream, which is after all where we want them to lead their lives. Our children have been beggars at a banquet. When they are locked out of integrated education with their typical peers, they embark upon a course of life which runs parallel to, but does not intersect, with the lives of ordinary people.

While other children relate to their peers and learn appropriate models of social behaviour, our children are clumped together in situations which are often more related to babysitting than education, and where they are unable to model appropriate behaviour for each other. Therefore, their behaviour is often unacceptable to their typical peers, and they are avoided.

While other children are enriching their lives with summer camps and Y classes, our children are often told they are not acceptable as participants to the staff or other parents. While other children are prepared for work in the competitive marketplace, our children march inexorably to the sheltered workshops, if there is a place for the, and where they can work for approximately $5 a week--and that may be an exaggeration, it may be less than that--and a disability pension. If there is no place for them, and their parents on their own have been able to find them a job, then they can sit at home or pursue hobbies.

People sometimes think that parents of children with Down's syndrome or parents of children with special needs are a very fussy group, but I must tell you that we are no longer willing to accept the sheltered workshop either as the career chocie of our children. While their are many people whose livelihoods may depend on the sheltered workshop and while the sheltered workshops have their place in our financial life, we are no longer willing to provide them a labour force. We see that integrated education is the beginning of the process of our children getting into the competitive marketplace, which is where they belong.

(Mrs. Bailey)

10:30 a.m.

When was the last time you went into a fast food restaurant and were served by a teenager with Down's syndrome? Remember the last time you went into a local mall and saw a kid with Down's syndrome hanging out? I wonder if you ever wonder where our children go when they grow up...

J-1030 follows

"When was the last time you went into a fast food restaurant and were served by a teenager with Down's syndrome? Remember the last time you went into a local mall and saw a kid with Down's syndrome hanging out? I wonder if you ever wonder where our children go when they grow up, because we wonder that. We look around. When we have children with Down's syndrome, we are out looking in the malls, in the schools, and in the playgrounds. Where are all these people? We see children, but we do not see young adults and we do not see adults. We wonder, are there special underground canyons to which they go when they turn 21, because we do not see them, they are not there. They are not there for a reason, because they have been streamed off at a very early age to a life that is parallel to ours but not involved with it.

Children who are not allowed to integrate with typical children, and do things that typical children do, are not able as adults to find their productive place in the community, except as recipients of service.

One of the arguments that parents of children with special needs face when they demand integrated education is that is very expensive. If that is really so--and we have no way of knowing--the choice is this: you pay for them as children or you pay for them as adults.

School serves not only to educate and prepare children for their adult responsibilities but, along with the family, it is the most powerful transmitter of vaules to successive generations of students. We shudder at the explicit and even more powerful implict values being transmitted by the Education Act of Onatrio as regards our children. After all, why is it that we need an International Year of Disabled Persons, and an ??International Decade of the Disabled? If we started integrating children when we should, at the preschool level, and let children grow up together and respect human diversity, we would not need to spend millions of dollars and great amounts of time changing, as adults, the destructive values we have taught them as children.

Now I want to tell you five stories about five terrific little kids with Down's syndrome who are are having their own individual struggles with the educational system. I think these stories will serve to reflect the individual impact that is unjustly experienced by us. I want to make the point to you, as I am telling you stories, that each parent fights the same battle each year. That means: kindergarden, grade 1, grade 2, grade 3, grade 4, grade 5. Even though a parent may get their child into the regular local school in kindergarden, it doesn't mean they are going to be there for grade 1. They have to start fighting that again in grade 1. While they are in the school during the year, they may have three or four fights. It is an ongoing, difficult situation.

The first story I am going to tell you is about Stephanie. I call this story, "Integration--You Must Be Crazy." Stephanie is five and a half years old, and she is a chatterbox. She is learning to read. She likes puzzles and books. She likes Polka Dot

Door and Sesame Street--those are the things that she watches. Obviously, her parents watch what she watches on TV.

She spent a year and a half in a segregated preschool, and then her parents moved her into an integrated preschool nursery situation, which is easier to find than schools which are covered by the public education system. About a year and a half before, wanting to get her into their local neighbourhood school, they began to talk to the principal and the staff to let them know that yes, Stephanie was going to come. How did they feel about it? She was a kid who was doing very well, and they wanted to pave the way for her.

The school said: "Yes, we shall think about it. It may be the place for her. We are not sure." Just before the school year began, they requested, before they would take Stephanie into school, that the parents themselves go for a psychiatric evaluation. I do not know if anyone here has been asked to see a psychiatrist before they registered their child in school. The parents went to the psychiatric evaluation, where the psychiatrist actually did not know what he was supposed to be doing either, but he said, "Yes, this is a nice family. It seems logical that if their child is five years old, she should be in kindergarden."

The parents were afraid not to go for the psychiatric evaluation, because they were afraid their child would be kept out of school. Therefore, they went, and, yes, the child was able to get into the junior kindergarden class with, unfortunately, a teacher who was not particularly interested in having her. They then spent the rest of the year battling back and forth, trying to find a teacher who would accept her in the classroom and treat as one of the other students. The thing I want you to remember about this story is basically that families are asked to do outrageous things in order to get their child with special needs integrated in school, which is their right--they have a right to be there.

The fate of an individual child in a school often depends on the attitudes of the individual teacher. Teachers are often over-cautious about the abilities of children with special needs, and so want to hold them back, unnecessarily. Teachers often come back to the parents, as they did to Stephanie's parents, saying: "We are having this difficulty in the classroom. What should we do?" Parents are always willing to help out, but we look to teachers to get beyond their preassumptions and deal with--

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(Mrs. Bailey)

~~come back to the parents. They did to Stephanie's parents saying, "We are having this difficulty in the classroom. What should we do?" Parents are often and always willing to help out, but we look to teachers to get beyond their preassumptions and deal with~~ behaviour problems and learning problems as they would for other children, not overwhelm parents.

The second story I want to tell you is about Susan. This story is about the myth of parent preparation. One of the things that we parents are told if we want to integrate our kids is, "Prepare the school. Prepare the staff. Get a good relationship going with the principal. Let them know about your child. Be accessible. Be available. Bring in materials so that you develop a co-operative relationship with the school."

Susan's school happens to be right across the street. Her brother, Bobby, has been going there for five years. Her mother has been very involved in the school. As a matter of fact, she is the vice-president of the home and school assocation. We would say that this parent is fairly involved. She has been talking to the principal for at least two years saying, "Guess who is coming to your school?" They knew she was coming, and they were not thrilled, but they figured they would try it.

When she was finally enrolled, it was with the reluctant agreement of the principal and the open hostility from the junior kindergarten teacher. Within a week, this same teacher who had Susan in her class, organized a meeting of the other parents with the co-operation of one other parent in the class, in order to have Susan removed from the school. That is not an uncommon experience that we would have--that the teacher would organize to move our kids out. There was no notice at all to Susan's parents about this. This meeting was going to be held without telling anyone. Because Susan's mother is in and out of the school a lot, she happened to find out about it and was able to attend.

One can only imagine the pain she felt at the hostility and the meanness of spirit directed at her five-year old daughter. This is a little girl who has nothing to be afraid of. She has got cute blonde pigtails. She has loads of energy and loads of ideas. She takes swimming lessons. She goes to Orff music classes. She goes to Brownies. She is in her Sunday school choir. There is nothing too very frightening about this child.

Within two days of this meeting, Susan's mother was called one morning, after she had come home from jogging, by the school principal who said, "We just happen to be having a meeting here of the teacher, the resource teacher, the area-designated principal, the psychologist and myself. Why not come over?" She was never told that this was, in fact, an Identification and Placement Review Committee meeting.

She walked over in her track suit, coming in blind, thinking that they were just going to have a little discussion about her

(Mrs. Bailey)

daughter. At that point, she was interviewed and dismissed and told to await a written recommendation of the committee. She defines this as the worst day of her life.

Fortunately, the school chairman, who is the vice-principal and also her older son's teacher, suggested putting Susan in a senior kindergarten class, which was actually a more age-appropriate placement for her, with the same teacher. This class was smaller, and the teacher was able to discover, in the process of having Susan with children her own age where she obviously performed better because kids should be with kids their own age and having a bit more time to spend with her, that she actually was a delightful child. It is unfortunate that, in the process of doing all this, she had polarized a community, damaged a child and damaged a parent.

The thing I want to remind you about this is that parents have been taking a tremendous amount of responsibility that should rightfully belong to the system in order to make this work. No matter what we do--doing the best preparation and given the best of possible worlds--it still does not seem to work.

The third situation I want to talk about is subtle sabotage. This is a story about Jimmy. Jimmy is seven. He is second in a family of four. He is the only boy. His mother says that he is a typical boy. I do not know if that means chauvinist or what. He likes bike riding and playing ball. He is out playing sports with the kids. He goes to Beavers at the age-appropriate level. His big thing is to grow up to play ball with the teenagers on his street.

He was integrated into junior kindergarten level at the local school. This was a very big class which was eventually split. Unfortunately, he was kept with the same teacher who was not happy to have him in the classroom. After six weeks, he was moved into senior kindergarten with no consultation with the parents. The parents, by happenstance, found out that Jimmy was in a new class with a new teacher with no individualized programming and another teacher who did not want him.

Finally, before Christmas, the identification and placement review committee decided that they wanted to move him to a segregated class. At this point, it was suggested by the parents that Jimmy go to the junior kindergarten, which was not an appropriate age-level placement but the best they could do, with the other teacher who was more accepting.

10:40 a.m.

This system happened to work very well. This teacher felt that Jimmy did very well in the class and was performing academically and socially. Unfortunately, for the next year, this teacher was declared surplus. The teacher who was to remain was the original teacher who was not interested in any way in having Jimmy in her class..

J-1040 follows

(Mrs. Bailey)

~~teacher felt that Jimmy did very well in the class and was performing academically and socially. Unfortunately, for the next year, this teacher was declared surplus. The teacher who was to remain was the original teacher who was not interested in any way in having Jimmy in her classroom.~~

The parents were then forced to choose between having Jimmy in a regular class with a teacher who was in no way interested in having him or moving him to a multiple-handicapped class, which is what they chose. He now sits with four children, one teacher and one aid. Because he is no longer able to go to his neighbourhood school, he is being bused for 50 minutes a day in order to get to school. This is down from an all-time high of 90 minutes a day on the bus. Even the school board itself has limits about how much time each child should spend on the bus in order to get to a school.

I call this subtle sabotage because, even though a school can say, "Yes, we are willing to have your child," they can sabotage by putting your child with teachers who will not accept your child, by not disciplining those teachers, by not providing aids or individualized programming and throwing up their hands and saying to the teachers, "What can we do?"

I want to talk about the fourth alternative. I call this the free enterprise alternative. I want to talk about a little girl named Anna who is four-years old and has never been to a segregated school. She has been in school for three years. She is learning to read. She is learning to play the violin. She does not think of herself as different, and neither do any of the kids that she goes to school with. The parents of the children that she goes to school with are all very accepting of her.

Mr. Sargent: What is a segregated school?

Mrs. Bailey: It is a school for children who are mentally retarded.

Her mother is not willing to risk putting her into a system where she could be damaged in the classroom and which does not want her and is not willing to accommodate to her special needs. Therefore, this mother is in the process, at her own expense, of setting up a private nonprofit integrated school for other children whose parents feel the same way. She also appeals in this situation to other parents. Believe it or not, there are parents of typical children who want them to go to school with our children, because they consider it educationally enriching and educationally sound.

This group of parents feels that, as taxpayers who are already supporting a public school system, we are not able to use the public system. We have to spend our own money and set up our own systems parallel to that because our children will not be accommodated.

(Mrs. Bailey)

These are our specific recommendations about the Education Act of Ontario:

1. That the Education Act make an explicit and implicit commitment to the fundamental right of all children with special needs to be educated with their age-appropriate peers in the local school with individual programming;

2. That the full range of due-process protections be available to ensure the above;

3. That section 72 of the Education Act, therefore, be repealed--the section that says trainable retarded students be served in segregated schools or segregated classes--and that the Metropolitan Toronto School Board, which serves trainable-retarded students, and other segregated schools existing for such purposes, be closed and these students be served in their local neighbourhood school;

4. That the identification and placement review committee be used to identify children with special needs without attachment of labels. Therefore, we recommend clause 8(2)(b) be amended to disallow labelling for the purpose of determining exceptionability, placement and programming;

4.(b) That this committee be renamed the identification programming review committee, as all placements would be made according to recommendation 1, which means all placements would logically be in a local school, age-appropriate classroom;

5. That the identification programming review committee be responsible for ensuring appropriate individual programming and be the watchdog committee which will ensure that the integration process is being carried out throughout the school system to prevent undermining by specific schools, principals or teachers;

5.(b) That a strengths and needs assessment be the basis for programming;

5.(c) That, as parents have no right under the IPRC system now to question the appropriateness of the children's program, we recommend that subsection 8(2) be amended to allow for this;

6. That section 34 of the Education Act be abolished. No child should be designated "unable to profit from instruction." Indeed, such an occurrence should alert us to the denial of fundamental human rights.

Integration in local schools with age-appropriate peers with individualized programming is not an idea which is untried and untested. It is taking place successfully in the Roman Catholic separate school board in Wellington county and Hamilton-Wentworth and in isolated situations when an individual school, usually Catholic, has chosen to integrate a particular student.

(Mrs. Bailey)

Of course, it is also sad to say that there are examples of integration which have been set up to fail. That is to say, a student has been placed in a more or less age-appropriate class with some programming, with no support or direction for the teacher and with little or no support from the school principal and the system as a whole. Therefore, the success of the experiment may rest on the shoulders of a six-year-old girl and her often determined but beleaguered parents who are basically engaged in a process of hand-to-hand combat with the system on a daily basis.

Integration, as a specific intent or goal of the act, must be clearly stated so that there is no room for confusion or foot dragging by school boards. The process of integration must be closely monitored, and there must be a...

J-1045 follows

(Mrs. Bailey)

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~~Integration, as a specific intent or goal of the act, must be clearly stated so that there is no room for confusion or foot dragging by school boards. The process of integration must be closely monitored, and there must be~~ body with the authority to take proper corrective action.

School integration works when it incorporates the following:

(a) The belief, set in law, enforced in attitude and action, that children with special needs are entitled to integrated education as an equal benefit of the law and due-process protection from abuses;

(b) School boards actively support integration by consulting meaningfully with the special education advisory committees and provide training in integration for school personnel and monitor the process;

(c) Individual schools, from the principal to the caretaker, work to support the integration of the child into the social fabric of the school;

(d) Children are identified as exceptional, and their programming is based on a strengths and needs assessment rather than on traditional testing and labelling;

(e) Teachers receive appropriate training, support and help from resource specialists to meet their students' needs;

(f) Parents collaborate as respected members of a team working for the best interests of their child.

There exists at this point many resources available to train and assist individuals, teachers and school boards in the process of integration and the provision of sound individualized programming to children with special needs. Unfortunately, because so much time is wasted by parents, professionals and school boards fighting the right to integration issue, a lot of valuable and expensive time is wasted which should be spent on developing quality education for our children.

Let me close by saying, for those of you who may be thinking that we parents of children with special needs are only concerned about our own kids, and we are not concerned about typical kids and we ignore the situation that typical kids are often failed by the educational system, that this is not true. We also have typical children.

We believe, without a doubt, that the key to better education for typical children and the key to promoting humanistic values in our society wherein human differences are recognized,

(Mrs. Bailey)

respected and reasonable accommodation made, is the inclusion, by right, of our children into the regular age-appropriate classrooms in their local schools. When we, the public, direct our educators to value and work toward the strengths and needs of each student, then surely all our children will reap the benefits.

The last point I want to make is that the school system is not going to change by itself. It is not going to change with each parent fighting each battle by themselves. They will only move when the Legislature says, "This is what you must do," and builds teeth into the system. Thank you.

Mr. Warner: Thank you very much for your excellent presentation, although it is very disturbing. Parts of this came as a real shock to me, not because I am unfamiliar with the work of people who have mentally retarded children or anyone who has been associated with the efforts to have an integrated educational system.

I was very pleased to support Bill 82 when it came before the Legislature, because I felt that it would, for the first time in the history of Ontario, give children the right to attend school. As we are so painfully aware, until that bill became law, school boards could systematically deny children the opportunity to attend school. Some school boards were worse than others. Some would very systematically choose who they wanted to have in their schools. It seemed that it was very much a fundamental right. It is a civil rights issue. Every person is entitled to an appropriate education--appropriate to his or her needs. That is the basis for Bill 82.

I am wondering, based on your presentation and your experience, if the problem is essentially with the bill itself or if it is with the system which is created within the bill. For example, is it more the IPRC aspect, which is spelled out in the bill, that is the cause of the problem? Secondly, is it also the fact that, although we have had a good five years since the bill was passed, it would appear that the teachers have not been adequately prepared in order to handle the responsibilities which are outlined in Bill 82? Could you comment? Do you think we need an overhaul of Bill 82, or should we address the deficiencies of the IPRC process and a better approach for our teachers?

10:50 a.m.

Mrs. Bailey: It is two issues. Bill 82 says that children are entitled to a publicly supported education. Our complaint is that yes, they have a right to education, but we want them to have integrated education. We do not want them in special classes at the end of the hall. What is happening is that...

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(Mr. Warner)

overhaul of Bill 82 or should we address the deficiencies of the identification and placement review committee process and a better approach for our teachers?

Mrs. Bailey: There are two issues. Bill 82 says that they are entitled to a publicly supported education. Our complaint is that, yes, they have a right to education but we want them to have integrated education. We do not want them in special classes at the end of the hall.

What is happening is, while children are sometimes able to get in the building, we have a fight over where they should be in the building. We want them to be seen as equal to other children. That means that all children are equal. They all go to the same place and reasonable accommodation is made to their individual education needs.

There are many children who are not able, even with Bill 82, to get in the door, children who have been labelled "trainable retarded." There is a fight for many people to get in the door and, once they are in the door, to get appropriate, integrated classroom settings, programming and support. There is a problem with the overall bill and then with the IPRC system, this is really the battleground. Very often parents are not told, as in one case, that an IPRC is being held. The IPRC is often stacked against them. Parents are not adequately prepared. They are not always given the information they need.

Because the focus is on identification and placement, you can either fight the label or you can fight the placement. Parents of children with special needs are saying, "We want a strengthened needs assessment." If I tell you that my child has Down's syndrome, you know nothing about my child. We want an assessment that is more educationally sound and valuable. We want the placement to be automatically assumed to be the regular age-appropriate class with their peers. Then we can focus on programming.

The least time is spent on focusing on programming and adequate support for the child in the class. We are obviously fighting to get them in the class. We are saying, "They have a right to be there," and they are saying, "No, you do not."

Mr. Warner: I know we are going to be pressed for time. I have two questions. How is a child prevented from getting into the school in the first place? You mentioned that has happened.

Mrs. Bailey: It depends on the label. If a child is labelled "trainable retarded," he can be served either in segregated schools or segregated classes.

It is also a matter of a parent going to the school. For example, I could go to my school around the corner and say, "I want to register my daughter for kindergarten." What I could do is just register her and not say anything and put her in the class, which is what I would probably do. Most parents would not do that.

(Mrs. Bailey)

A parent would go there and say, "I have a child with Down's syndrome and I would like to get her in kindergarten." Then they would say, "Well, we are not so sure. We have to have her tested. Let us have an IPRC. Let us get her tested. Let us get her labelled. Then we will see where she belongs."

Our point is that it does not matter. The results of the testing are irrelevant with respect to placement. If she gets a label "trainable retarded," which means a certain intelligence quotient or below, they can say, "We do not want her." If she gets a certain label that says her IQ is within a certain range, she might be accepted into a segregated class within the school, special education.

What we are saying is that we do not want that. When our children are segregated, they do not become part of the mainstream. It is a beginning process to end up in the workshops. We feel that with regard to every person having a right to participate and get equal opportunities, it starts them off already--

Mr. Warner: It is part of a system that is part of a philosophy to hide everything that is "not normal."

Mrs. Bailey: That is right. We are a perpetual underclass.

Mr. Warner: This country has a very bad record in that regard, especially in comparison with many other countries.

Last question: is it your understanding that the Hamilton Board of Education has a program of withdrawal rather than special classes? The student is in a regular class, a student who is classified as being exceptional, which is both ends of the scale, exceptional, but a withdrawal program is provided so that the youngster receives the appropriate special attention on a withdrawal basis out of the classroom. Is that available in Hamilton-Wentworth?

Mrs. Bailey: In Hamilton they do not have segregated classes. They may occasionally use a segregated class if they have to withdraw a child from integration as a short-term measure in order to move them back in. I am not aware whether they use withdrawal or aids. Mrs. Langdon, do you know?

Mrs. Langdon: Yes, they have--

Mr. Chairman: Could you come forward?

Mrs. Langdon: I am Linda Langdon and I am--

J-1055 follows

[illegible] them back in. I do not know if they use withdrawal or [illegible] Linda, do you know?

[illegible]

[illegible]

Mrs. Langdon: [illegible] from the York Region Down Syndrome Association. Louise and I work fairly closely together.

The Hamilton model, I believe, is called needs-based resource model. What they do is an evaluation of every child and determine what the child's needs are. Then, they have these marvelous meetings in the actual school that involve the principal, teacher, a special education resource person, consultants from the board level--if necessary--and of course, the parents. What they do is plan a program around each and every child. Most of the program is implemented in the actual classroom.

I saw a little girl when I was there who was in grade 5, so that would make her about 12, I guess. She was having difficulty with math. This little girl had Down's syndrome as well. She was having difficulty with math and her math, if you were to test it, would probably be at about a grade 2 level.

Instead of putting her in a special education class, they left her in the grade 5 class and, when all the other kids did grade 5 math, this little girl sat there very nicely and did grade 2 math. What the team did was to help the teacher program for this girl within the classroom. It just was not a problem, as it worked out very nicely for the little girl.

That particular child was not withdrawn. They also do withdraw some children at some point in time if they just need one-on-one attention. Then they will take them out for, perhaps, half an hour. I think I am speaking for all of us: we do not find that terribly reprehensible because lots of kids are withdrawn, so it is not unusual for her to be taken out of class for half an hour. It is when you are taken out all day that is the problem.

Mr. Warner: How long has that program been in place?

Mr. Chairman: Mr. Warner, I have got to share some of the questions. I am sorry. I allowed you a couple of supplementaries, but I have to move to Mr. Callahan and I want to get Mr. Partington on as well. I apologize, sir, it is just that time is going very quickly.

Mr. Callahan: The problem of which you speak is one that is easy to identify, but very difficult to rectify.

(Mr. Callahan)

I was involved with a learning disability group out in Brampton, and we actually had to go down to the Peel public board. They had to go down on three occasions. I had to go down on one and actually fight to get a parent from the North Peel organization on the special education advisory committee. They resisted it so vehemently, it was incredible.

In a similar fashion, when a child is examined by the psychologist, I have discovered that the psychologist's report gets locked away in a vault where nobody can look at it and the teacher never finds out about it, nor do the people who are setting up the programs.

I agree with you. The models I have seen out in Brampton, where young children with various disorders have been brought up in the mainstream of the school, is not only beneficial to the kids, it is beneficial to the kids who are absolutely normal because it teaches them some empathy and hopefully we will get a generation that is a little more intelligent in terms of dealing with people as people, as opposed to special.

Down's syndrome, learning disabilities or what-have-you, result in certain behavioural activities that create some difficulties in terms not only of that child learning, but also the other children learning. They have found this, even in the special education classes, where they would lump kids with hearing disabilities with children with learning disabilities with children with some other disability, and the teacher would have to try and teach all of those children at the same time. That is totally unacceptable. None of them were getting a proper education.

I am glad to hear that you are not saying that there should not be some withdrawal for special assistance for children. Without that, these children might very well get lost in the shuffle. You have mentioned a model, Hamilton-Wentworth. Are there any other models where they have taken the approach you have suggested, where they actually create a program for the child and leave the child in the same classroom?

11 a.m.

Mrs. Bailey: There are specific principals and school superintendents who do travel around and talk to groups that are interested in finding out about education and they are more than willing to share the way their model works. It might be very valuable, if committee members were interested, to approach them, because I do think they feel very positively about the experience.

1100 follows

~~(Mr. Callahan)~~

~~[redacted]~~

Mrs. Bailey: ~~There are specific principals and school superintendents who do travel around and talk to groups that are interested in finding out about education and they are more than willing to share the way their model works. It might be very valuable, if committee members were interested, to approach them because I think they do feel very positively about the experience.~~

In terms of withdrawal or aids in the classroom, what we are looking for is quality education for our children and I do not think we are going to fight a half an hour withdrawal process if that works. We do not mind. What we want, fundamentally, is for our children to be accepted as persons who are equal to other children and with them, and then the programming follows from that.

Mr. Callahan: How do you propose that we deal with the situation that you discussed about the teacher who did not want that child. Obviously, that is probably more rampant than we would expect. How do you propose we do that?

Mrs. Bailey: I do not know. What would a school do if the teacher went to the principal and said, "I am really not fussy about black people and I do not want any in my class?"

Mr. Callahan: That is a little easier to indicate as a discrimination, but there is discrimination and there is discrimination. You can do it passively and actively.

Mrs. Bailey: Sometimes there is passive discrimination, where a child is not taught. I know of a situation where a little girl was in grade 1 and was already reading. She was held back a year when she could probably have managed grade 2, and had always had good experiences in integrated classes.

She would come home from school crying everyday. When they investigated what was happening in the classroom, the teacher would invite the other children to participate in activities as a group, but tell her to sit in her seat. Of course, the mother immediately withdrew her and put her into an integrated private school.

To me, that is a situation that involves three things. It involves adequate preparation for teachers--training. It involves diffusing their fear of the unknown, but it also involves some discipline from an authoritative body.

Mr. Chairman: Mr. Callahan, I am going to have to move on. I have Mr. Partington, Mr. Villeneuve and Ms. Gigantes yet, and our time has expired. I do apologize to the next group coming before us that we are running a little late.

Members of the committee will try to keep the questions very short and succinct, without a great deal of philosophical introduction, and then we can get the answers rather quickly as well. Mr. Partington, I know you will agree with that.

Mr. Partington: I will be very short.

Mr. Chairman: I appreciate that, sir.

Mr. Partington: I just have a couple of questions about the adoption of the students in the classroom to the child with Down's syndrome. Do your studies show they would be supportive or would their reactions sometimes harm or hurt the child?

Mrs. Bailey: Generally, if they meet other kids early enough, children are very accepting of a lot of differences because they do not really think about it. They are not old enough to know what is normal and what is not normal, but they also take the lead from the adults. If they like the teacher and if the entire system--the principal and the teachers--are positive towards a child with special needs, the kids pick up and follow from that. If they have the opportunity to do things together and see each other as other people, the reaction has normally been very positive.

Mr. Partington: One more question. In the classroom, for 35 or 40 minutes--whatever the length of course is--in the program you see as appropriate, would there be any large amount of time devoted to the child with Down's syndrome, or do you see the child fitting in and basically just being taught, perhaps slightly differently, but the with same teaching to all the sutdents?

Mrs. Bailey: It would vary. When the child can do the work the class is doing, the child would do the work. If a child would need some time from an aid in the classroom, as we mentioned, they might be doing their own math in the classroom, or perhaps some individualized program from a teacher or an aid, or they might need some withdrawal.

We recognize that our children do need specific help. We are not saying, "Put them in the school system as equals because we think they are absolutely typical." We know they are not typical. We want accommodations made to their needs. I think there are many creative ways to do that without, in any way, removing the benefits for other children.

Linda, did you want to say anything?

Mrs. Langdon: That is fine.

Mr. Villeneuve: Mrs. Bailey, you presentation was almost shocking to me, coming from a very rural part of Ontario. I had not realized that Bill 82 was not working at all to what it was intended. Your views, the Hamilton-Wentworth model, and you have also made a statement here about individual schools--primarily Catholic--is there any reason for that?

Mrs. Bailey: I think it ...

1105 follows

~~(Mr. Villeneuve)~~

~~working at all to what it was intended to. You have used the Hamilton-Wentworth model. You have also made a statement here about individual schools which are primarily catholic. Is there any reason for that?~~

Mrs. Bailey: ~~I think it~~ was because they did not have a system set up before that. They never had a segregated classroom. I do not know if at one point they did not take any children with special needs. However, now that they are opening up, they are opening up in an integrated way. Other than that, I cannot really say why.

Mrs Langdon We have asked several Catholic superintendents that very same question. I asked one superintendent in particular: "Is this a religion-based thing? Is it because you are coming from a Catholic school board that you are able to offer it? Do people who are Catholic have a more accepting attitude about what is going on?" As much as he defended his religion, he said: "Yes, of course, we are accepting of people, tolerant and all those good values. However, there is not any reason why what we are doing cannot be accomplished in a public school board."

Mr. Villeneuve: Attempting to legislate this is going to be most difficult.

Mrs. Langdon: We will help.

Mrs. Bailey: When we approach school boards, we are really trying to be helpful. We are not trying to destroy anything.

Mr. Villeneuve: Thank you for your presentation. It has been a real eye-opener.

Ms. Gigantes: If we had the kind of system in educational terms that you see as our goal, in a class of 30 kids we would have three kids who would be dealt with in individual programs.

Mrs. Bailey: It would probably depend on the number of children in that area. There might be three; there might be one.

Ms. Gigantes: Do you know whether the ministry itself is doing any work to try to break open this area?

Mrs. Langdon: The last time I spoke to the ministry office was last Thursday. They now have their discussion paper out. I have not seen it, but I have requested it.

Ms. Gigantes: What is the discussion paper called?

Mrs. Langdon: I do not even know the title. All I know is "the discussion paper on the Education Act." As I said, I have requested it to be mailed, but it has not arrived yet. I do not know why. Maybe the postal service is having difficulties these days.

(Mrs. Langdon)

I understand that in the discussion paper they are recommending section 72 be considered for deletion. This is the section stating all children labelled "trainable retarded" must be placed in segregated classes or schools. Apparently the other thing up for consideration is the idea of removing a lot of the individual labels. Instead of designating a child as "special education trainable mentally retarded", all children may simply be designated "special education".

It is very difficult to comment on the discussion paper without seeing it, but it certainly seems to be a step in the right direction and in the direction we would like to see things going.

Ms. Gigantes: Is it a focus on how we go forward from here in terms of dealing with what Bill 82 does not do?

Mrs. Langdon: That is right. Certainly, when we get a copy of the paper, we will be responding to that and giving input to the ministry as well.

Ms. Gigantes: I am sure you are too young to remember it, but Bill 82 in its time was an enormous breakthrough. We knew when we passed it that it was inadequate, that it was going to be underfunded in program terms and so on. There was no appeal. We knew parents were going to get messed up in the system and children with them.

Mrs. Bailey: I think what is happening now reflects a change in the attitudes of parents who have children with special needs. At one point, we felt they were kind of different so let us keep them there. Now in terms of attitude, we are feeling much more that they belong and are equal to other people. They may be different in some ways, but they have the same rights as you do to the goodies we all get.

Ms. Gigantes: Yuppie parents are more aggressive.

Mr. Chairman: Members of the committee, I have to bring the discussion to a close. Obviously, from the questions of the members, you can see they are--

Mr. Callahan: Because you are not a yuppie, that is why.

Mr. Chairman: One never knows. I do not know what the clear definition of one might be. Maybe I do qualify.

Mrs. Bailey, we appreciate the comments you have made this morning. Obviously, I think there is a very deep and sensitive interest on the part of the committee members in the problem that you and others in your group are facing. Certainly, we have more than just sympathy for the position you are putting forward. We will try to help if we can.

(Mr. Chairman)

11:10 a.m.

One of our colleagues, Mr. Villeneuve, indicated that it is sometimes difficult to break through with new concepts. However, we will do what we can within the parameters we have to work with. I do thank you for coming before us and presenting a very...

J-1110-1 follows.

(Mr. Chairman)

~~Mr. Villeneuve indicated it is sometimes difficult to break through with new concepts. However, we will do what we can within the parameters we have to work with. I do thank you for coming before us and presenting~~ awkward, difficult, trying and challenging problem.

Mrs. Bailey: Thank you all very much.

ADMINISTRATIVE DETAIL

Mr. Chairman: Before I ask the next group to come forward, I would like to give you a little bit of administrative detail with respect to our committee.

Questions were raised in regard to research for the committee. Research will prepare a summary to be available to all members before we go into clause-by-clause. This will follow all the hearings. There will be the break and it will be ready for you at that time.

The summary will contain proposed and suggested amendments, the origin of the amendments, the clause and legislation affected by the amendment and any explanation necessary to help you in expediting our discussions when we get into clause-by-clause.

Research will also review transcripts of any outstanding questions the members have raised and will prepare necessary answers to those questions. There have been quite a number of them, as you know.

In connection with tomorrow morning, the members of the New Democratic Party caucus have indicated they are going to have a caucus tomorrow morning. In light of that, we are trying to reschedule tomorrow morning so we can continue in their absence. In that respect, I would like to ask you to all be here at 10 o'clock sharp, as was the chairman this morning. Then we can get underway at exactly 10 o'clock. This will accommodate part of the problem the New Democrats are facing in that respect.

The clerk will also obtain copies of the Human Rights Code for members for your information.

I would like you to add to this afternoon's schedule by placing Dr. Ann Hall as number six in the afternoon's hearing. As you will recall, Dr. Hall is from the University of Alberta. She is the author of the book, the title of which escapes me at the moment but it has to do with fair play or something.

Ms. Gigantes: "Fair Ball".

Mr. Chairman: I was close.

Ms. Gigantes: Is that tomorrow or today?

Mr. Chairman: Today. It will be at 3:45 p.m. I ask the committee members to discipline themselves this afternoon to a certain extent and show some restraint because we have six hearings before us. Some of those are individual hearings and only allow 15 minutes. I have no control over the length of the presentation and I have very little control over the length of the questions asked by the committee members. However, I cannot stretch 15 minutes to accommodate the other speakers we have coming before us.

I know I repeat myself, but the time you add to one delegation is taken from another delegation. This makes it a little awkward in trying to keep on time. We have a little bit of flexibity this morning. I ask you to cancel the 11 o'clock delegation which is the Social Planning Council of Metro Toronto. It has cancelled and is being rescheduled for March 5. Therefore, we will be able to give the full time to the next delegation coming before us.

This is the last item I want to raise. Tomorrow morning, Women and Planning, which is scheduled for the 10 o'clock hearing, has been cancelled. What we will be attempting to do at that time is to move the 11:30 delegation, Real Women, into the 10 o'clock time frame. Therefore, we will be starting at 10 o'clock in any event, but we will finish a little earlier tomorrow morning if all delegations come in as we anticipate.

Are there any questions? That brings you up-to-date on all the news the chair has to share with you at this time. There being no questions, I will invite the next delegation to come forward.

WOMEN'S LEGAL EDUCATION AND ACTION FUND 963-9654

Mr. Chairman: We welcome Shelagh Day who is the president of the Women's Legal Education and Action Fund. Shelagh, will you introduce the lady with you? We can get under way as soon as you are ready.

Ms. Day: With me is Gwen Brodsky who is the litigation director...

J-1115-1 follows

(Mrs. Chairman)

. The lady she has with her and we can get under way as soon as you are ready.

Ms. Day: Thank you very much. With me is Gwen Brodsky who is the [illegible] for Women's Legal Education and Action Fund.

Perhaps I can start by giving you just a very brief description of this organization. It is very new. It was founded on April 14, 1985. It is specifically designed to undertake research on quality rights to provide public education on equality rights and to support test-case litigation under the new Constitution and its equality rights. It was very important to women in this country to be sure that at the time of these new constitutional guarantees women had access to the exercise of those equality rights and in organizations specifically designed to look at cases which will put forward important issues for women.

Ms. Brodsky will begin, and I have some comments after her.

Ms. Brodsky: Thank you. My comments will be directed to the question of the repeal of section 19(2) of the Human Rights Code. My submissions will be simple. I will begin with the reference to the Charter of Rights and conclude with the reference to the charter.

The Canadian Charter of Rights and Freedoms enshrines and guarantees a vision of equality. It imposes a duty on governments to take positive steps towards equality. The promise of equality contained in sections 15 and 28 of the charter is not only a legal principle, it is a democaratic ideal.

The Women's Legal Education and Action Fund is pleased that this government has taken the initiative to review its legislaton, and we strongly support the repeal of section 19(2) of the Human Rights Code.

Women are not equal beneficiaries of sport resources and opportunities, and this observation has been widely substantiated. I will refer to only two expert sources.

One is Helen Lenskyj, a sport sociologist, who appeared before you earlier in these hearings and also appeared in court during the summer of 1985 and testified that her research shows that public interest and attention in Canada has focused on boys' and men's sport for the last century. Translated to the context of school and community sport, this interest is reflected in superior equipment, facilities and a more extensive range of sports, programs and events offered to boys and men.

Another source is Abbie Hoffman, director general of Sport Canada, a department of the federal government responsible for administering a multimillion-dollar annual budget in the area of amateur sport and fitness. She says there has historically been a very considerable disadvantaged situation for females in sport generally and that disadvantage, which is a product of various

economic and social circumstances, simply has meant that there have been fewer opportunities for females to play various sports.

The goal of this government and of this committee should be to find ways not to perpetuate the existing inequalities in sports, but rather to eliminate them. Repealing section 19(2) is a positive step towards ending discrimination against women in sport. It is submitted that section 19(2) of the code stands in the way of women's equality and contravenes the spirit of the Charter. It effectively denies women equal protection of the law in the area of amateur athletics.

Section 19(2) has a blatantly discriminatory purpose, and laws which have discrimination as their purpose cannot be justified. Its purpose is to prevent complaints of discrimination based on sex. By way of contrast in the Human Rights Code, complaints in the area of sport based on all other grounds listed in the code are permitted: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status or handicap, all except sex--a blatant example of sex discrimination within the code.

11:20 a.m.

Some have argued that section 19(2) does have a valid purpose, that is, the purpose of protecting the frail sex from injury in sport. This is an argument which I refer to as a benevolently paternalistic argument and, like all such arguments, it presumes the inferiority of the protected group. Parents protect children and restrict their activities, and this may well be an acceptable and necessary practice for parents with respect to their children, but when it comes to women's equality rights it is not...

J-1120-1 follows.

Parents protect children and restrict their activities, and this may indeed be an acceptable and necessary practice for parents with respect to their children, but when it comes to women's equality rights, it is not acceptable for a government to stand in the way in the name of protecting us. There are plenty of ways to test people's fitness to play sports, and distinctions based on sex are simply not valid.

Even if the purpose of section 19(2) were good and valid, it is a overbroad and discriminatory provision. Its effect would demand its repeal, in any case. The effect of 19(2) is that all persons, whether male or female, are vulnerable to discrimination in sport and defenceless to complain about it. Section 19(2) does not simply ensure that frail persons are protected from injury; it potentially affects all sport participants. It actually denies qualified athletes the opportunity of achieving their full potential on the basis of sex.

It may be true that women as a group are less athletically fit than men as a group, but equality requires that people be judged according to their individual abilities and not according to the perceived characteristics of their group.

I will now turn to another argument that is sometimes posed against the repeal of section 19(2), and this is the so-called mandatory integration argument. It is sometimes argued that repeal of 19(2) mandates the death of women's sports. The logic underlying this assertion apparently is that you cannot allow women to have access to men's sport organizations without allowing men to have access to women's sport organizations.

I have two rebuttals to this argument. One, repeal of 19(2) does not mandate anything; it merely makes a discrimination complaint before the Human Rights Commission possible. I might mention as a side point, no other province in Canada has a 19(2) or its equivalent and women's sport has not died in the other provinces.

The other argument I would raise by way of rebuttal to the mandatory integration argument is that section 13 of the Human Rights Code and section 15(2) of the charter explicitly contemplate affirmative action programs and women-only sporting programs can be justified as a type of affirmative action to foster the development of women's sport and undo historic disadvantage, and this type of justification has been accepted in the United States courts.

In conclusion, not one of the stock arguments against the repeal of section 19(2) withstands the test of a principled scrutiny; 19(2) is an arbitrary and discriminatory law. In 1982, governments gave themselves a three-year period to bring statutes into line with section 15 of the charter. The three-year was up on April 17, 1985. Repeal of section 19(2) is a reform which is now long overdue.

Ms. Day: I would just like to make some comments on

other provisions which are not in Bill 7. On January 29, the Attorney General (Mr. Scott) appeared before this committee and made certain announcements, including his intention to repeal 19(2) of the Human Rights Code. He also announced that he intended to amend the Human Rights Code to include protections from discrimination on the basis of pregnancy.

We would like to make it very clear to this committee that we support that proposition wholeheartedly. We have not seen any draft of the proposed amendment. We would like to recommend that when that amendment is made, pregnancy be included in a definition of "sex discrimination." The fact that pregnancy discrimination may not be part of the law is some embarrassment to women in this country who have been in the courts for some years now and been told that discrimination on the basis of pregnancy is not discrimination on the basis of sex; a proposition which we find very hard to understand, as you can imagine.

Consequently, we would like to be sure that when the legislation is amended, it is amended in such a way as to make clear to those who may not have grasped it yet that discrimination on the basis of pregnancy or pregnancy-related illnesses is discrimination on the basis of sex. What we intend here is to make sure that instead of it being included as a separate ground of discrimination, it be included with a definition of "sex" because we think that is very important...

J-1125-1 follows.

(Ms. Day)

~~being included as a separate grounds of discrimination or~~ ~~included with a definition of sex.~~ That is very important to the understanding of sex discrimination and the kinds of discrimination women experience.

We would also like to express our support for the proposal of the Attorney General (Mr. Scott) to repeal subsection 16(1) of the Human Rights Code, which is that section that now bars complaints on the basis of accessibility. For disabled Canadians, accessibility is a fundamental need. We cannot purport to be protecting the rights of disabled people in Ontario, nor can we say that we have a human rights code that meets the requirements of section 15 of the Charter of Rights and Freedoms, unless complaints on the basis of a lack of accessibility can be fully dealt with under the Human Rights Code.

However, there are some major issues, in our view, that are neither in Bill 7 nor in the Attorney General's statement to this committee on January 29. There is some indication in his speech that other amendments to the Human Rights Code may be made in the Ministry of Labour. We are not aware of that review and we do not know of any ability for an organization such as ours to appear to speak to whatever review that may be.

Since we do not know of it and we have not heard of any way to make our views known to whatever other review may be under way and we see some large missing pieces, we would like to flag just a couple of those. First, this organization has undertaken a number of cases where mandatory retirement was at issue. I will tell you about one of them very briefly.

We undertook a case on behalf of a woman in Ontario who was working for a private employer. She had worked all her life outside the home, with the exception of 14 years that she spent raising five adopted children. She did not work outside the home during that period of time because there was a requirement in Ontario at the time she adopted those children that if you adopted children you could not work outside the home.

She worked in typical female employment. At the age of 65 she was facing mandatory retirement with no employment pension whatsoever. She did not want to stop working for financial and social reasons. That case was settled, but I suggest to you that there are many other women in Ontario who at the age of 65 are in constrained financial circumstances, to whom working for another few years may make some real difference with respect to their family and social lives.

Consequently, we suggest to you that the issue of mandatory retirement should be considered and should be considered in some way that gives organizations such as ours the chance to bring forward the issues that we think are there.

The second issue that is not raised by Bill 7 nor anywhere else that we can see is the open-ending of the grounds of discrimination in the Ontario Human Rights Code.

In section 15 of the charter, everyone now acknowledges that the protection that the charter affords is open-ended. Charter challenges can be taken forward under that section of the charter on grounds other than those that are named. We have taken a particular decision in this country to look forward into the future and to understand that we will not be able to name all the grounds of discrimination. The list would be very long but, in fact, we want to ensure that we protect people from discrimination, particularly when they belong to minorities who need that protection.

There is no proposal in Bill 7 to open-end the code or to include some new grounds of discrimination, which in our view ought to be included. If we do not open-end our statutory legislation or if we do not include other grounds of discrimination, we put Canadians in the position of being able to get protection from discrimination in some situations and not in others. This is a very anomalous situation and not good public policy.

11:30 a.m.

For example--

J-1130 follows

(Ms. Day)

~~of being able to get protection against discrimination in some situations and not in others. I suggest to you that this is a very anomalous situation and not good public policy.~~

~~For example~~, we put people in the position of being able to do something about discrimination if they are discriminated against by a provincial or federal government, but not if they are discriminated against by a large private corporation. With respect to dealing with something as fundamental as human rights and equality rights, we put certain groups of people in the position of having rights in some places and having no rights in others.

The committee established by the federal government to look at how federal laws should be amended, chaired by Patrick Boyer, considered this particular issue. One of the recommendations they made was that the Canadian Human Rights Act should be amended to include sexual orientation. That was one of the grounds they believed ought to be included now because of the discrimination against homosexuals and lesbians, which we know goes on in this country, and from which they are not afforded protection in any jurisdiction in the country, except in Quebec.

Their recommendation says it is clear to them that because of the wording of section 15, charter challenges can be brought under section 15 because of discrimination based on sexual orientation and, consequently, they believe that the Canadian Human Rights Act ought to be amended to parallel that protection in order that Canadians can get that protection where they need it. I suggest to you that the Ontario Human Rights Code ought to be amended likewise.

Perhaps I can clarify this. In my view, there are two ways of going about taking care of this problem. One is to, what I call, open-end the code, in other words, to put into it language which is similar to section 15, so that it can cover unnamed grounds. Alternatively, some grounds which we know are problematic in this country and which have been named over and over again, sexual orientation being one and, I would suggest, political belief being another, ought now to be included as prohibited grounds of discrimination in our provincial human rights legislation.

Finally, I would like to bring to your attention a problem that should be taken care of immediately which I believe is raised by a recent Supreme Court of Canada decision in the matter of Bhinder versus Canadian National Railway. You may be aware that particular decision has interpreted bona fide occupational qualification in such a way that it closes the door on any reasonable accommodation.

(Ms. Day)

Let me go backwards. If someone discriminates the defence, under all of our human rights legislation, will say that is not discrimination as that person was refused a job, for example, because there is a bona fide occupational qualification here. In other words, that person must be able to climb a ladder, run 40 miles, or whatever it happens to be, and that is a bona fide occupational qualification for this job.

The Supreme Court of Canada just recently has interpreted bona fide occupational qualification in such a way that they say if there is a bona fide occupational qualification, then an employer or a service-provider is under no obligation to reasonably accommodate the differences of that person.

You have heard the people in front of you just before use talking about the importance of reasonable accommodation to them with regard to using the regular school system. All of the people now in the equality rights field are asking for amendments to the Canadian Human Rights Act to cure the problem that we have with Bhinder, in other words, to make it clear that reasonable accommodation is an obligation unless it creates an undue hardship. This is the only way that people, particularly those with disabilities, are going to be able to use employment opportunities and service opportunities, such as the education system, which are enormously important to them.

We have looked at the Ontario Human Rights Code as it is presently worded, and we must say to you that we are not--

J-1135 follows

(Ms. Day)

~~employment opportunities and service opportunities, such as the education system, which are enormously important to them.~~

~~We have looked at the Ontario Human Rights Code as it is presently worded, and we must say to you that we are not~~ sure what is presently in the code is going to be good enough to withstand the same problem. Again, with the interests of disabled people and others at heart, this is a good moment to make the necessary amendments to make sure that we do not go through another round of litigation in order to cure this particular problem.

We have written to the federal government, along with a number of other organizations with similar interests, and proposed some ways of amending that legislation. I would be happy to leave that with you if you find that useful.

Mr Callahan: Just on the Bhinder case, my recollection of that judgement was at least one or the majority of the judges said if that had occurred in an industry that was covered by the Ontario Human Rights Code, the same result would not have been achieved. Yet, it is kind of interesting to watch the Metropolitan Toronto Police Commission telling Sikhs that they can wear turbans on foot patrol but they cannot wear them on motor cycles.

As you probably know, we have received delegations here saying that we should retain section 19(2). You have obviously given this concern, and I am sorry I am getting out of this marvellous practice of law, because I think there are going to be all sorts of very interesting litigation around. Section 1 or 2, I think it is, says that within a free and democratic society, reasonable--I cannot remember the exact wording. What is the likelihood of section 19(2) being decided by the Supreme Court of Canada as being within that exclusionary clause?

A lot of the arguments based by groups who have come before us and said, "retain section 19(2)" for the obvious reasons that they do not want young ladies, particularly in contact sports, to be subject to the injuries that they might sustain in hockey or football. Have you given any consideration to that as to whether section 19(2) would be within the section 1 or 2, or whatever it is, of the charter?

Ms. Brodsky: We have given a lot of consideration to whether there is a reasonably justification under section 1 of the charter, and feel that there is not supported litigation in the Blainey and the Ontario Hockey Association case in order to make the point that section 19(2) does infringe on equality rights and cannot be justified under section 1. I do not know where that case is going to go ultimately. The decision of the Ontario Court of Appeal is pending. However, the point that I would make is that the government, through Ian Scott, has already indicated a willingness to take the lead and not be constrained by--

Mr. Callahan: I recognize that. It was not specfically with section 19(2). It is with reference with some of the other sections of the Human Rights Code. You are talking about taking out the section dealing with accessibility to buildings. In essence, if you take that out, you open up a door the says every building, be it pre-existing or future, is one thing, but pre-existing buildings will now have to be adapted. You are looking at an absolutely massive injection of funds. With all due respect, you are looking at funds that could cripple the government. I am asking, most specifically with those sections, would they be considered in light of either section 1 or section, whatever that section is, as being a reasonable restriction?

Ms. Day: I, personally, am inclined to think not, and I will tell you why. Most recently, I have come from being a director of the Saskatchewan Human Rights Commission. If you look at the provisions of the Saskatchewan Human Rights Code, they do already what the Ontario Human Rights Code would do if section section 16(1) were repealed.

11:40 a.m.

In other words, the provision in Saskatchewan is that you can make a complaint on the basis of disability with respect to employment, or public services, or accommodation. Anyone making a complaint with respect to disability can be making that complaint because the place is not accessible. In the regulations under that code, it indicates that the defence on a complaint that has to do with accessibility is that renovation can not be made because it would cause undue hardship.

J-1140 follows

~~regulations under that code. It indicates that the defence on complaint about accessibility is that renovation cannot be made because it would cause undue hardship~~. That means that in the administration of that law, every situation is looked at individually.

As in most human rights legislation at the moment, we depend on the disabled public to come forward with their complaints about the circumstances that are of most concern to them. Each one of those situations is looked at individually to see whether or not accommodation can be made, reasonably made without undue financial hardship. My experience as the administrator of that code was this. We found that in many instances some very simple accommodation could be made and that quite simple and not very expensive renovations often cure the problem in such a way that disabled people can then use a facility or place.

Sometimes we were talking about renovations which were more substantial and expensive, but every situation was different. In addition to that, in Saskatchewan, what has occurred is the writing of a new building standard for all new buildings. Everyone realizes that new buildings is a different matter from old buildings.

Mr. Callahan: I have no trouble with the future ones.

Ms. Day: That is right. It is when we talk about existing buildings that people see a problem. That is why having the "undue hardship" defence is an important one. But there are many places where it can be done.

The other reason I suggest it is unlikely, in my view, to be seen as a reasonable limit is that we already have a decision from the Saskatchewan Court of Appeal on which leave to appeal to the Supreme Court of Canada was refused. It had to do with accessibility to a movie theatre for someone in a wheelchair. That now stands as the senior decision in the country.

Essentially, what that said was that access for disabled people is a right protected under legislation and that right should be allowed. That decision was brought down by the Saskatchewan Court of Appeal, and it is the most senior decision. With a decision like that standing there, it seems to me more difficult for a court to say it is a reasonable ??ban.

Mr. Callahan: One of the principles that would be agreed upon by any lawyer is that the law should be clear. Frankly, I say this as devil's advocate, subsection 15(1) is so broad that it is going to be very difficult for the law to be clear in any forum. It is going to require, as you say, individual applications and considerations of each one of these. I wish you all well. You are going to have work there like you never heard of.

Ms. Gigantes: Could I go back to subsection 19(2) and go a little bit further in the rebuttal process you began. The argument, as I have experienced it in this Legislature, that has come from established sports groups has grown more and more sophisticated. You dealt with a couple of prime-level arguments. Now we are into the level of argument about the protection, for example--the role that the participation of women in a particular sport, such as field hockey, where women have more capability of participation, given the state of the organization of that sport in Ontario, than men do. We have had people point out to us that it is boys who are underprivileged in participation in field hockey and that this is a growing problem for boys because of the nature of immigration to Ontario. There are children coming from areas of the world where field hockey is essentially a male sport, and they are looking to play here.

I understand how affirmative action works in an area such as organized hockey. But when you get to field hockey, and you are looking at a kind of reverse situation, what kind of legal position are we in in protecting women's participation in a sport where women have done very well?

(J1145 follows)

(Ms. Gigantes)

~~legal position are we in in terms of protecting women's participation in a sport where women have done very well~~

Ms. Brodsky: First, I would reiterate that subsection 19(2) is so over-broad as to encompass all sporting situations, and it cannot be looked at from the perspective of any particular sport or any single athlete. With respect to field hockey situation, in particular, contemplating what the consequences of repeal may be, of course, the Human Rights Commission will have the responsibility of determining what to do in a situation like that where there is a complaint.

A perspective I might suggest is that it is not possible, even for the commission, to look at field hockey alone, for example. Field hockey should be looked at in the broader context of women's sporting opportunities generally and whether female domination in the sport alone is sufficient to warrant the infusion of males into field hockey. I would suggest it is not.

Ms. Gigantes: So you would look at each sport and each situation with each sport? For example, at Carleton University there is a women's but no men's volley ball team. You would look at each situation in a broader context?

Ms. Brodsky: I would say, look at each situation as it comes up and ask if equality is being achieved overall through the programs that have been set up.

Ms. Gigantes: The second point I want to raise with you is this. We have had groups come before us and attack you, the women's Legal Education and Action Fund, quite directly on the base that in carrying the Blainey case, for example, they were put in a position where they could not get public funding to take their defence through court.

I have no problem, but for the record, I would like to have you speak to the discrepancy seen by organized hockey, for example, in public funds being available for the advancement of a case, such as the Blainey case, and the women's hockey association or the Ontario Hockey Association having to go into defence without public funding.

Ms. Brodsky: Public funds were not made available in the Blainey case. The Blainey case is one that the Legal Education Action Fund took on prior to the granting of Ontario funds. One of the terms of the funding was that we were not permitted to use it for cases that preceded the date of the grant.

Ms. Gigantes: Tomorrow, we will have the Realistic Equal Active for Life Women of Canada before us. I am sure we will also hear from them that there is public funding going to progressive liberated women's causes, and there is no public funding going to them for positions they wish to take against such causes.

Ms. Day: That is an issue at a number of governmental

(Ms. Day)

levels at the moment, as I understand it. REAL Women is asking for funding from the federal government--

Ms. Gigantes: Yes.

Ms. Day: It is a public issue we need to struggle with more clearly. I was interested to note that Jeanne Sauvé, our Governor General, was quoted in the newspaper last night saying that she was concerned about the growth of right-wing organizations in this country which were being given a place in the public forum to encourage intolerance. It seems quite important that instead of looking at organizations and saying we have an obligation to allow opposing points of view, we should consider whether or not the organizations, in fact, have equality interests at stake.

Equality is public policy in this country, and we have just enshrined it in the Constitution. We ought to be looking at whether or not the organizations we are dealing with and to whom we provide public funds clearly have, in a way we can feel assured of, those interests and the advancement of those interests firmly entrenched in their constitution, their work and behaviour.

11:50 a.m.

Mr. Partington: I have a couple of questions--

(J1150 follows)

~~(Ms. Day)~~

~~family-entrenched in what they are doing in their constitution, the book and their behaviour.~~

~~Mr. Gigantes: Thank you very much.~~

Mr. Partington: ~~I have a couple of questions~~, but almost a supplementary question to Ms. Gigantes's question.

You mentioned a look at the groups to see whether the objective of attaining equality is uppermost in their minds. As well, perhaps you might agree that in looking at those groups, you look at the public service they perform for the community and that they are motivated that way; the people in the province whom they serve and where they get their source of funds.

I raised the issue the other day because it had certainly been raised in the media in my area where sports groups usually raise their funds through public donations and are usually short of cash.

It seems to me the issue we are dealing with here is an issue in the public interest. We have had representations from sports groups representing millions of people in this province who want the law left as it is but who are working towards a resolution, whatever that fair resolution will be. Looking at it from that point of view, would you agree they may be entitled to public funding as well inasmuch as their motive is the welfare of both girls and boys in sport in Ontario?

Ms. Day: Let me just say what has already been said. The litigation LEAF has supported so far on this particular issue has received no public funds. Our work was taken on before there was any government money available. Consequently, we would be very happy to say we had public funds to support the work we were doing on this issue, but the fact is we have not. Consequently, I make no comment whatsoever about funding for other organizations on this particular subsection 19(2).

Mr. Partington: Is LEAF not a publicly funded organization?

Ms. Day: Yes and no. LEAF is an organization which so far has raised $330,000 privately. In addition to that, we have recently received about $100,000 in a federal grant. In Ontario, the government has made $1-million worth of litigation money available to LEAF.

Mr. Partington: So those are substantial public funds?

Ms. Day: That is right.

Let me just say something more about this. One of the things we are very concerned about and so are other organizations that have equality interests--and I named the Coalition of Provincial Organizations of the Handicapped, the Canadian Association for

(Ms. Day)

Community Living, the National Action Committee on the Status of Women, the National Association of Women and the Law and so on; the list is quite long--is how Canadians get access to the use of equality rights in this country. We have written a new Constitution. We have said we guarantee equality rights. The question is how do Canadians get the use of those equality rights. We all know litigation is a very expensive proposition, so how do we go about getting access to them.

We looked at this issue. It is clear to us that neither the legal aid system nor the ??Ontario Human Rights Commission can give women access to the exercise of those equality rights. That is why this organization exists. We think it is very important that there are public funds available so people can exercise their equality rights. Consequently, it is not a matter of this organization in particular being funded, it is a matter of women whom we represent having access to using equality rights. We think that is a proposition that ought to be publicly supported.

Mr. Partington: I was of the understanding previously, and perhaps erroneously, from a brief, that the Blainey case was publicly supported.

Ms. Day: Absolutely not.

Mr. Partington: Did you do the legal representation? Did LEAF?

Ms. Day: LEAF was involved in supporting the Blainey case at the beginning. We provided a lawyer on a pro bono basis.

Mr. Partington: What do you mean "pro bono?"

Ms. Day: Free.

Ms. Brodsky: The lawyer worked for free.

Ms. Day: That is right. At no cost to Justine Blainey or her parents.

At the appeal level, LEAF supported an intervention by the Canadian Association for the Advancement of Women in Sport. Again, the lawyer worked on a free basis and it was at no cost to the intervener. All that was arranged and done without any support from Ontario or the federal government or any other government.

Mr. Partington: But through your organization, it was done . . .

J-1155 follows

~~(Ms. Day)~~

~~The lawyer worked on a free basis and it was at no cost to the intervenor. All that was arranged and done without any support from Ontario or the federal government or any other government.~~

Mr. Partington: ~~But through your organization, it was done~~ without cost to Blainey?

Ms. Day: That is correct.

Mr. Partington: Just one other question, which is my principal question. That was a supplementary.

If subsection 19(2) is repealed, I guess we can see a distinguishing. There are certain sports that are very competitive on an intercity, interschool, intercollegiate level; body contact sports. Do you see having guidelines in the Ontario Human Rights Code where discrimination on the basis of sex would be permitted in those particular activities?

Ms. Day: I think that is a matter for the Ontario Human Rights Commission to deal with. If subsection 19(2) is removed, complaints go to the Ontario Human Rights Commission on a case-by-case basis. Personally, I do not see a reason per se for prohibiting women from engaging in contact sports.

Mr. Partington: That is an interesting point.

One further question then. In the education amendments in the United States in 1972, they had a clause prohibiting discrimination, but then they had in their guidelines requirements or statements that for purposes of interscholastic and intercollegiate teams and for contact sports, discrimination is permissible.

Ms. Day: My understanding is there have been some challenges in the United States that have to do with contact sports despite those guidelines.

Mr. Partington: Just one last question on that. Do you have any information as to the cost of insurance or the ability to obtain insurance if both men and women are playing on highly competitive teams? That is certainly a topical issue now or has been in this legislation.

Ms. Day: No, I do not. One of the problems we have with the insurance industry is that there are often assumptions made in their rate classifications based on categories that have to do with age, sex and disability. One of the things we think is going to happen is that some of their ability to make and set rates based on those grounds is probably going to disappear. I suggest to you if they started to base rates on now including girls, they might find themselves in some difficulty.

Mr. Partington: One last question, and it is brief. If subsection 19(2) is taken out, do you see any difference in the way sports programs are delivered or carried out in this province?

Ms. Day: I hope we will see some differences. I would like to say I myself have had some difficulty understanding the idea of forced integration; the idea that we would wake up the morning after subsection 19(2) was repealed and find all of our existing ways of playing sports in this province had changed overnight. Actually, I would like to think sometimes that is the way the law works. I was hoping I would wake up on the morning of April 18, 1985 and there would be equality. But the fact of the matter is we all know the law does not work that way. It is when someone thinks the law is breached and has the gumption to do something about the fact that they think the law is breached that we see advances made.

As an old administrator of human rights' law, my sense is that the day subsection 19(2) is repealed, very little will change. Some complaints will come forward, they will be looked at on an individual basis and gradually we will see some changes made that will give women access to some opportunities they do not have presently. I think that would be important. It will make people rethink how this is happening. In fact, I think this issue has been raised to a level of public attention that is probably quite useful.

Mr. Chairman: Now the very patient and understanding Mr. Villeneuve.

12 p.m.

Mr. Villeneuve: Thank you, Mr. Chairman.

I do not come from a legal background. Let me preface my question by saying I think we are overgoverned, overregulated and common sense will prevail in spite of it. I hope it does.

In the case of the Harlem Globetrotters, in order to exist or...

J-1200 follows

(Mr. Villeneuve)

~~Preface my question by saying I think we are overgoverned, over regulated and common sense will prevail in spite of us. I hope it does.~~

~~In the case of the Harlem Globetrotters, in order to exist~~ in order to qualify, you had to be black. They now have a lady on their team. From a legal standpoint, could they have been created in Ontario if subsection 19(2) was repealed?

Ms. Day: Are they a part of a professional league?

Mr. Villeneuve: They are.

Ms. Day: I do not believe the code applies to professional leagues. We are talking about amateur.

Mr. Villeneuve: Strictly amateur.

Ms. Day: Let us assume they are an amateur sports team, for your question.

Mr. Villeneuve: Okay, let us assume--right.

Ms. Day: Then I am not sure where you are going. Are you saying we could not have a black team?

Mr. Villeneuve: Is this what this present legislation is, if subsection 19(2) is repealed, assuming they are amateurs?

Ms. Day: Without repealing subsection 19(2), and assuming they are amateurs, we could not have an all-black team. In other words, the code presently does not allow us to say, "You cannot play on this team because you are white," or vice versa.

Mr. Villeneuve: It allows discrimination.

Ms. Day: But only on the basis of sex, not on the basis of race, so there is no way that you can presently keep out any black kid or white kid because of their race. The only thing you can do now is keep somebody out because of their sex.

Mr. Villeneuve: Well, the Globetrotters were quite obviously keeping white people out--

Ms. Day: Yes.

Mr. Villeneuve: --regardless of their ability. This could not have occurred here.

Ms. Day: No, not now.

Mr. Villeneuve: Under subsection 19(2), if repealed.

Ms. Day: Not now, regardless of subsection 19(2).

Ms. Gigantes: Subsection 19(2) has nothing to do with it.

Mr. Villeneuve: The discrimination has been down south.

Ms. Gigantes: Subsection 19(2) is all about sex, S-E-X.

Mr. Villeneuve: Thank you.

Mr. Warner: I note that we get a little extra time because of the cancellation, so do not feel depressed.

Mr. Chairman: I do not.

Mr. Warner: I appreciate your presentation. It is excellent, very thoughtful. I have a question for you around the reasonable accommodation. Before I pose the question, I would agree with your comments. You were very kind in your temperate language. I, at least, do not think that public money should go to any group that is fighting equality. That runs counter to everything we have been trying to do in this country. Establishing equality is difficult enough without spending public money on groups trying to fight equality. It is just bizarre.

It has been so long since I have had the chance to get on with the question. Reasonable accommodation, you were suggesting, is a phrase that we should consider placing in the Ontario Human Rights Code, 1981, and that it is a term which is not in the Canadian Charter of Rights and Freedoms, but belongs in the Canadian Charter.

Ms. Day: Yes, that is right. It is not a term that is in the Charter now, but it is a term that we now think ought to be in the Canadian Human Rights Act. It has essentially been read into the Canadian Human Rights Act, and into other legislation, including the old Ontario Human Rights Code.

It has been found, in the Bhinder case, that a bona fide occupational qualification stands in the way of an obligation on the part of an employer or a service provider to make that reasonable accommodation. Because of that decision, at that level, I am suggesting to you that this is a very important occasion to look again at Ontario legislation and to make sure that that problem is cured here as well.

My reading of your section 10 is that it may be somewhat better than the present wording of the Canadian Human Rights Act, but I would not rely on it. Because I would not rely on it, if it is not amended now, in other words, if there is no amendment that says it is not a bona fide occupational qualification or a bona fide requirement, unless an employer or service provider cannot reasonably accommodate the needs of an individual or group without undue hardship--that is the kind of language I would suggest--then we in Ontario may find we go the whole route with some case, up to the Supreme Court, under this legislation, before we amend it.

Because it has clearly been flagged as a problem, I am suggesting this is a good moment to take a look at that...

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(Ms. Day)

~~. . . may find we go the whole route with some case up to the Supreme Court, under this legislation, before we amend it.~~

~~Because it has clearly been flagged as a problem, I am suggesting this is good moment to take a look at that~~ part of the code as well. Clearly, rights for physically disabled people are given this extra layer of Charter protection now, and were we to go up through the system, we would be looking at that constitutional guarantee as well.

Mr. Warner: While the term "reasonable accommodation" does not appear in the Charter, would you say, in your opinion, that if we were to add that term to the Human Rights Code, it would be in keeping with the principle and spirit of the Charter?

Ms. Day: Absolutely. One of the four protections in section 15 is equal benefit of the law and that phrase "equal benefit of the law", people understand to mean the results or outcome. Clearly, disabled people would have the ability to argue that anything that does not, in actuality, bring equality, is not giving them the benefit of the law.

Mr. Warner: One last question. You mentioned there was a part--I think you were referring to the Ontario Human Rights Code--and you set up an either-or situation; either have an open-ended section or list the specifics. I wonder if you could go back over that briefly, and second, if it would be unreasonable to do both?

Ms. Day: Let me start from the beginning. There are two ways to do this. Section 15 of the Charter says equality, etc., "without discrimination, and in particular without discrimination on the basis of," and then it names some grounds. Because of that "without discrimination, and in particular," everyone who has written about section 15 of the Constitution--I believe without exception--has said that it is clear that this section covers kinds of discrimination other than the ones that are particularly named.

Commentators then go and say, "All right, what are the unnamed grounds in Canada that are not on that list, that have been clearly identified, over and over again, as problems to us?" They name these. They say, first of all, in every piece of human rights legislation at the statutory level there is protection for marital status. Marital status is not named in section 15, but all of the people, including governments, who have written about it, have taken for granted that marital status is protected.

The second one that people name is sexual orientation. It has been raised in this country as an issue repeatedly. Every human rights commission in this country, with the exception of the new British Columbia Human Rights Council, about which we will not say anything, have said that sexual orientation ought to be included in statutory human rights legislation.

(Ms. Day)

Every one of them has recommended at one time--or many times--to their governments, that it be included. So have lists of organizations that would take me the rest of the day to read, including many major trade unions in the country. Politicians have been very resistant, but it is clearly one of the grounds where there is discrimination and where there is presently no protection afforded for a substantial minority of Canadians. So, there is another ground.

Another obvious ground is political belief. Canada has actually been questioned in front of the United Nations human rights committee because of its lack of protection for Canadians on the ground of political belief. We are parties to international agreements--quite a number of them--and we have made commitments to protect Canadians from discrimination on political belief, and the UN human rights committee has specifically questioned us about our failure to do that. So, there is another obvious ground.

12:10 p.m.

There are two ways of dealing with this question. Let me say again, first of all, why I think it is so important. If we do not parallel in our statutory protections, the protections that are there and the constitutional guarantee right now, we do the following: we put those people who have protections because of the open-endedness of the of the Constitution in the position--let us take people who might...

1210 follows

~~made the following~~

~~We put those people who have protections because of the open-endedness of the Constitution in the position and do not take people who~~ might be discriminated against because of sexual orientation as an example--where if they are discriminated against by the Department of National Defence, for example, who thinks it is all right to do so, they can now go to court and challenge that discrimination.

However, if they are discriminated against in exactly the same way by Eaton's, Simpson's or you name it--and I am not saying those organizations do. I am simply giving them as examples so that you will understand what kind of body we might be talking about--those people have no legal recourse. The same act, in other words, the same behaviour which is constitutionally challengeable, nothing can be done if the same thing occurs, but the actor is a different actor.

If it is public policy in this country to provide people with legal recourse under a constitutional protection, it is very poor public policy to put those people in the position where they have no legal recourse over the same act because there is a different actor involved.

Consequently, it seems clear that we should be paralleling the protections in the constitutional equality rights guarantees. As I said earlier, there are two ways to do that. Either you can open-end the guarantee in the code by putting in language that is similar to the Constitution and saying "without discrimination" and "in particular, without discrimination" and then naming the grounds but having that open-endedness, or the other way to go about it is to include those grounds now that we know are problematic and that have been raised over and over again. If you go that route now, I would suggest that the two obvious ones to include are sexual orientation and political beliefs.

Mr. Warner: If you list those, can you also say anything else?

Ms. Day: Yes, you can.

Mr. Warner: One quick supplementary, if I could. In the case you used with sexual orientation, does the open-endedness of the charter not allow an action to be brought?

Ms. Day: Yes.

Mr. Warner: In the case of a private employer?

Ms. Day: No. The open-endedness allows this. If the code is not amended, it allows a challenge to be brought in court against the Ontario Human Rights Code on the basis that it does not provide that protection.

Mr. Warner: But not against the employer?

Ms. Day: No.

Ms. Brodsky: It does not apply to the employer.

Ms. Day: That is right. I would suggest what that does then is put the least protected people once more in the position of having to litigate instead of having governments act forwardly for them.

I would add to that. As far as we can determine, the reason why politicians have not included protections from discrimination on the basis of sexual orientation is because they believe it is controversial and there may be some part of the public that would not like it. The point is that we have protections in law precisely to protect those minorities who need the protection. If government will not act in such a way as to provide those protections, it is not doing its job.

Mr. Warner: Political will.

Mr. Chairman: I want to go to a brief supplementary from Mr. Polsinelli.

Mr. Warner: I was just going to close off. All I wanted to say was that your good reputation preceded you. Your appearance here this morning certainly substantiates all the glowing things that were said about you earlier. I appreciate your excellent presentation.

Mr. Callahan: Is today Valentine's Day?

Mr. Polsinelli: April Fool's Day.

I would like to thank our witnesses for a very elucidating presentation. They raise a critical point, the point being that I believe this committee is in dire need of a legal opinion.

The purpose of this bill is to bring the Ontario statutes in line with the Canadian Charter of Rights and Freedoms. The proposition we have today is that in order to bring the Human Rights Code in line with the Canadian Charter of Rights and Freedoms, particularly section 15, we basically scrap the Ontario Human Rights Code and replace it with a clause that basically mirrors section 15 tied in with the reasonableness...

J-1215 follows

~~we basically scrap the Ontario Human Rights Code and replace it with a clause that basically mirrors section 15 tied in with the reasonable~~ exception. If that is the case, then it is something that this committee will have to examine.

I am in the hands of the committee. At this point I would suggest that we decide whether or not we have the budget, ability or whatever to get a legal opinion as to whether or not we should be pursuing that avenue.

Mr. Chairman: For the moment, let us take that as a question that we will review and get back to you on.

Mr. Polsinelli: I take it legislative counsel is a member of the profession.

Mr. Chairman: Yes.

Mr. Polsinelli: Initially I suggest that we propose the question to legislative counsel after today's presentation. After their report to us, we should debate that issue at a future point in time after the public hearings are finished.

Mr. Chairman: Okay. I too would like share in the comments of my colleagues with respect to the quality and depth of your presentation. I enjoyed it a great deal. Certainly you added considerably to our information on this subject.

While not debating the issue, but by way of a comment that I feel compelled to make with respect to funding various interest groups, I have to say that, even though we have various and sundry groups come before us, some of which we agree with obviously and some which we do not, the issue of who is funded by government money and what groups are to receive that as a resource for purposes of doing the kind of work obviously that you or some other group are doing, should be somewhat more broad than just to include those groups that are "looking at the issue of equality" as opposed to a group that perhaps by definition one might suggest look at the issue from the standpoint of inequality.

In many instances, it would depend on whose ox is being gored and with a great many programs I have to suggest and suggestions that are made with respect to how we proceed. I do not want to be argumentative when I say this, but the question of equality is looked upon by virtually every submission that we have heard to date as being the fundamental basis upon which they base their philosophy and recommendations to our committee.

I do not mean this in a political sense. Equality does not necessarily come from the left and inequality from the right. It depends on the perspective of the group and how it sees a particular situation. I would have some difficulty in accepting, if you will, the position, if that was what was suggested, that groups that are proponents of equality in the broadest sense be funded and groups that are--and again I do not like using this word--in favour of the rather draconian aspects of inequality not be funded. I do not think it is quite that simple or quite that black and white.

(Mr. Chairman)

There are a great many subtleties and innuendos with respect to so many presentations that we have before us. For every problem we try to solve in government, another problem is sometimes created. Specifically, I think of programs like affirmative action. Sometimes they have a backlash against various other groups that may be looked upon as being an unequal treatment as it relates to other groups and organizations. Again I say that in a very helpful sense and not being critical at all of what has been said.

Ms. Gigantes: How would you know, Mr. Chairman? Have you ever seen an affirmative action program?

Mr. Chairman: I know you are speaking of Canada, but there have been affirmative action programs in the United States to use one specific instance where some of those affirmative action programs have actually been tested in the courts and have been found to be unfair by the courts.

12:20 p.m.

I am thinking specifically of the California case. The individual in question was with an affirmative action program. As you are aware, there were specific numbers at a particular university and he challenged those numbers as they related to the black community. He was able to overthrow that affirmative action program on the basis that it was unfair to him in this particular circumstance because he had the necessary qualifications and marks to get--

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(Mr. Chairman)

~~... as you are aware, and he was able to overthrow that affirmative action program on the basis that it was unfair to him in the particular circumstance because he had the necessary qualifications and merit to get~~ into a program, albeit there was an affirmative action program in that institution.

I do not want to debate it now but I simply say that certainly, if we are talking about equality, it should be interpreted in the broadest term and be looked upon as being something that, in regard to funding, one would apply to all groups, whether we agree with them or not. I say that certainly not as someone who comes in a political sense from the extreme right, but perhaps a more moderate viewpoint where I like to hear the broad spectrum of ideas and try to focus on those that can be helpful to us in what I think is the very real interest of every member of this committee from all political parties in developing a better Ontario and a better sense of fairness and balance in our society for all citizens. I believe that is our intent. We may come about it from a different viewpoint.

Ms. Day: I know that you do not want to continue the debate but maybe you would just let me make one comment before we close on the issue of funding. I really do not think this is a right-wing, left-wing issue. The groups that we can factually show you are disadvantaged in this country because of inequality--women, native peoples, visible minorities, disabled people, mentally disabled people, as you heard this morning--are the ones that in our view funding needs to go to as a priority, because we are the ones that do not have our equality and we can show you that on financial and opportunity grounds.

I do not think there is any factual quarrel among any of us about that. At the present moment those people have no funds to take forward equality cases and I am suggesting simply, that must be where the priority is.

Mr. Chairman: I do not disagree with that. Again I cautioned myself not to get into a debate on the issue but I wanted to get it on the record that, as an example, relating to 19(2) in particular which my colleague Mr. Partington raised, there are many volunteer organizations, well meaning, underfunded, who come before us frightened about the aspects of being taken to court. I know the issue as it relates to where they could stand now in being taken to court over the whole question of integration in some of their programs. They feel very strongly about it. There are also groups that look upon themselves as being underfunded because virtually all, if not most of their money is acquired from voluntary contributions.

Ms. Gigantes: That is not true.

Mr. Chairman: It is true.

Ms. Gigantes: What facilities have they used year-after-year? Publicly-funded facilities.

Mr. Chairman: Obviously for citizens of this province. I am talking about--

Ms. Gigantes: Yes, but some citizens have less access than others and that is what we are talking about.

Mr. Chairman: I do not disagree with that if you are going to tell me that--

Ms. Gigantes: I think this is out of order.

Mr. Chairman: It was quite in order for some members of the committee to express an opinion on the whole question of what groups should be funded. I am simply indicating that I am not in concurrence with those views.

Ms. Gigantes: No member of this committee expressed an opinion for 10 solid minutes on which groups should be funded.

Mr. Callahan: In fairness, some of us may have.

Mr. Partington: I think the chairman is very fair in allocating time, certainly since I have been at these meetings.

Mr. Chairman: Very rarely, as you know, have I taken the time of the committee to even raise a question, though on occasion I have had a question. However, we will bring this to a close simply by responding specifically to 19(2) and Ms. Gigantes comment about groups that are funded by government, if I could. I am thinking of a great many amateur associations that during the course of the year have had great difficulty in finding the necessary finances to carry out their programs and they are concerned in a very legitimate way about 19(2). I am not saying that I even agree with them, but they have difficulty much the same as you do, again obviously coming at it from a different direction, in what they see as the solution. They have difficulty in pulling together the necessary resources to fight the argument that they believe in very strongly.

I raised this question only because I think the record should show that some of us do not agree that only groups that are in some of the categories you have identified should be funded. Perhaps there should be some other groups that present an opposite argument, which should be funded for reasons that they have very strong and sincere beliefs in as well. I apologize for the length of that.

[redacted] . . .

1225-1 follows

(Mr. Chairman) [redacted]

Ms. Day: If you will allow me because we got involved in the 19(2) fight without any government funding as I said earlier, there is a wonderful resource in Canada right now called bored lawyers. They think that constitutional equality rights' cases are really fun and consequently, I suggest to those other voluntary organizations like ours which think that this is an important debate, there are lawyers who would be very interested in giving them some resources because when you have a new legal territory there are a lot of people who do like to get into it and there may be people out there who would volunteer.

Mr. Chairman: Thank you again. I believe the sentiments are shared by all members of the committee that we did enjoy your presentation. Certainly your views will be taken into account when we get into clause-by-clause.

I would remind members of the committee we are back at two o'clock.

Mr. Callahan: I will be delayed until ??

Mr. Chairman: Will you make sure that you are here, Mr. Polsinelli?

Mr. Polsinelli:

The committee recessed at 12:26 p.m.